NO. COA12-122

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2012

CHERI EVANS,
Employee,
Plaintiff,

v.

HENDRICK AUTOMOTIVE GROUP,
Employer,
CHUBB SERVICES CORPORATION,
Third-Party Administrator,
Defendants.

North Carolina
Industrial Commission
I.C. No. 681555

Appeal by defendants from opinion and award entered 7 June 2011 and amended 12 October 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2012.

Copeley Johnson & Groninger, PLLC, by Valerie A. Johnson; and Patterson Harkavy LLP, by Narendra K. Ghosh, for plaintiff-appellee.

McAngus Goudelock & Courie, P.L.L.C., by Andrew R. Ussery and Daniel L. McCullough, for defendants-appellants.

GEER, Judge.

Defendants Hendrick Automotive Group and Chubb Services Corporation ("Hendrick") appeal from an opinion and award of the North Carolina Industrial Commission awarding compensation to plaintiff Cheri Evans for total and partial disability as a result of injuries suffered when she fell from an escalator following a company-sponsored dinner during an out-of-town annual sales meeting. On appeal, Hendrick primarily contends that the Commission erred in concluding that Ms. Evans' injuries arose out of and in the course of her employment. Hendrick's argument overlooks well-established principles governing out-of-town business trips. This case falls squarely within the holding of *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 477 S.E.2d 678 (1996), and we therefore affirm.

Facts

The Commission's unchallenged findings establish the following facts. For 11 years, Ms. Evans was employed as the office manager for Honda Cars of McKinney, one of Hendrick's dealerships located in McKinney, Texas. In that capacity, she oversaw the dealership's financial and administrative activities, including management of employees and bookkeeping.

Ms. Evans began receiving performance appraisals in 2005 and audits were performed on the dealership every 12 to 18 months. The audit results were not perfect, but Ms. Evans

worked to improve performance. Ms. Evans' expense numbers consistently came in below budget goals, McKinney was one of Hendrick's more profitable dealerships, and Ms. Evans was well compensated for her efforts as office manager. Nevertheless, Ms. Evans made two key errors: (1) overpaying herself as a result of using the wrong pay sheet and (2) treating some nonexempt employees as exempt for salary purposes. Ms. Evans received no written reprimands for those mistakes and repaid Hendrick a substantial part of the overpayment.

As a condition of her employment, Ms. Evans was required to attend annual or biannual sales meetings at Hendrick's Charlotte, North Carolina headquarters. During April 2005, Ms. Evans attended a four-day sales meeting during which all expenses were paid by Hendrick. Hendrick paid for the managers in attendance to stay at the Westin Charlotte Hotel, and the managers were required to attend workshops and meetings at the Westin and the Charlotte Convention Center. On 19 April 2005, Hendrick hosted a dinner at a restaurant that was within walking distance of the Westin.

On that occasion, Hendrick provided alcoholic beverages at a reception in a bar before dinner, provided wine during dinner, and paid for drinks in the bar after the dinner. Ms. Evans had a couple of drinks before dinner and drank wine with dinner.

The dinner was held in a private room and was a very festive occasion. After dinner, Ms. Evans and one of her co-workers were hugging other managers, eventually starting a hug line.

As Ms. Evans left the dining room, she walked over to the bar area and ordered a drink, although she had only a sip before saying that she was ready to go back to the hotel. A group of managers, including Ms. Evans, started back to the Westin. After they got onto an escalator, Ms. Evans climbed onto the railing of the escalator. As she rode down, she struck a pillar, fell off the railing, and plunged 25 to 30 feet below.

Ms. Evans was taken to the hospital by ambulance. When she arrived at the hospital, her blood alcohol level was measured at a concentration of 48 miligrams per deciliter. Given her weight (105 pounds) and the fact that she was used to drinking only two drinks per month on average, her blood alcohol level was sufficient to cause a lack of inhibitory control that contributed to the accident.

Ms. Evans suffered very serious head trauma and various other injuries requiring multiple surgeries between 20 and 26 April 2005, including a repair of her fractured skull with steel plating and a left frontal craniotomy to remove blood from the brain. Ms. Evans returned to Texas where she was treated by multiple doctors to address on-going headaches, orbital

fractures, her loss of the senses of taste and smell, numbness in her chin area, bilateral wrist factures, broken teeth, and nasal and other facial fractures.

Ms. Evans also saw Dr. Brian Joe, a neurologist, who noted that Ms. Evans had problems with her short-term memory, focusing while driving, and mental processing speed. Dr. Joe believed that Ms. Evans' attention and concentration would be permanently impaired to some extent.

In addition, in March 2006, Laura H. Lacritz, Ph.D. performed a neuropsychological evaluation of Ms. Evans. Dr. Lacritz found that Ms. Evans had difficulty with her processing speed, visuo-constructional ability, and verbal abstraction. According to Dr. Lacritz, because of these deficits, Ms. Evans would take longer to complete certain tasks, and she would be vulnerable to becoming overwhelmed when having to process information quickly. Dr. Lacritz expected that the effects of Ms. Evans' traumatic brain injury would be stable over time, although her processing speed and attention might improve.

Ms. Evans' return to work at the dealership was difficult. Initially, she was not able to use a keyboard or keypad. She had episodes of crying and often did not remember things and made mistakes. She tried to compensate by putting up post-its as reminders of important tasks and when she did not understand

something, she tried to hide it. Prior to the accident, Ms. Evans had no problem with forgetting things, while afterwards, she felt that she was slower, had trouble keeping track of things, and was more reliant on written notes and emails.

While Ms. Evans was out of work, Hendrick had replaced her with two employees. When she returned, Ms. Evans was given 60 days to correct problems identified during her absence. Although Ms. Evans had only returned to work on a limited basis, she was able to correct the problems or put in place a plan for correction. A performance appraisal, on 16 February 2006 at the end of the 60-day period, indicated that Ms. Evans did well "on the tasks worked on" and that she "[got] things done." Critical comments included that she was "too abrasive/confrontational" and did too much. Another performance appraisal done in March 2006 indicated that Ms. Evans required some limited supervision on new and unusual tasks, that she had difficulty in making decisions involving new or complex tasks, and that long-term problems were sometimes managed with "short run" solutions.

In May 2006, Ms. Evans changed the pay for two office employees without authorization and issued a check without a required second signature. On 15 May 2006, Ms. Evans' employment with Hendrick was terminated. The termination notice stated that she had poor performance and pointed to the two May

2006 issues. Dennis Donathan, the comptroller at the dealership and the person who could have been the second signature on the check, knew in advance both about the raise being given to the employees and about the check, which was for lunch and gifts for Secretaries Week. However, only Ms. Evans was fired.

Ms. Evans was out of work for four months. After a job search, she found employment with RMC Credit Services, supervising their administrative staff, although her pay was significantly lower than that with Hendrick. She had lost wages in the amount of $639.43 per week during 2008, $816.00 per week during 2009, $419.15 per week in 2010, and $628.17 per week for the period 1 January 2011 through 18 January 2011.

Ms. Evans filed a claim and request that her case be assigned for a hearing on 18 December 2006. Hendrick denied that Ms. Evans had suffered an injury by accident arising out of and in the course of her employment. The deputy commissioner issued an opinion and award on 19 October 2008 and an amended opinion and award on 12 November 2008. That order awarded Ms. Evans temporary total disability benefits for 8 1/2 weeks and ongoing temporary partial disability benefits beginning 15 September 2006. Hendrick appealed to the Full Commission on 13 November 2008.

The Full Commission filed an opinion and award on 30 September 2009 affirming the deputy commissioner's opinion and award with minor modifications. On or about 5 October 2009, Ms. Evans filed a motion to amend the Full Commission's award to correct errors with respect to Ms. Evans' average weekly wage and wage loss. Prior to the Full Commission addressing that motion, Hendrick filed a notice of appeal. This Court dismissed that appeal as interlocutory on the basis that Ms. Evans' motion to amend was still pending. *Evans v. Hendrick Auto. Grp.*, ___ N.C. App. ___, ___, 708 S.E.2d 99, 102-03 (2011).

On remand, the Full Commission modified its opinion and award on 12 October 2011 in accordance with Ms. Evans' motion to amend and a subsequent joint motion of the parties with regard to issues relating to calculation of Ms. Evans' ongoing wage benefits. Hendrick timely appealed to this Court.

Discussion

Appellate review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is

plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). This Court reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

I

Hendrick first contends that the Industrial Commission erred in determining that Ms. Evans suffered a compensable injury by accident arising out of and in the course of her employment. *See* N.C. Gen. Stat. § 97-2(6) (2011) (defining "[i]njury and personal injury" as including "only injury by accident arising out of and in the course of employment"). This Court has held that "while the 'arising out of' and 'in the course of' elements are distinct tests, they are interrelated and cannot be applied entirely independently." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247-48, 377 S.E.2d 777, 781, *aff'd per curiam*, 325 N.C. 702, 386 S.E.2d 174 (1989). "Both are part of a *single test of work-connection*." *Id.* at 248, 377 S.E.2d at 781. Whether an accident meets this test is a mixed question of law and fact. *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 184, 639 S.E.2d 429, 432 (2007).

Hendrick's argument on appeal overlooks the well-established "rule that employees whose work requires travel away

from the employer's premises are within the course of their employment *continuously* during such travel, except when there is a distinct departure for a personal errand." *Cauble*, 124 N.C. App. at 528, 477 S.E.2d at 679. Under this rule, as *Cauble* explains, "'[w]hile lodging in a hotel or preparing to eat, or *while going to or returning from a meal*, [a traveling employee] is performing an act incident to his employment.'" *Id.* (quoting *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 42, 167 S.E.2d 790, 794 (1969)). "The rule's rationale is that an employee on a business trip for his employer must eat and sleep in various places in order to further the business of his employer." *Id.* (internal quotation marks omitted). It is, therefore, "well-established that a traveling employee will be compensated under the Workers' Compensation Act for injuries received while returning to his hotel, while going to a restaurant or while returning to work after having made a detour for his own personal pleasure." *Id.* at 529, 477 S.E.2d at 679 (internal quotation marks omitted).

In *Cauble*, the employee was sent to New York on a work crew. *Id.* at 527, 477 S.E.2d at 678. The company paid for the crew's lodging and gave all crew members a daily per diem to be used for other purposes, including meals. *Id.* During the assignment, the employee and his supervisor went to dinner at a

sports bar after their shift. *Id.* After dinner, they stayed to watch a ball game. *Id.* Late that evening, as the supervisor was driving the two men back to their motel, the supervisor collided with another car, and the employee was killed in the car accident. *Id.* Both the supervisor and the employee were legally intoxicated at the time of the accident. *Id.*, 477 S.E.2d at 679.

This Court held that the employee "traveled to New York, slept in a motel and ate at restaurants in order to further the business of and at the direction of his employer . . . ." *Id.* at 529, 477 S.E.2d at 680. Because "[a]t the time of the accident, he was returning to his motel from the place where he had eaten dinner," even though he had remained at the restaurant after dinner to drink alcohol and watch a ballgame, the Court concluded that at the time of the accident, he was in the course of his employment. *Id.* at 529, 530, 477 S.E.2d at 680. The Court, therefore, affirmed the award of compensation. *Id.* at 530, 477 S.E.2d at 680.

This case is materially indistinguishable from *Cauble*. The Commission found that Ms. Evans had traveled to Charlotte for a company sales meeting with all expenses paid by Hendrick. On the night of the accident, she attended a dinner sponsored by her employer. Although after the dinner, she stopped at the

restaurant bar to order a drink, she only drank a sip before deciding to return to her hotel with other managers. The accident and her injuries occurred when she was on her way back to the hotel. Because she received her injuries while returning to her hotel after dinner, she falls within the "well-established" rule set out in *Cauble* "that a traveling employee will be compensated under the Workers' Compensation Act for injuries received while returning to his hotel . . . ." *Id.* at 529, 477 S.E.2d at 679 (internal quotation marks omitted). Hendrick makes no attempt to distinguish *Cauble*.

The bulk of the cases Hendrick has cited are irrelevant because they do not involve traveling employees. Hendrick does, however, cite *Perry v. Am. Bakeries* Co., 262 N.C. 272, 272-73, 136 S.E.2d 643, 644 (1964), in which the plaintiff attended an out-of-town sales meeting. The night before the meeting was to begin, the plaintiff went to an employer-sponsored social event and then went out to dinner with a colleague. *Id.* at 273, 136 S.E.2d at 645. When he returned to the hotel, the plaintiff was injured while swimming in the hotel pool. *Id.* The rule set out in *Cauble* thus did not apply -- the employee had already returned to his hotel and was engaged in a purely personal endeavor when swimming. *See id.* at 275, 136 S.E.2d at 646 ("Plaintiff's activity in swimming was not a function or duty of

his employment, was not calculated to further directly or indirectly his employer's business to an appreciable degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the Inn. The injury did not have its origin in or arise out of the employment.").

Hendrick further contends that Ms. Evans' choice to ride the escalator railing constituted thrill-seeking behavior that did not benefit Hendrick and, therefore, was not within the scope of employment. Hendrick relies primarily on *Teague v. Atl. Co.*, 213 N.C. 546, 196 S.E. 875 (1938) (per curiam). We need not, however, decide whether this nearly 75-year-old case properly sets forth the law under the current Workers' Compensation Act.

N.C. Gen. Stat. § 97-12(1) (2011) provides that an employee is not barred from receiving compensation for an injury proximately caused by intoxication when the alcohol was "supplied by the employer or his agent in a supervisory capacity to the employee." Under the statute, "'[i]ntoxication' and 'under the influence' shall mean that the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of

either or both of these faculties at the time of the injury." N.C. Gen. Stat. § 97-12.

Here, the Commission made the following pertinent finding of fact:

> 16. Plaintiff's laboratory studies at the time of admission indicated that she tested positive for ethanol at a concentration of 48 milligrams per deciliter. She was 5"1' [sic] tall and weighed approximately 105 pounds. While she did occasionally drink alcohol, she regularly consumed a drink about twice a month. Her status as a naïve drinker, her height and weight and her blood alcohol content at the time of the accident was sufficient to cause a loss of inhibitory control, and to produce behavior that contributed to the occurrence of the accident.

In addition, the Commission found that "[a]ll of the alcohol, including the post dinner drinks at the bar, was provided by defendant-employer."

These findings are sufficient to establish that Ms. Evans was intoxicated as a result of alcohol supplied by Hendrick and that the intoxication was a proximate cause of her injury. *See Bare v. Wayne Poultry Co.*, 70 N.C. App. 88, 92, 318 S.E.2d 534, 538 (1984) (in holding that employee suffered compensable injury although engaging in horseplay with knife, explaining that proximate cause requires only that "'employment is a

contributory cause'" (quoting *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960))).

Although Hendrick does not specifically challenge these findings of fact, it does argue that Ms. Evans was not intoxicated at the time she rode the escalator railing, pointing to Ms. Evans' testimony that she did not feel intoxicated at the time of the accident and the fact that her blood alcohol level was only .048. However, a toxicologist, Andrew Paul Mason, testified that Ms. Evans' alcohol consumption was a significant contributing factor to her injury. He explained that Ms. Evans was a "naïve drinker" and "the effects of alcohol at a given concentration are generally greater in naïve drinkers than they are in practice[d] drinkers due to the issues related to tolerance." According to the toxicologist, Ms. Evans also would have had an ascending blood alcohol concentration at the time of the accident, and "the behavioral effects of alcohol at a given concentration are generally greater on an ascending blood alcohol concentration as opposed to a descending blood alcohol concentration."

He then concluded: "[B]lood alcohol concentrations in this range, roughly .05, certainly can and do produce alterations in mood, in performance and in behavior that can result in people taking actions that they might not normally take for a variety

of reasons. So unfortunately, I would find that that would be consistent with what has been described in this case." This testimony is sufficient to support the Commission's findings and its conclusion that Ms. Evans' injury arose out of and within the course of her employment. Hendrick cites no authority to the contrary involving intoxication from employer-supplied alcohol.

II

Hendrick next contends that the Commission erred in concluding that Ms. Evans was disabled as a result of her injuries and entitled to indemnity benefits under N.C. Gen. Stat. §§ 97-29 and 97-30 (2011). Hendrick primarily argues that the termination of Ms. Evans' employment for poor performance constituted a constructive refusal of suitable employment.

Our Supreme Court has held that when an employee has been terminated for reasons purportedly unrelated to their disability, an employer can show a constructive refusal of suitable employment by demonstrating that "(1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004). If an employer meets its burden, then

the employee is barred from receiving benefits "'*unless* the employee is then able to show that his or her inability to find or hold other employment . . . at a wage comparable to that earned prior to the injury[] is due to the work-related disability." *Id.* at 494, 597 S.E.2d at 699 (quoting *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996)). That is to say, "the employee would be entitled to benefits if he or she can demonstrate that work-related injuries, and not the circumstances of the employee's termination, prevented the employee from either performing alternative duties or finding comparable employment opportunities." *Id.*

Here, the Commission determined that Hendrick had not proven the second and third elements of *McRae*. Specifically, the Commission found that, in terminating Ms. Evans, "[d]efendants did not treat plaintiff as a non-disabled employee" and "[p]laintiff's disability resulted in her omissions at work, cumulating [sic] in her dismissal." While Hendrick points to evidence supporting its contention that it met its burden under *McRae*, it does not address the evidence upon which the Commission relied. The Commission's findings were supported by (1) evidence that Dennis Donathan, a healthy employee who was implicated in the incidents that led to Ms.

Evans' firing, was not terminated and (2) expert testimony that Ms. Evans' job performance issues that led to her firing were likely related to her injuries. Because the record contains competent evidence supporting the Commission's findings of fact and those findings support the conclusion that Ms. Evans did not constructively refuse suitable employment, Hendrick has failed to show any error by the Commission.

III

Hendrick next challenges the Commission's determination that Ms. Evans met her burden of proving that she is disabled. An employee seeking compensation under the Workers' Compensation Act "bears the burden of proving the existence of a disability and its extent." *Silva v. Lowe's Home Improvement*, 176 N.C. App. 229, 236, 625 S.E.2d 613, 620 (2006). As this Court held in *Silva*:

> An employee may meet this burden of proof in four ways: (1) medical evidence that, as a consequence of the work-related injury, the employee is incapable of work in any employment; (2) evidence that the employee is capable of some work, but has been unsuccessful, after reasonable efforts, in obtaining employment; (3) evidence that the employee is capable of some work, but that it would be futile to seek employment because of preexisting conditions, such as age or lack of education; or (4) evidence that the employee has obtained employment at a wage less than that earned prior to the injury.

Id. at 236-37, 625 S.E.2d at 620 (setting out test from *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). After the employee "meets this initial burden, the burden shifts to the employer to show that not only were suitable alternative jobs available to the plaintiff, but that the plaintiff was capable of obtaining one of these jobs." *Shaw v. United Parcel Serv.*, 116 N.C. App. 598, 601, 449 S.E.2d 50, 52-53 (1994), *aff'd per curiam*, 342 N.C. 189, 463 S.E.2d 78 (1995).

In this case, the Commission awarded temporary total disability under N.C. Gen. Stat. § 97-29 for a total of 8.5 weeks. It is undisputed that after the accident, Ms. Evans was not released by her doctors to return to part-time work for a period of 5.5 weeks, and the testimony of Dr. Watumull, the surgeon who performed Ms. Evans' nasal reconstructive surgery after Ms. Evans returned to work, established Ms. Evans was further totally disabled following the nasal surgery. The Commission's conclusion that Ms. Evans was temporarily totally disabled for 8.5 weeks is, therefore, supported by medical evidence as required by the first prong of *Russell*.

With respect to the award of partial disability benefits under N.C. Gen. Stat. § 97-30, Ms. Evans presented evidence under the fourth prong of *Russell*: "the production of evidence

that [the employee] has obtained other employment at a wage less than that earned prior to the injury." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The Commission found that "[p]laintiff completed a reasonable job search and, due to her efforts, was able to find gainful, suitable employment based upon her age, education and other factors, and injuries to her brain and other body parts." The Commission further found that this employment was at a lower wage than Ms. Evans had been earning prior to her injury.

In *Shaw*, this Court held that because the employee had met his initial burden of proving disability by producing evidence that he obtained employment at a wage less than what he earned prior to the injury and the record contained no evidence that the employer had met its burden of showing that alternative jobs were available to plaintiff and that plaintiff was capable of obtaining one of those jobs, the plaintiff was entitled to benefits under N.C. Gen. Stat. § 97-30. *Shaw*, 116 N.C. App. at 602, 449 S.E.2d at 53. The Court reversed the Commission's denial of § 97-30 benefits and held: "[B]ecause we find that plaintiff's presumption of post-injury diminished earnings capacity was established by plaintiff and unrebutted by defendant, we direct the Commission to allow plaintiff to elect

benefits pursuant to North Carolina General Statutes § 97-30." *Id.*

Because, in this case, Ms. Evans likewise met her initial burden under *Russell*, she had a presumption of post-injury diminished earning capacity. Hendrick failed to rebut that showing and, therefore, in accordance with *Shaw*, Ms. Evans was entitled to benefits under N.C. Gen. Stat. § 97-30 for temporary partial disability.

Affirmed.

Judge ROBERT C. HUNTER concurs.

Judge BEASLEY concurs in the result only.

Report per Rule 30(e).

Judge BEASLEY concurred in the result only prior to 18 December 2012.