NO. COA12-1463
NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2013

NATHANIEL JONES,
Employee,
Plaintiff,

v.

KIDDE TECHNOLOGIES, INC.,
Employer;

SENTINEL INSURANCE CO.,
Carrier-Defendants.

North Carolina
Industrial Commission
I.C. No. X29552

Appeal by plaintiff from opinion and award entered 15 October 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 2013.

Jesse S. Shapiro for plaintiff.

TEAGUE, CAMPBELL, DENNIS & GORHAM, L.L.P., by Melissa R. Cleary for defendants.

ELMORE, Judge.

Nathaniel Jones (plaintiff) appeals from the North Carolina Industrial Commission's denial of his claim for benefits on 18 October 2012. After careful review, the opinion and award of the Commission is affirmed.

I. Background

Plaintiff filed a Form 18 on 28 February 2011, claiming benefits for a back injury allegedly caused by a specific traumatic incident that occurred while plaintiff was working for Kidde Aerospace (defendant-employer). Defendant-employer and its carrier, Sentinel Insurance (collectively defendants), denied plaintiff's claim; thereafter, plaintiff requested that his claim be assigned for hearing.

On 13 September 2011, this matter was heard before Deputy Commissioner George Hall. On 24 January 2010, Deputy Commissioner Hall issued an opinion and award denying plaintiff's claim for benefits.

Plaintiff appealed to the North Carolina Industrial Commission (the Commission); the Commission issued an opinion and award on 30 October 2010. The Commission concluded that plaintiff failed to demonstrate a causal connection between the pain he experienced and the occurrence of an injury caused by a specific traumatic incident in his employment with defendant-employer.

The record indicates that on 13 January 2010, plaintiff was employed as a stockroom attendant for defendant-employer

performing the same duties he had performed since 2008. Part of his assigned duties included pulling the parts needed for orders and delivering them to the floor. During the middle of his shift, defendant testified that he was walking down an aisle in the stockroom when he turned and his back "locked up." As a result, he went down to his knees in pain. He was not carrying anything of substantial size or weight. When asked to explain how his body was moving at the time he experienced the pain, he testified, "I may have turned wrong. I just – the way I turned, it could have been that. I just basically turned a corner." When asked if he was twisting at all when his back "went out," he responded, "I could have been; probably."

Co-worker Aaron Brock witnessed the episode. He corroborated that plaintiff was carrying a small ziploc bag while walking down the aisle, then "turned the corner and just stopped." Brock did not see plaintiff twist his body. Duveen Strickland, plaintiff's supervisor, testified that when he asked what caused the pain, plaintiff said he was "only walking down the aisle when the pain occurred." Strickland said, "[Plaintiff] told me he had not been doing anything on the job to cause the pain." The "near miss investigation report" corroborates his testimony regarding that conversation.

Plaintiff sought treatment at the Wilson Medical Center on 13 January 2010, where he was diagnosed with acute lumbosacral strain, prescribed medication, and temporarily excused from work. The hospital notes indicate that plaintiff had previously suffered similar episodes. On 26 January 2010, plaintiff saw Dr. Greig McAvoy, who cleared plaintiff to return to full duty work the following day. Plaintiff returned on 27 January for a half-day, but left early because he was experiencing additional back pain. Thereafter, plaintiff filed for FMLA in January 2010 and took a leave of absence. Plaintiff's absence from work was treated as a personal illness due to the understanding that his injury was not work-related.

Between February 2010 and June 2010, plaintiff sought treatment with Dr. Shandal Emanuel, Dr. Raymond Baule, and Dr. Alvin Anthony for his continued back pain. On 30 April 2010, defendant-employer granted plaintiff's request for an additional 30 day leave of absence. Dr. Emanuel released plaintiff to return to light-duty work on 4 June 2010.

When plaintiff failed to return to work in early June, Ann Tally, HR manager for defendant-employer, testified that she called defendant on 3 June 2010 to request the status of his leave of absence. She did not hear back. Ms. Tally sent

plaintiff a certified letter on 7 June requesting documentation to substantiate plaintiff's time away from work. Plaintiff did not respond. Thereafter, defendant-employer terminated plaintiff by certified letter effective 25 June 2010. Plaintiff alleges that he attempted to return to work; however, there is no proof in the record to substantiate his claim.

Plaintiff did not report the 13 January episode as work-related injury until he filed a Form 18, more than one year after the episode. On the Form 18, plaintiff stated that he "suffered a back injury after bending down to pick up a package." Plaintiff later admitted that this was not true. There is evidence that plaintiff had a history of two prior back injuries. However, he neglected to tell Dr. Emanuel or Dr. Baule about these prior injuries during the course of his treatment. On 20 September 2010, plaintiff injured his back in a motor vehicle accident. Plaintiff now appeals the Commission's decision to this Court.

II. Analysis

On appeal, plaintiff argues that the Industrial Commission erred in finding that he did not sustain a compensable injury to his back. We disagree.

Review of an opinion and award of the Industrial 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. 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. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

On appeal, plaintiff specifically challenges the following findings of facts: 2, 6, 18, 20 and 21.

> 2. On January 13, 2010, Plaintiff was carrying a small, lightweight object during the middle of his shift when his back gave out. He testified that he was walking down an aisle and turning a corner when his back 'locked up' on him. He did not say that his body was twisting or that anything unusual occurred at the time his back gave way.
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> 6. Plaintiff did not report the January 13, 2010 episode as work-related until he filed an Industrial Commission Form 18 on February 25, 2011, more than on year later. Ms. Ann Talley, Human Resources Manager for Defendant-Employer, testified that she did not receive notification of a workers' compensation claim until May or June of 2011. Plaintiff provided no excuse for why he delayed reporting the claim.

> 18. . . . The Full Commission finds that Dr. Baule's opinion is not persuasive as he was given an incorrect description of the episode and was not aware of Plaintiff's prior back condition. In addition, Dr. Baule could not say whether the episode of back pain or Plaintiff's two prior back injuries were more likely to cause a disc bulge.
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> 20. Dr. Emanuel was not able to give a causation opinion to a reasonable degree of medical certainty on the cause of Plaintiff's back condition.
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> 21. The Full Commission finds that Plaintiff was simply walking on January 13, 2010, when his back gave way for an unknown reason, causing him to go down to his knees on the floor. There was no incident or inciting event to cause Plaintiff's pain. Plaintiff's back pain on January 13, 2010 is unrelated to his employment and was not a specific traumatic incident of the work he was assigned.

A. Finding 6

We first address plaintiff's contention that finding 6 must be set aside because defendant-employer had actual notice of the 13 January episode. Plaintiff relies on N.C. Gen. Stat. § 97-22, which provides that when an employer has actual notice of an accident, "the employee need not give written notice, and therefore, the North Carolina Industrial Commission need not make any findings about prejudice." The purpose of N.C. Gen. Stat. § 97-22 is to protect an employee's claim from dismissal

should he fail to file for benefits within the requisite time period. The statute does not prohibit the Commission from making findings regarding when a plaintiff filed for benefits. Here, the Commission neither disputed the fact that defendant had actual notice of the 13 December episode nor did it attempt to bar plaintiff's claim due to an alleged lack of notice. As such, plaintiff's argument as to finding 6 is without merit. This finding is supported by competent evidence in the record, including the Form 18 notice of accident report filed on 28 February 2011.

B. Findings 2 and 21

Plaintiff challenges findings 2 and 21 on the basis that the Commission erred in finding that his injury did not result from a specific traumatic incident. We disagree.

Here, plaintiff was simply walking down an aisle in the stockroom when he experienced back pain. When asked how his body was moving, plaintiff stated, "I may have turned wrong. . . . I just basically turned the corner." His testimony supports finding 2: plaintiff "did not say his body was twisting or that anything unusual occurred at the time his back gave way."

Additionally, plaintiff testified that he "walked down one way, turned a corner, turned the next corner at that point my

back just locked up on me." Brock provided a similar description of the episode, and Strickland testified that plaintiff admitted the injury was not work-related. Finding 21 provides that plaintiff's back gave out for "unknown reasons" and the back pain was "unrelated to his employment and was not a specific traumatic incident of the work he was assigned." We conclude that finding 21 is supported by competent evidence.

Plaintiff also challenges the following conclusion of law:

> Plaintiff must show that there was an event within a judicially cognizable time causing his back injury and must demonstrate a casual connection between the specific traumatic event and the injury. . . . In the case ***sub judice***, Plaintiff presented evidence that he experienced pain on a particular date but he presented no evidence linking that pain to the occurrence of an injury. . . . Therefore, Plaintiff has failed to establish that he suffered an injury by accident by specific traumatic incident in his employment with Defendant-Employer on January 13, 2010. N.C. Gen. Stat. § 97-2(6).

N.C. Gen. Stat. § 97-2(6)(2012) provides:

> where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

The plain language of this statute defines an "injury by accident" of an employee's back as an injury that stems from "the direct result of a specific traumatic incident" and is "causally related to such incident." N.C. Gen. Stat. § 97-2(6); *Chambers v. Transit Mgmt.*, 360 N.C. 609, 617, 636 S.E.2d 553, 558 (2006). "[T]he onset of pain is not a 'specific traumatic incident' that will determine whether compensation will be allowed pursuant to the act[.]" *Id.* at 619, 636 S.E.2d 559 (citation omitted). Plaintiff argues that the "specific traumatic incident" he suffered was "the action of walking and turning/moving wrong[.]" We do not agree. The twisting motion that occurs when one turns cannot be separated from the fluid act of walking. Just as chewing is central to eating, turning is an integral part of walking.

Moreover, for a claim to be compensable, back injuries not only have to be by accident, but they must be "by accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6).

> To have its origin in the employment an injury must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause

> and which comes from a hazard to which the workmen would have been equally exposed apart from the employment.

Bartlett v. Duke University, 284 N.C. 230, 233, 200 S.E.2d 193, 195 (1973) (quotations and citations omitted). In addition, we have articulated an increased risk test to determine whether an injury arose out of the employment. This increased risk analysis "focuses on whether the *nature* of the employment creates or increases a risk to which the employee is exposed." *Ramsey v. N.C. Indus. Comm'n S. Indus. Constructors Inc.*, 178 N.C. App. 25, 36, 630 S.E.2d 681, 689 (2006) (citations omitted) (alteration in the original).

Here, plaintiff's injury was unrelated to the nature of his employment. Generally, every employee must walk through a hall or aisle during the course and scope of his or her employment. Sustaining an injury while walking on an employer's premises is not a risk that a reasonable person would contemplate as incidental to the employment. Furthermore, plaintiff's duties did not predispose him to an increased risk of sustaining an injury while walking at work; thus his "injury" cannot fairly be traced to the employment as a contributing proximate cause. The evidence supports the Commission's findings of fact and the findings support the Commission's conclusions of law that

plaintiff failed to satisfy N.C. Gen. Stat. § 97-2(6).

C. Findings 18 and 20

Plaintiff challenges finding 18 and 20 on the basis that the 13 January episode caused his back injury. Plaintiff specifically challenges the two parts of finding 18: (1) that Dr. Baule was given an "incorrect description of the episode and that he was not aware of plaintiff's prior back condition" and (2) that "Dr. Baule could not say whether the episode of back pain or Plaintiff's two prior back injuries were more likely to cause a disc bulge." When asked whether he knew of plaintiff's two earlier back injuries, Dr. Baule stated, "I was not aware of that." When asked whether plaintiff's two prior injuries were more likely than the 13 January episode to have caused a disk bulge, he responded, "I can't answer that question." Thus, finding 18 is supported by competent evidence. As to finding 20, the record indicates that when asked whether the 13 January episode caused plaintiff's back pain, Dr. Emanuel responded, "I can't speak on that because I never [saw] him prior to that." The Commission's finding 18 is supported by competent evidence in the record.

Plaintiff's final argument -- that the back injury he sustained in the 20 September 2010 automobile collision

aggravated the original compensable injury of 13 January 2010 -- is without merit because plaintiff did not suffer a compensable injury on 13 January 2010.

III. Conclusion

After review, we conclude that the facts found are supported by competent evidence and they, in turn, support the Commission's conclusions. The opinion and award of the Commission is affirmed.

Affirmed.

Judge STEELMAN concurs in result only.

Judge STROUD concurs.

Report per Rule 30(e).