Sellers – affirmed
Marretic
Scott – dissenting

NO. COA99-420

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2000

ELLIS NANCE,

Employee-Plaintiff,
Appellant,

v.

From the North Carolina
Industrial Commission
I.C. No. 489537

JENNINGS VENEER,

Self-Insured Employer,

and

ASSOCIATION RISK MANAGEMENT,

Servicing Agent,
Defendant-Appellees.

Appeal by plaintiff from Opinion and Award entered 20 November 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 February 2000.

Donaldson & Black, P.A., by Jay A. Gervasi, Jr., for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare and Tracey L. Jones, for defendant-appellees.

EDMUNDS, Judge.

This appeal arises from the North Carolina Industrial Commission's (Commission) denial of workers' compensation benefits to plaintiff Ellis Nance. We affirm.

Plaintiff worked as a veneer clipper for defendant Jennings Veneer. Plaintiff's work required him to place sheets of veneer

into the clipper and then depress a foot pedal, which caused a blade to drop, cutting the veneer at specified lengths. The clipper's safety mechanisms consisted of a hand guard to prevent the operator from reaching under the blade and a guard covering the foot pedal to prevent accidental activation of the blade.

On the day of his injury, plaintiff reached under both the hand guard and the blade to retrieve a piece of veneer. As he did so, he depressed the foot pedal. The descending blade severed parts of his second, third, and fourth fingers from his left hand. Plaintiff was rushed to the hospital, where attempts to reattach his fingers were unsuccessful.

Plaintiff filed a Notice of Accident pursuant to the North Carolina Worker's Compensation Act. N.C. Gen. Stat. §§ 97-1 to -101.1 (1999). When the parties were unable to reach an agreement concerning compensation, plaintiff requested a hearing before the Commission. Plaintiff testified before the Deputy Commissioner that between 5:00 p.m. the night before and 2:00 a.m. the morning of the accident, he and four or five friends drank four or five cases of beer. Plaintiff admitted that he had consumed approximately a case. After a few hours sleep, plaintiff awoke around 6:00 a.m. and arrived at work shortly before 7:00 a.m. He testified he felt "fine" the morning of the accident; he believed he was neither uncoordinated nor that his thought processes were impaired. He added that the drinking before the accident was consistent with his usual pattern of consumption.

Plaintiff's supervisor, Jason J. Callahan, testified as to the proper use of the clipper. When Mr. Callahan asked plaintiff how the accident happened, plaintiff responded that "he was lighting a cigarette." Mr. Callahan added that when he drove plaintiff to the hospital, plaintiff so reeked of alcohol that Mr. Callahan had to roll down his truck window.

Plaintiff's expert, Richard G. Pearson, Ph.D., provided deposition testimony that the clipper was improperly designed and therefore inherently dangerous. Its safety features failed to comply with OSHA standards. Dr. Pearson described plaintiff's job as "a task requiring a fairly low level of motor skill, . . . one that is very easy to learn and once performed, becomes highly automated . . . . It's repetitive, monotonous, and sometimes boring." He testified that "alcohol . . . will ultimately affect reaction time, . . . principally, it affects the brain processing component of reaction time." He concluded that because of the highly automated and repetitive nature of plaintiff's job, alcohol would have little effect on plaintiff's performance: "I think that the presence of alcohol in his system was irrelevant." However, Dr. Pearson also testified: "If the task requires a great deal of, what I would call cognitive activity, which includes things like problem-solving, decision-making, judgement, issues like that, then I would hesitate to argue that, you know, that these would not be compromised by the presence of alcohol," and added on cross-examination that gross alcohol impairment could be a factor in an

individual's failing to perform properly a repetitive task that the individual previously had performed hundreds of times.

Defendant's expert, Robert E. Cross, Ph.D., provided deposition testimony as an expert in toxicology. He stated that plaintiff's blood alcohol level at 2:58 p.m. (approximately five and one-half hours after the accident) was 0.23 grams per deciliter (g/dL). Based upon the elimination rate of alcohol for alcoholics, Dr. Cross calculated that plaintiff's alcohol level at the time of the accident would have been 0.40g/dL, a near-lethal concentration for non-alcoholics. Regarding plaintiff's accident, he testified: "[T]here's no question in my mind that with a blood ethanol concentration of point-four-oh percent (.40%), that that fact was a major, if not the sole, contributing factor to this unfortunate accident . . . ."

After reviewing all the evidence, the Deputy Commissioner found in pertinent part:

> 7. Plaintiff was treated at High Point Regional Hospital for partial amputations of the second, third, and fourth fingers of his left hand. While at the hospital, plaintiff underwent testing for the presence of drugs and alcohol. The testing sample was collected at 2:58 p.m. on 23 August 1994. The test results were positive for marijuana metabolites, and indicated a blood alcohol level of 0.23g/dL(%).
>
> 8. . . . Based upon an elimination rate of .03 grams per deciliter per hour, which is in the middle of the range of elimination for alcoholics, plaintiff's blood alcohol level at the time of his accident would have been, and the undersigned finds that is [sic] was, approximately 0.40g/dL(%).

> 9. At a blood alcohol level of 0.40g/dL(%) plaintiff would have been, and the undersigned finds that he was, grossly impaired at the time of his accident with regard to his decision making and risk assessment skills, judgment, perception of time, and reaction time.
>
> 10. Plaintiff's intoxication was a proximate cause of his injury by accident in that, among other things, it impaired his judgment to the point where he either did not realize, or disregarded, the very serious risk involved in placing his left hand underneath the clipper blade. Plaintiff's impairment was also a proximate cause of his actions in depressing the foot pedal while his left had [sic] was underneath the clipper blade.

Accordingly, the Deputy Commissioner denied plaintiff's claim.

Plaintiff appealed to the full Commission, which, on 20 November 1998, modified and adopted the opinion and award of the Deputy Commissioner, with one Commissioner dissenting. The full Commission accepted the majority of the Deputy Commissioner's findings and added in pertinent part:

> 9. Plaintiff presented the testimony of Dr. Richard G. Pearson, an expert in the field of ergonomics, who stated that in his expert opinion, the presence of alcohol in plaintiff's system was irrelevant to his injury. Dr. Pearson believed that plaintiff's job was performed so mechanically and without conscious thought, that he was not called upon to use his ability to make judgments, solve problems, or make decisions and, accordingly, plaintiff's injury was not causally related to his inebriated state. However, Dr. Pearson also stated that if plaintiff was called upon to make decisions or use judgment, then his performance would be compromised by the presence of alcohol.
>
> 10. Even assuming that plaintiff's performance of his normal job duties did not require the use of conscious thought which would be affected by the presence of alcohol,

> the undersigned find that the placing of plaintiff's fingers under the cutting blade, and then pressing the foot button so that the cutting blade would descend through plaintiff's fingers, is separate and apart from the performance of plaintiff's normal job duties. The decision to place his fingers in a position of danger and then the inability to prevent his foot from depressing the blade trigger are clearly examples of decision-making, judgment, and conscious performance which were impaired by the presence of alcohol in plaintiff's system, and which caused his injury.

The full Commission concluded that plaintiff's injury was proximately caused by his intoxication and therefore barred plaintiff's recovery under the Act. Plaintiff appeals.

"'By authority of G.S. 97-86 the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it.'" *Suggs v. Snow Hill Milling Co.*, 100 N.C. App. 527, 530, 397 S.E.2d 240, 241 (1990) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980)). "The Commission's fact findings will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986) (citation omitted). Our review is limited to two issues: (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. *See Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995).

Plaintiff contends "[t]he Industrial Commission erred in denying Mr. Nance's claim on grounds of intoxication, because expert opinion evidence was applied incorrectly, and there is no evidence to support the finding or conclusion that the injury was caused by intoxication." We disagree. The controlling statute provides in pertinent part:

> No compensation shall be payable if the injury or death to the employee was proximately caused by:
>
> (1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee . . . .

N.C. Gen. Stat. § 97-12 (1999). Proximate cause has been defined as a cause that:

> (1) in a natural and continuous sequence and unbroken by any new and independent cause produces an injury, (2) without which the injury would not have occurred, and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

Goode v. Harrison, 45 N.C. App. 547, 548-49, 263 S.E.2d 33, 34 (1980) (citation omitted). While the employer bears the burden of proving that intoxication was a proximate cause of the injury, the employer is not required to prove that intoxication was the *sole* proximate cause. *See Anderson v. Century Data Systems*, 71 N.C. App. 540, 545, 322 S.E.2d 638, 641 (1984). "The Commission's determination on the issue of proximate cause can be set aside on appeal only if there is a complete lack of competent evidence to

support it." *Bursey v. Kewaunee Scientific Equipment Corp.*, 119 N.C. App. 522, 526, 459 S.E.2d 40, 43 (1995) (citation omitted).

In the case at bar, there was sufficient evidence to support the Commission's conclusion that plaintiff's intoxication was a proximate cause of his accident. Plaintiff admitted drinking heavily in the hours before work. His supervisor noted a strong smell of alcohol about plaintiff as he drove plaintiff to the hospital. Dr. Cross determined that plaintiff's blood alcohol level at the time of the accident was approximately 0.40g/dL. Although it was Dr. Pearson's opinion that plaintiff's level of intoxication would not interfere with his routine work on the clipper, there was additional evidence that plaintiff's actions leading to the accident were beyond the scope of his usual duties. Plaintiff's work responsibilities consisted of the repetitive chore of feeding veneer into the clipper. However, on the day of his accident, plaintiff went beyond his normal routine and reached beneath the hand guard and under the blade. At the same time, he pressed the foot pedal, causing the clipper's blade to descend. There was testimony that these actions required judgment and decision-making beyond that required of plaintiff while exercising his normal duties and that plaintiff's judgment and decision-making could be affected by his intoxication. Accordingly, the Commission did not err in concluding that plaintiff's intoxication was the proximate cause of his accident. *See Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 340 S.E.2d 111 (1986) (finding that evidence of employee's erratic driving, strong odor of alcohol about employee,

employee's statement that he had been drinking, and high level of alcohol in employee's blood supported Commission's conclusion that intoxication was proximate cause of injuries sustained in automobile accident occurring during course of employment).

Although plaintiff contends the Commission incorrectly applied the expert testimony, its findings incorporated both Dr. Pearson's opinion that intoxication would not interfere with plaintiff's routine work on the clipper and his opinion that plaintiff's intoxication would impair his judgment and decision-making capabilities. In finding ten, the Commission found that, even assuming plaintiff's intoxication had no effect on his routine procedure on the clipper, the intoxication did have an effect both on plaintiff's judgment as he assessed the risk of reaching beneath the guard and under the blade and on plaintiff's action in depressing the foot pedal while his hand was in a place of danger.

Additionally, plaintiff contends the Commission erred by not referencing Dr. Cross's testimony. However, the record reveals that the Commission considered Dr. Cross's testimony and accepted his analysis in finding plaintiff's alcohol level at the time of the accident to be approximately 0.40g/dL.

Finally, plaintiff challenges several findings as being unsupported by the evidence. However, we have reviewed the record and transcripts and determined that there is sufficient competent evidence in the record to support the Commission's findings. Plaintiff's arguments are without merit. The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges LEWIS and JOHN concur.

Report per Rule 30(e).