NO. COA03-1659

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2004

DIANE H. BROWN,
Employee-Plaintiff

v.

North Carolina Industrial Commission
I.C. File Nos. 801090 & 828950

WILKES COUNTY SHERIFF'S DEPARTMENT,
Employer

and

ZENITH INSURANCE COMPANY/ RISCORP (GRIT)
Carrier-Defendants

Appeal by plaintiff from an opinion and award entered 7 October 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 September 2004.

Franklin Smith, for employee-plaintiff.

Cranfill, Sumner, & Hartzog, L.L.P., by Amanda Kims Riess, for defendant-appellees.

CALABRIA, Judge.

Diane H. Brown ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission (the "Commission"), denying plaintiff workers' compensation benefits for injuries allegedly resulting from separate work-related accidents. We affirm.

In September of 1997, plaintiff was employed by the Wilkes County Sheriff's Department ("defendant") as a detective for child abuse and neglect cases. This position, a sworn

law enforcement officer position, requires the completion of an intensive, fourteen-week basic law enforcement training program. The training program includes an obstacle course with a six-foot wall. On 29 September 1997, while training on the obstacle course, plaintiff injured her right arm in an attempt to scale the wall. On 10 October 1997, plaintiff presented to Dr. Bradley Templeton with bruising and a lump on her right arm, which was diagnosed as a blood clot. However, a subsequent ultrasound indicated there was no blood clot in the arm, and the Commission found the extent of plaintiff's injury resulting from the 29 September 1997 accident was a bruise to her right arm.

The second injury reported by plaintiff occurred on 3 November 1997 to her left arm, which plaintiff stated was caused by "excessive bumping of [her] left arm in [the] obstacle course training and jerked and pulled [her] left arm when doing pullups on [the] bar in [the] gym." The following day, plaintiff presented to the emergency room with a nodule on her left arm, which was later determined to be a lipoma. Plaintiff reported she suffered a bruise and a broken blood vessel as a result of the injury on 3 November 1997. On 23 January 1999, Dr. David Kim performed outpatient surgery to excise the lipoma.

Over a year after the 3 November 1997 incident, in December 1998, plaintiff was examined by Dr. William Bell for, *inter alia*, low back pain. Plaintiff related to Dr. Bell that she injured her lower back while undertaking, as part of her training, an attempt to pull a 180-pound man out of a car. Despite plaintiff's assertion that she felt an immediate, sharp pain at the time of the attempt, which caused her to drop the victim and fall to the ground, plaintiff did not complain of the injury or the incident when she went to the hospital the following day, 4 November 1997, to have the lipoma on her left arm examined.

On 6 December 1997, plaintiff completed a workers' compensation form for her employer reporting the injuries from the incidents of 29 September 1997 and 3 November 1997. Defendants denied both claims by Form 61 denials in late January 1998. On 26 February 1998, plaintiff prepared separate Form 18 notices of injury for her claims and requested that her claims be assigned a hearing via Form 33 requests. In the Form 18 for the 29 September incident, plaintiff described her injuries as a deep muscle bruise and strain in the right arm and shoulder. In the Form 18 for the 3 November incident, plaintiff described her injuries as a deep bruise and hematoma. On 14 January 1999, plaintiff amended her Form 18 for the 3 November incident to add an injury to her lower back. The deputy commissioner issued an opinion and award denying plaintiff's claims for workers' compensation benefits, and plaintiff appealed. The Commission affirmed in an opinion and award filed 7 October 2003. Plaintiff appeals to this Court.

I. Injury from 29 September 1997

In its opinion and award, the Commission denied plaintiff's claim for workers' compensation benefits for the injury to her right arm resulting from the incident on 29 September 1997 on the grounds that plaintiff had failed to timely file her claim. In support of the denial, the Commission concluded, as a matter of law, that "plaintiff's claim is barred as plaintiff failed to timely file her claim for any alleged injury under N.C. Gen. Stat. §97-22." This conclusion was based on the Commission's finding that plaintiff had not filed her claim within thirty days, had given no reasonable excuse for that failure, and defendants had been prejudiced by the lack of an opportunity to fully investigate the claim or direct medical treatment had the case been accepted as compensable. Plaintiff has presented neither argument nor citation to authority challenging the Commission's denial of plaintiff's claim for the 29 September 1997 incident on the grounds that

plaintiff failed to file timely notice; accordingly, any assignment of error concerning this portion of the Commission's order has been abandoned. N.C. R. App. P. 28(b)(6) (2004).

II. Injury from 3 November 1997

Plaintiff asserts "the Full Commission committed reversible error in finding that the plaintiff failed to prove an accident arising out of and during the course of her employment and failing to find that the plaintiff sustained an injury by accident arising out of her employment on . . . November 3, 1997." In support of this assertion, plaintiff's sole citation to authority in her brief is to that portion of N.C. Gen. Stat. §97-25 (2003) concerning, in relevant part, payment ordered by the Commission for medical costs incurred by an employee in emergency situations when a physician other than one provided by the employer is called to treat the injured employee. The statute, however, is inapposite as plaintiff has failed to bring forward any argument as to the existence of an emergency. Furthermore, the statutory provision applies, by its own terms, where payment for such care is "ordered by the Industrial Commission." N.C. Gen. Stat. §97-25. No such order has been entered, and we find this argument to be without merit. No other argument contained in plaintiff's brief is supported by authority in violation of our appellate rules of procedure; therefore, we deem such arguments abandoned. N.C. R. App. P. 28(b)(6).

Moreover, the remainder of plaintiff's arguments on appeal, in substance, are unavailing. It is well-settled that the employee bears the burden of establishing the compensability of a worker's compensation claim. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). Our review of the Commission's opinion and award is "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 Industrial Commission is the "sole judge of the weight and credibility of the evidence," *see id.*, and this Court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Plaintiff's argument on appeal that defendants "have not come forward to dispute" that plaintiff "was injured by accident deriving out of and during the course of her employment" must fail since such arguments impliedly shift plaintiff's burden of proof to defendants. Moreover, much of the evidence of record depends on plaintiff's recitation of the events surrounding 3 November 1997, yet the Commission specifically found plaintiff's testimony was not credible in light of the numerous changes in plaintiff's claims concerning (1) those events and (2) the manner and extent of her resulting injuries. Such credibility determinations fall squarely within the sole province of the Commission, and we do not disturb them on appeal. We have carefully considered plaintiff's remaining arguments and find them to be without merit.

Affirmed.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).