NO. COA10-1064
NORTH CAROLINA COURT OF APPEALS

Filed: 19 April 2011

CARLOS MANUEL MERCADO ARCE,
Employee, Plaintiff,

v. North Carolina Industrial Commission
I.C. Nos. 176776, 176797

BASSETT FURNITURE INDUSTRIES, INC.,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier, Defendants.

Appeal by defendants from Opinion and Award entered 8 June 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 January 2011.

Randy D. Duncan, for plaintiff-appellee.

Smith Moore Leatherwood L.L.P., by Caroline H. Lock, for defendants-appellants.

MARTIN, Chief Judge.

Defendant-employer Bassett Furniture Industries, Inc. and defendant-carrier Liberty Mutual Insurance Company (collectively "defendants") appeal from an Opinion and Award by the North

Carolina Industrial Commission ("the Commission") awarding temporary total disability compensation to plaintiff-employee Carlos Manuel Mercado Arce and requiring defendants to pay costs, attorney's fees, and all past and future medical expenses incurred as a result of plaintiff—employee's compensable injury. We affirm.

The evidence tended to show that, in June 2008, then-nineteen-year-old plaintiff–employee began working as an ottoman upholsterer for defendant–employer, a furniture manufacturer. Plaintiff–employee's job duties involved applying poly-cushioning and fabric to ottoman frames and then carrying each completed ottoman to a conveyor belt, which was about eight inches higher than, and about four feet away from, plaintiff–employee's workstation table. Because plaintiff–employee completed approximately ten to twelve ottomans of various sizes each day, plaintiff–employee was required to "frequent[ly] lift[]" 25 to 50 pounds and to "occasional[ly] lift[]" 50 to 100 pounds at least ten times a day.

In the late morning on 27 October 2008, plaintiff–employee finished upholstering a large ottoman that weighed approximately 120 pounds. As plaintiff–employee and a co-worker lifted the ottoman to move it to the conveyor belt, plaintiff–employee felt a "mild" pain in the lower part of his back near "where [his]

back ends." Plaintiff-employee did not report this pain to anyone at work that day because he "thought it was from work—— from fatigue . . . from working when [he] was tired." Plaintiff-employee continued to work the rest of the day and, when he got home, took two Tylenol to treat the pain. Plaintiff-employee returned to work the next day at 7:00 a.m. and, about two hours later, he attempted to carry another heavy ottoman to the conveyor belt, this time without the assistance of a co-worker. When he lifted the ottoman, plaintiff-employee "felt like a pop in [his] back" and "felt pain in [his] back and the pain was going down into [his] leg." Unlike the "mild" pain he suffered from the previous day, which he rated as a one or two on a scale of one to ten, with ten being the most severe pain, plaintiff-employee rated this pain as a seven or eight.

Plaintiff-employee then asked the assistant cell supervisor, Becky Lambert, if he could report to the on-duty nurse at the plant, Arma Lynn Brooks ("Nurse Brooks"), in order to have her examine his back. Plaintiff-employee, who is originally from Puerto Rico and is a native Spanish speaker, testified through an interpreter that, because Ms. Lambert did not speak Spanish and because he did not speak English, plaintiff-employee did not attempt to communicate to Ms. Lambert that he had injured himself while he was working.

Plaintiff-employee said he approached Ms. Lambert for assistance on the morning of 28 October because his cell supervisor, Israel Jorge Galvez, who was also Ms. Lambert's direct supervisor, was not on the floor at the time he was injured. However, Mr. Galvez testified that he was "in the proximity" and said that Ms. Lambert called him over shortly after plaintiff-employee approached her. Mr. Galvez said that he and plaintiff-employee had a brief conversation in Spanish, during which time plaintiff-employee "said his back hurt." Mr. Galvez said that plaintiff-employee complained "he was having pain from the previous week," and said that plaintiff-employee did not indicate that he injured his back while lifting an ottoman at work.

When he reported to Nurse Brooks, plaintiff-employee lifted his shirt and showed her a "raised area on his left back just above his waist," which was about two to three inches in width, about the size of a tennis ball, and which did not move when palpated and felt hard to the touch. Because Nurse Brooks does not speak Spanish, she asked Florencio Chavez, who works as a supervisor for defendant-employer in a different department from that of plaintiff-employee and whose first language is Spanish, to serve as an interpreter.

According to Nurse Brooks, plaintiff-employee reported that

his back pain began the night before and did not mention that he had injured his back while lifting an ottoman at work. Nurse Brooks told plaintiff-employee that he needed to have a doctor examine his back and said that she did not send him to the Hart Industrial Clinic for treatment——which is where she refers employees who suffer work-related injuries——because plaintiff-employee did not tell her that he was injured while lifting ottomans at work. She noted in plaintiff-employee's health record that "this was not an accident since his back just started hurting." Nurse Brooks provided plaintiff-employee with a note that listed the name and phone number of plaintiff-employee's health insurance company, and indicated that plaintiff-employee had experienced back pain since the previous evening and that his pain increased at work. Across the top of this note, Nurse Brooks wrote the following: "No Worker's Comp."

Later that same day, plaintiff-employee went to the Catawba Valley Medical Center Emergency Department and, according to the department's records, plaintiff-employee reported that, "approximately a week and a half ago or so," he was at work where "[h]e was lifting an object around 100 lbs, and he felt some pain in his lower back." Plaintiff-employee testified that, while he was in the emergency room, his conversation was

translated by an interpreter over the telephone, and that he and the interpreter had a difficult time understanding each other. According to plaintiff-employee, he told the interpreter to tell the treating physician that he "had injured [himself] at [defendant-employer's] lifting a piece of furniture and so the doctor asked [him] how [he] had been feeling the last two weeks; if [he] had been having any pain and [he] said 'No. The only thing you feel at the end of work is tiredness.'" Plaintiff-employee said that the interpreter "confused the question about that or if it was tiredness," and so the department's records, which indicated that plaintiff-employee stated that he had been injured almost two weeks prior to 28 October 2008, incorrectly transposed those facts.

Plaintiff-employee was diagnosed with lumbar strain and was placed on "light duty restrictions with no lifting greater than 20 lbs and no prolonged, bending, twisting, stooping or squatting until he is rechecked by his company doctor." Because his back pain continued to increase, plaintiff-employee was referred for an MRI of his lumbar spine, which revealed "a disc bulge and facet arthropathy at the L5-S1 level, as well as a posterior annular tear, with an intravertebral disc herniation/Schmorl's node." After being treated unsuccessfully with conservative treatment, including physical therapy,

plaintiff-employee underwent an L5-S1 anterior lumbar interbody fusion on 23 June 2009. Plaintiff-employee did not return to work beginning 29 October 2008, and remained out of work at the time the matter was heard by the Full Commission.

On 24 November 2008, plaintiff-employee filed notices with the Commission alleging that he was injured during the course of his employment with defendant-employer on 27 October and 28 October 2008. Defendants denied plaintiff-employee's claims on the basis that plaintiff-employee's injuries did not arise out of and in the course of his employment with defendant-employer. The matter was heard and, on 17 November 2009, the deputy commissioner entered an Opinion and Award in favor of plaintiff-employee. Defendants appealed to the Full Commission, which entered its Opinion and Award on 8 June 2010 affirming the Opinion and Award of the deputy commissioner in favor of plaintiff-employee. One commissioner dissented, essentially basing her dissent on her finding that plaintiff-employee was not credible. Defendants appeal.

On appeal, the issues raised by defendants do not challenge the Commission's findings or conclusions with respect to plaintiff-employee's medical treatment or diagnoses. Accordingly, we need not recite each of the Commission's

thorough, detailed findings regarding those matters. Rather, defendants contend the Commission erred because it "made no findings of fact whatsoever regarding the credibility of plaintiff" in its Opinion and Award, and because plaintiff-employee's testimony was "not credible." We disagree.

In its Finding of Fact 9, the Commission found:

> Plaintiff presented to the Catawba Valley Medical Center Emergency Room, where a telephone interpretation service was used to translate. The Emergency Room note reflects that plaintiff experienced lower back pain while lifting a heavy object at work, approximately a week and a half ago. Plaintiff testified that there were problems with the interpretation. Both he and the telephone interpreter had difficulty understanding each other and the interpreter confused the doctor's questions with plaintiff's responses to other questions. Based on the difficulties in the translation, the Full Commission finds that any inconsistency as to when plaintiff's injury occurred is reasonably related to miscommunication or mistranslation between plaintiff and the telephone translation service. The Full Commission finds plaintiff credible concerning the two lifting incidents at work.

"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)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999), and "'is the sole judge of the credibility of the witnesses and the weight to be

given their testimony.'" *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965)). However, "the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "Requiring the Commission to explain its credibility determinations" and "allowing [this Court] to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another." *Id.* at 116–17, 530 S.E.2d at 553. "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. [Our] duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274).

Moreover, "'the findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, *even though there be evidence that would support findings to the contrary.*'" *Id.* (emphasis added) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633

(1965) (per curiam)). "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." *Id.* Accordingly, "[a]n opinion and award of the Industrial Commission will only be disturbed upon the basis of a patent legal error." *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988).

In its Finding of Fact 9, excerpted in full above, the Commission explicitly states that it "finds plaintiff credible concerning the two lifting incidents at work." This finding is also recognized in, and is the subject of, the dissenting commissioner's written response to the Full Commission's majority. Thus, defendants' contention that the Commission "made no findings of fact whatsoever regarding the credibility of plaintiff" is without merit.

In support of defendants' contention that plaintiff-employee's testimony was "not credible," defendants direct our attention to conflicts between plaintiff-employee's testimony and the testimony of defendants' witnesses, including plaintiff-employee's cell supervisor, Mr. Galvez, and urge this Court to conclude that the testimony of defendants' witnesses was *more* credible than that of plaintiff-employee's witnesses, including

the testimony of plaintiff-employee himself. Nevertheless, "[t]he Industrial Commission and the appellate courts have distinct responsibilities when reviewing workers' compensation claims." *See Billings v. Gen. Parts, Inc.*, 187 N.C. App. 580, 584, 654 S.E.2d 254, 257 (2007) (citing *Deese*, 352 N.C. at 114, 530 S.E.2d at 552), *supersedeas and disc. review denied*, 362 N.C. 233, 659 S.E.2d 435 (2008). Our responsibility is not to re-weigh the evidence or to re-examine the Commission's determinations regarding the credibility thereof, and we decline defendants' invitation to do so here. This Court is tasked only with determining whether the Commission's findings are supported by any competent evidence in the record, "'*even though there be evidence that would support findings to the contrary*,'" and if we find such competent evidence, we must hold that the Commission's findings are conclusive on appeal. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (emphasis added) (quoting *Jones*, 264 N.C. at 402, 141 S.E.2d at 633). Since our review of the record shows that there was competent evidence presented to support the Commission's findings with respect to plaintiff-employee's account of his injury, we overrule this issue on appeal.

Defendants next contend the Commission improperly disregarded and discounted competent evidence from defendants'

witnesses, particularly the testimony presented by Mr. Galvez, plaintiff-employee's cell supervisor. Again, we disagree.

"It is the duty of the Commission to consider ***all*** of the competent evidence, make ***definitive*** findings, draw its conclusions of law from these findings, and enter the appropriate award." ***Harrell v. J.P. Stevens & Co., Inc.***, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, ***disc. review denied***, 300 N.C. 196, 269 S.E.2d 623 (1980). "In making its findings, the Commission's function is 'to ***weigh and evaluate*** the ***entire*** evidence and determine as best it can where the truth lies.'" ***Id.*** (quoting ***West v. J.P. Stevens***, 6 N.C. App. 152, 156, 169 S.E.2d 517, 519 (1969)). "To weigh the evidence is not to 'discount' it. To weigh the evidence means to ponder it carefully; it connotes consideration and evaluation; it involves a mental balancing process." ***Id.*** "To 'discount' the evidence, on the other hand, is to disregard it, to treat it as though it had never existed, to omit it from consideration." ***Id.*** "While the Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony it nevertheless may not wholly disregard competent evidence." ***Id.*** (citation omitted); ***see also Ward v. Beaunit Corp.***, 56 N.C. App. 128, 134, 287 S.E.2d 464, 467 (1982) ("In making its findings of fact, the Commission may not ignore, discount,

disregard or fail to properly weigh and evaluate any of the competent evidence before it.").

The Commission "must make 'definitive findings to determine the critical issues raised by the evidence,'" *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 61–62 (quoting *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835), *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998), "and in doing so must indicate in its findings that it has 'considered or weighed' all testimony with respect to the critical issues in the case." *Id.* at 139, 502 S.E.2d at 62 (quoting *Lineback v. Wake Cty. Bd. of Comm'rs*, 126 N.C. App. 678, 681, 486 S.E.2d 252, 254 (1997)). "It is not, however, necessary that the Full Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission." *Id.*

Defendants argue that the Commission "impermissibly discounted" testimony from Mr. Galvez, Mr. Chavez, Nurse Brooks, and Kathy Joe Eads, who was defendant-employer's human resource manager, and assert that the Commission failed to make "definitive findings of fact" regarding "diametrically opposed testimony on key issues" presented by these witnesses. Thus, again, defendants essentially urge this Court to conclude that

the Commission erroneously found plaintiff-employee's testimony credible, even though defendants' witnesses "directly contradicted that of plaintiff[-employee] on several key points." We recognize that the Commission did not make any specific findings regarding the testimony of Mr. Galvez, which indicated that plaintiff-employee "said his back hurt" and that plaintiff-employee did not say that he injured his back while lifting an ottoman at work. Nonetheless, the Commission identified other evidence presented by defendants that tended to show that plaintiff-employee did not report he was injured at work while lifting ottomans on 27 October and 28 October 2008. Although the Commission did not specifically reject the testimony of Mr. Galvez or of other witnesses that could support a finding that plaintiff-employee did not injure himself at work while lifting ottomans, "[s]uch 'negative' findings are not required." *See Bryant*, 130 N.C. App. at 139, 502 S.E.2d at 62. Since the contradictory nature of Mr. Galvez's testimony was captured by the Commission's findings based on other evidence presented by defendants, we are not persuaded that the Commission's failure to recount Mr. Galvez's duplicative testimony requires a conclusion that the Commission impermissibly disregarded or discounted this contrary evidence. Because the Commission's findings "on the critical issues in

this case are supported by some competent evidence in the record, this Court is bound by those findings." *See id.* Accordingly, we overrule this issue on appeal.

Affirmed.

Judges HUNTER and THIGPEN concur.

Report per Rule 30(e).