

Affirmed

Author: Sellers

NO. COA00-924

Concurring: Riggs ~~has~~ NORTH CAROLINA COURT OF APPEALS

Bunn (Retired prior to decision) Filed: 7 August 2001

CLEM J. WILEY,  
Employee-plaintiff-appellant,

v.

From The North Carolina  
Industrial Commission  
No. 588987

RAMTEX,  
Employer,

and

ITT HARTFORD INSURANCE COMPANY,  
Carrier,

Defendants-appellees.

Appeal by employee-plaintiff from judgment entered 9 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2001.

Ronald Barbee for employee-plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Jonathan Anders and Kari R. Johnson, for defendants-appellees.

BRYANT, Judge.

Plaintiff appeals the denial of his motion to set aside the opinion and award of the full commission which denied him workers' compensation benefits.

In 1988, plaintiff Clem J. Wiley was employed by Ramtex. His original position with Ramtex was a cotton opening position that required him to open bales of cotton by striking the metal bands around the cotton with an axe until they busted. Plaintiff also used scissors to cut the plastic bands around bales of polyester.

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OF NORTH CAROLINA

He busted an average of six or seven bales of cotton and/or polyester per hour while working an average of forty-two hours per week.

After opening a bale of cotton or polyester, which weighed 600 and 500 pounds respectively, plaintiff would walk the bale by rocking it three or four feet to the line. According to plaintiff, the opening and walking of the bales required the continuous use of his hands, arms, and shoulders. Plaintiff alleges that he notified his supervisor, John Billings, and the company occupational health manager, Wanda Smith, of the pain in his hands and shoulders sometime prior to his 1991 transfer to the Ramtex cloth room department.

His duties in the cloth room department included driving rolls of cloth on a fork truck, maneuvering the rolls into the packaging materials and then closing each covered roll with a twist tie. For smaller rolls of cloth the plaintiff would often carry them himself instead of using the fork truck.

In 1995, plaintiff sought treatment from orthopaedic surgeon Dr. Arthur Carter, for the pain in his hands and shoulders. Dr. Carter diagnosed plaintiff with carpal tunnel syndrome, tenosynovitis, and shoulder impingement. Dr. Carter treated plaintiff for several years for these injuries and determined that plaintiff's right wrist had reached the maximum level of medical improvement. Based on plaintiff's description of his duties at Ramtex, Dr. Carter also opined that plaintiff's employment activities in the cotton opening and cloth room department were the likely source of these injuries.

Plaintiff filed a claim for workers' compensation benefits with the industrial commission on 21 November 1995. According to pre-trial stipulations, "[e]mployee contends that he sustained an injury by accident or contracted an occupational disease on or about July 22, 1995, which is denied by employer." On 27 September 1996, plaintiff filed a request for a hearing, and the case was heard on 22 July 1998 before Deputy Commissioner Pamela T. Young in Sanford, North Carolina.

On 17 July 1998, prior to the hearing, the parties took the deposition of Dr. Carter and after the hearing took the deposition of George Edwards, M.D., a hand surgeon. Dr. Edwards testified that plaintiff's job activities in opening the cotton and polyester bales did not require the kind of exertion that was repetitive enough or prolonged enough to cause carpal tunnel syndrome. Dr. Edwards also testified that if plaintiff's carpal tunnel syndrome was work related, his symptoms would have developed while performing the bale opening job. Similarly, Dr. Edwards opined that plaintiff's duties in the cloth room job were not sufficiently repetitive or prolonged enough to expose plaintiff to an increased risk of carpal tunnel syndrome.

Dr. Edwards, however, never examined, treated, nor reviewed the plaintiff's medical records. Instead, his observations were drawn from a videotape which portrayed the cotton opening and cloth packaging jobs as they were currently performed as of the date of hearing.

Ramtex's personnel manager Michael Fox and Ramtex employee Floyd Womble testified that the videotape, which served in part as the basis for Dr. Edwards' testimony, did not depict either job as

plaintiff performed them during the 1988 through 1998 time period. Thus, Deputy Commissioner Young found that the videotape did not accurately portray plaintiff's job duties as performed by plaintiff. On 17 February 1999, Deputy Commissioner Young filed an opinion and award granting workers' compensation benefits to plaintiff.

Defendants Ramtex and ITT Hartford Insurance Company appealed to the full commission on 7 May 1999. The full commission reviewed the appeal on 17 August 1999. Of the original three member panel sitting as the full commission, only two participated in the decision filed on 9 March 2000. The two remaining members rejected the findings and conclusions of law of Deputy Commissioner Young and determined plaintiff was not entitled to workers' compensation benefits.

On 4 April 2000, plaintiff filed a motion to set aside the opinion and award by the full commission and on 4 May 2000, the two member panel denied plaintiff's motion. Plaintiff filed notice of appeal to this Court on 18 May 2000.

I.

Plaintiff makes several contentions on appeal - most relating to the findings of fact of the full commission. First, plaintiff argues that the full commission committed error when it totally rejected the findings of fact of the deputy commissioner and made completely new findings. Plaintiff summarily asserts that the full commission abused its discretion in rejecting the findings of fact and conclusions of law made by the deputy commissioner.

Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with

the Commission - not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate . . . "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one."

*Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

See *Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 577, 447 S.E.2d 789, 794 (1994)

[U]pon review of a Deputy Commissioner's award, the full Commission's powers are plenary. (citations omitted). The full Commission is not bound by the Deputy Commissioner's findings of fact, (citation omitted); upon consideration of the evidence, it may [adopt, modify, or reject] [the Deputy Commissioners] findings, and is free to make its own determinations regarding the weight and credibility of the evidence. (citation omitted).

The statutory powers of the full commission to review awards of a deputy commissioner and "if good ground be shown therefor, [to] reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award" are plenary powers to be exercised in the sound discretion of the full commission. *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 639, 478 S.E.2d 223, 225 (1996), overruled on other grounds by, *Adams*, 394 N.C. at 681, 509 S.E.2d at 414. See N.C.G.S. § 97-85 (2000). The determination of the full commission should not be disturbed on appeal absent manifest abuse of discretion. See *Sanders*, 124 N.C. App. at 639, 478 S.E.2d at 225. Therefore, the full commission can make its own findings of fact and conclusions

of law distinct from those of the deputy commissioner; and we find plaintiff's argument as to this issue unpersuasive.

II.

Next, plaintiff argues that the full commission's opinion and award is not based on competent evidence in the record. Therefore, plaintiff asserts the decision of the full commission should be reversed. We disagree.

When reviewing appeals from the Industrial Commission, the Court is limited in its inquiry 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 Commission's findings of fact justify its legal conclusions and decision. (citation omitted). The Commission's findings of fact are conclusive on appeal if supported by competent evidence. (citation omitted). This is so even if there is evidence which would support a finding to the contrary.

*Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 120-21, 334 S.E.2d 392, 394 (1985).

Recognizing that the commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony in workers' compensation cases, *See Rivera v. Trapp*, 135 N.C. App. 296, 304, 519 S.E.2d 777, 782 (1999), this Court will only overturn the decision of the commission if that decision is not supported by competent evidence in the record.

For a plaintiff to successfully demonstrate he has an occupational disease under N.C.G.S. § 97-53(13) (2000), he must show the disease "is 1) characteristic of persons engaged in the particular trade or occupation in which the plaintiff is engaged; 2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or

occupation; and 3) there must be a [causal connection between the disease and the [claimant's] employment[]." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983). See N.C.G.S. § 97-53(13). The plaintiff bears the burden of proving each and every element of a claim under N.C.G.S. § 97-53(13). *Higgs v. Southeastern Cleaning Service*, 122 N.C. App. 456, 460, 470 S.E.2d 337, 340 (1996).

Plaintiff asserts that evidence was introduced that his description of job duties in the cotton opening and cloth service departments were fairly accurate. Therefore, he states, any contrary evidence was unfounded and inaccurate and presumably incompetent.

Plaintiff's treating physician, Dr. Carter, first testified that plaintiff's problems were causally related to plaintiff's duties in the cotton opening and cloth room department, but on cross-examination, stated that his conclusion was totally based on information received from plaintiff and plaintiff's counsel. After listening to defendants' description of plaintiff's job duties and after reviewing the videotape, Dr. Carter testified that it is less likely that plaintiff's employment would cause carpal tunnel syndrome.

Defendants' witness Dr. Edwards testified that plaintiff's cotton opening and cloth room positions with Ramtex did not cause plaintiff's injury nor place him in an increased risk of contracting carpal tunnel syndrome. Dr. Edwards based his opinion on his review of defendants' videotape depicting plaintiff's duties and upon hypothetical questions posed during his testimony.

Further, both doctors testified that plaintiff's seven year delay in obtaining medical treatment made it less likely the injuries were caused by plaintiff's employment. Moreover, managers at Ramtex testified that plaintiff did not complain of any problems until four years after he left the cotton opening position.

It is the province of the full commission to judge the credibility of the testimony and resolve conflicts in evidence. The testimony of Drs. Edwards and Carter is evidence competent to support the ultimate decision of the full commission, and this Court will not disturb that decision on appeal.

### III.

Third, plaintiff contends that the full commission committed error when it admitted in evidence a videotape purporting to depict the job duties of plaintiff in the cotton opening and cloth service jobs. According to the testimony of Ramtex employees Michael Fox and Floyd Womble, the videotape depicted plaintiff's work duties as of the date of the hearing and not necessarily as performed by plaintiff during his terms of employment. Moreover, plaintiff asserts that defendants' own witness, William Marsh, testified that plaintiff's testimony of plaintiff's job descriptions was fairly accurate.

Plaintiff argues that the videotape is a pivotal and crucial piece of evidence because Dr. Edwards based his medical testimony on duties as shown in the video. Therefore, because the videotape did not accurately portray the plaintiff's job duties as he performed them, he argues that the commission committed error in admitting the videotape in evidence.



The following are the relevant portions of the full commission's findings of fact:

20. At the hearing before the Deputy Commissioner, defendants produced a videotape depicting the cotton opening job and the cloth service job. There was also a written description provided of the cotton opening job. The videotape and the written job description accurately depict the cotton opening job as plaintiff performed it. The videotape depicts the cloth service job as performed after the ram pole was substituted for the fork truck which plaintiff drove while he worked in the cloth service job. In fact, all of the cloth service job duties plaintiff was required to perform are accurately reflected on the videotape except plaintiff's use of the fork truck. The videotape fairly and accurately depicts plaintiff's cloth service job.

21. The videotape is competent evidence of plaintiff's job duties in both cotton opening and cloth service and is sufficient and proper evidence upon which a competent medical opinion may be based.

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24. In conclusion, Dr. Edwards was presented with accurate and sufficient evidence of plaintiff's job duties, including the videotape and supplementary information clarifying the changes made in 1995 implementing the ram pole instead of the fork truck, upon which to base his conclusion. . .

As previously stated, the commission is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Rivera*, 135 N.C. App. at 304, 519 S.E.2d at 782. By analogy, it is in the province of the commission to determine and weigh the accuracy of any demonstrative evidence submitted. "The Commission's findings of fact are conclusive on appeal if supported by competent evidence. This is so even if there is evidence which

would support a finding to the contrary." *Sanderson*, 77 N.C. App. at 121, 334 S.E.2d 139 at 394. We will not reverse the decision of the full commission, as it appears the full commission has considered the arguments and made a decision of credibility based on competent evidence in the record. See *Mendenhall v. North Carolina Dept. of Human Resources*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995) (allowing the reviewing court to examine the record in its entirety, but disallowing the "court to replace the agency's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result").

IV.

Next, plaintiff presents the question of whether the full commission committed prejudicial error in sustaining defendants' objection to plaintiff's testifying he used his fingers and hands repetitively while performing his job. Plaintiff has not addressed this issue in his brief nor presented any evidence as to this issue. Therefore, we find that plaintiff has abandoned the issue. See N.C. R. App. P. 28(a) (2000) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

V.

Lastly, plaintiff assigns as error that the opinion and decision of the full commission is invalid because one of the members of the three person panel did not participate in the decision of the full commission. Again, this issue was neither addressed in plaintiff's brief, nor any evidence presented as to this issue. Therefore, this Court will not address plaintiff's last

contention as we find he has abandoned the issue. See N.C. R. App. P. 28(a).

For all of the reasons stated above, this Court affirms the decision of the full commission.

AFFIRMED.

Judge TIMMONS-GOODSON concurs.

Judge GREENE concurs in a separate opinion.

Report per Rule 30(e).

NORTH CAROLINA COURT OF APPEALS

Filed: 7 August 2001

CLEM J. WILEY,  
Employee,  
Plaintiff,

v.

N.C. Industrial Commission  
I.C. No. 588987

RAMTEX, INC.,  
Employer;

ITT HARTFORD INSURANCE COMPANY,  
Carrier;  
Defendants.

GREENE, Judge, concurring.

Because the issue raised in section V of the majority's opinion is jurisdictional, I would address this issue. See *Hedgepeth v. North Carolina Div. of Services for the Blind*, --- N.C. App. ---, ---, 543 S.E.2d 169, 171 (2001) (jurisdictional issues "can be raised at any time, even for the first time on appeal and even by a court *sua sponte*").

In this case, plaintiff assigns error to the full commission's 9 March 2000 opinion and award on the ground it is invalid because it was signed by only two commissioners. As stated in my dissent in *Coppley v. PPG Ind., Inc.*, --- N.C. App. ---, ---, 541 S.E.2d 743, 745 (2001) (Greene, J., dissenting), I believe an opinion and award of the full commission "is not finalized until it is entered and it is not entered until it is in writing, signed by the three commissioners, and filed with the Industrial Commission." Nevertheless, because this Court is bound by *Coppley*, I would hold that in the case *sub judice*, the full commission's 9 March 2000 opinion and award was not rendered invalid because it was signed by

only two commissioners. See *id.* at ---, 541 S.E.2d at 744 (opinion and award of full commission is valid if "rendered and filed by a majority of the commission"). Accordingly, I concur in the majority's opinion.

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