IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-782

Filed: 15 December 2020

North Carolina Industrial Commission, I.C. No. 16-038373

DWAYNE EMBERY, SR., Employee, Plaintiff,

v.

GOODYEAR TIRE & RUBBER CO., Employer, LIBERTY INSURANCE, Carrier, Defendants.

Appeal by Plaintiff from opinion and award entered 7 May 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 May 2020.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics and S. Neal Camak, for Plaintiff-Appellant.

Young, Moore & Henderson, PA, by Lori M. Allen, for Defendant-Appellee.

McGEE, Chief Judge.

Dwayne Embery, Sr., ("Mr. Embery") appeals from an opinion and award of the North Carolina Industrial Commission denying his claim for workers' compensation benefits because the injury he suffered while working for Goodyear Tire & Rubber Company ("Defendant") was not the result of an "accident." We affirm.

I. Facts & Procedure

Mr. Embery was working as a "Relief Man" at Goodyear's tire production plant in Fayetteville, North Carolina on 19 August 2016. At about 8:30 a.m., the tuber machine—which processes pieces of rubber into sections of tire tread—jammed. Mr. Embery went to help the main operator clear the jam. When Mr. Embery cut the rubber tread and attempted to remove the jammed rubber, he experienced a sharp pain in his left shoulder. Mr. Embery informed his manager, who sent him to the on-site medical dispensary.

The doctor at the dispensary evaluated Mr. Embery and ordered an MRI. The MRI showed a torn rotator cuff in his left shoulder. Mr. Embery was sent to an orthopedic surgeon who recommended surgery to repair the damage. Before undergoing surgery, Mr. Embery requested a second medical opinion about his shoulder injury. He sought other medical treatment on his own and eventually underwent surgery the following year to repair the tear of the rotator cuff and other structural damage to his shoulder. After his injury, Mr. Embery worked "light-duty" at Goodyear until his employment was terminated in late October 2016.

Mr. Embery had been employed by Goodyear since December 1997. At the time of his injury, he had worked as a "Relief Man" for ten years. Generally, a relief worker performs the tasks of other employees when those employees take breaks from work. The department in which Mr. Embery worked operated the tuber machines. In his relief role, he mostly served as an "Assistant Tuber Operator" or a "Booker."

On the day of the incident, Mr. Embery was filling in on the "booking end." The job description for the "Booker" position notes that an employee is required to manually remove treads when a jam occurs.

Mr. Embery timely sought workers' compensation benefits for his injury, but Defendants denied his request. He requested a hearing before the Commission on 17 November 2016. Following the hearing on 6 June 2017, the deputy commissioner filed an opinion and award denying Mr. Embery's workers' compensation benefits claim on 12 February 2018. Mr. Embery appealed to the Full Industrial Commission ("the Commission") on the same date.

The Commission entered an opinion and award on 7 May 2019, affirming the deputy commissioner's decision. It made the following relevant findings of fact:

> 10. . . . While in the dispensary, an Associate Report of Incident (ARI) and a Goodyear Associate Statement of Work Related Incident (Associate Statement) was completed. The ARI noted that Plaintiff was pulling on stuck rubber when he felt pain in his left shoulder. The Associate Statement specifically asked Plaintiff: "Is this task a part of your usual job duties?" to which Plaintiff responded "Yes."
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> 11. Plaintiff provided a recorded statement to [Liberty Insurance] on August 30, 2016, less than two weeks after the August 19, 2016 incident. Plaintiff was asked whether clearing jams was part of his normal job duties, and Plaintiff explained, "everybody knows, you always help clear the machine . . . I will help an operator . . . [because] the one man can't get all that rubber out like that." Plaintiff was also asked how often rubber is stuck in the machine and must be removed, and he responded that "it

> happens all the time." When asked whether he was doing anything out of the ordinary while removing the jam on August 19, 2016, Plaintiff responded, "No, Sir, nothing."
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> 12. At the hearing before the Deputy Commissioner, Plaintiff acknowledged that jams occur regularly on the tuber machine, and there are times when a tuber operator needs assistance from a Relief Man when removing a jam. Bookers also help remove jams in the tuber machine. Plaintiff testified that he clears out jams approximately once or twice a week and admitted that he "know[s] how to pull jams out because I'm a relief person."
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> 22. . . . Plaintiff was performing his normal job duties of pulling on stuck rubber to remove a jam when he felt pain in his left shoulder on August 19, 2016. While the work was strenuous, there is no evidence of unusual physical exertion by Plaintiff on the occasion in question as compared to other occasions when Plaintiff removes jams as part of his regular work routine. In sum, at the time of the incident on August 19, 2016, there was not an unlooked for or untoward event, nor was there an interruption of the normal work routine.

The Commission concluded that Mr. Embery's injury was not compensable because it was not caused by an "accident":

> 1. . . . Plaintiff failed to establish that his alleged shoulder injury on August 19, 2016 resulted from an interruption in, or departure from, his normal work routine, or that any unusual conditions arose in the performance of his normal job duties that resulted in his left shoulder condition. . . . Accordingly, Plaintiff's left shoulder claim is not compensable under the North Carolina Workers' Compensation Act.

Mr. Embery appeals.

II. Standard of Review

As a preliminary matter, Mr. Embery contends there is a conflict in the case law of this Court regarding the standard of review of decisions of the Commission. However, this Court reviews decisions of the Commission to determine "'whether there was *any competent evidence* before the Commission to support its *findings of fact* and whether the findings of fact justify its legal conclusions and decision.'" *Shay v. Rowan Salisbury Schools*, 205 N.C. App. 620, 623, 696 S.E.2d 763, 766 (2010) (quoting *Buchanan v. Mitchell County*, 38 N.C. App. 596, 599, 248 S.E.2d 399, 401 (1978)) (emphasis added). "Unchallenged findings of fact are presumed to be supported by competent evidence and are, thus conclusively established." *Weaver v. Dedmond*, 253 N.C. App. 622, 627, 801 S.E.2d 131, 136 (2017) (quotations and citations omitted). "This Court has no authority to re-weigh the evidence or to substitute its view of the facts for those found by the Commission." *Id.* However, as Mr. Embery notes, "[t]he Commission's *conclusions of law* are reviewed de novo." *Shay*, 205 N.C. App. at 623, 696 S.E.2d at 766 (quoting *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004)) (emphasis added). Whether the circumstances of a plaintiff's injury arose from an "accident" is a question of law. *Barnette v. Lowe's Home Centers, Inc.*, 247 N.C. App. 1, 6, 785 S.E.2d 161, 165 (2016) (citing *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)).

III. Analysis

Mr. Embery argues that the Commission erred by concluding his shoulder injury did not arise from an accident.

Our General Statutes define "injury" as "only injury by accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2019). An employee may recover for an injury if the employee proves the injury was caused "(1) by accident; (2) arising out of employment; and (3) in the course of employment." *Wilkes v. City of Greenville*, 369 N.C. 730, 737, 799 S.E.2d 838, 844 (2017) (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). Our Supreme Court has defined "accident" as an "unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (citing *Hensley v. Cooperative*, 246 N.C. 274, 278, 98 S.E.2d 289, 292 (1957)) (internal quotations omitted). An accident occurs as a result of "the *interruption* of the routine of work and the introduction thereby of *unusual conditions* likely to *result in unexpected consequences*." *Id.* (citing *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980)) (emphasis added). "[T]he mere fact of injury does not itself establish the fact of accident." *Bigelow v. Tire Sales Co.*, 12 N.C. App. 220, 222, 182 S.E.2d 856, 858 (1971).

Mr. Embery challenges finding of fact 22 and conclusion of law 1, in particular. Finding of fact 22 determined that Mr. Embery was "performing his normal job duties

of pulling on stuck rubber to remove a jam when he felt pain in his left shoulder," that there was "no evidence of unusual physical exertion by [Mr. Embery] on the occasion in question," and that "there was not an unlooked for or untoward event, nor was there an interruption of the normal work routine." As an initial matter, this finding of fact is legal, rather than factual, in nature. "[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *Barnette*, 247 N.C. App. at 6, 785 S.E.2d at 165 (citing *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675). Because the Commission's finding of fact 22 applies legal principles to the facts to determine whether an accident occurred, we treat it as a conclusion of law.

Mr. Embery also challenges conclusion of law 1, concluding his left shoulder claim is not compensable as an "accident" under the North Carolina Workers' Compensation Act because he "failed to establish that his alleged left shoulder injury . . . resulted from an interruption in, or departure from, his normal work routine, or that any unusual conditions arose in the performance of his normal job duties that resulted in his left shoulder condition." Both finding of fact 22 and conclusion of law 1 are clearly supported by the Commission's other findings of fact, so Mr. Embery cannot demonstrate error.

The following findings of fact were unchallenged on appeal: that Mr. Embery primarily worked as an "Assistant Tuber Operator" and "Booker" in his "Relief Man"

role; that the job description for the "Booker" position noted an employee is required to manually remove tread material when a jam occurs which can require "high effort"; that Mr. Embery affirmed he was performing his "usual job duties" when he felt a sharp pain in his shoulder; that clearing rubber jams was a part of his normal work routine because "[employees] always help clear the machine" and "one man can't get all that rubber out like that"; that rubber jammed and had to be removed from the machine "all the time"; that "nothing out of the ordinary" happened while he removed the jammed rubber; that jams occurred regularly and the "Relief Man" and the "Booker" help remove the rubber from the tuber machine; and that Mr. Embery cleared out jams approximately once or twice a week because he is a relief person. Because Mr. Embery did not challenge these findings of fact, we presume they are supported by competent evidence and they are conclusively established. *See Weaver*, 253 N.C. App. at 627, 801 S.E.2d at 136 (holding "[u]nchallenged findings of fact are presumed to be supported by competent evidence and are, thus conclusively established"). These unchallenged findings of fact justify the Commission's conclusions of law in finding of fact 22 and conclusion of law 1 that there was no accident.

By Mr. Embery's own testimony, he could *expect* and *look out* for rubber jams. *See Adams*, 61 N.C. App. at 260, 300 S.E.2d at 456 (defining "accident" as an "unlooked for and untoward event which is not expected or designed by the person

who suffers the injury"). The jams were not an *interruption* of his work because they were a normal part of his work routine. *See Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985) ("[O]nce an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act.") (citations omitted). Nor were the *conditions* or the *result* of the jam *unexpected* to him. *See Adams*, 61 N.C. App. at 260, 300 S.E.2d at 456 (holding an accident occurs as a result of "the introduction thereby of unusual conditions likely to result in unexpected consequences"). The Commission's application of the law to the undisputed evidence and its findings of fact justifies its conclusion of law that Mr. Embery's injury did not arise from an accident and is, therefore, not compensable.

IV. Conclusion

For the reasons outlined above, we affirm the Commission's opinion and award denying Mr. Embery compensation when his injury was not the result of an accident.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).