NO. COA13-378
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

DAVID A. HOLLIFIELD,
Employee, Plaintiff,

v. North Carolina Industrial Commission
I.C. No. W68730

COMMUNICATIONS INSTALLATIONS SPECIALISTS,
Employer,

CHARTIS INSURANCE,
Carrier,
Defendants.

Appeal by plaintiff and cross-appeal by defendants from an order of the Full Commission filed 3 December 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 October 2013.

Law Office of Gary A. Dodd, by Gary A. Dodd, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by John L. Kubis Jr., for defendants-appellees/cross-appellants.

MARTIN, Chief Judge.

David A. Hollifield, plaintiff, appeals and defendants,

Communications Installations Specialists ("Specialists") and Chartis Insurance Company ("Chartis"), cross-appeal from an order of the Full Commission of the Industrial Commission denying plaintiff's motion to reconsider the Full Commission's opinion and award filed on 3 October 2012.

The evidence at the hearing, before the deputy commissioner, tended to show that plaintiff was 62 years old and had worked in the construction industry for approximately 40 years with several construction companies.

Plaintiff worked with Specialists, a now insolvent and defunct Georgia-based company, on a project in Tennessee. When that project was completed he returned to North Carolina and soon after began working with a different construction company. On or about 24 October 2009 Specialists telephoned plaintiff, while he was working in North Carolina, about a job in Knoxville, Tennessee. During this conversation Specialists agreed to pay plaintiff $18.00 per hour and he accepted the job. Based on this agreement, plaintiff travelled to Knoxville on 2 November 2009.

On 7 November 2009 at the construction site in Tennessee, plaintiff tripped when getting off a backhoe and fell, landing on his head. Plaintiff was transported to the emergency room at Blount Memorial Hospital where he underwent a CT scan, and he

was told to seek medical treatment when he returned to North Carolina. The next day he returned to North Carolina, but went back to Knoxville on 9 November 2009 to supervise the other workers. He was terminated by Specialists on 14 November 2009 because he could not perform any physical work duties.

As a result of plaintiff's fall, he suffered injuries to his head, back, neck, and ribs. His physician, Dr. Sutaria, who treated plaintiff primarily for health conditions unrelated to his fall, could not establish the extent of the injuries suffered in the fall nor causally relate his disability to his work injury.

Based on these facts, the Commission concluded that it had jurisdiction over the plaintiff's claims, that he was not disabled, but he was entitled to past and future medical expenses incurred as a result of his injury. Plaintiff appeals and defendants cross-appeal.

The issues before the Court are whether (i) the Commission has subject matter jurisdiction over this dispute; (ii) plaintiff is entitled to benefits under N.C.G.S. § 97-31(23); and (iii) the Commission should receive additional evidence.

Generally, when we review an opinion and award from the Industrial Commission we limit our review to whether "any

competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). This Court is not permitted to reweigh the evidence and evidence tending to support the plaintiff's claim must be viewed in the light most favorable to the plaintiff. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

However, there are at least two exceptions to the general standard of review. First, "the Commission's findings of jurisdictional facts are *not* conclusive on appeal, even if supported by competent evidence." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903–04 (2000) (citing *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)). Thus, the appellate court has a duty to consider all of the evidence and find its own jurisdictional facts. *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

The second exception is when a court reviews the Commission's discretionary powers articulated in N.C.G.S. § 97-85, which provides that the Commission may "if good ground be shown therefor, reconsider the evidence, receive further evidence, [and] rehear the parties or their representatives."

N.C. Gen. Stat. § 97-85 (2011), *amended by* 2013 N.C. Sess. Laws 404, 404, ch. 163, § 1. Because it is for the Commission to decide if good ground is shown "the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979).

Specialists and Chartis contend the Commission lacks subject matter jurisdiction because the "last act" creating the employment contract in question occurred in Tennessee, not North Carolina. Plaintiff argues that we should not consider defendants' argument because they failed to properly appeal the question of subject matter jurisdiction to the Full Commission. We disagree with both of these arguments.

A party may not consent to subject matter jurisdiction that is not authorized by law. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). So a party may raise the issue of subject matter jurisdiction at *any* stage of a proceeding. *Id.* In fact, an argument relating to subject matter jurisdiction may be argued for the first time before the North Carolina Supreme Court. *Id.*; *see, e.g.*, *Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002). Thus, we should consider defendants' subject matter jurisdiction argument.

When an employee's accident takes place in, or an employee receives payment from, another state, the Commission's jurisdiction is limited to the following situations: "(i) . . . the contract of employment was made in this State, (ii) . . . the employer's principal place of business is in this State, or (iii) . . . the employee's principal place of employment is within this State." N.C. Gen. Stat. § 97-36 (2011).

The parties agree that Specialists is a Georgia corporation and that plaintiff worked in Tennessee. For the Commission to have jurisdiction, the employment contract must have been entered into in this State.

Our courts apply the "last act" test to determine where an employment contract is made. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998); *see, e.g.*, *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 226–27, 176 S.E.2d 784, 787 (1970). To confer jurisdiction, this test requires that the final act necessary to create a binding obligation, usually acceptance, occur in this State. *Thomas v. Overland Exp., Inc.*, 101 N.C. App. 90, 96–97, 398 S.E.2d 921, 925–26 (1990), *disc. review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991).

We believe our decision in *Murray* controls the disposition of this case. In *Murray*, the plaintiff was employed by the

defendant and upon the termination of that employment he returned to North Carolina. *Murray*, 131 N.C. App. at 295, 506 S.E.2d at 725. Two and one-half months later the defendant called the plaintiff, at his North Carolina residence, and offered him a position in Mississippi. *Id.* The plaintiff turned down the initial offer, but the defendant called back and offered to pay him more money for the same job. *Id.* The plaintiff accepted the offer. *Id.* This Court held that the plaintiff's acceptance, at his home in North Carolina, was the last act creating a binding obligation between the parties and that the paperwork the plaintiff completed at the job site was a "consummation of the employment relationship [and not] the 'last act' required to make it a binding obligation." Id. at 297, 506 S.E.2d at 726-27.

Defendants attempt to distinguish *Murray* by arguing that the plaintiff, in *Murray*, was unemployed at the time he accepted the offer of employment; while plaintiff, in this case, was employed at the time of the offer of employment, which prevented him from assenting to the terms of the offer. For this proposition defendants rely on *Washington v. Traffic Markings, Inc.*, 182 N.C. App. 691, 698, 643 S.E.2d 44, 48 (2007), which relies on *Murray* in reaching its ultimate conclusion. Therefore, we find defendants' distinction unconvincing.

In this case, Specialists called plaintiff, in North Carolina, and offered him a job in Tennessee. Specialists agreed to pay plaintiff $18.00 per hour and plaintiff accepted that offer. Plaintiff's actions of reporting for work in Tennessee, and completing the employment form in Tennessee were simply the fulfillment of their agreement. *See Murray*, 131 N.C. App. at 297, 506 S.E.2d at 726–27. Therefore, the Commission has jurisdiction because the last act giving rise to the binding employment obligation was plaintiff's acceptance of Specialists' offer in North Carolina.

In his appeal, plaintiff argues the Commission erred by denying plaintiff weekly compensation benefits under N.C.G.S. § 97-31(23) because the Commission should have presumed a disability existed based on the fact that plaintiff was injured. While we find this argument convincing, we must affirm the Commission's award because plaintiff failed to establish the extent of his back injury.

Generally, to recover under the Workers' Compensation Act an employee must establish his injury caused his disability, unless his injury "is included in the schedule of injuries" in N.C.G.S. § 97-31. *Hollman v. City of Raleigh*, 273 N.C. 240, 250, 159 S.E.2d 874, 881 (1968) (internal quotation marks omitted). If the injury is listed in the schedule of injuries

then the employee does not have to "establish a loss of wage-earning capacity because disability is presumed from the fact of the injury itself." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11, 562 S.E.2d 434, 442 (2002) *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003).

In this case, the Commission found that plaintiff suffered injuries to his head, back, neck, and ribs in the course of his employment. Of these injuries, back injuries are listed in N.C.G.S. § 97-31. However, to determine the amount of compensation that should be awarded under section 97-31(23) the Commission must find that an employee has lost total use of his back or the percentage of the use of his back that he has lost. The Commission found that Dr. Sutaria was not able to establish the extent of plaintiff's disability. While plaintiff is entitled to a presumption of disability due to his injury, he failed to establish the extent of his injury. As a result, plaintiff failed to establish the amount of compensation he is entitled to under section 97-31(23) because the Commission could not determine if plaintiff suffered a total or partial loss of the use of his back.

Finally, plaintiff argues that the Commission erred in concluding that there is not good grounds for the Commission to reconsider the evidence, receive further evidence, or rehear the

parties or their representatives. We find this argument without merit.

Plaintiff's argument is that the Commission should have found good grounds to receive additional evidence because there was newly discovered evidence. However, we review the Commission's decision not to receive additional evidence under the abuse of discretion standard. *See Lynch*, 41 N.C. App. at 131, 254 S.E.2d at 238. The Commission abuses its discretion "upon a showing that its ruling is 'manifestly unsupported by reason' or 'so arbitrary that it could not have been the result of a reasoned decision.'" *Spears v. Betsy Johnson Mem'l Hosp.*, 210 N.C. App. 716, 721, 708 S.E.2d 315, 320 (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. review denied*, __ N.C. __, 710 S.E.2d 20, *reh'g denied*, __ N.C. __, 717 S.E.2d 572 (2011). Furthermore, it is not the purpose of this Court "to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Plaintiff fails to argue that the Commission abused its discretion in any way in reaching its conclusion. We affirm the Commission's decision not to receive additional evidence because there is no evidence that the Commission's refusal to take additional evidence was not the product of a reasoned decision.

Affirmed.

Judges STEELMAN and DILLON concur.

Report per Rule 30(e).