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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-588

Filed: 18 December 2018

North Carolina Industrial Commission, I.C. No. 16-004856

BEVERLY SIDES, Employee, Plaintiff,

v.

ASHLEY FURNITURE INDUSTRIES, INC., Employer, SELF-INSURED
(GALLAGHER BASSETT SERVICES, INC., Third-Party Administrator), Defendant.

Appeal by defendants from opinion and award entered 27 February 2018 by
the North Carolina Industrial Commission. Heard in the Court of Appeals
15 November 2018.

Raymond M. Marshall for plaintiff-appellee.

*Cranfill Sumner & Hartzog LLP, by Carl Newman and Roy G. Pettigrew, for
defendants-appellants.*

ARROWOOD, Judge.

Ashley Furniture Industries, Inc. and Gallagher Bassett Services, Inc.
("defendants") appeal from the Full Commission of the North Carolina Industrial
Commission ("the Commission")'s opinion and award. For the reasons stated herein,
we affirm the decision of the Commission.

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I. Background

On 18 January 2016, Beverly Sides (“plaintiff”) was employed by Ashley Furniture Industries (“defendant-employer”) as a machine operator. Her job included changing the settings on a cleat block machine, commonly referred to as a WB325, which drills holes in pieces of wood, and cuts them into smaller pieces. A “crank” on the WB325 is used to set the machine to cut particular sizes of wood.

As plaintiff set the machine to an infrequently used setting on 18 January 2016, the crank became abnormally tight, forcing plaintiff to apply more force than usual. She began to feel a burning sensation in her left shoulder, which she reported as a left shoulder injury to her supervisor and to defendant-employer’s health and safety office. She completed an employee workplace injury report detailing the injury.

Plaintiff presented for evaluation at Wake Forest Baptist Hospital Occupational Medicine in Clemmons on 2, 4, and 11 February 2016. She was referred to physical therapy, prescribed Skelaxin and Diclofenac, and restricted to limited use of her left shoulder. Plaintiff was also referred for orthopedic evaluation. Her orthopedic surgeon diagnosed the injury as left shoulder joint pain, left shoulder impingement syndrome, and left rotator cuff tendinitis. He referred her to physical therapy and prescribed anti-inflammatory medication.

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Defendant-employer denied plaintiff's worker's compensation claim on 12 February 2016. On 18 February 2016, plaintiff filed a Form 18 *Notice of Accident to Employer and Claim of Employee, Representative, or Dependent* that claimed her left shoulder injury occurred "[w]hile very forcefully turning a malfunctioning machine handle." Subsequently, plaintiff filed a Form 33 request for hearing on 23 February 2016. Defendants responded, denying plaintiff sustained an injury by accident in the course and scope of her employment.

Deputy Commissioner Michael T. Silver heard this matter on 24 June 2016 and 16 November 2016. He entered an opinion and award denying plaintiff's claim on 26 July 2017, finding plaintiff did not produce sufficient evidence that her left shoulder problems are caused, or materially exacerbated or aggravated by, the 18 January 2016 incident. Plaintiff appealed. Defendants cross-appealed, arguing the opinion and award failed to conclude plaintiff did not sustain an "injury by accident."

The Full Commission heard the matter on 12 December 2017, and entered an award on 13 February 2018 reversing Deputy Commissioner Silver's opinion and award and awarding benefits to plaintiff based on its determination that plaintiff suffered an injury by accident arising out of and in the course of her employment.

Defendants appeal.

II. Discussion

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On appeal, defendants argue that the Commission erred by concluding plaintiff was injured by accident, and by relying on the testimony of plaintiff's orthopedic surgeon to establish medical causation.

A. Standard of Review

Our 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.” *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted), *reh’g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). We review the Commission’s findings of fact for “whether the record contains any evidence tending to support the finding[.]” *id.*, and review the “conclusions of law *de novo*.” *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006) (citation omitted).

B. Injury by Accident

Defendants first argue the Commission erred by concluding plaintiff suffered a compensable “injury by accident” within the meaning of the Worker’s Compensation Act (“the Act”). We disagree.

“A plaintiff is entitled to compensation for an injury under the Workers’ Compensation Act only if (1) it is caused by an ‘accident,’ and (2) the accident arises out of and in the course of employment.” *Gray v. RDU Airport Auth.*, 203 N.C. App.

521, 525, 692 S.E.2d 170, 174 (2010) (citations and internal quotation marks omitted). “An accident is an unlooked for event and implies a result produced by a fortuitous cause.” *Id.* (citation and internal quotation marks omitted). Accordingly, “if the employee is performing his regular duties in the usual and customary manner, and is injured, there is no accident[.]” *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E.2d 360, 363 (1980) (citation and internal quotation marks omitted).

However, our Supreme Court has held that “extra exertion by the employee, resulting in injury, may qualify as an injury by accident” even when an employee is carrying out his normal job duties, so long as “the extra and unusual exertion was accidental[.]” *Jackson v. N. Carolina State Highway Comm’n*, 272 N.C. 697, 700-701, 158 S.E.2d 865, 868 (1968) (citing *Gabriel v. Town of Newton*, 227 N.C. 314, 42 S.E.2d 96 (1947)).

Here, the Commission found plaintiff was performing her job duties at the time of the injury, but because “the crank had ‘always been easy to turn’ until [the day of the accident,]” the “amount of force plaintiff exerted to turn the crank . . . was unusual and constituted an interruption of plaintiff’s normal work routine.” Based on this finding, the Commission held that the preponderance of the evidence established plaintiff sustained a work-related injury by accident to her left shoulder, arising out of and in the course of her employment with defendant-employer.

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Defendants allege this conclusion is in error because the extra force exerted by plaintiff was not “accidental,” and, thus, not an injury by accident under the Act. Defendants cite to *Gray* to support this argument. In *Gray*, our Court reviewed the Commission’s denial of worker’s compensation benefits to a traffic control officer at an airport authority who ruptured his Achilles tendon when he stepped backward onto a section of a crosswalk that sloped down to the roadway. *Gray*, 203 N.C. App. at 528, 692 S.E.2d at 175. The Commission denied the claim because it concluded the plaintiff did not suffer a compensable injury by accident, as it was typical for the plaintiff to step backwards in this way while carrying out his job duties, and no unusual or unforeseen circumstance interrupted his work routine. *Id.* at 528-29, 692 S.E.2d at 176.

On appeal, the court in *Gray* affirmed this conclusion, distinguishing the facts from *Konrady v. U.S. Airways, Inc.*, 165 N.C. App. 620, 626, 599 S.E.2d 593, 597 (2004). In *Konrady*, our Court upheld a determination that a plaintiff suffered an injury by accident “when she jarred her knee exiting a van that had pulled up closer than normal to the curb so that the bottom step overlapped the curb and the bottom step was shorter than other steps[,]” even though exiting the van was not an interruption in the plaintiff’s job duties. *Gray*, 203 N.C. App. at 527, 692 S.E.2d at 175. Our Court explained that “the van pulling closer to the curb and the shorter distance between the bottom step and the ground were an unforeseen circumstance

and unusual condition and that [the plaintiff] could not recall ever before having encountered that situation.” *Id.* (quoting *Konrady*, 165 N.C. App. at 626, 599 S.E.2d at 597).

The instant case is more like *Konrady* than *Gray*. Here, the Commission found “the amount of force plaintiff exerted to turn the crank . . . was unusual[.]” This finding is supported by competent evidence that the crank malfunctioned, as plaintiff testified the crank was normally easy to turn, and she had never exerted much force to turn the crank until the day of the injury. In contrast, there was “nothing wrong with” or unusual about the crosswalk when the plaintiff in *Gray* stepped within it and injured his Achilles tendon. *Id.* at 529, 692 S.E.2d at 176 (internal quotation marks omitted).

This result is further supported by *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E.2d 360, 363 (1980), where an employee’s usual work included “a task which entailed pulling rods from rolls of cloth.” *Id.* at 23, 264 S.E.2d at 361. The evidence in *Porter* tended to show that the plaintiff was injured when the “withdrawal of the rod was *unusually difficult* because the roll of cloth was extra tight,” which the Commission concluded was an unusual exertion, and therefore an accident. *Id.* at 27, 264 S.E.2d at 363 (emphasis added) (internal quotation marks omitted). Our Court affirmed this result. *Id.* Similarly, in *Barnette v. Lowe’s Home Centers, Inc.*, 247 N.C. App. 1, 785 S.E.2d 161 (2016), our Court held an injury by accident occurred where

an employee performed his normal work duty of carrying a refrigerator up a staircase while delivering the refrigerator because the narrowness of the staircase forced him to “[utilize] an unusual and awkward . . . work technique that was not normally used in his normal work routine[,] to wit, having to carry the new refrigerator back down the unusually narrow staircase without a break or pause.” *Id.* at 10, 785 S.E.2d at 167 (internal quotation marks and citations omitted).

Likewise, the evidence in this case that the crank was unusually difficult to turn supports the Commission’s ultimate finding that there were unusual circumstances interrupting plaintiff’s work routine, which, in turn, supports the conclusion that plaintiff’s injury constituted a compensable accident under the Act.

C. Medical Causation

Next, defendant argues the Commission erred by relying on plaintiff’s orthopedic surgeon’s testimony to establish medical causation.

In a workers’ compensation case, the claimant “bears the burden of initially proving each and every element of compensability, including a causal relationship between the injury and his employment.” *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361, *aff’d*, 360 N.C. 54, 619 S.E.2d 495 (2005) (citation and internal quotation marks omitted). Causation must be proven “by a greater weight of the evidence or a preponderance of the evidence.” *Id.* (citation and internal quotation marks omitted). In a case involving complex medical questions, “only an

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expert can give competent opinion testimony” on causation. *Id.* at 475, 608 S.E.2d at 361-62 (citation omitted). Although “medical certainty is not required” to establish causation, an expert cannot establish causation by speculation. *Id.* at 475-76, 608 S.E.2d at 362 (citation and internal quotation marks omitted). Even so, a physician’s opinion “is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination.” *Id.* at 476, 608 S.E.2d at 362 (citation omitted).

Ultimately, “[t]he Commission is the sole judge of the credibility . . . and the weight to be given” to the testimony. *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Even if the evidence on causation is conflicting, “[t]he Commission’s findings of fact on the issue of causation are conclusive if supported by competent evidence[.]” *Lettley v. Trash Removal Serv.*, 91 N.C. App. 625, 628, 372 S.E.2d 747, 749 (1988) (citation omitted).

Here, Defendant contends that this testimony does not provide competent evidence to support the Commission’s finding that “Dr. Martin opined, to a reasonable degree of medical certainty, that the left shoulder condition he treated in plaintiff was causally related to the January 2016 work event.” We disagree.

Plaintiff offered her orthopedic surgeon’s testimony to establish that the 18 January 2016 accident caused her left shoulder condition. Plaintiff’s orthopedic surgeon, Dr. David Martin, first treated plaintiff on 28 April 2016. He diagnosed

plaintiff with left shoulder joint pain, left shoulder impingement syndrome, and left rotator cuff tendinitis, which he testified are conditions consistent with the injurious conditions plaintiff described. Accordingly, he testified there was a causal connection between the accident and the injury, explaining that the type of push-pull activity with an unusual amount of force or exercise described by plaintiff as occurring in January 2016 as the cause of the injury is consistent with the conditions he saw and treated.

Dr. Martin was asked on cross-examination whether, ignoring the history given by plaintiff, the *objective* findings, “clearly indicate that [plaintiff’s] symptoms in the left shoulder were from trauma[.]” Dr. Martin replied: “No, I don’t think that’s a--- I don’t think that’s a distinction that we can make from the findings[.]” He explained: “[i]f you take away the history, then I’m not sure that you can tell” whether the cause of plaintiff’s shoulder problems were degenerative or the result of a specific traumatic accident. Despite this testimony, the fact that Dr. Martin considered plaintiff’s history in assessing causality does not render his opinion that there was a causal relationship between the 18 January 2016 accident and the left shoulder injury incompetent. *See Adams*, 168 N.C. App. at 476, 608 S.E.2d at 362. Therefore, it was within the Commission’s discretion to find Dr. Martin’s testimony credible and sufficient to establish a causal relationship between the 18 January 2016 accident and plaintiff’s left shoulder condition.

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III. Conclusion

For the foregoing reasons, we affirm the opinion and award of the Commission.

AFFIRMED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).