NO. COA02-199

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

WALDON A. BOGER
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 969629

CURLEE MASONRY, INC.
Defendant-Employer

and

VALLEY FORGE INSURANCE COMPANY,
Defendant-Carrier

Appeal by defendant from Opinion and Award of the North Carolina Industrial Commission entered 1 October 2001. Heard in the Court of Appeals 13 November 2002.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Sharpless & Stavola, PA, by Eugene E. Lester, III, for defendant-appellant.

WYNN, Judge.

Defendant, Curlee Masonry, Inc., appeals from the Industrial Commission's opinion and award concluding that Walden A. Boger was totally disabled from 2 August 1999 through 15 October 1999. On appeal, Curlee Masonry first urges this Court to do something it cannot--overrule or disregard the Supreme Court of North Carolina's holdings in *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). Alternatively, Curlee Masonry argues that certain of the

Industrial Commission's findings of fact were not supported by any competent evidence, and that certain conclusions of law were not supported by the findings of fact. Compelled by law to follow *Adams*, we uphold the opinion and award of the Industrial Commission.

On 7 June 1999, Curlee Masonry hired Boger as a laborer which consisted of "just supplying [brick masons] with brick, mortar, and anything [the masons] need." According to Boger, on 2 August 1999, he felt a "pop in [his] neck" while lifting bricks. Boger left work because of the pain in his neck, arms, and shoulders; he did not return to work the next day. On 4 August 1999, Boger contacted his supervisor and received permission to seek medical attention at the emergency room where he was diagnosed with "Thoracic Strain," advised not to lift greater than ten pounds for a week, and instructed to see an orthopedist. On 11 August 1999, Boger requested and received light duty work. However, after only an hour on the job, Boger stopped working because of persistent pain in his neck and arms.

On 18 August 1999, Boger was diagnosed as having "Cervical Strain with Radiculopathy." Boger was told that he "should not return to work until examined by Dr. Zuhosky." On 10 September 1999, Boger was examined by Dr. Zuhosky who diagnosed a "Cervical Strain." After a four-week course of physical therapy and treatment, Curlee Masonry's insurance carrier informed Boger that they were unwilling to pay for anymore medical expenses, including a CT scan recommended by Dr. Zuhosky, and were filing a form to deny his workers' compensation claim.

Consequently, Boger brought his claim for hearing before a Deputy Commissioner of the Industrial Commission who found that Boger's "testimony [was] not credible" and that Boger did not injure his neck on 2 August 1999. In support of this conclusion, the Deputy Commissioner relied on Boger's criminal history with crimes involving dishonesty, Dr.

Zuhosky's assertion that Boger's complaints were "exaggerated," and that Boger's statements were, at times, inconsistent.

However, on appeal, the Full Commission reversed the Deputy Commissioner, and awarded Boger an additional $190.38 in total compensation benefits, plus medical compensation for his neck injury. The Full Commission found, from a cold record, that Boger's testimony was credible. Curlee Masonry appeals this opinion and award.

By its first assignment of error, Curlee Masonry argues that this Court should review the Full Commission's credibility findings under a "whole record" standard of review, because the Full Commission reversed the credibility findings of the Deputy Commissioner based on a cold record. Curlee Masonry acknowledges that in *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), our Supreme Court held that:

> "It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate . . . that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one."

Id. at 681, 509 S.E.2d at 414.

Notwithstanding *Adams*, Curlee Masonry admonishes this Court to observe and reverse, what Curlee Masonry considers, a fundamental inconsistency: Namely, that the Full Commission is permitted to do that which this Court is precluded from doing; re-weighing credibility evidence from a cold record. Our Supreme Court, however, has made it eminently clear that the Court of Appeals has "no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions 'until otherwise ordered by the Supreme Court.'" *Dunn*

v. Pate, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Accordingly, this assignment of error is without merit.

By its second and third assignments, Curlee Masonry argues that the Full Commission's Finding of Fact 17 is not supported by competent evidence. We must disagree.

"Under our Workers' Compensation Act, 'the Commission is the fact finding body.'" *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). "'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The Commission's findings of fact "'are conclusive on appeal if supported by any competent evidence.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, this Court is precluded from weighing the evidence on appeal; rather, we can do no more than "'determine whether the record contains any evidence tending to support the [challenged] finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted).

Here, Curlee Masonry argues Finding of Fact 17 is not supported by competent evidence. In Finding of Fact 17, the Full Commission found that:

> Plaintiff was totally disabled from August 2, 1999 through October 15, 1999; that is, because of his compensable injuries, he was unable to earn any wages during that period. . . . Plaintiff needs an MRI on his neck and possible treatment by a neurosurgeon so he can get better. The primary relief he seeks is needed medical treatment.

Although Curlee Masonry argues there is no competent evidence to support this finding, the record is replete with evidence of Boger's disability. For instance, Boger testified that during the relevant period he was unable to work or complete routine daily activities because of severe neck

pain and inability to move his arms. "This Court has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work." *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002); *see also Matthews v. Petroleum Tank Service, Inc*. 108 N.C. App. 259, 423 S.E.2d 532 (1992) (employee's own testimony concerning level of pain he suffered was competent evidence as to his ability to work); *Niple v. Seawell Realty & Indus. Co.*, 88 N.C. App. 136, 362 S.E.2d 572 (1987) (employee's own testimony as to pain upon physical exertion competent evidence as to her ability to work), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988). Accordingly, this assignment of error is without merit.

In the alternative, Curlee Masonry argues that Finding of Fact 17 is inconsistent, and therefore precluded by, Findings of Fact 12 and 15. However, even assuming that the Commission did find some facts favoring Curlee Masonry, this would not mandate a conclusion in favor of Curlee Masonry. Rather, "if the evidence before the Commission is capable of supporting two conflicting findings, the determination of the Commission is conclusive on appeal." *Blankley v. White Swan Uniform Rentals*, 107 N.C. App. 751, 754, 421 S.E.2d 603, 605 (1992). Thus, even if the Commission recited facts tending to support Curlee Masonry, the "Commission has the duty and authority to resolve conflicts in the testimony," and the ability to conclude that Curlee Masonry's evidence was outweighed by Boger's evidence. *Id*.; *see also* Hawley *v. Wayne Dale Const*., 146 N.C. App. 423, 428, 552 S.E.2d 269, 272 (2001) (holding that the "Commission may weigh the evidence and believe all, none or some of the evidence") (citations omitted). Accordingly, though material and mutually exclusive findings of fact are a basis for appeal, findings of fact that merely support a contrary position, contained within a larger narrative advancing that position, are not a basis for appeal.

Moreover, we find that the Commission's Findings of Fact were not in conflict. In Finding of Fact 12, the Commission noted that on 11 August 1999 Boger requested and received light duty work from his supervisor. Curlee Masonry argues this request demonstrates that Boger was not "totally disabled from August 2, 1999 through October 15, 1999." Curlee Masonry neglects to mention, however, that Boger also testified that he was only able to work about an hour because of severe neck pain, and that Boger never returned to work after this single attempt to perform light duty work. Although Finding of Fact 12 does contain statements supporting Curlee Masonry's argument, these statements are part and parcel to a greater narrative that refutes Curlee Masonry's contentions. Accordingly, Finding of Fact 15 does not preclude Finding of Fact 17, and Curlee Masonry's argument is without merit.

Furthermore, Curlee Masonry argues Finding of Fact 15 is inconsistent with the Commission's conclusion that Boger was totally disabled during the relevant time period. In Finding of Fact 15, the Commission found that on 4 August 1999: "The physician prescribed rest, an ice pack . . . advised plaintiff to call an orthopedist, and prescribed no lifting greater than 10 lbs. for a week." Curlee Masonry again argues that this finding and prescription demonstrates that Boger was not "totally disabled from August 2, 1999 through October 15, 1999." Again, however, Curlee Masonry neglects to mention Finding of Fact 16, which is chronologically and logically dependent on Finding of Fact 15. In Finding of Fact 16, the Commission found that when Boger finally received an appointment with an orthopedist, as advised on 4 August 1999, he was diagnosed with "Cervical Strain with Radiculopathy." Accordingly, this assignment of error is without merit.

In sum, because "there is some competent evidence in the record to support" the Commission's findings of fact, "we hold that the Commission's findings of fact [are] conclusive

on appeal." *Adams*, 349 N.C. at 682, 509 S.E.2d at 414. We also conclude that these findings of fact support the Commission's conclusions of law.

Affirmed.

Judge TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).