NO. COA04-1249

NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2005

MELADORA McALLISTER,
Employee-Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 280211

WAL-MART STORES, INC.,
Employer,

and

AMERICAN HOME ASSURANCE CO.,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 8 April 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 April 2005.

Mitchell, Brewer, Richardson, Adams, Burge and Boughman, by Vickie L. Burge, for plaintiff-appellee.

Young Moore and Henderson, P.A., by J. Aldean Webster, III, Joe E. Austin, Jr. and Jennifer T. Gottsegen, for defendant-appellants.

STEELMAN, Judge.

Plaintiff has a long prior history of abdominal pain, rectal bleeding, and other problems. She was treated for rectal bleeding on 6 April 2000, and treated for "rather severe abdominal pain" on 12 July 2001 and 28 August 2001. On 28 September 2001 plaintiff underwent a laparoscopic cholecystectomy, during which she was diagnosed with an umbilical hernia. Prior

to the injury in question, plaintiff had hernia surgery, had her gallbladder removed, and had a history of ovarian cysts. None of these prior injuries were work related. Plaintiff began working for defendant Wal-Mart Stores, Inc. (Wal-Mart) on 25 October 2001. Plaintiff continued to receive treatment for her ailments following her employment with Wal-Mart, and in May of 2002 was given a note by her physician restricting her to lifting weights less than twenty pounds.

Plaintiff regularly lifted boxes weighing between fifty and sixty pounds in the course of her employment with Wal-Mart, and her job description required her to be able to lift up to eighty pounds. On 18 June 2002, in the course of her duties, she lifted a box which she alleged weighed around fifty pounds. She felt pain in her abdomen and back as she lifted the box. Shortly after the incident, plaintiff noticed that she was bleeding, though she was uncertain if it was from her vagina or rectum, and was sent by her supervisor to seek medical attention. An accident report was filed.

Plaintiff was diagnosed with an abdominal strain on 19 June 2002, and restricted to lifting no more than ten pounds. On 26 June 2002, plaintiff was cleared by her physician to work without restriction. However, plaintiff again sought medical treatment on 12 July 2002, complaining of severe abdominal pain. On 31 July 2002, plaintiff was diagnosed with an abdominal strain and rectal bleeding caused by anal fissures. Plaintiff was again released to work on 1 August 2002 with lifting restrictions of twenty pounds. Plaintiff did not return to work at Wal-Mart.

Plaintiff's claim for worker's compensation was denied by a claims analyst on 6 August 2002, based on a finding by the company physician that the injury was not work related. Plaintiff requested a hearing, and by opinion and award filed 25 June 2003, Deputy Commissioner W. Bain Jones, Jr. determined that plaintiff had sustained a compensable injury, and that she was

entitled to temporary total disability compensation of $304.92 per month from 25 June 2002 until further order of the Commission, and that defendants were required to pay costs, attorneys fees, and plaintiffs' medical costs. Defendants appealed the opinion and award of the deputy commissioner.

The Full Commission modified the opinion and award of the deputy commissioner by limiting award of temporary total disability compensation at the rate of $304.92 to the period from 18 June 2002 through 31 August 2002, but granting either party the ability to reopen the record to present evidence on plaintiff's disability, if any, after 31 August 2002. The remaining award of the deputy commissioner was left undisturbed. From the opinion and award of the Full Commission, defendants appeal.

In defendants' first argument, they contend that the findings of fact of the Industrial Commission do not support its determination that an accident resulting in a compensable injury occurred on 18 June 2002. We agree.

"Review on appeal from an order and award of the Industrial Commission is limited to a determination of whether the Commission's findings are supported by the evidence and whether the findings, in turn, support the Commission's conclusions." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 105-06 (1991). We initially note that though defendants attempt to argue that the evidence presented to the Commission does not support its conclusion of law that an accident occurred on 18 June 2002, because they have not specifically assigned as error any of the Commission's findings of fact, these findings of fact are binding on appeal. *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). Our review in the instant case is thus limited to whether the Industrial Commission's findings of fact support its legal conclusions.

In order to receive worker's compensation benefits, an employee must have been injured during the course of employment as defined in Chapter 97. N.C. Gen. Stat. §97-2(6) states in relevant part:

> "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment . . . . With respect to back injuries, however, where injury to the back arises out of and in the course of the 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.

Thus, in order to be compensable, the injury must have either been the result of an "accident" as defined in our worker's compensation case law, or it must have involved an injury to the back resulting from a "specific traumatic event" occurring on the job.

> "An accident under the workers' compensation act has been defined as '"an unlooked for and untoward event which is not expected or designed by the person who suffers the injury,"' and which involves '" the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences."'"

Smith v. Hous. Auth. of Asheville, 159 N.C. App. 198, 203, 582 S.E.2d 692, 696 (2003)(citations omitted)(emphasis in original). When an employee is injured when lifting an object in the course of her employment, even when her duties require lifting, the injury may still be the result of an accident, and thus compensable. *See e.g. Gladson v. Piedmont Stores/Scotties Discount Drug Store*, 57 N.C. App. 579, 292 S.E.2d 18 (1982)(where employee lifted box that was unexpectedly heavier than usual in normal course of employment, Commission's determination that injury was the result of an accident was proper). However, "An 'accident' is not established by the mere fact of injury but is to be considered as a separate event preceding and causing the injury. No matter how great the injury, if it is caused by an event that involves both an employee's normal work

routine and normal working conditions it will not be considered to have been caused by accident." *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 79-80, 239 S.E.2d 847, 849 (1978).

In the instant case, the Commission found as fact that plaintiff "picked up a box of weights and felt a pull in her abdomen and an ache in her back. Another employee helped her to place the box on a pallet. Plaintiff testified that the box weighed approximately fifty pounds." The Commission further found that in her regular duties, plaintiff "lifted from five to approximately fifty to sixty pounds. Plaintiff's job description required her to be able to lift between ten and eighty pounds."

There are insufficient findings of fact to support a conclusion that when plaintiff lifted an amount she normally lifted in the course of her employment, and one well within the limits defined in her job description, this constituted an "unlooked for and untoward event" supporting the Commission's conclusion of law that an accident occurred on 18 June 2002.

Plaintiff argues in her brief that the actual weight of the box was eighty pounds, and that at the time of the event plaintiff was restricted by doctor's orders to lifting twenty pounds or less. These facts, argues plaintiff, are sufficient to support a conclusion that plaintiff suffered an accident on 18 June 2002. Assuming *arguendo* plaintiff is correct in her argument, we are restricted on appeal in the instant case to a determination of whether the findings of fact support the conclusions of law and award. We cannot go behind the Commission and make additional findings of fact. *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 644, 566 S.E.2d 807, 810 (2002); *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434-35, 144 S.E.2d 272, 274 (1965).

The Commission made no finding of fact establishing the weight of the box plaintiff lifted on 18 June 2002. The finding of fact stating: "Plaintiff testified that the box weighed approximately fifty pounds" does not establish the weight of the box, it merely establishes plaintiff's assertion, and we decline to infer from this statement that the Commission considered this question settled. *Davis v. Weyerhaeuser Co.*, 132 N.C. App. 771, 776, 514 S.E.2d 91, 94 (1999). Because the weight of the box has not been established, we have no basis to determine if plaintiff was lifting more than the twenty pounds to which she was medically restricted. In the absence of such a finding we do not reach the issue of whether the lifting of a box, the weight of which exceeded the twenty pound restriction, could standing alone support a finding that plaintiff suffered an injury by accident.

In addition, though the Commission states in its findings of fact that when plaintiff lifted the box in question she "felt a pull in her abdomen and an ache in her back," and that she complained of stomach and back pains to the doctor she saw immediately following the incident, the Commission did not indicate that it was basing its opinion and award on the definition of "injury" under N.C. Gen. Stat. §97-2(6) relating to back injuries. The Commission does not mention back injury in any of its conclusions of law, and in its first conclusion of law specifically states that plaintiff "sustained a compensable injury by accident."

Further, the findings and conclusions of law fail to specify how the plaintiff's injury was the result of an accident. We refuse to engage in speculation concerning the nature of the "accident" found by the Commission.

Because we have determined that there are insufficient findings of fact in the instant case for us to adequately review the Commission's conclusion that an accident occurred on 18 June 2002, we must also hold that the findings of fact are insufficient to review the conclusion that

plaintiff suffered a compensable injury on that date. To the extent, if any, that the Commission was basing its opinion and award on compensable injury relating to a back injury under N.C. Gen. Stat. §97-2(6), we hold that its findings of fact do not support an award on this basis. We vacate the opinion and award of the Industrial Commission and remand with instructions to either make additional findings of fact in support of its opinion and award, or take other action consistent with this opinion. *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 80, 541 S.E.2d 510, 516 (2001); *Jackson v. Fayetteville Area System of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985). Because we remand, we do not address the other issues raised in defendants' appeal.

VACATED AND REMANDED.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).