An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1005

Filed: 17 April 2018

North Carolina Industrial Commission, I.C. No. 14-060363

ALVIN J. CHASE, Employee, Plaintiff,

v.

GREIF INC., Employer, and TRAVELERS INDEMNITY COMPANY OF AMERICA, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 28 April 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2018.

Sellers, Ayers, Dortch & Lyons, PA, by John F. Ayers, III and Christian R. Ayers, for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by Kara S. Glidewell, for defendant-appellee.

ZACHARY, Judge.

Alvin J. Chase ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission denying his workers' compensation claim. After careful review, we conclude that the Commission's findings of fact were supported by competent evidence and that those findings supported the Commission's conclusions of law, and the opinion of the Commission should be affirmed.

Background

On 14 November 2014, plaintiff was employed by Greif Packaging LLC-DBA Southeastern Packaging Company ("defendant") in Concord, North Carolina, where defendant produces corrugated sheets of cardboard. Plaintiff worked as a clamp truck operator in Plant One. A clamp truck is an oversized forklift with a clamping mechanism on the front instead of forks. The trucks are powered by propane fuel, with a fuel tank located behind the upper part of the seat. Plaintiff's primary duty was to load tractor trailer trucks with large rolls of paper stored in Plant One to be delivered to Plant Two. Plaintiff was also responsible for changing out the clamp truck's fuel tank, which he did approximately two to three times per day.

Plaintiff testified that on 14 November 2014 he ran out of fuel after about two hours, which surprised him as it usually took longer for fuel tanks to empty. However, defendant's safety coordinator testified that the two tanks recovered from plaintiff's truck that day were thirty-three gallon tanks, which typically lasted about two hours. While changing out the fuel tanks, plaintiff "noticed propane spraying out from the fuel line[,] . . . heard a hissing sound[,] and smelled what he described as a 'rotten eggs' or sulphur smell." Plaintiff experienced propane leaks about once every two weeks, and he would often smell propane in heavy doses when the leaks occurred.

Plaintiff and two of defendant's other employees testified that leaks commonly occurred at the point at which the fuel line connects to the tank, but that they had never encountered a leak from the fuel line itself. Despite the novelty of this leak, plaintiff repaired it himself and felt safe to continue operating the clamp truck. When he re-hooked the tank he confirmed there was no longer a leak. Plaintiff then began feeling increasingly "weird" and "awkward, in a sense, light-headed, dizzy kind of . . . ," which prompted him to check the fuel line to determine whether the leak had returned. It had not. Plaintiff radioed a co-worker who was working in Plant Two and told him that he thought there was a leak, that he felt "messed up," and that "[he had] been sitting over here getting effed up off of propane." The co-worker testified that he did not think plaintiff was in any danger because plaintiff "was laughing about it."

Plaintiff then used his phone to access the internet and search for the symptoms of propane poisoning, because he was growing steadily concerned that something was wrong. He found that his symptoms were similar to those he read about online. Instead of calling his supervisor about his condition or the leak, plaintiff drove his car to Plant Two. On his way, he stopped to alert a passing maintenance vehicle about the leak and told its passengers that he was feeling "really messed up." Plaintiff found his supervisor in Plant Two and told him he was not feeling well and thought he had inhaled propane. His supervisor testified that plaintiff appeared

normal initially, but started "acting weird," "was panicking," alternated from being responsive to non-responsive, and complained that his extremities were numb. Other co-workers testified that plaintiff seemed to be disoriented, his eyes were rolling around, and he appeared close to fainting. They took plaintiff outside for some fresh air and called an ambulance. Plaintiff was taken to the hospital, where he received oxygen and was released that evening. Plaintiff's bloodwork indicated that his carbon monoxide levels were normal and inconsistent with carbon monoxide poisoning.

After plaintiff went to the hospital, defendant's maintenance staff inspected his clamp truck and determined that there was no propane leak. Following plaintiff's incident, defendant performed two industrial hygiene surveys to test for increased levels of carbon monoxide or propane in Plant One. During these tests, the building louvers were shut to close off the ventilation and create less air circulation than there was on 14 November 2014. The carbon monoxide and propane levels were below the OSHA Permissible Exposure Limits, although certain readings with the trailers were elevated.

Plaintiff testified that he felt light-headed and dizzy and started stuttering over the weekend, but he returned to work the following Monday. Defendant instructed plaintiff to see a physician, who released plaintiff to work. Plaintiff completed an almost twelve hour shift, and worked a thirteen hour shift the following day. On 19 November 2014, plaintiff saw his primary care physician, who noted that

his speech was stuttering but clear, and admitted plaintiff to the hospital for oxygen therapy and a neurologic consult. Plaintiff subsequently saw a variety of physicians, who treated him for anxiety and panic disorder, and prescribed anti-anxiety medications.

Plaintiff filed a claim for workers' compensation benefits, alleging brain injury, psychological injuries, neurological injuries, and systemic injury as the result of "[e]xposure to dangerous levels of propane and carbon monoxide gases . . . or alternatively, psychological and neurological symptoms resulting from the perceived exposure to dangerous levels of propane and carbon monoxide gases." After a hearing on 19 November 2015, the Deputy Commissioner found that plaintiff was not exposed to harmful levels of gases on 14 November 2014, that plaintiff failed to prove an accident occurred, and that plaintiff failed to prove that a causal relationship existed between his alleged work-related accident and his psychological condition. Plaintiff appealed to the Industrial Commission, which found that plaintiff failed to meet his burden of proving that there was a propane leak on 14 November 2014 that was different and/or more significant than leaks he normally experienced, and that any condition he experienced as a result of the alleged fuel leak "was the result of plaintiff's perception that he was exposed to a dangerous propane leak -- a perception which is not supported by evidence of record." The Commission found that plaintiff's

testimony regarding the alleged leak and alleged exposure to propane was not credible. Plaintiff now appeals the Commission's opinion and award.

Standard of Review

On appeal from an opinion and award of the Industrial Commission, our review is limited to evaluating "whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 757, 594 S.E.2d 446, 448 (2004) (citation and quotation marks omitted). "The Commission's findings of fact are conclusive on appeal when they are supported by competent evidence, even when there is evidence to support contrary findings." *Id.* (citation omitted). Moreover, the " 'Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "Contradictions in the testimony go to its weight, and the Commission may properly refuse to believe particular evidence." *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980). Furthermore, "[f]indings of fact that are not challenged on appeal are binding on this Court." *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007) (citation omitted). However, the Commission's conclusions of law are

reviewed *de novo*. *Boney v. Winn-Dixie, Inc.*, 163 N.C. App. 330, 331, 593 S.E.2d 93, 95 (2004) (citation omitted).

Discussion

In order for an injury to be compensable under the North Carolina Workers' Compensation Act ("Act"), the plaintiff must prove: " '(1) that the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment.' " *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)); N.C. Gen. Stat. § 97-2(6) (2016). "[A]n injury . . . is compensable only if that injury was caused by an 'accident,' which must be a separate event preceding and causing the injury." *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 24, 264 S.E.2d 360, 362 (1980) (citations omitted). An accident is "an unlooked for and untoward event which is not expected or designed by the injured employee" and involves "the interruption of the routine of work, and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428-29, 124 S.E.2d 109, 110-11 (1962) (citation omitted).

It is well-established that "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." *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985) (citation omitted); *see also*, *Pitillo v. N.C. Dep't of Envtl. Natural Res.*, 151 N.C. App. 641, 645 566 S.E.2d 807, 811 (2002) (citation omitted) ("If an injury occurs under normal working conditions, no accident has occurred.").

In the instant case, plaintiff contends that the Commission misapprehended the law by requiring him to prove that he suffered an actual exposure to propane or carbon monoxide on 14 November 2014. We conclude that plaintiff was required to prove that he suffered an actual exposure in order for his injury to be compensable. *See Id.*; *Porter*, 46 N.C. App. at 24, 264 S.E.2d at 362. Where plaintiff regularly encountered propane leaks in his employment as a clamp truck operator, a perceived exposure to propane was not an unusual or unexpected event, and thus was not an "accident" under the Act. *Bowles*, 77 N.C. at 550, 335 S.E.2d at 504.

Plaintiff further maintains that the Commission erred by applying *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 566 S.E.2d 807 (2002), to the facts of this case. In *Pitillo*, the plaintiff claimed she suffered a mental injury from a meeting with the director and a personnel officer concerning her annual performance evaluation. *Id.* at 643-46, 566 S.E.2d at 809-13. Following the meeting, she developed anxiety and sought workers' compensation benefits, arguing that the meeting had caused her mental injuries as either an injury by accident or an

occupational disease. *Id.* This Court upheld the Commission's denial of benefits, stating that the meeting was no "different from other meetings to discuss performance evaluations." *Id.* at 646, 566 S.E.2d at 811. While "a mental or psychological illness may be a compensable injury if it has occurred as a result of an accident . . . ," "an injury is not a compensable 'injury by accident' if the relevant events were 'neither unexpected nor extraordinary,' and it was only the claimant's emotional response to the events that was the precipitating factor." *Id.* (internal citations and quotation marks omitted).

In the instance case, plaintiff testified that he regularly encountered leaks while changing out the propane fuel tanks. He failed to prove he (1) encountered an actual exposure to propane, and (2) encountered an actual exposure to propane that was more significant or in any other way different from what he routinely experienced. Plaintiff essentially argues that if he imagined a leak and had an emotional reaction to this imagined event, he would be entitled to workers' compensation benefits. This argument is without merit.

Next, plaintiff argues that the Commission's finding that there was no leak or exposure to a noxious gas that "was different and/or more significant than the leaks and resulting exposures" than those plaintiff encountered in the past was not based on competent evidence. Relatedly, plaintiff also argues that the Commission's finding that his testimony was not credible was not based on competent evidence. As stated

above, the " 'Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (citation omitted). Moreover, the plaintiff has the burden of proving his claim by the preponderance of the evidence. *Vaugh v. Insulating Servs.*, 165 N.C. App. 469, 473, 598 S.E.2d 629, 632 (2004). "[T]he plaintiff must present credible evidence of exposure sufficient to prove that he was . . . injuriously exposed while working for the defendant-employer." *Id.* Plaintiff specifically objects to the Commission's consideration of three items of evidence: (1) the Industrial Hygiene tests performed on 18 November 2014 and 26 November 2014, which showed propane and carbon monoxide levels in Plant One below OSHA permissible limits, (2) plaintiff's emergency room carbon monoxide reading of 3.1%, which was in the normal range, and (3) reports of defendant's employees who found no leak or odor when they responded to plaintiff's request for inspection. While plaintiff is not required to establish exact toxicity levels or present evidence of toxicity measurements to prove an exposure occurred, the Commission is not prohibited from considering the above evidence that plaintiff deems "incompetent." This is competent evidence, and plaintiff is ultimately asking this Court to reweigh the evidence, which is not the role of this Court. *Faison*, 163 N.C. App. at 757, 594 S.E.2d at 448 (citation omitted). Furthermore, the Commission did not find plaintiff's testimony to be credible, a finding that was supported by competent evidence and is a determination left solely

to the Commission. *Adams,* 349 N.C. at 680, 509 S.E.2d at 413. We conclude that the opinion and award of the Commission should be affirmed.

Conclusion

For the reasons discussed above, the opinion and award of the Industrial Commission is

AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).