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NO. COA04-1177

NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2005

JOHN DAUGHERTY  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 120931

MOUNTAIN CONSTRUCTION  
ENTERPRISES, INCORPORATED,  
Employer,

and

BUILDERS MUTUAL INSURANCE  
COMPANY,  
Carrier,  
Defendants.

Appeal by employee-plaintiff from opinion and award of the North Carolina Industrial Full Commission entered 4 March 2004 by Commissioner Laura Kranifeld Mavretic. Heard in the Court of Appeals 17 May 2005.

*Crosswhite, Edwards & Crosswhite, P.A., by Michael D. Cleaves, for the plaintiff-appellant.*

*Lewis & Roberts, P.L.L.C., by Jeffrey A. Misenheimer for defendants-appellees.*

JACKSON, Judge.

Plaintiff, John Daugherty, appeals from an Opinion and Award of the full Industrial Commission (“full Commission”) filed 4 March 2004 affirming, with minor modifications, the

Opinion and Award of Deputy Commissioner Amy Pfeiffer denying plaintiff workers' compensation benefits. Plaintiff timely appealed the full Commission's Opinion and Award.

Plaintiff had been employed by defendant, Mountain Construction Enterprises, Inc. ("Mountain Construction"), as a painter for approximately four years at the time of the incident which is the basis of this action. At the time of the incident, plaintiff was the lead painter for Mountain Construction and, in addition to painting, his duties included meeting with customers, advising on color selection, and supervising the painting crew. Plaintiff had suffered an admittedly compensable knee injury, which required surgery, prior to this incident and had received workers' compensation benefits for that injury. Plaintiff returned to work following his knee surgery shortly before this incident, but continued to have difficulty with his knee.

On 8 March 2001 the owner of Mountain Construction, Mark Kirkpatrick ("Kirkpatrick"), spoke to plaintiff at the Mountain Construction office regarding his continued difficulties. At that time Kirkpatrick told plaintiff to take his remaining vacation and not to report back to work until 12 March 2001. Kirkpatrick also advised plaintiff to contact his physician regarding the continuing problems with his knee.

During this time plaintiff had been working on the Doolittle house for Mountain Construction. The homeowner specifically had instructed Mountain Construction that he would not pay any overtime and, consequently, all of Mountain Construction's employees had received strict instructions that they were not to put in overtime on the project. Kirkpatrick also testified that there was an unwritten but well known company policy that work on weekends had to be approved by himself or the job supervisor and that employees were not to work alone at job sites.

Plaintiff testified that on the evening of 9 March 2001, a Friday, he received a call from one of the painters on the Doolittle job, Chris Haywood ("Haywood"), asking if he could work

on Saturday to make up time he had missed during the week due to illness. Plaintiff testified that he told Haywood that he could work that Saturday, but that there had been some changes in the paint colors that he would have to discuss with Haywood first. Plaintiff and Haywood agreed to meet at the Doolittle house between 7:30 and 8:00 am the next morning, 10 March 2001. Plaintiff testified that, in addition to discussing the paint colors with Haywood, he intended to go to the job site to pick up his tools. Neither plaintiff nor Haywood asked for or received permission from Kirkpatrick or the project supervisor to work on Saturday.

Plaintiff arrived at the job site at approximately 7:30 a.m. accompanied by his fiancée. Plaintiff did not see any vehicles or other indication that anyone else was there. Plaintiff then obtained the keys to the house and attempted to enter the house through the front door. Plaintiff testified that upon attempting to open the door it would only open one and a half to two inches. Plaintiff pushed the door using a little more force and the door opened slightly more. Plaintiff then used his body weight against the door which suddenly “flew open” causing him to stumble into the house. Plaintiff further testified that as he was attempting to regain his balance his feet became tangled in extension cords on the floor causing him to fall down an open stairway approximately thirteen feet from the door.

During the fall plaintiff struck his head and shoulder and was possibly knocked unconscious for a brief period as he could not remember what happened for a short time. Plaintiff testified that he got up “shook it off and went back upstairs.” Plaintiff’s fiancée had remained in their vehicle while plaintiff went into the house and did not see him fall down the stairs. Plaintiff had his fiancée take pictures of the job site “in case we have problems.” Haywood never arrived at the house and plaintiff re-secured the site and returned home.

After returning home, plaintiff began having difficulty breathing, felt dizzy, developed a headache and had significant back pain. Plaintiff went to the emergency room for treatment and advised the treating physician that he had fallen at work. X-rays were taken of plaintiff's shoulder and knee and he was sent home with instructions to rest, keep his feet up and use ice packs. Plaintiff subsequently was treated by his family physician who ordered a chest x-ray, put plaintiff into a back brace and started him on pain medication. Plaintiff's family physician also removed him from work.

Plaintiff filed a Workers' Compensation claim for the injuries suffered as a result of the incident. Plaintiff's claim was denied by the full Commission. Plaintiff appeals the Opinion and Award of the full Commission. An appellate court may review only those matters that are properly before the court. *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 397 (1982). The Rules of Appellate Procedure are mandatory and failure to follow those rules makes an appeal subject to dismissal. *Dillingham v. North Carolina Dep't of Human Resources*, 132 N.C. App. 704, 707, 513 S.E.2d 823, 825 (1999), N.C.R. App. P. Rule 25(b).

Rule 10 of the North Carolina Rules of Appellate procedure provides the requirements for assignments of error on appeal. Rule 10 provides, in part, that assignments of error "shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. Rule 10(c)(1)(2005). Rule 10 goes on to state "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." *Id.* Plaintiff makes only two assignments of error as follows:

1. Plaintiff/Employee contends that the Full Commission erred in finding that Plaintiff/Employee did not suffer an accident while performing duties within the scope and course of his employment on March 10, 2001.

2. Plaintiff/Employee contends that the Full Commission erred in finding that Plaintiff/Employee did not prove that he sustained a compensable injury pursuant to §97-1 of the North Carolina General Statutes.

Neither of these assignments of error state the legal basis upon which they are assigned nor do they direct the attention of this Court to the particular error upon which they are based through record or transcript references. Although plaintiff clearly indicates the legal bases for his assignments of error in his brief, as the scope of review of this Court “is confined to a consideration of those assignments of error set out in the record on appeal in accordance with [] Rule 10,” these assignments are not properly before this Court and are deemed abandoned and plaintiff’s appeal is dismissed. *See Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E.2d 435 (1988)(holding that failure to state the grounds upon which the errors were assigned required that exceptions upon which the assignments were based be deemed abandoned).

Assuming *arguendo* we were to consider these assignments of error, plaintiff still could not prevail as these assignments fail to assign error to any of the full Commission’s findings of fact. If error is not assigned to particular findings of fact, those findings are presumed to be supported by competent evidence and are therefore binding on appeal. *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). Consequently, our review in this case would be limited to whether the full Commission’s findings of fact support its conclusions of law. *Id.*

An injury is compensable under our Workers’ Compensation Act if it is caused by an accident which arises out of and in the course of the employment. N.C. Gen. Stat. §97-2(6)(2003), *Pitillo v. N.C. Dep’t of Env’tl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002). An employee is injured in the course of his employment when the injury

occurs ““under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer’s business.”“ *Lewis v. Orkand Corp.*, 147 N.C. App. 742, 747, 556 S.E.2d 685, 689 (2001)(quoting *Powers v. Lady’s Funeral Home*, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982) (citations omitted)). In its finding of fact number 5 the full Commission found that “[p]laintiff was *not authorized* to work in any capacity for defendants until after the March 13 2001 meeting with his supervisor.” (Emphasis added.) This finding alone is sufficient to support the conclusions of law that plaintiff did not suffer an injury by accident in the course and scope of his employment on 10 March 2001 and that he had not proven that he had sustained a compensable injury. Therefore, he cannot prevail on appeal.

Appeal dismissed.

Judge WYNN concurs in separate opinion.

Judge BRYANT concurs.

Report per Rule 30(e).