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NO. COA07-1194

NORTH CAROLINA COURT OF APPEALS

Filed: 3 June 2008

WILLIAM GLENN,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 435536

TDM CORPORATION,
Employer,

and

THE HARTFORD,
Carrier,
Defendants-Appellants,

Appeal by plaintiff from Opinion and Award entered 30 May 2007 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 18 March 2008.

Leicht & Olinger, by Gene Thomas Leicht, for plaintiff-appellant.

Hedrick, Garner, Kincheloe & Garofalo, L.L.P., by Matthew D. Glidewell, for defendants-appellees.

JACKSON, Judge.

William Glenn ("plaintiff") appeals from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission ("Full Commission") denying his claim for workers' compensation benefits. For the following reasons, we affirm.

From 26 August 1991 until 12 May 2004, plaintiff worked as a machinist for TDM Corporation ("defendant-employer"), milling formed metal pieces into precision parts to be fit later onto larger structures per defendant-employer's customers' specifications. Plaintiff primarily worked with cast metals on a horizontal boring machine used to bore, drill, tap, and cut the metal pieces and remove from the pieces what plaintiff called "stock" - the paint in which the metal pieces were delivered to defendant-employer. Plaintiff never used a dust mask, respirator, or other ventilation device while milling metals for defendant-employer.

In 1995, plaintiff began experiencing breathing difficulties, and on 13 March 1995, Dr. Darilyn Dealy ("Dr. Dealy") diagnosed plaintiff with infiltrates resulting from viral pneumonia or aspiration. X-rays taken on 11 March and 15 March 1995 indicated bilateral patchy air-space disease predominantly in the upper lobes and mid-portions of plaintiff's lungs .

Beginning in August 1995, plaintiff sought treatment from Dr. Daniel Veazy ("Dr. Veazy"). On 29 August 1995, plaintiff presented to Dr. Veazy, complaining of a lack of stamina, and an x-ray taken on that date revealed small, diffuse infiltrates with a slightly nodular pattern in the upper and mid-portions of plaintiff's lungs. Another x-ray taken on 31 August 1995 indicated multi-focal atypical pneumonitis, granulomatous process, or interstitial pneumonitis. Dr. Veazy also treated plaintiff for continued pulmonary issues that plaintiff had in common with other members of his family. Dr. Veazy strongly recommended that plaintiff follow up with a pulmonologist, but plaintiff failed to do so.

On 25 December 1996, plaintiff was hospitalized for recurrent bilateral pneumonia with hypoxia. An x-ray taken on 26 December 1996 indicated prominent bilateral infiltrates, the pattern and appearance of which had not changed since the x-rays in March 1995. On 27

December 1996, plaintiff was vaccinated against pneumococcal disease, which is caused by the bacteria *streptococcus pneumoniae* and commonly results in pneumonia.

On 23 March 2004, plaintiff presented to his family physician, Dr. D. Michael Pass ("Dr. Pass"), for treatment of his worsening asthma. Dr. Pass noted on that occasion that plaintiff's asthma and allergies had flared up due to the time of year.

On 6 May 2004, plaintiff presented to Haywood Regional Medical Center Urgent Care, complaining of breathing difficulties and sharp pains in his chest. X-rays taken on that date revealed possible complications of silicosis, to wit: (1) extensive bilateral lung densities characteristic of massive progressive fibrosis; and (2) compensatory emphysematous changes. Plaintiff returned to Dr. Pass the following day, and a CT scan performed on 10 May 2004 was considered worrisome for pulmonary bronchogenic neoplasm with bilateral hilar and pulmonary involvement or co-existing pneumonia or co-existing fungal or tuberculus infection. Dr. Pass referred plaintiff to pulmonologist Dr. Michael Todd Cross ("Dr. Cross"), and on 12 May 2004, plaintiff presented to Dr. Cross, complaining of progressive shortness of breath and pleuritic chest pain. Based upon his review of plaintiff's chest x-rays and CT scan, as well as his physical examination of plaintiff, Dr. Cross diagnosed plaintiff with pneumoconiosis. Dr. Cross noted that silicosis is a form of pneumoconiosis and expressed concern that plaintiff had experienced significant toxic dust exposure of an industrial nature, particularly considering plaintiff's metal working history.

On 20 May 2004, Dr. Cross performed a transbronchial biopsy of the left upper lobe of plaintiff's lungs, and the biopsy samples were reviewed by pathologist Dr. Meryl L. Goldstein ("Dr. Goldstein"). The pathology specimens revealed no evidence of either infectious organisms or pre-cancerous cells. Dr. Goldstein noted that the specimens demonstrated a nodular aggregate

of epithelioid histiocytes and multinucleated giant cells associated with refractile crystalline material and calcified debris, indicating a non-necrotizing granulomatous inflammation. However, the crystalline material found in plaintiff's tissue sample could not be specifically identified because of the small quantity of tissue material obtained. Dr. Cross opined that plaintiff had a metal-related or talc-related lung disease and initially diagnosed plaintiff with Giant Cell Interstitial Pneumonitis syndrome. Although sarcoidosis - a hereditary condition that causes unusual immunologic responses and shortness of breath - was a possible diagnosis, Dr. Cross opined that the crystals in plaintiff's lungs were too large to be sarcoid. With respect to the possibility of silicosis, Dr. Cross was unable to determine whether plaintiff had been exposed to a sufficient amount of silica dust to cause silicosis, and, therefore, declined to opine that plaintiff's lung condition was the result of plaintiff's employment.

On 24 August 2004, plaintiff presented to Dr. Harry Lipham ("Dr. Lipham"), a board certified pulmonologist. Based upon his examinations of plaintiff, his reviews of plaintiff's x-rays and other diagnostic studies, and his assessment of plaintiff's work history, Dr. Lipham diagnosed plaintiff as having silicosis with associated massive progressive fibrosis.

Dr. Victor Louis Roggli ("Dr. Roggli"), a pulmonary pathologist, examined plaintiff's biopsy specimen and opined that plaintiff does not have silicosis and that plaintiff more likely has sarcoidosis. Dr. Carl A. Smart ("Dr. Smart"), a board certified pulmonary critical care physician, examined plaintiff and similarly opined that plaintiff probably does not have silicosis and that it was more likely that plaintiff has sarcoidosis. Additionally, Dr. Smart opined that whatever was causing the appearance of plaintiff's lungs on x-rays taken in 1995 was the same thing causing the appearance of plaintiff's lungs in 2004.

On 21 July 2004, plaintiff filed for workers' compensation benefits, alleging that he contracted silicosis in the course and scope of his employment with defendant-employer. By Opinion and Award filed 31 July 2006, Deputy Commissioner Kim Ledford ("Deputy Commissioner Ledford") denied plaintiff's claim. Plaintiff appealed to the Full Commission , and on 13 December 2006, plaintiff filed a motion requesting that the Full Commission receive and consider additional evidence, including an affidavit of the operations manager for plaintiff's prior employer purportedly demonstrating that Deputy Commissioner Ledford relied upon false testimony in denying plaintiff's claim for benefits. By Opinion and Award entered 30 May 2007, the Full Commission denied plaintiff's motion and affirmed the Opinion and Award of Deputy Commissioner Ledford with modifications. Thereafter, plaintiff filed timely notice of appeal.

Plaintiff's brief fails to comport fully with our Rules of Appellate Procedure. Pursuant to Rule 28(b)(6), "[i]mmediately following each question [in an appellant's brief] 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." N.C. R. App. P. 28(b)(6) (2007) (emphasis added). This requirement in Rule 28(b)(6) is one of the appellate rules "designed primarily to keep the appellate process 'flowing in an orderly manner.'" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.,* 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (quoting *Craver* v. Craver, 298 N.C. 231, 236, 258 S.E.2d 357 361). Plaintiff, however, has failed to reference the pertinent assignments of error, as well as their location in the record, following any of the questions presented in his brief. As a result, this Court is left to determine (1) which of plaintiff's seventeen assignments of error correspond to the three separate questions presented in his brief; (2) whether the precise arguments presented in the brief are supported by assignments

of error; and (3) which, if any, of the assignments of error plaintiff has failed to argue in his brief and, therefore, has abandoned. *See* N.C. R. App. P. 28(b)(6).

"It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), *rehearing denied* by, 359 N.C. 643, 617 S.E.2d 662,(2005). Nevertheless, plaintiff's rule violation is not so substantial or gross to warrant sanctions. *See* N.C. R. App. P. 25, 34 (2007); *Dogwood,* 362 N.C. at 199, 657 S.E.2d at 366. Therefore, we caution plaintiff's counsel to be more diligent in future appeals. *See Fickley v. Greystone Enters.,* 140 N.C. App. 258, 259, 536 S.E.2d 331, 332 (2000).

On appeal from a decision of the Full Commission, this Court's review is limited to determining whether competent evidence supports the Full Commission's findings of fact and whether the findings of fact support the conclusions of law. *See Roberts v. Cent. Contrs.,* 162 N.C. App. 688, 690.91, 592 S.E.2d 215, 218 (2004). Findings of fact that are supported by any competent evidence or to which plaintiff either has not assigned error or has not argued in his brief are deemed binding on appeal. *See Myers v. BBF Printing Solutions*, __ N.C. App. __, __, 645 S.E.2d 873, 875.76 (2007). The Full Commission's conclusions of law are reviewed *de novo*. *See Roberts*, 162 N.C. App. at 691, 592 S.E.2d at 218.

Plaintiff first contends that the Full Commission erred by failing to consider and receive additional evidence as he requested. We disagree.

North Carolina General Statutes, section 97-85 provides in pertinent part that "[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown . . . receive further evidence . . . ." N.C. Gen. Stat. §97-85 (2005). "The party against whom an award has been made does not have 'a substantive right to require the Full Commission

to hear new or additional testimony. It may, and should, do so if the due administration of justice requires.'" *Keel v. H & V, Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992) (quoting *Tindall v. American Furniture Co.*, 216 N.C. 306, 311, 4 S.E.2d 894, 897 (1939)). "In determining whether to accept new evidence, the Commission must consider the relative prejudices to the parties, the reasons for not producing the evidence at the first hearing, 'the nature of the testimony, and its probable effect upon the conclusion reached.'" *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 606, 463 S.E.2d 425, 428 (1995) (quoting *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 577, 139 S.E.2d 857, 862.63 (1965)). Ultimately, as this Court has explained,

> [t]he powers granted the Commission to review the award and to receive additional evidence are plenary powers to be exercised in the sound discretion of the Commission. Whether such good ground has been shown is discretionary and will not be reviewed on appeal absent a showing of manifest abuse of discretion. In exercising its discretion, the Commission is not directed to make specific findings of fact.

Keel, 107 N.C. App. at 542, 421 S.E.2d at 366.67 (internal quotation marks and citations omitted). "Abuse of discretion exists when 'the challenged actions are manifestly unsupported by reason.'" *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585,589 (2004) (quoting *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002)).

In the instant case, plaintiff requested that the Full Commission consider the affidavit of Robert Owen ("Owen"), who worked with plaintiff as a machinist prior to plaintiff's employment with defendant-employer. In his affidavit, Owen stated:

> 3. At the Arden facility where William Glenn and I worked together, Norton Company-Diamond Tools manufactured diamond cutting tools made of cold roll steel. Norton Company-

> Diamond Tools never machined or manufactured any tool or product from cast stock at the Arden plant.
>
> . . . .
>
> 5. Norton Company did manufacture and produce cutting wheels with various cutting surfaces. However, the cutting wheels were manufactured in a Norton Company plant located in Massachusetts.
>
> 6. During his employment at the Norton Company-Diamond Tools facility in Arden, North Carolina, neither William Glenn nor any employee at the Arden plant machined, produced, utilized, made or manufactured any products known to contain silicon abrasives or silica.

Plaintiff offered this affidavit to refute two of Deputy Commissioner Ledford's findings of fact:

> 2. Prior to working for [d]efendant-employer . . ., [p]laintiff worked for a company called Norton from approximately 1984 through 1988, where he performed the same job functions as a machinist that he later performed for [defendant-employer]. In addition to milled metal parts, Norton also produced silicone abrasives in the same enclosed facility where [p]laintiff worked.
>
> . . . .
>
> 32. Plaintiff had told Dr. Lipham on September 20, 2004, that he had not had any significant occupational exposures to silica dust prior to working for [defendant-employer], despite having worked for an employer [*i.e.*, Norton] that manufactured silicon abrasives at the same facility where [p]laintiff worked prior to starting work for [defendant-employer].

Plaintiff contended in his motion that these findings were premised upon the "concocted testimony" of defendant-employer's owner, Edgar Ramsey ("Ramsey"), who testified that Norton made silicon abrasives at the facility where plaintiff worked. In its 30 May 2007 order denying plaintiff's claim for workers' compensation benefits, the Full Commission denied

plaintiff's motion, ruling that plaintiff "ha[d] not shown good ground to reconsider the evidence, receive further evidence, [or] rehear the parties or their representatives . . . ."

On appeal, plaintiff contends that the Full Commission abused its discretion in refusing to receive and consider Owen's affidavit. However, plaintiff could have and should have deposed Owen or obtained an affidavit from Owen in advance of the hearing before Deputy Commissioner Ledford, particularly considering the significance of any evidence that may have tended to cast light on the extent of plaintiff's exposure to silica in his prior employment. Plaintiff failed to explain - either to the Full Commission or to this Court - why such evidence was not obtained prior to the hearing, and if the Full Commission had granted plaintiff's motion and considered Owen's affidavit, the Full Commission would have had to allow defendants to rebut or discredit the new evidence. *See Allen v. K-Mart*, 137 N.C. App. 298, 304, 528S.E.2d 60, 64.65 (2000). As this Court has explained, "in exercising its discretion to receive additional evidence, the Commission should consider all the circumstances of the case, including the delay involved in taking additional evidence, and should not encourage a lack of pre-deposition preparation by counsel or witnesses." *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 708, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999) (*per curiam*).

Additionally, plaintiff had the opportunity both to cross-examine Ramsey during the hearing and to testify as to his own recollection of the prevalence of silica at Norton. However, on cross-examination of plaintiff, the following colloquy took place:

> [DEFENSE COUNSEL]: Then you worked for Norton . . . . Is that the same Norton that's responsible for making silicon abrasives?
>
> [PLAINTIFF]: Yes, it is.
>
> [DEFENSE COUNSEL]: *Do you know if silicon abrasives were manufactured there, the same place you worked for Norton?*

> [PLAINTIFF]: *I don't know for sure*. I know we made diamond tools.

(Emphases added). Plaintiff also was asked, "So you could have been exposed to silica dust while you were working as a machinist at [Norton]," and plaintiff acknowledged, "That's correct." On re-direct, plaintiff's counsel made no attempt to clarify plaintiff's statement concerning his possible exposure to silica dust while working for Norton.

Finally, although it declined to consider Owen's affidavit, the Full Commission modified one of Deputy Commissioner Ledford's findings concerning plaintiff's silica exposure from prior employment.**[Note 1]** Deputy Commissioner Ledford found that "[p]laintiff had told Dr. Lipham . . . that he had not had any significant occupational exposures to silica dust prior to working for [defendant-employer], despite having worked for an employer [*i.e.*, Norton] *that manufactured silicon abrasives at the same facility* where [p]laintiff worked prior to starting work for [defendant-employer]." (Emphasis added). The Full Commission qualified this finding, noting instead that "there was a *probability* that plaintiff was exposed to silicon dust" while at Norton. (Emphasis added).

In sum, plaintiff had the opportunity to present the evidence contained in Owen's affidavit to Deputy Commissioner Ledford, and if the Full Commission had considered Owen's affidavit, it would have had to permit defendants to rebut the evidence. Further, the evidence in Owen's affidavit could have been addressed adequately by thorough examination of Ramsey and plaintiff during the hearing. Finally, the Full Commission qualified one of Deputy Commissioner Ledford's findings by using the word "probability" in referring to plaintiff's exposure to silica dust at Norton. Therefore, the Full Commission's decision to deny plaintiff's motion to consider additional evidence was not manifestly unsupported by reason. Accordingly, plaintiff's assignment of error is overruled.

Plaintiff next contends that the Full Commission erred by finding that he failed to establish that he suffers from silicosis. We disagree.

Pursuant to North Carolina General Statutes, section 97-62, "[t]he word 'silicosis' shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates." N.C. Gen. Stat. §97-62 (2005). As this Court has explained,

> [i]n ascertaining the right to compensation in cases involving occupational diseases such as silicosis, the Industrial Commission must ordinarily determine 1) whether the plaintiff in fact has an occupational disease, 2) whether, and to what extent, the plaintiff is disabled within the meaning of N.C. Gen. Stat. Sec. 97-54, and 3) to what degree any such disability is caused by the occupational disease.

Pitman v. Feldspar Corp., 87 N.C. App. 208, 212, 360 S.E.2d 696, 698 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

In the case *sub judice*, the Full Commission concluded that "[p]laintiff failed to establish that he suffered from the occupational disease silicosis" *and* that "[e]ven if plaintiff had shown that he developed silicosis, plaintiff did not present sufficient competent evidence tending to show a proximate causal relationship between plaintiff's alleged occupational silicosis and plaintiff's work for defendant[-employer] to allow plaintiff to recover." Therefore, if either of these conclusions are supported by the Full Commission's findings of fact, the Full Commission's denial of benefits must be affirmed. *See Hansel v. Sherman Textiles*, 304 N.C. 44, 54, 283 S.E.2d 101, 107 (1981) ("The denial of compensation may be predicated upon the failure of the claimant to prove any one of the elements of compensability.").

In its findings of fact, the Full Commission stated that it found "the opinions of Dr. Roggli and Dr. Smart to be more persuasive," and therefore, gave their opinions more weight. On appeal, plaintiff contends that the Full Commission erred in giving more weight to the

opinions of Dr. Roggli and Dr. Smart because neither expert made a definitive diagnosis of plaintiff's condition and both noted only the possibility of either sarcoidosis or silicosis. Plaintiff argues that medical testimony as to "possibility" instead of "probability" is not competent, and therefore contends that the Full Commission erred both in ruling out silicosis, and in finding that plaintiff suffers from sarcoidosis. However, plaintiff confuses the burden of proof. The burden was not on defendants to prove a condition other than silicosis; rather, the burden rested squarely on plaintiff as the claimant "to prove each element of compensability." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003).

In addition, plaintiff contends that the opinions of Dr. Roggli and Dr. Smart constituted speculation and therefore were incompetent. Specifically, plaintiff argues that: (1) neither Dr. Roggli nor Dr. Smart "followed the prevailing standard medical practice by reviewing plaintiff's x-ray and CT scan films"; (2) Dr. Smart only examined plaintiff for five minutes; and (3) Dr. Roggli never conferred with his colleagues in evaluating plaintiff's biopsy sample. These arguments, however, are directed at the credibility of the experts' opinions, not their competence. It is well-settled that the Full Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence," *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 394 (2008), and this Court may not second-guess the Full Commission's determination that the opinions of Dr. Roggli and Dr. Smart are entitled to more weight. *See Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *adopted per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005).

In its Opinion and Award, the Full Commission made the following findings of fact:

> 35. Dr. Roggli testified that the refractile crystalline material and calcified debris identified in Dr. Goldstein's pathology report are very likely to be Schaumann bodies made up of either calcium carbonate or calcium oxalate. It is Dr. Roggli's

opinion plaintiff does not have silicosis but that plaintiff more likely has sarcoidosis, a hereditary condition that causes unusual immunologic responses. Typical signs and symptoms of sarcoidosis include shortness of breath, radiological patterns mimicking nodular masses most severe in the upper zones of the lungs, and lymph node enlargement. In response to questions from plaintiff's counsel, Dr. Roggli testified that accelerated silicosis is a term that's used for a very special circumstance where you're exposed to massive amounts of silica and the disease progresses very rapidly.

> 36. Dr. Roggli testified that an endobronchial or transbronchial biopsy is typically performed for purposes of ruling out sarcoidosis and that a non-necrotizing granuloma in a transbronchial biopsy, like that in plaintiff's transbronchial biopsy, is consistent with sarcoidosis. Sarcoidosis can look like other diseases in clinical and radiological studies, and Dr. Roggli has actually written textbooks about how clinicians should distinguish sarcoidosis from other diseases caused by inhalation of dust, including silicosis. Mistaken diagnosis of silicosis in a person with sarcoidosis is a common difficulty Dr. Roggli has discussed in multiple textbooks.

. . . .

> 40. Dr. Smart is of the opinion that plaintiff probably does not have silicosis. While he finds plaintiff's biopsy results more indicative of sarcoidosis than silicosis, Dr. Smart is not positive that plaintiff has sarcoidosis, either, because plaintiff's signs and symptoms could also indicate a chronic granulomatous process such as fungal process, berylliosis, or hypersensitivity pneumonitis. Dr. Smart read the report from Dr. Goldstein's review of plaintiff's lung biopsy specimen from May 2004, to indicate that plaintiff had a non-necrotizing granulomatous process, which Dr. Smart testified indicates a differential diagnosis including sarcoidosis, hypersensitivity pneumonitis, and berylliosis. Dr. Smart testified that plaintiff's biopsy findings increase the likelihood that plaintiff's true diagnosis is sarcoidosis.

Finding of fact number 35 is supported by Dr. Roggli's deposition testimony, in which Dr. Roggli stated that his review of the biopsy specimens and accompanying report "indicate[] the possibility of sarcoidosis" and that "the appearance of the crystalline material and . . . calcified debris gives some weight to that possibility." Plaintiff failed to assign error to findings

of fact numbers 36 and 40, and therefore, these findings are binding upon this Court. *See Estate of Gainey v. S. Flooring &Acoustical Co.*, __ N.C. App. __, __, 646 S.E.2d 604, 607 (2007). These findings of fact, which are conclusive on appeal, fully support the Full Commission's conclusion of law that "[p]laintiff failed to establish that he suffered from the occupational disease silicosis." Accordingly, plaintiff's arguments are overruled.

Because we affirm the Full Commission's determination that plaintiff failed to establish that he suffers from silicosis, we need not address plaintiff's argument that the Full Commission erred by failing to find a causal connection between plaintiff's silicosis and his employment with defendant-employer.

Affirmed.

Judge WYNN concurs in the result only.

Judge BRYANT concurs.

Report per Rule 30(e).

NOTE

1. See *Nash v. Conrad Industries, Inc.*, 62 N.C. App. 612, 617, 303 S.E.2d 373, 376 ("The power to review and reconsider evidence and amend awards carries with it the power to modify or strike out findings of fact and conclusions made by the deputy commissioner or hearing commissioner, even though no exception has been made by the parties."), *aff'd*, 309 N.C. 629, 308 S.E.2d 334 (1983) (per curiam).