A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any other purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered. See Rule of Appellate Procedure 30 (e)(3).

NO. COA02-816

NORTH CAROLINA COURT OF APPEALS

Filed: 3 June 2003

DANNY THOMAS RHODES,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 274996

HERSEK EXPRESS, INC.,
Employer,
Defendant

Appeal by defendant-employer from an Interlocutory Opinion and Award of the North Carolina Industrial Commission filed 12 June 1998 and an Opinion and Award of the Industrial Commission filed 28 February 2002. Heard in the Court of Appeals 15 April 2003.

Deaton and Biggers, P.L.L.C., by Brian D. Gulden, for plaintiff-appellee.

Bogle, Anthony & Leach, by Timothy T. Leach, and Aaron E. Bradshaw, for defendant-appellant.

STEELMAN, Judge.

Plaintiff was employed as a long-distance truck driver for defendant. After loading his truck with materials at various locations, plaintiff would drive with a partner to California on trips lasting between five and seven days. Defendant paid plaintiff $600.00 per trip to California.

On 10 July 1992, plaintiff injured his back when he adjusted the load in his truck by moving a roll of cloth. He immediately felt a burning sensation in his back. After completing his

duties for that day, Rocky Hersek ("Hersek"), owner of defendant, drove plaintiff to the emergency room where plaintiff was diagnosed with a lumbar strain.

When plaintiff's back pain did not subside, he began seeing Dr. Karl Jordan ("Dr. Jordan"), a chiropractor. Dr. Jordan treated plaintiff from 13 July through 4 August 1992 with spinal manipulation and physical therapy. Plaintiff continued to have back pain, and Dr. Jordan referred him to Dr. Raymond Sweet ("Dr. Sweet"), a neurosurgeon.

Before being evaluated by Dr. Sweet, plaintiff sought treatment from another chiropractor, Dr. Mark Cook ("Dr. Cook"). Dr. Cook treated plaintiff on a regular basis until 20 June 1994.

Plaintiff first saw Dr. Sweet on 21 October 1992, when he initially was diagnosed with a ruptured disc at L4-L5 on the left with damage to the L5 nerve root. Dr. Sweet ordered an MRI which revealed a compression fracture at L-4 of plaintiff's spine. Dr. Sweet recommended plaintiff obtain a bone scan and undergo physical therapy, which plaintiff did not seek due to his inability to pay for the treatment. Dr. Sweet again evaluated plaintiff on 13 July 1999, and found plaintiff to have reached maximum medical improvement with a fifteen percent (15%) permanent partial impairment of his back due to the compression fracture.

Defendant denied plaintiff's workers' compensation claim that he was injured by accident while working for defendant on 10 July 1992. On 31 January 1995, a hearing on the issue of the compensability of plaintiff's injury was conducted by a Special Deputy Commissioner of the North Carolina Industrial Commission("Commission"). On 8 April 1997, the Deputy Commissioner filed an Opinion and Award finding plaintiff suffered an injury by accident arising out of and in the course of his employment and directing the parties to confer and attempt to resolve the remaining issues.

Defendant appealed the Deputy Commissioner's Opinion and Award. The Full Commission conducted a hearing on 8 October 1997, resulting in an Interlocutory Opinion and Award filed 12 June 1998 which affirmed the Deputy Commissioner's decision.

The parties failed to resolve the remaining issues, and the case came on for another hearing before a Deputy Commissioner on 25 June 1999. On 24 May 2000, the Deputy Commissioner filed an Opinion and Award concluding that (1) plaintiff's average weekly wage on 10 July 1992 was $261.24, which yielded a compensation rate of $174.14; (2) plaintiff sustained a compensable injury by accident as the direct result of a specific traumatic incident of the work assigned; (3) plaintiff was totally disabled due to his injury by accident from 11 July 1992 through 13 July 1999, when he reached maximum medical improvement, and he was entitled to total disability compensation during that period; (4) plaintiff was no longer disabled after 13 July 1999 but retained permanent partial disability of fifteen percent in his back, entitling him to permanent partial disability benefits; and (5) plaintiff was entitled to receive medical compensation "for as long as it is or was reasonably necessary to effect a cure, give relief, or lessen the period of his disability."

Both plaintiff and defendant appealed the Deputy Commissioner's Opinion and Award. The Full Commission affirmed the Deputy Commissioner's Opinion and Award with the exception that it concluded plaintiff had an average weekly wage of $600.00, yielding a compensation rate of $400.02.

I.

Defendant argues the Commission erred in finding plaintiff suffered a compensable injury by accident. In support of this argument, defendant first contends the Commission failed

to consider evidence presented by defendant regarding plaintiff's credibility or to make findings of fact on this evidence.

This Court's review of the Commission's Opinion and Award is limited to whether its factual findings are supported by any competent evidence and whether its conclusions are adequately supported by its findings. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982); *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 546 S.E.2d 133 (2001). The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence, even if there is some evidence to sustain contrary findings. *Allen*, 143 N.C. App. at 60, 546 S.E.2d at 137. "'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

In this case, the Commission specifically found that "[p]laintiff's testimony is regarded as credible...." There is no evidence that the Commission ignored or disregarded evidence presented by defendant regarding plaintiff's credibility. The Commission is the sole judge of a witness's credibility and is permitted to give testimony the weight it deems appropriate. Under our limited standard of review, we conclude that the Commission's finding as to plaintiff's credibility is supported by competent evidence of record, and we are bound by this finding on appeal.

To further support its first assignment of error, defendant contends the Commission erroneously found plaintiff sustained his burden of proving injury by accident.

N.C. Gen. Stat. §97-2(6) (2001) defines an injury to be an "accident arising out of and in the course of the employment."

> [W]here injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident

> of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. Gen. Stat. §97-2(6). This Court has interpreted this statute as requiring an employee to prove his injury occurred at a cognizable time, but he is not required to demonstrate unusual circumstances accompanying the injury. *Bradley v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 335 S.E.2d 52 (1985).

The Commission made the following finding of fact:

> 6. On 10 July 1992 plaintiff sustained a compensable injury by accident when he adjusted the load in his trailer and in the process he picked up or pushed a roll of cloth that had fallen. Plaintiff felt an immediate pull in his back when he lifted or pushed the roll of cloth. Plaintiff has not worked for defendant or for any other employer since this incident on 10 July 1992. Defendant stipulated that plaintiff's injury by accident is compensable.

This finding is supported by plaintiff's testimony regarding the incident leading to his injury on 10 July 1992. The finding points to a specific action by plaintiff which occurred at a cognizable time and resulted in his injury, namely the adjustment of the load in his trailer while on a job for defendant. Such finding is sufficient to support the Commission's conclusion that "[o]n 10 July 1992, plaintiff sustained a compensable injury by accident as the direct result of a specific traumatic incident of the work assigned." Therefore, we find no error by the Commission on this basis.

Defendant further contends the medical evidence is insufficient to prove plaintiff's disability is the result of an accidental injury sustained by plaintiff in the course and scope of his employment with defendant. It argues that plaintiff had sustained the back injury prior to the 10 July 1992 incident.

Dr. Jordan testified that it was unlikely plaintiff's injury occurred prior to 10 July 1992 because plaintiff would not have been able to unload the truck as he had done on that date with a back injury. Dr. Cook testified that several of his diagnoses of plaintiff were related to the 10 July 1992 incident, including intervertebral disc syndrome and neuritis, and that he could distinguish between conditions related to prior injuries from those resulting from the work-related incident. Dr. Sweet testified that the pain and other problems plaintiff was having when he sought treatment were related to the 10 July 1992 incident. This testimony provides sufficient evidence to demonstrate plaintiff's injury was related to the 10 July 1992 incident occurring during the course and scope of his employment.

Based on the foregoing, we hold the Commission did not err in finding plaintiff suffered a compensable injury by accident.

II.

In its next assignment of error, defendant argues the Commission erred in finding plaintiff was totally disabled from 10 July 1992 through 13 July 1999. It contends that the evidence of record shows that plaintiff's condition permitted him to resume gainful employment as of 31 January 1995 and, therefore, any award of temporary disability should be limited to the period between 10 July 1992 and 31 January 1995.

N.C. Gen. Stat. §97-2(9) (2001) defines disability under the Workers' Compensation Act to be an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." "When the employee suffers the total lack of capacity to earn wages in any job, his disability is total." *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264-65, 423 S.E.2d 532, 535 (1992) (citation omitted). A plaintiff's testimony regarding his inability to work and his subjective opinion of his pain is competent

evidence upon which the Commission may base a finding of temporary total disability. *Id.* at 265-66, 423 S.E.2d at 536.

The Commission made the following pertinent findings of fact regarding the extent of plaintiff's disability:

> 10. From 16 November 1992 through 13 July 1999, plaintiff's only treatment has been with Drs. Jordan and Cook. Plaintiff testified that during this time he received treatment from Dr. Cook once or twice per month and that the treatment would alleviate his pain for short periods. Other than those brief periods following treatment, plaintiff testified that he remained unable to work in any capacity due to pain and his physical limitations caused by his injury. Plaintiff's testimony is regarded as credible by the Full Commission
>
> 11. On 13 July 1999, plaintiff was reevaluated by Dr. Sweet as ordered by [the Deputy Commissioner]. At this evaluation, Dr. Sweet found plaintiff to be at maximum medical improvement, and rated plaintiff with a 15% permanent partial impairment of his back as a result of the compression fracture he sustained on 10 July 1992. Dr. Sweet did not identify a surgical problem, and therefore surgery is not indicated. Dr. Sweet released plaintiff to return to work with the permanent restrictions of no repetitive bending, climbing, crawling, or lifting more than 15 pounds. In addition to these restrictions, plaintiff must be allowed to change positions at least every 30 minutes.
>
> 12. Plaintiff reached the end of his healing period by 13 July 1999, the date he was found by Dr. Sweet to be at maximum medical improvement. Since 13 July 1999, plaintiff has not made reasonable efforts to find suitable employment, nor has he shown that seeking employment would have been futile as a result of his permanent restrictions, his age, education, skills and other factors affecting employability. Therefore, plaintiff has not proven that his disability continued after 13 July 1999.

The evidence of record supports these findings. Plaintiff testified that he experienced pain in his back "[m]ost of the time" and required assistance from his girlfriend in his daily activity since the July 1992 incident. He also stated both chiropractors and Dr. Sweet imposed work limitations on him. Plaintiff testified that he had not worked since his injury.

Dr. Sweet testified that plaintiff reached maximum medical improvement as of 13 July 1999 with a fifteen percent permanent partial disability of his back. Dr. Sweet further testified that, in his opinion, plaintiff's work capabilities would be permanently restricted to "light, inside office work with no...lifting more than fifteen pounds."

Dr. Cook stated in his deposition that as of 25 February 1992, plaintiff had reached maximum medical improvement. On that date, he approved plaintiff for "light-duty employment...[but] strenuous activity should be avoided."

Under our standard of review, the Commission's findings are conclusive when supported by *any* competent evidence, despite evidence to sustain findings to the contrary. Because the testimony from plaintiff and Dr. Sweet is competent to support the finding that plaintiff was temporarily totally disabled until 13 July 1999, we hold this assignment of error is without merit.

III.

In its final assignment of error, defendant argues the Commission erred in finding plaintiff's average weekly wage was $600.00.

The Commission's findings regarding plaintiff's compensation are as follows:

> 3. Defendant compensated plaintiff in the amount of $600.00 per trip to California. Plaintiff was paid by the trip and not by the week, and each trip took between five and seven days to complete.
>
> 4. Plaintiff's pay was divided in part into a *per diem* amount of between $28.00 and $32.00 per day. The *per diem* was an advance to cover plaintiff's expense and meals while he was on a trip, and was deducted from the $600.00 per trip that plaintiff earned as wages. However, the *per diem* amount was not taxed and was not reported as wages on plaintiff's W-2 form. If plaintiff's expenses or advances exceeded the $28.00 to $32.00 he was allotted per day, these additional expenses would be deducted from his $600.00 per trip wage and thus his taxable wage would decrease. Plaintiff was allowed the *per diem* expenses deduction from taxes even if his expenses were less than the *per diem*

> advance. Furthermore, out of the $600.00 per trip received by plaintiff, defendant also subtracted out any fines, tickets or damages to the truck which may have been received or sustained by plaintiff.
>
> 5. Plaintiff's average weekly wage is determined by the Full Commission to be $600.00, yielding a weekly compensation rate of $400.02. The evidence shows that plaintiff was paid $600.00 per trip and each trip took between five and seven days. The payroll records offered by defendant do not show any itemized *per diem* amounts which were allegedly deducted from his wages and paid in cash; therefore, the records are not indicative of the wages actually paid to plaintiff. The amounts deducted from plaintiff's wages for fines, tickets or damages to the truck should not be used to demonstrate a lower average weekly wage. Accordingly, the Full Commission finds that establishing plaintiff's wages by using the base pay for each weekly trip most nearly approximates the amount which plaintiff would have earned had he not been injured.

N.C. Gen. Stat. §97-2(5) provides that an employee's average weekly wages are determined by dividing the earnings by the number of weeks and parts of weeks worked. However, where this general method "would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. §97-2(5).

Plaintiff testified that he understood his weekly salary was $600.00. His co-worker testified that their base salary for the California trip was also $600.00. Defendant's payroll supervisor testified that expenses and advances as well as the *per diem* normally were deducted from the $600.00 base salary and the employee was given a check for the remainder, thus accounting for the lower amount of wages appearing on plaintiff's W-2 form.

The Commission found that calculating plaintiff's average wages using his base salary of $600.00 per trip most nearly approximated the amount he would have earned. This finding is

supported by competent evidence of record and we are bound by the Commission's determination on this matter. We hold this assignment of error has no merit.

AFFIRMED.

Judges WYNN and TYSON concur.

Report per Rule 30(e).