NO. COA06-1385

NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2007

KENNETH R. GOLDS,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 950746

RYDER INTEGRATED LOGISTICS, INC.,
Employer/Defendant,

and

RYDER SERVICES CORPORATION,
Servicing Agent/Defendant.

Appeal by Plaintiff from opinion and award entered 20 June 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 April 2007.

Franklin D. Smith for Plaintiff-Appellant.

Young Moore and Henderson P.A., by Jeffrey T. Linder, for Defendants-Appellants.

STEPHENS, Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission ("Commission") which terminated his workers' compensation benefits. On appeal, Plaintiff argues that the Commission erred by "overlooking the diagnoses and opinions given by Dr. Bond and Dr. Hanson [sic], Plaintiff's treating physicians, and in following the physicians who had merely conducted an independent medical examination." For the reasons stated herein, we affirm the decision of the Industrial Commission.

FACTS

Plaintiff had been employed for four months as a tractor trailer driver for Defendant Ryder Integrated Logistics, Inc. ("Ryder") when, on 23 December 1998, Plaintiff returned to Ryder's lot on North Carolina Highway 268 to drop off his truck. As he exited the truck holding on to the truck cab's handrail with his left hand, Plaintiff's foot slipped on ice which had accumulated on the truck's running board. As a result, Plaintiff was dangling from the handrail by his left arm for a few moments before gaining sure footing on the ground. Plaintiff reported the incident to his supervisor who instructed Plaintiff to see a doctor as soon as possible.

On 28 December 1998, Plaintiff was examined by Dr. John L. Bond. Plaintiff's x rays were normal, so Dr. Bond suspected a sprain. Dr. Bond prescribed Vicodin for Plaintiff's pain and took Plaintiff out of work. Shortly thereafter, Ryder filed an "Employer's Report of Injury to Employee" with the North Carolina Industrial Commission and began providing Plaintiff with disability and medical compensation benefits. Over the next three months, Dr. Bond continued to treat Plaintiff with injections, therapy, cervical traction, and pain medications. Plaintiff, however, reported no significant improvements. Dr. Bond determined that Plaintiff was capable of doing work at a modified level and recommended that he receive a neurosurgical evaluation.

In March 1999, Dr. John A. Wilson ordered magnetic resonance imaging ("MRI") of Plaintiff's neck. The MRI results were normal, showing minimal degenerative changes and osteophytic ridges, and no compression of the spinal cord and nerve roots. Concluding that there was no neck injury, Dr. Wilson released Plaintiff to return to work and recommended he see an orthopedist to address his shoulder complaints.

In June 1999, Plaintiff received an orthopedic evaluation from Dr. Walton W. Curl. Dr. Curl's initial examination indicated "no tenderness over the rotator cuff . . . [and] normal

strength in the bilateral upper extremities." Dr. Curl ordered an MRI of the shoulder, but estimated the injury was likely cervical and soft tissue related. The MRI did not indicate a rotator cuff tear but did evidence cystic lesions characteristic of a ganglion cyst.

In July 1999, after reviewing the results of Plaintiff's MRI scans, Dr. Bond diagnosed Plaintiff with a shoulder strain, recommended he stay on modified work, and estimated that he would have a 10 percent partial permanent impairment ("PPI") to his left upper extremity.

On 21 September 1999, Plaintiff was released from his employment,**[Note 1]** but Ryder continued providing disability and medical compensation payments. After his release, Plaintiff saw another doctor for an independent medical examination ("IME"). An electromyography ("EMG"), a nerve conduction study, and an MRI of the neck were ordered to determine whether Plaintiff sustained any neurological injury. The EMG and nerve conduction study yielded normal results, and the MRI did not reveal any significant change from Plaintiff's first MRI.

From September 1999 into 2000, all of Plaintiff's objective tests with Dr. Bond were relatively normal, yet Plaintiff displayed no signs of improvement and reported escalated pain. A second nerve conduction study and EMG test to the left upper extremity yielded normal results. In April 2000, Plaintiff underwent a functional capacity evaluation ("FCE") which revealed that despite his complaints of pain, he was capable of working at the medium duty level. Dr. Bond opined that Plaintiff would likely have a 35 percent PPI of the left upper extremity. Dr. Bond concluded that Plaintiff was incapable of driving a truck for extended periods of time and suggested that he restrict any lifting to fifteen pounds. When Plaintiff continued to complain of pain, however, Dr. Bond concluded that he was only able to perform sedentary work at the waist level on the left side.

In June 2000, at the request of Defendants and in order to continue receiving benefits, Plaintiff began vocational rehabilitation in addition to medical treatment. Plaintiff had not obtained a job by January 2001 and Plaintiff's vocational counselor began noting his lack of participation in job search efforts. Also, Plaintiff began demonstrating overt behaviors inconsistent with a diligent job search.**[Note 2]** On 22 February 2001, Defendants filed a motion to compel Plaintiff to fully participate in his vocational job search. The Commission, however, denied Defendants' motion.

In May 2001, Plaintiff returned to Dr. Curl who re-evaluated Plaintiff's condition by examining Plaintiff and reviewing his 1999 MRI of the shoulder. The examination and MRI revealed suggestions of cystic lesions in the suprascapular notch, but did not reveal a rotator cuff tear or any condition indicating that surgical intervention would be required. Dr. Curl recommended a neurosurgical evaluation to ensure surgery was not needed, but Dr. Curl believed Plaintiff had reached maximum medical improvement ("MMI") and was capable of working. Dr. Curl released Plaintiff for full-time work with a fifteen-pound weight lifting restriction.

Plaintiff still was not fully cooperating with vocational rehabilitation in August 2001. Therefore, Defendants renewed their motion to compel participation, and on 21 February 2002, the Commission ordered Plaintiff to comply with reasonable vocational rehabilitation efforts pursuant to N.C. Gen. Stat. §97-25, or risk a suspension of compensation. Despite the Commission's order, Plaintiff refused to fully participate in vocational rehabilitation efforts.

Through June 2002, Plaintiff continued to receive medical treatment from Dr. Bond. Dr. Bond administered injections and prescribed pain relief medication, but Plaintiff never reported any improvements. A third MRI of Plaintiff's neck revealed no changes from prior testing. On

15 January 2003, Dr. Bond stated that Plaintiff was no longer capable of working in any employment, and recommended that Plaintiff be referred to a pain clinic. Plaintiff's vocational rehabilitation was terminated as a result of Dr. Bond's opinion.

On 15 April 2003, Plaintiff saw Dr. O. Del Curling for a neurosurgical consultation and IME regarding his neck. Dr. Curling reported that "the etiology of [Plaintiff's] symptoms [was] somewhat unclear," noting that his assessment was clouded by Plaintiff's demonstration of "symptom magnification behavior." Through testing, Dr. Curling was able to "rule out a left cervical radiculopathy as a source of [Plaintiff's] pain[.]" Dr. Curling found that Plaintiff was at MMI and considered him capable of modified work. Dr. Curling suggested an FCE to pinpoint Plaintiff's work capability, but warned that Plaintiff might "self limit his performance as a result of his pain syndrome." Dr. Curling found no causal relationship between Plaintiff's current problems and his 23 December 1998 accident.

Dr. Bond disagreed with Dr. Curling's assessment, and in September 2003, Dr. Bond estimated that Plaintiff had a 65 percent PPI of his left upper extremity.

In November 2003, Plaintiff underwent another IME with orthopedic surgeon Dr. Frank Rowan. Plaintiff told Dr. Rowan that since the accident, his pain was so severe he could not do chores around the house or operate a vehicle. Dr. Rowan examined Plaintiff's medical records as well as surveillance tapes that showed Plaintiff (1) carrying a ten-to-fifteen-pound bag in his left arm, (2) using his left hand to lift the bag and place it in the trunk, and (3) driving with both hands. Dr. Rowan concurred with Dr. Curling's assessment, concluding that Plaintiff (1) needed no further treatment, (2) needed to return to work according to his capabilities under the FCE guidelines, and (3) was likely capable of doing more. Additionally, Dr Rowan concluded that "Plaintiff [had] no injury causally related to any incident in 1998."

On 25 November 2003, Plaintiff's second FCE revealed that he was capable of performing work at least at the sedentary-light duty level. The results were deemed inconclusive, however, due to Plaintiff's "overall symptom exaggeration and failure to comply with testing[.]" Nevertheless, Dr. Bond expressed his opinion that Plaintiff was now totally disabled.

Pursuant to Plaintiff's request for a hearing, Plaintiff's case came before Deputy Commissioner George T. Glenn, II, for hearings on 24 February 2004 and 1 June 2004. After the hearings, Deputy Commissioner Glenn issued an order compelling Plaintiff to "attend and fully participate in[] an assessment with the Wilkes County Vocational Workshop[.]" Despite the order, Plaintiff reported to only seven of the thirteen sessions. Additionally, Plaintiff never stayed for more than one hour on the days he did attend, and his productivity and participation were very poor.

On 17 November 2004, Plaintiff saw Dr. Hans C. Hansen for a pain management evaluation. Dr. Hansen recommended some interventional measures to treat Plaintiff's ongoing complaints of pain and advised Plaintiff to reduce his pain medication usage. Dr. Hansen suggested that Plaintiff was capable of returning to work on a graduated basis.

On 30 August 2005, Deputy Commissioner Glenn filed an opinion and award concluding that Plaintiff's current conditions were not causally related to his work accident, and that, consequently, Defendants were entitled to terminate Plaintiff's disability benefits and medical compensation. The Full Commission affirmed Deputy Commissioner Glenn's decision by opinion and award filed 20 June 2006. For the reasons which follow, we affirm the decision of the Full Commission.

ANALYSIS

In considering an appeal from a decision of the North Carolina Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "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 *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). "[F]indings of fact to which [an appellant] has not assigned error and argued in his brief are conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002) (citation omitted). "The Commission's conclusions of law are reviewed *de novo*." *McRae*, 358 N.C. at 496, 597 S.E.2d at 701 (citation omitted).

Furthermore, an appellate court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "[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.

In his brief, Plaintiff argues that none of the Commission's findings of fact or conclusions of law "are . . . supported by the prevailing competent evidence of record." Notably, Plaintiff did not assign error to any of the Commission's twenty-eight findings of fact or four conclusions of law. Plaintiff's sole assignment of error states "[t]he Full Commission committed error in overlooking the diagnoses and opinions given by Dr. Bond and Dr. Hanson [sic], Plaintiff's

treating physicians, and in following the physicians who had merely conducted an independent medical examination." This assignment of error is insufficient to present any of the Commission's findings or conclusions for our review. *See* N.C. R. App. P. 10(c)(1) ("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."). Moreover, even were we to conclude that this assignment of error properly presented any of the Commission's findings or conclusions, the extent of Plaintiff's argument regarding any of those findings and conclusions is that "Plaintiff adamantly disputes" the Commission's third conclusion of law. This statement is no argument at all and is without merit. *See* N.C. R. App. P. 28(b) ("An appellant's brief in any appeal shall contain . . . [a]n argument . . . .").

We agree with Defendants that the thrust of Plaintiff's argument on appeal is "that the Commission erred in affording greater weight to the medical opinions" of certain doctors over others. Such an argument is not properly made to this Court and is overruled. *Deese*, *supra*; *Adams*, *supra*.

The opinion and award of the North Carolina Industrial Commission is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).

NOTES

1. Plaintiff was released from his employment because Dr. Bond did not clear Plaintiff for "regular duty work" and the employer's "temporary duty program ended on September 21, 1999[.]"

2. These behaviors included voluntarily disclosing his "thirty-five percent disability rating" on job applications.