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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-424

Filed: 17 October 2017

N.C. Industrial Commission, I.C. No. 14-779562

JAMES E. BREWER, Employee, Plaintiff,

v.

FIRST STOP CORE & BATTERY, LLC, Employer, RIVERPORT INSURANCE COMPANY, Carrier (BERKLEY ASSIGNED RISK SERVICES, Administrator), Defendants.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 6 January 2017. Heard in the Court of Appeals 21 September 2017.

*Musselwhite, Musselwhite, Branch and Grantham, by Stephen C. McIntyre, for plaintiff-appellant.*

*Brewer Defense Group, by Joy H. Brewer and Kenneth E. Menzel, for defendant-appellees.*

ARROWOOD, Judge.

James E. Brewer (“plaintiff) appeals from the Opinion and Award of the Full Commission of the North Carolina Industrial Commission (“Commission”) denying his workers’ compensation claim. For the reasons stated herein, we affirm.

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I. Background

Plaintiff began working for First Stop Core & Battery, LLC, a scrap metal business, (“defendant-employer”; with Riverport Insurance Company (Berkley Assigned Risk Services), collectively “defendants”) the last week of November 2014. Plaintiff’s employment with defendant-employer consisted of unloading trucks, separating various grades of metals into different piles, and weighing the metal.

On 10 December 2014, plaintiff filed an Industrial Commission Form 18 “Notice of Accident to Employer and Claim of Employee, Representative, or Dependent (G.S. §§ 97-22 Through 24)[.]” Plaintiff alleged that on 3 December 2014, he sustained a work injury to his back when he fell into a pit. On 23 December 2014, defendants filed a Form 61 “Denial of Workers’ Compensation Claim (G.S. 97-18(c) and G.S. 97-18(d))[.]” denying plaintiff’s claim.

The case was heard before Deputy Commissioner Lori A. Gaines on 4 November 2015. In an opinion and award filed 21 March 2016, the deputy commissioner denied plaintiff’s claim for workers’ compensation benefits. Plaintiff appealed to the Full Commission.

The case was heard by the Full Commission on 9 August 2016. In an opinion and award filed on 6 January 2017, the Full Commission denied plaintiff’s claim. The Commission made the following pertinent findings of fact:

3. Plaintiff testified that on December 3, 2014, he was unloading metal from a customer’s truck and as he

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was maneuvering a long piece of steel his foot slipped causing him to fall and flip backwards into a pit. Plaintiff described the pit as “three stories high.”

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9. Marshall McClenny . . . works for Defendant-Employer. . . Mr. McClenny testified that he was present at the scrap yard on December 3, 2014 and he did not witness any injury or accident involving Plaintiff and Plaintiff did not report any injury or accident on that date. Mr. McClenny testified that Plaintiff performed his usual job duties on December 3, 2014 and he did not exhibit any functional limitations or show any signs of having sustained a recent injury.
10. Denise Hunt works for Defendant-Employer as a manager. . . Ms. Hunt testified that she was working in close proximity to Plaintiff on December 3, 2014 and she did not witness any injury or accident involving Plaintiff on that date. . . Ms. Hunt drove Plaintiff home from work on December 3, 2014 and he did not report any injury or accident to her during their ride home. . . .
11. Christopher McClenny . . . testified that he is not an employee of Defendant-Employer, but he helps out Defendant-Employer as needed. Mr. Christopher McClenny was present at the scrap yard on December 3, 2014 and he did not witness any injury or accident involving Plaintiff.
12. Defendant-Employer submitted four photographs of the scrap yard, including the scale area, into evidence. The photographs show the scale area surrounded by two concrete walls on each side and one concrete wall in the back and railings alongside the scale. There does appear to be a “pit” containing scrap metal a couple of feet away from the scale area, but the “pit”

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is separated from the scale area by a wall and concrete flat surface. . . .

13. The Full Commission finds that the testimony of Marshall McClenny, Denise Hunt and Christopher McClenny that they did not witness any injury or accident involving Plaintiff on December 3, 2014 is credible.

. . . .

23. . . . Dr. Allen testified that he based his opinion upon the history that he obtained from Plaintiff that he fell onto some metal on December 3, 2014. Dr. Allen testified that it was his belief that Plaintiff tripped and fell onto some metal at work. He was unaware that Plaintiff is alleging he fell fifteen to twenty feet into a pit. Dr. Allen testified that if Plaintiff had fallen fifteen to twenty feet as alleged, he would likely have a much more serious injury to his back.
24. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's testimony regarding his alleged fall on December 3, 2014 is conflicting and inconsistent and is not supported by the competent evidence of record. During his January 12, 2015 recorded statement, Plaintiff stated that on December 3, 2014 he was on the right side of the scale and Justin was on the left side of the scale and as he was pulling a piece of metal, he tried to avoid hitting Justin when his foot slipped on some oil that was on the scale and he fell backwards down into the pit and landed on a hot water heater injuring his back. However, the testimony of Ms. Denise Hunt, which the Full Commission has found to be credible, and the other competent evidence of record supports a finding that at the time Plaintiff alleged he fell into the pit, he was observed leaning up against a refrigerator that was located in the scale area while Ms. Hunt and Justin

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were talking to a customer. Plaintiff's testimony that he reported his injury to Mr. Marshall McClenny on December 3, 2014 is contradicted by the credible testimony of Mr. Marshall McClenny that he observed Plaintiff working on December 3, 2014 and at no time did Plaintiff report any injury or accident on that date. Furthermore, Mr. Marshall McClenny, Ms. Denise Hunt and Mr. Christopher McClenny all provided testimony, which the Full Commission has found credible, that they individually throughout the day observed Plaintiff working at the scrap yard on December 3, 2014 and at no time did they observe any injury or accident involving Plaintiff. Also, there is no "15-20" foot pit as described by Plaintiff in the photographs of Defendant-Employer's scrap yard and the photographs show that the scale area was surrounded and separated from the pit by concrete walls and railings. The video surveillance of Defendant-Employer's scrap yard on December 3, 2014 did not show any fall or injury to Plaintiff.

25. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's testimony regarding the alleged work injury is not credible.
26. The Full Commission assigns greater weight to the testimony of Marshall McClenny, Denise Hunt and Christopher McClenny over Plaintiff's testimony regarding the alleged fall on December 3, 2014.

Based upon the foregoing findings of fact, the Commission made the following conclusions of law:

3. In this case, Plaintiff has failed to meet his burden of proving by a preponderance of the evidence in view of the entire record that he sustained a compensable injury by accident or specific traumatic incident as a

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result of the work assigned, arising out of and in the course of his employment with Defendant-Employer on or about December 3, 2014. . . .

4. . . . After weighing the conflicting and inconsistent factual evidence in this case which does not support Plaintiff's testimony on how his injury occurred and the expert medical testimony of Dr. Allen which is colored by Plaintiff's report of an alleged fall on December 3, 2014 which is not credible, the Full Commission concludes that Plaintiff has failed to prove that his back condition is causally related to, or is a direct and natural result of any incident that may have taken place on or about December 3, 2014, or that any incident that may have taken place on or about December 3, 2014 materially exacerbated or aggravated a preexisting condition. . . .
5. Plaintiff also has the burden of proving disability, and Plaintiff must prove both the existence and the extent of disability. . . . In this case, Plaintiff failed to meet his burden of proving that his disability resulted from a work-related incident. . . .

. . . .

7. Given the foregoing, Plaintiff's claim is not compensable under the provisions of the North Carolina Workers' Compensation Act. N.C. Gen. Stat. §§ 97-1, *et. seq.*

Plaintiff timely appealed to this Court on 27 January 2017.

II. Discussion

The sole issue on appeal is whether the Commission erred by denying plaintiff's claim for workers' compensation benefits. At base, plaintiff's contention on

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appeal seeks to have this Court overturn the Commission's determination with respect to the credibility of a witness and to reweigh the evidence in his favor.

Review of an opinion and award of the Commission "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) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "Findings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957). "[W]here findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal." *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014). Moreover, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. "[T]his Court is not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached." *Roberts v. Century Contractors, Inc.*, 162 N.C. App. 688, 691, 592 S.E.2d 215, 218 (2004) (citation omitted).

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First, plaintiff contends that the Full Commission disregarded evidence from Hunt where she “admitted that she sent Plaintiff a text message confirming she saw him fall at work and injured his back – an admission that Denise Hunt stated she confirmed in writing with the Plaintiff.” Furthermore, plaintiff argues that the Full Commission’s finding of Hunt’s credibility in findings of fact 24 and 26, “at the same time disregarding Denise Hunt’s own text message stating she actually witnessed the fall occurring is internally inconsistent[.]”

Plaintiff is referring to Hunt’s testimony at the 4 November 2015 hearing before the deputy commissioner in which she admitted she sent the following text message to plaintiff:

Yea I saw were u fell but u knw good an well its not their fault, yea u gave me one cause u offered it to me. U have no right to sew anyone u already sewed someone for hurting ur bk b4, u didn’t mess it up here an u knw <sup>1</sup>

By asserting that this text message was a confirmation that plaintiff fell at work or an admission that Hunt witnessed plaintiff injure his back at work, plaintiff is essentially requesting this Court to re-weigh the evidence presented before the Full Commission. We decline to do so. It is not within the scope of our Court’s review to reweigh the evidence because the Commission is the sole judge of the weight and

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<sup>1</sup> A photograph of the text message was admitted into evidence.



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credibility of the evidence. *See Hassell v. Onslow County Bd. Of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008).

Next, plaintiff argues that the Full Commission's conclusions of law, denying plaintiff's claims, are in direct contradiction to its findings of fact. Plaintiff begins by asserting that the Full Commission erred in concluding that he did not sustain a compensable work injury in light of Hunt's credibility and testimony, as discussed above. As we previously stated, we cannot reweigh the evidence presented before the Full Commission and thus reject his argument. Plaintiff continues by arguing that the Full Commission erred in concluding that plaintiff had not proven that a specific traumatic incident occurred when plaintiff's testimony, plaintiff's report to defendant-employer, Hunt's testimony, and medical records all confirmed that plaintiff fell at work.

We are reminded that "the Commission may believe all or a part or none of any witness's testimony. The Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted." *Carey v. Norment Sec. Indus.*, 194 N.C. App. 97, 104, 669 S.E.2d 1, 6 (2008) (citation omitted).

Here, although plaintiff testified that he suffered a work injury to his back on 3 December 2014 and reported the fall to defendant-employer, the Full Commission found his testimony "not credible." The Full Commission found that plaintiff sought medical attention and attributed his low back pain to a "fall from bed of truck used

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for weighing scrap metal,” “f[alling] into a pit at the scrap yard[,]” “falling at work[,]” and falling “on some metal and hurt[ing] his back.” The Full Commission also found that Dr. David R. Allen (“Dr. Allen”), tendered as an expert in the field of orthopedic surgery, opined that the condition for which he treated plaintiff was for his 3 December 2014 fall. Nevertheless, the Full Commission found that Dr. Allen’s opinion was based upon the history that he obtained from plaintiff. Ultimately, the Full Commission assigned “little weight” to the opinion testimony of Dr. Allen regarding the cause of plaintiff’s back condition “as Dr. Allen’s opinion was based upon Plaintiff’s report that he had fallen onto some metal on December 3, 2014, which the Full Commission has found not to be credible and is contrary to the competent evidence in the record.” Because the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we find that plaintiff’s arguments have no merit. *See Hassell*, 362 N.C. at 307, 661 S.E.2d at 715 (“The Commission’s credibility determinations . . . cannot be the basis for reversing the Commission’s order absent other error.”) (citation omitted).

Based on the foregoing reasons, the 6 January 2017 Opinion and Award of the Full Commission is affirmed.

AFFIRMED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).