NO. COA05-1106

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

CAROL SWANEY,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 215326

FIVE STAR FOOD SERVICE, INC.
Employer,

and

ST. PAUL FIRE & MARINE
INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 1 March 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 March 2006.

Keel O'Malley, LLP, by Joseph P. Tunstall, III, for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Winston L. Page, Jr. and Bryant D. Paris, III, for defendants-appellees.

ELMORE, Judge.

Carol Swaney (plaintiff) appeals the Opinion and Award by the Full Commission entered 1 March 2005 and also the denial of her Motion for Reconsideration and for Additional Findings of Fact. For the reasons that follow, we affirm.

Plaintiff was employed as a delivery driver for Five Star Food Service, Inc. (Five Star) beginning in January of 2000. As a delivery driver, plaintiff pulled orders for potato chips, candy, coffee, sandwiches, paper products, and snack crackers. Plaintiff delivered boxes of these products to individual locations to be loaded into vending machines. Plaintiff testified that she unloaded boxes with an average weight of fifty to one hundred pounds. Plaintiff's supervisor, Ralph Litwitz (Mr. Litwitz), testified that the boxes ranged in weight but the heaviest item would be thirty-five pounds.

On 15 October 2001 plaintiff was unloading boxes from the back of the delivery truck onto a handcart at the Perdue plant in Robersonville, North Carolina. Plaintiff testified that she turned to place a box on the handcart and felt a severe pain in the middle of her back. Plaintiff stood still for a few minutes to see if the pain would subside, but it did not. Plaintiff finished unloading the delivery at Perdue, delivered sandwiches to National Spinning in Washington, North Carolina, and then returned to the Five Star office in Kinston. According to plaintiff, she informed her supervisor, Mr. Litwitz, that she had injured her back. However, Mr. Litwitz testified that plaintiff did not report a back injury following her route that day.

Dr. Kenneth L. Johnson, II (Dr. Johnson), an internal medicine specialist, began treating plaintiff for osteoarthritis of her hands in August of 2000. Dr. Johnson prescribed Vioxx for her osteoarthritis. When plaintiff returned to Dr. Johnson on 10 August 2001, Dr. Johnson noted that plaintiff continued to suffer from symptoms of osteoarthritis. On 15 October 2001, the day of her alleged injury, plaintiff returned to Dr. Johnson for an appointment scheduled prior to that day. Plaintiff reported back pain between her shoulders that had been going on for the past week. Dr. Johnson diagnosed plaintiff with a mild paraspinal strain with muscle spasm. Dr. Johnson made

no note in plaintiff's records of a work-related injury to her back. On 23 October 2001 plaintiff presented with continued back pain.

On 5 November 2001 plaintiff was evaluated by Dr. Kurt Voos (Dr. Voos), a specialist in spinal surgery. Dr. Voos testified that plaintiff reported to him that she had been having neck and low back pain over the past six to eight months but that it had significantly worsened over the past three to four weeks. Dr. Voos recommended a cervical spine MRI. The MRI revealed that plaintiff had a disk herniation at C5-6. Dr. Voos then recommended physical therapy and epidural steroid injections for plaintiff. During plaintiff's visit on 13 May 2002, when she presented with low back pain, Dr. Voos ordered a lumbar MRI. Plaintiff returned to Dr. Voos on 5 June 2002. Dr. Voos reviewed the lumbar MRI and determined that plaintiff had some foraminal stenosis at L4-5. Dr. Voos noted in plaintiff's medical records that he could not determine the etiology of her low back pain. After reviewing a CT myelogram on 28 August 2002, Dr. Voos noted that the results were "essentially normal" with a mild disk bulge at L4-5. On 23 July 2003 Dr. Voos recommended proceeding with an anterior cervical diskectomy and fusion at C5-6.

Plaintiff continued to perform light duty work for a week following her alleged injury of 15 October 2001. On 21 February2002 plaintiff filed a Form 18 with the North Carolina Industrial Commission reporting a back injury that occurred in October of 2001. Deputy Commissioner Phillip A. Holmes entered an Opinion and Award on 23 January 2004. Deputy Commissioner Holmes concluded that plaintiff failed to prove by the greater weight of the evidence that she sustained an injury by accident on 15 October 2001. Plaintiff appealed to the Full Commission, which entered its Opinion and Award on 1 March 2005. The Commission affirmed the deputy commissioner's decision with minor modifications. Commissioner

Bernadine S. Ballance dissented from the majority opinion. Plaintiff filed a motion for reconsideration, which was denied by the Commission in an order entered 6 May 2005. Plaintiff's notice of appeal to this Court was filed on 9 May 2005.

I.

Our review of a decision of the North Carolina Industrial Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the 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). "[F]indings of fact by the Commission may be set aside on appeal when there is a complete lack of evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). But, when there is any competent evidence in the record to support a finding of fact, that finding is binding upon the appellate court even where there is contradictory evidence. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

II.

Plaintiff assigns error to the Commission's findings on the credibility of the testimony by plaintiff's treating physician Dr. Johnson. The Commission made the following pertinent finding of fact:

> 17. Based upon the expert testimony of record, the Full Commission gives greater weight to the causation opinions of Dr. Voos, plaintiff's treating spine specialist than to Dr. Johnson, who bases his opinion of causal relation on his memory of events that occurred two years earlier rather than his own medical records which are in contradiction to his memory. Dr. Voos concludes that he is unable to determine the etiology of plaintiff's cervical complaints. Therefore the Full Commission finds based upon the greater weight of the evidence that plaintiff has failed to prove that she sustained an injury by accident or a specific traumatic incident of the work assigned arising out of and in the course of her employment with defendant-employer.

With respect to plaintiff's contention that there is no competent evidence to support the Commission's finding on the credibility of Dr. Johnson, we note initially that this Court may not re-weigh the testimony of an expert witness. *See Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (the Commission is the sole judge of the weight to be given witness testimony; appellate court may not weigh the evidence because Commission is the fact finding body); *see also Adams*, 349 N.C. at 680-81, 509 S.E.2d at 413.

Plaintiff asserts that Dr. Johnson's testimony on causation should be entitled to more weight. More specifically, plaintiff argues that Dr. Johnson was plaintiff's family physician and that his testimony should be given more weight than the testimony of Dr. Voos, who treated plaintiff during the time period from November 2001 through July 2003. However, this Court is bound by a credibility determination of the Commission where there is any competent evidence to support it. *See Drakeford v. Charlotte Express*, 158 N.C. App. 432, 441, 581 S.E.2d 97, 103 (2003) ("[T]he Full Commission is the 'sole judge of the weight and credibility of the evidence' and does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible.") (quoting *Deese,* 352 N.C. at 116, 530 S.E.2d at 553).

Dr. Johnson testified that he recalled plaintiff informing him that she was moving a box with a twisting movement when she felt pain in her back. Dr. Johnson stated that he did not remember why he failed to record in plaintiff's medical documents this statement made by her about the cause of her injury. On cross-examination, Dr. Johnson stated that he determined on the day of his deposition that he should convey this information about plaintiff's injury. As stated previously, determinations of credibility are the role of the Commission. *See Deese*, 352 N.C. at 115, 530 S.E.2d at 552; *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983) ("[T]he Commission may assign more weight and credibility to certain testimony

than other."), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). The Commission could have properly determined that, given Dr. Johnson's failure to record any note regarding an injury at work during the several visits in that time period plaintiff made to him, his testimony was unreliable.

Notwithstanding this Court's limited review of the Commission's credibility determinations, plaintiff argues that Dr. Johnson's testimony was the only opinion on causation and that the Commission erred in failing to enter a finding consistent with this testimony. But the Commission is not required to accept as true Dr. Johnson's testimony on causation. *See Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (in considering and evaluating all the evidence, the Commission may choose to reject certain testimony of an expert witness), *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999).

III.

Next, plaintiff challenges the Commission's finding that she did not sustain a back injury resulting from a specific traumatic incident of the work assigned arising out of and in the course of her employment. This determination was stated in finding of fact number 17, *supra*. The following other findings of fact by the Commission are also relevant to plaintiff's challenge:

> 3. On October 15, 2001, plaintiff made a delivery in Robersonville. Plaintiff alleges that while unloading boxes, she picked up a box to place it on a handcart. Plaintiff alleges that when she turned to place the box on the handcart, she felt a pain in her upper back.
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> 4. Plaintiff completed her route, delivered sandwich trays to National Spinning in Washington, and returned to Kinston.
>
> 5. After she completed her delivery route on October 15, 2001, plaintiff alleges that she reported her injury to her supervisor, Mr. Ralph Litwitz. However, Mr. Litwitz testified that

> plaintiff did not report that she had injured her back during her route.
>
> 6. Mr. Litwitz did not receive a report of a back injury from plaintiff on October 15, 2001. Accordingly, Mr. Litwitz did not report that plaintiff injured her back on October 15, 2001 as required by company policy.
>
> 9. Dr. Johnson never recorded in his October 15, 2001 office note that plaintiff reported a workplace injury. However, over two years later at his deposition, he testified that he remembered on the day of the deposition that plaintiff said her pain was work related.
>
> 10. On October 23, 2001, plaintiff returned to Dr. Johnson for additional treatment of her back. At that time, he referred plaintiff to Dr. Hardy in Greenville for consultation with regard to plaintiff's back pain.
>
> 11. Dr. Johnson never recorded in his October 23, 2001 office note that plaintiff reported a workplace injury.
>
> 16. Plaintiff failed to inform defendant-employer of her alleged injury within thirty days after the alleged injury.

"Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, [the appellate court is] bound by those findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). We now determine whether there is competent evidence in the record to support the Commission's finding that plaintiff failed to establish her injury arose out of and in the course of her employment with Five Star.

Plaintiff does not dispute that Dr. Johnson failed to record a work-related injury in his office notes on either of the two occasions that he evaluated plaintiff in October of 2001 and then, over two years later during his deposition, asserted that plaintiff mentioned a work-related injury to him. Also, plaintiff does not contest finding of fact number four, which states that plaintiff completed her delivery route before returning to Kinston on 15 October 2001. The

failure of plaintiff's treating physician to record any indication of a work-related back injury supports the Commission's finding that plaintiff's back pain did not arise out of a specific incident at work. The fact that plaintiff was physically able to complete her delivery route before returning to the Five Star office on 15 October 2001 was further support for the Commission's finding.

Additionally, the record contained competent evidence that plaintiff did not report to her supervisor any back injury caused by unloading boxes on 15 October 2001 during her delivery route. Mr. Litwitz, plaintiff's supervisor, testified that plaintiff did not report to him on 15 October 2001 that she had injured her back during her delivery route. Instead, Mr. Litwitz testified that during the year prior to October of 2001, plaintiff had on occasion complained that her back was hurting her. He stated that if plaintiff had informed him of a specific back injury following a delivery route, that he would have followed the company policy of reporting the injury. Although plaintiff's testimony contradicts this evidence, we are nonetheless bound by the Commission's finding as there is competent evidence to support it. *See Pittman*, 132 N.C. App. at 156, 510 S.E.2d at 709 (where there is any competent evidence to support a finding of the Commission, even if there is evidence to the contrary, then that finding is conclusive on appeal).

After a careful review of plaintiff's assignments of error and the record on appeal, we hold that the Commission's findings are supported by competent evidence and its conclusions of law are supported by the findings. Accordingly, we also hold that the Commission did not err in denying plaintiff's motion for reconsideration.

Affirmed.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).