NO. COA05-578

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

KELLY D. LANE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 220208

BEALL'S INC.,
Employer,

WAUSAU INSURANCE COMPANIES,
Carrier,
Defendants.

Appeal by defendant from opinion and award entered 3 January 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 March 2006.

No brief filed on behalf of plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Cameron D. Simmons and Meredith T. Black, for defendant-appellants.

GEER, Judge.

Defendants Beall's Inc. and Wausau Insurance Companies appeal from an opinion and award of the Industrial Commission awarding plaintiff Kelly D. Lane temporary total disability compensation and continuing medical benefits. "'[W]here the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact.'" *Westbrooks v. Bowes*, 130 N.C. App. 517, 528, 503 S.E.2d 409, 417

(1998) (quoting *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987)). We conclude that the Commission's opinion and award contains insufficient findings of fact to permit us to review its decisions regarding causation, the compensability of Ms. Lane's continuing medical treatment, and whether her claim should be barred for lack of notice. We, therefore, remand for further factual findings.

Facts

On 21 September 2001, Ms. Lane was employed as a sales clerk in a Beall's Inc. clothing store when she "felt the onset of pain in her back" while unloading boxes of clothing from a delivery truck. Ms. Lane did not believe immediate medical attention was necessary and, because the manager was not in the store at the time, she did not immediately report her injury. She did, however, "report[] the incident to her supervisor several days later." Two weeks later, on 4 October 2001, Ms. Lane was moving a heavy clothing rack at Beall's when she again felt pain in her back.

Ms. Lane sought chiropractic treatment the following day with Dr. Anthony del Genovese at Nelson & Nelson Chiropractic, who took Ms. Lane out of work. Ms. Lane also received chiropractic treatment from Dr. Robert W. Twadell at Chiropractic Advantage and, on 13 November 2001, Ms. Lane began treatment with Dr. Charles W. Pinnell III at Primary Care Plus. Dr. Pinnell diagnosed Ms. Lane with a lower back strain and recommended she continue to remain out of work. Ms. Lane nevertheless returned to Beall's in a cashier position in November.

In late December 2001, the employees were informed the store would be closing after the holiday season. Because, however, Ms. Lane "was unable to work due to pain," she voluntarily left her employment with Beall's on 8 January 2002 and has not worked since. The store closed permanently on 23 February 2002.

On 12 February 2002, Ms. Lane filed a Form 18 providing notice of her original 21 September 2001 injury. Defendants filed a Form 61 denying Ms. Lane's workers' compensation claim on 6 May 2002, and Ms. Lane thereafter requested a hearing before the Industrial Commission.

On 15 August 2002, Ms. Lane saw Dr. John J. Mingle of the Department of Neurology for the University of North Carolina Hospitals. Although an MRI performed in September 2002 showed that Ms. Lane was within normal limits, Dr. Mingle diagnosed her with myofascial pain syndrome. When Ms. Lane next saw Dr. Mingle nearly ten months later, on 30 May 2003, he removed her from work for two to four weeks to obtain physical and occupational therapy. Ms. Lane never received the recommended treatment.

Following a hearing on 12 June 2003, the deputy commissioner entered an opinion and award concluding that, on 21 September and 4 October 2001, Ms. Lane had sustained a compensable injury arising out of and caused by her employment at Beall's and that, as a result, Ms. Lane was entitled to both temporary total disability benefits from 5 October 2001 until she returned to work in November 2001 and continuing medical expenses. Defendants appealed to the Full Commission, which adopted the deputy commissioner's opinion and award with only minor modifications. Defendants have timely appealed to this Court.

I

Defendants first argue that the Commission's findings of fact are inadequate to support its conclusions that Ms. Lane's back condition and need for treatment are causally related to her incidents at work on 21 September and 4 October 2001. "[A]ppellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of

fact." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004).

Regarding the nature of Ms. Lane's injuries, the Commission found only that "Dr. Pinnell diagnosed [Ms. Lane] with a lower back strain" and that "Dr. Mingle diagnosed [Ms. Lane] with myofascial pain syndrome." The Commission did not, however, state whether it accepted these diagnoses or include any other findings to indicate what, if any, conditions Ms. Lane was suffering from at the time of the hearing before the deputy. Moreover, with respect to causation, the Commission made only a single summary finding that, "[b]ased upon the greater weight of the competent medical evidence of record, [Ms. Lane's] back condition is casually [sic] related to her incidents at work . . . ." Because the Commission failed to specify what this "back condition" was, we cannot review whether the causation finding is supported by competent evidence. Finally, regarding Ms. Lane's need for continued treatment, the only pertinent finding notes that Dr. Mingle recommended Ms. Lane receive "physical therapy, occupational therapy, and aqua therapy. . . ." Again, however, the Commission made no findings as to whether it found this treatment necessary or even what condition Dr. Mingle's recommended treatment would address — a "lower back strain," "myofascial pain syndrome," both, or neither. *Compare In re Rogers*, 297 N.C. 48, 56, 253 S.E.2d 912, 918 (1979) ("Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence.").

As a result of the brevity of the findings of fact, we are unable to ascertain on appeal what conditions the Commission believed Ms. Lane to be suffering from, how or why those conditions are causally related to her incidents at work, and what treatment has been approved for which condition. "Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact."

Lawton, 85 N.C. App. at 592, 355 S.E.2d at 160. Accordingly, we remand to the Commission for further findings of fact. *See Hansel v. Sherman Textiles*, 304 N.C. 44, 59-60, 283 S.E.2d 101, 109-10 (1981) (remanding for further findings when, among other things, the Commission failed to find the extent and nature of plaintiff's disability and whether that disability was causally related to her employment).

II

Defendants next argue that the Commission erred by not making adequate findings of fact as to whether Ms. Lane gave sufficient notice of her claim under N.C. Gen. Stat. §97-22 (2005). "[T]he Commission is not obliged to make specific findings of fact as to every issue raised by the evidence. . . . Still, the Commission 'is required to make findings on crucial facts upon which the right to compensation depends.'" *Westbrooks*, 130 N.C. App. at 528, 503 S.E.2d at 416-17 (quoting *Lawton*, 85 N.C. App. at 592, 355 S.E.2d at 160).

With respect to notice, N.C. Gen. Stat. §97-22 provides that:

> Every injured employee . . . shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, . . . no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident . . ., unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

Nevertheless, "[f]ailure of an employee to provide written notice of her injury will not bar her claim where the employer has actual knowledge of her injury." *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 172, 573 S.E.2d 703, 706 (2002), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003).

In the instant case, the Commission found that Ms. Lane "reported the [21 September

2001] incident to her supervisor several days" after it occurred. Although defendants assign error to this finding of fact, this assignment of error is not brought forth in their brief and is, therefore, abandoned. N.C.R. App. P. 28(a). Moreover, Ms. Lane testified before the Commission that she had told her manager she had been "hurt on the truck" following the 21 September injury, and, accordingly, this finding is supported by competent evidence. *See Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001) (Commission's findings are binding on appeal if supported by competent evidence).

There is, however, no finding with respect to whether defendants ever received notice of Ms. Lane's 4 October injury, despite defendants' evidence both that the employer had received no such notice and that it had been prejudiced by the lack of notice. Consequently, we remand for entry of findings of fact regarding whether defendants had actual notice of Ms. Lane's 4 October incident; whether she provided written notice of that incident; if not, whether she had a reasonable excuse; and whether defendants suffered any prejudice from the lack of notice. *See, e.g., Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5-6, 613 S.E.2d 715, 719 (remanding when Commission concluded claimant's excuse for failure to notify was reasonable, but made no findings as to why), *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005); *Westbrooks*, 130 N.C. App. at 528, 503 S.E.2d at 417 (remanding when defendants contended they were prejudiced by claimant's failure to provide notice and Commission made no findings on the issue).

Affirmed in part; remanded in part.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).