NO. COA12-713
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

DINA OCHOA, Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. NOS. W87635, X00966, & X21932

NOAH'S ANGELS, LLC, d/b/a COMFORT KEEPERS, Employer, NORTH AMERICAN SPECIALTY INSURANCE COMPANY, Carrier (GALLAGHER BASSETT, Third-Party Administrator),
Defendants.

Appeal by Defendants from opinion and award entered 8 February 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2012.

Walden & Walden, by Daniel S. Walden, for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Shelley W. Coleman and M. Duane Jones, for defendants.

THIGPEN, Judge.

Noah's Angels, LLC, d/b/a Comfort Keepers ("Defendant-employer"), North American Specialty Insurance Company, and Gallagher Bassett (collectively, "Defendants") appeal from an

opinion and award of the Full North Carolina Industrial Commission ("the Commission") awarding plaintiff temporary total disability compensation and medical expenses. After careful review, we affirm.

I. Factual & Procedural Background

Dina Ochoa ("Plaintiff") began working for Defendant-employer as a personal care attendant in May 2006. In this capacity, Plaintiff provided personal, in-home care for Hazel Bumgarner at Ms. Bumgarner's residence in Winston-Salem. Ms. Bumgarner was in her nineties, at the time Plaintiff cared for her, and required assistance in performing daily activities such as bathing, dressing, toileting, grooming, and ambulation. Defendant-employer designated Ms. Bumgarner a "fall risk," and part of Plaintiff's job was to ensure that Ms. Bumgarner was able to move around her home safely.

On 9 February 2010, Plaintiff was assisting Ms. Bumgarner "from her chair to the restroom" when Ms. Bumgarner's legs gave way. Plaintiff prevented Ms. Bumgarner from falling to the floor, but experienced pain in her back and right shoulder in doing so. Plaintiff reported pain in her right shoulder to her primary care physician, Dr. Kimberly Lis, on 23 February 2010. Dr. Lis prescribed pain medication and advised Plaintiff to

apply ice to her shoulder to reduce the inflammation. Plaintiff did not report the 9 February 2010 incident or the resulting injury to Defendant-employer at that time, as the pain was "minor" and she believed it would go away. Plaintiff continued to perform her regular job duties for Defendant-employer with "a little bit of discomfort."

On 3 March 2010, Plaintiff was helping Ms. Bumgarner walk from the bedroom to the living room when Ms. Bumgarner's legs again gave way, and Plaintiff again prevented Ms. Bumgarner from falling or suffering injury. Plaintiff experienced increased shoulder pain as a result of this incident and presented to Dr. William Cameron Williams on 10 March 2010. Dr. Williams diagnosed Plaintiff with tendinitis and prescribed pain medication, which Plaintiff testified helped to reduce the pain. Plaintiff did not notify Defendant-employer of the 3 March 2010 incident at that time and continued to carry out her usual job duties with "moderate" pain.

On 26 May 2010, Plaintiff was assisting Ms. Bumgarner to the restroom when Ms. Bumgarner's legs suddenly gave way, causing her to fall further – almost to the floor – than she had in the two previous incidents. Plaintiff caught Ms. Bumgarner, who weighed approximately 100 pounds, and lifted her up.

Plaintiff succeeded in preventing injury to Ms. Bumgarner, but "experienced severe pain in her right shoulder and back which was greater than any pain that she had previously experienced in that area." Plaintiff finished her shift that day and worked again on 28 May 2010, but she informed Defendant-employer on 29 May 2010 that she would be unable to work her shift that day due to her shoulder pain. Defendant-employer terminated Plaintiff's employment when she did not report to work on 29 May 2010 and failed to produce a doctor's note corroborating her injury. Plaintiff has been unemployed ever since.

On 10 June 2010, Plaintiff filed a Form 18 alleging an injury by accident in connection with the 26 May 2010 incident. Plaintiff subsequently filed a Form 18 relating to the 3 March 2010 incident on 8 September 2010 and an additional Form 18 relating to the 9 February 2010 incident on 4 January 2011. Defendants denied the compensability of the foregoing incidents, and Plaintiff thereafter filed a Form 33 requesting a case hearing.

On 7 February 2011, the matter came on for an evidentiary hearing before Deputy Commissioner James C. Gillen. The deputy commissioner determined that Plaintiff had not sustained a compensable injury by accident and denied Plaintiff's claim.

Plaintiff thereafter appealed to the Commission, which, by opinion and award entered 8 February 2012, reversed the deputy commissioner's decision and awarded Plaintiff temporary total disability compensation and medical expenses based upon Plaintiff's 26 May 2010 injury. The Commission determined that Plaintiff was barred from recovery in connection with the 9 February 2010 and 3 March 2010 incidents for failure to provide Defendant-employer with timely written notices of those incidents. Defendants filed a timely notice of appeal with this Court on 9 March 2012.

II. Analysis

Defendants raise two primary contentions on appeal: (1) the Commission erred in determining that Plaintiff had sustained an "accident" within the meaning of the Workers' Compensation Act; and (2) the Commission erred in determining that Plaintiff is entitled to past and ongoing disability compensation. Our standard of review in addressing these contentions is well-established:

> Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. If supported by competent evidence, the

> Commission's findings are conclusive even if the evidence might also support contrary findings. The Commission's conclusions of law are reviewable *de novo*.

Legette v. Scotland Mem'l Hosp., 181 N.C. App. 437, 442–43, 640 S.E.2d 744, 748 (2007) (internal citations omitted). Furthermore, "[i]t is well established in North Carolina that the Workers' Compensation Act should be liberally construed and that [w]here any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as arising out of employment." *Hollin v. Johnston County Council on Aging*, 181 N.C. App. 77, 84, 639 S.E.2d 88, 93 (2007) (citations and quotation marks omitted) (second alteration in original). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

A. Injury by Accident

Defendants first contend that the Commission's conclusion that Plaintiff's 26 May 2010 injury was a compensable injury by accident is not supported by the Commission's findings of fact. We disagree.

"For an injury to be compensable under the Workers' Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hollar v. Montclair Furniture Co., Inc.*, 48 N.C. App. 489, 490, 269 S.E.2d 667, 669 (1980). The plaintiff bears the burden of proving each element of compensability. *Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (1989). There is no dispute in the instant case that Plaintiff sustained her injury in the course of her employment and that the injury arose out of her employment with Defendant-employer. The sole question is whether Plaintiff's injury was caused by an "accident" for purposes of workers' compensation. This Court has previously described what constitutes a compensable injury by accident as follows:

> The terms "accident" and "injury" are separate and distinct concepts, and there must be an "accident" that produces the complained-of "injury" in order for the injury to be compensable. An "accident" is an "unlooked for event" and implies a result produced by a "fortuitous cause." If an employee is injured while carrying on [the employee's] usual tasks in the usual way the injury does not arise by accident. In contrast, when an interruption of the employee's normal work routine occurs,

> introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred. The "essence" of an accident is its "unusualness and unexpectedness. . . ."
>
> Thus, in order to be a compensable "injury by accident," the injury must involve more than the employee's performance of his or her usual and customary duties in the usual way. Moreover, once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an "injury by accident" under the Workers' Compensation Act.

Gray v. RDU Airport Auth., 203 N.C. App. 521, 525-26, 692 S.E.2d 170, 174 (2010) (internal citations and quotation marks omitted) (ellipsis in original).

Defendants do not challenge any of the Commission's findings of fact as unsupported by competent evidence, and these findings are therefore binding on appeal. *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010). Defendants' contention is that these findings do not support the conclusion that Plaintiff suffered an injury by accident, and, more specifically, that the event that caused Plaintiff's injury was not an unexpected event because Ms. Bumgarner had been designated a "fall risk" and because Plaintiff had been specifically trained on how to handle a patient's fall.

We find instructive our prior holding in *Konrady v. U.S. Airways, Inc.*, 165 N.C. App. 620, 599 S.E.2d 593 (2004). There, the plaintiff, a flight attendant, "misstepped" as she exited a courtesy van and injured her knee. *Id.* at 621-22, 599 S.E.2d at 594. Holding that the plaintiff had sustained a compensable injury by accident, we stated the following:

> In deciding whether the Commission's findings are sufficient to support its conclusion that an accident occurred, the issue is not whether exiting vans is routine for Konrady, as defendants contend, but whether something happened as she was exiting that particular van on that specific occasion that caused her to exit the van in a way that was not normal. Were there any unexpected conditions resulting in unforeseen circumstances? Here, the unexpected conditions found by the Commission included a step that was shorter than other steps and the overlapping of the step with the curb. The unforeseen circumstances found by the Commission were that the step down from the van was much shorter than Konrady anticipated, causing her to "misstep" and hit the ground harder than she expected.

Konrady, 165 N.C. App. at 626, 599 S.E.2d at 597.

Here, the unexpected event on 26 May 2010 was not Ms. Bumgarner falling, but rather the precise manner in which she fell. While it is true that Plaintiff could have anticipated *a* fall as she assisted Ms. Bumgarner to the restroom, the evidence – as reflected in the Commission's findings – reveals that the

circumstances of *this particular fall* rendered it distinct from Ms. Bumgarner's prior falls and therefore unexpected. The Commission indicated the following in its findings of fact 16 and 17:

> 16. On May 26, 2010, plaintiff was once again assisting Ms. Bumgarner in ambulating to the bathroom when Ms. Bumgarner's legs gave way suddenly and *she fell almost to the floor*. Plaintiff used her right upper extremity to halt Ms. Bumgarner's fall and prevent her from injuring herself, and then she lifted Ms. Bumgarner up, at which point plaintiff's right shoulder and back were pulled as she supported Ms. Bumgarner's weight. When this occurred, plaintiff experienced severe pain in her right shoulder and back which was greater than any pain that she had previously experienced in that area.
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> 17. Plaintiff testified, and the Full Commission finds, that *Ms. Bumgarner's legs were unusually weak on the morning of May 26, 2010*. Furthermore, plaintiff testified, and the Full Commission finds, that *Ms. Bumgarner's fall on May 26, 2010 was different from any of her previous falls in that Ms. Bumgarner fell further than she ever had during the four years that she was in plaintiff's care*. Due to the degree of Ms. Bumgarner's fall, plaintiff had to "go all the way down and reach her and bring her up," at which point plaintiff felt the severe pain in her right shoulder and back.

(Emphasis added). The uncontested findings that Ms. Bumgarner's legs were "unusually weak" on the morning of the 26 May 2010 incident and that Ms. Bumgarner "fell further than she ever had

during the four years that she was in plaintiff's care" support the Commission's conclusion that the 26 May 2010 incident "constituted an unlooked for and untoward event which interrupted Plaintiff's regular work routine" and that Plaintiff had, therefore, "sustained an injury by accident arising out of and in the course of her employment with defendant-employer."

We note that Defendants cite *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982), in support of their contention that Plaintiff did not sustain an injury by accident. This reliance is misplaced, however, as the *Davis* plaintiff conceded in his own testimony that he had been "doing [his] usual work in the usual way" at the time he sustained his injury. *Id.* at 114, 292 S.E.2d at 764. Moreover, in *Davis*, the Commission had previously concluded that the plaintiff's injury was not the result of an accident, and this Court, accordingly, was required to uphold that conclusion if supported by competent evidence. *Id.* at 116, 292 S.E.2d at 766. Here, in contrast, our standard of review requires that we uphold the Commission's conclusion that Plaintiff *did* sustain an injury by accident if that conclusion is supported by the Commission's findings. As discussed above, the Commission's findings are sufficient to support its conclusion that Plaintiff sustained an injury by

accident. Defendant's contention on this issue is overruled.

B. Disability Compensation

Defendant next contends that the Commission erred in concluding that Plaintiff is entitled to past and ongoing disability compensation. We disagree.

"Disability" for purposes of workers' compensation "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2011). "In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986).

> The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Moreover,

> In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment. An unsuccessful attempt to obtain employment is, certainly, evidence of disability. Where, however, an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.

Peoples v. Cone Mills Corp., 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986).

Here, the Commission concluded that Plaintiff was totally disabled and entitled to ongoing total disability compensation as a result of the injury she sustained to her right shoulder on 26 May 2010. The Commission specified that Plaintiff had met her burden of proving disability in that "it would [have been] futile for plaintiff to seek work given the fact that English is not her first language, and given her lack of education and advanced age." This conclusion is supported by the Commission's findings of fact 1 and 32, which provide, in pertinent part, the following:

> 1. Plaintiff is 71 years old, having a date of birth of April 20, 1940. Plaintiff is a high school graduate. English is plaintiff's

> second language, with Spanish being her primary language. . . .
>
> . . . .
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> 32. The Full Commission finds based upon the preponderance of the evidence in view of the entire record that it would be futile for plaintiff to seek work given the fact that English is not her first language, and given her lack of education and advanced age.[1]

Defendants acknowledge these findings but nevertheless contend that "the Full Commission made no findings, and the Record contains no evidence, as to how these two facts contribute to any disability Plaintiff may have." This argument is meritless in light of our Supreme Court's holding in ***Peoples***, ***supra***, that age, inexperience, and lack of education are "preexisting factors" demonstrating that a claimant's attempt to obtain employment would be futile. Plaintiff's testimony, upon which the Commission based its findings with respect to these factors, is evidence in support of futility. Furthermore, the Commission is not required to make findings indicating ***how*** its findings of fact support its conclusions of law. To the

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[1]We note that finding of fact 32 is in substance a legal conclusion, ***In re Helms***, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (providing that a "determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact" (citation omitted)), and, reclassifying it as such, that the conclusion stated therein is supported by the Commission's findings.

contrary, the Commission is required only to "find those facts which are necessary to support its conclusions of law." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000). We hold that the Commission's findings here are sufficient to support its conclusion that any attempt by Plaintiff to obtain employment would have been futile, and, in turn, that Plaintiff had met her burden in proving disability.

III. Conclusion

For the foregoing reasons, the Commission's 8 February 2012 opinion and award is hereby

AFFIRMED.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).