Bunn – affirmed
Bolch
Ballance

NO. COA99-1017

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2000

ALLEN FOREMAN,
Employee,
Plaintiff

v.

CITY OF ELIZABETH CITY,
Employer

SELF-INSURED, NORTH CAROLINA INTERLOCAL RISK MANAGEMENT AGENCY,
Servicing Agent,
Defendants

North Carolina
Industrial Commission
I.C. File No. 662586

Appeal by plaintiff from opinion and award entered 21 May 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 April 2000.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Alan J. Miles, for defendants-appellees.

WALKER, Judge.

Plaintiff instituted this action to recover benefits under the Workers' Compensation Act (Act) for a knee injury he suffered while working for defendant-employer City of Elizabeth City.

Plaintiff began employment with defendant City in September of 1995 as a plumbing repairperson. On 30 July 1996, plaintiff suffered an injury to his right knee on a truck he was driving for

defendant-City. Plaintiff sought treatment from Drs. Roy Hall, James M. Watson and Lawrence M. Shall for his injury. Plaintiff filed a workers' compensation claim and defendants denied the claim on the grounds that they were "[u]nable to verify injury by accident through doctors[']notes and witness[']statements." A deputy commissioner of the North Carolina Industrial Commission conducted a hearing concerning plaintiff's claim and concluded that plaintiff was not entitled to an award under the Act. On appeal, the Full Commission affirmed the deputy commissioner's opinion and award and found the following:

> 2. Plaintiff began working for the City of Elizabeth City in September [1995]. He was assigned to plumbing repairs, including water and sewer repairs.
>
> 3. On or about May 17, 1995, as plaintiff was playing basketball after work, he planted his foot and twisted, and his right knee suddenly gave way. He had an immediate onset of pain and swelling.
>
> 4. Following this incident, plaintiff was seen on May 24, 1995 by Dr. James Watson, an orthopaedic specialist. Plaintiff reported to Dr. Watson that he had experienced several episodes of his right knee giving way over the past several months. Dr. Watson suspected a possible medial meniscus tear. Plaintiff also showed signs of cruciate instability, an indication of a possible torn anterior cruciate ligament.
>
> 5. Dr. Watson recommended rehabilitative exercises. Plaintiff was seen by Dr. Watson in one follow-up visit and showed improvement with exercise.
>
> 6. Plaintiff has stated that he sustained an injury to his right knee on July 30, 1996, as a result of a compensable accident. This accident was asserted to have occurred as plaintiff was getting onto a truck used in the

performance of his duties. Plaintiff has given varying statements as to how this incident occurred, at times indicating that his knee "gave way" and at other times stating that his foot "slipped" as he stepped onto the running board.

7. James Hill, a supervisor, was responsible for completing an accident report. Mr. Hill did not learn of the incident until late August and completed an accident report on September 9, when he first had an opportunity to speak with the plaintiff. At this time, plaintiff told James Hill that his knee gave way as he stepped onto the running board of the truck. He did not mention any slip or fall. He later asked Hill to change the written accident report to state that his foot "slipped" as he stepped on the running board.

8. Plaintiff also talked with Eileen Chaney, Risk Manager for the City of Elizabeth City. This conversation took place on or about September 10, 1996. After talking with plaintiff, Ms. Chaney completed the Form 19, which indicates that plaintiff experienced pain in his right knee while getting into the truck. Later, at plaintiff's request, Ms. Chaney assisted plaintiff in completing the Form 18, which indicates the plaintiff's right knee gave way as he was getting into the truck. Plaintiff did not mention to Ms. Chaney during either of those conversations that he slipped while getting into the truck.

9. Plaintiff saw Dr. Watson on August 26, 1996. Dr. Watson's notes indicate that plaintiff told him he felt a sudden pop in his knee while getting out of a truck on July 31, 1996. There is no mention of any slip or fall.

10. In a recorded statement given on September 12, 1996, plaintiff stated his foot "slipped" and that his knee "snapped out of place" as he put his foot up to get into the truck. This is similar to plaintiff's testimony at the initial hearing.

11. There were no witnesses to this incident. A co-worker, Jeffrey Felton, saw the plaintiff immediately afterward, and plaintiff appeared

to be in pain and was holding his knee. However, Mr. Felton did not see the incident itself, and so he could not say whether plaintiff slipped or whether plaintiff's knee just gave way.

12. Although plaintiff did experience an onset of knee pain on July 30, 1996, while he was entering the truck at work, the exact circumstances of this event are difficult to determine. Due to plaintiff's inconsistent statements as to how the incident occurred, the undersigned find that plaintiff did not "slip" while trying to get into the truck. Thus, he did not suffer an accident. Plaintiff's testimony as to a "slip" is not accepted as credible or convincing in light of the fact that this statement was not given until months after the incident and was not consistently given.

13. Plaintiff was seen by Dr. Lawrence Shall, an orthopaedic specialist, on September 30, 1996. An MRI study confirmed Dr. Shall's initial assessment of a torn medial meniscus and an anterior cruciate ligament tear. On October 22, 1996 Dr. Shall performed a surgical repair of the knee injury. Plaintiff had a good recovery, and Dr. Shall released him to return to work at full duty as of March 17, 1997.

14. The greater weight of the competent, credible, and convincing medical evidence, including the testimony of Dr. Watson and Dr. Shall, shows that it is unlikely that plaintiff's knee injury was the result of any particular incident occurring on July 30, 1996. As Dr. Watson noted, plaintiff had a more severe injury in May of 1995, when he injured his knee while playing basketball after work but which is not the subject of this claim for compensation. This was a twisting type of injury, which both physicians acknowledged was likely to cause the type of injury which plaintiff sustained, a medial meniscus tear and an anterior cruciate ligament tear. The undersigned accept these expert opinions as credible and convincing.

15. Plaintiff had reported to Dr. Watson that he had experienced episodes of his knee giving

> way even prior to the basketball injury. Dr. Watson made the same assessment of plaintiff's injury in May of 1995 as he later made in 1996. Dr. Shall made the same assessment when he saw plaintiff in 1996. The diagnosis was the same in 1996 as it had been a year earlier, an indication that the injury actually occurred in May of 1995. Further, after reviewing Dr. Watson's records regarding plaintiff's knee injury of May, 1995, Dr. Shall could not determine to any degree of medical certainty that the knee injury was caused by the incident of July 30, 1996.
>
> 16. The greater weight of the competent, credible, and convincing evidence fails to establish that plaintiff sustained an accident on July 30, 1996, which resulted in injury to his knee.

Based on these findings of facts, the Commission concluded the following:

> 1. Plaintiff has failed to establish by the greater weight of the competent, credible or convincing evidence that he sustained a compensable injury by accident on or about July 30, 1996. N.C. Gen. Stat. § 97-2(6).
>
> 2. Even if it had been determined that plaintiff sustained an accident on that date while entering the truck, the greater weight of the evidence fails to establish that any such accident caused the particular injury to plaintiff's knee. The competent, credible, and convincing evidence likewise fails to establish that any such incident significantly aggravated any pre-existing knee condition. Thus, under the law, plaintiff's claim must be denied. N.C. Gen. Stat. § 97-2(6).

From the opinion and award, plaintiff appeals.

This Court is limited to two questions when reviewing an opinion and award from the Commission: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether those findings of fact support

the Commission's conclusions of law. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). Therefore, if there is competent evidence to support the findings, those findings are conclusive on appeal even though there is plenary evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997).

For an injury to be compensable, it must be the result of an accident arising out of and in the course and scope of plaintiff's employment. *See* N.C. Gen. Stat. § 97-2(6)(1999). In deciding whether there was an accident, the only question on appeal is whether there was "an unlooked for and untoward event [which is not expected or designed by the injured employee]" or "the interruption of the routine work and the introduction thereby of unusual conditions." *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985)(citations omitted)(*quoting Ross v. Young Supply Co.*, 71 N.C. App. 532, 535, 322 S.E.2d 648, 651 (1984)).

Plaintiff contends the Commission erred in finding and concluding that plaintiff failed to establish "by the greater weight of the competent, credible or convincing evidence that he sustained a compensable injury by accident on or about July 30, 1996." He argues that the Commission did not consider Dr. Shall's testimony that the 30 July 1996 incident aggravated plaintiff's pre-existing condition to produce his injury. Our review of the record and transcript from the hearing below leads us to the

conclusion that there is competent evidence to support the dispositive findings made by the Commission and that the Commission considered Dr. Shall's testimony.

Plaintiff's medical evidence included the depositions of Dr. James M. Watson, who treated plaintiff from 24 May 1995 to 6 September 1996, and Dr. Lawrence M. Shall, who treated plaintiff from 30 September 1996 to 3 October 1997. According to Dr. Watson, plaintiff was treated by him in 1995 for a knee injury incurred while playing basketball. Dr. Watson's examination at that time revealed that plaintiff "had some instability in his cruciate ligament in the knee [and] a tear in the medial meniscus." Plaintiff also sought treatment from Dr. Watson in August of 1996 for his 30 July 1996 work-related knee injury. Plaintiff indicated to Dr. Watson that "he had had a sudden pop in his right knee when he was getting out of a truck." Dr. Watson noted in his medical report that "[plaintiff] was seen in 1995 for similar symptoms which were felt to be on the basis of a probable medial meniscal tear."

Dr. Shall testified in his deposition that he saw plaintiff on 30 September 1996 for his 30 July 1996 work-related knee injury. Dr. Shall testified that plaintiff's patient history indicated that plaintiff injured his knee while "getting up on a truck." He further testified that his examination revealed that plaintiff had a torn meniscus and a torn anterior cruciate ligament. After showing Dr. Shall the 24 May 1995 medical notes by Dr. Watson

regarding plaintiff's basketball injury, the following colloquy took place:

> Q. The first question I want to ask you as far as your opinions are concerned, is do you have an opinion and to a reasonable degree of medical certainty as to the cause of the meniscal tear and the A.C.L. tear for which you provided medical treatment in September of 1996?
>
> . . .
>
> A. The only [note] that really makes a difference is this first note dated 5/24/95, and he -- Dr. Watson describes the condition that I treated, the torn medical meniscus and the antecruciate instability.
>
> So I don't know if this is old or new. I don't know if -- since I never saw [plaintiff] before, well into his treatment on the second injury. If he twisted his knee playing basketball in 1995, could he have had an unstable knee and his knee twisted and pivoted and given way; or could he have torn it and Dr. Watson have been wrong; or at least could he not have had a torn antecruciate and he could have torn his antecruciate de novo, meaning the first time [on]....
>
> July 30th, 1996, I have no way of knowing. And I can't give a reasonable degree of medical probability one way or the other.
>
> Q. Okay. Could you state whether the incident that happened on July 30th, 1996, was an aggravation of a pre-existing condition?
>
> A. At the very least, [plaintiff's 30 July 1996 injury] was an aggravation of a pre-existing condition; and at the very most, it caused the condition and I have no way of knowing."

Contrary to plaintiff's assertion, the Commission considered Dr. Shall's testimony when it denied plaintiff's claim. After weighing the evidence, the Commission specifically found that

plaintiff had not proven by the greater weight of the competent, credible evidence, "including the testimony of Dr. Watson and Dr. Shall," that he sustained an accident on 30 July 1996, which resulted in his knee injury. "The Commission is the sole judge of the weight and credibility of testimony, and its findings may be set aside on appeal only if there is a complete lack of evidence to support them." *Thompson v. Tyson Foods, Inc.*, 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995). We hold there was competent evidence supporting the Commission's finding and conclusion that plaintiff did not sustain a compensable injury by accident within the meaning of N.C. Gen. Stat. § 97-2(6). Accordingly, the Commission's opinion and award is

Affirmed.

Chief Judge EAGLES and Judge SMITH concur.

Report per Rule 30(e).