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NO. COA03-1568

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

JAMES MACFARLAND,
Employee,
Plaintiff,

v.

North Carolina Industrial
Commission
I.C. No. 820742

AMERICAN NATIONAL CAN,
Employer,

and

GALLAGHER BASSETT SERVICES,
Servicing Agent,
Defendants.

Appeal by defendants from opinion and award filed 13 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 September 2004.

Elliot Pishko Morgan, P.A., by J. Griffin Morgan, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender, for defendant-appellants.

THORNBURG, Judge.

American National Can and Gallagher Bassett Services ("defendants") appeal from an opinion and award filed 13 June 2003 in favor of James MacFarland ("plaintiff"). We affirm.

Plaintiff suffered a compensable injury on or about 22 May 1997. Plaintiff and defendants entered into a Form 21 Agreement,

which the North Carolina Industrial Commission (the "Commission") approved on or about 5 October 1998. Plaintiff did not comply with vocational rehabilitation services provided by defendants. Accordingly, Special Deputy Commissioner Gina Cammarano entered an administrative order dated 26 April 2001 approving defendants' motion to suspend payment of compensation until plaintiff fully complied with the vocational rehabilitation services. Several months later, plaintiff moved to reinstate benefits on the ground that he was complying with the vocational rehabilitation. On 21 September 2001, an order was entered by the Executive Secretary reinstating plaintiff's temporary total disability benefits. Defendants appealed this order, and a hearing was held to review this issue. On 29 April 2002, a deputy commissioner entered an order concluding that plaintiff was not fully cooperating with the vocational services provided by defendants, and thus, was not entitled to reinstatement of his disability benefits. Plaintiff appealed this order to the full Commission. The full Commission reversed the order of the deputy commissioner and ordered defendants to resume payments to plaintiff. The full Commission also concluded that defendants were not subject to a 10% penalty or sanctions.

Defendants appeal the opinion and award of the full Commission and plaintiff cross-assigns as error the full Commission's failure to impose a 10% penalty on defendants.

Defendants bring forth three assignments of error for our review. Defendants first argue that the full Commission's

conclusion of law that plaintiff is fully cooperating with vocational rehabilitation efforts is not supported by the findings of fact. Specifically, defendants argue that the findings of fact made by the deputy commissioner do not support the full Commission's conclusion. This argument is without merit.

On appeal of an award of the full 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 duty of an appellate court "goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). The 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. Furthermore, there is no requirement that the full Commission "explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Id.* at 116-17, 530 S.E.2d at 553.

In the instant case, defendants concede in their appellate brief that the findings of the full Commission support the conclusion of law at issue. Moreover, defendants do not argue that these findings are not supported by competent evidence. Essentially, defendants do not bring forth any argument other than that the full Commission should have found the same facts and thus, the same conclusion, as the deputy commissioner. Because the full

Commission is not bound by the findings of the deputy commissioner and may make its own determinations as to the weight and credibility of the evidence, defendants' argument must fail. *Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 427, 557 S.E.2d 104, 109 (2001). This assignment of error is overruled.

Defendants next assert that as a matter of law, a plaintiff cannot fully and completely cooperate with vocational efforts while sleeping until 1:00 p.m. to 2:00 p.m. and consuming up to four beers per day. Again, defendants are asserting that the full Commission improperly ignored facts found by the deputy commissioner. For the reasons discussed above, this argument must also fail.

Defendants' final argument is that the Industrial Commission ignored substantial and significant evidence when it made its findings of fact, which are thus not supported by competent evidence. Defendants purport to encompass twenty assignments of error under this argument. However, a review of this portion of defendants' appellate brief indicates that defendants are once again arguing that the full Commission erred by not making the same findings of fact and conclusions of law made by the deputy commissioner. This argument fails for the reasons above stated.

By a purported cross-assignment of error, plaintiff attempts to argue that the full Commission erred in failing to assess a 10% late payment penalty against defendants pursuant to N.C. Gen. Stat. § 97-18(g) (2003). North Carolina Rule of Appellate Procedure 10(d) provides that "an appellee may cross-assign as error any action or

omission of the trial court . . . which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C. R. App. P. 10(d) (2003). Plaintiff's cross-assignments of error, if sustained, would not provide an alternative basis for upholding the order and award of the full Commission. In order to have presented the alleged error for this Court's review, plaintiff should have filed a cross-appeal. Because plaintiff has failed to do so, we do not consider this argument. See *Harrison v. Tobacco Transp., Inc.*, 139 N.C. App. 561, 571, 533 S.E.2d 871, 877 (2000) (dismissing the plaintiff's purported cross-assignment of error on the same issue), *disc. review denied*, 353 N.C. 263, 546 S.E.2d 96, 97 (2000). This alleged cross-assignment of error is dismissed.

For the reasons set forth above, we affirm the decision of the full Commission.

Affirmed.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).