

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1110

Filed: 2 May 2017

North Carolina Industrial Commission, I.C. No. 13-740862

CHRISTOPHER BUCKNER, Employee, Plaintiff,

v.

UNITED PARCEL SERVICE, Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 3 November 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 March 2017.

Christopher Buckner, pro se, for plaintiff-appellant.

Goodman McGuffey, LLP, by Jennifer Jerzak Blackman, for defendants-appellees.

DIETZ, Judge.

Plaintiff Christopher Buckner appeals from the Industrial Commission's opinion and award denying his workers' compensation claim. Buckner began experiencing left arm pain while working as a driver for Defendant United Parcel Service. The Commission entered an opinion and award denying Buckner's claim

BUCKNER V. UNITED PARCEL SERV.

Opinion of the Court

because he failed to prove that his left arm pain was the result of an injury by accident or an occupational disease.

On appeal, Buckner challenges a number of findings and conclusions by the Commission. As explained below, under the narrow standard of review applicable to this appeal, we must reject all of Buckner's arguments. Although Buckner points to some evidence in the record supporting his arguments, there is at least some competent evidence supporting the Commission's findings, which in turn support its conclusions. As a result, under the applicable standard of review, we must affirm the Commission's opinion and award.

Facts and Procedural History

On 24 July 2013, Plaintiff Christopher Buckner was making deliveries as a "regular temporary package car driver" for Defendant United Parcel Service. While driving between delivery locations, Buckner felt pain "right in the crease of [his] forearm, like someone was almost pinching it and increasing the tension on it and just like gripping it as hard as they could." Buckner notified his supervisor and continued working his route until a replacement driver relieved him. The same day, Buckner went to NextCare Urgent Care where he reported that he began experiencing pain while working, but was "[u]nsure of actual injury."

On 30 July 2013, Buckner gave a recorded statement to Defendant Liberty Mutual Insurance Company. When asked what happened, Buckner stated, "Uh I

BUCKNER V. UNITED PARCEL SERV.

Opinion of the Court

don't know exactly what happened. Uh when . . . my arm started hurting I was just driving." He speculated that his pain may have been caused by delivering some awkward, heavy packages earlier in the day, but that "there's no moment in time at any particular time. I was actually driving from one stop to the next in the middle of just simply driving when my arm started to actually hurt."

On 5 August 2013, Defendants denied Buckner's workers' compensation claim on the ground that Buckner had not suffered a compensable injury by accident as defined by the Workers' Compensation Act. Buckner requested a hearing to challenge the denial of his claim.

On 18 October 2013, Buckner presented for an orthopedic evaluation with Dr. William Mallon. Buckner reported that "[h]e was moving some heavy and awkward boxes and packages in his truck, and also doing his driving and stopping" when "[a]t some point during the day, he noticed a sharp, stabbing, cramping pain to the elbow." Dr. Mallon diagnosed Buckner with elbow tendonitis and ordered an MRI to evaluate for a partial biceps tendon rupture. Buckner returned to Dr. Mallon on 25 October 2013. After reviewing the MRI results, Dr. Mallon diagnosed Buckner with elbow tendonitis and an ulnar nerve lesion.

Deputy Commissioner George R. Hall, III held a hearing on Buckner's claim on 21 November 2013. Buckner testified as the only lay witness. He testified that he

BUCKNER V. UNITED PARCEL SERV.

Opinion of the Court

sustained “a left arm injury” when, after delivering heavy packages, he “was driving in between stops” and “felt a pain in the inside of [his] forearm.”

The parties deposed Dr. Mallon as the only expert witness on 18 December 2013. Dr. Mallon testified that Buckner reported that his pain began while moving heavy packages and driving, and that lifting and driving were part of Buckner’s normal job functions. Dr. Mallon testified that Buckner’s left arm tendonitis was originally “an acute condition” with a sudden onset of pain that later became a chronic condition. Dr. Mallon further testified that although he believed a UPS driver “is at higher risk” of tendonitis, “tendonitis is something that people experience doing jobs other than delivery drivers,” “an average person could sustain it,” and “[w]e don’t know exactly what causes tendonitis.” As to the ulnar nerve lesion, Dr. Mallon stated that he is “not sure” that a UPS driver would be at a higher risk than an average person and that “an average person . . . doing normal daily activities could sustain this injury.”

Deputy Commissioner Hall filed an opinion and award on 6 February 2014, denying Buckner’s claim of injury by accident, but finding Buckner’s claim compensable as an occupational disease. Both parties appealed to the Full Commission.

The Full Commission heard Buckner’s claim on 22 July 2014. On 3 November 2014, the Full Commission entered an opinion and award denying Buckner’s claim,

Opinion of the Court

concluding that Buckner failed to prove his claim was compensable as an injury by accident or an occupational disease because Buckner “failed to establish . . . that his left arm condition is related to an injury by accident” and Buckner “did not meet his burden of establishing that his left elbow condition was causally related to his employment.” Buckner timely appealed.

Analysis

Buckner raises a number of arguments on appeal. First, he challenges several of the Full Commission’s findings of fact, arguing that they are not supported by competent evidence in the record. Next, he challenges a series of the Commission’s conclusions of law, arguing that they are not supported by the Commission’s findings or are incorrect statements of law. Finally, he challenges portions of the deputy commissioner’s opinion and award. For the reasons discussed below, we reject Buckner’s arguments and affirm the Commission’s opinion and award.

I. Full Commission’s Findings of Fact

Buckner first argues that the Full Commission erred because several of the Commission’s findings of fact are not supported by competent evidence in the record. We disagree.

“This Court reviews an award from the Commission to determine: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.” *Kee v. Caromont Health, Inc.*,

BUCKNER V. UNITED PARCEL SERV.

Opinion of the Court

209 N.C. App. 193, 195, 706 S.E.2d 781, 782 (2011). Under the competent evidence standard, if the Commission's factual findings are supported by *any* competent evidence in the record, those findings are binding on appeal. *Adams v. Frit Car, Inc.*, 185 N.C. App. 714, 717, 649 S.E.2d 651, 653 (2007).

Buckner first challenges Finding of Fact 3. He argues that there is “no competent evidence of record” to support the Commission's finding that his “initial theory of compensability was that he suffered an injury by accident” but he later asserted the theory that he “developed an occupational disease.” First, we note that this finding (which, in essence, is that Buckner's theory of compensability evolved over time) is not essential to the Commission's ultimate finding that Buckner's injury is not compensable. In any event, this finding is supported by evidence in the record. The initial injury reports and Buckner's own testimony characterized his injury as an acute injury by accident. The theory that Buckner's arm pain was an occupational disease does not appear in the record until Dr. Mallon asserted it in his deposition testimony and the deputy commissioner discussed it in the opinion and award. These facts are competent evidence to support the Commission's finding that Buckner's theory of compensability evolved over time.

Buckner next challenges Finding of Fact 9, which found that “Plaintiff failed to establish that his employment placed him at greater risk of developing his left elbow condition than the public generally.” Buckner contends that “Doctor Mallon

Opinion of the Court

clearly states that Plaintiff was at a greater risk for the left arm injury due to [his] job as a UPS driver.”

This argument again ignores the competent evidence standard. To be sure, some of Dr. Mallon’s statements support Buckner’s position. But the question is not whether there is some evidence supporting Buckner’s argument, but whether there is *any* competent evidence supporting the Commission’s findings. *Adams*, 185 N.C. App. at 717, 649 S.E.2d at 653. Moreover, 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). “[W]here the evidence before the Commission is such as to permit either one of two contrary findings, the determination of the Commission is conclusive on appeal and the mere fact that an appellate court disagrees with the findings of the Commission is not grounds for reversal.” *Morrison v. Burlington Indus.*, 301 N.C. 226, 232, 271 S.E.2d 364, 367 (1980).

Here, Buckner relied on Dr. Mallon’s testimony to prove he suffered from an occupational disease due to tendonitis or an ulnar nerve lesion. Dr. Mallon testified that tendonitis is “something people experience doing jobs other than delivery drivers” and a condition that he sees “in other kinds of patients.” He stated that “[w]e don’t know exactly what causes tendonitis.” Dr. Mallon also testified that he was “not sure” that a UPS driver is at a higher risk of developing an ulnar nerve lesion. This

BUCKNER V. UNITED PARCEL SERV.

Opinion of the Court

testimony supports the Commission's finding that Buckner failed to prove he was at greater risk of injury than the public generally.

Buckner next challenges Finding of Fact 10, which found that "Dr. Mallon's testimony was uncertain and equivocal" as to whether Buckner's left elbow condition was causally related to his employment. Buckner contends that this finding is not supported by competent evidence because "Doctor Mallon's Deposition in whole is that as to causation that Plaintiff's left elbow condition is more likely than not causally related to his employment." Again, we note that the Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony" and that we are constrained by the narrow, competent evidence standard of review. *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274; *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008).

The finding that Dr. Mallon's testimony on causation was "uncertain and equivocal" is supported by his deposition testimony. Dr. Mallon waived in his opinion on causation and expressed uncertainty several times during his testimony. He stated that "[w]e don't know exactly what causes tendonitis." He also stated that he was "not sure" whether working as a UPS delivery driver would cause ulnar nerve lesion. Dr. Mallon testified that Buckner was more likely to get tendonitis than "someone who is not lifting repetitively," but that it is "really hard to say" whether Buckner's repetitive lifting caused his tendonitis because "that's the old, you know,

post hoc ergo propter hoc thing.” He concluded that “in the absence of any other evidence, it’s more likely than not that it did,” but “again, it’s difficult to say for certain.”

This testimony provides sufficient competent evidence to support the Commission’s finding that Dr. Mallon’s testimony was “uncertain and equivocal.” Accordingly, we reject Buckner’s argument.

II. Full Commission’s Conclusions of Law

Buckner next argues that the Full Commission erred in denying his claim because several of the Commission’s conclusions of law are not supported by the Commission’s findings or are incorrect statements of the law. As explained below, we disagree.

“We review the Commission’s conclusions of law *de novo*, but this review is limited to whether the findings of fact support the Commission’s conclusions of law.” *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 310, 663 S.E.2d 322, 328 (2008).

Buckner first argues that the Commission’s conclusions applied too narrow a definition of “injury by accident.” Specifically, Buckner challenges the Commission’s conclusion that the Workers’ Compensation Act “does not provide compensation for injury, but only for injury by accident.”

The Commission’s conclusions contain an accurate statement of the law. First, this statement in the Commission’s opinion and award is a direct quote from this

BUCKNER V. UNITED PARCEL SERV.

Opinion of the Court

Court's decision in *Pitillo v. N.C. Dep't of Env'tl. Health & Nat. Res.*, 151 N.C. App. 641, 644, 566 S.E.2d 807, 811 (2002); *see also* N.C. Gen. Stat. § 97-2(6); *O'Mary v. Land Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964). Moreover, the Commission further describes the applicable legal standard for "injury by accident" in other conclusions of law and, again, accurately states the law with citation to authority from this Court. Thus, we reject Buckner's argument that the Commission misstated the law in describing the scope of an injury by accident.

Buckner next challenges the Commission's conclusion that he had the "burden of proving every element of compensability by a preponderance of the evidence in view of the entire record." Buckner argues that the Commission misstated the law because "only an expert can give competent opinion evidence as to the cause of the injury." We reject this argument. The Commission's conclusion does not mean that only Buckner *personally* could provide evidence of the elements of his claim; instead, the Commission simply stated (correctly) which party bears the burden of proof on compensability. *See, e.g., Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003); *Gaddy v. Kern*, 17 N.C. App. 680, 683, 195 S.E.2d 141, 143 (1973).

Finally, Buckner challenges Conclusions of Law 4 and 9, both of which concern Buckner's failure to establish compensability. Conclusion 4 states that "Plaintiff was unable to establish through lay or expert medical testimony that his injury occurred

Opinion of the Court

by accident” and Conclusion 9 states that “Plaintiff did not meet his burden of establishing that his left elbow condition was causally related to his employment.”

We reject Buckner’s arguments because the Commission’s findings of fact, including the findings discussed in Part I above, readily support the Commission’s conclusions. Simply put, although Buckner disagrees with the Commission’s conclusions, those conclusions flow from express findings by the Commission that, in turn, are supported by at least some competent evidence in the record. Accordingly, this Court must affirm the Commission’s conclusions. *Starr*, 191 N.C. App. at 310, 663 S.E.2d at 328.

III. Issues Regarding Deputy Commissioner’s Opinion and Award

Buckner also raises arguments regarding the deputy commissioner’s opinion and award. We need not reach these issues because we affirm the Full Commission’s opinion and award.

Conclusion

We affirm the Industrial Commission’s opinion and award.

AFFIRMED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).