NO. COA06-1548

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

ANZELLA JACKSON,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File Nos. 105204 & 441504

MISSION ST. JOSEPH HEALTH SYSTEM, Employer, SELF-INSURED (CAMBRIDGE INTEGRATED SERVICES, Servicing Agent),
Defendant.

Appeal by Plaintiff and Defendant from opinion and award entered 31 July 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2007.

Gary A. Dodd for Plaintiff.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and James A. Barnes IV, for Defendant.

McGEE, Judge.

Anzella Jackson (Plaintiff) and Mission St. Joseph Health System (Defendant) appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) entered 31 July 2006. At a hearing before Deputy Commissioner Kim Ledford (the Deputy Commissioner) on 29 July 2004, Plaintiff testified she injured her back on 20 December 2000 while employed as a psychiatric technician in Defendant's geriatric ward. Plaintiff testified that an elderly patient who weighed between 250 and 300pounds stood up from her wheelchair and

lost her balance. The patient "grabbed" Plaintiff's hand and pulled Plaintiff towards her, and as the patient did so, Plaintiff felt pain in her shoulder, neck, and lower back. Plaintiff went to Defendant's emergency room and was given medication. Plaintiff was also advised to put hot or cold compresses on her back and to stay out of work for several days. Plaintiff returned to work on 27 December 2000, but she continued to experience pain in her back, neck, and shoulder.

Plaintiff testified that she sought medical treatment from Dr. Michael James Goebel (Dr. Goebel) on 24 January 2001. Plaintiff continued to see Dr. Goebel and also began seeing Dr. Daniel W. Hankley (Dr. Hankley). Plaintiff testified that she also sought medical treatment from Dr. Keith Maxwell (Dr. Maxwell).

Plaintiff testified that she sustained another injury at work on 31 January 2003. Plaintiff discovered a patient hanging from a door with a sheet around her neck. The patient weighed 150 pounds, and Plaintiff held her up for several seconds until help arrived. Plaintiff testified that in addition to back pain, she experienced "tingling in [her] left thigh and numbness in [her] leg[.]"

Plaintiff testified that after Dr. Hankley released her on 29 May 2003, she continued to have problems with her back. In July 2003 she went on PRN status, which meant that she worked on a "call-as-needed" basis. Plaintiff testified that she applied for family leave status on 11 May 2004. Plaintiff further testified that in connection with her application, she submitted a certificate from her family physician, which stated that Plaintiff had "low back pain requiring frequent . . . visits to [a] neurosurgeon." Plaintiff testified that she had not returned to work since 11 May 2004. Plaintiff further testified that she had been seeing Dr. James Hoski (Dr. Hoski).

Dr. Goebel, who was stipulated to be an expert in orthopedic surgery, testified that he first saw Plaintiff on 24 January 2001. Dr. Goebel diagnosed Plaintiff as having a lumbar strain, recommended physical therapy, and placed Plaintiff on "light-duty activities with a lifting

restriction of 20 pounds." Dr. Goebel again saw Plaintiff on 16 February and 21 March 2001 and continued her on light-duty activities. Dr. Goebel saw Plaintiff on 18 April 2001, ordered an MRI scan, and continued her on light-duty activities. Dr. Goebel reviewed the results of the MRI scan with Plaintiff on 12 May 2001 and testified that the MRI scan showed minimal disc degeneration that was consistent with Plaintiff's age. Dr. Goebel next saw Plaintiff on 16 May 2001, by which time Plaintiff had undergone a Functional Capacity Evaluation (FCE). Dr. Goebel stated that the FCE showed Plaintiff "was capable of a light to medium physical demand level, which is a lifting restriction of 35 pounds within an 8-hour workday." Dr. Goebel further stated that Plaintiff had reached maximum medical improvement and that Plaintiff had a permanent partial impairment (PPI) rating of 0%.

Dr. Goebel next saw Plaintiff on 19 March 2002 and testified that his "impression was unchanged from what it had been previously, which [was] lumbar degenerative dis[c] disease of minimal severity." Dr. Goebel had previously placed Plaintiff on a work restriction of 35 pounds but, because Plaintiff was seeing Dr. Hankley, Dr. Goebel "left [Plaintiff's] work restrictions up to [Dr. Hankley]." Dr. Goebel testified that he last saw Plaintiff on 22 May 2003 and told her "there was no surgical intervention to be done to improve her condition, and [he] deferred to Dr. Hankley for any further treatment." Dr. Goebel also testified that he believed Plaintiff was capable of gainful employment.

Dr. Hankley testified as an expert in the field of physical medicine and rehabilitation with a specialty in spinal treatment. Dr. Hankley testified that he first saw Plaintiff on 13 March 2002 and diagnosed her with a lumbar strain. Dr. Hankley testified that Plaintiff was restricted from lifting over 35 pounds and he recommended that Plaintiff undergo an FCE. Dr. Hankley testified

regarding a 16 April 2002 note documenting a team conference concerning Plaintiff. Dr. Hankley testified:

> We held a team conference, which is usually a standard practice at Blue Ridge Bone & Joint, to review the results of a [FCE]. Mike Piercy, who performed the [FCE] and the job site analysis, was present. We discussed the results. It appeared that [Plaintiff] was able to tolerate her current job with her restrictions as listed in the [FCE].

Dr. Hankley again saw Plaintiff on 1 August 2002. Plaintiff stated to Dr. Hankley that "she was unable to tolerate . . . her job." Dr. Hankley recommended that Plaintiff should be "bending and stooping occasionally" and should be "crouching and squatting infrequently." Dr. Hankley saw Plaintiff on 27 August 2002 and noted that Plaintiff could continue to work within the restrictions outlined by the FCE.

Dr. Hankley again saw Plaintiff on 11 February 2003, at which time Plaintiff reported that she was injured at work on 31 January 2003 when she tried to support the weight of a patient who was trying to hang herself. Plaintiff presented with low back pain and left trapezius pain, and Dr. Hankley testified that he believed Plaintiff could continue to work. Dr. Hankley saw Plaintiff again on 13 February 2003, at which time Plaintiff requested to be "written out of work." Dr. Hankley advised Plaintiff "[t]hat it would be in her best interests to avoid any prolonged bed rest and to continue to work as tolerated[,]" and Dr. Hankley released Plaintiff to return to work.

Dr. Hankley saw Plaintiff again on 27 February 2003 and diagnosed her with a lumbar strain and a cervical strain. Dr. Hankley recommended that Plaintiff have physical therapy and undergo an MRI scan. Dr. Hankley reviewed with Plaintiff the MRI that showed Plaintiff had some disc degeneration and some marrow edema. Dr. Hankley again released Plaintiff to return to work. Dr. Hankley saw Plaintiff on 8 April 2003 and assigned Plaintiff a 0% PPI rating. Dr.

Hankley saw Plaintiff again on 29 May 2003, at which time Plaintiff indicated she was having decreased pain. Dr. Hankley advised Plaintiff that she could continue to work.

Mike Piercy (Mr. Piercy) testified as an expert in the field of vocational rehabilitation. Mr. Piercy conducted an FCE of Plaintiff on 4 May 2001. Plaintiff put forth full effort during the FCE and the results indicated that Plaintiff could work at the light-medium physical demand level. Mr. Piercy testified that he began another FCE of Plaintiff on 19 March 2002. However, Mr. Piercy had to stop the FCE because Plaintiff's blood pressure exceeded acceptable levels. Plaintiff completed the FCE on 28 March 2002. Mr. Piercy testified that Plaintiff gave "close to full effort" and the FCE indicated Plaintiff could work at the medium physical demand level.

Dr. Maxwell, a board certified expert in the field of orthopedic surgery, with a specialty in the spine, saw Plaintiff on 13 December 2002. Dr. Maxwell testified that he diagnosed Plaintiff with two-level lumbar degenerative disc disease. Dr. Maxwell referred Plaintiff to his partner, Dr. Rudins, "for functional restoration and medical management for lumbar disc disease." Dr. Maxwell testified that Dr. Rudins treated patients on a continuing basis for chronic back pain. Dr. Maxwell also testified that in his opinion, this treatment was medically necessary.

Plaintiff also saw Dr. James Hoski, a board-certified orthopedic surgeon, with fellowship training in spine surgery, on 6 April 2004. Dr. Hoski's examination of Plaintiff revealed spasm in the low back region and some tenderness at the midline in the low back region. He testified that muscle spasm can be indicative of pain. Dr. Hoski last saw Plaintiff on 6 July 2004 and opined that she was not a candidate for surgery but that "a pain specialist would be appropriate for her."

The remainder of the factual and procedural history required for resolution of the issues presented is contained within the analysis portion of this opinion.

The Deputy Commissioner filed an opinion and award on 30 June 2005, and both parties appealed. The Commission entered an opinion and award on 31 July 2006 in which it determined that "[t]he appealing parties have not shown good grounds to reconsider the evidence, receive further evidence, rehear the parties or their representatives, or amend the Opinion and Award." The Commission (1) denied Plaintiff's claim for benefits for wage loss; (2) ordered Defendant to pay certain "prior unauthorized medical expenses incurred by [P]laintiff as a result of her compensable injuries of December 20, 2000 and January 31, 2003"; (3) ordered that Defendant "shall select a pain specialist, to further evaluate [P]laintiff and provide any reasonable necessary treatment to help give [P]laintiff pain relief or better pain management"; and (4) ordered that Defendant pay the cost. Plaintiff and Defendant appeal.

Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support contrary findings. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995). The Commission's conclusions of law are reviewable *de novo*. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003). It is well settled that the Commission is the "sole judge of the weight and credibility of the evidence[.]" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). On appeal, this Court may not re-weigh evidence or assess credibility of witnesses. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

Plaintiff's Appeal

I.

In her first argument, Plaintiff contends that several of the Commission's findings were unsupported by the evidence. Plaintiff further argues the Commission's findings of fact were contrary to the competent evidence and reflect the Commission's failure to view the evidence in the light most favorable to Plaintiff. We disagree.

Plaintiff first challenges finding of fact six, where the Commission found that "[o]n December 28, 2000, [P]laintiff was seen by Dr. Gordon Groh at Blue Ridge Bone and Joint Clinic, who assessed her with mechanical low back pain. Dr. Groh changed her medication and released [P]laintiff to work full duty, to be seen in 4 to 6 weeks." However, this finding is supported by the 28 December 2000 office note of Dr. Groh, which stated: "[Plaintiff]may continue to work full duty and I will see her again in the office in 4 to 6 weeks."

Plaintiff next challenges the portion of finding of fact ten that states that after Plaintiff saw Dr. Goebel on 16 May 2001, "Plaintiff continued to work for [D]efendant in the geriatric ward. For the most part, [Plaintiff's] duties were within the restrictions outlined by Dr. Goebel. [Plaintiff] was able to perform her duties on a day-to-day basis." Plaintiff argues that this finding is contrary to Plaintiff's uncontradicted testimony that she experienced difficulty in performing her work duties as a result of her back injuries. However, even if there was competent evidence in the record to support contrary findings, the findings of the Commission are binding because they are supported by the testimony of both Plaintiff and Dr. Goebel. *See Jones*, 118 N.C. App. at 721, 457 S.E.2d at 317. It is clear from Plaintiff's testimony that she continued to perform her work, despite her problems. Moreover, although Dr. Goebel noted on 16 May 2001 that he would see Plaintiff on an as-needed basis, Plaintiff did not seek further medical treatment until

March 2002, nearly a year after the 16 May 2001 appointment. This evidence supports the challenged finding.

Plaintiff next argues that a portion of finding of fact thirteen was unsupported by the evidence. The Commission found that Plaintiff completed an FCE on 28 March 2002. Plaintiff challenges the following portion of the finding regarding the results of the FCE: "Validity measures indicated that [P]laintiff was not putting forth maximum effort. Despite the apparent submaximal effort, this FCE demonstrated that [P]laintiff was capable of working within the medium physical demand level with a lifting restriction of 50 pounds." However, this finding was supported by the FCE Summary Report prepared by Mr. Piercy, which stated: "Overall test findings, in combination with clinical observations, suggest the presence of near full, though not entirely full, effort on [Plaintiff's] behalf." In the FCE Summary Report, Mr. Piercy also described Plaintiff's effort as "sub-maximal." Moreover, Mr. Piercy testified that during the FCE, Plaintiff gave "close to full effort." The FCE Summary report also provided as follows:

> FCE results indicate [Plaintiff] is able to work at the MEDIUM Physical Demand Level for an 8 hour day according to the Dictionary of Occupational Titles. MEDIUM Physical Demand Level is defined as lifting up to 50 lbs. on an Occasional basis (0-33% of an 8 hr. working day), 20 lbs. on a Frequent basis (34-66%), and 10 lbs. on a Constant basis (67-100%).

This evidence supports the challenged portion of finding of fact thirteen.

Plaintiff also challenges the support for finding of fact fifteen, in which the Commission found: "On April 16, 2002, Dr. Hankley held a 'team conference' with Mary Silver, who administers the workers' compensation program for . . . Defendant . . . . The results of the FCE were discussed and it was determined that [P]laintiff was able to tolerate her job within the restrictions outlined by the FCE." Dr. Hankley testified that a team conference was held on 16

April 2002 to review the results of the FCE. Dr. Hankley further testified: "It appeared that [Plaintiff] was able to tolerate her current job with her restrictions as listed in the [FCE]."

Plaintiff argues the finding "was inconsistent with the restrictions outlined in the [FCE] as previously asserted in this brief." On the contrary, however, the FCE specifically provided that Plaintiff met the critical demands of her job "with the exception of Bending/Stooping (Constant) and Crouching/Squatting (Occasional)." The FCE further provided: "The following activities should be limited: Bending/Stooping (Occasional) and Crouching/Squatting (Infrequent). As indicated [Plaintiff] works with a treatment team consisting of several other professionals. According to supervisory personnel[,] members of the team are available to assist with direct patient care of a [strenuous] nature." Dr. Hankley's testimony, and the Commission's finding based thereon, also specifically recognized that there were certain limitations on Plaintiff's ability to do her job. Plaintiff also argues that Dr. Hankley's testimony supporting this finding lacked a factual basis. However, it is clear that Dr. Hankley based his assessment on the FCE and on his previous encounters with Plaintiff. For the reasons stated above, this finding was supported by competent evidence.

Plaintiff also challenges the support for finding of fact twenty-seven, which provides, in pertinent part, that on 29 May 2003, Dr. Hankley "released [Plaintiff] to return to work without restriction." In support of her argument, Plaintiff cites other testimony of Dr. Hankley which Plaintiff contends contradicts this finding. However, on appeal, this Court may not re-weigh the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. The challenged finding is supported by Dr. Hankley's progress note dated 29 May 2003 in which Dr. Hankley stated: "I believe [Plaintiff] has a 0 impairment rating for her low back according to the North Carolina Industrial Commission Rating Guide. She can continue to work without restrictions." Accordingly, this

finding was supported by competent evidence. For the reasons stated above, we overrule these assignments of error.

II.

Plaintiff next argues the Commission erred by concluding that Plaintiff failed to prove she was entitled to indemnity benefits. We disagree.

The Commission concluded that "Plaintiff has failed to prove by the greater weight of the evidence that she is entitled to any indemnity compensation related to the injuries sustained in her employment with [D]efendant on December 20, 2000 and/or January 31, 2003." In support of this conclusion of law, the Commission made the following findings of fact:

> 32. On May 11, 2004, [P]laintiff applied for Family Medical Leave status. As part of the application, she was required to obtain a certificate from a treating physician describing the medical facts to support certification, including a brief statement as to how the medical facts meet the criteria of a particular category. According to [P]laintiff, her family physician provided such a certificate, although the same does not appear to be in evidence in this case.
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> 33. Although [P]laintiff identified a total of 41 days that she alleges she missed as a result of her work injuries, the unplanned absence forms only indicate three times during which [P]laintiff reported back problems. Given the information contained on the unplanned absence forms, [P]laintiff's testimony regarding the dates she missed related to her back condition is deemed not credible. Furthermore, there was no medical testimony presented demonstrating that [P]laintiff was not able to perform the duties of her position. The evidence that [P]laintiff has continued to work as a psych tech contradicts her claim that she is unable to work in this position.
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> 34. There is insufficient evidence of record to determine by its greater weight that [P]laintiff is entitled to indemnity benefits related to her injuries of December 20, 2000 or January 31, 2003. At all times she has been released to work by her treating physicians, and the employer has had work available within her restrictions.

Plaintiff challenges the Commission's finding that the certificate from Plaintiff's family physician was not in evidence. Plaintiff points to her own testimony where she quoted from the certificate prepared by her family physician. However, the Commission's finding is supported. The certificate in support of Plaintiff's application for medical leave status was not admitted into evidence, nor was it included in the stipulated medical records. Accordingly, the certificate was not in evidence.

Plaintiff also challenges the finding that "there was no medical testimony presented demonstrating that [P]laintiff was not able to perform the duties of her position." Plaintiff cites *Tickle v. Insulating Co.*, 8 N.C. App. 5, 173 S.E.2d 491, *cert. denied*, 276 N.C. 728 (1970), for the proposition that "'[t]here are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of.'" *Id.* at 8, 173 S.E.2d at 494 (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965)). However, *Tickle* is inapposite, as it dealt with the testimony required to prove causation, not whether a worker was capable of performing the duties of a job.

The challenged finding was supported by the evidence. Dr. Goebel testified that following his visits with Plaintiff, he consistently released Plaintiff to work, under certain restrictions. Likewise, Dr. Hankley testified that after his visits with Plaintiff, he continually released Plaintiff to work, though under certain limitations. Moreover, the Commission also found that "[t]he evidence that [P]laintiff has continued to work as a psych tech contradicts her claim that [she] is unable to work in this position." We hold that the Commission's findings, which are supported by the evidence, support the Commission's conclusion of law denying Plaintiff's claim for indemnity compensation.

Defendant's Appeal

I.

Defendant argues the Commission erred in awarding Plaintiff future medical treatment pursuant to N.C. Gen. Stat. §97-25. We disagree.

N.C. Gen. Stat. §97-25 (2005) provides: "Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary." Pursuant to N.C. Gen. Stat. §97-2(19) (2005), the term "medical compensation" is defined as follows:

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]

In *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 43, 415 S.E.2d 105, 107, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992), our Court held that "relief from pain constitutes 'relief' as that term is used in N.C. Gen. Stat. §97-25." However, "[l]ogically implicit in the authority accorded the Commission to order . . . *further* medical treatment under [N.C. Gen. Stat.] §97-25 is the requirement that the supplemental compensation and future treatment be directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). Defendant argues that the Commission's award of additional medical treatment was not supported by competent evidence. Based upon the medical evidence in support of this award, we disagree.

Defendant assigns error to finding of fact nineteen in which the Commission found that "[i]n Dr. Maxwell's opinion, Dr. Rudins could offer reasonably necessary treatment" for

Plaintiff's back pain. However, this finding is supported by competent evidence. Deputy Commissioner Edward Garner, Jr. entered an administrative order on 14 October 2002 allowing Plaintiff to have a second opinion examination by a physician of her own choosing. Subsequently, Plaintiff saw Dr. Maxwell. Dr. Maxwell testified that he diagnosed Plaintiff with two-level lumbar degenerative disc disease. Dr. Maxwell referred Plaintiff to his partner, Dr. Rudins, "for functional restoration and medical management for lumbar disc disease." Dr. Maxwell testified that Dr. Rudins treated patients on a continuing basis for chronic back pain. Dr. Maxwell also testified that in his opinion, this treatment was medically necessary.

Defendant also assigns error to finding of fact thirty in which the Commission found that "[t]he treatment by a pain specialist, as recommended by Dr. Hoski and Dr. Maxwell, would be a reasonable step to take to help [P]laintiff manage her pain." This finding is supported by the testimony of Dr. Maxwell recited above and by the testimony of Dr. Hoski. Dr. Hoski's examination of Plaintiff revealed spasm in the low back region and some tenderness at the midline in the low back region. He testified that muscle spasm can be indicative of pain. Dr. Hoski last saw Plaintiff on 6 July 2004 and opined that she was not a candidate for surgery but that "a pain specialist would be appropriate for her."

This testimony from Dr. Maxwell and Dr. Hoski constitutes competent evidence in support of the Commission's findings that Plaintiff was entitled to future medical treatment. "'The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Thus, although Defendant presented contrary evidence, the Commission's findings are supported by competent evidence. Therefore, we overrule these assignments of error.

II.

Defendant next argues the Commission erred by failing to award attorney's fees and costs. We disagree.

N.C. Gen. Stat. §97-88.1 (2005) provides:

> If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

"The decision of whether to [award these costs], and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

Defendant argues that it made every effort to attempt to determine what Plaintiff was seeking related to this claim. Defendant argues that because it was willing to authorize a return visit with one of Plaintiff's treating physicians and because the evidence presented in this matter revealed that Plaintiff had reached maximum medical improvement with no permanent partial impairment rating, the Plaintiff's action was brought without reasonable ground.

The Commission, however, found that "[b]ecause [P]laintiff's prosecution of this matter [is] not without reason, and is not indicative of stubborn, unfounded litigiousness, [D]efendant is not entitled to an award of attorney's fees as a sanction pursuant to N.C. Gen. Stat. §97-88.1." The Commission based its findings on the same evidence referenced in the preceding Section I of Defendant's Appeal in this opinion. Thus, as we held above, there was competent evidence to support the Commission's findings. These findings supported the Commission's determination not to award attorney's fees and costs. These assignments of error are overruled.

Affirmed.

Judges STEPHENS and SMITH concur.

Report per Rule 30(e).