

Ballance - affirmed
Bolch
Scott

NO. COA99-517

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2000

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OF NORTH CAROLINA

WILLIE J. HARRIS
Employee/Plaintiff

v.

Industrial Commission
I.C. File No. 671189

TOWN OF ATLANTIC BEACH
Employer/Defendant

SELF-INSURED (GAB ROBINS,
Administrator)

Appeal by plaintiff from opinion and award entered 24 November 1998 of the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2000.

David P. Voerman by plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Joy H. Brewer, for defendant-appellee.

MARTIN, Judge.

Plaintiff appeals from an opinion and award of the Full Commission denying him benefits. Plaintiff was employed by the Town of Atlantic Beach as a police officer and was injured on 23 April 1995 in the course of making an arrest. In its opinion and award, the Commission found:

12. There is no medical evidence which causally related plaintiff's knee problems for which he first sought treatment on August 14, 1996 to his injury by accident on April 23, 1995. No deposition testimony was presented from Dr. Bright, nor does the record contain the medical records from Dr. Bright.

The Commission awarded benefits to plaintiff for his medical treatment incurred through 24 April 1995, but denied benefits for treatment received after that date as well as disability benefits.

All of the assignments of error which plaintiff argues on appeal center upon the alleged failure of the Commission to consider certain medical records which plaintiff contends were either received or stipulated into evidence before the deputy commissioner. None of this medical evidence, however, has been included in the record on appeal filed in this Court, precluding our review of the Commission's opinion and award and the merits of plaintiff's arguments with respect thereto. Review in this Court is "solely upon the record on appeal . . . constituted in accordance with this Rule 9." N.C.R. App. P. 9(a). Although plaintiff has included, in an appendix to his brief, the medical records upon which he grounds his arguments, a "[p]arty's brief is not part of the record on appeal." *Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ.*, 125 N.C. App. 373, 375, 481 S.E.2d 326, 328 (1997).

Plaintiff argues that he attempted to include the medical records in the record on appeal, but the Commission sustained defendant's objection to their inclusion in its order settling the record on appeal. Judicial settlement of the record on appeal when the parties cannot agree is final and will not be reviewed on direct appeal of the judgment. *Brown v. Lyons*, 93 N.C. App. 453, 378 S.E.2d 243 (1989); *Millsaps v. Wilkes Contracting Co.*, 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d

466 (1972). Review of an order settling a record on appeal may be sought only by a petition for writ of certiorari. See *Craver v. Craver*, 298 N.C. 231, 237 n. 6, 258 S.E.2d 357, 362 n. 6 (1979); *Horton v. New South Insurance Co.*, 122 N.C. App. 265, 468 S.E.2d 856, *disc. review and cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996). Plaintiff has not sought such review of the Commission's order settling the record on appeal.

Since the medical records upon which plaintiff's arguments are grounded were not included in the record, we cannot review the issues pertaining to them. *Paschall v. North Carolina Dept. of Correction*, 88 N.C. App. 520, 364 S.E.2d 144, *disc. review denied*, 322 N.C. 326, 368 S.E.2d 868 (1988). His assignments of error disclose no other grounds to disturb the Commission's opinion and award; accordingly it is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

Report per Rule 30(e).