NO. COA02-1150

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2003

PATRICIA S. GIGOUS,
Employee,
Plaintiff;

v.

North Carolina Industrial Commission
I.C. File No. 302307

CITY OF GREENSBORO,
Employer,

and

KEY RISK MANAGEMENT
SERVICES, INC.
Servicing Agent,
Defendant.

Appeal by plaintiff from opinion and award filed 6 June 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 April 2003.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and Jeanette L. Foust, for plaintiff appellant.

Smith Moore L.L.P., by Caroline H. Lock and Manning A. Connors, for defendant appellees.

ELMORE, Judge.

Plaintiff Patricia S. Gigous appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission (Commission), which concluded that plaintiff was not entitled to compensation under the North Carolina Workers' Compensation Act for her back

condition. The Commission's findings of fact are supported by competent evidence, and the Commission's conclusions of law are in turn supported by its findings of fact. Accordingly, we affirm the Commission's opinion and award denying compensation to plaintiff.

The underlying facts tend to show plaintiff was employed for approximately eight years by defendant City of Greensboro (City), first as a groundskeeper from 1988-1990 and later as supervisor of Keeley Nursery (Nursery), a City-owned facility where plants are grown for use in public areas, from 1990-1996. Plaintiff's duties at the Nursery included plant propagation activities such as pruning, weeding, and fertilizing, as well as managerial tasks such as budget analysis and supervising, hiring and firing employees. During her employment by the City, plaintiff's supervisor was Mark Bush (Bush).

At the initial Industrial Commission hearing before Deputy Commissioner George Glenn, plaintiff testified that on 21 September 1992 she was helping another City employee repair an irrigation leak in a ditch by pouring cement on top of the break. While plaintiff was in the ditch her fellow employee handed down a bucket of cement, and when plaintiff turned to dump the cement, she "felt something pull in [her] back," followed by a "sharp pain." Plaintiff testified she missed several days of work following her alleged injury. Plaintiff testified that Bush was out of town on the date of her alleged injury, but that she called Bush after he returned "to let him know what had happened and why I was out." According to plaintiff, she had experienced back pain prior to this alleged incident, but it was never severe enough that she sought medical attention. Plaintiff also testified that on 28 September 1992 she went to her family physician, Dr. Kevin Little (Dr. Little), and that she told Dr. Little she had injured her back while repairing the irrigation leak. Dr. Little took X-rays and an MRI and diagnosed "spondylolisthesis," or slippage

of the vertebral bodies, at the L5-S1 vertebrae, caused in his opinion by a congenital pars defect at the L5 vertebra. Dr. Little also noted a bulging disc and prescribed physical therapy.

After her third and final physical therapy session, plaintiff reported significant improvement with minimal complaints of pain. The City paid for plaintiff's MRI and for her three physical therapy sessions, with the last payment occurring on 1 June 1993. Plaintiff continued to work for the City until May 1996, when she left to open her own plant nursery, and never filed a workers' compensation claim in connection with her alleged 21 September 1992 injury. For the next six years plaintiff sought no further treatment for her back condition, until presenting to Dr. Little on 15 June 1999 complaining of "a couple of months history of chronic low left back pain," accompanied now by pain "radiating down her leg at times all the way to her left heel." Dr. Little referred plaintiff to a neurosurgeon, Dr. Robert Nudelman (Dr. Nudelman), who performed an L5-S1 diskectomy, interbody fusion, and posterior lateral fusion on 2 November 2000. Plaintiff returned to work full-time three to four months later, and she has done well since this surgery.

In his testimony before the Deputy Commissioner, Bush testified that, contrary to plaintiff's assertions, plaintiff first informed him on 13 October 1992 that she had injured her back. Bush did not recall plaintiff ever saying her back injury resulted from dumping a bucket of cement while repairing an irrigation-ditch leak. Bush testified that on 13 October 1992, he and plaintiff sat down in the Nursery's office and together completed a Form 19 "Employer's Report of Injury to Employee." The Form 19 was admitted into evidence and read, in pertinent part, as follows:

> 6. Date of injury[:] 21 Sept. 1992 . . .
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> . . .

> 8. Date disability began[:] 28 Sept. 1992 6:30 A.M.
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> 9. When did you or your supervisor first know of injury[:] 13 Oct. '92
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> . . .
>
> 19. Machine, tool or thing causing injury[:] Continual bending, stooping, lifting (SEE ATTACHMENT)
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> . . .
>
> 24. Describe fully how injury occurred, and state what employee was doing when injured[:] No one incident _ Apparently caused by continual bending, stooping & lifting over a period of time . . .

The "attachment" referenced in Line 19 stated: "Employee maintains that she could site [sic] no one incident that would have caused this injury. She further indicates that Dr. Little suggests the problem has resulted due to Patricia's continual bending, stooping, and lifting." Bush testified that if plaintiff had told him that her injury was caused by a specific incident, he would have described the incident in the Form 19, "even if it had meant [adding] another attachment." Bush testified that he never led plaintiff to believe that her alleged back injury would be covered under the Workers' Compensation Act, and that he did not in fact have the authority to make such a determination.

Evidence considered by the Commission also included Dr. Little's deposition testimony. Dr. Little testified that the history he took from plaintiff on her 28 September 1992 visit indicated she had been having low back pain for a week and that "[s]he awoke with it one morning, no previous injury or overuse." Contrary to plaintiff's testimony, Dr. Little's medical records do not reflect any indication from plaintiff that she injured her back while repairing the irrigation leak or lifting a bucket of cement. Dr. Little testified that he first learned of plaintiff's

alleged injury involving the irrigation leak repair and bucket of cement at his deposition on 1 August 2001.

The Commission also considered Dr. Nudelman's deposition testimony. Dr. Nudelman testified that plaintiff suffered from a congenital condition which resulted in the slippage at L5-S1, and that this slippage caused or significantly contributed to the degenerative disc disease and bulging disc with which plaintiff was diagnosed in 1992. Dr. Nudelman further testified that it was possible, but not probable, that plaintiff's alleged 21 September 1992 irrigation-ditch incident caused or contributed to the condition for which he treated plaintiff in 2000.

On 17 February 2000, for the first time, plaintiff filed a Form 18 "Claim of Employee," and on 18 February 2000 plaintiff filed a Form 33 "Request That Claim Be Assigned for Hearing." By opinion and award filed 14 December 2001, Deputy Commissioner Glenn concluded that plaintiff was not entitled to compensation. The Full Commission reviewed Deputy Commissioner Glenn's decision without receiving further evidence, and by opinion and award filed 6 June 2002, the Full Commission modified and affirmed Deputy Commissioner Glenn's decision. Plaintiff gave notice of appeal to this Court on 28 June 2002.

Plaintiff brings forth twenty-three assignments of error challenging a number of the Commission's findings of fact and conclusions of law. The four issues presented in plaintiff's brief are (1) whether various actions of the City constituted acceptance of liability for plaintiff's claim, such that the City is "estopped from subsequently denying the injured worker's workers' compensation claim;" (2) whether various actions of the City estopped the City from asserting plaintiff's failure to file her claim within the then-applicable statutory filing period as a defense to plaintiff's claim; (3) whether the Commission incorrectly placed the burden of proof on plaintiff to show a causal connection between her 1992 "injury by accident or specific traumatic

incident" and her 1999 condition and surgery; and (4) whether plaintiff "is entitled to have defendants provide all medical compensation arising from her injury by accident and/or specific traumatic incident to her back" under the authority of *Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993).

It is well-settled that "appellate courts reviewing Commission decisions are 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). The Commission's findings of fact are conclusive if they are supported by any competent evidence in the record, even though there is evidence that would support contrary findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). The Commission's conclusions of law are reviewed *de novo* by this Court. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 63, 546 S.E.2d 133, 139 (2001).

Here, the Commission made findings of fact, in pertinent part, as follows:

> 3. On October 13, 1992, plaintiff first informed Mr. Bush that she was experiencing back pain. Plaintiff was unable to cite any specific incident that caused her back pain and suggested only that it could have been due to continual bending, stooping, and lifting. On October 13, 1992 Mr. Bush and plaintiff together completed a Form 19 in the nursery office. Consistent with what plaintiff reported to Mr. Bush, the Form 19 reflects that plaintiff could not cite any specific incident that caused her back pain. . . .
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> 4. At the hearing before the Deputy Commissioner, plaintiff testified that she hurt her back while repairing an irrigation leak in a ditch when she lifted a bucket of cement. However, plaintiff never reported this incident to Mr. Bush. Mr. Bush had no authority to make any decision about whether plaintiff's alleged back injury was accepted or denied as a compensable workers' compensation claim. . . . Mr. Bush did not tell plaintiff "not to worry about it" or that the claim would be covered by workers' compensation. As a supervisor herself,

plaintiff knew that Mr. Bush had no authority to make compensability decisions.

5. Prior to October 13, 1992 plaintiff received treatment for her back from her family physician, Dr. Kevin L. Little. When plaintiff first saw Dr. Little on September 28, 1992 complaining of back pain, she did not give him a history that included a specific incident or any injury to her back at work. Instead, plaintiff told Dr. Little that she simply awoke with back pain one morning[.] . . . Dr. Little testified that he first learned of plaintiff's alleged incident involving a bucket of cement at his deposition taken on August 1, 2001.

. . .

7. . . . Plaintiff's spondylolisthesis was caused by a congenital pars defect at the L5 vertebra.

. . .

10. Defendant paid for plaintiff's medical expenses related to the MRI and three sessions of physical therapy with Mr. Brockmann. The last payment for these expenses was made on June 1, 1993.

11. During her employment with the City of Greensboro, plaintiff never sought or received any compensation for disability pursuant to the Workers' Compensation Act. . . .

12. . . . Plaintiff's responsibilities as a nursery owner include heavy physical labor, heavy lifting, and a substantial amount of stooping, bending, and twisting.

13. Plaintiff did not seek or receive any treatment for back or spine problems again until June 15, 1999, when she returned to Dr. Little. Between September 28, 1992 and June 15, 1999 . . . plaintiff never complained of back pain, and neither Dr. Little nor any of his associates noted any symptoms consistent with back pain or radiculopathy.

14. . . . Dr. Little opined, and the Commission hereby finds, that the symptoms and condition for which Dr. Little treated plaintiff in 1999 were caused by the work plaintiff was doing as a self-employed nursery owner, which included a substantial amount of lifting, bending, stooping, and digging.

. . .

16. Dr. Nudelman reviewed films and an MRI scan, which revealed spondylolisthesis of L5 on S1 due to bilateral L5 pars interarticularis defects with associated degenerative change at the L5-S1 disc and a superimposed left L5-S1 disc herniation. Each of these conditions was congenital or degenerative in nature.

17. . . . Dr. Nudelman was unable to state that plaintiff's alleged September 1992 accident caused, resulted in, or significantly contributed to the condition for which he treated plaintiff beginning in March 2000 or the subsequent surgery.

. . .

19. Plaintiff first filed a claim for workers' compensation benefits with the Industrial Commission on February 17, 2000. On that date, she filed a Form 18 and for the first time identified a specific incident that she alleged caused her back problems. . . .

20. The Deputy Commissioner who heard this case did not accept as credible plaintiff's testimony as to a specific lifting incident in 1992 involving a cement bucket in which she alleges that she injured her back. The Full Commission declines to reverse the credibility determination of the Deputy Commissioner and finds that plaintiff's back condition in 1992 developed gradually over a period of time and not as a result of a specific traumatic incident or injury by accident. In addition, the greater weight of the evidence showed that plaintiff's back symptoms in November 2000 developed as the result of her job duties in her own nursery business.

21. Assuming *arguendo* that plaintiff injured her back dumping a bucket of cement while working in an irrigation ditch, plaintiff failed to file a claim with the Commission within two years after the last payment of medical compensation that occurred on June 1, 1993. Plaintiff filed her Form 18 with the Commission on February 17, 2000[,] which was over six years from the last payment of medical compensation. There is insufficient evidence of record from which to determine by its greater weight that defendant induced plaintiff into any delay in filing a claim with the Industrial Commission.

After a careful review of the record, we hold that the Commission's findings of fact are supported by the record evidence. We stress that the Commission is "the sole judge of the weight and credibility of the evidence," *Deese*, 352 N.C. at 116, 530 S.E.2d at 553, and our "task on appeal is not to weigh the respective evidence but to assess the *competency* of the evidence in support of the Full Commission's conclusions." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 486, 528 S.E.2d 397, 401 (2000) (emphasis in original). The record is replete with evidence that plaintiff did not initially attribute her 1992 back pain to the incident she now alleges occurred while repairing the irrigation leak on 21 September 1992. Further, both Dr. Little and Dr. Nudelman testified that plaintiff suffers from a congenital spine abnormality which increased her likelihood for developing degenerative disc disease. Plaintiff's own testimony establishes that her job duties after leaving the City's employ in 1996 required substantial lifting, stooping, bending, and twisting. Finally, the record is clear that plaintiff first filed her claim for workers' compensation benefits on 17 February 2000, and that the City's last payment for plaintiff's limited 1992 back-related medical treatment occurred on 1 June 1993.

The next, and final, of this Court's limited tasks on appeal is to determine whether these detailed findings of fact support the Commission's conclusions of law. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Based on the foregoing findings, the Commission concluded as follows:

> 1. Plaintiff did not sustain an injury by accident arising out of and in the course of her employment or a specific traumatic incident of the work assigned on or about September 21, 1992. N.C. Gen. Stat. §97-2(6). Therefore, plaintiff's back condition in November 2000 is not causally related to any work-related incident that occurred in 1992 while plaintiff was employed by defendant-employer.
>
> 2. Assuming *arguendo* that plaintiff sustained an injury by accident on September 21, 1992, plaintiff failed to file a

> claim with the Industrial Commission within two years after the alleged injury. Proper filing of a claim by an employee within two years is a condition precedent to jurisdiction by the North Carolina Industrial Commission. N.C. Gen. Stat. §97-24. Therefore, plaintiff's claim is time barred and the Industrial Commission has no jurisdiction over th[e] matter. . . .
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> 3. The payment in 1993 of nominal medical bills for treatment received by plaintiff in 1992 does not estop defendant from asserting the jurisdictional bar of N.C. Gen. Stat. §97-24) [*sic*]. *Abels v. Renfro Corp.*, 100 N.C. App. 186, 187, 394 S.E.2d 658, 659 (1990).
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> 4. Defendant did not make any false representations or conceal any material facts with the intent of misleading plaintiff. Moreover, plaintiff did not reasonably rely on any statements made to her by the employer. Therefore, defendant is not equitably estopped from asserting N.C. Gen. Stat. §97-24 as a defense to this claim. *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 314, 309 S.E.2d 273, 276 (1983).
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> 5. Plaintiff is entitled to no compensation under the North Carolina Workers' Compensation Act.

We hold that the Commission's findings of fact justify its conclusions of law. For purposes of the Workers' Compensation Act, N.C. Gen. Stat. §97-2(6)(2001) defines a compensable back injury as an injury arising "out of and in the course of the employment[,] and [which] is the direct result of a specific traumatic incident of the work assigned." There are two scenarios upon which a back injury may be found compensable under the Workers' Compensation Act: "(1) if the claimant was injured by accident; or (2) if the injury arose from a specific traumatic incident." *Glynn v. Pepcom Industries*, 122 N.C. App. 348, 354, 469 S.E.2d 588, 591 (1996). Conclusion of law number one, wherein the Commission determined that plaintiff's back condition was not compensable under the Workers' Compensation Act, is supported by the Commission's findings of fact that "[p]laintiff was unable to cite any specific incident that caused her back pain" and that plaintiff suffered from a congenital spine condition

that increased her likelihood of developing degenerative disc disease. The Commission's findings that plaintiff's back condition was at least partially "degenerative in nature" and that plaintiff's job duties after leaving the City's employ in 1996 involved substantial lifting, stooping, bending, and twisting also support this conclusion of law.

Similarly, "assuming *arguendo*," as did the Commission in conclusion of law number two, "that plaintiff sustained an injury by accident on September 21, 1992," we hold the Commission's findings of fact support its conclusion of law that "plaintiff's claim is time barred and the Industrial Commission has no jurisdiction over this matter." The version of N.C. Gen. Stat. §97-24(a) which was in effect in 1992 provided that "[t]he right to compensation under [the Workers' Compensation Act] shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident." N.C. Gen. Stat. §97-24(a) was amended in 1994 to its current form, which added to the 1992 version as follows:

> The right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission . . . within two years after the accident or (ii) a claim . . . is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. §97-24(a) (2001). It is well-settled that "the timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." *Reinhardt v. Women's Pavillion*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991). Ordinarily, estoppel is insufficient to overcome a jurisdictional bar, absent circumstances which are deemed egregious. *Id.* at 87, 401 S.E.2d at 140.

In the case at bar, plaintiff alleges that she was injured on 21 September 1992, yet she did not file her claim until 17 February 2000, as the Commission found in its finding of fact number nineteen. This was well beyond two years after both plaintiff's alleged 21 September 1992 accident and the 1 June 1993 date of defendant's last payment of medical compensation. Findings of fact numbers three, four, ten, and twenty-one support the Commission's conclusions of law numbers three and four that the City is not equitably estopped from asserting the jurisdictional bar of N.C. Gen. Stat. §97-24(a) as a defense to plaintiff's claim.

Accordingly, the opinion and award of the Commission denying compensation to plaintiff is

Affirmed.

Judge MARTIN and Judge HUDSON concur.

Report per Rule 30(e).