NO. COA06-1127

NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 2008

SARONA R. KELLEY,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 190804

WAKE COUNTY SHERIFF'S DEPARTMENT
Self-Insured Employer,
Defendant
Administered by:
The Schaffer Companies, Ltd.
(previously administered by
Compensation Claims Solutions)

Appeal by defendant from Opinion and Award entered 4 May 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 March 2007.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Bertics, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Bambee B. Blake, Joy H. Brewer and Ginny P. Lanier, for defendant-appellant.

CALABRIA, Judge.

The Wake County Sheriff's Department ("defendant") appeals from an Opinion and Award of the North Carolina Industrial Commission ("the Commission") concluding Sarona R.

Kelley ("plaintiff") sustained a compensable injury by accident arising out of and in the course of her employment. We affirm.

Plaintiff was employed by defendant as a deputy sheriff for fifteen years. Plaintiff's duties as a deputy sheriff required her to serve and process criminal summonses, patrol assigned areas, investigate suspicious conditions and complaints, and arrest suspects. Plaintiff was expected to work in an environment that involved risks and exposure to potentially dangerous situations. While working in the field, plaintiff normally worked ten hour shifts, and while performing administrative duties in the office, she normally worked eight hours per day. In executing her duties, plaintiff has issued citations, chased and arrested suspects, transported prisoners, and when necessary, drawn her weapon or physically fought suspects.

Plaintiff suffered from a long history of acid reflux disease, heartburn, bloating, and other symptoms indicative of gastroesophageal reflux disease ("GERD"). On 16 February 2001, plaintiff's physician, Dr. Michael A. Tyner ("Dr. Tyner"), performed surgery to resolve plaintiff's GERD symptoms. The purpose of the surgery was to reduce plaintiff's hiatal hernia, repair her diaphragm, and perform a fundoplication, a procedure which creates a wrap around the esophagus by using a portion of the stomach to prevent acid reflux. Plaintiff's recovery was successful and she returned to full duty as a deputy sheriff on 16 March 2001.

Approximately two months later, on 24 May 2001, plaintiff attempted to serve a warrant on an adult male suspect. When the suspect did not immediately cooperate, plaintiff requested a backup deputy for assistance. Deputy Joel Goodwin ("Deputy Goodwin") arrived at the scene to assist the plaintiff. After Deputy Goodwin arrived, plaintiff expected that he would immediately assist her in restraining the suspect, but he did not. Plaintiff attempted to handcuff the suspect, but the suspect resisted arrest, leading to a prolonged altercation. Plaintiff struggled with the

suspect and when she grabbed her cap stun (similar to mace), Deputy Goodwin finally interceded and assisted plaintiff. With the assistance of Deputy Goodwin, plaintiff was able to place the suspect under arrest. That evening, while plaintiff completed her report of the incident, she informed her supervisor of pain in her back, stomach and right shoulder.

On 25 May 2001, the following day, plaintiff did not report to work because she was experiencing abdominal discomfort and pain in her right arm. Plaintiff was examined at Concentra Medical Centers ("Concentra"), was prescribed pain medication and then sent home. On 29 May 2001, plaintiff returned to Concentra for a second examination. After the examination, plaintiff was allowed to return to work and resume her normal duties. Plaintiff returned to Concentra on 31 May 2001 and was examined by Dr. Michael J. Landolf ("Dr. Landolf"). Dr. Landolf determined that plaintiff's abdominal strain had resolved and that plaintiff could resume performing her regular duties at work.

On 26 June 2001, plaintiff was transported by ambulance to Rex Hospital Emergency Room because she was suffering severe pains in her chest and stomach area. Plaintiff was prescribed a mixture of gastrointestinal medications and given an injection for the pain. Plaintiff returned to work two days after the incident and resumed her full work duties. Plaintiff testified that following the 24 May 2001 incident at work, she experienced gastrointestinal problems and needed to take medications for acid reflux and bloating.

On 12 October 2001, plaintiff sought treatment from Dr. Tyner because she experienced chest pains and had difficulty swallowing. Dr. Tyner testified that plaintiff's physical examination failed to reveal the cause of plaintiff's symptoms. However, an x-ray of plaintiff's abdomen revealed that plaintiff's previous hiatal hernia repair was disrupted and the fundoplication had dislodged and was sitting in her lower chest. On 18 October 2001, plaintiff

underwent procedures based upon Dr. Tyner's determination that surgery was necessary. Specifically, Dr. Tyner placed a wrap around plaintiff's esophagus and used a patch to repair her diaphragm. On 17 January 2002, because of continued complications with the fundoplication, plaintiff underwent a second surgery. Following the surgery, Dr. Tyner excused plaintiff from work for four months. Plaintiff continued treatments with Dr. Tyner through April of 2002.

On 25 May 2001, defendant filed Form 19, the employer's report, noting that plaintiff's injuries were to her "right shoulder and stomach" and defendant's carrier subsequently denied plaintiff's claim. On 28 March 2002, plaintiff filed a Form 33 requesting a hearing for her injury sustained on 24 May 2001, noting the part of body injured as "hernia." On 26 November 2003, Deputy Commissioner Bradley W. Houser determined that plaintiff didn't sustain an injury by accident arising out of her employment that resulted in a hernia or rupture of her fundoplication. Plaintiff filed a notice of appeal to the Full Commission.

On 4 May 2006, the Commission determined that plaintiff sustained an injury by accident arising out of her employment with defendant and that plaintiff was totally disabled by the accident. The Commission awarded plaintiff temporary total disability benefits in the amount of $620.00 per week beginning 17 October 2001 and medical compensation. Defendant appeals from the order and award of the Commission.

Defendant argues the Commission erred in finding and concluding that plaintiff sustained a compensable injury by accident pursuant to N.C. Gen. Stat. §97-2(6), as the Commission should have considered the case under N.C. Gen. Stat. §97-2(18), and there is insufficient competent evidence that plaintiff suffered a compensable hernia or rupture pursuant to N.C. Gen. Stat. §97-2(18). The standard of review for an award by the Commission is whether any competent evidence supports the Commission's findings and whether those findings support the

Commission's conclusions of law. *Sharpe v. Rex Healthcare*, 179 N.C. App. 365, 370, 633 S.E.2d 702, 705 (2006). Conclusions of law are reviewed *de novo* by this Court. *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000). Generally, an injury is compensable under the North Carolina Worker's Compensation Act if it is the result of an "accident arising out of and in the course of employment." N.C. Gen. Stat. §97-2(6)(2007). An injury is also compensable, if an accident arising out of the course of and scope of employment "aggravate[s], accelerate[s], or combine[s] with the [employee's preexisting] disease or infirmity to produce the injury . . . ." *Mills v. City of New Bern*, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996) (internal quotations omitted).

I. N.C. Gen. Stat. §97-2(18)

Defendant argues that plaintiff's injury must be considered under N.C. Gen. Stat. §97-2(18), not N.C. Gen. Stat. §97-2(6).

North Carolina General Statute §97-2(18), provides in pertinent part:

> In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:
>
> a. That there was an injury resulting in hernia or rupture.
>
> b. That the hernia or rupture appeared suddenly.
>
> d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.
>
> e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

Id.

Defendant points to plaintiff's notation as to part of the body injured on her Form 33 as "hernia" as an acknowledgment that she was seeking benefits for a "hernia" under N.C. Gen. Stat. §97-2(18) and argues that the Commission should have considered plaintiff's claim based upon N.C. Gen. Stat. §97-2(18), not N.C. Gen. Stat. §97-2(6). Although defendant assigns error to 16 of the 29 findings of fact by the Commission, defendant does not argue in its brief that the findings of fact as to plaintiff's medical condition and treatment were not supported by the evidence, but only that the plaintiff did not suffer from a compensable hernia or rupture pursuant to N.C. Gen. Stat. §97-2(18). Defendant also contends that the Commission failed to make the findings necessary under N.C. Gen. Stat. §97-2(18) and erred by considering the case under N.C. Gen. Stat. §97-2(6).

Plaintiff disagrees and argues that her injury by accident was not a hernia or rupture but was a disruption or damage to her fundoplication. Plaintiff further argues even if the injury were a hernia, the Commission's failure to consider the case under N.C. Gen. Stat. §97-2(18) is harmless error and the hernia is compensable because it reoccurred after the previous hernia repair was disrupted and the reoccurring hernia is, therefore, the result of an aggravation to a pre-existing condition.

The pertinent findings of the Commission as to the nature of plaintiff's injury are as follows:

> 9. Because of her ongoing symptoms, in October of 2001 plaintiff again sought treatment from Dr. Michael Tyner, who had performed her prior hernia operation. . . . Upon further examination, Dr. Tyner found that *the previous hiatal hernia repair . . . had been disrupted*. In essence, part of the wrap that was put around plaintiff's esophagus during the February procedure had moved into her lower chest.
>
> 17. Dr. Tyner testified that in his opinion, plaintiff's symptoms and *the recurrence of her hernia* in October 2001 were

> more likely than not caused by the work-related altercation incident of May 24, 2001. Dr. Tyner opined that plaintiff's . . . *hiatal hernia repair [was] damaged* as a result of the incident at work . . . .
>
> 26. The Full Commission finds, based on the greater weight of evidence, that on May 24, 2001, while in the course and scope of her employment as a Deputy Sheriff effecting arrest of a subject who was resisting arrest, plaintiff suffered an injury substantially aggravating her *pre-existing, non-disabling fundoplication and hiatal hernia repair*.

(Emphasis added).

We must first distinguish between plaintiff's preexisting condition, a hiatal hernia, which was treated by her February 2001 surgery and the fundoplication, and plaintiff's alleged injury which is the subject of her claim, which was a disruption or damage to her fundoplication. We note that although in finding of fact 17 the Commission mentions a "recurrence" of plaintiff's "hernia," Dr. Tyner's ultimate opinion, as stated also in finding of fact 17, was that plaintiff's "*hiatal hernia repair [was] damaged* as a result of the incident at work . . . ." Thus, we must not confuse the plaintiff's original condition, a hiatal hernia, with the disruption or damage to her hiatal hernia repair, the fundoplication. The fact that plaintiff had a type of hernia, a hiatal hernia, and that her prior surgical repair to that hernia was disrupted, does not necessarily make her injury for which she seeks compensation a "hernia" or a recurrence of a hernia, in the sense of N.C. Gen. Stat. §97-2(18).

"The medical condition known as 'hernia' is not specifically defined in either the Act or in the case law." *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 620 (1991). This Court declined "to define the term hernia" in *Pernell*, and we also decline. The statute does mention two specific types of hernia, inguinal and femoral, although these two types are not exclusive, as the statute also includes "or otherwise."**[Note 1]** We also note that N.C.

Gen. Stat. §97-2(18) actually uses the terms "hernia or rupture," and "rupture" is also undefined by either statute or caselaw. Certainly we could not venture to create any sort of formal or exclusive definition of "hernia or rupture," as our cursory review of the medical dictionary definitions of "hernia" reveals at least ten specific types of "hernia," and this list is certainly incomplete.**[Note 2]** In the absence of a statutory definition, the Commission's findings of fact and conclusions of law as to the existence of a "hernia or rupture" in any particular case must rest upon the evidence and testimony, particularly the expert medical testimony and evidence. Therefore, based upon our standard of review, we must consider whether any competent evidence supports the Commission's findings that plaintiff sustained an injury by accident and whether those findings support the Commission's conclusions of law. *Sharpe*, 179 N.C. App. at 370, 633 S.E.2d at 705.

As noted above, defendant does not argue that the Commission's findings of fact are not supported by the evidence, and upon review of the record, we find that there is competent evidence to support the Commission's findings of fact. There was no need for the Commission to make findings of fact required under N.C. Gen. Stat. §97-2(18), as the evidence did not indicate and the Commission did not find that plaintiff suffered a "hernia or rupture" under N.C. Gen. Stat. §97-2(18). The findings of fact also support the Commission's conclusion of law which identifies plaintiff's injury as the tearing and significant disruption of "her pre-existing, non-disabling, fundoplication and hiatal hernia repair." This assignment of error is overruled.

II. Injury by Accident

Although subsumed in defendant's argument that the Commission erred by considering plaintiff's claim under N.C. Gen. Stat. §97-2(6) instead of N.C. Gen. Stat. §97-2(18), defendant also contends that plaintiff's injury was not the result of an accident, as it was not an "'unlooked

for and untoward event which is not expected or designed by the person who suffers the injury' and which involves 'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.'" *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002) (citations omitted.) Defendant contends that plaintiff was a deputy sheriff whose usual duties included arrests and that she had previously had to fight, chase and arrest suspects whom she later charged with resisting and obstructing an officer.

Plaintiff argues that the Commission properly found that Deputy Goodwin's delay in assisting plaintiff was an "unlooked for and untoward event" and that his prompt assistance could have minimized or even avoided the physical altercation between plaintiff and the suspect. In addition, plaintiff notes that overexertion or an extra or unusual degree of exertion by an employee in performing her usual job may be an unforeseen or unusual event which makes a resulting injury an injury by accident. *See Ferreyra v. Cumberland Cty.*, 175 N.C. App. 581, 584-85, 623 S.E.2d 825, 827 (2006); *King v. Forsyth Cty.*, 45 N.C. App. 467, 471, 263 S.E.2d 283, 285 (1980).

Upon review of the record, we find that there was competent evidence in the record to support the Commission's findings of fact that there was a considerable delay not anticipated by plaintiff in Deputy Goodwin's intervention, which resulted in a prolonged physical altercation between plaintiff and the suspect. The fact that there was conflicting evidence on this issue is not relevant. "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support. The court does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144

S.E.2d 272,274 (1965) (internal citations omitted). These findings of fact support the Commission's conclusions of law that this delay was an "unlooked for and untoward event" which was not expected by plaintiff and that plaintiff suffered a compensable injury by accident. This assignment of error is also overruled.

III. Temporary Total Disability Benefits

Defendant next argues that the Commission erred by finding and concluding that plaintiff is entitled to ongoing temporary total disability benefits because plaintiff has not presented competent evidence that her "inability to work is causally related" to her injury of 24 May 2001 and that she has not demonstrated that she is physically or mentally unable to work in any job. Plaintiff argues that she is entitled to benefits under N.C. Gen. Stat. §97-31 without any showing that she is unable to work in any capacity, as she has not yet reached maximum medical improvement. Plaintiff also argues that if she must demonstrate her inability to work, she has done so under the first prong of the Russell test by producing medical evidence that she is physically incapable of work in any employment. Plaintiff also argues that she has met the third prong of the Russell test by producing evidence that it would be futile for her to seek an "imaginary (unidentified) highly, modified job when she had a vested interest in returning to pre-injury work at pre-injury wages and with substantial benefits, having invested 15 years in the law enforcement system."

We first note that plaintiff's benefits for temporary total disability were awarded under N.C. Gen. Stat. §97-29, not N.C. Gen. Stat. §97-31, so plaintiff's reliance on N.C. Gen. Stat. §97-31 is misplaced.

The Commission found that plaintiff was temporarily totally disabled beginning on October 17, 2001. Pursuant to that finding of fact the Commission concluded that plaintiff has been totally disabled from all employment since October 17, 2001.

The burden is on the plaintiff to establish total disability under N.C. Gen. Stat. §97-29 in order to receive benefits. The plaintiff can make this showing of disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Products Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

The Commission relied on competent medical evidence that plaintiff was incapable of work with any employer. This Court has held that a finding of disability does not require a showing by the plaintiff that she is incapable of any task no matter how unrelated to her former employment or wage. It requires a showing that plaintiff is unable to obtain the "same wages from defendant or another employer . . . ." *Barber v. Going West Transp., Inc.*, 134N.C. App. 428, 436, 517 S.E.2d 914, 920 (1999). The evidence supports the Commission's findings that plaintiff is unable to find such competitive employment.

Dr. Tyner testified that plaintiff needed further physical therapy or a work hardening program to be able to return to the work she had previously performed. The testimony of medical professionals, plaintiff's continued symptoms of reflux problems and chest pain, and plaintiff's continued treatment as of the date of the hearing provide competent evidence supporting the

Commission's determination that plaintiff was incapable of earning the same wages from defendant or another employer as a result of injuries sustained while performing her duties. We also note that while plaintiff met her initial burden of evidence that injury impaired her wage-earning capacity, defendant failed to produce any evidence that "suitable jobs are available [and] . . . that plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). This assignment of error is overruled.

IV. Medical Treatment

Defendant lastly argues that the Commission erred by finding and concluding that plaintiff is entitled to medical treatment pursuant to N.C. Gen. Stat. §97-25, because plaintiff has not presented competent evidence that her medical treatment from October 2001 and after is directly related to the incident of 24 May 2001.

The Commission found as fact that plaintiff suffered an injury while performing the functions of her position as a law enforcement officer. The Commission further found that the subsequent medical care was provided to the plaintiff to repair those injuries caused by the altercation. There is competent evidence in the record to support those findings. Specifically, the testimonies of Drs. Tyner and Farrell support the findings of the Commission. Although, Dr. Westcott, in his testimony, stated that the injury and subsequent care were completely unrelated to the altercation. The Commission is the sole judge of the credibility of any witness and the weight to be given their testimony. The Commission may reject the testimony of any witness. *Barber*, 134 N.C. App. at 434, 517 S.E.2d at 920. The Commission explicitly found that the opinions of Drs. Tyner and Farrell were entitled to greater weight than that of Dr. Westcott. This assignment of error is overruled.

For the foregoing reasons the decision of the Commission is affirmed.

Affirmed.

Judges McCULLOUGH and STROUD concur.

Report per Rule 30(e).

NOTES

1. "All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation." N.C. Gen. Stat. §97-2(18) (2007) .

2. Direct inguinal hernia, indirect inguinal hernia, femoral hernia, umbilical hernia, incisional hernia, spigelian hernia, obturator hernia, epigastric hernia and hiatal hernia. David Manthey, MD & Bret A Nicks, MD, Hernias, Jan. 3, 2007, http://www.emedicine.com/emerg/topic251.htm ; 3 J.E. Schmidt, MD, *Attorneys' Dictionary of Medicine and Word Finder* H-113, H-114 (Cum. Supp. December 2005).