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NO. COA04-1384

NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2005

KEVIN ROOKER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 037982

FOOD LION,
Employer,

and

SELF INSURED, RISK MANAGEMENT SERVICES, INC., SERVICING AGENT,
Carrier,
Defendants.

Appeal by Plaintiff from Opinion and Award entered 17 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2005.

Brimbaugh, Mu & King, by Nicole D. Wray, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, LLP, by Tracie H. Brisson and Erica B. Lewis, for defendant-appellees.

WYNN, Judge.

In this workers' compensation appeal, Kevin Rooker contends that the full Commission erred in concluding that his medical condition of shingles was not related to his compensable back injury, and that he was no longer disabled as a result of his original compensable back injury. After carefully reviewing the record on appeal, we hold the Commission's findings of fact

are supported by competent evidence and those findings of fact support its conclusions of law. Therefore, we affirm the Opinion and Award of the Industrial Commission.

The evidence in the record tends to show that Mr. Rooker worked as an assistant manager at Food Lion in New Bern, North Carolina. On 5 February 2000, while disassembling a display, Mr. Rooker twisted his back, causing immediate pain in his back and his right leg. The next day he sought treatment at a local emergency room where he was diagnosed with a back strain and given two days off from work, and, thereafter, eight to ten days of light duty.

On 8 February 2000, Mr. Rooker saw Dr. Joseph McCabe for complaints of lower back pain. Dr. McCabe diagnosed Mr. Rooker with low back pain in his right side and herpes zoster to the right inguinal area. On 14 February 2000, Dr. McCabe released Mr. Rooker to return to work with a five pound lifting restriction and no bending, prolonged standing, squatting or pulling for seven days.

Dr. McCabe continued treating Mr. Rooker for his low back pain and his herpes zoster from February 2000 through April 2000. An MRI of Mr. Rooker's lumber spine on 22 February 2000 revealed no disc abnormalities. By 25 February 2000, Dr. McCabe's notes state that Mr. Rooker's back pain was "significantly better," but that Mr. Rooker still had a right inguinal rash from the herpes zoster condition. Dr. McCabe expected full discharge regarding Mr. Rooker's injury within one month.

On 14 March 2000, at Mr. Rooker's request, Dr. McCabe referred him to Dr. Cynthia Lopez, a board certified expert in the field of neurology and nerve conduction studies. Mr. Rooker began treating with Dr. Lopez on 21 March 2000. Dr. Lopez testified that Mr. Rooker had two separate issues: (1) back pain; and (2) shingles. Dr. Lopez conducted nerve conduction studies to determine the cause of the pain in Mr. Rooker's anterior thigh. Dr. Lopez found there

was no "evidence on the EMG to suggest that the right thigh numbness was caused by a radicular process in his [Mr. Rooker's] back." Dr. Lopez opined that Mr. Rooker's symptoms of numbness, tingling, and pain were associated with the shingles outbreak, and that he did not need further diagnostic testing. She further testified that Mr. Rooker's shingles and post-herpetic neuralgia were separate conditions from his back/pain lifting injury, but that she was "not sure" whether a physical injury such as Mr. Rooker's back strain could trigger the shingles virus.

Mr. Rooker next received treatment from Dr. Angelo Tellis from 19 July 2000 through 8 November 2000. Dr. Tellis diagnosed Mr. Rooker with myfascial pain and ordered a course of physical therapy and prolotherapy. Dr. Tellis also noted that Mr. Rooker suffered from lateral femoral cutaneous neuropathy which accounted for Mr. Rooker's neurologic pain complaints. Dr. Tellis opined that Mr. Rooker's lumbar strain and shingles were very different disease processes, and explained that "I don't think that it can be determined with any degree of confidence exactly what causes an outbreak of shingles." On 8 November 2000, Dr. Tellis released Mr. Rooker at maximum medical improvement with a zero percent permanent partial disability rating to his back from the February 2000 lifting injury.

After being released by Dr. Tellis, Mr. Rooker requested a second opinion and specifically requested a referral to Dr. William Richardson, an orthopaedic surgeon at Duke. Food Lion made the referral. Dr. Richardson reviewed the records, determined Mr. Rooker did not likely need to see a surgeon, and instead recommended Mr. Rooker to Dr. Anna Bettendorf.

Dr. Bettendorf, a board certified physician in both physical medicine and rehabilitation and electrodiagnostic studies, performed a battery of tests on Mr. Rooker to address a plethora of complaints, including lower back discomfort, right side numbness, aching, pain in his shoulders, constipation, and trouble sleeping. All of the tests performed by Dr. Bettendorf on Mr. Rooker

were well within normal limits. Dr. Bettendorf also opined that Mr. Rooker's shingles condition was a separate problem that was not caused by his lifting incident. She testified that there is no medical literature linking shingles to a back strain, and that a lumbar strain would not cause a shingles flare-up. Dr. Bettendorf concluded that Mr. Rooker had no permanent impairment and that he should resume his normal daily activities, including work as an assistant store manager.

On 12 February 2001, Mr. Rooker sought treatment with Dr. Paul B. Suh of the North Carolina Spine Center. Dr. Suh diagnosed Mr. Rooker with "lumbar degenerative disc disease" and recommended Mr. Rooker undergo a thorocolombar diskogram. This was performed on 20February 2001, and the results were normal. Mr. Rooker returned to Dr. Suh on 26 March 2001. Dr. Suh diagnosed Mr. Rooker with low back pain and issued work restrictions.

During his treatment with the various physicians, Mr. Rooker returned to work on several occasions. He was in and out of work between 5 February 2000 and 18 March 2001. On 2 March 2000, Food Lion filed a Form 19, reporting Mr. Rooker's injury. Block 26 of the form indicates Mr. Rooker did not miss work due to his injury. Because Mr. Rooker initially lost no time from work, Food Lion treated his claim as a medical-only claim and paid Mr. Rooker his regular salary when he missed sporadic time from work. Food Lion completed a Form 60 when Mr. Rooker went completely out of work in August 2000, formally accepting Mr. Rooker's claim for a low back strain stemming from the 5 February 2000 juice lifting incident. At that time, Mr. Rooker began receiving workers' compensation indemnity benefits.

Food Lion filed a Form 28B with the Industrial Commission after Mr. Rooker returned to work his regular job with a full-duty release on 19 March 2001. Although Mr. Rooker returned to his pre-injury job at the same wages, he left within a few hours complaining of pain. After 19

March 2001, Mr. Rooker requested a one year leave of absence. Mr. Rooker was terminated when he did not return to work after his one year leave of absence.

This case came for hearing before Deputy Commissioner Adrian A. Phillips, who concluded that Mr. Rooker's shingles and depression were not related to his compensable back injury, and that Mr. Rooker was no longer disabled as a result of his original compensable back injury. On 17 June 2004, the full Commission filed an Opinion and Award affirming the prior award. Mr. Rooker appealed.

In his first argument on appeal, Mr. Rooker contends that Food Lion accepted his shingles claim by failing to file the appropriate workers' compensation forms and by paying medical bills related to his shingles condition. Though we question the validity of these arguments, we do not reach the merits of either argument because there are no corresponding assignments of error in the record on appeal. *See* N.C. R. App. P. 10(a) (2004) ("[T]he scope of review on appeal is confined to consideration of those assignments of error set out in the record on appeal[.]"). North Carolina Rule of Appellate Procedure Rule 28(b)(6) states, "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." *See* N.C. R. App. P. 28(b)(6) (2004). Thus, the arguments contained in Mr. Rooker's brief which do not correspond to an appropriate assignment of error are not properly before this Court. *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (holding that, if the issues presented in an appellant's brief do not correspond to an assignment of error, the issues raised in the brief will not be considered by this Court); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (holding that the North Carolina Rules of Appellate Procedure are mandatory). Furthermore, Mr.

Rooker's failure to raise these issues before the full Commission waives appellate review of these issues. *See* N.C. R. App. P. 10(b)(1) (2004) ("In order to preserve a question for appellate review, a party must have presented to the trial [tribunal] a timely request, objection or motion stating the specific grounds for the ruling the party desired the [tribunal] to make . . .").

Mr. Rooker next contends that the full Commission's findings of fact are not supported by any competent evidence of record or go against the greater weight of the competent evidence of record. In particular, he contests the following findings of fact by the Commission:

> 9. Dr. Lopez testified that she could not give an opinion to any reasonable degree of medical certainty that physical stress or injury could even possibly trigger the dormant shingles virus, and that to do so would be nothing more than mere speculation. Dr. Lopez further testified she was unaware of any empirical or scientific evidence to show correlation between the back strain and shingles outbreak.
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> 29. There is no competent medical evidence of record showing that plaintiff's shingles was caused by, or is related to, his compensable back strain. The totality of the medical evidence shows that there is no known causal link between a back strain and the development of shingles. There is also no medical evidence that plaintiff's back strain caused him to develop a stress condition or that plaintiff suffered from stress related shingles.
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> 30. There is no competent evidence that defendant knowingly paid for plaintiff's shingles treatment or ever led plaintiff to believe he had a compensable shingles claim. The only accepted injury in this matter was plaintiff's low back strain of February 5, 2000, which resolved in or around November 2000.
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> 31. Plaintiff has remained capable of working in his job as an assistant store manager since November 8, 2000.

"Under our Workers' Compensation Act, 'the Commission is the fact finding body.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). "'The Commission is the sole

judge of the credibility of the witnesses and the weight to be given their testimony.'" *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The full Commission's findings of fact "'are conclusive on appeal if supported by any competent evidence.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). Thus, this Court is precluded from weighing the evidence on appeal; rather, we can do no more than "'determine whether the record contains any evidence tending to support the [challenged] finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted).

Mr. Rooker first challenges finding of fact nine, that Dr. Lopez could not give an opinion to any reasonable degree of medical certainty that physical stress or injury could trigger dormant shingles and that she was unaware of any empirical or scientific evidence to show a correlation between the back strain and the shingles outbreak. This argument is without merit.

The record on appeal shows that Dr. Lopez testified that she was unaware of any empirical studies showing a correlation between a back strain and an outbreak of shingles. She further testified that it was mere speculation to say that "anything is possible" as it relates to a correlation between shingles and back pain. Thus, the record includes competent evidence to support the full Commission's finding of fact that Dr. Lopez testified that she could not give an opinion to a reasonable degree of medical probability that physical stress or injury could trigger dormant shingles and that she was unaware of any empirical or scientific evidence to show a correlation between Mr. Rooker's back strain and his shingles outbreak. Therefore, finding of fact nine is binding on appeal.

Mr. Rooker next challenges finding of fact twenty-nine, that there is no competent evidence of record to show that his shingles was caused by or related to his compensable back

strain. The record reveals that Dr. Lopez testified that Mr. Rooker's shingles and back injuries were separate conditions. Dr. Bettendorf also opined that Mr. Rooker's shingles condition was a separate problem that was not caused by his lifting incident at work. In fact, every physician deposed in this case agreed that there is no medical literature, empirical studies, or evidence of any kind that a back strain could result in a shingles outbreak. Thus, the record shows competent evidence to support the Commission's finding that there is no evidence that Mr. Rooker's shingles was caused by or related to his compensable back strain. Therefore, finding of fact twenty-nine is binding on appeal.

Mr. Rooker next assigns error to finding of fact number thirty, that there is no competent evidence that Food Lion knowingly paid for his shingles treatment or ever led him to believe that he had a compensable shingles claim. The record shows that the billing code sheets stipulated into evidence have "lumbar radiculopathy" circled. The forms also contained options for treatment, including herpes zoster and post-herpetic neuralgia, which were not circled. The only code checked and submitted to the insurance carrier for payment was with regard to a back issue. The record further shows that Mr. Rooker never made a claim for shingles. In fact, when Mr. Rooker filed a written claim on a Form 18 in September 2000, he did not list "shingles" as a claim for injury in this matter. He only listed injuries to his back, his right leg, and headaches. Thus, the record contains competent evidence to support the Commission's finding that Food Lion did not knowingly pay for Mr. Rooker's shingles treatment and that Food Lion only accepted injury to Mr. Rooker's low back strain. Therefore, finding of fact thirty is binding on appeal.

Mr. Rooker also challenges finding of fact thirty-one, that he was capable of working in his job as an assistant store manager since 8 November 2000. He contends that the full

Commission had no competent evidence of record that he was able to work in his job as assistant store manager, and therefore, the full Commission should be reversed. This argument is without merit as well.

Here, the record on appeal contains evidence that Dr. Tellis released Mr. Rooker from his care on 8 November 2000, because Mr. Rooker had reached maximum medical improvement with regard to his back injury and retained zero percent (0%) permanent partial disability. Dr. Tellis saw no reason Mr. Rooker could not have resumed being as active as possible. Accordingly, there is competent evidence of record that Mr. Rooker was able to return to his job as assistant store manager. Following *Adams*, we conclude that finding of fact thirty-one is supported by competent evidence. Therefore, finding of fact thirty-one is binding on appeal.

Having determined that the full Commission's findings of fact are supported by competent evidence, we turn to the full Commission's conclusions of law, which we review *de novo. Snead v. Carolina Pre-Cast Concrete, Inc.,* 129 N.C. App. 331, 335, 499 S.E.2d 470, 472 (1998).

In his appeal, Mr. Rooker selects particular sentences from the full Commission's findings of fact 21, 22, 23, 24, and 25, and argues that if the full Commission accepts these findings as correct, then they misapprehended the law. This reliance is misplaced. Even assuming that the full Commission did find some facts favoring Mr. Rooker, this would not mandate a conclusion in favor of Mr. Rooker. Rather, Mr. Rooker bears the burden of proving his case by the "greater weight of the evidence." *Bailey v. Sears Roebuck & Co.,* 131 N.C. App. 649, 654, 508 S.E.2d 831, 835(1998). Thus, even if the full Commission recited facts tending to support Mr. Rooker, the Commission has the duty to weigh the evidence and the authority to conclude that Mr. Rooker's evidence was outweighed by Food Lion's evidence. *Hawley v.*

Wayne Dale Constr., 146 N.C. App. 423, 428, 552 S.E.2d 269, 272 (2001) (holding that the "Commission may weigh the evidence and believe all, none or some of the evidence") (citation omitted).

In sum, because "there is some competent evidence in the record to support" the Commission's findings of fact, "we hold that the full Commission's findings of fact [are] conclusive on appeal." *Adams*, 349 N.C. at 682, 509 S.E.2d at 414. We also conclude that these findings of fact support the Commission's conclusions of law and award.

Affirmed.

Judges CALABRIA and LEVINSON concur.

Report per Rule 30(e).