NO. COA02-351

NORTH CAROLINA COURT OF APPEALS

Filed: 17 June 2003

WILLIAM DEAN GILLENWATER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 844900

N.C. DEPT. OF TRANSPORTATION,
Employer,

SELF-INSURED,
Defendant.

Appeal by plaintiff from the Opinion and Award filed 7 January 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2003.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for defendant-appellee.

GEER, Judge.

Plaintiff, William Dean Gillenwater, appeals from a decision of the North Carolina Industrial Commission concluding that he failed to prove that he suffered a new occupational disease in 1996 as opposed to a change of condition arising out of a compensable 1992 accident. Under the standard of review applicable in workers' compensation cases, we affirm the Commission.

We first, however, address plaintiff's non-compliance with the North Carolina Rules of Appellate Procedure. Rule 10 of our Rules of Appellate Procedure provides:

> Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, *if separate record or transcript references are made*.

N.C.R. App. P. 10(c)(1) (emphasis added). Plaintiff has made little effort to comply with this rule. None of plaintiff's assignments of error refers to a particular page of the record, but rather each references generally the entire opinion and award of the deputy commissioner and the entire opinion and award of the Full Commission.

In addition, several of plaintiff's assignments of error are so broad that they amount to little more than a generalized attack on the Commission's opinion and award. For example, the fifth assignment of error states only: "The Full Commission erred when it failed to make appropriate conclusions of law based upon the findings of fact." Such an assignment of error does not comport with our rules. *See Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

In his brief, after *each* of his four arguments, plaintiff lists the exact same 25 assignment of error numbers followed by the same page numbers of the record on appeal: "pp. 7-16; 21-32." These page numbers do not correspond to the page numbers specified in the assignments of error in the record or to any particular documents or pleadings contained in the record on appeal. Again, this does not comply with the Rules of Appellate Procedure. Rule 28 provides, *inter alia*:

> Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error

> pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.

N.C.R. App. P. 28(b)(6). Plaintiff's failure to distinguish among his numerous assignments of error and failure to point to particular pages of the record disregards Rule 28.

Further, plaintiff has included in the appendix to his brief a single-spaced six-page "Chronology." This "Chronology" apparently is not an exhibit from the proceedings in the Industrial Commission, but rather a document newly prepared for this Court. As such, it seeks to permit plaintiff to exceed the page limitations contained in Rule 28(j) of the Rules of Appellate Procedure. This "Chronology" was disregarded in the consideration of this appeal.

As this Court has previously stressed, "[t]he Rules of Appellate Procedure are designed to expedite appellate review and [a party's] failure to observe the requirements of the Rules subjects their appeal to dismissal." *Anthony v. City of Shelby*, 152 N.C. App. 144, 146, 567 S.E.2d 222, 225 (2002); N.C.R. App. P. 25(b), 34(b)(1). Notwithstanding plaintiff's failure to comply with the Rules of Appellate Procedure, we have exercised our discretion to review the record to determine if the Commission erred in denying plaintiff's workers' compensation claim.

Plaintiff began working for defendant as a bridge worker in August 1989. In 1992, plaintiff was standing on the side of the road beside a Department of Transportation ("DOT") truck, when a drunk driver hit the DOT truck and the DOT truck in turn hit plaintiff. The accident caused plaintiff to be thrown into Interstate 40, where he was nearly hit by another vehicle. As a result of the accident, plaintiff sustained multiple physical injuries and was out of work for approximately sixteen months. There is no dispute among the parties that this 1992 accident was compensable under the Workers' Compensation Act.

After returning to work in 1993, plaintiff became a bridge maintenance inspector for defendant and worked as a member of a two-man crew. DOT offered evidence that plaintiff had trouble with absenteeism, tardiness, and poor work performance.

In March 1995, plaintiff began treatment with Dr. Jane L. Steiner, a board certified psychiatrist, for stress, depression, and panic attacks. In her deposition, Dr. Steiner explained that plaintiff had been suffering from his anxiety attacks throughout his life. Dr. Steiner was impressed that plaintiff was able to return to work after the 1992 accident since he had post traumatic stress disorder ("PTSD") from the 1992 accident. Additionally, Dr. Steiner indicated that although plaintiff's personal psychological and family history suggested that he was predisposed to depression, anxiety, and panic attacks, the 1992 accident would have been sufficient to cause anxiety attacks and panic attacks in someone who was not so predisposed.

In January 1996, Dr. Robert V. Buccini, a gastroenterologist, saw plaintiff for heartburn and vomiting of blood. Dr. Buccini conducted studies revealing that plaintiff had suffered from ulcers in the past and that plaintiff was currently suffering from ulcer disease in his stomach and small intestine. Plaintiff's medical history suggested that his consumption of aspirin for pain management related to the 1992 accident and for stress-related headaches was a proximate cause of the ulcer disease.

Plaintiff's employment with defendant was terminated effective 17 May 1996 on the grounds of excessive absenteeism and poor work performance. In 1998, plaintiff brought this claim for compensation for a new occupational disease based on psychological and gastrointestinal ("GI") conditions that he alleges arose out of his work in 1996.

The sole issue before the Commission was whether plaintiff had contracted a compensable occupational disease on or about 23 October 1996. The Commission concluded that

"[a]lthough plaintiff may have proven that he has suffered psychological and GI injuries as a direct consequence of a compensable 1992 injury and/or as a consequence of his treatment for the compensable 1992 injury, a change of condition from a compensable injury, if timely filed, is compensable under the original workers' compensation injury and does not constitute a separate and new injury." Because the issue of a change of condition under N.C. Gen. Stat. §97-47 (2001) was not before the Commission, the Commission concluded that plaintiff "has not proven by the greater weight of the competent evidence that he has sustained a compensable occupational disease" and therefore denied his claim for benefits.**[Note 1]**

In reviewing a decision by the Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The Commission's findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). On appeal, this Court may not re-weigh the evidence or assess credibility. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

Plaintiff contends that the evidence is insufficient to support the Commission's findings and ultimate denial of plaintiff's claim. Since we find that the record contains evidence to support the Commission's findings, we affirm.

Plaintiff first contends that the Commission erred in requiring that he be an employee of defendant on the date that he was diagnosed with an occupational disease. The Commission's

opinion and award does include a finding of fact that plaintiff "was not an employee of defendant on 23 October 1996, the date that he allegedly contracted the occupational disease," but the Commission did not rely upon this finding in reaching any of its conclusions. Since this finding is immaterial, we overrule this assignment of error.

Because plaintiff alleged that in 1996, he contracted a new occupational disease (in the form of various psychological conditions and GI problems), the Commission was required to determine whether plaintiff established his right to benefits for an occupational disease under N.C. Gen. Stat. §97-53(13). Under §97-53(13), plaintiff was required to prove that:

> (1) the disease is characteristic of individuals engaged in the particular trade or occupation in which the claimant is engaged; (2) the disease is 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 is a causal relationship between the disease and the claimant's employment.

Hardin v. Motor Panels, Inc., 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (citing *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations omitted)), *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). The first and second elements "are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365.

The Commission found as a fact that plaintiff had not established the necessary causal relationship between plaintiff's psychological conditions and his employment separate and apart from the 1992 accident: "[T]he cause of plaintiff's depression, post traumatic stress disorder, anxiety, and other psychological disorders was the 1992 accident." This finding was fully supported by the testimony of Dr. Steiner.

Dr. Steiner repeatedly confirmed that each of plaintiff's psychological conditions was the result of his being hit by the drunk driver while at work in 1992:

> Q. As a result of that being hit by the drunk driver and returning to work as a bridge inspector, would that have placed him at an increased risk of developing a major depression?
>
> A. Yes, I think so.
>
> * * *
>
> Q. Okay. What caused his PTSD; do you know?
>
> A. It could be the accident to begin with.
>
> Q. The accident in 1992 where he was hit by a drunk driver?
>
> A. I would think so, yes. . . . In other words, the accident, recurring thoughts, memories related to the accident, being fearful of being back in that same situation, being just more generally anxious, those are the things that you would see as part of the post traumatic stress.

Because the Commission's finding is supported by competent evidence, we must affirm the Commission's conclusion that plaintiff's psychological conditions arose out of the compensable 1992 accident and did not amount to a new occupational disease.

As for plaintiff's GI problems,**[Note 2]** Dr. Buccini testified that the stress that led to plaintiff's GI problems was not caused by the work itself, but rather arose out of his interactions with his supervisors: "I did not get the impression the work, per se, was the stress; it was the situation of his work. Not so much a hazardous occupation or physical effort, it was that . . . he did not get along well with his superiors and there was controversy in that regard." Plaintiff's contention that conditions resulting from stress due to interactions with supervisors can constitute an occupational disease has already been rejected by the Supreme Court. In *Woody v. Thomasville Upholstery, Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002) (per curiam) (adopting dissent of Martin, J., 146 N.C. App. 187, 201-02, 552 S.E.2d 202, 211-12 (2001)), the Supreme Court held that medical conditions resulting from working for an abusive supervisor are ordinary

diseases to which the general public is equally exposed outside the workplace in everyday life and, therefore, fall outside the scope of the Workers' Compensation Act.

Thus, as the Commission concluded, plaintiff's claims of discrimination, wrongful termination, and harassment were not properly the subject of a workers' compensation claim. Indeed, plaintiff asserted precisely the same factual allegations present in this case in an administrative proceeding under the State Personnel Act. *See Gillenwater v. N.C. DOT*, __ N.C. App. __, 576 S.E.2d 142 (2003).

In addition, Dr. Buccini's testimony failed to establish that plaintiff's employment placed him at a greater risk of developing his GI problems:

> Q. Doctor, during your medical treatment from January 9, 1996 until January 21, 1999, do you have an opinion, within a reasonable degree of medical certainty, as to whether . . . his reaction to the stress from his work environment exacerbated his medical condition for which you treated him?
>
> A. It's so difficult to say what . . . portion is due to what. I do believe he felt enormous stress at work. I do believe he had headaches which were made worse by that stress. *I do believe that this is a patient who would have had headaches if he won the lottery and retired in Bermuda*. I sense that there was something medical about the headaches, independent of the occupation. . . .
>
> Q. Okay. And would his occupation, as it related to his employment or in relation to his co-employees, put him, with his pre-existing condition, at an increased risk of developing that chain reaction leading to the disease for which you treated him--the chain reaction meaning the stress causing the increased headaches causing aspirin use?
>
> A. An increase compared to what? Compared to if he had an alternative occupation?
>
> Q. Increase compared to someone in the general public.
>
> A. Yes, I would say so.

> Q. Okay.
>
> A. *I would say that [plaintiff] had difficulties at work that other people would not have felt in the same way, and thus he developed symptoms that other people would not have felt. Put another way, if another person had been put in the same job, I don't think they would have the same reaction*.

This expert testimony supports the Commission's finding that plaintiff has failed to prove that *his employment* placed him at an increased risk of developing his GI disease as compared to members of the general public. *See Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 648, 566 S.E.2d 807, 813 (2002) (While "[u]nder appropriate circumstances, work-related depression or other mental illness may be a compensable occupational disease . . ., the claimant must prove that the mental illness or injury was due to stresses or conditions different from those borne by the general public.").

The Commission's findings that plaintiff failed to prove causation or increased risk are supported by the record. Those findings in turn support the conclusions of law. No basis exists for overturning the Commission's opinion and award.

Affirmed.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).

NOTES

1. The Commission expressly declined to address whether plaintiff is entitled to relief under N.C. Gen. Stat. §97-47: "The issue of modification of the prior Award, if warranted, for the 1992 injury is not before the Commission in this action, and, therefore, the Commission does not determine herein whether plaintiff is entitled to additional benefits under the prior Award." We likewise do not address this issue.

2. Dr. Buccini believed that plaintiff's GI problems arose out of excessive aspirin use from treatment for the 1992 injuries and possibly headaches.