An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-803

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

LULA MILLS,
Employee,
Plaintiff;

v.

STEELCASE, INC.,
Employer;

and

LIBERTY MUTUAL INSURANCE
Defendants.

North Carolina Industrial Commission
I.C. File No. 047860

Appeal by plaintiff from opinion and award filed 21 March 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2007.

Ganly & Ramer, by Thomas F. Ramer, for plaintiff-appellant.

Van Winkle Buck Wall Starnes & Davis by Allan R. Tarleton for defendant-appellee.

LEVINSON, Judge.

Plaintiff (Lula Mills) appeals an opinion and award of the North Carolina Industrial Commission awarding her temporary total disability, permanent partial disability for six weeks, medical expenses, attorney fees and costs. We affirm.

The record establishes the following pertinent facts: On 21 September 1998, plaintiff injured her lower back while working as a touch-up inspector at Steelcase Inc., a company that

manufacturers office furniture. At the time of her injury, plaintiff attempted to keep a desk from falling off a conveyor belt. Despite the injury, plaintiff continued to work the rest of the day. The next day, plaintiff reported that she was unable to continue working. She was sent by defendant's management to St. Joseph's Urgent Care. Plaintiff was diagnosed with a lumbar sprain and given limited duty work with lifting restrictions. Plaintiff was subsequently evaluated in defendant's medical department by Dr. David Bates, an occupational physician. He diagnosed her with a lumbar strain and provided her with limited duty work with lifting and bending restrictions. Plaintiff continued under the care of Dr. Bates, who directed limited duty work and physical therapy. Dr. Bates released plaintiff to full-duty work in November 1998. However, upon re-examination on 3 December 1998, Dr. Bates noted that she continued to have residual right hip tightness and recommended additional physical therapy if plaintiff's condition did not improve. Defendant ceased payment of plaintiff's medical treatment as of 15 February 1999. Plaintiff was advised by defendants to apply for short term disability; she received such benefits in the amount of $400.00 per week.

On 3 March 1999 plaintiff was examined by Dr. Donald Mullis, an orthopedic surgeon. Dr. Mullis diagnosed her with a "lumbar strain and a right hip greater trochanteric bursitis problem." Dr. Mullis also diagnosed plaintiff with degenerative disc disease in the "L5-S1" region of her back. Dr. Mullis re-evaluated plaintiff on 24 March 1999 and indicated that she had improved but continued to experience right hip problems.

Plaintiff continued to have back and hip complaints and returned to the Steelcase medical department five times between March and October 1999. A return visit to Dr. Mullis on 21 December 1999 resulted in a diagnosis of a "lumbar strain muscle ligament type injury." Dr. Mullis removed plaintiff from employment temporarily, and released her to full unrestricted duty

in mid-January 2000. Also in mid-January, plaintiff returned to defendant's medical department and was re-evaluated by Dr. Bates. Bates cleared her return to work, indicating that her back pain was resolving. After plaintiff returned to work in January of 2000, she was moved to a new job in the finishing department performing "scuffing." This required her to sand tall bookcase units that came down a "trolley like conveyor." After approximately three or four days, plaintiff again experienced increasing problems in her low back and right hip.

On 30 May 2000, plaintiff returned to Dr. Mullis for evaluation and treatment. Plaintiff had "some back and right leg pain" and "paralumbar muscle spasms." Dr. Mullis removed plaintiff from work until re-evaluation on 5 June 2000. On 5 June, Dr. Mullis placed plaintiff on light-duty work with lifting and bending restrictions. Plaintiff's last day of work for defendant was 26 May 2000.

In June 2000, plaintiff completed a short-term disability application with Liberty Mutual Insurance. Thereafter, on 17 July 2000, Dr. Mullis reported that plaintiff's muscle spasms had remitted and released her to return to work to "do light-duty, the first three weeks no more than 10 lbs. and after three weeks gradually work back into her normal routine." After an 8 August 2000 re-examination by Dr. Mullis, plaintiff was noted to suffer from some "slight paralumbar muscle spasms which is to be expected with the degenerative disc problem that she had." Dr. Mullis discharged her at that time and recommended full-duty release to return to work. However, upon re-examination by defendant's occupational physician, Dr. Bates, on 3 August 2000, Bates suggested that plaintiff not engage in "repetitive bending or stooping."

Plaintiff was subsequently treated by Dr. James Hoski, a Board certified surgeon. Dr. Hoski diagnosed plaintiff with a "lumbar sprain/strain with chronic low back pain" and recommended that plaintiff engage in a course of physical therapy. At that time, he also indicated

plaintiff was capable of working with occasional bending and some lifting restrictions. According to Dr. Hoski, plaintiff's MRI, long-term pain, and age "could be consistent" with degenerative disc disease. Dr. Hoski also testified that it would be appropriate for plaintiff to be placed out of work. Upon completion of further physical therapy, plaintiff returned to see Dr. Hoski on 15 November 2000, at which time she continued to have "numbness and tingling in her right leg [;] limited lumbar flexion, extension[;]and right paraspinal muscle spasms." Dr. Hoski nonetheless returned her to work with lifting and bending limitations. Finally, Dr. Hoski testified that "within a reasonable degree of medical probability" her current symptoms and condition were related to the 1998 injury.

Plaintiff was granted Social Security disability benefits beginning November 2000. Plaintiff testified that she did not seek additional employment due to her age and physical limitations. Specifically, plaintiff testified that after being released by Dr. Hoski in November 2000, she did not attempt to seek new employment "because of the [work] restrictions" she was given. In May 2001, consistent with defendant's policy concerning employees who were out of work for one year, plaintiff was notified of an impending termination. However, after plaintiff contacted defendant's Human Resources (HR) Manager, plaintiff was offered a project that would last approximately six months; thereafter, the HR manager explained, Steelcase "would evaluate her situation to see if her restrictions had changed." Plaintiff agreed to this arrangement. However, prior to returning to work, plaintiff notified the HR Director that she needed to undergo a non-work related medical procedure on her thyroid. After plaintiff's unrelated medical procedure, she was terminated.

By an opinion and award filed 20 May 2005, Deputy Commissioner Ronnie Rowell awarded plaintiff: (1) temporary total disability from 21 December 1999 through 13 January

2000; (2) permanent partial disability at two percent for six weeks; (3) medical expenses; and (4) attorney's fees and costs. The Full Commission affirmed the opinion and award of the deputy Commissioner, and modified it to the extent it awarded plaintiff additional temporary total disability from 26 May 2000 through 15 November 2000. Plaintiff appeals.

"The standard of appellate review of an opinion and award of the Industrial Commission is well established. Our review is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions." *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997) (quotation marks omitted). "The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary." *Plummer v. Henderson Storage Co.*, 118 N.C. App. 727, 730, 456 S.E.2d 886, 888 (1995) (citation omitted). "[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.'" *Baker v. City of Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (quoting *Rewis v. Insurance Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946)). Moreover, "[i]n weighing the evidence the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony[.]" *Plummer*, 118 N.C. App. at 730-31, 456 S.E.2d at 888 (citation omitted).

In Plaintiff's first argument on appeal, she contends that the Full Commission erred by denying her motion to receive additional evidence of documents concerning her award of Social Security disability benefits. Plaintiff asserts that this evidence would have corroborated her testimony regarding the Social Security.

N.C. Gen. Stat. §97-85 (2005) provides in pertinent part that "[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown . . . receive further evidence . . . ." Rule 701(6) of the Workers' Compensation Rules provides that "[n]o new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits." Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 701(6). We review the Commission's decision of whether to consider new evidence under an abuse of discretion standard. *See Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 366-67 (1992)("[T]he powers granted the Commission to review the award and to receive additional evidence are plenary powers to be exercised in the sound discretion of the Commission. Whether such good ground has been shown is discretionary and will not be reviewed on appeal absent a showing of manifest abuse of discretion."); *see also Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 708 (1999)("[I]n exercising its discretion to receive additional evidence a court should consider all the circumstances of the case. . . ."). "Abuse of discretion exists when 'the challenged actions are manifestly unsupported by reason.'" *Barnes v. Wells*, 165 N.C. App. 575, 580, 599, S.E.2d 585, 589 (2004) (quoting *Blankenship v. Town and Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002)).

Here, plaintiff has neither articulated what the Social Security documents contained, nor submitted them to this Court for consideration. Secondly, while plaintiff contends the information would have corroborated plaintiff's testimony concerning her receipt of social security benefits, the Commission made a finding of fact that she received Social Security benefits. In short, we are unpersuaded the Commission abused its discretion in precluding

consideration of the documents, and plaintiff has not demonstrated why the admission of the documents would have made a difference in the Commission's award. This assignment of error is overruled.

In plaintiff's next argument, she contends that finding of fact 22 is inconsistent with findings of fact 23, 26, and 27, and conclusions of law 2 and 3. These findings of fact follow:

> 22. At the time Dr. Hoski released Plaintiff to return to work in November 2000, Plaintiff was receiving short-term disability. Thereafter, Plaintiff filed for and was granted social security disability. From May 26, 2000 until May 2001, Plaintiff received $19,099.98 in short-term disability benefits and $8,849.33 in long-term disability benefits.
>
> 23. Plaintiff last worked for Defendant-Employer on May 26, 2000. Plaintiff has not returned to work for Defendant-Employer following May 26, 2000, nor has Plaintiff returned to work for any other employer following May 26, 2000. Plaintiff has not presented any evidence that she has actively engaged in any job search after the November 15, 2000 release to return to work or attempted to find other employment, but has been unsuccessful due to physical limitations resulting from her September 21, 1998 work injury.
>
> . . . .
>
> 26. As a direct and proximate result of her September 21, 1998 compensable back injury Plaintiff was incapable of working from December 21, 1995 until January 13, 2000, and from May 26, 2000 until November 15, 2000.
>
> 27. Plaintiff's disability as a result of her work-related injury by accident resolved by November 15, 2000. As a result of her compensable injury, Plaintiff sustained a two percent permanent partial impairment to her back.

The relevant conclusions of law were:

> 2. As a direct and proximate result of her September 21, 1998 compensable back injury, Plaintiff was disabled from work from December 21, 1999 until January 13, 2000, and from May 26, 2000 until November 15, 2000. N.C. Gen. Stat. §97-2(9).

> 3. As a direct and proximate consequence of Plaintiffs September 21, 1998 compensable back injury she is entitled to temporary total disability compensation benefits at a rate of $327.00 per week from December 21, 1999 until January 13, 2000, and from May 26, 2000 until November 15, 2000. N.C. Gen. Stat. §97-29.

Plaintiff contends that paragraph 22, finding that she received Social Security disability benefits, implies that she is <u>totally unable to work</u>. Thus, plaintiff contends, she should not have been required to search for alternative employment as the same would be have been a futile endeavor. This argument lacks merit.

In *Ramsey v. Southern Industrial Constructors Incorporated*, __ N.C. App. __, __, 630 S.E.2d. 681, 692 (2006), plaintiff argued that the Commission erred by failing to take his receipt of Social Security disability into consideration before finding that it would not have been futile for him to seek alternative employment. In addressing plaintiff's argument, this Court articulated that:

> '[E]vidence Plaintiff received payments pursuant to an employer-funded disability plan is not evidence Plaintiff is disabled within the meaning of the Workers' Compensation Act unless the evidence shows those payments were made because Plaintiff was incapable, due to her carpel tunnel syndrome [work-related injury], of earning wages she had earned before this injury in the same or any other employment.'

Id. at __, 630 S.E.2d. at 693 (quoting *Demery v. Perdue Farms*, *Inc.*, 143 N.C. App. 259, 266-67, 545 S.E.2d 485, 491 (2001)). This Court further noted that the only record evidence regarding plaintiff's Social Security disability benefits consisted of the fact that plaintiff acknowledged receipt of the same. Accordingly, this Court ruled that the evidentiary showing failed to meet the requirements of *Demery*, and "[i]n any event, the evidence-limited to a bare statement regarding receipt of benefits-certainly did not compel the Commission to conclude that plaintiff met his burden of proving total disability." *Ramsey*, __ N.C. App. at __, 630 S.E.2d. at 693.

In the instant case, on direct examination of plaintiff, the following evidence was presented that concerning her receipt of Social Security disability:

> Q: And you're currently receiving Social Security disability?
>
> A: Yes.
>
> Q: And this is due to your degenerative disc disease?
>
> A: It was -- it --
>
> Q: And your thyroid problem?
>
> . . . .
>
> Q: Does -- Is your social security disability due to your -- in part or in any way, due to your thyroid problem?
>
> A: Not that I know of. I don't think so.

Additionally, the Commission made the following findings of fact, which are binding on appeal. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)(findings of fact not challenged on appeal are binding on this Court).

> 14. . . . Dr. Mullis also informed Plaintiff that she had degenerative disk disease in the L5-S1 region of her back, which may be the cause of her lower back and right hip pain.
>
> . . . .
>
> 18. Plaintiff last treated with Dr. Mullis on August 31, 2000. Plaintiff reported that she was having problems with her lower back and right buttock. Dr Mullis noted that this pain was related to her degenerative disk disease and advised her the best thing she could do would be to get back to work.

We conclude, consistent with *Ramsey*, that the Commission was not compelled to conclude that plaintiff's receipt of Social Security disability benefits made her totally disabled for purposes of the Workers Compensation Act. The record does not show that the social security payments were made because plaintiff was incapable, due to her work-related injury, of "earning

wages she had earned before this injury in the same or any other employment." *Ramsey*, __ N.C. App. at __, 630 S.E.2d. at 693. Instead, the testimony revealed that plaintiff was receiving Social Security disability due to any variety of causes: (1) degenerative disc disease; (2) back injury; and/or (3) thyroid condition. The relevant assignments of error are overruled.

In plaintiff's next argument, she contends that the trial court erred in making finding of fact 24 because it did not determine the rate of pay, if any, the offered position by defendants would pay so as to permit evaluation of plaintiff's right to temporary partial disability under either N.C. Gen. Stat. §§97-30 or 97-31 (2005). We disagree.

It is well-established that a plaintiff in a workers' compensation claim is required to prove "that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). This burden can be met, *inter alia*, by the production of evidence that he has obtained other employment at a wage less than he earned prior to the injury. *Id.* However, as plaintiff concedes in her brief, "[t]here is absolutely no evidence of the rate of pay of such position to permit the Commission to determine or weigh an award of benefits pursuant to N.C.G.S. §97-30." In the absence of such evidence, and considering that plaintiff had the burden of proof on this issue, the relevant assignments of error are overruled.

We have evaluated plaintiff's remaining argument on appeal and conclude that it is without merit.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).