NO. COA02-1172

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2003

MAGGIE JONES,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File Nos. 841838 & 851924

WILSON STORES, d/b/a
HANNAFORD BROTHERS,
Employer,

and

INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 30 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 May 2003.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by J. Shannon Harris, for defendant appellees.

TIMMONS-GOODSON, Judge.

Maggie Jones ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") concluding that plaintiff failed to carry her burden of proving by credible evidence that she sustained an injury by accident arising out of and in the course of her employment with Wilson Stores("defendant-employer") and denying plaintiff's

claim for benefits under the Workers' Compensation Act. We affirm the opinion and award of the Commission.

The facts of the instant appeal are as follows: Plaintiff submitted claims for employment benefits to defendant-employer for injuries she sustained on 27 November 1997 and 15 July 1998. Defendant-employer denied the claims on the ground that plaintiff's injuries did not arise by accident. A deputy commissioner for the Commission reviewed the evidence submitted by plaintiff and awarded her benefits. Defendants appealed the decision by the deputy commissioner to the Commission, which held a hearing on the matter 30 April 2002. Upon review, the Commission made the following pertinent findings of fact:

> 3. Plaintiff became employed with defendant-employer as a cashier on June 28, 1997. From June 28, 1997 through November 22, 1997, plaintiff earned $1,569.65. Plaintiff was a part-time employee who worked 25 to 30 hours per week.
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> 4. On November 23, 1997, plaintiff was working the second shift. As she was ringing up groceries, plaintiff testified at the deputy commissioner hearing that she reached across her body with her left arm to pull and lift a one-gallon container of milk from the grocery cart located to her right in an attempt to scan the item. Plaintiff now alleges that as she lifted and pulled the one-gallon container of milk toward her, plaintiff's shoulder popped, dislocated and she felt immediate sharp pain and asserts that this occurred because the container was wet with condensation. Before the deputy commissioner's hearing, however, plaintiff gave a recorded statement to defendant-carrier wherein plaintiff stated that she was scanning a container of water, that it did not slip, and there was nothing unusual about this activity. Plaintiff did not describe condensation, slipping, or any untoward event in the recorded statement and the Full Commission finds that plaintiff's testimony before the deputy commissioner was not credible and that she has changed her story in an effort to create a compensable claim. The Commission further finds that it was not an unusual event for plaintiff to lift and pull a one-gallon container of milk or water toward her; plaintiff regularly performed this action during the course of her shift ringing up groceries. Thus, the Full Commission concludes from the greater weight of the competent

evidence that plaintiff did not sustain an injury from an accidental or untoward event.

5. Plaintiff was taken from work to the emergency room at New Hanover Regional Medical Center where she was referred to an orthopedic surgeon, Dr. Thomas Parent.

6. Plaintiff presented to Dr. Parent on November 24, 1997 and was diagnosed with shoulder instability. Plaintiff's shoulder was reduced under local anesthesia, and she was instructed not to work with her upper left extremity. At the time, plaintiff was seventeen (17) years old. In December 1997, plaintiff underwent an arthroscopic left anterior stabilization performed by Dr. Parent.

7. Dr. Parent was of the opinion that plaintiff did not exhibit any drug seeking behaviors while she was under his treatment. Dr. Parent was of the opinion that plaintiff might be purposely dislocating her shoulder. Plaintiff continued to complain to Dr. Parent of a painful automatically dislocating shoulder through her last treatment with him on June 18, 1998. Dr. Parent was of the opinion that as of June 1, 1998 plaintiff could return to work.

8. Plaintiff returned to work with [defendant-employer] in July 1998 and attempted to perform her job duties. Plaintiff was told that she would receive assistance in lifting, but on July 15, 1998 after repeated requests for assistance, she lifted a bag of dog food to scan when her left shoulder again dislocated.

9. On July 27, 1998, plaintiff sought treatment with Dr. Kevin Speer, a board-certified orthopedic surgeon with Duke University Medical Center. On September 1, 1998, Dr. Speer performed an arthroscopic surgery and Bankart repair. In the course of that surgery, Dr. Speer found that plaintiff's first surgery, which had been performed by Dr. Parent, had failed and that the ligaments and cartilage in plaintiff's left shoulder were torn explaining plaintiff's dislocations.

10. On October 16, 1998, plaintiff underwent a third surgery, which was also performed by Dr. Speer, as her operative construct had torn apart and her shoulder had dislocated. Plaintiff had not suffered an additional injury.

. . . .

22. As explained in Finding of Fact No. 4, plaintiff provided highly inconsistent accounts in her recorded statement with a representative of the carrier-defendant and testimony at the deputy commissioner hearing detailing these alleged workplace incidents; therefore, her testimony is not credible.

23. Plaintiff's alleged incident at work on November 23, 1997 resulting in a left shoulder injury did not constitute an injury by accident arising out of and in the course of her employment with defendant-employer as Plaintiff's work as a cashier often involved the handling of a one-gallon container of milk or water. Further, as explained in Finding of Fact No. 4, the Commission does not accept as credible, plaintiff's current testimony that the gallon of milk slipped because it was wet with condensation. The Commission accepts as credible plaintiff's original statement that the item did not slip and that there was nothing unusual about the circumstance. Thus, this incident was not an unusual occurrence interrupting plaintiff's normal and customary work duties.

24. The Commission further finds that plaintiff had a pre-existing deformity with her shoulder which allowed plaintiff to voluntarily dislocate her shoulder and that this condition was not caused, aggravated, or accelerated by the alleged incident at work.

25. As plaintiff's alleged incident of November 23, 1997 is not a compensable injury by accident, Plaintiff's alleged left shoulder dislocation while at work on July 15, 1998 cannot be a direct and natural result of a prior work-related injury. Further, the alleged incident on July 15, 1998 does not constitute an injury by accident arising out of and in the course of her employment with defendant-employer because part of Plaintiff's normal and customary duties as a cashier was to lift customers' groceries if a bagger was not available. The evidence does not support that this dislocation was caused by an accident or untoward event.

Based on the findings, the Commission concluded that plaintiff had "failed to carry her burden of proving with credible evidence that she sustained an injury by accident on November 23, 1997 [and July 15, 1998] arising out of and in the course of her employment with Defendant-Employer." The Commission therefore entered an opinion and award denying plaintiff's claim for benefits. Plaintiff appeals.

Plaintiff argues on appeal that the Commission's findings are unsupported by competent evidence. The standard of review of decisions by the Industrial Commission is well established. The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence, even where there is evidence to support a contrary finding. *See Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). In passing upon issues of fact, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). As such, the Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not. *See Anderson v. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951). Whether from a cold record or from live testimony, it is the Commission that ultimately determines credibility, and it may disregard any previous findings made by a deputy commissioner. *See Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998). Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965); *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000).

Plaintiff argues that there is no competent evidence to support the Commission's finding that her injury did not arise by accident, as well as its finding that plaintiff could voluntarily dislocate her shoulder. This argument is without merit. During her initial testimony regarding the 23 November 1997 incident, plaintiff testified that "the strain of the weight of the [gallon of] water [she was scanning] yanked [her] shoulder out of joint." Plaintiff specifically and repeatedly

denied that there was anything unusual about the incident, stating that the water neither slipped nor shifted when she lifted it. Plaintiff did not mention condensation on the container, nor any awkward body position. Plaintiff agreed that "there was nothing unusual" about the incident and that she lifted the container "in [her] normal manner." "No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by an accident." *Searsey v. Construction Co.*, 35 N.C. App. 78, 80, 239 S.E.2d 847, 849, *disc. rev. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978).

Plaintiff concedes the existence of this earlier testimony, but argues that she was "heavily medicated" at the time she made the statement, and that her statement is therefore inherently unreliable. As stated *supra*, however, our review "goes no further than to determine whether the record contains any evidence tending to support the findings," and assessment of the credibility and reliability of plaintiff's testimony was entirely within the province of the Commission. *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274; *Lanning*, 352 N.C. at 106, 530 S.E.2d at 60. Moreover, plaintiff's medical records support the Commission's finding that she was capable of voluntarily dislocating her shoulder. We therefore overrule this assignment of error.

Plaintiff further argues that there was no competent evidence to support the Commission's finding that her 15 July 1998 injury was not an injury by accident. Plaintiff's argument is based entirely upon her assertion that the 15 July 1998 injury was a direct and natural result of the 23 November 1997 injury, which arose by accident. Given our determination, however, that there is competent evidence of record to support the Commission's findings and conclusion that plaintiff's 23 November 1997 injury did not arise by accident,

plaintiff's argument on this point necessarily fails. We therefore overrule this assignment of error.

The opinion and award of the Commission is hereby

Affirmed.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).