NO. COA01-1062

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

DONNIE THOMPSON,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 805856

CARDINAL FREIGHT,
Employer, Self-Insured Employer

and/or

MANAGED CARE/LEGION,
Carrier,
Defendants

Appeal by plaintiff from an opinion and award entered 24 April 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 June 2002.

Perry Anthony & Sosna, by Cedric R. Perry, for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by Stephen Kushner, for defendant-appellee Cardinal Freight.

Brooks, Stevens & Pope, P.A., by Robert S. Welch and John A. Payne, for defendant-appellee Managed Care/Legion.

EAGLES, Chief Judge.

Donnie Thompson ("plaintiff") appeals from the Industrial Commission's Opinion and Award denying his workers' compensation claim against Cardinal Freight ("defendant-

employer") and Managed Care/Legion ("defendant-carrier"). The sole issue on appeal is whether the Industrial Commission erred in concluding that plaintiff did not sustain an injury by accident while in the course and scope of his employment. After careful consideration of the record and briefs, we affirm.

The evidence tends to show the following: Plaintiff was employed by defendant-employer as a truck driver beginning in 1992. In 1995, plaintiff entered defendant-employer's owner/operator program. Under this program, plaintiff could refuse any work assignment, choose any maintenance facility, and hire drivers. Additionally, plaintiff was responsible for repairs, accident insurance, and his own workers' compensation insurance.

Plaintiff chose to obtain workers' compensation insurance through defendant-employer, and defendant-employer deducted the premiums from plaintiff's income. From November 1995 to March 1996, defendant-employer secured plaintiff a policy through the North Carolina Selective Fund. After April 1996, defendant-employer secured plaintiff a policy through defendant-carrier.

Plaintiff's normal job duties consisted of driving a truck, loading freight, and unloading freight. Plaintiff claims that he sustained a knee injury on 4 June 1996 while he was unloading a refrigerator without a hand truck. Specifically, plaintiff contends that as he was attempting to unload a refrigerator, by grabbing and pulling it, he felt a "pop" in his left knee.

On 7 June 1996, plaintiff visited Dr. Joseph McLamb. In his notes, Dr. McLamb indicated that plaintiff experienced left knee pain beginning on 1 January 1996 and that plaintiff had been experiencing the pain for three to four months.

Plaintiff, claiming a work-related injury by accident on 4 June 1996, applied for workers' compensation benefits. Defendant-carrier denied his claim. Subsequently, plaintiff requested that

his claim be assigned for hearing. A hearing was held before Deputy Commissioner George Glenn, II, on 17 March 1999. After the hearing, the parties submitted the deposition testimony and medical records of Dr. McLamb and the deposition testimony of Dana Richards, Dr. McLamb's former secretary. On 7 July 2000, Deputy Commissioner Glenn issued an Opinion and Award denying plaintiff's claim. Thereafter, plaintiff appealed to the Full Industrial Commission ("Full Commission").

By Opinion and Award entered 24 April 2001, the Full Commission adopted the Deputy Commissioner's Opinion and Award, with certain amendments, and denied plaintiff's claim. In reaching its decision, the Full Commission concluded that

> (1) Plaintiff was not an employee of defendant-employer, Cardinal, but rather an independent contractor on January 1, 1996 and June 4, 1996 and therefore is not entitled to workers' compensation benefits. N.C.G.S. §97-2(2).
>
> (2) Even assuming arguendo that plaintiff was an employee of defendant-employer, plaintiff did not sustain an injury by accident on January 1, 1996 or June 4, 1996 while in the course and scope of his employment. N.C.G.S. §97-2(6).

Plaintiff appeals.

Initially, we note that plaintiff did not assign error to the Full Commission's conclusion that he was not an employee of defendant-employer and therefore not entitled to workers' compensation benefits. "[A]n employer-employee relationship is a prerequisite to coverage by, and recovery under, the Workers' Compensation Act[.]" *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 78, 511 S.E.2d 9, 12 (1999).

"The appellant must assign error to each conclusion it believes is not supported by the evidence. N.C. R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc.*

v. Greene, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999). Although plaintiff's failure to assign error to the Full Commission's conclusion regarding his status and the applicability of the Workers' Compensation Act constitutes an acceptance of the conclusion, we elect to review the merits of this appeal in our discretion under N.C. R. App. P. 2.

Under his assignment of error, plaintiff contends that "competent evidence in the form of [his] testimony, Dr. McLamb's [22 August 1997] correspondence, and the deposition testimony of Dana Richards all support [his] position that his injury was the result of a compensable accident that took place on June 4, 1996." Plaintiff argues that the Full Commission erred in concluding that he did not sustain an injury by accident on 4 June 1996 while in the course and scope of his employment. We disagree.

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999).

Here, plaintiff contends that he sustained a compensable work-related injury by accident on 4 June 1996. "To obtain an award of compensation for an injury under the North Carolina Work[ers'] Compensation Act, an employee must show that he sustained a personal injury by accident, that his injury arose in the course of his employment, and that his injury arose out of his employment." *Bryan v. Church*, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966). "Accident and

injury are considered separate. Ordinarily, the accident must precede the injury." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962).

Here, the Full Commission found that "plaintiff has failed to prove that he sustained an injury by accident on June 4, 1996, though he may have suffered an incident involving his knee on th[at] date." We are aware of some evidence in the record that might support findings contrary to the Full Commission's, i.e. plaintiff's testimony that he was injured as a result of a compensable work-related accident that took place on 4 June 1996, the 22 August 1997 letter prepared by Dr. McLamb indicating that plaintiff's knee injury "onset appeared to be just immediately prior to this [7 June 1996] office visit," and Ms. Richards' deposition testimony that she typed the 22 August 1997 letter from a tape of Dr. McLamb's dictation.

However, competent evidence in the record reveals that plaintiff did not seek medical treatment for his left knee injury until 7 June 1996 -- three days after the alleged accident; that Dr. McLamb's medical records indicated that plaintiff's left knee injury had an onset date of 1 January 1996 and that plaintiff had been experiencing that pain for three to four months preceding his visit; that Dr. McLamb testified several times in his deposition that the symptoms of plaintiff's knee injury began on 1 January 1996 and had persisted for three to four months prior to his visit; that Dr. McLamb prepared a letter dated 29 April 1999 stating plaintiff's "onset of symptoms in his left knee occurred on or about January 1, 1996 or 3-4 months prior to the visit of June 7, 1996;" that Dr. McLamb testified in his deposition and noted in his 29 April 1999 letter that his 22 August 1997 letter was "incorrect;" that plaintiff's physical therapist Bill Sorrels "noted crepitus/pain in [plaintiff's] left knee approximately one month" duration on 14 February 1996. Here, competent evidence supports that plaintiff's knee injury preceded any alleged accident on 4 June 1996. Accordingly, we hold that competent evidence in the record supports

the Full Commission's findings. Thus, the Full Commission's findings are conclusive upon appeal.

Finally, we note that "[t]he Industrial Commission's conclusions of law are reviewable de novo by this Court." *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). In reviewing the Full Commission's conclusions *de novo*, we conclude that the Full Commission's findings of fact justify its conclusions of law.

In sum, we conclude that plaintiff did not sustain a compensable work-related injury by accident on 4 June 1996. Accordingly, we affirm the Opinion and Award of the Industrial Commission.

Affirmed.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).