NO. COA04-1258

NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2005

DONNA WALKER, Administratrix of the
Estate of LARRY WALKER,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. TA-16103

N.C. DEPARTMENT OF TRANSPORTATION,
Defendant.

Appeal by defendant from an opinion and award filed 8 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 April 2005.

D. Keith Teague, P.A., by Danny Glover, Jr., for plaintiff appellee.

Attorney General Roy Cooper, by Assistant Attorney General Richard L. Harrison, for North Carolina Department of Transportation defendant appellant.

McCULLOUGH, Judge.

Defendant, the North Carolina Department of Transportation (DOT), appeals from a decision of the North Carolina Industrial Commission awarding compensation to plaintiff, the administratrix of the estate of Larry Walker, under the North Carolina Tort Claims Act, N.C. Gen. Stat. §143-291, *et seq*. We affirm.

Facts

On the afternoon of 20 August 1997, decedent Larry Walker was traveling south on N.C. Highway 343 in Camden County, North Carolina when, due to wet road conditions, his Ford

Ranger lost traction with the road, spun off the highway, and traveled eighty-six feet before striking a concrete bridge piling. Regrettably, Walker died as a result of this accident. The Walker accident was the second fatal accident to occur in this location of Highway 343 in six days. On 14 August 1997, a vehicle occupied by Luke Denison and Rebecca Gundersen lost traction with the road following a heavy downpour and struck a concrete bridge piling, resulting in the deaths of both Denison and Gundersen.

On 13 July 1999, the administratrix of Walker's estate filed a claim for damages against DOT under the North Carolina Tort Claims Act. The claim asserted that DOT Division Engineer Don Conner, DOT Division Maintenance Engineer Anthony W. Roper, and DOT District Engineer Jerry D. Jennings had been negligent by permitting Highway 343 to collect "an excessive and unreasonably deep pond of water in [the] travel lanes of the roadway," by failing to install guardrails between N.C. Highway 343 and the concrete bridge piers which Walker had struck, and by failing to install advisory signs warning motorists of the dangerous roadway conditions. DOT contested the claim and asserted, as its sole affirmative defense, Walker's alleged contributory negligence. Specifically, DOT asserted that Walker had negligently failed to reduce his speed given the wet road conditions, failed to equip his vehicle with rear tires having sufficient tread, and failed to keep proper control of his vehicle.

The evidence presented to the Industrial Commission tended to show the following: Trooper Ernest Goodwin, Jr., with the State Highway Patrol, investigated the Denison-Gundersen accident, which occurred following a heavy downpour in the area at issue. He observed N.C. Highway 343 to be generally wet, with water accumulating in parallel ruts in both lanes. Trooper Goodwin concluded that the Denison-Gundersen vehicle had hydroplaned due to standing water in the roadway. The day after the Denison-Gundersen accident, Sergeant Charles

Gould of the State Highway Patrol called DOT District Engineer Jerry Jennings to inform him of the accident. Sergeant Gould apprised Jennings that "there was a possibility that standing water had been a contributing factor" to the Denison-Gundersen accident. According to Jennings such a call "wasn't a common occurrence." Jennings telephoned his supervisor, DOT Division Engineer Don Connor and informed him of the information relayed by Sergeant Gould, including Sergeant Gould's concern that guardrails might be needed to buffer the bridge piers with which the Denison-Gundersen vehicle had collided.

Beginning the day after the Denison-Gundersen accident, numerous related newspaper articles were published on the front page of periodicals serving northeastern North Carolina. Each of these articles mentioned wet road conditions and/or standing water as the cause of the accident, and at least some quoted named or unnamed member of the State Highway Patrol as attributing the cause of the accident to standing water in the roadway. DOT Camden County Maintenance Engineer Raymond Skinner learned of the accident by reading about it in the newspaper.

DOT District Engineer Jennings visited the location of the Denison-Gundersen accident on 18 August 1997. He was not performing an official investigation, but was curious as to whether there were any obvious road defects that could have contributed to the wreck. Jennings looked for low shoulders and potholes, but he did not perform an analysis to detect rutting in the highway, even though such an analysis would have taken very little time. Jennings did not request a formal investigation of the accident scene, and did not request that any additional information be gathered from the scene other than the information that he had gathered during his visit.

A DOT Camden County Transportation Supervisor, Robert Winslow, learned of the Denison-Gundersen accident through conversations at work. He subsequently visited the accident scene out of "curiosity" and not as part of a formal investigation. Winslow knew only that it had been raining before the Denison-Gundersen accident, and he made only a quick visual inspection of the scene.

Thereafter, on 20 August 1997, decedent Walker was killed while driving in the same location of Highway 343. Gary McCoy had been traveling in same direction as Walker just prior to the accident. McCoy testified that he had slowed down due to rainy conditions and that Walker's vehicle was ahead of him on the highway. McCoy indicated that upon exiting onto Highway 343, he saw the taillights of Walker's vehicle disappear. He then observed Walker's vehicle stopped next to a bridge piling. McCoy did not actually witness Walker's vehicle lose control or leave the highway, but he did observe water standing in parallel ruts in the lane in which Walker had been traveling. McCoy stated that these ruts were approximately the length of a vehicle's tires and that he had previously noticed these ruts in the vicinity of the accident, even on dry days.

DOT District Engineer Jennings was called to the scene of the Walker accident, and with the benefit of the rain, he was able to observe standing water in ruts along the southbound lane of Highway 343. The ruts extended for approximately 100 yards, including the area where Walker left the highway. Jennings testified that these ruts probably would have been present during his visit to the area two days earlier and that he probably would have noticed them if he had been looking for rutting. The portion of the highway containing the ruts was resurfaced within forty-eight hours of the Walker accident.

Trooper David Putnam of the State Highway Patrol investigated the Walker accident. He determined that up to one-half of an inch of water had accumulated in the ruts along southbound Highway 343. Trooper Putnam concluded that Walker's vehicle was traveling southbound on Highway 343 when it spun counterclockwise, left the roadway "at a sideways angle," and continued sliding sideways until it hit the bridge piling on the east side of the road approximately eighty-six feet south of where it left the roadway. Trooper Putnam entertained four possibilities as to how the accident had occurred. The first was that the Walker's vehicle hydroplaned off the road. The second was that Walker lost control of his vehicle, ran off the road to the right, overcorrected, and then came back across the road, and ran off the road to the left. The third was that Walker suddenly and forcefully applied brakes, and lost control of his vehicle on the wet road. The fourth possibility was that Walker suffered a medical emergency that caused him to lose control of his vehicle. In his final report, Trooper Putnam noted that Walker's vehicle had hydroplaned due to water standing in the roadway, and during his testimony, he admitted that there was no evidence of any of the other causes of the accident. Trooper Putnam also concluded that the tire tread depths of Walker's vehicle were within the statutory requirements.

There was evidence that DOT has an established procedure of having an area accident investigation engineer perform a formal investigation and make recommendations following a fatal accident. DOT Area Accident Investigation Engineer Haywood Daughtry testified that the investigation begins with the obtaining of an accident report from the State Highway Patrol. Such a report takes a few days to generate, and according to Daughtry, is normally received within one and a half to two weeks, after which the area accident investigation engineer has thirty days to conduct an investigation. Daughtry did not receive notification of the Denison-

Gundersen accident until September of 1997, after the road had been resurfaced and guardrails had been installed.

Following the Denison-Gundersen accident, DOT District Engineer Jennings did not take any steps to hasten an investigation by the Area Traffic Investigation Engineer. Likewise, he did not attempt to obtain a copy of the Highway Patrol wreck report and did not attempt to contact the investigating officers.

Plaintiff's expert, Ernest Mallard, testified as an expert witness in highway design, highway engineering, and accident reconstruction. Mallard testified that, in his opinion, the section of Highway 343 where the Denison-Gundersen and Walker accidents occurred was a defective and unreasonably dangerous section of highway in light of the following conditions: it contained ruts holding as much as one-half an inch of water, the posted speed limit was fifty-five miles an hour, and there were neither guardrails between the road and the nearby bridge pilings nor cautionary signs to warn of the danger. Mallard concluded that these defects were the proximate cause of Walker's death. Mallard further opined that DOT employees should have been looking for, and should have noticed, rutting during their visits to the scene after the Denison-Gundersen accident but prior to the Walker accident.

Plaintiff's expert, Harold Satterwhite, Jr., testified as an expert on DOT's policies and procedures with respect to maintenance of highways, accident scene investigations, and the standard of care, duties, and responsibilities of DOT district engineers and area traffic engineers. In his opinion, the section of Highway 343 in which the accidents occurred was an unreasonably dangerous road because of the posted speed limit, the extent of rutting and its potential to hold water, and the unprotected concrete bridge pilings. According to Satterwhite, Sergeant Gould's 15 August 1997 telephone call to DOT District Engineer Jennings created a duty for Jennings to

immediately conduct, or have conducted, a reasonable inspection of the accident scene to determine whether roadway defects were present, including drainage problems with the highway. Satterwhite indicated that the rutting of the type involved in the present case required the immediate posting of signs to warn the traveling public until such time as the highway could be resurfaced. In addition, Satterwhite stated that the rutting present at the Walker accident scene should have been "visible to the eye" of DOT personnel upon inspection of the highway. Satterwhite concluded that Jennings breached the applicable duty of care following the Denison-Gundersen accident.

Another expert, Michael Sutton, testified that hydroplaning can occur in water as shallow as one-tenth of an inch and at speeds as low as forty-five miles per hour. Sutton opined that, given the size of Walker's vehicle and the condition of its tires, it could have hydroplaned in standing water at a depth of two-tenths of an inch.

The Hearing Commissioner entered an opinion and award denying plaintiff's claim. With one Commissioner dissenting, the Full Commission (the Commission) reversed, and entered a new opinion and award, which granted compensation. Specifically, the Commission made the following findings of fact:

> 19. [DOT] contends that [Walker]'s actions, or inactions constituted contributory negligence in relation to the accident resulting in his death on 20 August 1997. There were no eyewitnesses to this accident, and no competent witness testimony regarding the speed of the [Walker] vehicle at the time it left the roadway was offered. Additionally, although [DOT] contends that [Walker] was operating his vehicle with unsafe tires, the evidence of record establishes that his vehicle's tire tread depths complied with statutory requirements.
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> 20. Based upon the totality of the credible evidence of record, the Full Commission finds that there were no actions or inactions on the part of [Walker] that constituted contributory

> negligence in relation to the incident resulting in his death on 20 August 1997.
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> 34. [DOT] had notice of . . . an existing defect or dangerous road condition prior to [Walker]'s accident on 20 August 1997. [DOT] did not timely repair the dangerous condition or provide signage to warn the travelling public about the dangerous condition.
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> 35. [DOT] has a duty to provide and maintain safe road conditions and to provide warnings for dangerous conditions. [DOT] breached this duty with regard to the existing road conditions present at the time and place of [Walker]'s accident on 20 August 1997.
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> 36. [DOT]'s breach of duty caused [Walker]'s accident of 20 August 1997 and his resultant death.

The Commission made the following conclusions of law:

> 1. On 20 August 1997, the negligence of [DOT]'s named employees was the proximate cause of [Walker]'s injuries and death. . . .
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> 2. There were no actions or inactions on the part of [Walker] that constituted contributory negligence in relation to the incident resulting in his death on 20 August 1997. . . .
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> 3. Because of the negligence of [DOT]'s named employees, the State is liable to the plaintiff in this case . . . .

From this opinion and award, DOT now appeals.

On appeal, DOT argues that (1) the Commission's findings of fact do not support its conclusions of law; (2) the public duty doctrine precluded a finding of liability; (3) public officer immunity precluded a finding of liability; and (4) the Commission erred by failing to find contributory negligence. These arguments either have been waived by DOT or are without merit.

Standard of Review

We begin our analysis with the standard of review. The North Carolina Tort Claims Act empowers the Industrial Commission to adjudicate tort claims "against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C. Gen. Stat. §143-291 (2003).

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid[.]

Id. Under the Act, a decision of a Hearing Commissioner may be appealed to the Full Commission, which "may issue its own findings of fact and conclusions of law." N.C. Gen. Stat. §143-292 (2003). A decision and order of the Full Commission may be appealed to this Court; "[s]uch appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. §143-293 (2003). Thus, the standard of review in this Court is: "(1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998).

I.

At the outset, we note that all of DOT's eleven assignments of error assert only that "no competent evidence was presented on which to base the [named finding or conclusion]." However, most of the arguments in DOT's brief cannot be fairly characterized as challenging the sufficiency of the evidence to support the Commission's findings and conclusions. As such, DOT has largely abandoned its contentions that the Commission's findings of fact are not supported by competent evidence of record. *See* N.C. R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Likewise, the arguments contained in DOT's brief which do not correspond to an appropriate assignment or error are not properly before this Court. *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (holding that, if the issues presented in an appellant's brief do not correspond to an assignment of error, the issues raised in the brief will not considered by this Court); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (holding that the North Carolina Rules of Appellate Procedure are mandatory).

For example, in its second and third arguments on appeal, DOT contends that the public duty doctrine and public officer immunity preclude a finding of liability in the instant case. Though we find the strength of these arguments to be dubious, we do not reach the merits of either argument because there are no corresponding assignments of error in the record on appeal. *See* N.C. R. App. P. 10(a) ("[T]he scope of review on appeal is confined to consideration of those assignments of error set out in the record on appeal[.]").

Furthermore, the record indicates that DOT failed to raise either the public duty doctrine or public official immunity in the proceedings before the Industrial Commission. Both doctrines are affirmative defenses that must be asserted before the trial tribunal. *See, e.g.*, *Moses v. Young*,

149 N.C. App. 613, 615, 561 S.E.2d 332, 333 ("The sole issue on appeal is whether defendants may assert the public duty doctrine as an affirmative defense . . . ."), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002); *Epps v. Duke University*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 852 (characterizing public official immunity as an affirmative defense), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Therefore, DOT has also waived appellate review of these issues by failing to present them to the Industrial Commission. *See* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial [tribunal] a timely request, objection or motion stating the specific grounds for the ruling the party desired the [tribunal] to make . . . .").

II.

In another argument on appeal, DOT argues that the Commission "erred [in that] its conclusions of law failed to be supported by findings of fact [because] the Commission's findings of fact state[] [that] DOT did not have notice of any hazardous road conditions prior to [Walker]'s fatal accident." There is no corresponding assignment of error in the record on appeal, and the assignments of error listed in DOT's brief all allege that the findings or conclusions are not supported by competent record evidence. As such, review of this argument has been waived. *See* N.C. R. App. P. 10(a); *Bustle*, 116 N.C. App. at 659, 449 S.E.2d at 11. However, assuming *arguendo* that DOT's argument on appeal is properly before this Court, it lacks merit.

DOT contends that the Commission's findings of fact do not support its conclusions of law for three reasons. First, DOT asserts that the Commission's findings are internally inconsistent because Finding of Fact No. 10 contradicts Finding of Fact No. 34. Those two findings are as follows:

> 10. On Monday, 18 August 1997, Mr. Jennings went to the scene of the Denison-Gundersen accident. On that day, the weather was sunny, and the road surface was dry. No definitive evidence has been produced to establish that Mr. Jennings had knowledge of the road conditions exi[s]ting when the Denison-Gundersen [accident] occurred on the date of his visit to the scene. Mr. Jennings testified that he did not go to the scene to perform a formal investigation, but had other tasks in that area, and went to the scene to determine if there were obvious road defects that could have contributed to the accident. Mr. Jennings did not look for rutting in the road surface, but did look for low shoulders and potholes. During his visit, Mr. Jennings observed tracks in the grass, and was able to determine the area of N.C. 343 where the vehicle had been prior to leaving the road. Although Mr. Jennings testified that an analysis for rutting would not have taken much time, the only measurement he made at the scene was the distance between the pavement and the concrete bridge pilings on the east side of the road. Prior to [Walker]'s accident, Mr. Jennings did not request any additional inspections by [DOT]'s personnel of the Denison-Gundersen accident scene. Neither prior to 18 August 1997, nor between that time and [Walker]'s accident, did Mr. Jennings gather further information about the Denison-Gundersen accident or obtain an accident report. During the hearing, Mr. Jennings testified that in his opinion, there was not an urgent need to conduct an immediate formal inspection of the Denison-Gundersen accident scene.
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> 34. [DOT] had notice of . . . an existing defect or dangerous road condition prior to [Walker]'s accident on 20 August 1997. [DOT] did not timely repair the dangerous condition or provide signage to warn the travelling public about the dangerous condition.

According to DOT, Finding No. 10 essentially states that Jennings had no notice of the road conditions existing at the time of the Denison-Gundersen accident, which conflicts with the statement in Finding No. 34 that DOT had notice. However, read closely and in the context of the whole opinion and award, these findings are not inconsistent. Though Finding No. 10 does state that "[n]o definitive evidence has been produced to establish that Mr. Jennings had knowledge of the road conditions exi[s]ting when the Denison-Gundersen [accident] occurred on

the date of his visit to the scene," the order is replete with allusions to the evidence tending to show that DOT did have notice. For example, Finding No. 7 indicates that Sergeant Gould of the State Highway Patrol called Jennings the day after the Denison-Gundersen accident and "believed he [had] mentioned standing water being present at the accident scene." Finding No. 8 states that Jennings telephoned his supervisor, Division Engineer Don Connor and "advised him of Sergeant Gould's report of the Denison-Gundersen accident." Finding No. 9 mentions several local front-page newspaper articles that were printed within three days of the Denison-Gundersen accident, all of which mentioned the wet road conditions, and Finding No. 11 indicates that at least one DOT employee learned of the accident from these articles. Finding of Fact No. 12 notes that DOT Camden County Transportation Supervisor Winslow visited the Denison-Gundersen accident scene after he "had learned of [it] through a conversation at work." In light of the evidence mentioned in these findings, the Commission was not precluded from determining in Finding of Fact No. 34 that DOT had notice of the defective and dangerous road condition that caused the Walker accident, even though the evidence may have also supported a contrary finding. *See McRae v. Toastmaster, Inc*., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) ("The Commission's findings of fact are conclusive on appeal when supported by . . . competent evidence, 'even though there [is] evidence that would support findings to the contrary.'") (citation omitted).

Second, DOT insists that Findings of Fact Nos. 29 and 30 are inconsistent with Findings of Fact Nos. 10 and 22. Finding No. 10 is set forth above and the remaining findings are as follows:

> 22. . . . When a fatal vehicle accident occurs, [DOT]'s established procedure is for the Area Traffic Investigation Engineer to perform a formal investigation, and make any necessary recommendations for road repairs. The Area Traffic

Investigation Engineer for the roads in question in 1997 was Mr. Haywood Daughtry. At the hearing, Mr. Daughtry testified that [DOT]'s formal investigation of fatal accidents begins with obtaining a copy of the State Highway Patrol Report to determine the road conditions at the time of the accident. Regarding such reports, Sergeant Gould testified that it normally takes several days after an accident for a Highway Patrol Report to be completed. Under normal circumstances Mr. Daughtry testified that his office receives information regarding vehicle accident fatalities through formal reports within 30 days of the accident. Mr. Daughtry further testified that if he receives a request to investigate a fatal accident site prior to completion of the official report, he would investigate that site as soon as possible, and that he would obtain a working copy of [the] official Highway Patrol Report . . . for use in that investigation. According to Mr. Daughtry, an Area Traffic Investigation Engineer's investigation involved visiting the scene and verifying all of the relevant distances. The investigator would also ride, and walk through the scene, looking for any possible roadway or signing deficiencies. The investigator would then review the accident history of the area of road in question to determine if there are any significant accident patterns. Mr. Daughtry received notification of the Denison-Gundersen accident in September 1997, so at the time he investigated the scene, the road had been resurfaced and guardrails had been installed.

. . . .

29. Mr. Harold Landis Satterwhite, Jr.[,] was accepted by the Deputy Commissioner as an expert in [DOT]'s policies and procedures concerning the maintenance of highways, and investigations of accident scenes. Mr. Satterwhite was also accepted as an expert regarding highway engineering, and the standard of care, duties and responsibilities of [DOT]'s District Engineers and Area Traffic Engineers. Mr. Satterwhite testified that in his opinion, the area of N.C. 343 at issue constituted an unreasonably dangerous road because of the posted speed limit, the extent of rutting and its potential to hold water, and the unprotected concrete bridge pilings. According to Mr. Satterwhite, the standard of care for a District Engineer requires that he or she maintain safe roadways within their district. Fulfilling that duty requires a District Engineer to properly supervise their subordinates who are to observe, inspect and maintain roads in the district on a regular basis. The District Engineer is also responsible for inspecting, or having his subordinates inspect, potential roadway defects reported to their office. Mr. Satterwhite further testified that defects of which the District Engineer's Office had knowledge . . . should be

> repaired immediately, although he admitted that the [DOT] did not have sufficient resources to repair all rutting or other defects. As for standing water, Mr. Satterwhite testified upon notification of roadway conditions giving rise to the possibility of water accumulations,[DOT]'s highway engineers have a duty to respond to that immediately by inspecting the roadway for defects, and then correcting found defects as quickly as possible. Until such time as a known defect can be repaired, Mr. Satterwhite testified that [DOT] has a duty to immediately warn the traveling public.
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> 30. According to Mr. Satterwhite, Sergeant Gould's telephone call to Mr. Jennings on 15 August 1997 created a duty for Mr. Jennings to immediately conduct, or have a subordinate immediately conduct a reasonable inspection of the accident scene to determine whether roadway defects were present. Mr. Satterwhite further opined that given the manner and timing of Mr. Jennings' visit to the accident scene on 18 August 1997, . . . Mr. Jennings breached his duty as a District Engineer to conduct, or to have subordinates, such as Mr. Skinner or Mr. Winslow, conduct a reasonable inspection. As a basis for this opinion, Mr. Satterwhite testified that upon visiting the scene, Mr. Jennings should have specifically looked for rutting, and that had he conducted a reasonable inspection, the rutting in the southbound lane of N.C. 343 would have been visible.

According to DOT, Finding No. 10 establishes that it did not have notice of the road conditions leading to the Denison-Gundersen accident, and Finding No. 22 states that DOT's "established procedure" is to perform a formal investigation following receipt of a formal report, which is usually received "within 30 days of the accident." As already indicated, Finding No. 10 does not contradict the Commission's other findings which indicate that DOT did have notice of the road conditions leading to the Denison-Gundersen accident. Moreover, we are unpersuaded that we should second-guess the Commission's finding that, given the circumstances of the Denison-Gundersen accident, DOT was required to act more quickly than in other situations.

Third, DOT argues that the Commission "failed to state in any finding of fact that any DOT employee had notice of the condition of the road at the time of the Denison[-Gundersen] wreck prior to the occurrence of [Walker]'s accident." However, as already indicated, the

Commission's opinion and award, read closely and in context, sufficiently addresses the issue of notice to DOT's named employees.

Therefore, the Commission's findings of fact support its conclusions of law that the negligence of DOT's named employees was the proximate cause of Walker's injuries and death. Thus, to the extent there are corresponding assignments of error, they are overruled.

III.

In its final argument on appeal, DOT contends that the Commission erred by failing to find that Walker was contributorily negligent such that recovery was barred. We do not agree.

The Commission found that there was no competent evidence to indicate that Walker was speeding at the time of his accident and that evidence of record established that the tire tread depths for Walker's vehicle complied with the statutory requirements. Accordingly, the Commission found that Walker had not been contributorily negligent. In its brief, DOT insists that there was evidence from which the Commission could have concluded that negligence on Walker's part contributed to his injuries and death.

"The Commission's findings of fact are conclusive on appeal when supported by . . . competent evidence, 'even though there [is] evidence that would support findings to the contrary.'" *McRae*, 358 N.C. at 496, 597 S.E.2d at 700 (citation omitted). Our review indicates that the Commission's findings with respect to the lack of contributory negligence are supported by competent record evidence. Therefore, these findings are binding upon this Court.

These assignments of error are overruled.

IV.

In conclusion, we hold that (1) DOT has waived review of its arguments concerning the public duty doctrine and public official immunity, (2) the Commission's findings of fact support

its conclusions of law, and (3) the Commission did not err by failing to find that Walker was contributorily negligent. Therefore, the Commission's opinion and award is

Affirmed.

Judges TIMMONS-GOODSON and STEELMAN concur.

Report per Rule 30(e).