

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-841

NORTH CAROLINA COURT OF APPEALS

Filed: 4 March 2008

JAMES B. ELIXSON,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 447570

ADVANCED RESIDUALS
MANAGEMENT, LLC,
Employer,

and

BUILDERS MUTUAL
INSURANCE COMPANY,
Carrier/Defendants.

Appeal by Plaintiff from the 2 February 2007 opinion and award of the North Carolina Industrial Commission. Heard in the Court of Appeals 25 February 2008.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for Plaintiff-Appellant.

Lewis & Roberts, P.L.L.C., by John H. Ruocchio and Paul C. McCoy, for Defendant-Appellees.

ARROWOOD, Judge.

On 26 July 2004, James B. Elixson (Plaintiff) filed a claim under the Workers' Compensation Act for back injuries that he alleged resulted from an accident occurring during his employment as a heavy equipment operator with Defendant Advanced Residuals Management, LLC . On 3 January 2005, a Deputy Commissioner of the North Carolina

Industrial Commission filed an opinion and award finding that Plaintiff had suffered a compensable injury on or about 13 May 2004 and that he was entitled to temporary total disability benefits and medical compensation. On 17 January 2006, Defendants appealed to the Full Commission.

On 2 February 2007, the Full Commission reversed the Deputy Commissioner's opinion and award and denied Plaintiff's claim. On 1 May 2007, Plaintiff filed a Writ of Certiorari in this Court seeking a belated appeal of the Full Commission's 2 February 2007 decision. On 15 May 2007, this Court allowed Plaintiff's petition for writ of certiorari, and the resulting appeal is now before us.

In appeals from an Industrial Commission's decision, our standard of review involves a determination of whether there is competent evidence on the record to support the Commission's findings; and whether the Commission's findings support its conclusions, decision, and award. *See Sprinkle v. N.C. Wildlife Res. Comm'n*, 165 N.C. App. 721, 726, 600 S.E.2d 473, 476 (2004). Further, "[t]his Court is precluded from assessing credibility or re-weighting evidence and will only determine if the record contains any evidence to support the challenged finding." *Coe v. Haworth Wood Seating*, 166 N.C. App. 251, 254, 603 S.E.2d 549, 551 (2004) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)).

In his sole argument on appeal, Plaintiff contends that the Full Commission erroneously found that he did not sustain an injury by accident arising out of and in the course of his employment as defined by the Worker's Compensation Act (the Act). To recover for an injury under the Act, a Plaintiff has the burden of proving that: (1) he suffered an injury by accident; (2) the injury arose out of the employment; and (3) the injury arose in the course of the employment. *Wilson v. Mooresville*, 222 N.C. 283, 285, 22 S.E.2d 907, 910 (1942). However, with respect to

back injuries, the Act provides that a claimant may also receive compensation for an injury resulting from a “specific traumatic incident.” N.C. Gen. Stat. §97-2(6) (2007); *see also Lettley v. Trash Removal Service*, 91 N.C. App. 625, 628, 372 S.E.2d 747, 749 (1988).

Here, Plaintiff contends that the Full Commission erroneously found that he had “failed to prove by the greater weight of the evidence that any specific or inciting event caused an aggravation or acceleration of plaintiff’s pre-existing back pain.” In support of his argument, Plaintiff directs us to his own testimony that on 13 May 2004 he was thrown about the cab of a bulldozer he was operating after running over large stumps at the work site. Plaintiff contends that this incident constitutes the “specific traumatic incident” that supports his claim.

While the Commission specifically acknowledged Plaintiff’s testimony regarding the alleged incident on 13 May 2004, it also expressly rejected this testimony as not credible. The Commission found that “[p]laintiff’s reports regarding the onset of symptoms and the events of May 13, 2004 have been inconsistent, and are deemed by the undersigned as not credible.” In support of this determination of credibility, the Commission additionally found that: 1) on 12 May 2003, plaintiff had seen his doctor for back pain after an injury unloading a fishing boat the previous day ; and2) plaintiff’s supervisor and defendant-employer’s director of operations both reported that no large stumps were present at the work site as alleged by plaintiff. Because the Commission’s finding that Plaintiff had failed to prove the element of “specific traumatic incident” was based upon its finding that the proffered evidence was not credible, it is not subject to this Court’s review. *See Coe*, 166 N.C. App. at 254, 603 S.E.2d at 551 .

Affirmed.

Judges MCGEE and STROUD concur.

Report per Rule 30(e).