IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-836

Filed: 3 April 2018

North Carolina Industrial Commission, I.C. No. 15-031965

DENNIS W. DORAN, Employee, Plaintiff,

v.

THE FRESH MARKET, INC, Employer, XL INSURANCE CO. (GALLAGHER BASSETT SERVICES, INC., Administrator), Carrier, Defendants.

Appeal by Defendants from Opinion and Award entered 18 April 2017 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2017.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for Plaintiff-Appellee.

Cranfill Sumner & Hartzog LLP, by David A. Rhoades and Walter M. Dennis, for Defendants-Appellants.

INMAN, Judge.

The Fresh Market, Inc. and XL Insurance Co. ("Defendants") appeal from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission (the "Commission") awarding Dennis W. Doran ("Mr. Doran") worker's

compensation benefits for an on-the-job injury. After careful review, we affirm the decision of the Commission.

I. FACTUAL AND PROCEDURAL HISTORY

On 3 July 2015, Mr. Doran was working as a cheese specialist at a Fresh Market in Charlotte, North Carolina. Shortly after noon, Mr. Doran entered the store's walk-in cooler to unload the day's delivery of cheeses from a shipping pallet and onto the cooler's shelving. At the bottom of the items stacked on the pallet was a large box of cheddar cheese. The box did not have a weight printed on it, and the pallets themselves were arranged in an unusual way, resulting in less maneuverable space inside the cooler than usual. Mr. Doran looked at the box and believed it was light enough for him to lift and move without difficulty, and, as he picked it up, did not believe he needed assistance moving the cheese to the shelf. However, as he was maneuvering to place the cheese on the shelf, Mr. Doran heard a snap and felt a sharp pain in his right shoulder and arm. Mr. Doran immediately left the cooler and reported the injury to his supervisor, Kelley McKinney ("Ms. McKinney").

Mr. Doran's injury was later diagnosed as a proximal biceps tear, a torn rotator cuff, and impingement with AC arthrosis (the "Injury"), requiring surgery, injections, and physical therapy to treat. As a result of the Injury, Mr. Doran suffered a partial loss in wage earning capacity, incurred medical costs in the course of treatment, and retains a fifteen percent permanent partial disability in his right arm.

At the time of the Injury, Mr. Doran had been employed as a cheese specialist for roughly nine weeks after transferring from his earlier position as a deli clerk. He had never lifted a cheese shipment weighing more than twenty pounds unassisted, and most of the cheeses he lifted weighed between five and fifteen pounds. Those he lifted frequently weighed between five and ten pounds. Mr. Doran testified that the box was the heaviest thing he had lifted as a cheese specialist and "significantly heavier" than anything else he had lifted in that position. Indeed, this particular kind of cheese was shipped in blocks weighing approximately forty pounds, with the exact weight of any given shipment varying by a few pounds. Mr. Doran had never before ordered or picked up this product. Though The Fresh Market's written job description for a cheese specialist disclosed that the job required "frequent lifting of 0-10 pounds and occasional lifting of more than 50 pounds[,]" Mr. Doran had not seen the job description at the time of the Injury and testified that it did not match the duties expected of a cheese specialist in practice.

Mr. Doran sought worker's compensation benefits. Defendants denied his claim. He requested a hearing, which proceeded on 15 March 2016. Deputy Commissioner Hullender entered an opinion and award on 12 July 2016 denying Mr. Doran's claim, which Mr. Doran appealed to the Commission.

On 18 April 2017, the Commission entered an opinion and award awarding Mr. Doran compensation. In its order, the Commission made the following findings of fact:

> 3. As cheese specialist, [Mr. Doran] was responsible for inventory and ordering cheese approximately three times per week. The typical order would include boxes of cheese ranging in weight from 5 to 20 pounds. [Mr. Doran] testified that most of the cheeses he handled weighed between 5 and 15 pounds. However, every 6 to 8 weeks a large block of cheddar cheese weighing 35 to 40 pounds had to be ordered.
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> 5. [Ms. McKinney] . . . testified that the routine cheese orders that [Mr. Doran] would make three times a week involved cheese weighing 5 to 20 pounds. . . . [Mr. Doran's] testimony was consistent with that of Ms. McKinney, in that he testified that the cheeses he ordered on a frequent basis weighed between 5 and 10 pounds, and that most of the cheese that was ordered weighed "well under 25 pounds."
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> 7. While [Mr. Doran] could not state with certainty how heavy the box of cheese was, he testified that it was "one of [the] heaviest things that I had lifted by myself in that cooler." The weight of the box was not indicated on the outside of the box. Ms. McKinney confirmed [Mr. Doran] was lifting a box of cheddar cheese that typically weighs 35 to 40 pounds. She further testified that . . . it could very well be that July 3, 2015 was the first time [Mr. Doran] had unloaded a box of that weight.
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> . . .

> 12. . . . [Mr. Doran's] work routine of lifting cheese which usually weighed 5 to 10 pounds was interrupted when he had to lift a box of cheddar cheese which was heavier than usual. . . . [H]is usual work routine up to that point had not required him to lift cheese as heavy as the box of cheese he was lifting when he injured his right arm. Because the cheese he was lifting was heavier than usual, [Mr. Doran] was not carrying on his usual tasks in the usual way when his injury occurred.

The Commission also made the following conclusion of law:

> 3. [Mr. Doran's] usual work routine involved lifting and moving boxes of cheese but the fact that his job duties included occasionally lifting up to 50 pounds is not dispositive. . . . [Mr. Doran] was unfamiliar with the 35- to 40-pound block of cheddar cheese he lifted on July 3, 2015 and the box was heavier than any other box of cheese [Mr. Doran] had lifted before, thus resulting in an interruption of [Mr. Doran's] regular work routine and the introduction of a box that was heavier than expected and heavier than usual.

Defendants timely appealed, and argue before this Court that Mr. Doran did not suffer a compensable "injury by accident" within the meaning of the workers' compensation statute. N.C. Gen. Stat. § 97-2(6) (2015).

II. ANALYSIS

A. Standard of Review

Our Supreme Court has neatly delineated the function of the Commission and the standard of review applicable to this Court as follows: "(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing 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). Unchallenged findings are binding on appeal, *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 233, 743 S.E.2d 48, 53 (2013), while challenged findings "are conclusive on appeal when supported by competent evidence . . . even [if] there is evidence to support a contrary finding[,]" *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 431 (1981). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Commission's conclusions of law are subject to *de novo* review. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003).

B. Injury by Accident

In order for a workers' compensation claim to be compensable, "a claimant must prove three elements: (1) [that] the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (internal citation and quotation marks omitted). As to the first element, an accident is "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Hensley v. Farmers Fed'n Coop.*, 246 N.C. 274,

278, 98 S.E.2d 289, 292 (1957). "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. Of course, 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) (internal citations omitted).

Defendants' challenges fall into two general categories: (1) the Commission's findings of fact as to Mr. Doran's usual work routine, his familiarity with the box of cheese, and the unusual weight of the box are either unsupported by the evidence or insufficient; and (2) the Commission's conclusions of law as to whether Mr. Doran's work routine was interrupted and unusual conditions were present are either not supported by sufficient findings or are contrary to law. We address each category of argument in turn.

C. The Commission Made Necessary Findings Supported By the Evidence

Defendants first argue that the Commission failed to make a necessary finding as to what constituted Mr. Doran's work routine. But the very next sentence in their brief acknowledges the Commission's finding of fact 12 that Mr. Doran's work routine was "lifting cheese which usually weighed 5 to 10 pounds." We also note that conclusion of law 3 in the opinion and award includes the factual finding that "[Mr. Doran's] usual work routine involved lifting and moving boxes of cheese[.]" As

acknowledged by Defendants in their brief, portions of conclusion of law 3 "recite some facts that, if supported by competent evidence of record, could arguably be construed as findings[,]" and any findings in conclusion of law 3 that are so supported are binding on appeal. *See, e.g., Rolan v. N.C. Dept. of Agriculture and Consumer Services*, 233 N.C. App. 371, 380, 756 S.E.2d 788, 794 (2014) (reviewing the factual portions of a mixed finding of fact and conclusion of law by the Commission under the competent evidence standard). Because the order and award on its face contains findings as to Mr. Doran's usual work routine, we reject Defendants' argument that the Commission failed to make such findings.

Defendants next argue that finding of fact 12 contradicts the Commission's finding of fact 3, as the latter states that Mr. Doran's "typical order would include boxes of cheese ranging in weight from 5 to 20 pounds [and] . . . most of the cheeses he handled weighed between 5 and 15 pounds" while the former states "his [usual] work routine [consisted] of lifting cheese which usually weighed 5 to 10 pounds . . . ." There is no contradiction in these findings, however, as it is possible that: (1) Mr. Doran usually ordered cheeses of a certain weight; (2) that of the various kinds of cheese he lifted, most weighed between five and fifteen pounds; and (3) the cheeses he usually lifted weighed between five and ten pounds. All three of these statements can be true without contradiction, and we fail to see how Defendants' reference to

finding of fact 3 serves to defeat finding of fact 12. As a result, we reject this argument.

As for finding of fact 12 and the mixed findings of fact in conclusion of law 3 establishing Mr. Doran's usual work routine, we hold that there is sufficient evidence in the record to support them. Mr. Doran testified that the pallet was typically loaded with boxes of various weights, including some "two and a half pound[boxes], . . . a lot of five-pound boxes" of crumbled cheese, five-pound boxes of deli cheeses, and some remaining boxes weighing "[no] more than probably fifteen to twenty pounds." He further testified that of those boxes he unpacked from pallets, "most of the cheese is well under twenty-five pounds . . . and the cheese that I use on a frequent basis was between five and ten pounds." This evidence supports those facts found by the Commission in finding of fact 12; even if it did not, Defendants do not challenge findings of fact 3 and 5, which establish those same facts.

Defendants also challenge the sufficiency of the evidence supporting findings that the box of cheddar was heavier than usual and heavier than expected, and that lifting a box of this weight was not within Mr. Doran's usual work routine. As noted *supra*, Mr. Doran testified as to the weight of cheeses he commonly encountered. He further testified to his unfamiliarity with the box of cheese in question, stating "[i]t was the first time that I actually had purchased it and was moving it from one spot to another." As for the anticipated weight of the box, Defendants do not challenge

the Commission's finding that the weight was not printed on the box itself, and Mr. Doran testified that he did not think the box was too heavy to lift unassisted when he looked at it and picked it up. While Defendants argue that Mr. Doran should have known the weight of the cheese because he ordered it and the invoice stated its weight, there was no evidence introduced that Mr. Doran ever saw the invoice prior to lifting the cheese, and Ms. McKinney could not state with certainty whether the vendor guide used for ordering listed a weight.

Finally, Mr. Doran testified that the box "was significantly heavier than what I had lifted before," and that the heaviest thing he had lifted as a cheese specialist was "nothing other than . . . that box we're talking about now." This evidence is sufficient to support the Commission's findings that the box was heavier than those usually lifted by Mr. Doran and heavier than expected, and that lifting this box was not within Mr. Doran's usual work routine.

Defendants argue that if we affirm the Commission, our holding will lead to an absurd result. Specifically, they assert that such a holding would mean that "any time an employee was injured performing a task for the first time, the injury would automatically be compensable. In addition, an employee's 'routine' would expand each time he performed a new task. On the other hand, a *new* employee would basically have no regular routine." This is not an absurd result at all, however, and,

with the exception of Defendants' "new employee" analogy, has been the law of this state for more than three decades:

> New conditions of employment to which an employee is introduced and expected to perform regularly do not become a part of an employee's work routine until they have in fact become routine. . . . New conditions of employment cannot become an employee's 'regular course of procedure' or 'established sequence of operations' until the employee has gained proficiency performing in the new employment and become accustomed to the conditions it entails.

Gunter v. Dayco Corp., 317 N.C. 670, 675, 346 S.E.2d 395, 398 (1986) (citation omitted).

In *Gunter*, the plaintiff was a white-collar employee of the defendant who was given the option of being laid off or transferring to a factory job molding hoses. *Id.* at 671, 346 S.E.2d at 396. The plaintiff elected to transfer to the factory job and, on his third day in the new position, ruptured a tendon. *Id.* at 671, 346 S.E.2d at 396. The Supreme Court held that because "plaintiff's new working conditions had not become part of his work routine at the time of his injury[,]" his claim was compensable. *Id.* at 675, 346 S.E.2d at 398. The defendant advanced a similar argument regarding the usual work routines of new employees that Defendants advance here; in response, the Supreme Court wrote:

> The Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees and its benefits should not be denied by a narrow, technical and strict construction. The analogy defendant asks us to make between plaintiff and a new

> employee injured under similar circumstances would require us to construe the Act in the most narrow way to plaintiff's detriment, which we decline to do.

Id. at 676-77, 346 S.E.2d at 399.

Here, Mr. Doran was a former deli clerk with The Fresh Market and was transferred to his position as a cheese specialist. Though Mr. Doran's new duties included lifting the box of cheese that caused the Injury, he had never lifted an order of such weight before and was unfamiliar with this kind of bulk shipment. The box was heavier than usual and had not become part of his usual routine. *Id.* at 675, 346 S.E.2d at 398. As a result, Defendants' argument is without merit and, like the Supreme Court in *Gunter*, we decline to look beyond the facts of this case to Defendants' "new employee" analogy. *Id.* at 676-77, 346 S.E.2d at 399.

B. The Commission Did Not Err In Its Conclusions of Law

The Commission made a mixed finding of fact and conclusion of law in conclusion of law 3 that "the box was heavier than any other box of cheese Plaintiff had lifted before, thus resulting in an interruption of [Mr. Doran's] regular work routine and the introduction of a box that was heavier than expected and heavier than usual." It made a similar mixed finding of fact and conclusion of law in finding of fact 12, which states Mr. Doran's "work routine of lifting cheese which usually weighed 5 to 10 pounds was interrupted when he had to lift a box of cheddar cheese which was heavier than usual." Defendants contend that, contrary to the conclusion

reached by the Commission, Mr. Doran's routine was not interrupted, as his usual work routine included lifting boxes of cheese.

The Commission's conclusion that lifting the cheese interrupted Mr. Doran's work routine was supported by the Commission's findings, including the finding that he had never lifted a box of this weight before. *Gunter*, 317 N.C. at 675, 346 S.E.2d at 398. Further, lifting a box that "was heavier than expected and heavier than usual" can constitute an interruption in an employee's usual lifting work routine leading to an unforeseen event and accident. *See, e.g., Gladson v. Piedmont Stores/Scotties Discount Drug Store*, 57 N.C. App. 579, 580-81, 292 S.E.2d 18, 19 (1982) ("The work routine, the lifting of lighter crates, was interrupted by introduction of a crate heavier than expected and heavier than usual. This created an unusual condition, an unforeseen event, likely to result in unexpected consequences. The Commission was thus warranted in concluding as a matter of law that plaintiff suffered an injury 'by accident.' " (citations omitted)). The Commission's factual findings that lifting the box was not in Mr. Doran's work routine because the box was both heavier than usual and heavier than expected is supported by competent evidence in the record. As a result, we hold that the Commission's conclusion of law that Mr. Doran's work routine was interrupted is supported by sufficient findings.

We also hold that the Commission's conclusion that the unusual and unexpected weight of the box of cheese constituted an "unusual condition" resulting in an injury by accident is supported by sufficient findings. Unchallenged finding of fact 3 states that "every 6 to 8 weeks a large block of cheddar cheese weighing 35 to 40 pounds had to be ordered[,]" and the mixed factual findings in conclusion of law 3 state that "[Mr. Doran] was unfamiliar with the 35- to 40-pound box of cheddar cheese he lifted on July 3, 2015 and the box was heavier than any other box of cheese [he] had lifted before[.]" The conclusion of law ends by noting that the "box . . . was heavier than expected and heavier than usual." The Commission therefore made findings that the box of cheese was 35 to 40 pounds, that Mr. Doran was unfamiliar with the box, that he had never lifted a box of that weight before, and that the box was heavier than usual. These findings are sufficient to support the Commission's conclusion that the weight of the box in question constituted an "unusual condition" and "unforeseen event[.]"

We acknowledge, but are unpersuaded by, Defendants' argument that these conclusions reached by the Commission are contrary to North Carolina law based on this Court's decisions in *Reams v. Burlington Industries*, 42 N.C. App. 54, 57, 255 S.E.2d 586, 588 (1979) and *Dyer v. Mack Foster Poultry & Livestock, Inc.*, 50 N.C. App. 291, 293-94, 273 S.E.2d 321, 323 (1981). In those cases, we held that no compensable injury by accident occurred when employees were hurt while engaged

in their usual tasks of lifting goods, albeit in greater volumes than was typical. *Reams*, 42 N.C. App. at 57, 255 S.E.2d at 588 (holding no accident occurred where the plaintiff was injured after lifting 100 bales of cloth in a day when he typically lifted 30 in a day); *Dyer*, 50 N.C. App. at 293-94, 273 S.E.2d at 323 (holding no accident occurred where the plaintiff was injured after lifting more cases of eggs in a day than was typical). Repetition of tasks is different than increased weight. In *Reams* we explained that the number of bales lifted by the plaintiff was not an unforeseen event, but that "evidence . . . [of] exceptional weight . . . *would* constitute an 'unlooked for or untoward event' or a 'fortuitous cause.' " 42 N.C. App. at 57, 255 S.E.2d at 588 (emphasis added). *Reams* and *Dyer* are therefore inapposite.

III. CONCLUSION

The Commission made findings as to Mr. Doran's usual work routine, his unfamiliarity with the box of cheese in question, and the box's unexpected weight. It further found that the box was heavier than those usually lifted, and that Mr. Doran had never lifted a box of that weight before. These findings are supported by sufficient evidence and, consistent with North Carolina law, support the Commission's conclusions of law that Mr. Doran suffered an injury by accident. We therefore affirm the opinion and award of the Commission.

AFFIRMED.

Judges HUNTER and BERGER concur.

Report per Rule 30(e).