

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA04-725

NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2005

SHERRY FOWLER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 214669

FOOD LION, INC.,
Employer,
(Self-Insured),

and

RISK MANAGEMENT SERVICES,
Servicing Agents,
Defendants.

Appeal by defendants from opinion and award of the North Carolina Industrial Full Commission entered 29 March 2004 by Commissioner Pamela T. Young. Heard in the Court of Appeals 16 February 2005.

McGougan, Wright, Worley, Harper & Bullard, LLP, by Paul J. Ekster, for the plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Andrew D. Kaplan, for the defendant-appellants.

JACKSON, Judge.

Defendant, Food Lion, LLC, appeals from a ruling by the North Carolina Industrial Commission (“full Commission”) awarding total temporary disability and ordering payment of all medical expenses of Sherry P. Fowler (“plaintiff”) resulting from the injuries at issue. The

injuries were found to stem from two separate incidents plaintiff alleged occurred during her employment with defendant.

Plaintiff began working for defendant in its bakery department in 1999. Plaintiff's job duties included unloading trucks and placing the items in the freezer. The boxes plaintiff unloaded were estimated to weigh between fifty and seventy pounds. Other store employees assisted plaintiff with this task. On 18 July 2001, plaintiff felt a pull in her lower back while unloading a truck. She reported the incident to both the assistant manager and the head bookkeeper. Plaintiff filled out the necessary paperwork regarding the incident and underwent a drug test per defendant's policy. Plaintiff did not seek medical treatment for the injury nor did she miss any work as a result of it. She testified she did not file a workers' compensation claim because she was afraid she would lose her job if she did.

Plaintiff testified that she suffered a second injury on 10 January 2002, when she fell in the store freezer while unloading boxes. Plaintiff testified she fell on her knee after tripping over some boxes and immediately began experiencing pain in her back. Plaintiff did not notify any supervisors of the incident and continued to work. Plaintiff continued to work until she saw her doctor the next week, who removed her from work thereafter.

Plaintiff eventually was referred to a neurosurgeon who performed a lumbar fusion on her back. Plaintiff has not returned to work since being removed from work by her doctor and testifies she has difficulty performing any activity around the house.

At the hearing plaintiff testified on cross-examination that she did not have back problems prior to the two incidents she described. Plaintiff's medical records, however, show she sought medical attention on 23 April 1998 complaining of lower back pain that radiated down her legs and that on 28 April 1998 she underwent an MRI of the lower spine that showed spinal

stenosis of L4-5 and mild lateral recess angle stenosis of L5-S1. Upon being shown these medical records documenting her treatment for back problems prior to the incidents, plaintiff continued to deny she had ever suffered from, or sought treatment for, back problems.

Plaintiff's neurosurgeon, Dr. Wilfong, ("Wilfong") testified that, in his opinion, plaintiff's current back problems were the result of the specific injury allegedly suffered on 18 July 2001 and plaintiff would not be able to return to work again. On cross-examination, Wilfong testified that the 1998 MRI revealed moderate stenosis and absolutely was indicative of degenerative process; plaintiff was morbidly obese; obesity affects the strength of the back and makes obese people more prone to muscle or ligament strains; it absolutely was possible for a disc bulge or herniation to occur without an acute incident and that his opinions were based on plaintiff's report of her injury to him.

Plaintiff's primary physician, Dr. Essam Eskander ("Eskander"), testified plaintiff would continue to deteriorate due to her back problems. On cross-examination he further testified plaintiff was overweight, her weight could have an effect on the condition of her back and obesity exacerbates the degenerative process in the back.

A Food Lion deli manager, Bertina Norton, who worked with plaintiff testified that plaintiff frequently had complained of back pain prior to July of 2001. She also testified plaintiff had told her she had back problems for a while and had been advised she would need surgery, but that she had not been able to afford the surgery. Bertina Norton stated her only knowledge of the incident on 10 January 2001 was the result of being told of it by one of the cake decorators, Brenda Norton (no relation). Bertina Norton testified that plaintiff did not report the incident until 5 February 2001 when plaintiff told her she was having back problems related to the 10 January 2001 fall.

Brenda Norton testified at deposition that she worked closely with plaintiff and interacted with her on a daily basis. Brenda Norton stated plaintiff had mentioned her back was hurting many times prior to 10 January. She stated that on 10 January 2001, she “heard a commotion” and when she stepped around the corner in the deli she saw plaintiff on her knees on the floor. Plaintiff told her that her leg had given way and it did so on occasion . According to Brenda Norton, a few days after the incident she had a conversation with plaintiff during which plaintiff stated she had figured she could get workers’ compensation, have her back surgery and stay out of work until the new Wal-Mart was built and then go to work there.

Deputy Commissioner Theresa Stephenson found that plaintiff had suffered compensable injuries to her back on 18 July 2001 and 10 January 2002 which arose out of her employment with defendant Food Lion. Commissioner Stephenson awarded plaintiff temporary total disability in the amount of \$271.01 per week from 6 February 2002 until further order of the Commission and payment of medical expenses. Defendants appealed Deputy Commissioner Stephenson’s Order and Award to the full Commission. The full Commission affirmed the Opinion and Award of Deputy Commissioner Stephenson with minor modifications to the Opinion. Defendants appeal from the Opinion and Award of the full Commission.

Defendants assign as error all but two of the Commission’s findings of fact on the basis that they are not supported by competent evidence. Defendants further assign as error the Commission’s failure to make findings of fact regarding the credibility of several of the witnesses in the matter. Defendants also assign error to the Commission’s conclusions of law regarding the compensability of plaintiff’s back injuries arising from the incidents occurring on 18 July 2001 and 10 January 2002, the compensation to which plaintiff is entitled as a result of

those injuries, and the plaintiff's entitlement to the payment of her medical expenses by defendants. Finally, defendants assign error to the Commission's award in its entirety.

On appeal of a workers' compensation decision by the full Commission our review is limited to determining whether the Commission's findings of fact are supported by competent evidence and if those findings of fact support the Commission's conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). In reviewing the Commission's findings of fact we must determine only whether the record contains any evidence tending to support facts found by the Commission and not weigh the evidence presented to the Commission or decide the case on the basis of the weight of the evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) .

Defendants fail to present any argument demonstrating that any of the Commission's findings of fact are not supported by competent evidence. Instead defendants simply list evidence which is contrary to the Commission's findings of fact. However, "[w]e are bound by the Commission's findings if they are supported by competent evidence, even if there is contrary evidence." *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002). Consequently, the existence of conflicting evidence is not sufficient to support a reversal of the Commission's findings of fact when there exists other competent evidence in the record supporting the Commission's findings.

Defendants' argument is based on the contention that the evidence upon which the Commission based its findings of fact is not credible and therefore not competent. Our Supreme Court has held, however, that the Commission is the "sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. We, therefore, only examine whether there was competent evidence to support the Commission's findings of fact, and do not re-

examine or weigh the evidence. *See Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994) .

Defendants further assigns error to the Commission's failure to make findings of fact regarding the credibility of several witnesses in the matter. The Commission is not required to make findings of fact regarding witness credibility. Our Supreme Court was clear on this point in *Deese* when it stated that it is

clear that the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

352 N.C. at 116-117, 530 S.E.2d at 553. Accordingly, as defendants' arguments that the Commission's findings of fact are not supported by competent evidence would require this Court to substitute our determinations of credibility for those of the Commission impermissibly, those assignments of error are overruled.

We now turn to whether the Commission's findings of fact support its conclusions of law. There are two theories upon which a compensable back injury can be based: (1) injury by accident; or (2) injury resulting from a specific traumatic incident. *Livingston v. James C. Fields & Co.*, 93 N.C. App. 336, 337, 377 S.E.2d 788, 788 (1989). "[W]here injury to the back arises out of and in the course of employment and is the direct result of a specific traumatic incident of the work assigned, 'injury by accident' shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident." N.C. Gen. Stat. . 97-2(6)(2003).

The Commission found that plaintiff had “sustained traumatic injuries to her back on both July 18, 2001 and on January 10, 2001 [sic]. . . .” The Commission also made the following findings of fact:

2. In 1999 plaintiff received a job as a baker for defendant. On 18 July 2001 plaintiff was unloading a truck containing packages of chickens. Each package weighed approximately fifty (50) to seventy (70) pounds. As Plaintiff pulled up a package, she felt a pull in her back. Plaintiff reported this to Carlyle Suggs, Assistant Manager, and she was subsequently sent for a drug test, which tested negative.

4. On 10 January 2002 plaintiff was unloading a truck when she tripped over two (2) boxes and fell on her knee. Two workers, Brenda Norton and Reba Long came over when they heard the commotion of plaintiff’s fall. Plaintiff immediately complained of back pain. Plaintiff continued to take over-the-counter pain relievers in an attempt to control the pain and keep working.

These findings, read together, support the Commission’s conclusion that plaintiff had suffered compensable injuries to her back arising out of and in the course of her employment. Accordingly, defendants’ assignment of error that the Commission’s conclusions of law are not supported by the findings of fact is overruled.

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).