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NO. COA10-443

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

WANDA SMITH, WIDOW, AND JEFOREST
MATTHEW NEWSOME, AND RAYLGIN
CLEVEZ NEWSOME, by their Guardian
Ad Litem DOROTHY NEWSOME, ALLEGED
MINOR DEPENDANTS OF JESSE RAY SMITH,
DECEASED ,

Employee,
Plaintiff-Appellee,

v.

N.C. Industrial Commission
I.C. No. 547707

FLATFOOT CONCRETE CONSTRUCTION,

Employer,

and

OHIO CASUALTY GROUP,

Carrier,
Defendants-Appellants,

Appeal by plaintiff Dorothy Newsome from opinion and award of the Full Commission of the North Carolina Industrial Commission entered 11 December 2009 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 14 October 2010.

Brumbaugh, Mu & King, P.A., by Nicole D. Hart, for Dorothy Newsome, plaintiff-appellant.

Sutton Law Offices, P.A., by David C. Sutton, for Wanda Smith, Plaintiff-appellee.

JACKSON, Judge.

Dorothy Newsome ("Dorothy"), as guardian *ad litem* for the minor children J.M.N. and R.C.N. ("the children"), appeals the 11 December 2009 opinion and award from the Full Commission of the North Carolina Industrial Commission ("Full Commission") that denied survivor benefits to the children following the death of Jesse Ray Smith ("Smith"). For the reasons stated herein, we affirm.

On 14 June 2005, Smith died as a result of a compensable work-related accident. At the time of his death, Smith and his wife Wanda ("wife") had been estranged for approximately ten years, but they had not divorced. Smith's wife had left him because he was abusive, but according to her testimony, they had had sexual relations and were discussing reconciliation prior to his death. Smith also provided weekly support to his wife.

Smith had been in a relationship with Deborah Newsome ("Deborah") since approximately 1995. Deborah gave birth to two sons during that time: J.M.N., born in 1999, and R.C.N., born in 2000. According to Dorothy, Deborah's mother, Smith was at the hospital for the births of the children, but he refused to sign the birth certificates because "he said last time he signed a birth certificate, [] the woman jumped up and went and took child support out on him[.]"

Smith's wife testified that Smith had told her that the children "were trailer park children[,] meaning that "he didn't know who[se] they [were]."

Mattie Smith Peyton, Smith's mother, testified that Smith had told her that J.M.N.

"definitely . . . wasn't his child" but had not made any assertions as to R.C.N. Nonetheless, Smith's mother treated the children as her grandchildren.

During their relationship, Smith lived with Deborah and the children "[o]ccasionally off and on" or "[a]t times." According to Deborah, she and Smith "stayed together [the] majority of the time" except "when he start[ed] getting out of hand[.]" However, according to forms filed with the Department of Social Services ("DSS"), Smith maintained a separate residence, was unrelated to any member of Deborah's household, and was "a friend or neighbor[.]" Deborah testified that he did not identify himself as the children's father on the forms, because "why would he write that down and . . . incriminate himself?"

The children received Medicaid and food stamps, and Smith never was identified on any of those applications as the children's father, as living with Deborah and the children, or as contributing to the income of the family. In fact, Deborah had identified Rayshawn Green – "which was a lie and a name [she] made up" – as the children's father. She sometimes reported "unknown" as the children's father. Deborah testified that she "didn't have to" give Smith's name to any government agency because "he took care of us. The only time you turn in [their] names is when they don't [take] care of their children. He took care of his and me too." When asked about the amount of support Smith provided, Deborah simply stated that he gave her "at different times, different amount[s]" and that she "did not write it down." According to

Dorothy, Smith never provided financial support to the children but bought them clothes sometimes.

Dorothy also received welfare benefits for the children based upon documentation she signed in which she asserted that the children lived with her, that she had to buy them food and clothes, and that they were dependent upon her for support. She has had to repay those benefits, because she had failed to disclose to DSS that she worked a full-time job during the periods she received benefits.

Smith was listed as J.M.N.'s father on J.M.N.'s school forms. Smith claimed J.M.N. as a dependent on his 1999 tax return, and he claimed R.C.N. — but not J.M.N. — as a dependent on his 2003 tax return. However, on both of those tax returns, Smith also claimed his brother Perry as a dependent and identified Perry as his son. Following Smith's death, the children began to receive Social Security benefits as Smith's survivors.

Smith had worked during his relationship with Deborah. The parties stipulated that Smith's average weekly income resulted in a compensation rate of \$295.52 per week.

On 14 September 2006, a hearing as to this matter was held before a deputy commissioner of the North Carolina Industrial Commission. In an opinion and award filed 13 December 2006, only Smith's wife received benefits; it was found that Smith had not acknowledged the children as his during his lifetime. On appeal to the Full Commission, the case was remanded — based upon the

children's lack of representation at the first hearing – for a *de novo* hearing.

The *de novo* hearing took place on 6 October 2008, and on 8 May 2009, the deputy commissioner issued an opinion and award, which concluded that, other than Smith's wife, "[n]o other persons were wholly or partially dependent on [Smith] at the time of his death, and therefore, [Smith's wife] is determined to be the sole beneficiary of [Smith]." On appeal, the Full Commission concluded that "there is insufficient evidence that [Smith] either acknowledged, directly or indirectly, that the minor children [J.M.N.] and [R.C.N.] were his children, or that he actually provided financial support to them." The Full Commission determined that Smith's wife was the sole beneficiary. The children appeal.

Pursuant to our Workers' Compensation Act, "[t]he term 'child' shall include a[n] . . . *acknowledged* illegitimate child *dependent* upon the deceased[.]" N.C. Gen. Stat. § 97-2(12) (2005) (emphasis added). In the instant case, the Full Commission found that the children were neither acknowledged by nor dependent upon Smith. The children challenge both of these findings.

The children first argue that the Full Commission erred in finding that Smith never acknowledged them as his children. We disagree.

Our review of opinions and awards from the Full Commission "is strictly limited to the two-fold inquiry of (1) whether there is competent evidence to support the Commission's findings of fact;

and (2) whether these findings of fact justify the Commission's conclusions of law." *Foster v. Carolina Marble & Tile Co.*, 132 N.C. App. 505, 507, 513 S.E.2d 75, 77 (1999) (citing *Beaver v. City of Salisbury*, 130 N.C. App. 417, 502 S.E.2d 885, 887 (1998)). "This standard of review does not afford this Court the ability to judge the weight that the Commission has chosen to assign certain evidence; the Commission 'is the sole judge of the weight and credibility of testimony" *Id.* (quoting *Thompson v. Tyson Foods, Inc.*, 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995)). The findings of the Full Commission "may be set aside on appeal only if there is a complete lack of evidence to support them." *Thompson v. Tyson Foods, Inc.*, 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995) (citing *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981)).

Here, the Full Commission found as fact that, *inter alia*,

6. The record contains hundreds of pages of documents from the Pitt County Department of Social Services wherein [Deborah] indicates that a different man by the name of Mr. Rayshawn Green fathered the minor children [J.M.N.] and [R.C.N.], and claims that [Smith] was an "unrelated" acquaintance who always resided in a different household. The Pitt County Department of Social Services documents also indicate that [Deborah] received no support of any kind from the father of the minor children [J.M.N.] and [R.C.N.]. In fact, the Pitt County Department of Social Services documents indicate that the minor children [J.M.N.] and [R.C.N.] have been receiving welfare benefits since their birth through both [Dorothy] and [Deborah] in order to provide for their subsistence. The Full Commission gives great weight to the information contained within the Pitt County Department of Social Services documents in

determining whether [Smith] is the father of the minor children [J.M.N.] and [R.C.N.].

7. [Dorothy] made statements inconsistent with the Pitt County Department of Social Services documents. [Dorothy] signed her name on documentation contained in the Pitt County Department of Social Services documents stating that she had to buy clothes and other items for the minor children [J.M.N.] and [R.C.N.] because they received no support from their father. However, [Dorothy] testified that [Smith] sometimes bought clothes and food for the minor children [J.M.N.] and [R.C.N.]. In addition, [Dorothy] had to repay welfare benefits she received on behalf of the minor children [J.M.N.] and [R.C.N.] because she did not disclose that she had a full-time job while receiving the benefits. Further affecting the credibility of [Dorothy] is her testimony that she heard [Smith] speak to her regarding "his children," referring to the minor children [J.M.N.] and [R.C.N.], *after* his death.

. . . .

9. The Full Commission finds that the testimony of [Dorothy] regarding the paternity of the minor children [J.M.N.] and [R.C.N.] should be given little weight. The Full Commission further finds that the testimony of [Deborah] should be given little weight with respect to the paternity of the minor children [J.M.N.] and [R.C.N.].

10. The Full Commission finds, based upon the greater weight of the evidence, that [Smith] never legally or formally acknowledged the minor children [J.M.N.] and [R.C.N.] as his children. In fact, the testimony at the hearings . . . , as well as the documentary evidence, including the Pitt County Department of Social Services documents, establishes by the greater weight that [Smith] did not acknowledge the minor children [J.M.N.] and [R.C.N.] as his children. There are no checks, receipts, or any other written documentation either authored by or attributed to [Smith] which indicate[s] that he ever claimed to be the father of the minor children [J.M.N.] and [R.C.N.], nor is there any

credible evidence that [Smith] provided any substantial financial support for these children.

11. The record does contain an unsigned 1999 federal income tax return for [Smith] wherein he lists the minor child [J.M.N.] as a dependent, and an unsigned 2003 federal income tax return for [Smith] wherein he lists the minor child [R.C.N.] as a dependent. However, on both of these federal income tax returns [Smith]'s adult brother, who did not live with him, is also listed as a dependent. The Full Commission gives little weight to either the unsigned 1999 federal income tax return or the unsigned 2003 federal income tax return for [Smith] as evidence that he fathered the minor children [J.M.N.] and [R.C.N.].

. . . .

13. The Full Commission finds, based upon the greater weight of the evidence, that [Smith] was not the father of the minor children [J.M.N.] and [R.C.N.]. The Full Commission further finds that the minor children [J.M.N.] and [R.C.N.] were not dependent upon [Smith] for financial support. In the absence of any scientific evidence establishing that [Smith] fathered the minor children [J.M.N.] and [R.C.N.], credible documentary evidence of acknowledgment of paternity during [Smith]'s lifetime, and/or documentation of [Smith]'s financial support of these children, they are not entitled to receive [Smith]'s workers' compensation death benefits under § 97-38 of the North Carolina General Statutes. No weight is given to [Deborah]'s claim after the death of [Smith] that he is the father of the minor children [J.M.N.] and [R.C.N.] in order to receive workers' compensation death benefits when all during his lifetime she declared that he was not the father of these children in order to receive welfare benefits for their subsistence.

. . . .

16. The Full Commission finds, based upon the greater weight of the evidence, that since [Smith] had no other lawful dependents at the time of the June 14, 2005 work accident

resulting in his death other than [his wife], that [Smith's wife] is the sole beneficiary of [Smith]'s workers' compensation death benefits.

The children's main contention is that, "[l]ooking at the totality of the evidence (both documentary and testimonial), the life, acts and conduct of all parties to this claim prove that [Smith] was the father of [J.M.N.] and [R.C.N.], and that he acknowledged them as his children by his verbal declarations, acts and conduct." However, notwithstanding what other evidence existed, the documentation from DSS and the testimony of both Deborah and Dorothy supported the Full Commission's findings that Smith refused to acknowledge the children. Documentation from DSS shows that Smith averred that he was unrelated to any member of Deborah's household and was merely "a friend or neighbor[.]" Also, Deborah had attested to DSS that the children's father was someone named Rayshawn Green. Dorothy's testimony included the fact that Smith had refused to sign either child's birth certificate because "he said last time he signed a birth certificate, [] the woman jumped up and went and took child support out on him[.]"

The only pieces of evidence that would tend to support Smith's acknowledgment of the children are the two unsigned tax returns, which also include a clear misrepresentation that Smith's adult brother was his son and a dependent. In addition, although both Dorothy and Deborah testified to Smith's acknowledgment of the children in informal ways, the Full Commission specifically found that they both were unreliable witnesses. It was within the Full Commission's province to determine the credibility of the witnesses

and the weight to be given to each piece of evidence. *Foster*, 132 N.C. App. at 507, 513 S.E.2d at 77 (citing *Thompson v. Tyson Foods, Inc.*, 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995)). Accordingly, because competent evidence supports its findings that Smith did not acknowledge the children, we hold that the Full Commission did not err.

The children's second argument is that the Full Commission erred in finding that they were not dependent upon Smith for their support. We disagree.

With respect to this contention, the children challenge findings 13 and 16, as listed *supra*. However, competent evidence supports these findings. According to documents filed with DSS, Deborah attested that she did not receive financial support from anyone with respect to the children. Similarly, Dorothy claimed in DSS documents that she was responsible for buying clothes for the children and for providing food for them. From their births, the children have received food stamps based upon this lack of support from other sources. Although Dorothy and Deborah both testified that Smith provided financial support for the children, they were not able to estimate specific amounts of support, and they provided no documentary evidence, such as checks or receipts, to corroborate their testimony. Accordingly, the Full Commission had competent evidence before it upon which to base its findings that the children were not dependent upon Smith. Because the evidence supports the findings that the children were neither acknowledged by nor dependent upon Smith, the Full Commission did not err in

concluding that the children did not qualify for workers' compensation benefits based upon Smith's death.¹

Finally, Smith's wife requested that costs of the appeal be assessed against the children "as the same issue has been raised five times now without any tangible evidence to support [their] contention." Pursuant to Rule 34 of our Rules of Appellate Procedure, this Court may "impose a sanction against a party or attorney or both" if we determine that

an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

N.C.R. App. P. 34(a) (2009). If we decide to sanction a party, one appropriate sanction is "monetary damages including, but not limited to, . . . single or double costs[.]" N.C.R. App. P. 34(b)(2) (2009). Here, we hold that, although the evidence

¹ We note that either finding – that Smith did not acknowledge the children or that the children were not dependent upon Smith – alone would be sufficient to preclude the children's receiving any workers' compensation benefits due to Smith's death, because the Workers' Compensation Act requires both acknowledgment and dependency in order for illegitimate children to qualify. See N.C. Gen. Stat. § 97-2(12).

presented clearly supported the conclusion that the children were neither acknowledged by nor dependent upon Smith, the evidence was not so wholly one-sided as to make the current appeal frivolous, thereby warranting sanctions.

In addition to a request for costs, counsel for Smith's wife also requested an award of a contingency fee. The request, in its entirety, reads:

Also, the attorney for the appellee has represented her since 2005 without compensation through two full hearings on the merits, two appeals before the Full Commission and now this appeal. Respectfully, the undersigned requests that a contingency fee in the amount of 40% of benefits be approved as an attorney fee in this case due to the extraordinary amount of time and effort that has been expended in this matter.

North Carolina General Statutes, section 97-90(c) authorizes the Full Commission to approve a fee agreement between an attorney and his client. N.C. Gen. Stat. § 97-90(c) (2007). Whether or not an agreement exists, the Full Commission's award of attorneys' fees is appealable to superior court. *Id.*

In the case *sub judice*, the Full Commission awarded counsel the following fee: "An attorney's fee in the amount of 25 percent of the compensation awarded . . . is hereby approved for [Smith's wife]'s counsel." That award was neither listed as an issue presented nor argued within the brief. Accordingly, this issue is not properly before us for review.

For the reasons stated above, we hold that competent evidence supports the Full Commission's findings that Smith did not acknowledge the children as his children and that the children were

not dependent upon Smith. Accordingly, we affirm the Full Commission's opinion and award.

Affirmed.

Judges ELMORE and THIGPEN concur.

Report per 30(e).