

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA12-757
NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 2013

CATHLYN ACKER,
Employee,
Plaintiff-Appellee,

v.

North Carolina
Industrial Commission
I.C. No. W81423

WHOLE FOODS MARKET,
Employer,

GALLAGHER BASSETT SERVICES, INC.,
Carrier,
Defendants-Appellants.

Appeal by Defendants from opinion and award entered by the North Carolina Industrial Commission on 8 March 2012. Heard in the Court of Appeals 13 November 2012.

Oxner, Thomas + Permar, by John R. Landry, for Plaintiff-Appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Melissa R. Cleary, for Defendants-Appellants.

McGEE, Judge.

Cathlyn Acker (Plaintiff) initiated this action by filing a Form 18 with the Industrial Commission (the Commission) on 24

May 2010. Plaintiff was an employee of Whole Foods Market (Employer) on 26 March 2010. Plaintiff worked as a team member in the meat department and her duties included, *inter alia*, keeping product displays fully stocked. Plaintiff alleged that, on 26 March 2010, she was carrying trays of chicken out of a walk-in cooler and tripped when her left foot became entangled in shelving. Plaintiff "twisted and hopped and landed on her right leg." Plaintiff's right leg became swollen and she was later diagnosed with an "extensive post-traumatic bone bruise" and a tear in her meniscus.

Defendants completed a Form 19 report of Plaintiff's injury on 30 March 2010 and filed a Form 61 denying Plaintiff's worker's compensation claim on 5 May 2010. Defendants denied Plaintiff's claim on the ground that Plaintiff's symptoms were not caused by her alleged workplace incident, but rather by an accident Plaintiff had at her home on 19 March 2010, several days prior to the alleged workplace incident. In Plaintiff's 19 March 2010 accident, she stepped in a hole in her backyard and twisted her left ankle.

Plaintiff filed a request that her claim be assigned for hearing on 24 May 2010. Plaintiff's claim was heard on 10 December 2010, and a deputy commissioner entered an opinion and award on 5 August 2011, concluding that Plaintiff suffered a

compensable injury by accident to her right knee, left hip, and back, arising out of the workplace incident on 26 March 2010. The deputy commissioner ordered that Defendants provide compensation to Plaintiff for past, and ongoing, medical treatment related to those injuries. Defendants filed a Form 44 application for review by the Commission. The Commission heard the matter on 9 January 2012 and entered an opinion and award on 8 March 2012, in which it concluded that Plaintiff suffered a compensable injury by accident on 26 March 2010 and awarded Plaintiff medical compensation, average weekly wage compensation, and temporary partial disability payments. Defendants appeal.

Evidence

At the hearing, Plaintiff testified that, while carrying trays of meat at work on 26 March 2010, she tripped and later experienced pain in her right leg. Plaintiff also testified that on 19 March 2010, she stepped in a hole in her yard and twisted her left ankle. However, Plaintiff did not state that she injured her right leg during the 19 March 2010 accident. Plaintiff was initially treated by Dr. Jeffrey Kobs (Dr. Kobs) at Raleigh Orthopaedic. Dr. Kobs diagnosed Plaintiff with "bone bruises, medial meniscus tear, and degeneration of the lateral meniscus as well as arthritis" which was "consistent with a

trauma[.]" However, Dr. Kobs testified that, when he diagnosed Plaintiff, he was not told about the 19 March 2010 incident, and, at the time of his deposition, he was unable to know whether the earlier accident caused Plaintiff's symptoms.

Plaintiff was also seen for an independent medical evaluation by Dr. William Somers (Dr. Somers). Dr. Somers testified that Plaintiff's symptoms were related to the 26 March 2010 workplace incident and that he based this opinion, in part, on Plaintiff's having told him she had no symptoms prior to the workplace incident. Dr. Somers also testified that Plaintiff had not told him about her 19 March 2010 accident. However, in Dr. Somers's medical report regarding Plaintiff's evaluation, Dr. Somers observed that, even if the medial meniscus tear predated the 26 March 2010 workplace incident, the 26 March 2010 workplace incident would have aggravated any such pre-existing condition. The Commission found that Dr. Somers testified to a reasonable degree of medical certainty that Plaintiff's injuries were the result of Plaintiff's 26 March 2010 workplace incident.

Issue on Appeal

Defendants raise on appeal the issue of whether the Commission erred in holding that Plaintiff "sustained compensable injuries to her right knee, left hip and back as a result of the work incident of 26 March 2010."

[O]n appeal from an award of the Industrial Commission, review 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. This "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 omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

Compensability

Defendants first argue that the Commission erred in concluding that Plaintiff's injury was compensable "because [the] conclusion was based on speculative expert witness testimony contrary to law." Defendants contend that "[n]either [P]laintiff's treating physician, Dr. Kobs, nor her independent medical evaluation doctor, Dr. Somers, rendered a competent opinion that the alleged March 26, 2010 incident caused [P]laintiff's conditions." Specifically, Defendants assert that Dr. Kobs, when "presented with [P]laintiff's testimony at hearing about stepping in a hole in her backyard, . . . did not have an opinion as to whether [P]laintiff's knee condition was caused by the alleged on-the-job accident." Defendants contend

that Dr. Somers' opinion was based on his assumption that Plaintiff was asymptomatic prior to her work injury.

However, we note that Defendants do not challenge any of the Commission's findings of fact regarding expert opinion testimony. To the extent Defendants argue that the Commission's conclusion was based on conjecture, we note that the Commission's opinion and award contains the following finding of fact: "Dr. Somers testified that even if the medial meniscus tear pre-dated [P]laintiff's work incident on March 26, 2010, it was his opinion that the March 26, 2010 work incident aggravated any such pre-existing condition[.]" The Commission also found that "Dr. Somers testified to a reasonable degree of medical certainty that [P]laintiff's injuries . . . were the result of [P]laintiff's March 26, 2010 work incident." Thus, the Commission's conclusion was not based on speculative evidence, but rather on Dr. Somers' clear statement that, regardless of any possible prior conditions, Plaintiff's condition was related to the work incident.

Findings of Fact

Defendants next argue that the Commission's findings of fact concerning the 19 March 2010 accident were not supported by competent evidence and should be reversed. Specifically,

Defendants challenge finding of fact number 3, which reads as follows:

Plaintiff testified she and her husband moved into a new residence on or about March 19, 2010, and when she was in the backyard she stepped in a hole and twisted her left ankle. However, [P]laintiff testified she in no way injured her right knee, left hip, or low back as the result of this incident on March 19, 2010. Plaintiff further testified she did not seek or require medical treatment, was not assigned work restrictions, did not experience physical limitations, and did not miss any time from work as the result of this incident.

Defendants contend this finding of fact "is not supported by competent evidence with respect to whether [Plaintiff] sustained an injury on March 19, 2010." We note that, in support of their argument, Defendants cite only evidence which would support a finding to the contrary. However, "[w]e reiterate that the Commission's findings 'are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary[]'" . . . and that '[i]t is the Commission's duty to judge the credibility of the witnesses and to determine the weight given to each testimony.'" *Johnson v. Herbie's Place*, 157 N.C. App. 168, 177, 579 S.E.2d 110, 116-17 (2003) (citations omitted). The role of this Court is not to re-weigh the evidence presented to the Commission.

At the hearing, Plaintiff was asked the following: "You mentioned that you stepped in the hole and you twisted your left ankle. Did this incident in any way involve your right knee, left hip or low back?" Plaintiff replied, "No, I didn't - I didn't fall, I just stepped in the hole and, you know, went over." Therefore, we hold finding of fact number 3 was supported by competent evidence and Defendants' argument is without merit.

Defendants next argue that the Commission erred in finding of fact number 25 because it was not based on competent evidence. Finding of fact number 25 reads:

Although Dr. Kobs testified [P]laintiff's reported incident, when [Plaintiff] stepped in a hole in her backyard at home and twisted her left ankle on or about March 19, 2010, could be consistent with the acute findings on her right knee MRI, Dr. Kobs confirmed that it was not his opinion that [P]laintiff's incident at home on or about March 19, 2010, in any way caused or created the symptoms in [P]laintiff's right knee.

Defendants argue that there was "no competent evidence to uphold the . . . Commission's finding that 'it was not [Dr. Kobs'] opinion that [P]laintiff's incident at home . . . in any way caused or created the symptoms in Plaintiff's right knee.'"

During Dr. Kobs' deposition, the following exchange occurred:

Q The findings that you found on the MRI

that are acute and not chronic, could those be consistent with somebody stepping in a hole?

A Yes.

Q So based on that, do you have an opinion whether [Plaintiff's] knee condition was caused by the incident at Whole Foods?

A No.

On cross-examination, the following exchange occurred:

Q [Plaintiff] testified at the hearing that the incident on March 20th involved a twisting of her left ankle. That following that, sought no medical treatment, required no medical treatment, was assigned no work restrictions, did not experience physical limitations as a result of this incident.

Is it your opinion today that the March 20th incident in any way caused or created the symptoms in [Plaintiff's] knee?

A I cannot know that.

In the above exchange, we note that Dr. Kobs, in referring to the 19 March 2010 accident, uses the incorrect date of 20 March 2010; however, after examining Dr. Kobs' deposition, it is clear he is referring to the 19 March 2010 accident in which Plaintiff stepped in a hole in her backyard. The Commission found that Dr. Kobs confirmed that it was not his opinion that the 19 March 2010 accident was a cause of Plaintiff's symptoms. Dr. Kobs actually testified that he "[could not] know" whether the 19 March 2010 accident was a cause. We find this evidence is

competent to support the Commission's finding that it was not Dr. Kobs' opinion that the 19 March 2010 accident was a cause of Plaintiff's symptoms.

Defendants next argue that the Commission erred in making finding of fact number 36 because the finding was not based on competent evidence. Finding of fact number 36 reads:

Defendants offered no medical testimony to a reasonable degree of medical certainty that the conditions addressed in Dr. Somers' November 9, 2010 report were not the result of [P]laintiff's March 26, 2010 work incident.

Defendants contend that "[t]his finding of fact incorrectly places the burden on [D]efendants to show that the injury was not causally related to the alleged accident, when it was [P]laintiff who had failed to meet her initial burden." Plaintiff cites *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003), which provides that a "[p]laintiff has the burden to prove each element of compensability[.]" However, we read finding of fact number 36 to be an observation by the Commission that Defendants did not present medical testimony contradicting Plaintiff's evidence. In fact, finding of fact number 37 states that, based on a preponderance of the evidence, Plaintiff sustained her injuries as a result of the work incident. Thus, the Commission applied the correct burden of proof in making its findings. We therefore find Defendants'

argument concerning finding of fact number 36 to be without merit.

Having reviewed the evidence in the record, we hold there was competent evidence to support the Commission's findings of fact. Therefore, the Commission's findings of fact are binding on appeal. Because we have found Defendants' arguments to be without merit, we affirm the Commission's opinion and award.

Affirmed.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).