NO. COA04-120

NORTH CAROLINA COURT OF APPEALS

Filed: 1 March 2005

RUDOLPH BROWN, JR.,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 200450

NORTH CAROLINA SPECIAL CARE CENTER,
Employer,

and

KEY RISK MANAGEMENT SERVICES, INC.,
Carrier,
Defendant.

Appeal by plaintiff from opinion and award entered 15 September 2003 and order entered 23 October 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 October 2004.

Browne, Flebotte, Wilson, Horn & Webb, by Martin J. Horn and Greta Katz, for plaintiff appellant.

Attorney General Roy Cooper, by Assistant Attorney General, Patrick S. Wooten, for North Carolina Special Care Center, defendant appellee.

McCULLOUGH, Judge.

Plaintiff Rudolph Brown appeals from the opinion and award of the North Carolina Industrial Commission and its denial of his motions to reconsider and to allow additional evidence.

The Full Commission made the following findings of fact:

> 1. Plaintiff was employed as a teacher with N.C. Special Care Eastern Adolescent Treatment Program (EATP) where he worked with "Willie M" program adolescents.
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> 2. Plaintiff suffered an injury to his Achilles tendon while playing basketball on December 11, 2001, after his normal work hours.
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> 3. Plaintiff's basketball team was part of a recreational industrial basketball league organized by the Recreation Department of the City of Wilson. The team's basketball games were played at Reed Street Recreational Center, which was unrelated to defendant's property.
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> 4. Defendant's employees organized the team on their own. Defendant did not participate in organizing the basketball league or the team organized by the employees. Defendant never paid for the employee's time while participating on the team. Defendant neither recommended nor encouraged employees to participate in the basketball team. Defendant expected no benefit from the existence of the basketball team. Defendant never requested that the players appear at any functions to represent defendant or promote their place of employment.
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> 5. Defendant provided no equipment for the team. During the course of the team's history prior to plaintiff's injury, defendant only contributed $200.00 of the $350.00 team entrance fee in the first year of the team's existence, which was the year prior to plaintiff's injury. The source of funds for defendant's one-time monetary contribution was money from vending machines on defendant's property.
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> 6. Team participants were responsible for payment of their own individual entrance fees and their own uniforms.
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> 7. The players asked Dr. Richard Francis, a staff doctor, to serve as a volunteer coach of the team. Dr. Francis

served as coach and provided basketballs for the team at his personal expense.

8. The players organized a raffle and a chicken plate fund-raising event to raise money for the team's yearly entrance fee. The chicken plate fund-raising event was supposed to be executed by team players who were not working. However, several of the players did not show up and several on duty employees filled in because some players did not show up. No long-term commitment of employee time was made by defendant to support the team in any manner. Also, players asked for personal donations from other employees to supplement their fundraising efforts.

9. Plaintiff received no compensation from defendant for playing on the team nor was he required by defendant to participate.

10. Evidence reveals that some of the counselors would allow students who had demonstrated good conduct to be taken off campus to watch the employees' basketball team perform. The Full Commission gives this evidence little weight especially since there was no evidence presented showing defendant asked employees to use the games as a reward.

11. The Full Commission does not find credible the hearing testimony of employee Miguel Hall that the counselors played basketball games while they were "on the clock" and that advance notice of this had been given to Gayle Moore, Director of EATP.

12. Based upon the totality of the evidence, plaintiff has failed to prove by the greater weight of the evidence that his injury arose out of and in the course and scope of his employment with defendant.

Based on these findings of fact, the Full Commission made the following conclusions of law:

1. For a workers' compensation claim to be compensable, plaintiff must show that he sustained an "injury by accident arising out of and in the course of the employment." N.C.G.S. 97-2(6), (18). Both parts of the definition must be satisfied in order for compensability to be found. *Bell v. Dewey Bros.,* 236 N.C. 280, 72 S.E.2d 280 (1952).

> 2. "While it is clear that recovery will be allowed when attendance is required, the question becomes closer when the degree of employer involvement descends to mere sponsorship or encouragement." *Chilton v. Bowman Gray School of Medicine,* 45 N.C. App. 13, 262 S.E.2d 347 (1980). In this case, plaintiff's attendance was not required and the degree of employer involvement at the time of plaintiff's injury did not consist of sponsorship or encouragement; therefore, plaintiff's injury did not arise out of and in the course and scope of his employment.
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> 3. In *Chilton,* the Court of Appeals adopted from Larson's treatise on workers' compensation the following structured analysis applicable to recreation cases such as this: (1) Did the employer in fact sponsor the event? (2) To what extent was attendance really voluntary? (3) Was there some degree of encouragement to attend evidenced by such factors as: a.) taking a record of attendance; b.) paying for the time spent; c.) requiring the employee to work if he did not attend; or d.) maintain a known custom of attending? (4) Did the employer finance the occasion to a substantial extent? (5) Did the employees regard it as an employment benefit to which they were entitled as of right? (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards? *Chilton,* [45] N.C. App. [at] 14-15, 262 S.E.2d at 348. As the greater weight of the evidence so indicates in this case, none of these questions may be answered in the affirmative; thus, plaintiff is entitled to no recovery of benefits under the Workers' Compensation Act.

Based on these findings of fact and conclusions of law, the Full Commission denied plaintiff's claim. Subsequently, plaintiff filed a motion to reconsider and a motion to allow additional evidence. The Full Commission denied these motions. Plaintiff appeals.

On appeal, plaintiff argues that the Full Commission erred by (1) denying the motion to reconsider and the motion to allow additional evidence, (2) failing to dismiss the appeal from the Deputy Commissioner to the Full Commission because the appeal was not stated with particularity, and (3) refusing to force the Full Commission to produce a stenographic record of oral arguments. We disagree and affirm the opinion and award of the Full Commission.**[Note 1]**

I. Plaintiff's motions

Plaintiff argues that the Full Commission erred by denying his motion to reconsider and his motion to allow additional evidence. Before evaluating the merits of this argument, it is important to understand the procedural history of this case.

Here, the Deputy Commissioner considered all of the evidence and awarded plaintiff workers' compensation benefits. However, on appeal, the Full Commission reversed that decision and denied plaintiff's claim. *After* the Full Commission issued its opinion and award, plaintiff submitted a motion to reconsider and a motion to allow additional evidence. The Full Commission denied those motions, and plaintiff argues that these rulings were erroneous. Plaintiff's argument is unpersuasive.

First, plaintiff cites N.C. Gen. Stat. §97-85 (2003) which states:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

This statute applies to the initial appeal from the Deputy Commissioner to the Full Commission because it also mentions that

> the commissioner who heard and determined the dispute in the first instance . . . shall be disqualified from sitting with the full Commission on the review of such award, and the chairman of the Industrial Commission shall designate a deputy commissioner to take such commissioner's place in the review of the particular award.

Id. Therefore, if plaintiff wanted to present new evidence pursuant to this statute, he should have done so when the appeal first went to the Full Commission instead of waiting until after the Full Commission reversed the Deputy Commissioner.

Even if we assume that the statute could apply in this case, the Full Commission has broad discretion in deciding whether to allow additional evidence. In interpreting N.C. Gen. Stat. §97-85, this Court noted that

> [t]he Commission has plenary power to receive additional evidence, and may do so at its sound discretion. Furthermore, "[w]hether such good ground has been shown is discretionary and 'will not be reviewed on appeal absent a showing of manifest abuse of discretion.'"

Cummins v. BCCI Constr. Enters., 149 N.C. App. 180, 183, 560 S.E.2d 369, 371 (citations omitted), *disc. review denied,* 356 N.C. 611, 574 S.E.2d 678 (2002).

Plaintiff has not shown that the Full Commission abused its discretion by excluding evidence or refusing to reconsider its decision. In fact, plaintiff's brief offers little more than a litany of complaints regarding the Full Commission's credibility determinations.**[Note 2]** This is not helpful to plaintiff because the Full Commission is the "sole judge of the weight and credibility of the evidence[.]" *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. We dismiss this assignment of error.

II. Inadequate Appeal to the Full Commission

Plaintiff argues that defendant's appeal to the Full Commission should have been dismissed because defendant failed to state its grounds for appeal with particularity. Plaintiff cites a North Carolina Industrial Commission rule which states that when a party appeals from the decision of a Deputy Commissioner, he or she must state the grounds for the appeal with particularity.

This Court has held that

> the North Carolina Industrial Commission has the power not only to make rules governing its administration of the Workers' Compensation Act, but also to construe and apply such rules. "Its construction and application of its rules, duly made and

> promulgated, in proceedings pending before the said Commission, ordinarily are final . . . and not subject to review . . . on an appeal from an award made by said Industrial Commission."

Shore v. Chatham Manufacturing Co., 54 N.C. App. 678, 681, 284 S.E.2d 179, 181 (1981)(citation omitted), *disc. review denied*, 304 N.C. 729, 287 S.E.2d 902 (1982). In this case, the Full Commission determined that defendant stated its appeal with particularity. We decline to reconsider the Full Commission's construction and application of its own rule.

III. Stenographic Record

In his last argument, plaintiff contends that the Full Commission erred by failing to produce a stenographic record of oral arguments. Plaintiff has failed to cite any authority for this proposition. Therefore, this assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(6) (2004).

After careful consideration of the record and all of plaintiff's arguments on appeal, we conclude that the Full Commission acted properly in all respects. Accordingly, the opinion and award and the decisions to deny plaintiff's motions to reconsider and to allow additional evidence are

Affirmed.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).

NOTES

1. Ordinarily, the standard of review in workers' compensation cases is limited to "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). In the present case, plaintiff did not assign error to any of the findings of fact which are therefore binding on appeal. *Watson v. Employment Security Comm.*, 111 N.C. App. 410, 412, 432 S.E.2d 399, 400 (1993). Furthermore, after careful review, we conclude that the Commission's findings of fact do support its conclusions of law.

2. For instance, plaintiff argues that the Full Commission should have assigned more weight to evidence that EATP encouraged the basketball team by using it as a reward for students. Plaintiff also suggests that the Full Commission was wrong in deciding that the evidence of counselors playing basketball while they were working was not credible.