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NO. COA05-757

NORTH CAROLINA COURT OF APPEALS

Filed: 21 March 2006

APRIL N. LINDSEY,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 273257

CARDINAL HEALTH,  
Employer,

AMERICAN PROTECTION INSURANCE COMPANY,  
Carrier,  
Defendants.

Appeal by defendants from an opinion and award filed 26 January 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 January 2006.

*Patterson Harkavy LLP, by Valerie A. Johnson, for plaintiff appellee.*

*Orbock Ruark & Dillard, PC, by Barbara E. Ruark, for defendant appellants.*

McCULLOUGH, Judge.

Defendant Cardinal Health and its workers' compensation carrier, American Protection Insurance Company, appeal from an opinion and award of the North Carolina Industrial Commission granting disability and medical benefits to plaintiff April Lindsey for an injury she suffered while working. We affirm the Commission's opinion and award.

Facts

Defendant Cardinal Health is a pharmaceutical product distributor. Beginning in September 2001, plaintiff April Lindsey began working evening shifts at Cardinal to support herself while attending college.

During the course of her employment with Cardinal, Lindsey held several different positions. As an “over-the-counter picker” Lindsey filled orders by pulling products from shelves and placing them into plastic containers, or “totes,” which were in turn placed onto a large cart which Lindsey was required to keep with her as she moved about the company’s warehouse. As quality control personnel, Lindsey removed items from the totes and ensured that orders had been filled correctly; this position required lifting totes and placing them either onto the floor or onto a conveyor belt.

In October of 2002, Lindsey suffered an injury by accident at work when she hurt her left shoulder while reaching for an item on a high shelf. Her treating physician prescribed physical therapy and advised Lindsey to observe certain lifting restrictions when she returned to work. After returning to work, Lindsey was assigned work “running shorts” in Cardinal’s prescription drug department. Running shorts involved identifying missing items and placing them into totes and removing totes from her cart when the items were not available.

On 24 January 2003, while running shorts in the prescription drug department, Lindsey bent down to lift a tote and felt a sharp pain from her left hip to her left toes. Though severe, the pain quickly subsided. At that time, Lindsey did not associate the lifting with her leg pain, and she did not believe that she required medical attention. After returning home from her shift and going to bed, Lindsey was awakened by the same left leg pain. In the ensuing days, Lindsey began to experience the same pain with greater frequency.

Though she continued to work, Lindsey reported her pain to people in management positions at Cardinal. At one point, she was given pain medication, and on other occasions, she was permitted to take brief rest breaks.

After finishing her shift on 29 January, Lindsey sought treatment for her leg pain at an emergency room. According to Lindsey, she informed the hospital staff that she first felt pain in her leg while lifting a tote at work; however, this fact was not included in the hospital records. She was given pain medication and told to follow up with her family doctor.

In February of 2003, Lindsey sought treatment with Dr. William McGough, her family doctor. She reported that she was experiencing pain in her left hip and leg due to a work injury. Dr. McGough took Lindsey out of work and ordered an MRI of her lower back. The MRI was performed on 4 February 2003. It revealed the existence of a moderately large central disc protrusion at the L4-5 level and a small disc protrusion at the L5-S1 disc level.

A neurosurgeon, Dr. Ernesto Botero, examined Lindsey on 13 February 2003. The doctor's notes indicate that Lindsey injured herself while lifting a tote at work. Dr. Botero proceeded with conservative treatment options, and after this course of action was unsuccessful, pursued surgical options to address Lindsey's leg pain. Despite the surgery, Lindsey's pain persisted. As of 3 November 2003, she remained in the care of Dr. Botero and had been unable to work since 30 January 2003.

Lindsey filed a claim for workers' compensation. Cardinal Health and its workers' compensation carrier, American Protection Insurance Company, (hereinafter referred to collectively as "defendants") denied the claim, contending that Lindsey's injury did not occur at work. At a hearing before the Industrial Commission, Lindsey presented her own testimony concerning the incident at work and the testimony of Drs. Botero and McGough. Both doctors

opined that the injury for which Lindsey sought compensation was causally related to the incident which occurred while she was working on 24 January 2003.

A Deputy Commissioner issued a decision denying Lindsey's claim. Following an appeal by Lindsey, the Full Commission (hereinafter "the Commission") issued an opinion and award granting compensation and medical benefits to Lindsey.

Defendants now appeal.

### Discussion

On appeal, defendants first contend that the medical testimony presented by Lindsey failed to support the Commission's determination that she suffered a work-related injury. This contention is nonsensical, as both Dr. McGough and Dr. Botero testified that the injury for which Lindsey sought compensation was causally related to her 24 January 2003 accident at work. In light of this unretracted testimony, it is inconsequential whether, as defendants contend, there is other evidence which, cast in their favor, permits an inference that Lindsey's treating physicians did not really believe that an incident at work caused her condition. *See Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (reiterating that the standard of review for an opinion and award of the North Carolina Industrial Commission is limited to "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law."); *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002) ("The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding.").

Defendants next contend that the Commission erred by basing its findings upon Lindsey's testimony because her testimony was not credible. In determining the facts of a

particular case, “[t]he Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony.” *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002). In the instant case, it was the purview of the Commission to determine whether Lindsey was credible, and we will not revisit that determination on appeal.

Though we choose not to exercise our discretion to sanction defendants under Rule 34 of the North Carolina Rules of Appellate Procedure, we note that the present appeal is entirely frivolous. The issues raised by defendants are easily resolved by the application of well-established and oft-repeated principles of appellate review. Defendants and their counsel are admonished that it was inappropriate to file this appeal.

The assignments of error are overruled. The Commission’s opinion and award is

Affirmed.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).