NO. COA13-137
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

PORTIA ALSTON,
Plaintiff

v.

North Carolina
Industrial Commission
I.C. Nos. X08915 & X11898

NC A&T STATE UNIVERSITY,
Employer-Defendant

and

AMERICAN CASUALTY COMPANY,
Carrier-Defendant

Appeal by plaintiff from opinion and award entered 3 October 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 August 2013.

The Law Offices of Kenneth M. Johnson, P.A., by Kya Johnson, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Ryan C. Zellar, for defendant-appellee NC A&T State University.

CALABRIA, Judge.

Portia Alston ("plaintiff") appeals from an opinion and award by the Full Commission of the North Carolina Industrial

Commission ("the Commission") denying benefits to plaintiff on the basis of plaintiff's 6 July 2010 alleged injury resulting from an accident occurring at NC A&T State University ("A&T" or together with American Casualty Company, collectively "defendants"). We affirm.

I. Background

Plaintiff is a fifty-nine-year-old female who has been employed by A&T as a housekeeper for approximately eighteen years. At the time of the alleged incident, plaintiff was a lead housekeeper whose duties involved general cleaning in assigned buildings, such as sweeping, mopping, and dusting.

On 6 July 2010, plaintiff was assigned to work in Hines Hall, where it appeared to plaintiff that some rooms were under construction, because there was debris and dust in parts of the building. In addition to dusting and mopping offices, plaintiff also cleaned the laboratory ("lab") for three to five minutes. Plaintiff testified that the lab had a "foul odor" and had "bottles of stuff" on the floor. After about three hours in Hines Hall, plaintiff began to feel sick, could hardly breathe, and her voice "started tapering off." Following an attempt to get some fresh air, plaintiff realized her voice was gone, her throat was hurting and she had difficulty breathing.

Plaintiff visited PrimeCare on the day of the incident and several more times. When there was no improvement after several appointments, she was referred to an ear, nose and throat ("ENT") specialist who recorded swelling and redness on plaintiff's voice box and gave her a prescription for acid reflux. After a second visit to the ENT specialist, plaintiff's voice remained unchanged.

Plaintiff then sought treatment from Dr. Catherine Rees Lintzenich ("Dr. Lintzenich"), a voice specialist. Dr. Lintzenich did not detect any damage to plaintiff's vocal chords and diagnosed her condition as a functional dysphonia. In most cases, this condition is easily remedied by working with a speech pathologist. Dr. Lintzenich referred plaintiff to David Blalock, a speech pathologist who diagnosed plaintiff with functional voice disturbance. After conducting voice exercises with Blalock, plaintiff regained her voice.

On 11 October 2010, defendants concluded that plaintiff's alleged injury was not compensable under the Act and filed a Form 61 ("Denial of Workers' Compensation Claim"). Plaintiff then filed a Form 18 ("Notice of Accident to Employer and Claim of Employee") on 8 November 2010. On 29 October 2010, plaintiff filed a Form 33, requesting a hearing. After the hearing, the

Deputy Commissioner concluded that plaintiff did not sustain an injury by accident arising out of or in the course of employment with A&T, and also that defendants did not waive the right to contest the compensability of plaintiff's claim. Plaintiff appealed to the Commission, which affirmed the Deputy Commissioner's opinion and award denying plaintiff's claim. Plaintiff appeals.

II. Standard of Review

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. This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (internal quotations and citations omitted). "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). "[F]ailure to specifically except to individual findings of fact generally precludes review of the

sufficiency of the evidence to support them." *Pittman v. Inco, Inc.*, 78 N.C. App. 134, 136, 336 S.E.2d 637, 638 (1985).

III. Waiver of Right to Contest

Plaintiff argues that the Commission erred by concluding that defendants did not waive their right to contest the compensability of plaintiff's claim based on the language of N.C. Gen. Stat. § 97-18(d). We disagree.

Pursuant to the North Carolina Workers' Compensation Act ("the Act"), when an employee has filed a "claim for compensation [and] the employer or insurer is uncertain on reasonable grounds whether the claim is compensable[,]" an employer may "initiate compensation payments without prejudice and without admitting liability." N.C. Gen. Stat. § 97-18(d) (2011). The Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein." N.C. Gen. Stat. § 97-2 (11) (2011).

If an employer makes payments pursuant to N.C. Gen. Stat. § 97-18(d), payments may continue until the employer "contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first," unless the employer receives an

extension. N.C. Gen. Stat. § 97-18(d) (2011). When an employer "does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury ... it waives the right to contest the compensability of and its liability for the claim under this Article." *Id.*; *see also Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 724, 515 S.E.2d 17, 20 (1999).

In the instant case, on 6 July 2010, while cleaning a building on A&T's campus, plaintiff lost her voice, had difficulty breathing and experienced soreness in her throat. Plaintiff immediately notified her supervisor and defendants filed a Form 19 on 22 July 2010. On 11 October 2010, defendants filed a Form 61, denying plaintiff's claim. On 29 October 2010, plaintiff filed a Form 33, requesting a hearing on her claim, alleging that the carrier's denial of her claim "was submitted beyond the 90 day notice period pursuant to NCGS 97-18." After a hearing, the Commission found, *inter alia*, that:

> Defendants had actual notice of Plaintiff's alleged injury on 6 July 2010 and filed ... Form 61 denying Plaintiff's claim on 11 October 2011. Plaintiff filed her claim on ... Form 18 on 8 November 2010, after Defendants filed their Form 61. The Full Commission finds that no sanctions of any type are applicable in this matter. Assuming, *arguendo*, that the triggering event for the commencement of the running of

> the 90-day period is not the filing of a claim, but rather Defendants having actual notice of a claim, Defendants have not waived their right to contest the compensability of Plaintiff's claim.

The portion of the Commission's finding of fact that indicates that defendants did not waive their right to contest the compensability of plaintiff's claim represents an inference drawn from other facts and is, thus, tantamount to a conclusion of law, and will be reviewed as such. *See State ex rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987).

Plaintiff argues that N.C. Gen. Stat. § 97-18(d) "is applicable here because [] defendants paid without prejudice for medical treatment initially even though they failed to file indicating they were doing so." A&T's brief concedes that it "authorized for Plaintiff to attend a one-time examination with Dr. Jeffrey [sic] Rosen of Ear, Nose & Throat Associates of Greensboro ..." and later states, "[d]efendant did not pay any compensation benefits to plaintiff until it approved a one-time evaluation with Ear, Nose & Throat Associates on 27 August 2010." Despite the statements in the parties' briefs, our review "is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other

items filed pursuant to this Rule ....” N.C.R. App. P. 9(a)(2012). The record only indicates that plaintiff’s supervisor directed her to seek treatment at PrimeCare. Subsequently, PrimeCare referred her to Dr. Rosen. There is no evidence in the record that defendants made any actual *payments* for plaintiff’s medical care. In fact, the bills from Dr. Rosen’s office in the record state that the insurance company was “not approving this visit under Worker’s Comp.” According to the bills included in the record, no workers’ compensation payments were made to Dr. Rosen.

Even assuming, *arguendo*, that defendants did make medical payments on plaintiff’s behalf, N.C. Gen. Stat. § 97-18(d) governs situations where an employer initiates *compensation* payments. N.C. Gen. Stat. § 97-18(d) (2011). The Act defines compensation and medical compensation separately, thus distinguishing between the two types of payments. *See* N.C. Gen. Stat. § 97-2 (11) & (19) (2011). This Court has recognized that

> the legislature always has provided for, and continues to provide for, two distinct components of an award under the Workers’ Compensation Act: (1) payment for the cost of medical care, now denominated “medical compensation,” which consists of payment of the employee’s medical expenses incurred as a result of a job-related injury; and (2) general “compensation” for financial loss other than medical expenses, which includes

> payment to compensate for an employee's lost earning capacity and payment of funeral expenses.

Cash v. Lincare Holdings, 181 N.C. App. 259, 264, 639 S.E.2d 9, 14 (2007) (citation omitted); *see also Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 453, 46 S.E.2d 109, 112-13 (1948). Since the language of 97-18(d) references compensation payments, and does not include medical compensation payments, we presume that the legislature did not intend for medical compensation payments to fall within the meaning of 97-18(d). *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 135, 221 S.E.2d 297, 305 (1976) ("If the statute itself contains a definition of a word used therein, that definition controls and courts must construe the statute as if the definition had been used in lieu of the word.").

In the instant case, defendants admit authorizing a one-time *medical* examination in their brief. There is no evidence that defendants made any compensation payments to plaintiff. Since 97-18(d) only applies when an employer initiates *compensation* payments, and defendants did not make compensation payments, 97-18(d) does not apply. Therefore, the Commission did not err by concluding that defendants did not waive their right

to contest the compensability of plaintiff's claim pursuant to N.C. Gen. Stat. § 97-18(d).

IV. Compensability of Injury

Plaintiff also argues that the Commission erred by concluding that she failed to prove she sustained an injury by accident arising out of and in the course of her employment. We disagree.

Under the Workers' Compensation Act, a plaintiff is entitled to compensation for an injury "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)(internal quotation and citation omitted); N.C. Gen. Stat. § 97-2(6) (2011). An accident involves the "interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Poe v. Acme Bldrs.*, 69 N.C. App. 147, 149, 316 S.E.2d. 338, 340 (1984) (citations omitted). "If an employee is injured while carrying on the employee's usual tasks in the usual way the injury does not arise by accident." *Gray*, 203 N.C. App. at 525, 692 S.E.2d at 174 (brackets and citations omitted). "The plaintiff bears the burden of proving both elements of the claim." *Id.*

In the instant case, the Commission concluded that "[p]laintiff failed to prove that she sustained an injury by accident on 6 July 2010 as the result of unusual circumstances or conditions likely to result in unexpected consequences" and thus she "failed to prove that ... she sustained a compensable injury by accident arising out of or in the course of her employment ...." The Commission did not make any conclusions regarding whether there was a causal relationship between plaintiff's injury and her employment at A&T. Therefore, on appeal, we will only determine whether plaintiff met her burden of proving that she sustained an injury by accident.

Plaintiff was employed by A&T for approximately eighteen years. She was initially hired as a housekeeper, and was performing housekeeping duties on 6 July 2010, the date of the alleged accident. Plaintiff claimed that she sustained an injury when she was cleaning and "was exposed to chemicals from a laboratory ... and to dust from construction" resulting in "injuries to her voice box and throat." After being examined by several doctors, plaintiff was diagnosed with functional dysphonia and sent to a speech pathologist where plaintiff performed voice exercises. After the exercises, plaintiff regained her normal voice.

Plaintiff contends that the Commission erred by concluding that her injury was not the result of unusual circumstances or conditions because the day of the alleged accident was plaintiff's first day working in that particular building, and therefore it was an "unusual circumstance" for her to be exposed to the construction and "tubs of glue" that were present in the building. Plaintiff specifically challenges the portion of finding of fact 5, where the Commission found that "Plaintiff testified that nothing unusual occurred that day." We agree that nothing in plaintiff's testimony indicated that "nothing unusual" occurred on 6 July 2010.

However, the Commission also made the following unchallenged findings of fact:

> 5. Plaintiff testified that the cleaning duties she performed in Hines Hall on 6 July 2010 were duties that she had performed on many occasions during her 18-year tenure with Defendant-Employer ... Plaintiff did not recall seeing any unopened bottles of chemicals in the laboratory, and Plaintiff was in the laboratory for less than five minutes to remove the trash. There were no chemicals in the office area of Hines Hall.
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> . . .
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> 7. ... Mr. Washington testified that on 6 July 2010 he detected no foul smell on the second floor or in the laboratory, that the condition of the second floor was normal with nothing unusual about it, and that he

> did not experience any problems on that date. Mr. Washington also testified that the only chemicals that are in the lab rooms in Hines Hall are five-gallon drums of glue that are sealed.
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> 8. Mr. Charlie Williams, a supervisor of Plaintiff ... testified that on the date in question he looked in the laboratory, which appeared to be in its normal condition, and that he observed nothing unusual. Mr. Williams was not aware of any other employees who had lost their voice due to exposure to dust in Hines Hall.

These unchallenged findings indicate that plaintiff did not encounter unusual circumstances or conditions in Hines Hall on the morning of 6 July 2010. Plaintiff could not identify the chemicals that she claimed caused her injury. The only identified "chemicals" were tubs of glue, which were sealed. Furthermore, despite plaintiff's allegations, she failed to offer any evidence that construction occurred in the building. Even if the building had been under construction, plaintiff had previous experience cleaning buildings that were under construction. Therefore, plaintiff's exposure to a building that had been under construction would not be an unusual circumstance. *See Trudell v. Seven Lakes Heating & Air Conditioning Co.*, 55 N.C. App. 89, 90-91, 284 S.E.2d 538, 540 (1981) (holding no accident occurred where the plaintiff was injured after performing his new job for two weeks, but had

performed similar work for two-and-a-half years prior to his employment with the defendant).

Since the Commission's findings of fact support its conclusion, the Commission did not err in concluding that plaintiff failed to prove she sustained an injury by accident arising out of and in the course of her employment.

IV. Conclusion

The Commission did not err by concluding that defendants did not waive their right to contest the compensability of plaintiff's claim pursuant to N.C. Gen. Stat. § 97-18, because N.C. Gen. Stat. § 97-18(d) only applies when an employer initiates compensation payments, and there was no evidence that defendants made compensation payments. The Commission's findings of fact support its conclusions and therefore, the Commission did not err in concluding that plaintiff failed to prove she sustained an injury by accident arising out of and in the course of her employment.

Affirmed.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).