NO. COA06-1628

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2007

ROBERT N. BAKER,
Employee-Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 405357

GRAYSTONE CONSTRUCTION,
Employer-Defendant,

and

BUILDERS MUTUAL INSURANCE COMPANY,
Carrier-Defendant.

Appeal by Plaintiff from opinion and award entered 28 September 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 August 2007.

Brumbaugh, Mu & King, P.A., by Leah L. King, for Plaintiff-Appellant.

Lewis & Roberts, P.L.L.C., by John H. Ruocchio and Sarah C. Blair, for Defendants-Appellees.

STEPHENS, Judge.

Under the North Carolina Workers' Compensation Act ("Act"), "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by . . . [the employee's] 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 (2005). Plaintiff Robert N. Baker ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial

Commission ("Commission") in which the Commission denied workers' compensation benefits for an injury sustained 2 March 2004 in the course of Plaintiff's employment with Defendant Graystone Construction ("Graystone") upon the Commission's conclusion that "Plaintiff's injury is not compensable [under the Act] because it was proximately caused by his intoxication." We affirm.

Plaintiff began working for Graystone as a carpenter on or about 13 February 2004 . Plaintiff was driven to and from work each day by Mr. Maynard May ("May"), a co-worker.**[Note 1]** On 1 March 2004, Plaintiff finished work around 4:30 p.m. That evening, after May drove him home, Plaintiff estimated that he drank eight or ten beers before going to sleep around 11:30 p.m. May drove Plaintiff and other Graystone employees to work the next morning, picking up Plaintiff around 7:00 a.m. May testified that Plaintiff "smelled [of] beer" when he got into May's van, but that otherwise he observed "nothing unusual[]" about Plaintiff . May and another co-worker testified that Plaintiff did not appear "drunk" at the job site.

Plaintiff testified that around 9:00 that morning, while installing ceiling joists, he "just lost [his] balance and fell backwards" thirteen feet to the ground, landing on his buttocks . "[Plaintiff] had a small smell of alcohol coming from him" while he was lying on the ground after the fall, according to a co-worker who attended to Plaintiff . Plaintiff was transported to Dosher Memorial Hospital in Southport and from there to New Hanover Regional Medical Center in Wilmington ("New Hanover") where he was diagnosed as having a burst fracture of one of his vertebrae. As part of his treatment, a sample of Plaintiff's blood was drawn at New Hanover at 5:58 p.m. and analyzed at 6:00 p.m. The test results indicated that, at the time the blood was analyzed, Plaintiff's blood alcohol content was 0.7 milligrams per deciliter (mg/dL) .

Defendant Builders Mutual Insurance Company ("Builders Mutual") provided workers' compensation benefits to Plaintiff after the injury pursuant to an Industrial Commission Form 63. However, on 3 June 2004, Builders Mutual notified Plaintiff that it was terminating benefits because "[Plaintiff] tested positive for an illegal controlled substance" which Builders Mutual believed to be "the proximate cause of the injury." Plaintiff filed a request for a hearing with the Commission on 9 August 2004 . The claim was heard before Deputy Commissioner Phillip A. Holmes on 17 February 2005 . Following the hearing, Deputy Commissioner Holmes granted the parties additional time to depose expert and medical witnesses.

Dr. Shayne C. Gad, an expert in the field of toxicology and the only witness to offer an opinion about the meaning of the blood test results, was deposed on 3 October 2005. Dr. Gad testified that, based on the test results, Plaintiff's blood alcohol content at the time of the fall was 0.25 grams per deciliter (g/dL). Dr. Gad further testified that Plaintiff's blood alcohol content at the time of the accident was high enough to impair his judgment and motor performance and that the blood alcohol content "would have significantly contributed [to] and been causative of any accident." The following statement appears on the blood test results upon which Dr. Gad's testimony was based:

> NOTE: THIS ALCOHOL [sic] IS PERFORMED WITHOUT CHAIN OF CUSTODY AND IS INTENDED FOR MEDICAL USE ONLY. THESE RESULTS SHOULD NOT BE USED FOR LEGAL OR EMPLOYMENT PURPOSES.

The parties deposed two employees of New Hanover concerning the blood tests. Dr. Kelly Klinker testified that she ordered the tests drawn, that she did not know who actually drew Plaintiff's blood, and that she was "not familiar with the policy and procedure of blood collection and delivery to the lab." Mr. Michael Dale Register was identified by New Hanover as the lab technician who performed Plaintiff's blood tests. Mr. Register described New Hanover's

standard chain of custody procedures and also testified that there was no indication that Plaintiff's blood sample was tampered with or that a different procedure other than the hospital's standard procedure was followed in handling Plaintiff's blood sample.

On 12 January 2006, Deputy Commissioner Holmes issued an opinion and award in which he concluded that Plaintiff was not intoxicated at the time of the fall and that, therefore, Plaintiff sustained a compensable injury under the Act . Defendants timely appealed to the Full Commission and, on 28 September 2006, the Full Commission reversed the opinion and award of the Deputy Commissioner . The Full Commission concluded that "Plaintiff's injury is not compensable because it was proximately caused by his intoxication." Plaintiff appeals.

Plaintiff first argues that "[t]here is no competent evidence in the record to support [the Commission's] finding that [Plaintiff] was intoxicated at the time of his accident." While Plaintiff acknowledges that Dr. Gad's testimony constitutes evidence of Plaintiff's intoxication at the time of the accident, Plaintiff contends that Dr. Gad "based his opinion on [the blood test results]" and that Defendants "failed to show any chain of custody" for Plaintiff's blood sample. Plaintiff argues that Dr. Gad's testimony "is based upon incompetent evidence and therefore his opinion should not be considered as competent evidence" by this Court . We disagree.

In considering an appeal from a decision of the Commission, this Court is "limited to reviewing 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). "The Commission's findings of fact are conclusive on appeal when supported by such 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) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). "[F]indings of fact to which [an appellant] has not assigned error and argued in his brief are conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). "The Commission's conclusions of law are reviewed *de novo*." *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

Of the Commission's twenty-four findings of fact, Plaintiff assigned error only to "[t]he last sentence of Finding of Fact No. 5[,]" "[t]he last sentence of Finding of Fact No. 8[,]" and "Findings of Fact Nos. 23, 24 in their entirety[.]" Plaintiff did not assign error to finding of fact number twenty which states, "Defendants . . . proved the chain of custody [of Plaintiff's blood sample]." Accordingly, this finding is "'presumed to be supported by competent evidence and is binding on appeal.'" *Dreyer v. Smith*, 163 N.C. App. 155, 157, 592 S.E.2d 594, 595 (2004) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Because Defendants proved the chain of custody of Plaintiff's blood sample, Dr. Gad's testimony was based on competent evidence and his testimony itself constitutes competent evidence of Plaintiff's intoxication at the time of the accident. Thus, Plaintiff's argument is without merit.

Plaintiff next argues that "[t]here is no competent evidence in the record to support a finding that [Plaintiff's] intoxication was a proximate cause of his accident[.]" Again, we disagree.

In his response to interrogatories and on both direct and cross-examination before Deputy Commissioner Holmes, Plaintiff stated that the only reason he fell thirteen feet was that he "lost[his] balance." One of Plaintiff's co-workers testified that Plaintiff had a "smell of alcohol coming from him" while Plaintiff was lying on the ground after the fall. Dr. Gad testified that

Plaintiff's blood alcohol content at the time of the fall was approximately 0.25 g/dL. Dr. Gad also testified that Plaintiff's blood alcohol concentration at the time of the fall "would have impaired [Plaintiff] and would have significantly contributed [to] and been causative of any accident."

It is well settled that the Commission is the sole judge of the weight and credibility of evidence before it and that its factual determinations may be overturned on appeal only if there is a complete lack of competent evidence to support them. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000). Although Plaintiff did not attribute his loss of balance to impairment or intoxication, the Commission was free to reject that evidence and to accept Dr. Gad's testimony to the contrary. We conclude that the Commission's finding that Plaintiff's fall was proximately caused by his impairment or intoxication was supported by competent evidence. Plaintiff's argument is overruled.

Finally, Plaintiff argues that the Commission erred in (1) finding Dr. Gad's testimony to be credible and (2) "requiring" Plaintiff to present an expert opinion to contradict Dr. Gad's testimony. As it is well settled that "'[t]he 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) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Plaintiff's credibility argument to this Court is misplaced. Additionally, we disagree with Plaintiff's assertion that the Commission "required" him to produce an expert witness to rebut Dr. Gad's testimony. The Commission merely found that "there is no expert medical testimony to contradict [Dr. Gad's] opinions." The Commission based its decision to give "great weight" to

Dr. Gad as a witness on Dr. Gad's expert testimony regarding Plaintiff's level of intoxication at the time of his fall, not on Plaintiff's failure to offer contrary expert evidence. Plaintiff's argument is without merit and is overruled.

For the reasons stated, the opinion and award of the Commission is

AFFIRMED.

Judges McGEE and SMITH concur.

Report per Rule 30(e).

NOTE

1. Plaintiff's driver's license is permanently revoked for multiple convictions of driving while impaired.