No. COA10-39

NORTH CAROLINA COURT OF APPEALS

* *

CHERI EVANS, Plaintiff-Appellee, v. HENDRICK AUTOMOTIVE GROUP, Employer, and CHUBB SERVICES CORPORATION, Third-Party Administrator, Defendant-Appellants.	)	From the North Carolina Industrial Commission I.C. File No. 681555

* *

PLAINTIFF-APPELLEE'S BRIEF

* *

INDEX

TABLE OF CASES AND AUTHORITIES iii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

I. PLAINTIFF'S EMPLOYMENT BACKGROUND 3

II. PLAINTIFF'S BUSINESS TRIP AND INJURY BY ACCIDENT 5

III. PLAINTIFF'S MEDICAL TREATMENT 8

IV. PLAINTIFF'S COGNITIVE DIFFICULTIES AND RETURN TO WORK 10

STANDARD OF REVIEW 14

ARGUMENT 15

I. PLAINTIFF'S INJURY BY ACCIDENT IS COMPENSABLE BECAUSE IT OCCURRED DURING A FOUR-DAY BUSINESS TRIP IN CHARLOTTE, BECAUSE SHE WAS PROVIDED ALCOHOL BY THE DEFENDANT-EMPLOYER, AND WHILE SHE WAS LEAVING A BUSINESS DINNER SPONSORED BY THE DEFENDANT-EMPLOYER TO RETURN TO HER HOTEL. 17

A. An employee on a business trip who is injured while returning to her hotel must be compensated under the Workers' Compensation Act. 17

B. An employee's negligent or foolish activity is compensable, especially where, as here, it was contributed to by the employer's provision of alcohol during an employer-sponsored dinner and business trip. 24

II. PLAINTIFF IS ENTITLED TO TOTAL AND PARTIAL WAGE LOSS COMPENSATION, AMONG OTHER BENEFITS, AS AWARDED BY THE INDUSRTIAL COMMISSION. 27

A. Based on the undisputed and amply supported factual findings of the Commission, defendants cannot meet their burden of proving plaintiff constructively refused suitable employment by being terminated. 27

B. The uncontested factual findings establish that plaintiff is disabled under the Act because her new employment has reduced her wages. ... 32

CONCLUSION 35

CERTIFICATE OF SERVICE 36

APPENDIX:

Excerpt of Deposition of Andrew Paul Mason, Ph. D. ..... App. 1-6

Excerpt of Deposition of Laura Lacritz, Ph. D. ..... App. 7-18

Excerpt of Deposition of Dr. Jon Krumerman ..... App. 19-23

TABLE OF CASES AND AUTHORITIES

CASES

Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411, (1998) 14

Allred v. Allred-Gardner, Inc., 253 N.C. 554, 117 S.E.2d 476 (1960) 26

Alphin v. Tart L.P. Gas Co., 192 N.C. App. 576, 666 S.E.2d 160 (2008) 14

Archie v. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1942) 25

Avery v. Phelps Chevrolet, 176 N.C. App. 347, 626 S.E.2d 690 (2006) 15

Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984) 25, 26, 27

Cauble v. Soft-Play, Inc., 124 N.C. App. 526, 477 S.E.2d 678 (1996) 19, 20, 22, 23, 27

Chandler v. Nello L. Teer, Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981) 20

Cooper v. BHT Enters., 672 S.E.2d 748, __ N.C. App. __ (2009) 15

Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 377 S.E.2d 777 (1989) 18

Davis v. Raleigh Rental Ctr., 58 N.C. App. 113, 292 S.E.2d 763 (1982) 17

Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 639 S.E.2d 429 (2007) 18, 23

Goff v. Foster Forbes Glass Div., 140 N.C. App. 130, 535 S.E.2d 602 (2000) 14

Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982) 18

Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969) 19, 20, 22, 23, 24

Matthews v. Carolina Standard Corp., 232 N.C. 229, 60 S.E.2d 93 (1950) 23, 24

McGrady v. Olsten Corp., 159 N.C. App. 643, 583 S.E.2d 371 (2003) 25

McRae v. Toastmaster, 358 N.C. 488, 597 S.E.2d 695 (2004) 27, 28

Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182 (1983) 25

Perry v. American Bakeries Company, 262 N.C. 272, 136 S.E.2d 643 (1964) 22

Ramsey v. S. Indus. Constructors, Inc., 178 N.C. App. 25, 630 S.E.2d 681 (2006) 19, 21, 22

Rewis v. New York Life Insurance Co., 226 N.C. 325, 38 S.E.2d 97 (1946) 21

Rice v. Uwharrie Boy Scout Council, 263 N.C. 204, 139 S.E.2d 223 (1964) 23

Ross v. Young Supply Co., 71 N.C. App. 532, 322 S.E.2d 648 (1984) 18

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 425 S.E.2d 454 (1993) 33, 34

Seagraves v. Austin Co. of Greensboro, 123 N.C. App. 228, 472 S.E.2d 397 (1996) 27, 28

Spratt v. Duke Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983) 21

Stubblefield v. Construction Co., 277 N.C. 444, 177 S.E.2d 882 (1970) 24

Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963) 18

Teague v. Atlantic Co., 213 N.C. 546, 548, 196 S.E. 875, 876 (1938) 24

Thornton v. Hartford Acc. & Indem. Co., 198 Ga. 786, 32 S.E. 2d 816 (1945) 20

STATUTES

N.C. Gen. Stat. § 97-2 17

N.C. Gen. Stat. § 97-12 ..... 26, 27

N.C. Gen. Stat. § 97-29 34

N.C. Gen. Stat. § 97-30 34

OTHER AUTHORITIES

1 Larson, Workmen’s Compensation Law, § 25.21 .. 24

No. COA10-39

NORTH CAROLINA COURT OF APPEALS

* *

CHERI EVANS, Plaintiff-Appellee, v. HENDRICK AUTOMOTIVE GROUP, Employer, and CHUBB SERVICES CORPORATION, Third-Party Administrator, Defendant-Appellants.	)	From the North Carolina Industrial Commission I.C. File No. 681555

* *

PLAINTIFF-APPELLEE'S BRIEF

* *

QUESTIONS PRESENTED

I. DID THE INDUSTRIAL COMMISSION CORRRECTLY CONCLUDE THAT PLAINTIFF SUFFERED A COMPENSABLE INJURY BY ACCIDENT, WHICH OCCURRED DURING A FOUR-DAY BUSINESS TRIP IN CHARLOTTE, BECAUSE SHE WAS PROVIDED ALCOHOL BY THE DEFENDANT-EMPLOYER, AND WHILE SHE WAS LEAVING A BUSINESS DINNER SPONSORED BY THE DEFENDANT-EMPLOYER TO RETURN TO HER HOTEL?

II. DID THE INDUSTRIAL COMMISSION CORRECTLY CONCLUDE THAT PLAINTIFF WAS ENTITLED TO TEMPORARY TOTAL DISABILTY BENEFITS PURUSANT TO N.C. GEN. STAT. § 97-29 AND TEMPORARY PARTIAL DISABILTY BENEFITS PURUSANT TO N.C. GEN. STAT. § 97-30?

STATEMENT OF THE CASE

Plaintiff Cheri Evans filed a claim for workers' compensation benefits on December 13, 2006, and requested that the claim be assigned for hearing. (R. pp. 3-4) The workers' compensation case was heard in the Industrial Commission on January 29, 2008, before Deputy Commissioner Robert Wayne Rideout, Jr. (R. p. 15) Deputy Commissioner Rideout issued an Opinion and Award on October 19, 2008, finding that plaintiff suffered a compensable injury by accident, and concluding that plaintiff is entitled to temporary total disability benefits for her time out of work, temporary partial disability benefits for her loss of wages, and payment of medical expenses. (R. pp. 15-29) Fixing a clerical error in the first Opinion and Award, Deputy Commissioner Rideout issued a substantively similar Amended Opinion and Award on November 12, 2008. (R. pp. 30-45)

Defendants appealed the Amended Opinion and Award to the Full Commission. (R. pp. 46-48) A unanimous panel of the Full Commission issued a decision on September 30, 2009, affirming in full the Deputy Commissioner's decision and similarly concluding that plaintiff suffered a compensable injury by accident and was entitled to temporary total disability benefits, temporary partial disability benefits, and payment of medical expenses. (R. p. 54-69)

The Full Commission's Opinion and Award, however, contained an error in computation regarding plaintiff's wage loss benefits. Accordingly, plaintiff filed a motion to amend the decision on October 5, 2009, requesting that the Commission correct its error and properly calculate plaintiff's wage loss benefits. (R. pp. 70-72) Defendants concurred with plaintiff's motion to amend. (R. p. 71) The Industrial Commission has, to date, not yet ruled on plaintiff's motion to amend. Although plaintiff's motion to amend was still pending, defendants filed a notice of appeal on October 26, 2009. (R. pp. 73-76)

On February 16, 2010, plaintiff filed a motion to dismiss defendants' appeal because defendants have sought to appeal from a non-final order of the Industrial Commission. Defendants filed a response on February 24, 2010.

STATEMENT OF FACTS[1]

I. PLAINTIFF'S EMPLOYMENT BACKGROUND

Plaintiff was employed for 11 years by Honda Cars of McKinney in McKinney, Texas, as the office manager. (R. p. 56)

[1] Almost none of the relevant facts are in dispute. In their brief, defendants challenge only two of the Commission's findings in paragraph #37, specifically that "The defendants[']termination of plaintiff did not amount to an unjustifiable refusal or suitable employment by the plaintiff[,]" and that "Plaintiff's disability resulted in her omissions at work, cumulating in her dismissal." (Defs.' Br. at 27-31.)

At the time of the hearing she was 48 years old and had a bachelor's degree in accounting. (Id.) Plaintiff worked 10 or 11 hour days, five days per week. (Id.)

Plaintiff oversaw the dealership's administrative and financial activities. (Id.) She was responsible for accounting, bookkeeping and general office procedures. (Id.) She was also responsible for the supervision of the office staff, including meetings, budgeting, and training. (Id.) Plaintiff never took sick leave prior to her accident and typically took only one or two days of vacation per year. (Id.)

Prior to April 2005, plaintiff did not receive formal performance appraisals. (Id.) Her work entitled her to a trip to the Atlantis resort as an award in 2002. (Id.) Audits were performed in order of the dealership's financial status every 12 to 18 months. (Id.) While the audit results were not perfect, plaintiff worked hard to correct errors and to improve. (Id.) Plaintiff was consistently below budget goals and was highly compensated by a monthly salary and a monthly bonus of a percentage of the net income for the dealership. (R. pp. 56-57) The McKinney location was one of defendant-employer's more profitable dealerships. (R. p. 57)

Over her 11-year employment history, plaintiff had made two key mistakes: she overpaid herself because she was told to use

the prior office manager's pay sheet, and she treated some non-exempt employees as exempt for salary purposes. (Id.) Plaintiff later repaid the dealership for part of her salary overpayment. Plaintiff received no written reprimands for her actions. (Id.)

As a condition of her employment, plaintiff was required to attend annual or biannual meetings in Charlotte, North Carolina. (Id.) Defendant-employer conducted the meetings for training and awards purposes. (Id.) Plaintiff had no other business travel outside of McKinney, Texas. (Id.)

II. PLAINTIFF'S BUSINESS TRIP AND INJURY BY ACCIDENT

Plaintiff travelled to Charlotte, North Carolina, for the April 17-20, 2005 meeting held in Charlotte with two other managers from McKinney. (R. p. 57) All of plaintiff's expenses, including her travel expenses, were paid for by defendant-employer. (Id.) Plaintiff stayed at the Westin Charlotte where accommodations were arranged by the employer for the out-of-town managers and team members. (Id.) Four hundred and sixty (460) attendees attended the training and recognition conference, including general managers, office managers, department managers and staff, and various corporate staff members. (Id.)

Plaintiff was required to attend workshops and meetings organized by defendant-employer. (Id.) Scheduled activities were

held at the Westin, the Charlotte Convention Center, as well as a scheduled dinner at a restaurant, Bentley's on 27, at 6:00 p.m. on the evening of April 19, 2005. (Id.)

On April 19, the attendees were directed to assemble for a group picture of Hendrick Automotive Team members. (R. p. 58) The group of office managers, controllers and others walked from the Westin to the restaurant at around 6:00 p.m. (Id.) Alcoholic beverages were provided by defendant-employer in the bar area prior to dinner, and plaintiff shared a couple of drinks with other employees. (Id.)

Dinner at the restaurant was solely for members of the defendant-employer's team attending the conference and was held in a private room. (Id.) The atmosphere was jovial and fun; team members laughed, ate, and drank alcoholic beverages. (Id.) All of the food and alcohol was paid for by defendant-employer. (Id.) In addition to the pre-dinner cocktails, plaintiff and other managers had wine at dinner. (Id.) In keeping with the atmosphere of the dinner, plaintiff and co-workers hugged people who were leaving, eventually starting a hug line. (Id.)

Following dinner, plaintiff and others walked into the bar area. (Id.) Plaintiff ordered a drink and took a sip before telling people that she was ready to go back to the hotel. (Id.) The group of managers in the bar prepared to leave for the

hotel. (Id.) The Westin was a ten-minute walk from the restaurant, and the managers headed back as a group. (Id.) Plaintiff felt as if she had been drinking, but that she was not drunk. (Id.) All of the alcohol, including the post-dinner drinks at the bar, was provided by defendant-employer. (Id.)

Although plaintiff has no specific memory of the events that transpired immediately following the group's departure from the bar, another manager from Charlotte, Matt Milroth, established that the group walked towards the escalator in order to return to the Westin. (Id.) The group was loud and raucous, whooping and hollering, and having a good time as they left. (Id.) Milroth saw plaintiff put her leg over the side of the escalator and ride it down briefly. (Id.) Although plaintiff was on the escalator railing for at most a couple of seconds, she hit a pillar and fell to the tile floor approximately 25-30 feet below. (R. pp. 58-59) None of the other managers saw the accident. (R. p. 59)

The incident occurred so quickly that Milroth did not have time to react or even to speak to tell plaintiff that she was about to hit the pillar. (Id.) Members of the group frantically ran down the escalator and called 911. (Id.) The incident occurred at approximately 10:16 p.m. (Id.) Plaintiff was taken by ambulance to Carolinas Medical Center. (Id.)

III. PLAINTIFF'S MEDICAL TREATMENT

Plaintiff tested positive for ethanol on admission to the hospital at a concentration of 48 milligrams per deciliter. (R. p. 59) She was 5"1' tall and weighed approximately 105 pounds. While she did occasionally drink alcohol, she regularly consumed a drink only about twice a month. (R. pp. 59-60) Her status as a naïve drinker, her height and weight and her blood alcohol content at the time of the accident was sufficient to cause a loss of inhibitory control, and to produce behavior that contributed to the occurrence of the accident. (R. p. 60)

Plaintiff was treated in the emergency department for multiple traumas, including head trauma. (R. p. 59) Plaintiff was admitted to the hospital and underwent multiple surgeries between April 20 and April 26. (Id.) Plaintiff suffered multiple fractures of her bilateral maxillary sinuses, her bilateral orbits, including a depressed fracture, and three complex facial lacerations that were repaired by plastic surgery on April 20. Several of her teeth were broken. (Id.) Her nasal fracture required repair on April 25. (Id.)

Because of an enlarging left epidural hematoma and left frontal contusion, plaintiff underwent a left frontal craniotomy to remove blood from the brain on April 22. (Id.) Her skull had been fractured and was repaired by steel plating. (Id.)

Plaintiff's wrists were repaired by separate reductions on April 21 and April 25, including the use of hardware. (Id.)

Plaintiff returned to Texas after her discharge from Carolinas Medical Center. (R. p. 60) She was seen by Dr. Jon Krumerman, a neurosurgeon, on April 28, 2005, because of her continuing complaints, including headaches. (Id.) Dr. Krumerman indicated that the headaches was due to multiple factors, considering the trauma and recent brain surgery. He arranged for observation and referred her for follow up treatment. (Id.)

As of May 26, 2005, Dr. Krumerman noted that plaintiff had made an excellent recovery, including resolution of her bleeding. (Id.) Plaintiff was able to walk ten miles per day in order to participate in a breast cancer race, and Dr. Krumerman allowed her to return to work part-time. (Id.)

Plaintiff also received treatment from several physicians for her vision, orbital fractures, eight broken teeth, hearing, nasal fracture, nasal obstruction, lost sense of smell, and bilateral wrist fractures. (R. pp. 60-61) As a result of the accident, plaintiff lost her sense of smell and taste, has numbness in her chin area, has frequent headaches, experiences pain in her wrists, and has multiple facial scars. (R. p. 65) Because of the trauma and the resultant treatment, plaintiff looks different than she did before the accident. (Id.)

IV. PLAINTIFF'S COGNITIVE DIFFICULTIES AND RETURN TO WORK

By August 22, 2005, Dr. Krumerman noted bilateral frontal lobe encephalomalacia but no complaints of headache. (R. p. 62) However, by December 12, 2005, plaintiff's headaches had returned. (Id.) In addition, plaintiff had "become more aware of some of her cognitive difficulties, namely difficulty with some decision-making and multitasking." (Id.) Dr. Krumerman referred plaintiff to a neurologist for her headaches and to a neuropsychologist for her cognitive difficulties. (Id.)

Dr. Brian Joe, a neurologist, examined plaintiff on December 13, 2005. (Id.) Plaintiff was experiencing problems with short-term memory, trouble focusing while driving, and mental processing speed. (Id.) Plaintiff noted that she had to re-read a page several times before grasping the information. Dr. Joe noted that plaintiff's clinical presentation was very good, but that she did show slow processing speed and had headaches. (Id.) He suspected that her "attention and concentration will be impaired to some extent permanently." (Id.) Dr. Joe agreed that plaintiff should undergo neuropsychological testing. (Id.)

Because of her cognitive difficulties, plaintiff's return to work at the dealership was very difficult. (Id.) Although she had performed the job for many years, and had a degree in

accounting, she was unable to use the calculator or a keyboard immediately following her return. (Id.) She put up post-it notes to remind her of important tasks and tried to conceal her lack of understanding. (Id.) However, she often forgot things and made mistakes. (Id.)

When plaintiff was out of work following the accident, defendant-employer replaced her with two employees. (Id.) When she returned to work, Farris Hamilton gave plaintiff 60 days to act on items that needed improvement. (Id.) Although she returned to work part time, plaintiff worked hard and was able to rectify some problems and to implement a corrective plan for others. (R. pp. 62-63) Another review was scheduled for the end of the period. (R. p. 63)

Plaintiff's follow-up performance appraisal was completed on February 16, 2006. (Id.) The appraisal stated that plaintiff did well on tasks and got things done, but also that she was a bit too abrasive and that she did too much. (Id.) A subsequent performance appraisal from March 2006, completed by comptroller Dennis Donathan, indicated that plaintiff required some limited supervision or new or unusual tasks, that she had difficulty in decisions involving new or complex demands, and that she used short term solutions for long-term problems. (Id.) Her overall performance demonstrated "marked improvement." (Id.)

Plaintiff underwent a neuropsychological evaluation on March 28, 2006, performed by Laura H. Lacritz, Ph.D. (Id.) Dr. Lacritz noted that plaintiff felt she was less quick and sharp, took longer to finish tasks, and had difficulty with memory. (Id.) Other problems were word-finding difficulties, missed letters when typing, and decreased reading comprehension. (Id.) She confused north and south on one occasion and feared getting lost. (Id.)

Dr. Lacritz performed extensive testing, including separate tests on intelligence, reading, sorting, verbal fluency, memory, and verbal learning. (R. pp. 63-64) Plaintiff demonstrated some difficulty during the testing, including mild word-finding problems, and she became upset while taking one test. (R. p. 64)

The results of Dr. Lacritz's testing and evaluation indicated that plaintiff had an average IQ, consistent with premorbid levels, but had difficulty on processing speed, visuo-constructional ability, and verbal abstraction. (Id.) Plaintiff had an overall pattern of residual deficits from her traumatic brain injury, including relative cognitive deficits in processing speed, language functioning and aspects of attention. (Id.) Dr. Lacritz felt that it would take plaintiff longer to complete certain tasks and that she would be vulnerable to becoming overwhelmed when having to process information quickly.

(Id.) Dr. Lacritz suggested several adaptations, including repeating information, making use of written notes and systematically organizing her tasks. (Id.) Dr. Lacritz expected that the effects of the traumatic brain injury would be stable over time, but it was possible that her processing speed and attention could improve. (Id.)

In May 2006, plaintiff failed to follow her usual procedure of obtaining a second signature on a check because she forgot to obtain Donathan's signature before cashing it. (Id.) Plaintiff also changed the pay for two office employees without authorization. (Id.) Donathan, the comptroller, knew about the raise given to the employees and the check prior to either being issued; however, only plaintiff was fired. (Id.) Her last day working for defendant-employer was May 15, 2006. (Id.) The termination notice stated that she had poor performance and listed the two episodes. (Id.)

The Industrial Commission found that plaintiff's disability resulted in her omissions at work, cumulating in her dismissal. (R. p. 65) Regarding the dismissal, defendants did not treat plaintiff the same as a non-disabled employee. (Id.) Defendants' termination of plaintiff did not amount to an unjustifiable refusal of suitable employment by the plaintiff. (Id.)

Plaintiff was out of work for four months following her termination. (Id.) After a reasonable job search, she found suitable employment with RMC Credit Services supervising the administrative staff. (Id.) Although plaintiff had to learn a new job, she is able to delegate tasks and to recognize her limitations. (Id.) Plaintiff's earnings in her new employment have been reduced. (Id.) Using her 2007 earnings, plaintiff's average weekly wage following her injury is $1403.25. (Id.) Compared to her pre-injury earnings, plaintiff has suffered a weekly wage of loss of $997.29. (Id.)

STANDARD OF REVIEW

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." Goff v. Foster Forbes Glass Div., 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" Alphin v. Tart L.P. Gas Co., 192 N.C. App. 576, 583, 666 S.E.2d 160, 165 (2008) (quoting Adams v. AVX Corp., 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)). "If there is

competent evidence to support the findings of fact, they are conclusive on appeal even though there is evidence to support contrary findings." Avery v. Phelps Chevrolet, 176 N.C. App. 347, 353, 626 S.E.2d 690, 694 (2006). Likewise, unchallenged findings of fact are binding on appeal. Cooper v. BHT Enters., 672 S.E.2d 748, 751, __ N.C. App. __ (2009).

ARGUMENT

As the Industrial Commission concluded, plaintiff Cheri Evans is entitled to compensation for an injury by accident that occurred on April 19, 2005, during a four-day business trip in Charlotte. Plaintiff was seriously injured after she drank alcohol provided by the defendant-employer and then left the raucous business dinner to return to her hotel. The risk of injury was increased due to the nature of the work dinner, and her injury had its origins in that risk. Moreover, this Court has conclusively established that an employee on a business trip who is injured while returning to her hotel must be compensated under the Workers' Compensation Act. Thus, plaintiff's injury, a rational consequence of the circumstances of her employment, is compensable.

Defendants' contention that plaintiff loses her right to compensation because she engaged in negligent or "thrill-

seeking" behavior should be rejected for two reasons. First, this Court had held that an employee's injury remains compensable even if it is caused by the employee's own negligence or foolish activity. Second, it was plaintiff's consumption of alcohol provided by her employer that led to her loss of inhibition and contributed to her accident. Therefore, plaintiff's injury by accident was causally related to her employment because it was contributed to by defendant-employer's provision of alcohol at an employer-sponsored dinner.

Plaintiff is thus entitled to total and partial wage loss compensation, among other benefits, as awarded by the Commission. Defendants cannot meet their burden of proving plaintiff constructively refused suitable employment by being terminated because the undisputed facts on appeal demonstrate that (1) plaintiff's termination was related to her compensable injury; and (2) a non-disabled employee would not have been terminated for the same reasons she was terminated. In addition, the uncontested factual findings establish that plaintiff is disabled under the Act, and thus entitled to benefits, because her new employment – suitable to her qualifications and injury-related physical limitations – has reduced her wages. Not only are the relevant facts unchallenged on appeal, but are also amply supported by competent evidence in

the record. Accordingly, the Commission's Opinion and Award should be affirmed in full.

I. PLAINTIFF'S INJURY BY ACCIDENT IS COMPENSABLE BECAUSE IT OCCURRED DURING A FOUR-DAY BUSINESS TRIP IN CHARLOTTE, BECAUSE SHE WAS PROVIDED ALCOHOL BY THE DEFENDANT-EMPLOYER, AND WHILE SHE WAS LEAVING A BUSINESS DINNER SPONSORED BY THE DEFENDANT-EMPLOYER TO RETURN TO HER HOTEL.

A. An employee on a business trip who is injured while returning to her hotel must be compensated under the Workers' Compensation Act.

The undisputed evidence demonstrates that plaintiff was injured on April 19, 2005, in an accident that occurred while she was on an overnight business trip in Charlotte and was leaving a business dinner sponsored by defendant-employer. A compensable injury under the Act is an "injury by accident arising out of and in the course of the employment." See N.C. Gen. Stat. § 97-2(6). Plaintiff's injury satisfies all the elements of this standard.

"The term 'accident,' under the Act, has been defined as an unlooked for and untoward event, and a result produced by a fortuitous cause. Unusualness and unexpectedness are its essence." Davis v. Raleigh Rental Ctr., 58 N.C. App. 113, 116, 292 S.E.2d 763, 765-66 (1982) (citations omitted). "An injury is said to arise out of the employment when it is a natural and probable consequence or incident of the employment and a natural

result of one of its risks, so that there is some causal relation between the accident and the performance of some service of the employment." Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 185, 639 S.E.2d 429, 432 (2007) (quoting Taylor v. Twin City Club, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963)). Finally, "the words 'in the course of' refer to the time, place, and circumstances under which an accident occurred. The accident must occur during the period and place of employment." Ross v. Young Supply Co., 71 N.C. App. 532, 536-37, 322 S.E.2d 648, 652 (1984).

The Court of Appeals has held that "while the 'arising out of' and 'in the course of' elements are distinct tests, they are interrelated and cannot be applied entirely independently." Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 247-48, 377 S.E.2d 777, 781, aff'd per curiam, 325 N.C. 702, 386 S.E.2d 174 (1989). "Both are part of a single test of work-connection." Id. at 248, 377 S.E.2d at 781. Because "the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other." Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 252, 293 S.E.2d 196, 199 (1982).

Plaintiff's injuries were caused by her fall off the escalator at Bentley's on 27, a Charlotte restaurant. Because

the fall was a quintessential accident, the dispositive questions are whether her injury arose out of and in the course of her employment. As Plaintiff was on an overnight business trip and was just leaving an employer-sponsored dinner, those questions are answered by well-settled law.

"'North Carolina adheres to the rule that employees whose work requires travel away from the employer's premises are within the course of their employment continuously during such travel, except when there is a distinct departure for a personal errand.'" Ramsey v. S. Indus. Constructors, Inc., 178 N.C. App. 25, 30, 630 S.E.2d 681, 685-86 (2006) (quoting Cauble v. Soft-Play, Inc., 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996)). "The rationale underlying this rule 'is that an employee on a business trip for his employer must eat and sleep in various places in order to further the business of his employer.'" Id. (quoting same). Injuries arise out of employment for traveling employees when the employee is "subjected to an increased risk because of the requirement that he travel." Id. at 37, 630 S.E.2d at 690.

For example, in Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969), the plaintiff was on a business trip in Milwaukee and was injured by a car while walking to a restaurant for dinner, which would have been reimbursed by the

defendant-employer. Id. at 43, 167 S.E.2d at 794. At issue was whether his injury arose out of and in the course of his employment. Id. at 41, 167 S.E.2d at 793. This Court held that the plaintiff's injury met the standard because "there was a reasonable relationship between Martin's employment and the eating of meals." Id. at 43, 167 S.E.2d at 794. "While lodging in a hotel or preparing to eat, or while going to or returning from a meal, he is performing an act incident to his employment ... ." Id. (quoting Thornton v. Hartford Acc. & Indem. Co., 198 Ga. 786, 32 S.E. 2d 816 (1945)).

Accordingly, it is "well-established that a traveling employee will be compensated under the Workers' Compensation Act 'for injuries received while returning to his hotel, while going to a restaurant or while returning to work after having made a detour for his own personal pleasure.'" Cauble, 124 N.C. App. at 529, 477 S.E.2d at 679 (quoting Chandler v. Nello L. Teer, Co., 53 N.C. App. 766, 770, 281 S.E.2d 718, 721 (1981) aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982)). Thus, in Cauble, the plaintiff's injury that occurred on a business trip while plaintiff was returning to his hotel from dinner was held to be in the course of and arising out of his employment. Id. at 529-30, 477 S.E.2d at 680.

In this case, plaintiff was on an overnight business trip, traveling from her home office in McKinney, Texas, for a four-day corporate meeting in Charlotte. During the trip, she attended a dinner at Bentley's on 27 that was part of the corporate meeting's program and was paid for by the defendant-employer. While leaving the building where the restaurant was located to return to her hotel, she accidentally fell off an escalator and was injured. Plaintiff's momentary lapse in judgment did not amount to a personal errand or departure. Plaintiff rode the escalator improperly for, at most, a couple of seconds. Her fleeting conduct amounted to a minor deviation and was incidental to the employment. See Rewis v. New York Life Insurance Co., 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946) (concluding accident was compensable when the employee, taking a break and feeling faint, sought some air and fell from a window); Spratt v. Duke Power Co., 65 N.C. App. 457, 472, 310 S.E.2d 38, 47 (1983)(concluding accident was compensable when the employee slipped on coal dust while running to vending machine in violation of plant rules). As plaintiff here had not made a distinct departure for a personal errand, her injury was "in the course of" her employment. See Ramsey, 178 N.C. App. at 30, 630 S.E.2d at 681.

The post-dinner atmosphere caused by the boisterous, alcohol-fueled group of managers, who were whooping and hollering on their way down the escalator, made the happening of disinhibition and an accidental fall due to employer-provided alcohol a foreseeable occurrence. Because plaintiff was feeling the effects of the alcohol and was using the escalator to travel from the employer-sponsored dinner to her hotel, she was subjected to an increased risk considering all of the circumstances, and thus her injury arose out of her employment. See id. at 37, 630 S.E.2d at 690.

Moreover, like the plaintiffs in Martin and Cauble, plaintiff was traveling between her hotel and a restaurant for a dinner provided by defendant during a business trip, so her accident en route was in the course of and arose out of her employment. See Cauble, 124 N.C. App. at 529-30, 477 S.E.2d at 679-80; Martin, 5 N.C. App. at 43, 167 S.E.2d at 794.

Defendants rely on Perry v. American Bakeries Company, 262 N.C. 272, 136 S.E.2d 643 (1964), to argue that plaintiff's injury is not compensable. In that case, however, the plaintiff was injured in a hotel swimming pool during a business trip, well after returning to his hotel from dinner. Id. at 274, 136 S.E.2d at 645-46. As the Court of Appeals explained in Martin, the "case is easily distinguishable from the instant case in

that the employee was injured while engaging in an entirely personal function wholly independent of the employment." Martin, 5 N.C. App. at 44, 167 S.E.2d at 795. By contrast, plaintiff was injured while returning to her hotel from a dinner organized, promoted, and paid for by the defendant-employer.

Similarly, defendants rely on Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 639 S.E.2d 429 (2007), to argue that plaintiff's injury at a business-sponsored recreational event did not arise out of her employment. The dinner at the Bentley's on 27 restaurant, however, was not a mere recreational event, but rather an employer-paid meal on the agenda of the conference during an out-of-town business trip. Cf. Rice v. Uwharrie Boy Scout Council, 263 N.C. 204, 208, 139 S.E.2d 223, 227 (1964) (holding compensable an accident during a fishing expedition, which was part of a business trip). As explained in Martin, because employees must eat out during business trips, travel to and from such meals are "incident to [] employment." Martin, 5 N.C. App. at 43, 167 S.E.2d at 794. Therefore, plaintiff must be compensated for her "injuries received while returning to [her] hotel." See Cauble, 124 N.C. App. at 529, 477 S.E.2d at 679.

Defendants also rely on Matthews v. Carolina Standard Corp., 232 N.C. 229, 60 S.E.2d 93 (1950), to argue that

plaintiff's injury was unrelated to her employment. In that case, the plaintiff was injured during his lunch hour when he had no duties and was on his own time. Id. at 234, 60 S.E.2d at 96. In this case, by contrast, plaintiff was not on her own time, but rather was walking from her employer-sponsored dinner to her employer-paid hotel during a business trip. Thus, her injury is compensable because it "has its origin in a risk created by the necessity of sleeping and eating away from home." See Martin, 5 N.C. App. at 42, 167 S.E.2d at 793 (quoting 1 Larson, Workmen's Compensation Law, § 25.21).

B. An employee's negligent or foolish activity is compensable, especially where, as here, it was contributed to by the employer's provision of alcohol during an employer-sponsored dinner and business trip.

Defendants lastly rely on the case of Teague v. Atlantic Co., 213 N.C. 546, 548, 196 S.E. 875, 876 (1938), to argue that plaintiff's injury was caused by "thrill-seeking" conduct and is thus somehow not causally related to her employment. The facts of Teague are easily distinguishable. The plaintiff in Teague was forbidden to ride the empty crate conveyor, yet repeatedly and voluntarily violated the employer's mandate, leading to his death. Id. The Supreme Court also later held that negligent acts by the employee generally are not a bar to compensation. Stubblefield v. Construction Co., 277 N.C. 444, 445, 177 S.E.2d

882, 883 (1970) (affirming award of compensation where plaintiff suffered fatal accident while negligently knocking dust and debris from conveyor rollers, actions which "had no relation to his duties").

More on point is Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182 (1983), where this Court held that the employee's voluntary and negligent decision to ride a dragpan to lunch in violation of the employer's warning did not bar the award of compensation for decedent's death. Noting that the facts were similar to those in Archie v. Lumber Co., 222 N.C. 477, 481, 23 S.E.2d 834, 836 (1942), it quoted from the Supreme Court's opinion: "[we] do not think compensation should be denied his dependents because he made an error of judgment and attempted to use a more hazardous means of transportation . . . ." Id. at 547, 303 S.E.2d at 184.

Accordingly, this Court has recently concluded that "A plaintiff's entitlement to workers' compensation generally is not defeated by his negligence, or by evidence that at the time of injury the plaintiff was engaged in a foolish, even forbidden, activity." McGrady v. Olsten Corp., 159 N.C. App. 643, 649, 583 S.E.2d 371, 375 (2003) (emphasis added). See, e.g., Bare v. Wayne Poultry Co., 70 N.C. App. 88, 92, 318 S.E.2d 534, 538 (1984) (holding that plaintiff suffers compensable

injury from "participating in horseplay" with deboning knife). Therefore, plaintiff's conduct, to the extent it was foolish or negligent, does not relieve defendants of liability.

In any event, plaintiff's behavior on the escalator, even if reckless, was causally related to her employment because it was due to the alcohol provided by her employer during an employer-sponsored dinner and business trip. According to the testimony of Andrew Mason, Ph.D., an expert in toxicology, plaintiff's actions that led to her fall were significantly contributed to by the effects of her intake of alcohol before, during, and after dinner. (App. pp. 1-6) The Commission's finding of fact – unchallenged by defendants – is that plaintiff's alcohol consumption caused a loss of inhibition and produced behavior that contributed to her accident. (R. p. 60)

For an injury to be compensable under the Act, "it is not required that the employment be the sole proximate cause of the injury, it being enough that 'any reasonable relationship to the employment exists, or employment is a contributory cause.'" Bare, 70 N.C. App. at 92, 318 S.E.2d at 538 (quoting Allred v. Allred-Gardner, Inc., 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960)). Employers are liable for accidents caused by alcohol that they provide to their employees. See N.C. Gen. Stat. § 97-

12(1); Cauble v. Soft-Play, Inc., 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996).

After sending plaintiff on a business trip, sponsoring a celebratory dinner for employees only, and providing alcohol to employees before, after, and with the dinner, defendants cannot escape liability for plaintiff's resulting accident. Because plaintiff's consumption of employer-provided alcohol contributed to her accident, there is a significant causal relationship between her employment and her injury, such that it is compensable under the Act. See N.C. Gen. Stat. § 97-12(1); Bare, 70 N.C. App. at 92, 318 S.E.2d at 538.

II. PLAINTIFF IS ENTITLED TO TOTAL AND PARTIAL WAGE LOSS COMPENSATION, AMONG OTHER BENEFITS, AS AWARDED BY THE INDUSRTIAL COMMISSION.

A. Based on the undisputed and amply supported factual findings of the Commission, defendants cannot meet their burden of proving plaintiff constructively refused suitable employment by being terminated.

Defendants' argument that plaintiff is not entitled to disability compensation because of the loss of her employment with defendant-employer is completely without merit given the Commission's unchallenged findings and the evidence in the record. In McRae v. Toastmaster, 358 N.C. 488, 597 S.E.2d 695 (2004), the Supreme Court adopted the test from Seagraves v. Austin Co. of Greensboro, 123 N.C. App. 228, 472 S.E.2d 397

(1996), to determine an injured employee's right to continuing benefits after being terminated for alleged misconduct. McRae, 358 N.C. at 495-96, 597 S.E.2d at 700. Under the test, "to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." Id. at 493, 597 S.E.2d at 699 (citing Seagraves, 123 N.C. App. at 234, 472 S.E.2d at 401). If the employer can meet this burden, benefits for lost earnings are barred, "unless the employee is then able to show that his or her inability to find or hold other employment at a wage comparable to that earned prior to the injury is due to the work-related disability." Id. (quoting same).

Defendants cannot meet the second prong of the Seagraves test because the Commission made the unchallenged finding that, regarding her termination, "Defendants did not treat plaintiff as a non-disabled employee." (R. p. 65) Because this finding was not contested by defendants, and is thus binding on appeal, defendants' Seagraves argument necessarily fails.

Even if defendants had challenged the finding, moreover, it is plainly supported by competent evidence. Defendants offered no evidence that a non-disabled employee would have been

discharged for the same mistakes that plaintiff made. In fact, while Dennis Donathan – a nondisabled employee – was complicit in the two omissions that resulted in plaintiff's termination, and he and plaintiff speculated about which one would be fired. Donathan kept his job and only plaintiff lost hers.

Defendants also cannot meet the third prong of the Seagraves test. The Commission specifically found that "Plaintiff's disability resulted in her omissions at work, cumulating in her dismissal." (R. p. 65) This finding is amply supported by other unchallenged findings made by the Commission, as well as the competent evidence in the record.

The evidence shows that the conduct defendants terminated plaintiff for was caused by her injury. Following her injury and return to work, plaintiff experienced significant problems with her memory, ability to understand complex tasks, and ability to perform tasks at the same speed she could pre-injury. These effects of her cognitive deficits are exactly the problems that resulted in her discharge. While plaintiff tried her best to cover up and work around these problems, her adaptations eventually failed, and defendant-employer terminated her.

Dr. Lacritz, the neuropsychologist who saw plaintiff and performed extensive testing, testified that plaintiff's brain injury caused her difficulties in performing her job:

> A: Well, the difficulties of processing speed might result in trouble being able to quickly understand what is expected of her and what she needs to do in order to complete a task, that it might just take her longer to figure out the steps and to complete them.
>
> With attentional variability, she may have trouble working for extended periods of time, vulnerable to distraction, need to take breaks, that sort of thing. Attention is also very critical for memory, so while she didn't really demonstrate memory problems on formal testing, individuals that have attention problems can sometimes feel like they have memory problems or feel very scattered because if they are not adequately attending to something, and they don't get the information in. If they don't get it in, they can't pull it out later.
>
> So her expression or in a type of job where people make demands on you randomly throughout the day or a lot of different things are being asked, it – it can result in her feeling a bit scattered in having trouble organizing and--attending to what needs to be done.
>
> Q [by Ms. Johnson]: Doctor, is it your opinion that the deficits such as you've described are due to the fall and head injury of April 19, 2005?
>
> A: Yes.

(App pp. 7-8) Dr. Lacritz's evaluation demonstrated that the particular types of lapses that would result from the deficits caused by plaintiff's brain injury – such as failing to get a required second signature – include those that led to her termination. (App. pp. 17-18)

Plaintiff's attentional lapses and processing speed are overall a product of generalized brain functions; however the

frontal lobes tend to be very important. Plaintiff sustained frontal lobe injuries that have resulted in permanent encephalomalacia, a condition the neurosurgeon, Dr. Krumerman, described as "a change in the density of the brain, change called encephalomalacia which means there's less brain present where she had a contusion. And the radiologist specifies that she has encephalomalacia in the frontal poles and in the left occipital pole." (App. pp. 19-20) Dr. Krumerman testified that the radiologist related that the "encephalomalacia was extensive in the frontal lobe bilaterally and also the left occipital lobe." (App. p. 20) Damage to the frontal lobe can change an individual's functioning, particularly in the areas of speech and discretionary inhibitions, and can cause disturbances in memory, particular short-term memory. (App pp. 22-23) Thus, plaintiff's particular type of brain injury sustained on April 19, 2005, was most likely the cause of her performance problems.

Dr. Lacritz further testified to a reasonable degree of neuropsychological certainty that the deficits that plaintiff had from the fall in 2005 resulted in the omissions that led to her termination. (App. pp. 12-14) She explained:

> Q. And could you explain that the -- the impact of those deficits on the -- on the facts as I've described them to you?
>
> A. Certainly.

> Q. Would they have been likely to contribute to her inability to do the job as described in the job description?
>
> A. Certainly. I mean, I think based on the job description as well as her description of what her job entails, that there was a lot of pressure on things being done quickly in a lot of demands made on her throughout the day, which I think potentially left her feeling overwhelmed since she had difficulty being able to process information quickly and organize things. And her attention problems, I believe, contributed to the memory difficulties. And she probably, you know, looking back return to work to quickly and became overwhelmed with the high level of demands that were required of her based on her limitations.

(App. pp. 14-15) Defendants produced no contrary evidence concerning plaintiff's cognitive functioning, the causation of the cognitive deficits, or their effects on the problems at work leading to her termination. Therefore, the Commission's findings that plaintiff's injury and resulting disability caused her termination, and that she did not constructively refuse suitable employment should be affirmed.

B. The uncontested factual findings establish that plaintiff is disabled under the Act because her new employment has reduced her wages.

Contrary to defendants' arguments, the Commission's findings that plaintiff's injury resulted in disability and wage losses for her should be affirmed because they are fully supported by other unchallenged findings of fact as well as the

evidence in the record. The factors set out in Russell v. Lowes Product Distribution, 108 N.C. App. 762, 425 S.E.2d 454 (1993) establish that plaintiff has proven her disability, or incapacity to earn pre-injury wages. This Court held:

> [a]n employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, (3) the production of evidence that he is capable of some work but that it would be futile because of pre-existing conditions, i.e., age, inexperience, lack of education, to seek other employment, or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

Following her accident, plaintiff was temporarily totally disabled for an astonishingly short period of time considering the nature and severity of her injuries. The evidence is undisputed that Ms. Evans was totally unable to work for 5 1/2 weeks following April 19, satisfying the first prong of the test. Dr. Krumerman released plaintiff to return to part-time work on May 26, 2005. In addition, Dr. Watumull testified that plaintiff would have been temporarily totally disabled due to her rhinoplasty performed on November 21, 2005 for two to four

weeks. Accordingly, plaintiff is due total disability benefits for these periods under N.C. Gen Stat. § 97-29.

In addition, plaintiff's brain injury caused quantifiable deficiencies in her cognitive functioning, requiring the imposition of adaptations, or restrictions, by Dr. Lacritz in the way she performed her job duties. Following plaintiff's discharge by defendant-employer, which, as discussed, was caused by plaintiff's injury and resulting cognitive deficiencies, plaintiff was capable of some work, but was unsuccessful in her reasonable efforts to obtain other employment for approximately four months. This period satisfies the second prong of Russell.

As the Commission found (without challenge by defendants), "Plaintiff completed a reasonable job search and, due to her efforts, was able to find gainful, suitable employment based upon her age, education and other factors, and injuries to her brain and other body parts." (R. p. 65) (emphasis added). Her wage loss following the termination thus satisfies the fourth prong of Russell, in that she produced evidence "that [s]he has obtained other employment at a wage less than that earned prior to the injury." Russell, 108 N.C. App. at 765, 425 S.E.2d at 457. Plaintiff is therefore entitled to benefits under N.C. Gen. Stat. § 97-30.

CONCLUSION

For the foregoing reasons, the Court should affirm in full the Industrial Commission's opinion and award.

This the 10th day of May, 2010.

PATTERSON HARKAVY LLP

Electronically submitted
Valerie A. Johnson
NC Bar No. 21125
100 Europa Dr., Suite 250
Chapel Hill, NC 27517
Tel: 919-942-5200
Fax: 919-942-5256
Email: vjohnson@pathlaw.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Narendra K. Ghosh
NC Bar No. 37649
100 Europa Dr., Suite 250
Chapel Hill, NC 27517
Tel: 919-942-5200
Fax: 919-942-5256
Email: nghosh@pathlaw.com

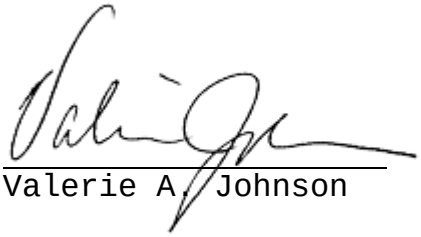
Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

The undersigned counsel for the plaintiff-appellee hereby certifies that a copy of Plaintiff-Appellee's Brief was sent via first class mail, postage prepaid, addressed as follows:

Andrew R. Ussery
McAngus Goudelock & Courie, PLLC
Post Office Box 30307
Charlotte, N.C. 28230
aussery@mgclaw.com

This the 10th day of May, 2010.



Valerie A. Johnson