

Appeal Dismissed

Sellers
Mauretic
Bolch

NO. COA99-1357

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2000

DAVID LEE CUTHBERTSON,
Employee,
Plaintiff;

v.

HOECHST CELANESE, INC.,
Employer;

North Carolina
Industrial Commission
I.C. No. 347787

SELF-INSURED (ESIS, Inc. Servicing
Agent),
Defendant.

IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

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FILED

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 25 June 1999. Heard in the Court of Appeals 18 September 2000.

Kenneth M. Johnson, P.A., by Kenneth M. Johnson, for the plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher B. Kincheloe and Sharon E. Dent, for defendant-appellee.

EAGLES, Chief Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission holding: (1) plaintiff failed to show that he was totally disabled, (2) defendant successfully rebutted the presumption of continuing disability, and (3) plaintiff is not entitled to receive further temporary total disability payments. We do not reach the merits of plaintiff's arguments, however, because of plaintiff's disregard for the North

Carolina Rules of Appellate Procedure. Because of the serious and pervasive nature of appellate rule violations here, we dismiss this appeal.

Appellants must adhere to certain mandatory procedural requirements to obtain review of lower court decisions. *Duke University v. Bishop*, 131 N.C. App. 545, 546, 507 S.E.2d 904, 905 (1998). See *In re Lancaster*, 290 N.C. 410, 424, 226 S.E.2d 371, 380 (1976). "[O]nly those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions. This can be a strict requirement. The Rules of Appellate Procedure are mandatory. They are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Duke*, 131 N.C. App. at 546, 507 S.E.2d at 905. See *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979) (citation omitted).

Appellants are required to submit complete records which are in final and proper form. See N.C.R. App. P. 9(a)(1)(e), (j) (1997). Appellant's first omission occurs in the record on appeal. N.C.R. App. P. 10(c)(1) states unequivocally that "[a] listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal." Thus, "assignments of error are now mandatory to perfect an appeal." *Duke*, 131 N.C. App. at 546, 507 S.E.2d at 905. See *Shook v. County of Buncombe*, 125 N.C. App. 284, 286, 480 S.E.2d 706, 707 (1997). Although the index to the record on appeal provides that a listing of assignments of error is present, and a page is designated for assignments of error, no assignments of error are actually listed

on the designated page or anywhere else in the record or appellant's brief. Whether the omission is intentional or inadvertent, it is appellant's responsibility to ensure that the record is in its complete and proper form. *Duke*, 131 N.C. App. at 546, 507 S.E.2d at 905. See *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983).

The appellant's brief is also void of any reference to assignments of error. At the beginning of each argument are lists of transcript and deposition page numbers. Furthermore, certain depositions listed are not included in the record on appeal.

The North Carolina Rules of Appellate Procedure clearly state the method for denoting error within the briefs. N.C.R. App. P. 28(b) (5) states:

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

Id. (Emphasis added). Plaintiffs fail to include, after each question presented for review, a "reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." *Duke*, 131 N.C. App. at 548, 507 S.E.2d at 905. See *Shook*, 125 N.C. App. at 287, 480 S.E.2d at 707. A listing of transcript and deposition page numbers is not sufficient to either preserve or denote error within a brief. Assignments of error are not only

mandatory, but critical in aiding the review of a lower court decision. Although not specifically mentioned in the Rules of Appellate Procedure, correct grammar and punctuation are preferred. Appellant's brief is largely without concern for traditional rules of grammar. As well, citations are not pursuant to any recognizable format. Appendix B of the North Carolina Rules of Appellate Procedure requires that citations be according to *A Uniform System of Citation*, (14th ed. 1991).

Nevertheless, we have attempted to review this case on its merits, in so far as is possible utilizing this record on appeal and the briefs submitted. It appears that appellant's complaints on appeal are based on the sufficiency of appellee's evidence. Our review discloses that the Full Commission's opinion and award contains 29 findings of fact and 4 conclusions of law, all supported by evidence found in the transcripts and depositions. These findings support the Full Commission's conclusions of law.

Appellate review of an opinion and award of the Industrial Commission is limited to two questions of law: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions." *Alva v. Charlotte Mecklenburg Hospital Auth.*, 118 N.C. App. 76, 79, 453 S.E.2d 871, 873 (1995). On appeal, the Industrial Commission's findings of fact are conclusive if supported by competent evidence even though a contrary finding may be found. *Alva*, 118 N.C. App. at 79, 453 S.E.2d at 874. "[T]he Industrial Commission is the sole

judge of the credibility of the witnesses and the weight to be given their testimony." *Alva*, 118 N.C. App. at 80, 453 S.E.2d at 874, *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982). Here, there is competent evidence to support the Commission's findings of fact which in turn support the Commission's conclusions of law. Were we to address the merits of appellant's argument, we would affirm the Full Commission.

Because of appellant's numerous flagrant violations of our rules, and because "[o]ur rules are mandatory, and in fairness to all who come before this Court, they must be enforced uniformly," appellant's appeal is dismissed. *Duke*, 131 N.C. App. at 548, 507 S.E.2d at 906. *See Shook*, 125 N.C. App. at 287, 480 S.E.2d at 708.

Dismissed.

Judges TIMMONS-GOODSON and FULLER concur.

Report per Rule 30(c).