

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-1154

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2012

GREGORY D. SMITH,
Employee,
Plaintiff,

v.

From the North Carolina
Industrial Commission
I.C. No. W60926

WAKE COUNTY GOVERNMENT,
Employer, Self-Insured (KEY
RISK MANAGEMENT, Third-Party
Administrator),
Defendant.

Appeal by Plaintiff from opinion and award entered 4 August 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2012.

Younce & Vtipil, P.A., by Robert C. Younce, Jr., for Plaintiff.

Office of the Wake County Attorney, by Jennifer M. Jones and Roger Askew, for Defendant.

STEPHENS, Judge.

Plaintiff-employee Gregory D. Smith ("Employee") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") denying his claim for workers' compensation benefits. The sole issue considered by the Commission was whether Employee sustained a compensable injury by accident arising out of and in the course of his employment with Defendant-employer Wake County. For the reasons discussed herein, we affirm.

In July 2009, Employee worked as a building inspector for Wake County. On 9 July 2009, Employee arrived to inspect a home under renovation in Zebulon and saw that the back door was cracked open. Employee entered the residence and discovered an intruder on the second floor. As the intruder attempted to escape past him, Employee grabbed the intruder's sweatshirt with his left hand. The intruder jerked repeatedly against Employee's grip, and, on the third try, pulled free and fled.

Employee called the Zebulon planning director and asked for police assistance. When the police arrived, Employee explained what had happened. Employee later testified that he felt "a little sore and jarred up[,] " but he did not mention any injury or pain to the planning director or police. Employee testified

that he experienced increasing pain in his left arm, left shoulder, and neck over the next few weeks.

On 10 August 2009, Employee visited his primary care doctor, complaining he had suffered severe left arm pain for one month. However, Employee did not mention the incident with the intruder. An MRI revealed a mild broad-based left paracentral posterior lateral disc extending into the central canal with resulting moderate left-sided central canal stenosis which caused a moderate degree of left-sided spinal cord compression. The primary care doctor referred Employee to Russell Margraf, M.D., a neurosurgeon. Margraf's notes indicate that Employee said his pain began in his right arm and later moved to his left arm, although Employee denied having made such a statement. Employee never mentioned the 9 July incident with the intruder to Margraf. Margraf later performed a two-level cervical decompression and fusion procedure on Employee. Following the surgery, Employee's arm pain improved, but he continued to have severe shoulder pain. Margraf was unable to testify that the medical conditions for which he treated Employee were more likely than not a result of the 9 July incident. Margraf referred Employee to Hardy Singh, M.D., an orthopaedic surgeon specializing in shoulder surgery.

Singh examined Employee on 4 November 2009 and diagnosed him as having a left rotator cuff tendon tear and joint arthritis. On 12 November 2009, Singh performed several outpatient diagnostic and surgical procedures on Employee, including an arthroscopic rotator cuff tendon repair. Employee never mentioned the 9 July incident to Singh until his first post-surgery visit on 22 November 2009. Employee testified that he had been under the misapprehension that he could only file a worker's compensation claim within 30 days after his initial injury, but had recently learned that he had two years in which to do so.

Singh opined that Employee's left rotator cuff tear was "[m]ore likely than not" consistent with Employee's struggle with the intruder on 9 July 2009, and that Employee's pre-existing bone spur was aggravated or made symptomatic by the same incident. However, Singh also noted that Employee's reported history was "inconsistent." In an opinion and award filed 4 August 2011, the Commission found that Employee's medical issues were not causally related to the events of 9 July 2009 and thus denied Employee's claim. Employee appeals.

Standard of Review

Under the Workers' Compensation Act, the Commission is the sole judge of the

credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

Richardson v. Maxim Healthcare/Allegis Group, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (brackets, quotation marks, and citations omitted), *rehearing denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 304, 663 S.E.2d 322, 325 (2008) (citation omitted).

Discussion

Employee argues that the Commission's findings of fact 31 and 33 are not supported by competent evidence. We disagree.

The challenged findings of fact are as follows:

31. Dr. Singh opined that [Employee]'s left rotator cuff tear was caused by his July 9, 2009 injury by accident. Dr. Singh further testified that the bone spurs more likely than not pre-existed the incident of July 9, 2009, but were made symptomatic by that incident. However, during cross-examination by defendant's counsel, Dr. Singh stated

that [Employee]'s history seems very inconsistent, and further testified that those inconsistencies would affect his opinion on causation.

. . .

33. Based upon credible medical evidence of record, the Full Commission finds that [Employee]'s left-sided rotator cuff tendon tear, acromioclavicular joint arthritis, labrum tear, and frozen arm/shoulder were not the direct and natural result of or causally related to his July 9, 2009 injury by accident.

Although Employee couches his argument in terms of a lack of competent evidence to support these findings, his actual contention is that competent evidence would have supported different findings had the Commission weighed the evidence in a different manner. For example, Employee concedes that Singh stated on cross-examination that Employee's "story seems very inconsistent" and that a patient's inconsistent history would affect his opinion about medical causation. Singh testified that Employee's rotator cuff tear was acute and approximately three to six weeks old at the time of the 12 November 2009 surgery. This testimony would place the date of injury in late September or early October, rather than in July. In addition, Singh noted that Employee had not mentioned the 9 July 2009 incident as the possible source of his injury to his primary

care doctor, neurosurgeon, or to Singh himself until after Singh had performed surgery on Employee. Singh also testified that the neurosurgeon's notes suggested that Employee's pain had begun in his right arm, which Singh stated would not be consistent with the 9 July incident having caused Employee's symptoms. Further, Singh's notes indicated that Employee had suggested his arm pain had begun following a "brawl" in which Employee took part in June 2009. This competent evidence fully supports findings of fact 31 and 33. Accordingly, the Commission's opinion and award is

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER, ROBERT C., concur.

Report per Rule 30(e).