NO. COA12-35
NORTH CAROLINA COURT OF APPEALS

Filed: 7 August 2012

JAMES KING III,
Plaintiff

v.

North Carolina
Industrial Commission
I.C. File No. W55368

CAPITAL OF CARY, Employer, N.C. AUTO DEALERS' ASSOCIATION, Carrier (BRENTWOOD SERVICES ADMINISTRATORS, Third-Party Administrator)
Defendants

Appeal by plaintiff from Opinion and Award entered 27 September 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2012.

Law Offices of James Scott Farrin, by Douglas E. Berger, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, L.L.P., by Matthew W. Skidmore, for defendants-appellees.

ERVIN, Judge.

Plaintiff James King, III, appeals from a Commission order determining that he had failed to prove that he was an employee of Defendant Capital of Cary at the time of the alleged injury by accident or that he had sustained a compensable injury by accident arising out of and in the course of his employment. On appeal, Plaintiff contends that the Commission erred by

determining that (1) he was not employed on the date of the alleged injury by accident and (2) that the evidence did not support Plaintiff's claim that he sustained a compensable injury by accident. After careful consideration of Plaintiff's challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

In July 2005, Plaintiff began working as a vehicle service advisor at Defendant Capital's automobile dealership. In January 2009, Plaintiff was assigned the additional duties of warranty claims administrator, which entailed reviewing vehicle service orders to ensure that they included a proper itemization of the parts and labor that had been used in connection with the provision of warranty service and were submitted for reimbursement to the manufacturer in a timely manner.

Prior to submitting reimbursement claims relating to warranty service work, Plaintiff was required to provide service orders to Defendant Capital's service manager, Charles Davis, for his review. In order for Defendant Capital to receive reimbursement for costs incurred in providing warranty service, claims seeking such payments had to be submitted to the

manufacturer within 90 days of the date on which a customer requested such service. Mr. Davis' salary was directly related to the number of reimbursement payments Defendant Capital received from manufacturers.

After Plaintiff and Mr. Davis failed to process all of the reimbursement claims within the required 90 day period, they developed a practice under which Plaintiff would close out a late service order, open a new order utilizing a more recent service request date, and transfer the relevant parts and labor costs to the new service order. In February 2009, Plaintiff prepared a service order for Mr. Davis' vehicle under a warranty applicable to a vehicle owned by another individual. This order was included in a group of service orders that Defendant Capital wrote off because the reimbursement claims were not submitted in a timely manner.[1]

In June 2009, Defendant Capital's controller, Renee Pakala, discovered that approximately $10,000 in reimbursement claims had not been submitted in a timely manner. As a result, Plaintiff was relieved of his duties as a warranty claims administrator. However, he continued to work as a service advisor. Between June 2009 and 6 November 2009, Plaintiff continued to close out service orders that had not been

[1]Mr. Davis was terminated from Defendant Capital's employment due to this fraudulent service order in April 2010.

submitted in a timely manner, re-open new orders, and direct the transfer of parts and labor costs from the untimely orders to the new orders.

In late October 2009, Ms. Pakala reconciled the parts inventory, at which point she discovered that issues concerning timely submission of warranty claims to manufacturers continued to exist. On 2 November 2009, Ms. Pakala became aware that an unusually high number of service orders had been voided from Defendant Capital's computer system. As a result, Ms. Pakala and Defendant Capital's fixed operations director, Ronnie Lumley, conducted an investigation, during which they discovered that Plaintiff had failed to submit certain pending reimbursement claims in a timely manner and that Plaintiff had continued the practice of closing un-submitted service orders and moving the information to new service orders with a more recent service request date.

On 5 November 2009, Ms. Pakala, Mr. Lumley, and Mr. Davis met with Defendant Capital's general manager, Clarence Ferguson, for the purpose of discussing how to deal with Plaintiff's improper handling of reimbursement claims. At this meeting, the group decided that Mr. Ferguson would meet with and fire Plaintiff on the following morning. After that meeting, Mr. Ferguson and Mr. Davis completed and signed a payroll notice

indicating that Plaintiff had been terminated on 5 November 2009 for improperly administering warranty reimbursement claims.

On the same date, Plaintiff and Mr. Davis spoke by telephone following the completion of a bariatric surgical procedure that Plaintiff had undergone that day. Although Plaintiff testified that he and Mr. Davis had not discussed Plaintiff's termination during that conversation, Mr. Davis testified that he had informed Plaintiff during this telephone conversation that he had been fired. Mr. Davis also testified that he had informed Mr. Ferguson and Mr. Lumley that he had told Plaintiff that he was fired, at which point Mr. Lumley directed Mr. Davis to contact Mark Kelly and offer him the service advisor position previously held by Plaintiff.

Plaintiff usually carpooled and ordinarily reached Defendant Capital's premises at around 7:00 a.m. However, Plaintiff drove to Defendant's premises and clocked in at 5:59 a.m. on 6 November 2009. At 6:11 a.m., Plaintiff called Mr. Davis and told him that he had slipped on some oil and grease in a service bay and had injured his back, stomach, and head.[2]

At around 6:16 a.m., Wake County Emergency Medical Services personnel arrived at the dealership and found Plaintiff lying on

[2]Other employees of Defendant Capital testified that they did not see any oil or grease on the floor of the service bay in which Plaintiff allegedly fell.

the service bay floor. Defendant told the EMS personnel that he had slipped on some grease on the floor and that he was experiencing left shoulder and mid-back pain. Plaintiff was transported to the emergency room, where he reported that he had fallen on his back and braced himself with his left arm. Upon his release from the emergency room, Plaintiff was instructed to follow up with his primary care physician.

On 9 November 2009, Plaintiff presented himself to his primary care physician, Dr. Gina Micchia, complaining of neck and back pain and numbness in his left arm and fingers. Dr. Micchia ordered an x-ray of Plaintiff's neck and an MRI of his back. The MRI performed upon Plaintiff's lumbar and cervical spines revealed that he had a ruptured disc and a small disc protrusion with some deformation of the spinal cord.

On or about 11 November 2009, Defendant Capital's payroll and benefits specialist, Kathleen Haithcock, received a notice signed by Mr. Ferguson and Mr. Davis indicating that Plaintiff had been fired on 5 November 2009. On 12 November 2009, Ms. Haithcock informed Plaintiff that Defendant Capital did not intend to file his workers' compensation claim and told Plaintiff to contact Mr. Davis. Plaintiff claimed that Mr. Davis informed him for the first time that he had been fired in the ensuing conversation.

After Plaintiff submitted a claim for unemployment compensation, Ms. Haithcock completed a response which stated that Plaintiff had been fired for improperly failing to comply with warranty-related procedures and had last worked for Defendant on 6 November 2009. On 25 November 2009, Ms. Haithcock completed a Notice of Claim and Request for Separation Information for submission to the Employment Security Commission indicating that Plaintiff had last worked for Defendant on 6 November 2009. In addition, Ms. Haithcock submitted a Form 22 which stated that Plaintiff had worked for Defendant Capital on 6 November 2009.

On 2 December 2009, Dr. Dennis Bullard performed fusion surgery on Plaintiff's back at the L4-L5 level. On 16 February 2010, Dr. Bullard performed fusion surgery on Plaintiff's neck to repair a ruptured disc at the C6-C7 level. Plaintiff had undergone back surgery in 2000 and 2001 relating to a lower back injury. Plaintiff had also sought upper neck and back treatment in September of 2007 after having been diagnosed with a neck and thoracic sprain.

B. Procedural History

On 16 November 2009, Defendants submitted a Form 19 providing notice of Plaintiff's injury. On 1 December 2009, Plaintiff submitted a Form 18 providing notice of his accident

and asserting a claim for workers' compensation benefits. Subsequently, Defendants submitted a Form 61 denying Plaintiff's claim for workers' compensation benefits on the grounds that "[t]here was no injury by accident in the course and scope of employment." On 23 December 2009, Plaintiff filed a Form 33 requesting that his claim be assigned for hearing. In response, Defendants filed a Form 33R contending that Plaintiff had not sustained an injury by accident in the course and scope of his employment and that Plaintiff's account of the events leading to his alleged injury lacked credibility.

On 16 February 2011, Deputy Commissioner George T. Glenn, II, entered an Opinion and Award concluding that an employer-employee relationship existed between Plaintiff and Defendant Capital on 6 November 2009 and that Plaintiff had sustained an injury by accident arising out of and in the course of his employment. Based upon that determination, Deputy Commissioner Glenn awarded Plaintiff temporary total disability benefits from 30 November 2009 through 29 April 2010, partial disability benefits from 6 May 2010 until such time as Plaintiff could make an election of benefits, medical expenses, attorney's fees, and costs. However, Deputy Commissioner Glenn withheld a decision with respect to Plaintiff's claims for permanent partial disability compensation relating to his cervical and lumbar

injuries until the completion of a functional capacity evaluation. Defendants noted an appeal to the Commission from Deputy Commissioner Glenn's decision.

On 27 September 2011, the Commission, by means of an Opinion and Award issued by Commissioner Staci T. Meyer, with the concurrence of Commissioners Pamela T. Young and Danny L. McDonald, concluded that Plaintiff had failed to prove by the greater weight of the evidence that he was an employee of Defendant Capital at the time of the alleged injury or that he had sustained a compensable injury by accident arising out of and in the course and scope of his employment with Defendant Capital. Based on that determination, the Commission concluded that Plaintiff was not entitled to disability or medical compensation and that his claim for workers' compensation benefits should be denied. Plaintiff noted an appeal to this Court from the Commission's order.

II. Legal Analysis

In his brief, Plaintiff contends that the Commission erred by concluding that he "failed to meet his burden of proving by the greater weight of the evidence that he sustained a compensable injury by accident arising out of and in the course of his employment with Defendant[Capital] on or about November 6, 2009." More specifically, Plaintiff argues that (1) there

was "sufficient evidence [separate and independent from Plaintiff's testimony] to support a finding that [P]laintiff fell resulting in the injuries surgically treated by Dr. Bullard . . ." and that (2) the Commission failed to consider Dr. Bullard's testimony in determining whether Plaintiff sustained a compensable injury by accident. In light of these contentions, Plaintiff argues that this case should be remanded to the Commission to permit it to properly weigh the evidence and make appropriate findings. We do not find Plaintiff's argument persuasive.

In reviewing a challenge to a Commission order, this Court 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), with the Commission serving as the sole judge of the weight and credibility of the evidence. *Id.* (citation omitted). "'The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the [challenged] finding[s].'" *Johnson v. Lowe's Cos., Inc.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 618 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *aff'd*, 354 N.C. 358, 554 S.E.2d 336 (2001).

Unchallenged findings of fact are binding for purposes of appellate review. *Ferreyra v. Cumberland Cty.*, 175 N.C. App. 581, 583, 623 S.E.2d 825, 826-27 (2006). In an order resolving a claim for workers' compensation benefits, the Commission "must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend," including "find[ing] those facts which are necessary to support its conclusions of law." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 172, 579 S.E.2d 110, 113 (citations and quotation marks omitted), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). We review the Commission's conclusions of law on a *de novo* basis. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

According to well-established North Carolina law, the "Workers' [C]ompensation [Act] 'does not provide compensation for injury, but only for injury by accident.'" *Pitillo v. N.C. Dep't. of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 644-45, 566 S.E.2d 807, 811 (2002) (quoting *O'Mary v. Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964)). "An accident is 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.'" *Ferreyra*, 175 N.C. App. at 583-84, 623 S.E.2d at 827 (quoting *Adams v. Burlington Industries Inc.*, 61 N.C. App. 258, 260, 300

S.E.2d 455, 456 (1983)). As a result, "an injury is compensable under the North Carolina Workers' Compensation Act only if (1) it is caused by an 'accident,' and (2) the accident arises out of and in the course of employment." *Pitillo*, 151 N.C. App. at 645, 566 S.E.2d at 811 (citing N.C. Gen. Stat. § 97-2(6)). The claimant bears the burden of proving the existence of a compensable employment-related accident. *Id.*

In challenging the Commission's determination that no compensable accident occurred, Plaintiff argues that those portions of the Commission's Findings of Fact Nos. 23, 25, 28, and 35 which recount Plaintiff's version of the events that transpired on 6 November 2009 as he reported them to Mr. Davis, Emergency Medical Service personnel, and attending emergency room personnel coupled with the Commission's determination that affidavits filed by three of Defendant Capital's employees indicating that Plaintiff had made statements suggesting that the accident had been staged lacked credibility, permit a reasonable inference that Plaintiff was injured as the result of a compensable work-related accident. According to Plaintiff, this series of findings renders the Commission's conclusion that Plaintiff failed to prove that he sustained an injury by accident erroneous. We do not agree.

Although the findings upon which Plaintiff's argument rely "accurately characterize[] the record evidence [as it relates to Plaintiff's reports to medical personnel and co-workers concerning how his injury occurred], [the existence of such statements] does not resolve the credibility of [P]laintiff's statements [indicating how he was injured, and such an] assessment is not within our province." *Sheehan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 512, 563 S.E.2d 300, 304 (2002). As Plaintiff candidly concedes, the Commission found as a fact that "none of the testimony by Plaintiff or Mr. Davis [was] credible" and that "the testimony, as a whole . . . was not sufficiently consistent or credible to show that Plaintiff suffered a compensable injury by accident on November 6, 2009." The Commission's decision to reject the entirety of Plaintiff's testimony as incredible compels the conclusion that the Commission found Plaintiff's account of the manner in which the alleged accident took place to lack credibility regardless of whether his account was contained in his testimony before the Commission or in statements that he made to others. Under the applicable standard of review, we lack the authority to revisit the Commission's credibility determinations.[3] Put another way,

[3]To the extent that Plaintiff's argument relies upon the Commission's finding that the affidavits of three of Defendant Capital's employees indicating that Plaintiff made statements

although "[t]he fact that [P]laintiff repeatedly gave the same account of his injury . . . lend[s] credence to that account . . .[,] the Commission found that [P]laintiff's account of his . . . accident was not credible, and we cannot overturn the Commission's finding regarding [P]laintiff's credibility." *Sheehan*, 150 N.C. App. at 512, 563 S.E.2d at 304.

In addition, information contained within the Commission's unchallenged findings undermines Plaintiff's uncorroborated contention that his injuries resulted from a work-related accident. For example, the Commission found that Mr. Lumley testified that he had "directed [Mr.] Davis to proceed and terminate Plaintiff on [5] November [] 2009" and that, to the extent that Plaintiff, Mr. Davis, and Mr. Lumley provided inconsistent testimony concerning the circumstances surrounding Plaintiff's termination, the testimony presented by Plaintiff and Mr. Davis was not credible. In addition, the Commission found that:

> [w]hile employed by Defendant [Capital], Plaintiff usually arrived at work at 7:00 a.m. and usually carpooled to and from work with Mr. Davis. However, on November 6, 2009, just one day after his bariatric surgery, Plaintiff drove to Defendant-Employer's premises himself and clocked in

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suggesting he fabricated the accident lacked credibility, we conclude that such a determination has no bearing on the Commission's separate determination that Plaintiff's version of the events of 6 November 2009 lacked credibility as well.

> at 5:59 a.m. Plaintiff claims that he arrived at work early in order to catch up on work as a result of having missed work the day before because of his surgery. Plaintiff alleges that after clocking in that morning, he slipped on some oil and grease on the concrete floor in one of the service bays, causing him to fall. Plaintiff claims that as a result of the alleged fall, he hit his head, buttocks, lower back, upper back, left hand, and left shoulder on the floor.

Finally, although Dr. Bullard testified that Plaintiff had "sustained ruptured discs to both his neck and back as a result of the . . . fall and that [Plaintiff's] injuries [were] consistent with a fall[,]" Dr. Bullard had no independent knowledge that an accident of the nature contended for by Plaintiff had actually occurred. *Sheehan*, 150 N.C. App. at 514, 563 S.E.2d at 305. Simply put, "[t]he only record evidence regarding how [P]laintiff injured his back [and neck] consists of the account given by [P]laintiff and the statements of others that are based on [P]laintiff's account. Once the Commission rejected that account, no evidence remained indicating that [P]laintiff sustained his injury in a work-related accident." *Id.* (holding that the Commission did not improperly determine that the plaintiff's injury was non-compensable where (1) the Commission found that the plaintiff's uncorroborated account of the accident was not credible; (2) the Commission found facts that undermined the plaintiff's contention that he was injured

at work; and (3), although a doctor concluded that the plaintiff's injuries were consistent with the incident that he claimed to have occurred, the doctor lacked any independent knowledge concerning that incident given that the doctor's opinion was based upon the history supplied by the plaintiff). As a result, the Commission did not err by concluding that Plaintiff failed to carry his burden of proving that he sustained a compensable injury by accident.[4]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the Commission did not err by rejecting Plaintiff's claim for workers' compensation benefits based upon a determination that Plaintiff had failed to prove that he sustained a compensable injury by accident arising out of and in the course and scope of his employment with Defendant Capital on 6 November 2009. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

JUDGES ROBERT C. HUNTER AND STROUD concur.

Report per Rule 30(e).

[4]Given our determination that the Commission did not err by concluding that Plaintiff had failed to carry his burden of proving that he sustained a compensable injury by accident, we need not address Plaintiff's claim that the Commission erred by concluding that Plaintiff had failed to prove he was an employee of Defendant Capital on the date of the alleged accident.