NO. COA11-234
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

PAUL CLARK,
Employee, Plaintiff

v. North Carolina Industrial Commission I.C. File No. W08094

CARL CHAVIS d/b/a CJ CHAVIS TRUCKING,
Employer,

TRAVELERS INDEMNITY COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 28 October 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 August 2011.

George Ligon, Jr., for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Shelley W. Coleman and M. Duane Jones, for defendants-appellees.

MARTIN, Chief Judge.

In 2006, defendant-employer Carl Chavis owned and operated two businesses: a trucking business and a firewood splitting business. Plaintiff Paul Clark began working for Mr. Chavis in late September 2006, splitting wood at his home. Mr. Chavis did

not know at the beginning of each week whether he would need plaintiff to split wood the following Saturday; he would let plaintiff know each week whether he would need him to work. Plaintiff was paid in cash.

Mr. Chavis carried a workers' compensation policy with defendant Travelers Indemnity Company. However, that policy only covered employees of Mr. Chavis's trucking business, "CJ Chavis Trucking." His firewood splitting business was not listed on the policy. Plaintiff did no work for the trucking business.

The third consecutive Saturday that plaintiff split logs for Mr. Chavis was 14 October 2006. Plaintiff testified that he was splitting wood while Otis King, the only other person working for Mr. Chavis, was stacking split wood on the truck. Mr. King then returned to the wood splitter without plaintiff realizing he had returned. Mr. King pulled down the lever of the wood splitting machine unexpectedly, amputating plaintiff's ring finger and breaking his thumb.

Mr. Chavis took plaintiff to Urgent Care. Shortly thereafter, plaintiff underwent surgery to close his wounds, cover the exposed bone, and to try to make the hand as functional and cosmetically acceptable as possible. In May

2007, he was referred to Anesthesia Pain Group at Rex Hospital for pain management. He has had three surgeries to repair his hand. Plaintiff has not worked since the accident.

Plaintiff retained legal counsel a few days after the accident and, on 10 April 2008, filed a claim in Wake County Superior Court against both Mr. Chavis and Mr. King. Plaintiff claims that during the civil discovery process for that case, Mr. Chavis never disclosed that he carried any workers' compensation coverage.

On 5 March 2009, over two years after the accident, plaintiff filed a Form 18 Notice to Employer seeking workers' compensation benefits for the injury. On 3 April 2009, defendants filed a Form 61 denying plaintiff's claim, alleging that the two-year statute of limitations for filing claims had expired and that the workers' compensation policy did not cover the type of work performed by plaintiff. On 22 June 2009, defendants filed a motion to dismiss plaintiff's claim for lack of jurisdiction pursuant to N.C.G.S. § 97-24, which was later denied.

The action was subsequently heard by Deputy Commissioner Baddour on 8 September 2009. At the hearing, plaintiff testified with respect to the manner in which the accident

occurred, as well as the long-term effects that he still experiences because of the accident. When asked whether he had asked Mr. Chavis "if he had any insurance or any provisions or what he was going to do for [him,]" plaintiff testified that he thought that "we would have an agreement about working out some kind of way that, . . . he could help me out, which he told me that he didn't have no workman's' [sic] comp." On cross-examination, plaintiff testified that he never specifically asked Mr. Chavis if he should file a claim under workers' compensation. According to plaintiff, Mr. Chavis did not tell plaintiff to not file a workers' compensation claim, and did not tell him that the statute of limitations was two or three years, or anything else in regard to workers' compensation.

Mr. Chavis also testified at the hearing. He testified that there was "nothing mentioned about no workman's' [sic] comp or nothing" and that he had "told [plaintiff] that [he] didn't have no [sic] insurance that would cover him." Mr. Chavis testified that he did not "even really think about [his Traveler's workers' compensation policy] at the time, and that's why [he] didn't file [the claim] under workman's'[sic] comp."

On 9 April 2010, the Deputy Commissioner denied plaintiff's claim on the basis that plaintiff was not employed in the type

of work covered by Mr. Chavis' workers' compensation policy. Defendant appealed to the Full Commission. On 28 October 2010, the Full Commission agreed with the Deputy Commissioner's finding that Mr. Chavis' policy only covers employees of his trucking business and that plaintiff "did not perform any duties for the trucking business." The Commission additionally concluded that because the claim had not been filed within the applicable two-year time limit prescribed by N.C.G.S. § 97-24, the Commission lacked jurisdiction and subsequently dismissed the case. Plaintiff appeals.

Plaintiff argues that the facts of this case mandate that the doctrine of equitable estoppel be applied in order to override the two-year statute of limitations. The doctrine of equitable estoppel arises when a party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment. *Long v. Trantham*, 226 N.C. 510, 513, 39 S.E.2d 384, 387 (1946). The doctrine is used to stop a defendant from unjustly benefitting from his own

wrongful conduct. *Freidland v. Gales*, 131 N.C. App. 802, 806-07, 509 S.E.2d 793, 796 (1998).

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citing *Clark v. Wal-Mart*, 360 N.C. 41, 42-43, 619 S.E.2d 491, 492 (2005)). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, *even when there is evidence to support contrary findings*." *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999) (emphasis added) (citing *Lineback v. Wake Cty. Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997)). Also, the Commission "is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Id.* (internal quotation marks omitted).

Plaintiff challenges "[p]ortions of the Industrial Commission's findings of facts Nos. 8 and 9" as not being

supported by competent evidence in the record. The challenged findings state:

> 8. Although plaintiff does not dispute that his claim was not filed with the Commission within two years of the accident, he alleges that defendants are estopped from pleading the two-year limitation as a defense. Plaintiff admitted at the Deputy Commissioner's hearing that he did not ask Mr. Chavis whether Mr. Chavis had workers' compensation coverage or whether plaintiff should file a workers' compensation claim. Further, plaintiff admitted that Mr. Chavis never gave him advice concerning how long plaintiff had to file a claim and that Mr. Chavis did not discourage him from filing a workers' compensation claim.
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> 9. Plaintiff's uncle suggested that plaintiff file a claim for his injury against Mr. Chavis' homeowners' insurance carrier, which was Nationwide Insurance. After plaintiff made this suggestion to Mr. Chavis, Mr. Chavis believed his homeowners' insurance might cover plaintiff's injury. Mr. Chavis testified that he did not believe his workers' compensation coverage would apply to plaintiff's injury and that he did not even think about the coverage.

In challenging these findings, plaintiff argues the Commission erred because Mr. Chavis "admittedly did not tell plaintiff about his workers compensation policy and, because he claimed that he forgot that he had a policy," he told plaintiff that "he did not have any insurance that would cover him."

Here, there was competent evidence presented to support the Commission's finding of fact number eight that Mr. Chavis did nothing to induce plaintiff to believe anything about the availability of workers' compensation coverage. As noted above, plaintiff admitted that he never asked Mr. Chavis whether he should file a workers' compensation claim, that Mr. Chavis never provided any advice to him as to how long he had to file a workers' compensation claim, and that Mr. Chavis did not discourage him from filing a workers' compensation claim. Also, plaintiff testified that he had been continuously represented by counsel since shortly after the accident.

Challenged finding of fact number nine is also supported by the evidence. At trial, Mr. Chavis testified that he had taken insurance out for his trucking and hauling business and had not requested insurance coverage for any other part of his income. He also explained that he had attempted to file a claim under his homeowner's insurance because plaintiff had told him that he had been advised by his uncle that this might be a possibility. We will not, therefore, as plaintiff appears to request, reweigh the evidence and determine the credibility of the witnesses. Both of the challenged findings of fact are supported by

competent evidence and therefore plaintiff's contentions have no merit.

Even had there been no evidence to support the two properly challenged findings of fact, the denial of plaintiff's claim would be affirmed because other unchallenged findings of fact support the Commission's conclusion that estoppel was not appropriate in this case.

In his initial brief, plaintiff does not challenge the Commission's findings of fact that Mr. Chavis' workers' compensation policy only covers employees of his trucking business and that plaintiff did not perform any duties for Mr. Chavis' trucking business. Additionally, plaintiff did not challenge the Commission's finding that he retained an attorney days after the accident and "despite any knowledge of the existence of any workers' compensation insurance coverage, [he] should have preserved his workers' compensation claim by filing a claim with the Industrial Commission." *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (noting that unchallenged findings of fact are binding on appeal).

Plaintiff argues for the first time in his reply brief that the Commission erred by finding that he was not a covered employee. However, as this argument was not among those issues

argued in plaintiff's initial brief, we will not consider it now. *See Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 707-08, 682 S.E.2d 726, 740 (2009) (citing *Oates v. N.C. Dep't of Corr.*, 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994) (holding that this Court "will not entertain what amounts to a new argument presented in th[e] reply brief"); *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 199, 439 S.E.2d 599, 606 (concluding appellant's reply brief could not "resurrect" an abandoned claim where appellant had not raised the issue in the initial brief), *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993); *Animal Prot. Soc'y of Durham, Inc. v. State*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) (declining to address a constitutional argument first raised in a reply brief because "[t]he reply brief [is] intended to be a vehicle for responding to matters raised in the appellees' brief; it was not intended to be—and may not serve as—a means for raising entirely new matters")).

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).