

*An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-861

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

RICKY COOK,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 276576

ERECT ALL, Employer,  
and  
TRAVELERS INSURANCE COMPANY,  
Carrier,  
Defendants.

Appeal by plaintiff from an opinion and award filed 21 March 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2006.

*Oxner Thomas & Permar, PLLC, by Todd P. Oxner, for plaintiff appellee.*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas M. Morrow and Bettina Mumme, for defendant appellant.*

MCCULLOUGH, Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission (“the Commission”) denying workers’ compensation benefits to plaintiff Ricky Cook (“Mr. Cook”) based on the finding that plaintiff was intoxicated at the time of the injury and that the injury was proximately caused by his intoxication. We affirm.

FACTS

On 27 June 2002, Mr. Cook was working as an ironworker for Erect All in Johnston County, North Carolina. While working on the construction of an elementary school, Mr. Cook fell from a steel beam approximately 22 feet in the air before landing on the ground. At the time of the fall, Mr. Cook was not connected to a safety line. Immediately after the fall, Mr. Cook was taken to Johnston County Memorial Hospital and was thereafter flown to Duke University Medical Center for evaluation and treatment of his injuries. The medical records from Johnston County Memorial Hospital, stipulated to by counsel and introduced at trial without objection, showed that while being treated, medical providers noted an emission of a very strong smell of alcohol. A blood test, taken approximately 30 minutes after the accident, revealed a blood alcohol level (BAC) of .27 and the presence of cocaine.

Pursuant to the injuries sustained, a Form 33 request for hearing was filed by Mr. Cook on the basis of Erect All's failure to pay benefits. A Form 33R was filed by Erect All in response to the claim denying compensability. At the hearing before the Full Commission, Erect All asserted the affirmative defense of intoxication as their grounds for denying compensation.

In an opinion and award filed 21 March 2005, the Commission determined that Mr. Cook had sustained injury while working for Erect All. The Commission further determined that at the time the injuries were sustained, Mr. Cook was intoxicated and this intoxication was the proximate cause of his injuries. Moreover, the Commission found that based on the greater weight of the evidence, Mr. Cook was not provided alcohol by his employer and as such, based on the provisions of N.C. Gen. Stat. §97-12, he was not entitled to compensation. From this opinion and award, Mr. Cook now appeals.

#### ANALYSIS

We first address Mr. Cook's argument that the Commission erred in admitting medical records into evidence which he contends were obtained without a valid authorization. This error was not preserved for appeal and therefore is not considered by this Court.

The North Carolina Rules of Appellate Procedure state that, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion." N.C.R. App. 10(b)(1) (2006). A review of the transcript reveals that at the beginning of the trial, counsel stipulated to the authenticity of the medical records which Mr. Cook now contends were admitted into evidence in error. Following counsels' stipulations, the medical records were admitted into evidence and no objections were made. It was not until much later during the trial that an objection was brought as to the medical records. Where the objection was not made at the time the records were admitted into evidence, nor in the temporal proximity of their admission, the objection was waived. Therefore, this assignment of error is overruled.

## II

We next address Mr. Cook's contention that the Commission erred by concluding that he had the burden of proof in establishing that Erect All, his employers, provided the intoxicating substance to him. This contention lacks merit.

N.C. Gen. Stat. §97-12 provides that an employee is not entitled to compensation for injury or death proximately caused by "[h]is intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee[.]" N.C. Gen. Stat. §97-12(1) (2003), *amended by* 2005 N.C. Session Laws ch. 448, §2. Further, under this statute, the employer has the burden of proof on the affirmative defense of intoxication. *See Smith v. Central Transport*, 51 N.C. App. 316, 276 S.E.2d 751 (1981). This Court must affirm the Commission's determination if (1) its findings are supported by competent record evidence,

and (2) its conclusions are supported by findings of fact and applicable law. *See Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (noting this Court's standard of review).

The gravamen of Mr. Cook's argument is that he would have preferred for the trial court to accept his testimony as true rather than the testimony of V.R. Phipps. In the instant case, there was evidence presented by V.R. Phipps that he did not purchase any alcohol for Mr. Cook on the night in question and that to his knowledge, no one affiliated with Erect All had supplied Mr. Cook with an intoxicating substance. On the other hand, Mr. Cook testified that either Onion (Herman Phipps) or V.R. Phipps had purchased the alcohol for him and further denied that he, Mr. Cook, had purchased any alcohol himself. He also testified that later in the night, he gave someone his own money to purchase more alcohol. After considering the evidence, the Commission determined that Mr. Cook's testimony was conflicting, not credible, and therefore would be afforded no weight. The Commission was not required to find as credible any evidence that the employer or a supervisory agent of the employer supplied Mr. Cook with alcohol. *See Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002) ("The Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony."). Moreover, Mr. Cook failed to assign any error to the Commission's Finding of Fact No. 9 which stated, "Based upon the greater weight of the evidence, the Full Commission further finds that plaintiff was not provided alcohol by his employer." *See White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 660-61, 606 S.E.2d 389, 392 (2005) ("[F]indings of fact to which [an appellant] has not assigned error . . . are conclusively established on appeal.") (citation omitted). Therefore, this assignment of error is overruled.

Finally we address the argument that the Commission erred by finding and concluding that Mr. Cook's injury was proximately caused by his intoxication. We disagree.

When an employer asserts intoxication as a defense to a workers' compensation claim under N.C. Gen. Stat. §97-12, he carries the burden of proving that the intoxication was the proximate cause of the injury. *Anderson v. Century Data Systems*, 71 N.C. App. 540, 545, 322 S.E.2d 638, 641 (1984), *disc. review denied*, 313 N.C. 327, 327 S.E.2d 887 (1985). In shouldering this burden, the employer is not required to disprove all other possible causes of injury other than intoxication, nor that intoxication was the sole proximate cause of the employee's injuries. *Id.* What is required is evidence that the employee's intoxication was more probably than not a cause in fact of the accident resulting in injury to the employee. *Id.* As stated, *infra*, this Court is bound by the Commission's determination where the findings of fact are supported by any competent evidence and the conclusions of law are supported by the findings of fact and the law. *See Creel*, 126 N.C. App. at 552, 486 S.E.2d at 480 (noting this Court's standard of review). Further, the Commission is the exclusive judge of credibility and the weight to be given to the testimony. *Effingham*, 149 N.C. App. at 109-10, 561 S.E.2d at 291.

In the instant case, an expert in toxicology, Dr. Glenn Simon (Dr. Simon), testified by way of deposition giving his opinion on whether or not intoxication was a proximate cause of Mr. Cook's injury. Dr. Simon testified that 30 minutes after Mr. Cook's fall, his BAC was .27 percent. Dr. Simon further testified that this BAC would have kept Mr. Cook from functioning both physically and mentally in a way that he would have functioned on a normal day. Moreover, Dr. Simon stated that it was his opinion to a reasonable degree of toxicological certainty that intoxication was the proximate cause of Mr. Cook's fall on 27 June 2002. Mr. Cook contended that the cause of the fall was the failure of Erect All to require each employee to wear a safety

line. Where it is evident that there was competent evidence presented at the hearing for the Commission to conclude that intoxication was a cause in fact of the accident, this assignment of error is overruled.

Accordingly, this Court finds that there is no merit to the contentions of Mr. Cook on appeal, and for the foregoing reasons, the Commission's opinion and award is

Affirmed.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).