IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-86

Filed: 20 September 2016

North Carolina Industrial Commission, I.C. No. 13-003239

TAMMY YARBOROUGH, Employee, Plaintiff,

v.

DUKE UNIVERSITY, Employer, SELF-INSURED (DUKE UNIVERSITY WORKERS' COMPENSATION ADMINISTRATION, Administrator), Defendant.

Appeal by Plaintiff from opinion and award entered 6 October 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 August 2016.

Perry, Perry & Perry, P.A., by Robert T. Perry, for Plaintiff.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Jennifer Morris Jones, for Defendant.

STEPHENS, Judge.

In this appeal from an opinion and award of the North Carolina Industrial Commission ("the Full Commission"), Plaintiff-employee Tammy Yarborough challenges the denial of worker's compensation benefits based upon the determination that she failed to establish that she suffered a compensable injury during her employment with Defendant-employer Duke University. Applying our

well-established standard of review in worker's compensation appeals, we must affirm.

Factual and Procedural Background

Yarborough began working for Duke University in 2010 as a cashier in its cafeteria. In December 2011, Yarborough became a "Patient Food Service Tech," a position which required her to transport meals to patients using a food cart which Yarborough had to push through swinging double doors in certain locations. On the morning of 30 August 2013, after serving breakfast, Yarborough delivered a food cart to an elevator and then, empty-handed, passed through the double swinging doors. According to Yarborough's testimony, one of the doors swung back more quickly than she expected, striking her left shoulder and causing instant pain. Yarborough immediately realized that she could not move her left arm, notified her supervisor of the incident, and filed a report.

Yarborough sought medical attention several hours later at Duke's Employee Occupational Health and Wellness ("EOHW") clinic. Based on the evidence from this examination, the Full Commission made the following pertinent findings of fact:

> 10. At this first visit to the EOHW clinic, [Yarborough] completed an Initial Health and Safety Review for Shoulder Pain form. This form notes [Yarborough's] symptoms began when she was "getting a cart" and that they developed "gradually." [Yarborough] admitted she completed the form and signed it, verifying its accuracy.

> 11. Based on the stipulated medical record from this initial visit to the EOHW, nurse practitioner (NP) Jeffrey McNeil noted that [Yarborough] reported that "[s]he began to push her cart through the door, when the door closed and bumped her left deltoid." According to [Yarborough's] reported history, she did not experience any unusual pain at that time, but experienced severe pain in the left shoulder about 30 seconds later when reaching her arm out to hug a co-worker. At this visit, [Yarborough] reported no previous injuries to her left shoulder, upper back, or chest.
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> 12. NP McNeil made detailed observations based upon his findings on exam. Among these observations and findings were that [Yarborough] was reportedly unable to raise her affected arm and shoulder or move it when requested. He noted that [Yarborough's] left arm exhibited no edema, redness, sign of bruising, deformity, winging of the scapula, or other abnormal appearance. [Yarborough] was tender to palpation through the musculature of the upper back and over the top of the shoulder joint, but with no obvious sign of bruising or swelling. X[]rays showed no sign of any fractures. [Yarborough] was assessed with left shoulder pain, prescribed medication, referred for physical therapy, and issued temporary work restrictions to avoid lifting over fifteen pounds to shoulder height and no lifting over shoulder height.

Yarborough performed light-duty work until 1 October 2013, when the Full Commission denied her worker's compensation claim. "A progress note from EOHW dated 14 October 2013 indicated that [Yarborough] was demonstrating normal shoulder range of motion and that she had a note from her personal doctor advising that she could return to full[-]duty work with no restrictions."

On 12 December 2013, Yarborough "underwent an MRI, which showed a full thickness rotator cuff tear . . . . [and she] was referred to Dr. Lee Diehl[, a board-

certified orthopedic surgeon], who operated on her shoulder on 26 February 2014." "Dr. Diehl testified that 'having no contradictory evidence,' it was more likely than not that [Yarborough's] rotator cuff tear was directly related to the door closing incident she described to him." He further noted that Yarborough "denied any prior shoulder problems." However, Yarborough

> testified [that] she was involved in an automobile accident in June 2009, and another in May 2013. Medical records related to the 2009 car wreck note that [Yarborough] complained of "neck, shoulder, thoracic and lumbar pain." These medical records make multiple other references to complaints related to the left shoulder, noting, for instance, [Yarborough] experienced cramps specifically in her left arm and shoulder blade during physical therapy. . . . [Yarborough] was seen at Duke Medicine one day after a 12 May 2013 rear-end collision . . . [and] reported stiffness in her left upper back and left arm.

In addition to Dr. Diehl's evidence, testimony was also received from Dr. Carol Epling who was accepted without objection as an expert in preventive medicine with a specialty in occupational and environmental medicine. "Based upon the delayed onset of pain and the lack of objective signs of trauma five hours after the alleged incident, Dr. Epling testified to a reasonable degree of medical certainty that the alleged event of a door bumping [Yarborough's] left deltoid was not a likely cause for her rotator cuff tear."

In addition,

> . . . Michael Whitley was tendered as an expert biomedical engineer with expertise in biomechanics and accident

reconstruction without objection. Mr. Whitley worked with and under Mike Sutton, who was tendered as an expert professional engineer with expertise in accident reconstruction and mechanical engineering, without objection. Together Mr. Whitley and Mr. Sutton produced a report detailing their findings and professional opinions in this matter.

. . . .

22. In Mr. Whitley's expert opinion as a biomedical engineer, he did not believe that [Yarborough's] rotator cuff could have been injured in the manner alleged by [Yarborough]. Mr. Whitley explained that in contrast to [Yarborough's] report of being struck by the door on her whole left arm while walking out of the . . . room with her arm by her side, rotator cuff injuries are generally recognized as being caused by "chronic overuse or an acute impact to the shoulder while the arm is in a muscularly-stressed condition." When the arm is in a relaxed position, there is no force being applied to the shoulder joint. However, when the arm is energized or lifted from the body, a sudden impact to the arm [or] shoulder can cause an acute tear—but even then the mechanism of injury is usually a significant fall or automobile accident.

23. According to the accident reconstruction report, and as explained by Mr. Sutton and Mr. Whitley, a force of only eight pounds, nine ounces was necessary to open one of the double doors in question or to stop one of them from closing.

24. Mr. Whitley testified that none of the mechanisms of injury that typically lead to a rotator cuff tear were present in [Yarborough's] alleged incident, which involved "a minor impact between the outside of her relaxed arm and a slow-swinging door—or, a swinging door that can be stopped with a force of less than nine pounds."

Following a hearing on 26 June 2014, the deputy commissioner entered an opinion and award on 4 March 2015 finding Yarborough's injury compensable and awarding Yarborough temporary total disability benefits, temporary partial disability benefits, medical expenses, and attorney fees. Duke appealed to the Full Commission, which entered its own opinion and award on 6 October 2015, denying any award of benefits to Yarborough:[1]

> 25. Based on [Yarborough's] varied accounts of how the alleged incident occurred and when pain began, along with the improbability that the door could have made contact with [Yarborough's] arm as she alleges as she walked through, the Full Commission finds that [Yarborough] has failed to demonstrate that she sustained an injury by accident on 30 August 2013.
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> 26. The Full Commission places less weight on the opinions of Dr. Diehl. The Full Commission places greater weight on the opinions of Dr. Epling, Mr. Whitley, and Mr. Sutton, and consequently finds that [Yarborough] has failed to prove that her left rotator cuff tear was causally related to her alleged 30 August 2013 incident.

From the opinion and order of the Full Commission, Yarborough appeals.

Discussion

[1] Although labeled as findings of fact in the Full Commission's opinion and award, both whether an employee has suffered a compensable injury—here an injury by accident—and whether a subsequent medical condition is causally related to a compensable injury are legal conclusions. *See Barnette v. Lowe's Home Ctrs., Inc.*, __ N.C. App. __, __, 785 S.E.2d 161, 165 (2016). "Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review." *Id.* (citing *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("[C]lassification of an item within [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.")).

We begin by addressing the proper standard of review in this appeal. Citing *Spears v. Betsy Johnson Mem'l Hosp.*, 210 N.C. App. 716, 708 S.E.2d 315, *disc. review denied*, 365 N.C. 205, 710 S.E.2d 20, *reh'ing denied*, 365 N.C. 332, 717 S.E.2d 572 (2011), Yarborough argues that the Full Commission "abused its discretion" by improperly determining that (1) she did not suffer a compensable injury on 30 August 2013 and (2) her shoulder condition was not causally related to the 30 August 2013 incident.[2] Yarborough misperceives both *Spears* and our long-standing case law regarding appeals from decisions of the Full Commission. First, the portion of *Spears* quoted by Yarborough addressed the proper standard of appellate review of the Full Commission's denial of a motion to set aside a prior judgment procured by fraud on the court. *See id.* at 721, 708 S.E.2d at 319 ("The denial of a motion to set aside a prior judgment procured by 'fraud on the court' is reviewed for abuse of discretion." (citation omitted)). Here, there was no motion to set aside the Full Commission's opinion and award. Instead, Yarborough challenges the Full Commission's legal conclusions that she failed to establish that she suffered a compensable injury or that her subsequent shoulder condition was causally related to a compensable injury.

[2] Yarborough also summarily "asserts the Industrial Commission abused their [sic] discretion in . . . finding[s] of fact[] 12, 18, and 21[,]" but fails to explain how these findings are erroneous, advance any legal argument, cite any authority, or even mention their content. Accordingly, we deem any challenge to those findings of fact abandoned. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

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. 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) (citations and internal quotation marks omitted), *reh'ing denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). "The Commission's findings of fact may be set aside on appeal only when there is a *complete* lack of competent evidence to support them." *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citation omitted; emphasis added). Findings of fact unchallenged by the appellant are presumed to be supported by competent evidence on appeal. *Cooper v. BHT Enters.*, 195 N.C. App. 363, 364-65, 672 S.E.2d 748, 751 (2009) (citation omitted). Finally, "[t]he 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) (emphasis added).

I. Challenges to credibility determinations regarding Mr. Whitley's testimony

Yarborough advances several unavailing arguments regarding credibility determinations made by the Full Commission as to the expert testimony offered by Mr. Whitley. For example, Yarborough challenges the "finding Mr. Whitley had

sufficient understanding to testify to the anatomy of the human body . . . ." Our review of the opinion and award reveals no specific finding regarding Mr. Whitley's knowledge of anatomy, but finding of fact 22 includes a reference to his "expert opinion as a biomedical engineer . . . ." To the extent Yarborough is attempting to raise an issue regarding Mr. Whitley's qualifications as an expert witness, she has waived that argument because, according to unchallenged finding of fact 5, "Mr. Whitley was tendered as an expert biomedical engineer with expertise in biomechanics and accident reconstruction *without objection*." (Emphasis added).

Yarborough also takes issue with a comment Mr. Whitley made at the hearing—"A tendon and a muscle are—the same item. The tendon is where the muscle attaches to a piece of bone." Yarborough asserts that this comment reflects a lack of understanding of shoulder anatomy which should disqualify Mr. Whitley's expert opinion that her "rotator cuff could [not] have been injured in the manner alleged by" Yarborough. Mr. Whitley's opinion, however, was not based on any medical expertise in anatomy, but rather on his expertise and research regarding the force of the swinging door that Yarborough alleged struck her shoulder, as indicated in the Full Commission's unchallenged findings of fact 23 and 24. Those factual findings make clear that it was the disparity between Yarborough's report of the alleged injury by a purportedly heavy, fast-moving swinging door, and the relatively light force exerted by that door as measured and described by Mr. Whitley and Mr.

Sutton in their accident reconstruction report, that resulted in Mr. Whitley's expert opinion regarding causation. More importantly, whether any aspect of Mr. Whitley's testimony should have cast doubt on the *credibility and weight* of his opinions is simply not for this Court to consider. *See Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274 (holding that "[t]he Commission is the *sole judge* of the credibility of the witnesses and the weight to be given their testimony" (emphasis added)). Accordingly, we overrule Yarborough's contentions regarding Mr. Whitley's testimony.

II. Challenges to the Full Commission's determination regarding compensable injury

Yarborough also argues the Full Commission abused its discretion by improperly determining that she did not suffer a compensable injury on 30 August 2013. We disagree.

Under the Worker's Compensation Act ("the Act"), an employee "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 . . . ." *Shay v. Rowan Salisbury Schs.*, 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (citation and internal quotation marks omitted), *appeal dismissed*, 364 N.C. 435, 702 S.E.2d 216 (2010). No party disputes that Yarborough was engaged in the course of her employment at the time of the alleged injury. However, Duke University did dispute whether an accident occurred,

and the Full Commission determined that Yarborough did not suffer an injury by accident.

> [The Act] defines injury to mean only injury by accident arising out of and in the course of the employment. Our Supreme Court has defined the term accident as used in the . . . Act as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury; 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.

Id. (citations, internal quotation marks, and some brackets omitted). "[U]nusualness and unexpectedness are [the] essence" of an accident under the Act. *Smith v. Cabarrus Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940). "If an employee is injured while carrying on his usual tasks in the usual way the injury does not arise by accident. An accidental cause will be inferred, however, when an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences occurs." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986) (citations omitted).

Yarborough suggests her case is similar to that in *Kelly v. Carolina Components*, 86 N.C. App. 73, 356 S.E.2d 367 (1987). We find the facts of that case easily distinguishable. The plaintiff in *Kelly* did allege an injury by accident involving a heavy door, but in that matter the Full Commission awarded the plaintiff benefits after finding as fact that the plaintiff

> was employed by the defendant-employer as an exterior door assembly man. During the first week following the plaintiff's return after the New Year Holiday, the plaintiff was attempting to get an exterior door down from the rack where it was stored some 18 to 20 feet from the ground. The plaintiff climbed a ladder, reached for the door, and placed it upon his head with his hands holding the sides. When he discovered that the door was heavier than he had anticipated, he tried to replace the door on the rack but could not do so. He then began to descend the ladder with the door balanced on his head. While climbing down the ladder, he felt pressure and pain in his neck as a result of the weight of the door balanced on his head.
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> . . . The pain the plaintiff experienced in his back was the result of a specific traumatic incident of the work assigned.
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> . . . The next morning the plaintiff noticed that he could not turn his head from side to side. From then on his condition began to deteriorate. His back began to bother him and he noticed that he had trouble straightening up from a bent position. He tried over the counter medications in an attempt to alleviate his discomfort.

Id. at 76, 356 S.E.2d at 369. The issue in *Kelly* was whether the Act "require[d] evidence of an *immediate* onset of pain in order to support a finding of a specific traumatic incident . . . ." *Id.* (internal quotation marks omitted; emphasis in original). This Court "decline[d] to give the statute so narrow a construction, [because the] plaintiff clearly testified at one point that he experienced pain and pressure at the time of the incident . . . ." *Id.* at 76-77, 356 S.E.2d at 369 (citation omitted). In contrast to the present case, there was no mention of testimony from medical and

biomedical engineering expert witnesses disputing and casting doubt upon the plaintiff's account of the alleged injury by accident.

We agree with Yarborough's general proposition that evidence of a heavy door causing "an *immediate* onset of pain" could "support a finding of a specific traumatic incident." *See id.* at 76, 356 S.E.2d at 369 (emphasis in original). However, that issue is not relevant here where the Full Commission found Yarborough's account of the alleged incident on 30 August 2013 *not credible*. *See Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274 (holding that "[t]he Commission is the *sole judge* of the credibility of the witnesses and the weight to be given their testimony" (emphasis added)). The Full Commission's findings of fact quoted *supra* fully support its legal conclusion that Yarborough "failed to demonstrate that she sustained an injury by accident on 30 August 2013" "[b]ased on [her] varied accounts of how the alleged incident occurred and when pain began, along with the improbability that the door could have made contact with [Yarborough's] arm as she alleges . . . ." Accordingly, we overrule this argument.

II. Challenges to the Full Commission's determination regarding causal relation

Yarborough also argues that the Full Commission abused its discretion by determining that her shoulder condition was not causally related to the alleged accident of 30 August 2013. In light of our holding that the Full Commission's findings of fact support its legal conclusion that Yarborough failed to establish that

she suffered a compensable injury, the issue of causal relation is moot and we need not address Yarborough's argument challenging "finding of fact 26 which discredits Dr. Diehl's testimony." Further, as noted *supra*, in that mixed finding of fact and conclusion of law, the Full Commission stated that it was placing "less *weight* on the opinions of Dr. Diehl. . . . greater *weight* on the opinions of Dr. Epling, Mr. Whitley, and Mr. Sutton, and consequently finds that [Yarborough] has failed to prove that her left rotator cuff tear was causally related to her alleged 30 August 2013 incident." (Emphasis added). Once again, Yarborough asks this Court to overrule the Full Commission's credibility determination, something we cannot do. *See id.* Thus, even were we to address this argument, Yarborough would not prevail.

The opinion and award of the Full Commission is therefore

AFFIRMED.

Judges McCULLOUGH and ZACHARY concur.

Report per Rule 30(e).