IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-403

Filed: 20 December 2016

North Carolina Industrial Commission, I.C. No. Y06047

LAWRENCE CROWDER, Employee, Plaintiff

v.

BALDOR ELECTRIC, Employer, SELF-INSURED (GALLAGHER BASSETT SERVICES, Third-Party Administrator), Defendant.

Appeal by plaintiff from opinion and award entered 26 January 2016. Heard in the Court of Appeals 2 November 2016.

Ganly & Ramer, P.L.L.C., by Thomas F. Ramer, and Ruth Smith for plaintiff-appellant.

Wilson Ratledge, PLLC, by James E. R. Ratledge and Brian C. Tarr, for defendant-appellee.

DAVIS, Judge.

Lawrence Crowder ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission determining that his injury was not compensable because it did not arise out of his employment with his employer, Baldor Electric Company ("Baldor Electric" or "Defendant"). On appeal, Plaintiff argues that the Commission erred in making this determination because (1) his injury came within the unexplained fall doctrine, and he was therefore entitled to a presumption

that the injury arose out of his employment with Defendant; and (2) the Commission relied on inadmissible evidence. After careful review, we affirm.

Factual Background

In May 2012, Plaintiff had been working as a press operator at Baldor Electric's manufacturing plant in Weaverville, North Carolina for approximately 28 years. On 21 May 2012, Plaintiff spent the middle part of a hot day tilling for potatoes in his garden. He arrived at work at 4:20 p.m. for the second shift, which usually ran from 4:30 p.m. to 3:00 a.m.

At approximately 1:05 a.m., maintenance technician Randell Wilson arrived to repair a piece of equipment Plaintiff had been using earlier in his shift. Wilson subsequently left for a few minutes and upon his return found Plaintiff lying on the ground. Plaintiff later testified that after handing a hammer to Wilson, "I don't remember nothing, it's like you turn the TV set off, everything went black." The next thing Plaintiff remembered was hearing a paramedic speaking to him in the back of an ambulance.

Plaintiff was taken by ambulance to a hospital where he received treatment. A subsequent MRI revealed a muscular tear in Plaintiff's right shoulder that had resulted from his workplace fall. Plaintiff underwent two surgeries to repair this shoulder injury.

On 14 June 2012, Plaintiff filed a claim for workers' compensation benefits,

which was denied by Defendant on 7 January 2013. A hearing on Plaintiff's claim was held before Deputy Commissioner Stephen T. Gheen beginning on 22 September 2014. Deputy Commissioner Gheen issued an opinion and award on 25 February 2015 in which he concluded that Plaintiff's injury was compensable and that Plaintiff had demonstrated he was disabled and entitled to benefits.

Defendant appealed to the Full Commission. After hearing the appeal on 25 August 2015, the Commission issued an Opinion and Award on 26 January 2016 determining that Plaintiff's injury was not compensable because Plaintiff had failed to demonstrate that it had arisen out of his employment with Defendant. Plaintiff filed a timely notice of appeal to this Court.

Analysis

Appellate 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." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009). Therefore, when reviewing the Commission's findings of fact our "duty goes

no further than to determine whether the record contains any evidence tending to support the finding[s]." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation and quotation marks omitted).

"Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013). The Commission's conclusions of law are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74, *disc. review denied*, 365 N.C. 369, 719 S.E.2d 26 (2011).

I. Applicability of Unexplained Fall Doctrine

Under the Workers' Compensation Act, an injury is compensable if the claimant proves 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." *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). At issue in the present case is whether the Commission erred in determining that Plaintiff failed to satisfy the third prong — that his injury arose out of his employment with Defendant.

Plaintiff contends that the resolution of this question requires the application of the unexplained fall doctrine.

> In a workers' compensation case, if the cause or origin of a fall is unknown or undisclosed by the evidence, we apply

> case law unique to unexplained fall cases. When a fall is unexplained, and the Commission has made no finding that any force or condition independent of the employment caused the fall, then an inference arises that the fall arose out of the employment.

Philbeck, 235 N.C. App. at 128, 761 S.E.2d at 672 (citation and quotation marks omitted). This "inference is permitted because when the cause of the fall is unexplained such that there is no finding that any force or condition independent of the employment caused or contributed to the accident, the only active force involved is the employee's exertions in the performance of his duties." *Id.* (citation, quotation marks, brackets, and ellipsis omitted).

Our caselaw draws a distinction, however, between unexplained falls and falls that are caused by an idiopathic condition of the employee. "An idiopathic condition is one arising spontaneously from the mental or physical condition of the particular employee." *Hodges v. Equity Grp.*, 164 N.C. App. 339, 343, 596 S.E.2d 31, 35 (2004) (citation and quotation marks omitted). "Unlike a fall with an unknown cause — where an inference that the fall had its origin in the employment is permitted — a fall connected to an idiopathic condition is not presumed to arise out of the employment." *Philbeck*, 235 N.C. App. at 128, 761 S.E.2d at 672 (citation and quotation marks omitted). As we explained in *Philbeck*:

> (1) Where the injury is clearly attributable to an idiopathic condition of the employee, with no other factors intervening or operating to cause or contribute to the injury, no award should be made; (2) Where the injury is associated with any

> risk attributable to the employment, compensation should be allowed, even though the employee may have suffered from an idiopathic condition which precipitated or contributed to the injury.

Id. at 128-29, 761 S.E.2d at 672 (citation omitted).

In our decision in *Hollar v. Montclair Furniture Company*, 48 N.C. App. 489, 269 S.E.2d 667 (1980), we addressed the applicability of the unexplained fall doctrine where the fall occurred because the employee fainted. *Id.* at 490, 269 S.E.2d at 669. In *Hollar*, the Commission had found that "as [the] plaintiff was walking around a table she suddenly, for an unexplained reason, felt as if she were passing out and called to [her coworker] to catch her. He did so, but [the] plaintiff's back struck the floor and she passed out." *Id.*

The Commission determined that the plaintiff had failed to establish that her injury arose out of her employment. *Id.* On appeal, this Court first determined that "plaintiff's fall [did] *not* come within the 'unexplained' category of falls" because "it [was] clear that plaintiff fell *because she fainted*." *Id.* at 491, 269 S.E.2d at 669 (emphasis added). Having declined to apply the unexplained fall doctrine, we then remanded the case for the Commission to determine whether the plaintiff had fainted because of "conditions or circumstances related to her employment." *Id.*

In its Opinion and Award in the present case, the Commission made the following pertinent findings of fact:

> 3. Prior to reporting to work on 21 May 2012,

plaintiff worked in his garden tilling for potatoes. Plaintiff testified that it was hot outside at the time and that, after tilling for the potatoes, he went home to get into an air-conditioned environment.

4. On 21 May 2012, plaintiff arrived at work at 4:20 p.m. Defendant's plant was air conditioned. Although Plaintiff had to wear hard-toe shoes, he could wear lightweight clothing. Plaintiff kept a bottle of water with him while he worked, and he drank as much water as he felt he needed throughout his shift.

. . . .

8. At approximately 10:00 p.m., plaintiff took a 30 minute break at which time he ate a sandwich and a banana and drank some milk. After his break, plaintiff returned to work on the Youssh press.

9. Plaintiff took a 15 minute break at 12:45 a.m. At that time he performed some stretching exercises.

10. At approximately 1:05 a.m. on 22 May 2012, maintenance technician Randell Wilson arrived to fix the Cincinnati press. Plaintiff assisted Mr. Wilson by handing him a threader rod and then a hammer. Mr. Wilson testified that plaintiff appeared normal in all respects at this point in time.

11. After plaintiff handed Mr. Wilson the hammer, Mr. Wilson tapped on the press's powder hopper with it in an attempt to free what he believed was an obstruction. When he was unable to free the obstruction using the hammer, Mr. Wilson informed plaintiff that he was going to go start a repair order. He then left the area in order to use a computer to submit a repair order. The computer was located in the maintenance office, approximately 100-150 feet from the Cincinnati press.

12. Defendant's computer records indicate that Mr.

Wilson entered the repair order at 1:20 a.m. on 22 May 2012. After submitting the repair order, Mr. Wilson walked approximately 100 feet back toward the Cincinnati press and discovered plaintiff lying unresponsive in an aisle-way approximately 75 feet from the Cincinnati press. Mr. Wilson testified that he was away from Mr. Crowder for approximately two to four minutes. When Mr. Wilson returned and found plaintiff, the condition of the shop appeared normal and nothing was out of place.

13. When Mr. Wilson first saw plaintiff he was on his back with his knees up in the air and his head was moving back and forth. It appeared to Mr. Wilson that plaintiff was performing abdominal crunch exercises. Mr. Wilson called out plaintiff's name, but plaintiff did not respond. Mr. Wilson approached plaintiff and observed saliva or blood coming from the corner of plaintiff's mouth.

14. Mr. Wilson immediately ran to find maintenance supervisor Jimmy Taffer. After Mr. Wilson was unable [to] locate Mr. Taffer in his office, he paged him. Defendant's phone records indicate that this occurred at 1:21 a.m.[;] however, Mr. Wilson testified that there was a discrepancy of one to two minutes between the time kept by defendant's computer system and the time kept by defendant's phone system.

15. Mr. Wilson returned to plaintiff's location where he was met by Mr. Taffer and another employee, Colin Cody. Plaintiff was still lying on the floor, but his body had turned 90 degrees. Both Mr. Wilson and Mr. Taffer observed a small amount of blood and saliva coming out of plaintiff's mouth.

16. Mr. Taffer is a former Emergency Medical Technician ("EMT"). He testified that, upon arriving at plaintiff's location, he surveyed the scene but did not observe anything that plaintiff could have fallen or tripped over. After determining that the scene was safe, Mr. Taffer directed Mr. Wilson to get defendant's automatic external

defibrillator ("AED") consistent with defendant's protocol. When Mr. Wilson returned with the AED, Mr. Taffer and Mr. Cody were talking to plaintiff, but it did not appear that plaintiff was responding. Mr. Wilson also observed that plaintiff appeared to be attempting to roll onto his left side.

17. Mr. Taffer saw plaintiff working on the evening of 21 May 2012 before he was discovered lying on the floor and observed him to be behaving normally.

18. When Mr. Taffer arrived on the scene after speaking to Mr. Wilson on the phone, he observed plaintiff lying on his left side unresponsive with his eyes closed.

19. Mr. Taffer shook plaintiff and attempted to get him to respond to verbal cues, but plaintiff was unresponsive. Mr. Taffer then directed Mr. Cody and Mr. Wilson to call 911 and retrieve the AED.

20. Mr. Taffer next checked to see whether plaintiff was breathing, which he was. He also checked inside plaintiff's mouth in an attempt to determine whether plaintiff had choked on something. When Mr. Taffer looked in plaintiff's mouth he observed blood and saliva.

21. Mr. Taffer next applied the pads of the AED to plaintiff. Upon doing so, Mr. Taffer noticed that plaintiff's skin felt cool and clammy. The AED cycled three times and indicated that there was not a "shockable rhythm." At that point, Mr. Taffer and the other[s] waited with plaintiff for Emergency Medical Services ("EMS") to arrive.

22. During the ten minutes that elapsed between when Mr. Taffer arrived on the scene and when EMS arrived, plaintiff became somewhat more alert. His eyes were open and he was making some sounds, but he was still unable to respond to verbal cues.

23. EMS arrived at defendant's facility at 1:32 a.m.

and found plaintiff lying on his left side on the floor. Kristy Watson, a certified Emergency Medical Technician, testified that plaintiff's heartrate, blood pressure, and respiration were normal. She further testified that plaintiff was responsive to verbal stimuli in that he acknowledged he was being spoken too [sic]. However, plaintiff did not follow commands or communicate verbally.

24. Ms. Watson noted a small amount of blood from his mouth and a laceration to his tongue. Based on her assessment, Ms. Watson noted in her report that plaintiff appeared to have been in a postictal-type state. Ms. Watson testified that postictal means "post seizure." However, during her testimony Ms. Watson stated she did not make a determination that Plaintiff was postictal, only that she was describing his symptoms and further explained that she was not of the opinion that Plaintiff ever suffered a seizure and was not able to explain his fall. She did not document any facial or head trauma, other than trauma to plaintiff's tongue.

25. Plaintiff testified regarding the incident on 22 May 2012 that, after he handed the hammer to Mr. Wilson, "I don't remember nothing. It's like you turn a TV set off. Everything went black." Plaintiff further testified that the next thing he remembers is waking up in the back of an ambulance with a woman speaking to him. Upon waking up, plaintiff experienced pain in his neck and right shoulder.

26. On separate occasions following the 22 May 2012 incident, plaintiff told Mr. Taffer and defendant's Human Resources Manager, Alan Burnette, that he thought the incident on 22 May 2012 may have been due to his having "overdone it" in his garden.

27. Plaintiff was taken by ambulance to the nearest VA Hospital emergency department, where he was examined and treated by Dr. Michael Hill, MD. Records from the VA Hospital documented "blood noted at right

side lower lip, small lacerations noted to either side of time [sic], and slight left facial droop noted although tongue is middling . . . ." Plaintiff complained of pain in his right shoulder.

28. Dr. Hill ordered various tests including a CT scan, EKG, urinalysis and blood work, all of which yielded normal results. Plaintiff's blood pressure and heart rate were also normal.

29. The emergency department records reflect a provisional diagnosis of "Syncope vs seizure; dehydration."

30. On 31 May 2012, following his discharge from the VA Hospital, plaintiff followed up with his primary care physician, Dr. Paul Riggs at the Charles George VA Medical Center. At the time he was deposed in connection with this matter on 6 November 2014, Dr. Riggs had been treating plaintiff for a minimum of four to five years. On 31 May 2012, plaintiff complained to Dr. Riggs of right shoulder pain and decreased range of motion, which caused Dr. Riggs to suspect that plaintiff had an acute right rotator cuff tear.

31. On 27 June 2012, plaintiff underwent a right shoulder MRI which revealed a complete full thickness tear of the supraspinatus and infraspinatus muscle with retraction of the tendon. Plaintiff underwent surgeries to repair this condition on 17 July 2012 and on 6 December 2013.

32. The 6 December 2013 surgery was performed by orthopaedic surgeon Dr. Gordon Groh. Dr. Groh opined, and the Full Commission finds, that plaintiff's 22 May 2012 fall caused or contributed to plaintiff's right shoulder condition for which he required two surgeries.

33. On deposition, the emergency department physician, Dr. Hill, testified that other than the fact that plaintiff had bit his tongue and that there was blood at the

side of [his] mouth, there was not objective evidence of what he referred to as "this so-called seizure event" noted by the EMT, Ms. Watson. Although Dr. Hill testified that he routinely uses the EMS report and intake nurse's notes in assessing a patient, in his deposition he dismissed Ms. Watson's report as "conjecture." Although he acknowledged that "facial droop" could be indicative of stroke, he did not give any credence to the nurse's note indicating that the nurse observed facial droop because he did not observe it at the time he examined plaintiff.

34. When informed that Mr. Wilson had observed plaintiff lying on the ground, engaged in crunch-like activity and asked whether this was consistent with seizure activity, Dr. Hill testified that he did not dispute what Mr. Wilson said he saw, but stated that Mr. Wilson was "a naïve bystander from a medical standpoint."

35. It is unclear from Dr. Hill's testimony whether he believes plaintiff lost consciousness on 22 May 2012. He initially opined that he did not know whether plaintiff "fell because he fell or [] fell because he lost consciousness." Later in the deposition, Dr. Hill testified that it was unclear whether plaintiff had actually passed out on 22 May 2012. However, shortly thereafter he testified that he was unable to state to any reasonable degree of medical certainty what caused plaintiff to lose consciousness, but did not object to the suggestion that plaintiff had, in fact, lost consciousness. Dr. Hill opined that there were no findings indicating an "external cause" for plaintiff's condition on 22 May 2012.

36. During his deposition, Dr. Riggs was presented with a number of hypothetical scenarios involving plaintiff's loss of consciousness on 22 May 2012. Although he opined that there was no way to determine to a reasonable degree of medical certainty what caused plaintiff to lose consciousness on 22 May 2012, Dr. Riggs did not deny that plaintiff had lost consciousness on that date.

> 37. Dr. T. Hemanth Rao, a board certified neurologist, conducted a review of plaintiff's medical records at defendant's request. Dr. Rao's report reflects his belief, that "syncope due to dehydration *would* provide a causal explanation for Mr. Crowder being found lying on the ground at the work area. . ." and that the "only other explanation could be a seizure triggered by dehydration."
>
> 38. The competent evidence of record reflects that plaintiff was alert and standing at 1:15 a.m. on 22 May 2012, but then blacked out and lost consciousness and was found on the floor of defendant's plant shortly thereafter.
>
> 39. There is no evidence that plaintiff's loss of consciousness was related to a risk of his employment. The evidence of record demonstrates that defendant's plant was air conditioned on the date in question, and that plaintiff had the opportunity to eat and drink as much as he thought he required. Furthermore, the evidence shows that, just prior to his fall, plaintiff was standing on level ground handing tools to Mr. Wilson. There is no evidence that plaintiff was exerting himself more than he typically did while working for defendant on 22 May 2012.

The Commission also made the following pertinent conclusions of law:

> 8. In the instant case, the preponderance of the evidence, including plaintiff's own testimony, establishes that plaintiff fell on 22 May 2012 because he blacked out. Thus, as in *Hollar*, plaintiff's fall is not unexplained and the unexplained fall doctrine is inapplicable to his claim. As such, the compensability of plaintiff's claim turns on whether his blacking out was caused in any part by the conditions and circumstances of his employment.
>
> 9. There is no evidence of record that plaintiff's blackout episode is attributable, even in part, to any risk attributable to his employment. Accordingly, plaintiff has failed to meet his burden of proving by a preponderance of

> the evidence that his 22 May 2012 injury arose out of his employment and, therefore, his claim is not compensable.

(Internal citations omitted.)

Plaintiff argues there is no competent evidence in the record to support the Commission's determination in Finding No. 38 that he "blacked out and lost consciousness." We cannot agree. Plaintiff himself testified that after handing Wilson the hammer, "I don't remember nothing, it's like you turn the TV set off, everything went black." Moreover, while not providing a precise medical cause of Plaintiff's blackout, the medical evidence set forth above — which is largely unchallenged by Plaintiff — provides additional support for the Commission's finding that Plaintiff did indeed black out and lose consciousness. Accordingly, we overrule Plaintiff's challenge to Finding No. 38. *See Hill v. Hanes Corp.*, 319 N.C. 167, 172, 353 S.E.2d 392, 395 (1987) ("[C]ourts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached." (citation and quotation marks omitted)).

Next, Plaintiff argues that the Commission erred in Conclusion No. 8 in which it determined that Plaintiff was not entitled to the benefit of the unexplained fall doctrine. We believe that this conclusion is supported by the Commission's findings and is a correct application of the law based on *Hollar*. Here, as in *Hollar*, there is sufficient evidence to show why Plaintiff fell — that is, he fell because he blacked out

and lost consciousness. Under the reasoning of *Hollar*, blacking out constitutes an explanation for Plaintiff's fall for purposes of the unexplained fall doctrine. Accordingly, we conclude that the present case does not involve an unexplained fall.

Plaintiff's argument appears to be — at least in part — a disagreement with the wisdom of our holding in *Hollar*. However, we are bound by our prior decision in that case. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Having determined that the unexplained fall doctrine does not apply, the only remaining question is whether "even though [Plaintiff] may have suffered from an idiopathic condition which precipitated or contributed to the injury," his "injury [was] associated with any risk attributable to the employment[.]" *Philbeck*, 235 N.C. App. at 128-29, 761 S.E.2d at 672 (citation omitted). Here, unlike in *Hollar*, the Commission specifically determined in Conclusion No. 9 that "[t]here is no evidence of record that plaintiff's blackout episode is attributable, even in part, to any risk attributable to his employment." Plaintiff has failed to show that this conclusion was erroneous. Indeed, Conclusion No. 9 is fully supported by Finding No. 39 in which the Commission found that on the night of the incident Plaintiff was working in an air-conditioned environment, had the opportunity to eat and drink as much as he

needed, was on level ground just prior to his fall, and was not exerting himself any more than he ordinarily would have been.

Accordingly, the Commission did not err in concluding that Plaintiff failed to establish that his injury was compensable. *See Hedges*, 206 N.C. App. at 734, 699 S.E.2d at 126 (demonstrating compensability requires a showing that "the injury arose out of the employment").

II. Dr. Rao's Testimony

Plaintiff's final argument on appeal is that the Commission erred in reciting in its findings evidence that it ruled inadmissible elsewhere in its Opinion and Award. On 25 November 2014, Deputy Commissioner Gheen issued an order determining that evidence provided by Dr. Rao was inadmissible because Defendant did not disclose him as an expert witness in the parties' pre-trial agreement. Defendant appealed this ruling to the Full Commission, which held the issue in abeyance pending the Commission's hearing.

In its Opinion and Award, the Commission referenced in Finding No. 37 a report from Dr. Rao in which he provided his opinion as to the cause of Plaintiff's fall. The Commission later proceeded to make the following conclusion of law:

> 10. The Full Commission does not agree with defendant that former Deputy Commissioner Gheen erred in not allowing the deposition of Dr. Hemanth Rao into evidence. Defendant failed to identify Dr. Rao as a possible expert witness in accordance with the Commission's Uniform Pre-Trial Order despite having contacted Dr. Rao

> regarding retaining his services almost one month prior to the parties' submission of the Pre-Trial Agreement.

Based on our careful review of the record and the Commission's findings and conclusions, we are satisfied that the Opinion and Award did not rely upon Dr. Rao's report. Therefore, the reference to his report in Finding No. 37 is at most harmless error. However, we note that the better practice would have been for the Commission to make no reference at all to Dr. Rao's report in its findings given its express determination that Dr. Rao had not been properly identified as a possible expert witness.

Conclusion

For the reasons stated above, we affirm the Commission's 26 January 2016 Opinion and Award.

AFFIRMED.

Judges INMAN and ENOCHS concur.

Report per Rule 30(e).