A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any other purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered. See Rule of Appellate Procedure 30 (e)(3).

NO. COA01-605

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

DAVID JONES,
Employee-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 841967

JIM WALTER HOMES
Employer,

LUMBERMEN'S UNDERWRITING ALLIANCE
Carrier,
Defendant-Appellees.

Appeal by plaintiff from an opinion and award entered 1 March 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 February 2002.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr. and Kimberly A. D'Arruda, for defendant-appellees.

McGEE, Judge.

David Jones (plaintiff) appeals from an opinion and award of the North Carolina Industrial Commission filed 1 March 2001, in which the Industrial Commission denied plaintiff workers' compensation benefits for an injury to his foot because the Industrial Commission determined plaintiff failed to show by the greater weight of the evidence that this injury arose out of and in the course of his employment.

Plaintiff testified that while working for Jim Walter Homes (defendant-employer), he was inspecting a house which was under construction on 2 May 1998. During the inspection, he stepped on a nail. He treated the injury by wiping it with an alcohol swab, applying an antibiotic ointment, and applying a band-aid. Plaintiff testified he discussed the injury the next day with another employee, Barbara Quinlan (Quinlan). He removed his shoe and showed Quinlan where the nail had pierced his foot. Quinlan denied this account.

Plaintiff went to his family physician, Dr. Robert Powell (Dr. Powell), on 11 May 1998. Plaintiff told Dr. Powell he had been experiencing pain and swelling in his right foot for about two weeks. Dr. Powell asked plaintiff if he had experienced any recent foot injuries. Plaintiff denied any recent injuries but discussed with Dr. Powell an injury that occurred several years earlier. Dr. Powell diagnosed plaintiff with osteomyelitis, a disease of the bone.

Following a recommendation from Dr. Powell, plaintiff was treated by Dr. Karl Hubbard (Dr. Hubbard), an orthopedic surgeon, on 14 May 1998. Plaintiff again denied any recent injuries to his foot but discussed with Dr. Hubbard a nail injury to his foot that occurred several years earlier. Dr. Hubbard saw no sign of a recent injury to plaintiff's foot. After being treated initially by Dr. Hubbard, plaintiff was admitted to Albemarle Hospital. Plaintiff was driven to the hospital by his supervisor; however, plaintiff did not mention a work-related injury to his supervisor. At the hospital, Dr. Hubbard performed an irrigation and debridement procedure and an incisional biopsy on plaintiff's foot. Plaintiff testified that while at the hospital he told Andrew Raynor, defendant-employer's local branch manager, that he stepped on a nail on 2 May 1998 while at work. Raynor denied plaintiff's testimony on this issue.

Plaintiff was discharged from Albemarle Hospital on 29 May 1998. On that day, plaintiff told Dr. Hubbard he stepped on a nail on 2 May 1998 while at work. After plaintiff's release,

plaintiff developed a staph infection. Dr. Hubbard considered it likely that plaintiff would have to have a surgical amputation of his foot. Dr. Hubbard referred plaintiff to Dr. Michael Romash (Dr. Romash), who diagnosed plaintiff with diabetic neuropathy. Dr. Romash successfully treated plaintiff and avoided amputation. Plaintiff returned to work on 30 December 1998. Both Dr. Powell and Dr. Hubbard testified a nail puncture wound would be consistent with the injuries plaintiff suffered.

Defendants denied plaintiff's request for benefits on 11 June 1998. Plaintiff filed a Form 33 request for hearing dated 22 June 1998. The matter was heard before a deputy commissioner on 11 December 1998, and an opinion and award denying plaintiff's claim was filed 26 April 2000. Plaintiff gave notice of appeal, and the matter was reviewed by the Industrial Commission on 24 January 2001. The Industrial Commission affirmed the deputy commissioner in an opinion and award on 1 March 2001. Plaintiff appeals from this opinion and award.

Plaintiff argues the Industrial Commission erred in its findings of fact and conclusions of law when it determined there was not a causal relationship between the injury to his foot and his employment with defendant-employer. Plaintiff contends the Industrial Commission completely disregarded the medical opinions of Dr. Hubbard and Dr. Powell. We disagree.

On an appeal from an opinion and award from the Industrial Commission, the standard of review for this Court "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 issue of whether a particular accident arises out of and in the course of employment is a mixed question of fact and law, and this Court's review is limited on appeal to the question of whether the findings and conclusions are supported by

competent evidence." *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982).

"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, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). Furthermore, the "'findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

The Industrial Commission concluded plaintiff failed to show a causal relationship connecting the injury to plaintiff's foot to an accident at plaintiff's workplace. "A person claiming the benefit of compensation has the burden of showing that the injury complained of resulted from the accident." *Snead v. Mills, Inc.*, 8 N.C. App. 447, 451, 174 S.E.2d 699, 702 (1970). The only evidence presented which showed plaintiff was injured at work was plaintiff's own testimony. While plaintiff testified he immediately told another employee, Quinlan, he had been injured on the job, Quinlan denied being told about or being shown the injury. Plaintiff also testified he told his supervisor, Raynor, of the injury; however, Raynor also denied being told.

The Industrial Commission based its decision "upon the record in its entirety, and particularly the credible testimony of Barbara Qui[n]lan, Andrew [Raynor], Dr. Powell and Dr. Hubbard[.]" While both Dr. Powell and Dr. Hubbard testified a nail puncture would be consistent with the injury plaintiff received, both Dr. Powell and Dr. Hubbard also testified neither was told initially of a nail puncture wound occurring on 2 May 1998, despite both specifically asking plaintiff if he had suffered a recent injury.

"Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. American National Can Corp*., 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (emphasis in original). The Industrial Commission

> "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." Thus, the Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal.

Dolbow v. Holland Industrial, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

There is competent evidence in the record which supports a conclusion that plaintiff was not injured at work. Furthermore, there is evidence in the record which casts doubt on the credibility of plaintiff's testimony. Because there is competent evidence in the record which supports the Industrial Commission's findings of fact and conclusions of law, we affirm the opinion and award of the Industrial Commission.

Affirmed.

Judges GREENE and THOMAS concur.

Report per Rule 30(e).