

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1624

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

JERRY R. SMITH,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 191193

SOUTHLAND PINE NEEDLES,
Employer,

and

AMCOMP,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered by the North Carolina Industrial Commission on 16 August 2005. Heard in the Court of Appeals 22 August 2006.

Brumbaugh, Mu & King, P.A., by Angela D. Vandivier-Stanley, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Clayton M. Custer and Julie B. Bradburn, for defendant-appellees.

HUDSON, Judge.

In February 2004, Deputy Commissioner J. Brad Donovan entered an opinion and award granting plaintiff temporary total disability benefits and medical treatment for injury to his back. Defendants appealed to the Full Commission, which reversed the Deputy Commissioner. Plaintiff appeals. We affirm the Full Commission's opinion and award.

The facts as found by the Commission show that plaintiff was employed as an assistant plant manager with defendant-employer. On 24 July 2001, plaintiff injured his right leg in a non-work-related softball game. He was diagnosed with a muscle strain and put on crutches, but he continued to experience pain in his hip, leg, knee, and back. On 20 August 2001, plaintiff saw orthopedist Dr. Jason Guevara, who diagnosed him with greater trochanteric bursitis and a hamstring pull. Dr. Guevara ordered physical therapy, and plaintiff returned to light duty work the following week. Plaintiff claims that on 5 September 2001, while at work, he stepped back onto a piece of wood and fell. Plaintiff claims that he reported the incident to the general manager but admits that he did not fill out an accident report. Plaintiff did not seek medical attention following the accident. The general manager subsequently assigned plaintiff to run a front-end loader. Plaintiff claims that the vibration and abrupt movements of the loader, which had a broken seat, caused him further back pain. On 23 September 2001, plaintiff left work and did not return, due to his back pain. Plaintiff claimed that he went to the doctor's office, but he produced no medical records or testimony.

On 23 October 2001, plaintiff returned to see Dr. Guevara for his previously scheduled follow-up appointment. Plaintiff did not report a fall at work nor that the type of work he had been performing aggravated his condition. On 24 October 2001, plaintiff saw Todd Zeh, a chiropractor recommended by Dr. Guevara. Mr. Zeh's examination of plaintiff revealed low back muscle spasm, decreased range of motion in the lower back, diminished Achilles and patellar reflexes, and some muscle weakness. He opined that plaintiff's test results were consistent with sacroiliac joint problems. On 4 December 2001, plaintiff returned to see Dr. Guevara and specifically requested that the doctor note in his records that plaintiff had fallen at

work on 12 August 2001. In December 2001, plaintiff underwent an MRI, which showed several bulged disks.

In January 2002, plaintiff saw orthopedist Dr. Malcomb Shupeck, who noted minimal disk disease and was unable to explain plaintiff's complaint of leg pain. On 7 February 2002, orthopedic spine specialist Dr. Dion Arthur examined plaintiff. He suspected symptom magnification by plaintiff and concluded that the MRI did not indicate a recent injury, such as a fall, but was more consistent with a chronic type of degenerative condition. In June 2002, plaintiff saw his family physician, Dr. Ohadugha, who diagnosed sciatica. In October 2002, plaintiff presented to Dr. Rene Kotzen, a neurosurgeon, who diagnosed him with disc bulging. Dr. Rajesh Khurana, a family practitioner, also testified that he saw plaintiff in 1997 and 1999 for several complaints, including mild back pain.

On 7 November 2001, plaintiff gave a recorded interview to Barbara Jones of AmComp. He stated that his back first began hurting on 5 September 2001, but that two weeks prior to the interview (approximately 24 October 2001), he was driving the front-end loader when he could no longer take the pain. He claimed that he went to his doctor that day and told Jones that he would provide her with this doctor's name. At the hearing, several of plaintiff's co-workers testified that they never saw him fall on 5 September 2001.

Plaintiff argues that the overwhelming weight of the competent, credible evidence establishes that he sustained a compensable injury by accident. We disagree. This Court's review of an Industrial Commission decision is limited "to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)).

“[T]he full Commission is the sole judge of the weight and credibility of the evidence.” *Id.* As “the sole judge of the credibility of witnesses,” the Commission “may accept or reject any of a claimant’s evidence.” *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985). On appeal, if the record contains “any evidence tending to support the findings,” such findings will be conclusive even if “there be evidence that would support findings to the contrary.” *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (internal citation and quotation marks omitted).

It is well established that a workers’ compensation claimant bears the burden of proving that he or she sustained “an injury by accident arising out of and in the course of employment.” N.C. Gen. Stat. §97-2(6) (2003); *Smith v. Dacotah Cotton Mills, Inc.*, 31 N.C. App. 687, 690, 230 S.E.2d 772, 774 (1976). Here, the Commission made the following pertinent finding:

26. The greater weight of the competent and credible evidence of record supports a finding that plaintiff did not sustain an injury by accident or specific traumatic incident on or about September 5, 2001. Specifically, the plaintiff is not accepted as a credible witness as to the testimony offered at the hearing before the deputy commissioner regarding the history of the alleged injury as well as the numerous inconsistent accounts plaintiff gave to the medical providers and the insurer.

The record reveals that plaintiff did make inconsistent statements regarding his injury, and as the Commission is the sole judge of credibility and is free to “accept or reject any of a claimant’s evidence,” *Grant*, 77 N.C. App. at 247, 335 S.E.2d at 332, it is not our role to question this credibility determination or to re-weigh the evidence.

Affirmed.

Judges WYNN and TYSON concur.

Report per Rule 30(e).