NO. COA09-1100

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

RANDY LEE DUCKWORTH,
Employee,
Plaintiff-Appellee,

v. Industrial Commission
I.C. No. 240103

SGL CARBON,
Employer,

and

ACE USA/ESIS,
Carrier,
Defendants-Appellants.

Appeal by Defendants from opinion and award entered 17 April 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 February 2010.

Daniel Law Firm, P.A., by Stephen T. Daniel and Warren T. Daniel, for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Edward A. Sweeney and Mathew E. Flatow, for Defendants.

STEPHENS, Judge.

This matter was heard by Deputy Commissioner George T. Glenn II on 28 November 2006 in Statesville, North Carolina. On 28 April 2008, Deputy Commissioner Glenn issued an opinion and award finding that Plaintiff sustained an injury by accident within the course and scope of Plaintiff's employment and that Plaintiff is

permanently and totally disabled as a result of the injury by accident. Defendants appealed this decision to the Full Commission (the "Commission"). On 17 April 2009, the Commission issued an opinion and award adopting Deputy Commissioner Glenn's opinion and award with minor modifications. From the opinion and award of the Commission, Defendants appeal.

I. Factual Background

Although Defendants assigned error to many of the Commission's findings of fact, Defendants have not argued on appeal that these findings were unsupported by competent evidence. Indeed, Defendants instead concede that the Commission's findings "are not in dispute and are factually consistent with the testimony." Accordingly, the Commission's findings of fact are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (Findings of fact not challenged on appeal are deemed supported by competent evidence and are therefore binding on appeal.); N.C. R. App. P. 28(b)(6) (2009) (Assignments of error not argued in appellant's brief are abandoned.). The Commission's findings thus establish that Plaintiff's injury arose as follows:

Plaintiff began working for SGL Carbon, LLC ("Employer") in 1978 and was employed by Employer until he was terminated in 2002. (R p. 50). In July 2001, Plaintiff was employed in the shipping department, and his responsibilities included preparing products for shipment and using a forklift to load pallets of carbon rods into large shipping containers for export purposes. On 12 July 2001, a container arrived at Employer's shipping department

sometime after 8:00 a.m. Plaintiff testified that he opened the double doors of the truck carrying the shipment and immediately smelled a bad odor. Inside the container, Plaintiff observed a layer of white powder, resembling baking flour, which coated the floor of the container in areas up to an inch deep. Plaintiff's boots and the forklift left tracks of powder on the floor of the container. Plaintiff proceeded to nail down wooden tracks in the container using an air gun, which was the usual procedure Plaintiff followed in loading trailers. Plaintiff testified that the air gun kicked up the white powdery "dust" located on the floor of the container. Plaintiff did not know if the odor was coming from the powder, or if the powder actually was flour.

Plaintiff began loading pallets into the container with a fork truck. While inside the container, Plaintiff had to "rev up" the engine of the fork truck, and the revving of the engine stirred the white powder into an airborne dust, to the point where it was visible inside the container. Plaintiff could feel himself inhaling the dust while he was inside the container. Plaintiff continued to go in and out of the container with the fork truck until he had loaded all 13 pallets. Throughout this time, Plaintiff inhaled the white powder as it circulated throughout the container in an airborne form.

Plaintiff's co-worker, Tony Ollis ("Ollis"), testified that after Plaintiff opened the door to the container, Ollis also noticed a white powder with a bad smell on the floor. Ollis stated that the containers they loaded typically "had a smell to them[,]"

but that this particular container had a "peculiar" smell. Plaintiff's supervisor, Greg Leonard ("Leonard"), however, testified that he inspected the container, and he did not see any such powder or substance and denied smelling anything unusual. Plaintiff finished loading the container, and he and his co-worker, Doug Banks ("Banks"), closed the container's double doors. Banks noted that the container had a foul smell.

Shortly after loading the container, Plaintiff began feeling nauseated and sick. He was still not feeling well when he returned to the shipping department. At approximately 9:05 a.m., Plaintiff sensed that something was wrong and felt like he was going to vomit. He walked to a nearby bathroom, but before he could reach a bathroom stall, Plaintiff vomited violently two to three times in a urinal. As he washed his face in the sink, Plaintiff noticed that his hands, face, lips, and other parts of his body were swelling and his coworkers also noticed and asked him what was wrong. Plaintiff felt like he was "choking to death" and was scared when he looked at himself in the mirror. Plaintiff had never had an allergic reaction like this before, and other than having to take Benadryl for an occasional bee sting throughout his life, he never had allergy problems.

Leonard observed Plaintiff's condition and got a golf cart to take Plaintiff to the nurse's station. Plaintiff vomited one or two more times on the way to the nurse's station. There was no nurse in the nurse's station at the time, and all Plaintiff recalled at that point was that he felt like he was choking to

death and that his chest was hurting. Leonard testified that Plaintiff was struggling to breathe.

At that point, Burke County EMS was called and Scott Rich ("Rich") was one of two emergency medical technicians ("EMT") who responded to the call. When Rich arrived, Plaintiff was lying on his back on the nurse's exam table, complaining of chest pain, shortness of breath, nausea, and vomiting, and was sweating profusely. Plaintiff was placed on an EKG to rule out a heart attack, and it revealed that Plaintiff had a normal sinus rhythm. Plaintiff was taken to the emergency room ("ER") at Grace Hospital in Morganton, North Carolina, where his condition was noted to be unchanged. Rich testified that Plaintiff was in acute distress at the time of the call, and that Plaintiff's symptoms that he observed (swelling, redness, pain, shortness of breath, difficulty breathing, and sweating) were symptoms of an anaphylactic or anaphylactoid[1] reaction. Plaintiff was treated in the ER for approximately three hours by Dr. John Hamel ("Dr. Hamel"). Dr. Hamel did not know what substance caused Plaintiff's allergic reaction, but he opined that Plaintiff was exposed to some substance, whether inhaled, ingested, or through skin contact, that

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[1] "Anaphylactic" is defined as "of, relating to, affected by, or accompanying anaphylaxis[.]" *Webster's Third New International Dictionary* 78 (2002). "Anaphylactoid" is defined as "resembling anaphylaxis[.]" *Id.* "Anaphylaxis" is defined as "hypersensitivity (as to foreign proteins or drugs) that is marked by a tendency to intense systemic reaction and that results from specific sensitization following one or more usu[al] parenteral contacts with a sensitizing agent and seen chiefly in experimental animals but manifested in man in acute serum sickness and in severe or fatal reactions to second or later administrations of certain drugs (as penicillin)[.]" *Id.*

caused him to have a release of histamine which caused an allergic reaction. Plaintiff was released from the ER and sent home to recuperate, with instructions to see his family doctor.

The following day, 13 July 2001, Plaintiff presented to his family physician, Dr. Charles McGraw ("Dr. McGraw"). Dr. McGraw found Plaintiff to have hives and he was swollen all over. Dr. McGraw testified that, in his opinion, had Plaintiff not been taken to the hospital on the day of his reaction, he would have died. Over the course of the following months, Plaintiff continued to experience swelling in his hands, lips, and ears. He suffered from a general feeling of weakness, lack of energy, and was not sleeping well.

Plaintiff attempted to return to work in October 2001, despite still not feeling well. After working for approximately four days, Plaintiff presented to Dr. McGraw with pain in his scrotal area, nausea, vomiting, and headaches. Dr. McGraw testified that these symptoms were consistent with an allergic reaction or infection, and that it was his opinion that the return to work had caused an exacerbation of the previous symptoms. Dr. McGraw prescribed Cipro and bed rest for Plaintiff, and took him out of work again. In November 2001, Plaintiff began having stomach pain and bleeding from his rectum. Dr. McGraw diagnosed Plaintiff with anal fissures.

Plaintiff's problems continued, and on 5 January 2002, Plaintiff was admitted to the emergency department at Grace Hospital, where he was treated by surgeon Dr. Keith Forgy ("Dr.

Forgy"). Plaintiff was diagnosed with lower abdominal pain, fever, leukocytosis (elevated white blood cell count), ruptures and diverticulitis with peritonitis. On 7 January 2002, Dr. Forgy performed a Sigmoid colostomy to divert Plaintiff's stool away from the perforated area and also drained pelvic abscesses. Plaintiff remained in the hospital until 11 January 2002. From 12 July 2001 through the date of the colostomy, Plaintiff continued to experience swelling in his hands, feet, face, ears, lips, tongue, and other body parts. Plaintiff was unable to work following the colostomy.

On or about 12 February 2002, Plaintiff received a letter from Employer advising him that his employment was being terminated and that he would no longer be receiving disability benefits. Plaintiff continued to have serious abdominal problems after the colostomy. He was readmitted to the emergency department with a pelvic abscess on 18 February 2002. On 20 August 2002, Dr. Richard Sigmon ("Dr. Sigmon") performed colostomy reversal surgery, reversing the procedure performed by Dr. Forgy, in an effort to alleviate Plaintiff's problems. Plaintiff continued to have bowel problems after the reversal procedure, however, and continued to suffer from restlessness, anxiety, and depression.

II. Standard of Review

The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings

support the Commission's conclusions of law. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993). The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a contrary finding. *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981). In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness's testimony entirely if warranted by disbelief of that witness. *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). However, before finding the facts, the Commission must consider and evaluate all of the evidence. Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence. *Weaver v. Am. Nat'l Can Corp.*, 123 N.C. App. 507, 473 S.E.2d 10 (1996). The Commission's conclusions of law are reviewed *de novo*. *Deseth v. Lenscrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

III. Discussion

A. Identity of Substance Causing Injury by Accident

Defendants argue that the Commission's conclusion that "Plaintiff sustained an injury by accident stemming from his initial reaction to hazardous material(s) arising out of and in the course of his employment with defendant-employer on July 12, 2001" is not supported by the Commission's findings of fact. We disagree.

It is well established that the Workers' Compensation Act (the "Act") "should be liberally construed to achieve its purpose of providing compensation to employees injured by accident arising out of and in the course of their employment and that its benefits should not be denied by a technical or narrow construction of its language." *Lynch v. M. B. Kahn Const. Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238 (1979). The Act provides that a compensable injury is an "injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident." N.C. Gen. Stat. § 97-2(6) (2009). "Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962). An accident is "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Id.* at 428, 124 S.E.2d at 110-11. "While there need be no appreciable separation in time between the accident and the resulting injury, there must be some unforeseen or unusual event other than the bodily injury itself." *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 378, 293 S.E.2d 594, 595 (1982) (internal citation omitted).

Defendants contend that the Commission's findings do not support a conclusion that Plaintiff's injury arose by accident because "Plaintiff was conducting himself in his employment duties in the usual manner." Plaintiff's injury resulted from an allergic

reaction to the white powder contained in the container. Defendants argue that the inhalation of an unknown substance does not, by itself, constitute an injury by accident, and that for a compensable injury to arise from inhalation of "some sort of particulate," the substance must be inherently dangerous. Defendants point to the fact that no expert identified the substance that caused Plaintiff's reaction and argue that, without a determination of the identity of the substance to which Plaintiff was exposed, the Commission's findings fail to support its conclusion that Plaintiff was injured by accidental means. We are wholly unpersuaded by Defendants' argument. We conclude that, despite not being able to identify the powdery substance he came into contact with, Plaintiff provided sufficient evidence that his injuries arose from being exposed to a substance while loading a container in the course of his employment and that his exposure to such substance was not a normal part of his work routine.

As summarized previously, the Commission found the following facts pertinent to and supportive of the challenged conclusion of law: Prior to 12 July 2001, Plaintiff's health was generally good. That morning, Plaintiff was preparing a container for loading, when he noticed a layer of white powder coating the floor of the container. A nail gun kicked the white powder up around Plaintiff's face and head, and exhaust from the fork truck stirred the white powder into an airborne dust, to the point that it was visible inside the container. Plaintiff inhaled the white powder as it circulated throughout the container in an airborne form.

Shortly after loading the container, Plaintiff began to feel nauseated and sick, and then vomited multiple times and noticed swelling in several parts of his body. Thereafter, Plaintiff was taken to the ER for treatment of his anaphylactic or anaphylactoid reaction. In Dr. McGraw's opinion, had Plaintiff not been taken to the hospital that day, Plaintiff would have died.

After Plaintiff's initial allergic reaction, he continued to have problems with swelling and complained of nausea, vomiting, and headaches. In November 2001, Plaintiff began having stomach pain and started bleeding from his rectum. Plaintiff continued to have serious abdominal pain and was admitted to the hospital on 5 January 2002 where he was diagnosed with lower abdominal pain, fever, leukocytosis (elevated white blood cell count), ruptures, and diverticulitis with peritonitis. Plaintiff underwent a colostomy on 7 January 2002, but his severe abdominal problems continued. After the colostomy was reversed on 25 June 2004, Plaintiff's severe health problems, including chronic abdominal and gastro-intestinal pain, chronic fatigue, shortness of breath, and depression, persisted.

Plaintiff was totally disabled from the date of the accident through the time of the hearing. Plaintiff suffers from chronic pain and frequently feels weak, tired, and stiff. Plaintiff did not have a history of allergy problems or asthma prior to his allergic reaction at work in July 2001. Based upon the evidence to which the Commission gave greater weight, the Commission found

> that plaintiff's health problems began with his initial allergic reaction to an unknown

> chemical substance in the shipping container he was loading on July 12, 2001. After that date, plaintiff's health declined steadily, and except for a brief attempt to return to work for four days in October 2001, plaintiff has not worked since July 2001.

Thus, the Commission's findings establish that Plaintiff suffered an allergic reaction resulting from the interruption of his usual work routine of loading containers. Such interruption occurred by introduction of the white powder. *See Harding*, 256 N.C. at 429, 124 S.E.2d at 111. The fact that the identity of the white powder is unknown is of no moment to the determination that Plaintiff suffered an injury by accident. The determinative inquiry is not the identity of the white powder, but whether exposure to such a substance as would produce the severe reaction Plaintiff experienced was a normal part of Plaintiff's work routine. Clearly, it was not. On the contrary, Plaintiff's exposure to the white powder was "an unlooked for and untoward event which [was] not expected or designed by [Plaintiff.]" *Id.* We conclude that the Commission properly determined such an exposure was not normal and, thus, constituted an accidental occurrence.

Furthermore, the Commission's findings based on the medical expert testimony supports the Commission's conclusion. These findings are set forth below.

> 63. Dr. McGraw is of the opinion, to a reasonable degree of medical certainty, that the anaphylactic or anaphylactoid reaction plaintiff suffered on July 12, 2001, was a significant causal factor in the development of his health problems thereafter, which ultimately led to multiple abdominal surgeries including a colostomy.

64. Dr. McGraw is of the opinion that Plaintiff has been totally disabled since 12 July 2001 and to a reasonable degree of medical certainty that Plaintiff's total disability is permanent.

65. Dr. Forgy is of the opinion that the symptoms that plaintiff experienced on July 12, 2001, were consistent with a severe allergic reaction, and agreed that this would indicate an allergy reaction to something he was exposed to at work. Dr. Forgy additionally believed that plaintiff was totally disabled from the time he first saw him on January 5, 2002 until at least six weeks after his colostomy closure. Plaintiff's colostomy was reversed on June 25, 2004.

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67. Dr. Sigmon opined that plaintiff is totally disabled as a result of numerous health problems stemming from his initial reaction to hazardous material(s) on the job in July 2001, including chronic abdominal and gastro-intestinal pain, chronic fatigue, shortness of breath, and severe depression. In November 2005, plaintiff was determined to be disabled by the Social Security Administration.

68. Dr. Andrew Mason, a forensic toxicologist, reviewed information provided to him concerning plaintiff and he concluded that plaintiff experienced symptoms consistent with an anaphylactic/atopic or anaphylactoid allergic episode or some other form of hypersensitivity reaction that was initiated during an on the job exposure to an unidentified substance, and that since plaintiff's symptoms were temporally and immediately initiated by exposure to an unknown substance, a strong causative relationship exists between plaintiff's symptoms and on-the-job exposure.

69. Dr. Mason felt that plaintiff's exposure and ingestion of the white powder substance on July 12, 2001, was a significant causal factor of his severe allergic reaction.

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> 71. Dr. John Hamel, the immediate treating physician, did not know what substance caused plaintiff's allergic reaction, but he opined that plaintiff was exposed to some substance, whether inhaled, ingested, or through skin contact, that caused him to have a release of histamine which caused an allergic reaction.

The foregoing findings based on medical expert testimony establish that Plaintiff's allergic reaction and subsequent medical problems resulted from exposure to the unknown substance on 12 July 2001. Although Plaintiff was unable to prove the identity of the substance that caused his reaction, the fact that he began feeling ill almost immediately after being exposed to the substance in the container, coupled with the medical testimony that the substance was a causal factor in producing Plaintiff's reaction, also support the Commission's conclusion that Plaintiff sustained an injury by accident. Furthermore, the fact that Plaintiff had not previously had this reaction when loading containers for Employer raises a reasonable inference that the substance was not something Plaintiff was regularly exposed to during his work routine. Thus, the Commission properly concluded that Plaintiff suffered an "injury by accident arising out of and in the course of his employment" when he was unexpectedly exposed to a substance that resulted in his subsequent health problems. *Harding*, 256 N.C. at 429, 124 S.E.2d at 111. Defendants' argument is overruled.

B. Occupational Disease

In continuation of their argument above, Defendants contend that Plaintiff's claim should have been analyzed as an occupational

disease rather than an injury by accident. In light of our foregoing holding that the Commission properly concluded that Plaintiff sustained a compensable injury by accident, we need not address Defendants' argument regarding occupational disease.

C. Compensability of Plaintiff's Injuries

Defendants also argue that the Commission's conclusions that Plaintiff's abdominal problems and colon perforation were the direct and natural consequences of Plaintiff's allergic reaction on 12 July 2001 were not supported by competent evidence. Specifically, Defendants contend that, other than Dr. McGraw, Plaintiff's treating physicians were not able to testify with any level of certainty as to what caused Plaintiff's allergic reaction and whether that reaction was related to Plaintiff's colon infection and perforation. Defendants also challenge Dr. McGraw's causation opinions, contending they are not supported by the evidence. We disagree.

In considering whether an employee's subsequent health problems are compensable as resulting from a compensable injury under the Act, the general rule is

> [w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause, attributable to claimant's own intentional conduct.

English v. J. P. Stevens & Co., 98 N.C. App. 466, 470, 391 S.E.2d 499, 501 (1990). "All natural consequences that result from a work-related injury are compensable under the Workers' Compensation

Act." *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 260, 614 S.E.2d 440, 444 (2005). Thus, "when a work-related injury leaves an employee in a weakened state that results in further injury, the subsequent injury is compensable." *Id.*

Here, the Commission's findings establish that Plaintiff's initial allergic reaction on 12 July 2001 was a direct and causal factor in the onset of the serious abdominal and intestinal problems Plaintiff suffered thereafter, including colon perforation. Plaintiff enjoyed generally good health prior to the allergic reaction on 12 July 2001. Thereafter, he experienced serious health problems including continuous swelling, severe abdominal pain, and rectal bleeding, that resulted in a colostomy in 2002 and a reversal of the colostomy in 2004.

"[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Here, the medical evidence is sufficient to support the Commission's conclusion that Plaintiff's exposure to the white powder caused Plaintiff's allergic reaction which was a direct causal factor in producing Plaintiff's subsequent health complications. Dr. McGraw testified that Plaintiff's allergic reaction caused swelling in his scrotum, which is directly connected to the abdomen through the inguinal canal. Plaintiff was prescribed prednisone, a type of steroid, to treat

the swelling. Dr. McGraw opined that the steroid likely led to Plaintiff's colon perforation.

Defendants admit that Dr. McGraw's testimony supports the Commission's findings, but nonetheless challenge the credibility of Dr. McGraw's testimony. Defendants' challenge to Dr. McGraw's credibility is twofold. First, Defendants argue that Dr. McGraw never knew of Plaintiff's exposure to an unknown, white, powdery substance. Second, Defendants again assert their argument that Dr. McGraw could not form an opinion to a reasonable degree of medical certainty without knowing the identity of the substance. Defendants' argument fails on both counts. Dr. McGraw's testimony shows that when he first treated Plaintiff on 13 July 2001, he was not aware that Plaintiff had been in contact with a white powdery substance. It is clear from Dr. McGraw's subsequent testimony, however, that he later became aware of Plaintiff's contact with the substance and formed his opinion that this contact caused Plaintiff's allergic reaction. Whether Dr. McGraw knew of this substance when he initially treated Plaintiff for the reaction is irrelevant to the credibility of his medical opinion. Furthermore, we have held that the identity of the white powdery substance is immaterial in this matter, and thus, Dr. McGraw's inability to identify the substance does not affect the competence of his causation opinion.

The Act "and the decisions of this Court clearly state that the Commission is the sole judge of the credibility of the witnesses and the weight of the evidence." *Hassell v. Onslow Cty.*

Bd. of Educ., 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008).

> The Commission may not wholly disregard competent evidence; however, as the sole judge of witness credibility and the weight to be given to witness testimony, the Commission may believe all or a part or none of any witness's testimony. The Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted. Nor is the Commission required to offer reasons for its credibility determinations.

Id. at 306-07, 661 S.E.2d at 715 (internal citations and quotations omitted). The Commission found Dr. McGraw's testimony to be competent and credible and gave more weight to this testimony than to Defendant's expert, Dr. Steven Howard St. Clair. The credibility of these witnesses was a matter to be decided by the Commission and not by this Court.

Accordingly, the testimony of Dr. McGraw supports the Commission's conclusion that Plaintiff's allergic reaction on 12 July 2001 was a direct and causative factor in producing Plaintiff's subsequent health problems. Thus, the Commission properly concluded that Plaintiff's health problems resulting from the initial allergic reaction were compensable under the Act. Defendants' argument is overruled, and the opinion and award of the Commission is

AFFIRMED.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).