NO. COA12-1575
NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2013

TARA ANDERSON,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. W33354

SODEXO,
Employer,

and

GALLAGHER BASSETT SERVICES INC.,
Carrier,
Defendants.

Appeal by Plaintiff from Opinion and Award entered 6 September 2012 by the North Carolina Industrial Commission.

Heard in the Court of Appeals 23 April 2013.

Hardison & Cochran P.L.L.C., by J. Adam Bridwell, for Plaintiff.

McAngus, Goudelock & Courie, P.L.L.C., by Carolyn T. Marcus, for Defendants.

STEPHENS, Judge.

Background

This case arises from an injury allegedly suffered by Ms. Tara Anderson ("Plaintiff") to her right shoulder on 2 July 2009. Plaintiff alleges that a fall at work resulted in a compensable injury; her employer, Sodexo, disputes that allegation. The case was initially heard on 12 July 2011 by Deputy Commissioner Keischa M. Lovelace of the North Carolina Industrial Commission ("the Commission"), who concluded that Plaintiff suffered a compensable right shoulder injury as she went in to work on 2 July 2009. Sodexo appealed to the Full Commission.

The Full Commission heard the matter on 16 July 2012. In its 6 September 2012 opinion, the Commission made the following pertinent findings of fact and conclusion of law:

> 1. Plaintiff[], who was forty-six years old at the time of the hearing before the Deputy Commissioner, has worked for []Sodexo since October 2002 as a Cook II. Through its contract with the United States Government, Sodexo provides food service support at Camp Lejeune. Plaintiff works in the kitchen and is required to prep and prepare food, bake all pastries and bread, lift up to forty-five pounds, and reach overhead to put things in the oven.
>
> 2. Plaintiff alleges that on July 2, 2009, as she was stepping on a milk crate to gain access to the loading dock which adjoins the kitchen area, she lost her balance, fell backwards[,] and landed on her right shoulder. . . .

3. Kim Moore, [P]laintiff's supervisor, testified that [P]laintiff told her on the morning of July 2, 2009[,] that she had fallen that morning in the parking lot. Plaintiff had not clocked in yet at the time of the fall. []Moore testified that she asked [P]laintiff to show her where she had fallen[] and [P]laintiff took her out to the parking lot to an area that was not within 100 yards of the mess hall. . . .

. . . .

9. The Full Commission does not accept as credible [P]laintiff's testimony that she sustained an injury to her right shoulder when she fell from a milk crate while trying to climb up on the loading dock when she was reporting to work on July 2, 2009.

10. The Full Commission accepts as credible the testimony of Kim Moore, and based thereon finds that [P]laintiff reported to []Moore that she fell in the parking lot on July 2, 2009.

11. Sodexo was responsible for maintaining the food service area and an area up to 100 yards surrounding the mess hall in which its employees worked. The parking lot where [P]laintiff fell prior to beginning work on July 2, 2009[,] was owned by the United States Government and was not under Sodexo's maintenance or control.

12. Plaintiff did not sustain an injury by accident arising out of and in the course of her employment with defendant-employer on July 2, 2009.

. . . .

CONCLUSION OF LAW

. . . .

> 2. [T]he Full Commission finds that the greater weight of the credible evidence establishes that [P]laintiff's July 2, 2009[,] injury occurred before work on premises that were neither owned, controlled nor maintained by [Sodexo]. Therefore, [P]laintiff did not sustain an injury by accident arising out of and in the course of her employment on July 2, 2009, and her claim for injury on that date is not compensable.

As a result, the Commission denied Plaintiff's claim. Plaintiff has appealed that decision to this Court.

Standard of Review

Review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. [The appellate court's] duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation and quotation marks omitted). "Whether an injury arose out of and in the course of

employment is a mixed question of law and fact, and the [Commission's] findings in this regard are conclusive on appeal if supported by competent evidence." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780, *affirmed per curiam*, 325 N.C. 702, 386 S.E.2d 174 (1989). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965).

Discussion

"An injury is compensable under the Workers' Compensation Act only if the injury (1) is an 'accident' and (2) 'arises out of and in the course of the employment.'" *Culpepper*, 93 N.C. App. at 247, 377 S.E.2d at 780 (citation and brackets omitted). On appeal, Plaintiff argues that she suffered an injury by accident which arose out of and in the course of her employment when she "*fell in the parking lot outside her designated work location* . . . on July 2, 2009." (Emphasis added).

This is the first time that this argument has been made by Plaintiff. At the hearing before the deputy commissioner, Plaintiff (here, "A") testified as follows:

DIRECT EXAMINATION . . . :

. . . .

Q. . . . . Now if you could explain to the Commission, what occurred on July 2nd of 2009?

A. I was going into work, and we use a — we have a dock, and so we would use a crate to step up onto the dock, and I stepped up on a crate to step up on the dock, and I lost my balance, and I went backwards and I tried to break my fall with my shoulder — with my arm, and I fell backwards.

. . . .

CROSS-EXAMINATION . . . :

. . . .

Q. [I]sn't it true that you made no mention whatsoever of falling off of a milk crate [when you reported the fall to your supervisor]?

A. No, I told her exactly what happened.

Q. Didn't you actually tell her that you fell out in the parking lot?

A. No, I did not.

Q. Didn't she walk out into the parking lot with you —

A. No, she —

Q. — and look — ?

A. did not.

. . . .

Q. [Didn't she w]alk out into the parking lot with you, look at the spot where you allege that you fell and tell you that that

> [sic] — which actually the parking lot was undergoing resurfacing at the time[?] Do you recall that?
>
> A. No.
>
> Q. And didn't she ask to see the exact spot where you claim that you had fallen in the parking lot?
>
> A. No, she did not.
>
> . . . .

During her testimony, Plaintiff maintained that she ***did not*** fall in the parking lot, basing her contention that the fall constituted a compensable injury on the premise that she fell while attempting to climb on to a milk crate and up to the loading dock at her work location in the mess hall. Plaintiff persisted with this theory throughout her argument before the Full Commission. Now, on appeal, Plaintiff contrarily contends that her injury ***in the parking lot*** is compensable because it arose out of and in the course of her employment. This argument is not properly preserved for our review.

In the context of appeals from the Commission, this Court has repeatedly held that "[t]he 'law does not permit parties to swap horses between courts in order to get a better mount' on appeal." ***Floyd v. Exec. Pers. Grp.***, 194 N.C. App. 322, 329, 669 S.E.2d 822, 828 (2008) (holding that "arguments . . . not raised before the Full Commission" will not be addressed on appeal)

(citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also Powe v. Centerpoint Human Servs.*, __ N.C. App. __, __, 715 S.E.2d 296, 307 (2011). Plaintiff did not contend in her argument to the Commission that she had fallen in the parking lot or that her injury was compensable as a result of that fall. Because Plaintiff has not ridden to this Court on her original mount, we decline to provide a post on which she may hitch this new horse. *See Floyd*, 194 N.C. App. at 329, 669 S.E.2d at 828.

AFFIRMED.

Judges MCGEE and HUNTER, JR., ROBERT N., concur.

Report per Rule 30(e).