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NO. COA06-1412

NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 2008

DONALD THOMAS GROVE,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 278724

BAR CONSTRUCTION COMPANY, INC.,  
J. CLIFF REDDING CONSTRUCTION,  
PAMELA HILL CONSTRUCTION,  
Employer,

KEY RISK INSURANCE COMPANY,  
Carrier,  
Defendants.

Appeal by employee-plaintiff, employer-defendant, and carrier-defendant from an Opinion and Award entered 1 June 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2007.

*Moody, Williams & Roper, LLP, by C. Todd Roper, for plaintiff-appellant.*

*Prather Law Firm, by J.D. Prather for defendants-appellants Bar Construction Co. And Key Risk Insurance Co.*

STEELMAN, Judge.

The Industrial Commission's findings of fact were supported by competent evidence in the record, and the findings in turn support its conclusion that plaintiff was not totally disabled. The Industrial Commission erred in failing to address the issues of plaintiff's permanent partial

disability, and the consequences of plaintiff's invocation of his privilege against self-incrimination. The Industrial Commission properly applied N.C. Gen. Stat. §97-19 in holding that defendants Bar and Key Risk were liable to pay plaintiff's award only in the event that defendant Redding was unable to pay. The Industrial Commission did not err in concluding that there was a causal relationship between the accident and plaintiff's injuries.

### I. Factual and Procedural Background

On 24 July 2001, Donald Thomas Grove ("plaintiff") was injured when a dump truck he was operating overturned. Immediately following the accident, plaintiff assisted co-workers with the overturned dump truck by operating a large piece of machinery. The process of righting the dump truck took about fifteen minutes. Thereafter, plaintiff was treated at a local hospital. Plaintiff described pain in the area of his ribs and disclosed a pre-existing condition of ankylosing spondylitis which caused him to suffer from persistent back pain. Prior to the accident, plaintiff had suffered fractures to thoracic vertebrae ten and eleven. At the local hospital, plaintiff was diagnosed with fractures to his eighth and ninth ribs. Plaintiff stayed out of work for one week and then returned to work full time.

On 17 October 2001 plaintiff sought treatment from Dr. Karl Boatright for continued pain. On 7 November 2001, Dr. Boatright diagnosed plaintiff with fractures to the seventh and eighth thoracic vertebrae, immediately removed plaintiff from work, and referred plaintiff to Dr. Paul Suh. On 26 November 2001, Dr. Suh confirmed Dr. Boatright's diagnosis, and recommended a spinal fusion of the fractured vertebrae, which was performed on 30 November 2001. Upon his release from Dr. Suh's care, plaintiff was not released for work duty, was limited to light activity, and was restricted from lifting, pushing, pulling, or driving. Dr. Suh testified that after a spinal fusion, a patient would have been out of work for six months, and thereafter

could return to work. Since his spinal fusion, plaintiff attempted to work on only two occasions. Plaintiff testified that on each occasion he experienced severe back pain and could only work for a few hours.

Plaintiff was employed by J. Cliff Redding Construction (“Redding”) at the time of his injury. Redding was a subcontractor for Bar Construction Company, Inc. (“Bar”), the general contractor on a project at North Carolina A&T University in Greensboro. Key Risk Insurance Company (“Key Risk”) provided workers’ compensation insurance for Bar on 24 July 2001. Bar failed to obtain from Redding a certificate stating that it had workers’ compensation insurance, as required by N.C. Gen. Stat. §97-93.

On 1 June 2006, the North Carolina Industrial Commission entered its award. Plaintiff was awarded temporary total disability benefits from 25 July 2001 through 28 July 2001, and from 17 October 2001 through 30 May 2002. It further ordered that plaintiff be paid for “all medical expenses incurred or to be incurred by the plaintiff as a result of his compensable injury.” The Commission denied plaintiff’s claim for total and permanent disability benefits under N.C. Gen. Stat. §97-29 (2005). Pursuant to N.C. Gen. Stat. §97-19, Redding was ordered to pay plaintiff the sum ordered in the award, with Bar and Key Risk to be “liable only in the event that Redding is unable to pay.”

From the Opinion and Award, plaintiff, defendant Bar, and its insurer, Key Risk, all appeal.

## II. Standard of Review

”Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact.” *Chambers v. Transit Mgmt.*, 360

N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted). “The Commission’s findings of fact are conclusive on appeal when supported by . . . competent evidence, ‘even though there [is] evidence that would support findings to the contrary.’” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (citation omitted) (alteration in original). Conclusions of law are subject to *de novo* review. *Id.* at 496, 597 S.E.2d at 701.

### III. Plaintiff’s Appeal

#### A. Total Disability under N.C. Gen. Stat. §97-29

In his first argument, plaintiff contends that the Commission erroneously failed to find and conclude that he was totally disabled. We disagree.

Disability under the Workers’ Compensation Act is defined as “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.” N.C. Gen. Stat. §97-2(9) (2005). An employee bears the burden of establishing that he is totally disabled. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). This burden may be met in one of four ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;

(2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;

(3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or

(4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

*Id.* (citations omitted).

Plaintiff's brief makes arguments that he should have been awarded total disability benefits under the first and third prongs of the *Russell* test. He contends that there was evidence in the record supporting a finding that he was incapable of work as a result of his work-related injury. Thus, plaintiff argues that the Full Commission should have found that he was totally disabled. We note that plaintiff makes no argument that the Commission's findings of fact are not supported by the evidence, but rather points to evidence in the record that he contends supports his position. Our review of the Commission's findings "goes no further than to determine whether the record contains *any* evidence tending to support the finding[s]." *Anderson v. Lincoln Constr. Co.*, 265N.C. 431, 434, 144 S.E.2d 272, 274 (1965) (emphasis added). It is the role of the Commission and not an appellate court to resolve factual disputes in the evidence, assess credibility of witnesses, and determine the weight to be given to the evidence. *Id.*; *Matthews v. Petroleum Tank Serv., Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992). In the absence of an argument that the Commission's findings were not supported by the evidence, plaintiff's assignments of error pertaining to the findings of fact are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007). Thus, the findings of fact assigned as error under this argument (findings 4 and 12) are binding upon this court for purposes of this appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

Even assuming *arguendo* that the assignments of error as to these findings of fact were properly preserved for review, they have no merit. Findings of fact 4 and 12 read as follows:

4. Prior to the July 24, 2001, injury by accident, the plaintiff suffered from ankylosing spondylitis [sic], a progressive condition that causes the back to form a "C" shape. In 1996, prior to the injury at issue, the plaintiff suffered fractures along the T10-11 portions of his spine. For a period of almost three years prior to the accident at issue, the plaintiff had been taking pain medications

for back pain, and his pre-accident pain was so severe that his back would ache continually at nights and he would be unable to sleep on his back because of the pain and discomfort.

12. The plaintiff maintains that he is unable to return to work because of continued back pain; however, the medical evidence of record fails to show that any doctor has continued to write the plaintiff out of work following his post-surgery recovery[.] Thus, the Full Commission finds that the plaintiff has failed to show that he was incapable of work after May 30, 2002, the last day in which he would have been kept out of work by Dr. Suh following the November 30, 2001 surgery. Further, the plaintiff has not shown that he is unable to find suitable employment or that it would be futile for him to look for work, given he is under 40 and has a GED.

We hold that there is competent evidence in the record to support these findings of fact. On 24 July 2001, plaintiff disclosed to the treating physician at the local hospital where he was treated after the accident that he suffered from ankylosing spondylitis with persistent back pain. Plaintiff testified that he had fractured thoracic vertebrae numbers ten and eleven in 1996. Drs. Suh and Boatright both located these old fractures. Dr. Boatright testified that plaintiff had suffered from back pain for at least three years prior to the accident, and that he had trouble sleeping for many years. Dr. Suh was unable to locate any no-work orders for plaintiff beyond 13 December 2001 and testified that typically someone with plaintiff's condition would be out of work for six months following his spinal fusion. Plaintiff's back pain improved after the surgery . Dr. Suh testified that as a result of plaintiff's ankylosing spondylitis, he had work restrictions. He further testified that he was unable to quantify what plaintiff's work restrictions would have been in the absence of the T7-8 fractures, and could not quantify any additional restrictions as a result of these fractures. Findings of fact 4 and 12 are thus supported by competent evidence in the record.

Plaintiff asserts in his brief that his “permanent pain conditions prevent him from working in his prior employment or in any other employment.” In support of this argument plaintiff cites to his own testimony that he cannot work due to pain. Evidence based upon plaintiff’s testimony and not based upon medical evidence is insufficient to meet plaintiff’s burden of proof under the first prong of the *Russell* test. *Everett v. Well Care & Nursing Services*, 180 N.C. App. 314, 321, 636 S.E.2d 824, 829 (2006).

We hold that the Industrial Commission did not err in concluding that plaintiff had failed to meet his burden of establishing that he is “incapable of work in any employment” under the first prong of the *Russell* test.

As to the third prong of the *Russell* test, plaintiff, in his brief, makes a generalized assertion of futility. Plaintiff testified that he had only made two attempts to work following his surgery. We hold that the Industrial Commission did not err in concluding that plaintiff has failed to meet his burden that “it would be futile . . . to seek other employment” under the third prong of the *Russell* test.

This argument is without merit.

#### B. Permanent Partial Disability

In his second argument, plaintiff contends that the Commission erroneously failed to find that he suffered a 30% permanent partial disability to his back. We agree that the Commission failed to properly address this issue and remand this issue to the Commission.

Plaintiff assigns error to finding of fact 9, which reads as follows:

Dr. Suh believed that the plaintiff suffered a thirty percent (30%) permanent partial disability to his back as a result of all the problems from which he suffered; however, he did not indicate what percent of that rating was related to the T7-8 fracture. Dr. Suh could not say whether the plaintiff’s T7-8 fracture was a result of

the accident of July 24, 2001, and deferred to Dr. Boatright's opinion as to the cause of the T7-8 fracture.

This is the only reference in the Commission's Opinion and Award to any permanent partial disability under N.C. Gen. Stat. §97-30 (2005). There are no conclusions of law or dispositional provision as to this issue. While the parties have briefed this issue as if the Commission denied the plaintiff's claim for permanent partial disability, we find no such holding to be expressly or impliedly stated in its award. It is the duty of the Commission in entering awards to make findings of fact, conclusions of law, and rulings upon all issues properly before it. *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992) . We remand this matter to the Commission for entry of findings of fact, conclusions of law, and a ruling on this issue. In so doing, the Commission shall consider the effect of Dr. Suh's inability to allocate any permanent partial disability between plaintiff's pre-existing condition and the injury received in his compensable accident.

### C. Order of Liability

In his third argument, plaintiff contends that the Commission erroneously concluded that defendant Key Risk was not liable to pay plaintiff's award unless defendant Redding was unable to pay. We disagree.

Plaintiff assigns error to the following conclusion of law:

"Any principle contractor...who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate...stating that such subcontractor has complied with N.C. Gen. Stat. §97-93 hereof, shall be liable...for the compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract." N.C. Gen. Stat. §97-19. However, "[a]ny principle contractor...may recover the amount so paid from any person, person, or corporation who independently of such

provision, would have been liable for the payment thereof.” *Id.* Thus, the Full Commission finds J. Cliff Redding Construction, the subcontractor, to be liable for the compensation awarded to the plaintiff herein. Bar Construction Company, Inc., the contractor, shall be liable only in the event that Redding is unable to pay.

Plaintiff asserts that the Full Commission erred in concluding that defendant Bar is liable only in the event that defendant Redding is unable to pay. He argues that it would be futile to require him to seek payment from Redding, and that he should be allowed to proceed directly against Bar and Key Risk.

Under the provisions of N.C. Gen. Stat. §97-19, Bar, as a general contractor, is liable to plaintiff for compensation and other benefits payable under Chapter 97 because it failed to procure a certificate of compliance with N.C. Gen. Stat. §97-93 from its subcontractor, Redding. N.C. Gen. Stat. §97-19 specifically provides that:

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The Commission held that Redding, as plaintiff’s immediate employer, was liable to plaintiff and that Bar was liable “only in the event that Redding was unable to pay.” We hold that the Commission correctly applied the provisions of N.C. Gen. Stat. §97-19 in its Opinion and Award.

Plaintiff cites to this Court the case of *Robertson v. Hagood Homes, Inc.*, 160 N.C. App. 137, 584 S.E.2d 871 (2003) for the proposition that he should be allowed to proceed directly against Bar to collect his award. *Robertson* merely held that a general contractor was liable for compensation benefits due to an insured employee of a subcontractor of its subcontractor under N.C. Gen. Stat. §97-19. It did not address the question of setting an “order in which the parties shall be exhausted” and is therefore inapplicable to this case.

This argument is without merit.

#### IV. Defendants' Appeal

##### A. Plaintiff's Invocation of Fifth Amendment

In their first argument, defendants contend that the Commission failed to rule upon the defendants' contention that plaintiff waived his disability claim by invoking his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. We agree and remand this issue to the Commission for further proceedings.

During plaintiff's testimony before the Commission, counsel for the defendant sought to cross-examine plaintiff concerning his income received from Redding in 2001, whether he filed income tax returns for that income, and whether he had consumed illegal drugs following the accident. Plaintiff invoked his privilege under the Fifth Amendment against self-incrimination, and refused to answer the questions. On appeal to the Full Commission, defendants alleged as error:

3. The Industrial Commission's failure to conclude that plaintiff waived his disability claim by invoking the Fifth Amendment privilege against self-incrimination as to matters material to the disability claim.

The Opinion and Award of the Industrial Commission is totally devoid of any findings of fact, conclusions of law, or disposition of this allegation of error which was properly before the Full Commission. It is the duty of the Commission to make findings of fact, conclusions of law, and disposition of issues properly before it. *Viergge*, 105 N.C. App. at 638, 414 S.E.2d at 774 . We remand this issue to the Industrial Commission for entry of an order that resolves this issue.

Upon remand, the Commission shall determine whether the matters with respect to which he asserted his Fifth Amendment privilege were "essential to evaluate" plaintiff's claims for compensation under Chapter 97, *See Roadway Express, Inc. v. Hayes*, 178 N.C. App. 165, 174,

631 S.E.2d 41, 47 (2006), and if it so finds, it shall apply the holdings in the cases of *Cantwell v. Cantwell*, 109 N.C. App. 395, 396-98, 427 S.E.2d 129, 130-31 (1993) and *Roadway Express*, 178 N.C. App. at 171-174, 631 S.E.2d at 46-47 to dismiss plaintiff's claims.

#### B. Opinion Testimony of Dr. Boatright

In their second argument, defendants contend that the Commission erred in finding that plaintiff's fracture and disability were causally related to the 24 June 2001 accident. We disagree.

We initially note that our review of this argument is hampered by the failure of defendants' counsel to specify the assignments of error upon which this argument is based. This is a violation of Rule 28(b)(6) of the Rules of Appellate Procedure. Further, defendants' assignments of error contain no "specific record or transcript references" in violation of Rule 10(c)(1) of the Rules of Appellate Procedure. Nonetheless, in our discretion, we choose not to dismiss this argument, but to address it. *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007).

Defendants assign error to finding of fact 7, which reads as follows:

Dr. Boatright indicated that it was not unusual for the emergency physicians to miss the fractures at T7-8 due to the plaintiff's pre-existing condition. Dr. Boatright was of the opinion that the plaintiff had suffered the fractures at T7-8 on July 24, 2001, when the dump truck over turned because it would take a trauma to cause this kind of injury. It was also Dr. Boatright's opinion that the injury of July 24, 2001, had exacerbated the plaintiff's ankylosing spondylitis, causing him severe pain. Thus, based upon the testimony of Dr. Boatright, the Full Commission finds that July 24 2001 [sic] injury by accident caused the fractures at T7-8, or alternatively, caused an aggravation of the plaintiff's ankylosing spondylitis.

Defendants contend that Dr. Boatright's opinion is based solely upon the history provided by the plaintiff which was not credible and was contradicted by other evidence in the record.

In his deposition, Dr. Boatright expressed the opinion that:

My opinion is that he developed a new injury at the T7-8 level at the time the dump truck overturning based on the history which he gave me. In addition, based upon the CT scan and the fact that he had a pseudarthrosis there, I was certain enough that we proceeded with surgical intervention at this level, although I was not the surgeon who performed the intervention.

Dr. Boatright went on to testify that it was not unusual for an emergency room not to diagnose this type of fracture. In response to cross-examination by defendants' counsel, he further testified that even given plaintiff's preexisting conditions and the "bouncing and jostling around" from operating heavy equipment, it would be "very unlikely" that a fracture of the spine would develop. However, he also testified that ". . . the kind of jostling where the dump truck turned over and, you know, the \_ and the patient fell from one side to the other, that's the kind of jostling you would need to make a T7-T8 fracture, even in an ankylosing spondylitis patient."

As to plaintiff's history, Dr. Boatright testified that plaintiff complained of a different type of pain following the 24 July 2001 accident. Based upon this complaint, Dr. Boatright suspected a fracture of the spine and ordered the tests that confirmed his suspicions.

The above-recited evidence constitutes competent evidence in the record supporting the Commission's finding of fact 7. Issues of credibility, and weighing of conflicting evidence are for the Commission to resolve, not an appellate court. *Matthews*, 108 N.C. App. at 264, 423 S.E.2d at 535.

This finding of fact establishes a causal connection between the accident of 24 July 2001 and the fractures of plaintiff's T7-8 vertebrae and supports the Commission's conclusions of law that plaintiff is entitled to temporary total disability and payment of medical bills incurred and arising from the compensable injury. This argument is without merit.

Assignments of error not argued in the parties' briefs are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

AFFIRMED in part, REMANDED in part.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).