NO. COA07-1046

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

RANDY R. LEWIS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 744105

BEACHVIEW EXXON SERVICE,
Employer,

PENN NATIONAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 27 April 2007 by Commissioner Dianne C. Sellers for the North Carolina Industrial Commission. Heard in the Court of Appeals 21 February 2008.

Wilson & Ratledge, P.L.L.C., by James E.R. Ratledge, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Buxton S. Copeland and Meredith Taylor Berard, for defendant-appellees.

TYSON, Judge.

Randy R. Lewis ("plaintiff") appeals from the opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission"), which denied his claim for benefits. We affirm.

I. Background

In *Lewis v. Beachview Exxon Serv.*, a divided panel of this Court previously addressed plaintiff's appeal. 174 N.C. App. 179, 619 S.E.2d 881 (2005), *rev'd.*, 360 N.C. 469, 629 S.E.2d 152 (2006). A more thorough discussion of the underlying facts of plaintiff's appeal is contained in this Court's previous opinion. *See Lewis*, 174 N.C. App. at 180-81, 619 S.E.2d at 881-82.

> Deputy Commissioner W. Bain Jones heard this case on 25 February 2002 and filed an opinion and award on 31 July 2002, awarding plaintiff temporary total disability, medical benefits, and attendant care for his claim related to his pulmonary condition. [Beachview Exxon Service ("Beachview") and Penn National Insurance Company ("Penn") (collectively, "defendants")] appealed to the Full Commission which, on 30 January 2004, reversed the opinion of the deputy commissioner. Plaintiff appeal[ed].

Id. at 180, 619 S.E.2d at 881.

Judge Hudson, writing for the majority of this Court, and Judge Wynn "remand[ed] this matter to the Industrial Commission for further proceedings and to make findings of fact and conclusions of law regarding all issues raised by the evidence upon which plaintiff's right to compensation depends." *Id*. at 183, 619 S.E.2d at 883. Judge Steelman concurred with the majority opinion's remand "on the issue of estoppel[,]" but:

> dissent[ed] as to the majority opinion's refusal to discuss the remaining issues brought forward by plaintiff's appeal, and specifically to the remanding of this case to the Commission, allowing it to make findings and conclusions as to "all issues raised by the evidence upon which plaintiff's right to compensation depends."

Id. (Steelman, J. dissenting). Judge Steelman stated he "would affirm the Commission's decision that plaintiff's pulmonary condition was not the result of his hernia surgery and is not compensable, and that the hernia surgery did not materially aggravate or exacerbate his pre-existing pulmonary condition." *Id*. at 185, 619 S.E.2d 884 (Steelman, J. dissenting).

Our Supreme Court *per curiam* "reverse[d] the decision of [this Court] for the reasons stated in the dissenting opinion." *Lewis*, 360 N.C. at 470, 629 S.E.2d at 152. Our Supreme Court remanded this case to this Court "for remand to the North Carolina Industrial Commission for further findings of fact and conclusions of law on the issue of estoppel." *Id.*

On remand, the Commission entered an opinion and award, which denied plaintiff's estoppel claim. Commissioner Bernadine S. Ballance dissented because she "d[id] not believe the majority . . . properly address[ed] the estoppel issue as directed by the Supreme Court of North Carolina . . . ." Plaintiff appeals.

II. Issues

Plaintiff argues the Commission erred when it: (1) made erroneous findings of fact and conclusions of law on the issue of estoppel; and (2) failed to make findings of fact or conclusions of law on the issue of waiver.

III. Motion to Dismiss

Defendants moved to dismiss plaintiff's appeal for failure to comply with the provisions of Rules 12 and 28 of the North Carolina Rules of Appellate Procedure. Plaintiff subsequently filed an amended brief which corrected the prior rules violations. In our discretion, we review the merits of the case. N.C. R. App. P. 2 (2008).

IV. Standard of Review

Our Supreme Court has stated:

> [W]hen reviewing Industrial Commission decisions, appellate courts must examine "whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law." 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 *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)).

"[T]he full Commission is the sole judge of the weight and credibility of the evidence . . . ." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The Commission's mixed findings of fact and conclusions of law and its conclusions of law applying the facts are fully reviewable *de novo* by this Court. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982); *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. rev. denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

V. Estoppel

Plaintiff argues the Commission erred when it entered finding of fact numbered 42 and conclusions of law numbered 7 and 8. We disagree.

Finding of fact numbered 42 states:

> 42. After former Deputy Commissioner Jones filed the original Opinion and Award on July 31, 2002, plaintiff appealed to the Full Commission and later filed a Form 44 Application for Review and Brief. Nowhere in plaintiff's Form 44 or Brief did he raise the issue of the Deputy Commissioner's failure to address the estoppel issue. Nowhere in plaintiff's Form 44 or Brief to the Full Commission did plaintiff contend that estoppel would be an alternative theory of recovery.

Conclusions of law numbered 7 and 8 state:

> 7. In the discretion of the undersigned, the principles of estoppel, whether equitable, judicial or otherwise, do not apply to the facts of this case. *Whiteacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004). In using our discretion not to apply the principles of estoppel to this case, the undersigned are also influenced by public policy considerations. If defendants in workers' compensation cases are prevented from contesting the compensable consequences of an accepted claim, after some such benefits had been paid for the contested condition, then workers'

> compensation insurance carriers and employers are going to be reluctant to pay for any condition where there is the slightest question as to whether it may be related. This would result in a denial of numerous claims and would result in increased litigation. Employers and carriers should be encouraged to pay these benefits without fear that such payment will be used against them later to prevent them from contesting that a certain condition is a compensable consequence of the accepted injury. Applying the principles of estoppel to such situations would not be good public policy for this State.
>
> 8. In the alternative, even if estoppel principles should apply to this case, plaintiff abandoned the estoppel ground for appeal when he failed to state that ground in either his Form 44 Application for Review or his Brief to the Full Commission. By abandoning this ground for appeal, plaintiff cannot now be heard on the estoppel issue. The Full Commission inadvertently, and in error, recited the issues as they had been before the Deputy Commissioner even though plaintiff did not raise this estoppel issue on his appeal to the Full Commission. Rule 701(2) & (3), Workers' Compensation Rules of the North Carolina Industrial Commission.

The North Carolina Industrial Commission Rule 701(2) and (3) state:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3).
>
> (3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 701, 2002 Ann. R. (N.C.) 771.

Competent evidence in the record supports the Commission's finding of fact numbered 42. The record shows plaintiff did not raise the issue of the Deputy Commissioner's failure to address the estoppel issue in his Form 44 Application for Review. The Commission's finding of

fact numbered 42 is supported by competent evidence and that finding supports the Commission's conclusions of law numbered 7 and 8. *McRae*, 358 N.C. at 496, 597 S.E.2d at 700. This assignment of error is overruled.

VI. Conclusion

The Commission made sufficient findings of fact to support its conclusions of law. The opinion and award appealed from is affirmed.

Affirmed.

Judge STROUD concurs.

Judge GEER concurs in the result by separate opinion.

Report per Rule 30(e).

NO. COA07-1046

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

RANDY R. LEWIS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 744105

BEACHVIEW EXXON SERVICE,
Employer,

PENN NATIONAL INSURANCE COMPANY,
Carrier,
Defendants.

GEER, Judge, concurring in the result.

The Commission found and the majority agreed that plaintiff abandoned his claim of estoppel "when he failed to state that ground in either his Form 44 Application for Review or his

Brief to the Full Commission." While I agree that plaintiff's failure to raise the estoppel argument in his brief to the Full Commission could constitute abandonment of the issue, I do not believe that the Industrial Commission rules provide any basis for concluding that plaintiff's failure to reference estoppel in his Form 44 supported a finding of abandonment. Essentially, the Full Commission and the majority opinion are importing into the Rules of the Industrial Commission the cross-assignment of error provisions for appellees contained in N.C.R. App. P. 10(d).

I do not believe such an approach is appropriate and, therefore, concur in the result only. This is not a mere quibble with the reasoning of the Commission and the majority - the rulings could have a significant impact on Industrial Commission practice.

Rule 701 of the Rules of the Industrial Commission governs appeals to the Full Commission. That rule specifies:

> (2) After receipt of notice of appeal, the Industrial Commission will supply *to the appellant* a Form 44 Application for Review upon which *appellant must state the grounds for the appeal*. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity *the grounds for appeal* shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. . . .
>
> (3) Particular *grounds for appeal* not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 701(2), (3) (emphasis added). Thus, by the Rule's plain language, it imposes a burden to file a Form 44 only on the appellant and limits the Form 44 only to stating the grounds for appeal.

The Rule imposes no requirements on the appellee to file a Form 44. With respect to appellees, the Rule provides only that "appellee shall have 25 days from service of appellant's brief within which to file a reply brief in triplicate with the Industrial Commission, with written statement of service of copy by mail or in person on appellant." Workers' Comp. R. of N.C. Indus. Comm'n 701(4).

In this case, plaintiff was both an appellant and an appellee. He appealed the deputy commissioner's rulings on his average weekly wage, whether to impose a penalty on defendants, the scope and duration of the award for attendant care, and whether reasonable grounds existed for defendants to defend this claim. As to these issues, plaintiff was the appellant. Defendants appealed, among other rulings, the deputy commissioner's determination that there was a causal connection between plaintiff's pulmonary condition and his hernia surgery. As to that issue, plaintiff was the appellee.

In other words, plaintiff prevailed on the issue of the compensability of his pulmonary condition. He had no reason to - and, indeed, could not - appeal the deputy commissioner's finding of compensability because he was the prevailing party. Thus, plaintiff's estoppel argument did not constitute "the grounds for [his] appeal," and Rule 701, by its plain language, did not require inclusion of that issue in plaintiff's Form 44.

Plaintiff's argument that defendants were estopped from challenging the compensability of his pulmonary condition constituted an alternative basis for upholding the deputy commissioner's determination that defendants were required to pay compensation for plaintiff's

pulmonary condition. The provisions of the North Carolina Rules of Appellate Procedure governing assignments of error do require that an appellee cross-assign error with respect to such an alternative theory:

> Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

N.C.R. App. P. 10(d). There is no comparable provision in the North Carolina Industrial Commission Rules.

While, in this case, plaintiff was both appellant and appellee, the reasoning of the Commission and the majority opinion would apply equally to parties who are only appellees. An appellee would risk abandoning an alternative theory if it did not file a Form 44 referencing the deputy commissioner's failure to address that theory. Significantly, however, Rule 701 specifies that only parties filing a notice of appeal receive a Form 44. Nevertheless, under the Commission's and the majority's approach, an appellee would have to file a Form 44 challenging the deputy commissioner's omission. The question arises whether parties who would otherwise only be an appellee must now give notice of appeal in order to preserve the right to assert alternative bases for upholding the deputy commissioner's opinion and award.

I see no basis in the Industrial Commission's rules for imposing such a requirement. Parties to workers' compensation cases have received no notice that such a requirement applies to appellees. Neither this Court nor the Industrial Commission can, without prior notice, superimpose upon proceedings in the Industrial Commission procedural requirements applicable only in the appellate courts.

It does not matter that, in this case, plaintiff was both an appellant and appellee and, therefore, was required to file a Form 44. The rules must be construed consistently with respect to all parties and, therefore, the ruling of the majority and the Commission could apply even when a party was solely an appellee.

In any event, the Commission also found that plaintiff failed to address estoppel in his brief to the Full Commission. I believe that finding is a sufficient basis for concluding that plaintiff did not properly preserve his claim of estoppel for appellate review.

Rule 701(4) provides that "[i]f both parties appeal, they *shall* each file an appellant's and appellee's brief on the schedule set forth herein." (Emphasis added.) While plaintiff included in the record on appeal his appellant's brief (as well as defendants' appellants' brief), the record contains no indication that plaintiff ever filed his appellee's brief. Nor does plaintiff suggest in his brief to this Court that he filed an appellee's brief in which he presented estoppel as an alternative basis for finding compensability.

Arguably, the Commission could conclude - although I do not believe that it was required to do so - that plaintiff had abandoned its estoppel argument. Such a conclusion, however, is inconsistent with the Commission's finding that the parties stipulated that one of the issues before the Commission was "whether defendants are estopped from denying plaintiff's pulmonary condition" and the requirement that the Commission address all issues before it - the basis for remand to the Commission for further findings.

On the other hand, plaintiff cannot raise arguments on appeal that were not first presented to the trial tribunal. Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount'" in the appellate court. *State v. Sharpe*, 344 N.C. 190, 194, 473

S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). *See also* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Since the issue of estoppel apparently was not raised before the Full Commission, it is not properly before this Court.