IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-70

No. COA21-336

Filed 1 February 2022

North Carolina Industrial Commission, I.C. Nos. 18-028218 and 18-028219

ERIN JENKINS, Plaintiff,

v.

WELLS FARGO BANK, NA, Employer, OLD REPUBLIC INSURANCE COMPANY, Carrier (SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., Third-Party Administrator), Defendants.

Appeal by plaintiff from opinion and award entered 12 April 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 December 2021.

The Sumwalt Group, by Vernon Sumwalt and Christa Sumwalt, for Plaintiff-Appellant.

McAngus Goudelock & Courie, PLLC, by H. George Kurani, for Defendants-Appellellees.

CARPENTER, Judge.

¶ 1 Erin Jenkins ("Plaintiff") appeals from the full North Carolina Industrial Commission's (the "Commission") opinion and award (the "Opinion and Award"), affirming the deputy commissioner's opinion and award and denying Plaintiff's claim for workers' compensation benefits. For the reasons set forth below, we affirm the Commission's Opinion and Award.

I. Factual & Procedural Background

¶ 2 Plaintiff was employed as a marketing program manager for Wells Fargo Bank, NA ("Wells Fargo"). The position involved, *inter alia*, out-of-state travel. June 2018, Plaintiff stayed three days at a Residence Inn by Marriott in Des Moines, Iowa in connection with a Wells Fargo event. Wells Fargo paid all travel expenses associated with the trip as well as Plaintiff's salary during the trip. On 20 June 2018 at approximately 9:00 p.m., Plaintiff was sitting on the couch in her hotel room checking work emails from her cellular work phone. When Plaintiff went to stand up, her "foot slipped to the right a little bit[,] and [she] had [a] very strong burning sensation shoot up [her] leg." Plaintiff went to sleep shortly after the incident.

¶ 3 The next morning, Plaintiff placed her right foot down on the floor to get out of bed and "immediately fell forward"; to break her fall, she put her left hand out, hit her head, and twisted her wrist. During a conference call that morning, Plaintiff told a co-worker about the incidents. While in Iowa, Plaintiff went to an urgent care center and was told she had broken her foot and wrist. The doctor at the urgent care center referred Plaintiff to an orthopedic specialist at OrthoCarolina, who would coordinate her care when she returned to Charlotte, North Carolina. She notified her manager about her injuries when she arrived at the airport heading home.

¶ 4 The staff of OrthoCarolina diagnosed Plaintiff with a "distal radius fracture," or, wrist fracture, and "small fracture to her fifth metatarsal" in her right foot. To

treat Plaintiff's foot, OrthoCarolina fitted her with a boot. In early July 2018, Dr. Bryan Loeffler, M.D. ("Dr. Loeffler") of OrthoCarolina became involved in the treatment of Plaintiff's wrist and performed a surgical procedure after non-operative procedures were unsuccessful. The only time Plaintiff missed work due to her injuries was on the day of surgery.

¶ 5 On 3 July 2018, Wells Fargo filed one I.C. Form 19 reporting Plaintiff's left wrist fracture and head contusion (I.C. File No. 18028218). On the same day, Wells Fargo filed a separate I.C. Form 19 reporting Plaintiff's right foot fracture (I.C. Form No. 18028219).

¶ 6 On 6 July 2018, Wells Fargo and Old Republic Insurance Company (collectively "Defendants") denied Plaintiff's claims on the ground she "cannot prove by the preponderance of the evidence that [s]he sustained a compensable injury by accident arising out of and in the course of [her] employment." On 20 August 2018, Plaintiff contested Defendants' denial of her claims under the Workers' Compensation Act by filing one I.C. Form 18, "Notice of Accident to Employer" for each respective injury. Also on 20 August 2018, Plaintiff filed for each claim number an I.C. Form 33 – Request that Claim be Assigned for Hearing, on the basis Defendants denied compensability pursuant to I.C. Form 61 dated 6 July 2018.

¶ 7 On 28 March 2019, a hearing was held before Deputy Commissioner Mary Claire Brown. The issues before Deputy Commissioner Brown included whether: (1)

Plaintiff had sustained a compensable injury by accident on 20 June 2018 arising out of and in the course and scope of her employment; (2) Plaintiff had sustained a compensable injury by accident on 21 June 2018 arising out of and in the course of her employment; and (3) Plaintiff is entitled to any compensation pursuant to the North Carolina Workers' Compensation Act. The two claims were consolidated for purposes of the hearing. Plaintiff was the only witness to testify at the hearing. Dr. Kenneth G. Reardon, P.A. and Dr. Loeffler of OrthoCarolina were deposed following the hearing.

¶ 8 On 24 October 2019, Deputy Commissioner Brown issued her opinion and award denying Plaintiff's claim for workers' compensation benefits on the basis Plaintiff did not sustain a compensable injury by "accident" under N.C. Gen. Stat. § 97-2(6). On 24 October 2019, Plaintiff gave notice of appeal from Deputy Commissioner Brown's opinion and award.

¶ 9 On 11 March 2020, the Commission heard oral arguments from the parties. The issues before the Commission were the same as those presented to Deputy Commissioner Brown. On 12 April 2021, the Commission entered its Opinion and Award, which affirmed Deputy Commissioner Brown's opinion and award. Plaintiff timely gave notice of appeal from the Opinion and Award to this Court.

II. Jurisdiction

¶ 10 This Court has jurisdiction to address Plaintiff's appeal from the Opinion and

Award of the North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 97-86 (2019).

III. Issue

¶ 11 The sole issue before this Court is whether the Commission erred in concluding Plaintiff did not sustain a compensable injury by accident arising out of and in the course of her employment.

IV. Standard of Review

¶ 12 This Court's review of an opinion and award of the Commission is limited to determining "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). Where the Commission's findings of fact are not challenged, the findings are rendered binding on appeal. *Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007). Further, the Commission's factual findings "are conclusive on appeal if supported by any competent evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). This "[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965) (citation omitted).

V. Analysis

¶ 13 On appeal, Plaintiff argues the Commission misapprehended the law when it concluded Plaintiff's injury was not the result of an accident. As such, she maintains this Court should remand the matter to the Commission for it to make additional findings of fact under the correct legal standards. For the reasons set forth below, we disagree.

A. Preservation of Issue

¶ 14 As an initial matter, we consider Defendants' contention that Plaintiff waived and abandoned her argument that the Commission erred by requiring her to provide proof of "environmental abnormalities" because this "theory of the case on appeal is completely different from her position below, and the arguments she present[ed] to this Court were never presented to the Commission."

¶ 15 Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure governs the preservation of issues during a trial. Rule 10(a)(1) provides in pertinent part:

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1).

¶ 16 Rule 10(a)(1) does not explicitly address how a party is to preserve his or her arguments with respect to a trial court's written findings of fact or conclusions of law

when the trial court enters its order subsequent to a hearing. However, as this Court explained in *In re B.R.W.*, "[a]n *appeal* is the procedure for 'objecting' to the trial court's findings of fact and conclusions of law," and a party is not required to object at trial to preserve his or her arguments with respect to the findings and conclusions made by the court. *In re B.R.W.*, 2021-NCCOA-343, ¶ 40 (emphasis added).

¶ 17 Since the Commission is the sole judge of the credibility of the witnesses and the weight to be given to evidence, similar to that given a trial judge before a juvenile proceeding, this reasoning is similarly applicable to cases before the Industrial Commission. *See Anderson*, 265 N.C. at 433–34, 144 S.E.2d at 274. Although Plaintiff did not raise this argument at the hearing before the Commission, she properly appealed from the Commission's Opinion and Award and presented the issue, preserving her arguments as to any factual findings and conclusions of law. *See In re B.R.W.*, 2021-NCCOA-343, ¶ 40. Thus, we consider Plaintiff's arguments on the merits.

B. The Industrial Commission's Conclusions regarding Unusual Conditions

¶ 18 In her first argument, Plaintiff contends "[t]he Industrial Commission misapprehended the law by requiring something 'unusual about the hotel room, the floor, or how Plaintiff stood up'" to conclude the rolling of her foot was an "accident" under N.C. Gen. Stat. § 97-2(6) and N.C. Gen. Stat. § 97-52. Defendants argue the

Commission correctly concluded as a matter of law that Plaintiff did not suffer a compensable "accident" within the meaning of N.C. Gen. Stat. § 97-2(6) because Plaintiff cannot prove her injuries were a result of an accident or that the injuries arose out of her employment. For the following reasons, we are unpersuaded by Plaintiff's argument.

¶ 19 The Commission made the following pertinent findings of fact:

> 4. When Plaintiff stood up from the couch, she testified that she "rolled" her right foot. On re-direct examination, Plaintiff's counsel asked her to elaborate, asking "Did you misstep? Did you slip?" Plaintiff testified, "[f]rom my best recollection, when I stood up it just—it rolled. I don't know if I had landed on it wrong, but it just twisted a little bit."
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> 5. Plaintiff gave a recorded statement to Defendant-Carrier on 3 July 2018, in which she described her injury in similar terms. Plaintiff stated that she "got up from the couch and rolled" her right foot, at which time it started "throbbing and burning." Plaintiff was not asked, but also did not state that she fell or slipped when she injured her foot. Likewise, in her answers to Defendants' First Set of Interrogatories, Plaintiff stated she "rolled [her] foot getting up from the couch" in her hotel room.
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> 6. Plaintiff testified that she went to bed shortly after injuring her foot. She awakened at approximately 6:30 am on 21 June 2018 and got out of bed on her way to shower and get ready for work. She testified she forgot about injuring her right foot the night before. As she stood up and placed her right foot down, Plaintiff felt pain and lost her balance, falling to the floor. She injured her left wrist and hit her

> head as a result of the fall. Plaintiff testified she would not have fallen the morning of 21 June 2018, if she had not previously injured her foot the night before.
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> 14. Based on a preponderance of the evidence, the Full Commission finds that although Plaintiff indeed injured her right foot on 20 June 2018, there were no unusual conditions or unforeseen circumstances likely to result in unexpected consequences that existed at the time when Plaintiff stood up from the couch. There is no evidence that there was an interruption of Plaintiff's routine or any unusual condition that caused Plaintiff to stand up in a manner that differed from how she normally did so, thereby causing her to roll her right foot. Further, the Full Commission finds that Plaintiff's right foot injury was not related to a slip or a fall.
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> 15. Based on a preponderance of the evidence, the Full Commission finds that Plaintiff's 21 June 2018 fall was solely the consequence of the unrelated 20 June 2018 injury to her right foot. As such, the Full Commission further finds the injuries to Plaintiff's left wrist was unrelated to any risk or hazard incident to Plaintiff's employment duties and did not arise out of her employment.

¶ 20 The Commission's conclusions of law pertinent to Plaintiff's contention state:

> 6. Plaintiff's injury on 20 June 2018 occurred when she rolled her foot after standing up. The incident happened in a hotel room while Plaintiff was travelling for work; however, there was no evidence there was anything unusual about the hotel room, the floor, or how Plaintiff stood up, and no evidence of an unusual or unforeseen event or circumstance

> that caused Plaintiff to roll her foot. As such, the Full Commission concludes that there was no separate unlooked for or untoward event preceding and causing Plaintiff's 20 June 2018 right foot injury, and Plaintiff did not sustain a compensable injury by "accident." *See, e.g., Gra*y, 201 N.C. App. at 529, 692 S.E.2d at 176; *Evans v. Wilora Lake Healthcare*, 180 N.C. App. 337, 339–41, 637 S.E.2d 194, 196 (2006). N.C. Gen. Stat. § 97-2(6).
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> 7. For injuries which are the result of idiopathic conditions, i.e., due to the mental or physical condition of the particular employee, the injury must arise out of both the idiopathic condition of the employee and the hazards incident to the employment in order for the employer to be liable. *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 92–93, 63 S.E.2d 173, 176 (1951). Generally, the effects of such an idiopathic fall are compensable "if the employment places the employee in a position increasing the dangerous effects of a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960).
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> 8. The Full Commission concludes that because no risk or hazard incident to Plaintiff's employment duties combined with her idiopathic condition (i.e. right foot injury) to contribute to the injuries she sustained to her wrist when she fell on the morning of 21 June 2018, this incident did not arise out of her employment and is therefore not compensable. *Allred*, 253 N.C. at 557, 117 S.E.2d at 479; *Vause*, 233 N.C. 92–93, 63 S.E.2d 173, 176.

¶ 21 "For an injury to be compensable under the Worker[s'] Compensation Act, the claimant must prove 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." *Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489, 490, 269 S.E.2d 667, 669 (1980) (citations omitted). Our Supreme Court has defined the term "accident" as "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 726, 153 S.E. 266, 268 (1930) (citations omitted). "The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E.2d 360, 363 (1980).

¶ 22 Plaintiff relies on our Supreme Court's case of *Taylor v. Twin City Club* to argue the Commission erred by concluding her injuries were non-accidental. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E.2d 865 (1963). Plaintiff quotes the *Taylor* Court in stating: "[t]o prove an accident in industrial injury cases[,] it is not essential that there be evidence of any unusual or untoward condition or occurrence causing a fall which produces injury. The fall itself is the unusual, unforeseen occurrence which is the accident." *Id.* at 437, 132 S.E.2d at 876 (citation omitted).

¶ 23 However, Plaintiff fails to mention in her brief the Court in *Taylor* went on to discuss when injuries sustained by falls are compensable and when they are non-compensable:

> [i]f a fall and the resultant injury arise solely from an idiopathic cause, or a cause independent of the employment, the injury is not compensable. *Vause v. Equipment Co., supra.* But the effects of a fall are compensable if the fall results from an idiopathic cause *and* the employment has placed the employee in a position which increases the dangerous effects of the fall." *Allred v. Allred Gardner, Inc., supra*; *Rewis v. Insurance Co., supra.*

Id. at 439, 132 S.E.2d at 868 (emphasis added).

¶ 24 Here, Plaintiff does not contest any of the Commission's findings of fact; thus, the findings are conclusive on appeal. *See Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. at 501, 646 S.E.2d at 607. We next consider the challenged conclusions of law. The Commission concluded in conclusion of law 8 Plaintiff's injuries were the result of her idiopathic condition associated with her right foot. This conclusion is supported by findings of fact 4, 5, 6, 14, and 15. The Commission correctly stated in conclusion of law 7 the case law regarding when an injury caused by an idiopathic condition may be compensable. *See Allred*, 253 N.C. at 557, 117 S.E.2d at 479; *Taylor*, 260 N.C. at 439, 132 S.E.2d at 868. The Commission then properly applied the law regarding idiopathic conditions in conclusion of law 8 and determined there were no risks or hazards incident to Plaintiff's employment which contributed to her injury. Thus, the Commission concluded Plaintiff's injuries were solely caused by her idiopathic conditions, and therefore, non-compensable. *See Vause*, 233 N.C. at 92–93, 63 S.E.2d at 176. Conclusion of law 8 is supported by

findings of fact 14 and 15. Contrary to Plaintiff's assertion, the Commission did not improperly require proof of abnormalities in the work environment; rather, it correctly considered whether "the accident and the resultant injur[ies] ar[o]se out of both [Plaintiff's] idiopathic condition . . . and hazards incident to [her] employment." *See id.* at 92–93, 63 S.E.2d at 176. Therefore, Plaintiff's argument is without merit.

C. Industrial Commission's Standard for Determining an Accident

¶ 25 In her second argument, Plaintiff asserts the Commission erroneously applied a three-step analysis in determining compensability rather than the correct two-step analysis approach. According to Plaintiff, under the two-step approach, "(1) the accident must precede (2) the injury." She argues the Commission applied a three-step approach by looking to existing environmental abnormalities at the time of the injury. Therefore, she maintains this Court should reverse and remand this case to the Commission for additional findings consistent with *Love v. Town of Lumberton*, 215 N.C. 28, 1 S.E.2d 121 (1939) and *Smith v. Cabarrus Creamery Co.*, 217 N.C. 468, 8 S.E.2d 331 (1940).

¶ 26 We find the cases of *Love* and *Smith* readily distinguishable from the instant case. In *Love*, the plaintiff was pouring lime into a feeder from a bucket when lime got into his eyes and face. *Love*, 215 N.C. at 30, 1 S.E.2d at 122. Our Supreme Court affirmed the Commission's conclusion that the plaintiff sustained an injury by accident arising out of and in the course of his regular employment. *Id.* at 31, 1 S.E.2d

at 123. *Love* is not a case considering an employee's idiopathic condition; rather, the plaintiff was injured in the performance of his duties when a hazard of his employment contributed to his accident.

¶ 27 In *Smith,* the plaintiff was an employee of a creamery and was delivering milk in the course of his regular work duties. *Smith*, 217 N.C. at 471, 8 S.E.2d at 233. He suffered a hernia while lifting boxes of milk. *Id.* at 471, 8 S.E.2d at 233. The Commission awarded the employee benefits on the ground he suffered an "injury by accident, arising out of and in the course of employment." *Id.* at 471, 8 S.E.2d 232–33. Our Supreme Court affirmed the Commission's award, concluding the injury was an accident because it was the result of "fortuitous circumstances." *Id.* at 473, 8 S.E.2d at 234. The Court distinguished cases relied upon by the defendant-employer by explaining that in those cases, there was "an absence of unusualness or unexpectedness in both the external facts and the internal conditions." *Id.* at 472, 8 S.E.2d at 233. As in *Love*, the employee in *Smith* was injured while performing his duties when a hazard of his employment—lifting heavy boxes—contributed to his accident.

¶ *28* *Love*, *Smith*, and their progeny of cases do not involve injuries arising from a plaintiff's idiopathic conditions. As discussed above, the Commission did not erroneously require an additional element when it made its conclusions of law—it properly considered whether Plaintiff's employment placed her "in a position which

increase[d] the dangerous effects of the fall." *See Allred*, 253 N.C. at 557, 117 S.E.2d at 479.

VI. Conclusion

¶ 29 The Commission's findings of fact were unchallenged and binding on appeal. *See Estate of Gainey*, 184 N.C. App. at 501, 646 S.E.2d at 607. These findings of fact in turn support the Commission's conclusions of law. *See Richardson*, 362 N.C. at 660, 669 S.E.2d at 584. Accordingly, we affirm the Commission's Award and Opinion.

AFFIRMED.

Judges TYSON and GORE concur.

Report per Rule 30(e).