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NO. COA11-717
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

KENNETH R. CLARK,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 580989

THE GOODYEAR TIRE & RUBBER CO.,
Employer, and LIBERTY MUTUAL
INSURANCE GROUP, Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award entered 31
January 2011 by the North Carolina Industrial Commission. Heard
in the Court of Appeals 14 November 2011.

Kathleen G. Sumner, for plaintiff-appellant.

*Young Moore and Henderson P.A., by Julia E. Dixon and
Angela Farag Craddock, for defendants-appellees.*

MARTIN, Chief Judge.

Plaintiff-employee, Kenneth Clark, appeals from an Opinion
and Award by the North Carolina Industrial Commission ("the
Commission") denying his workers' compensation claim. We
affirm.

Plaintiff contends he sustained an injury to his right shoulder when he fell over a railing at work on 13 April 2005. Plaintiff alleges he informed his supervisor of his injury, but did not go to the employee dispensary or fill out a report of injury form while at work. Instead, plaintiff took a leave of absence citing a non-occupational medical condition. When plaintiff returned to work on 11 October 2005, he again represented he was out of work for a non-occupational injury, and did not fill out a report of injury form at work until 15 November 2005. On 2 December 2005, plaintiff filed a Form 18 claim for workers' compensation. Defendants Goodyear Tire & Rubber Co. and Liberty Mutual Insurance Group ("defendants") did not file Form 61 denying plaintiff's claim until 27 May 2009.

Plaintiff requested a hearing before the Commission, and the matter was assigned to a deputy commissioner and scheduled for hearing on 21 October 2009. At the hearing, plaintiff sought to introduce testimony of two of his coworkers, Ronald Bailey and William Horne, regarding statements he allegedly made to them on 13 April 2005. Defendants moved to strike this testimony on hearsay grounds, and the Commission granted defendants' motion. After evaluating the evidence, the deputy commissioner issued an Opinion and Award denying plaintiff's

claim.

Plaintiff then appealed to the Full Commission, which found, *inter alia*:

39. [T]he . . . evidence does not establish that Plaintiff sustained an injury to his right shoulder at work on April 13, 2005.

. . . .

41. Plaintiff has failed to establish a reasonable excuse for the lack of timely written notice.

The Full Commission concluded the evidence did not show a causal connection between plaintiff's symptoms and the alleged injury, nor a reasonable excuse for his lack of timely written notice, and denied plaintiff's claim. Plaintiff now appeals to this Court, challenging the Commission's conclusion that he did not provide a reasonable excuse for his failure to give timely written notice and its exclusion of his lay witness testimony regarding the existence and notice of his injury.

Plaintiff first contends the Commission erred in concluding he did not provide a reasonable excuse for his failure to give timely written notice. Plaintiff fails to argue, however, that the Commission erred in finding his injury is not compensable.

"The function of all briefs required or permitted . . . is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their [positions]." N.C.R. App. P. 28(a). "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). Findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are conclusively established on appeal. *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009).

Plaintiff fails to present a specific issue or make a sufficient argument in his brief contesting the Commission's finding regarding medical causation. In his brief, plaintiff makes only two statements which mention medical causation. First, plaintiff states that the "evidence is clear that this was an injury by accident to his right shoulder, and that it clearly meets the injury by accident requirement" Second, he contends that "all the medical evidence in this case supports causation and as such, [he] has met his burden of proof." These statements alone are not sufficient to "define clearly" medical causation as an issue before the court. N.C.R.

App. P. 28(a). Therefore, the Commission's finding that plaintiff's injury is not compensable is conclusively established on appeal. Since his injury is not compensable, the Commission's finding that plaintiff did not provide a reasonable excuse for his untimely notice does not require reversal of the Commission's Opinion and Award.

Plaintiff next contends the Commission erred in striking the testimony of two of his lay witnesses as inadmissible hearsay. We disagree.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2009). Although our Court has held the rules of evidence do not strictly apply in workers' compensation cases, hearsay is generally inadmissible in workers' compensation cases in North Carolina. See, e.g., *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 703, 632 S.E.2d 525, 529 (2006). Hearsay evidence is not competent to establish plaintiff's injury arose out of employment or was sustained in the course of employment. *Plyler v. Charlotte Country Club*, 214 N.C. 453, 455, 199 S.E. 622, 623 (1938).

It is undisputed that plaintiff's alleged statements to his coworkers Bailey and Horne were made at work, outside of court. However, plaintiff contends he sought to introduce the statements to "[explain] the subsequent conduct of the testifying witness," not to prove the truth of the matter asserted, i.e., that he injured himself at work and told his supervisor about it that day on 13 April 2005. Bailey and Horne each testified they spoke with plaintiff regarding his fall, but neither could definitively say they saw plaintiff fall or speak with his supervisor. Plaintiff's argument that the statements were being offered to show "the subsequent conduct of the testifying witness" is misplaced, as the subsequent conduct of Bailey and Horne is neither at issue, nor relevant to any issue in this case. Thus, the proffered statements are hearsay, and the Commission did not err by striking testimony regarding plaintiff's statements to Horne and Bailey as hearsay.

We have considered plaintiff's remaining arguments and have concluded they are without merit and therefore, we decline to address them.

Affirmed.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).