NO. COA13-533
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

WANDA G. THORNTON,
Employee,

Plaintiff,

v.

From the North Carolina Industrial Commission
I.C. No. 216738

CITY OF RALEIGH,
Employer,

SELF-INSURED (N.C. LEAGUE OF MUNICIPALTIES, Third-Party Administrator),

Defendants.

Appeal by plaintiff from the Opinion and Award filed 4 January 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2013.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Brad G. Inman and Leann A. Gerlach, for defendant-appellee.

STEELMAN, Judge.

Where the amendment to N.C. Gen. Stat. § 97-32 was a substantive change in the law, the effective date was 24 June

2011. The new requirement that the Commission shall "specify what actions the employee should take to end the suspension and reinstate the compensation" is not applicable to this case. Where the Commission made ample findings of fact explaining its reasoning for finding that plaintiff's offer to return to employment was not credible, the Commission did not err by denying plaintiff's motion to compel the reinstatement of benefits.

I. Factual and Procedural History

The case was originally heard by this Court in *Thornton v. City of Raleigh*, No. COA11-1503, __ N.C. App. __, 731 S.E.2d 721 (2012)(unpublished) (*Thornton I)*. We reference that opinion for a more complete recitation of the factual background.

Wanda Thornton (plaintiff) was injured during the course and scope of her employment with the City of Raleigh (defendant), while working on a water meter. The parties entered into an Industrial Commission Form 21, Agreement for Compensation for Disability, and plaintiff began receiving weekly benefits on 7 February 2002.

On 1 July 2009, defendant offered plaintiff employment as a security booth attendant. Plaintiff failed to report to work for the booth attendant position, and on 11 August 2009, defendant filed an Industrial Commission Form 24, Application to Terminate

or Suspend Compensation. On 16 September 2009, the Commission directed that defendant suspend payment of compensation while plaintiff refused to accept suitable work.

On 4 March 2010, plaintiff filed an Industrial Commission Form 33 request for hearing, asserting that defendant's Industrial Commission Form 24 had been improvidently approved. On 25 March 2011, the Deputy Commissioner entered an opinion and award upholding the suspension of benefits until plaintiff's refusal to accept the position ceased. While the case was on appeal to the Full Commission, on 17 June 2011, plaintiff filed a motion to reinstate her workers' compensation disability benefits on the grounds that she was now willing to try the security booth position as of 25 March 2011.

In *Thornton I*, we affirmed the Commission's opinion and award holding that the security booth position was suitable employment and that plaintiff unjustifiably refused to attempt that position. *Thornton I*, No. COA11-1503, __ N.C. App. __, 731 S.E.2d 721, slip op. at 15 (unpublished). We remanded the case for additional findings of fact addressing plaintiff's motion to compel reinstatement of benefits. *Id.*

On 3 October 2012, plaintiff filed a motion to reopen the evidentiary record. The Commission denied plaintiff's motion and issued an amended opinion and award on 4 January 2013. This

opinion and award was based upon the evidence of record at the time of the hearing before the Full Commission on 8 August 2011. The Commission concluded that plaintiff was not entitled to a reinstatement of disability benefits because plaintiff's alleged willingness to return to work was not credible and that plaintiff failed to establish that her refusal of suitable employment had ceased.

Plaintiff appeals.

II. Standard of Review

Plaintiff does not challenge any of the Commission's findings of fact. Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal. *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 485-86, 613 S.E.2d 243, 247 (2005). Our review, therefore, is limited to "whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

III. Amendment to N.C. Gen. Stat. § 97-32

In her first argument, plaintiff contends that the Commission erred by failing to explain the steps necessary for

plaintiff to end her suspension of benefits as required by a 2011 amendment to N.C. Gen. Stat. § 97-32. We disagree.

> In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it. A clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment. As a result, in addition to applying to all cases brought after their effective dates, such amendments apply to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment.

Ray v. N.C. Dep't of Transp., 366 N.C. 1, 8-9, 727 S.E.2d 675, 681 (2012) (citations omitted). Where an amendment is determined to be a substantive change in the law, the effective date specified in the session law will control. *Id.* at 10, 727 S.E.2d at 681. "To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes." *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315 (1993).

The amendment to N.C. Gen. Stat. § 97-32 changed the wording of the first sentence, and added the following two sentences to the statute:

> Any order issued by the Commission suspending compensation pursuant to G.S. 97-

> 18.1 on the ground of an unjustified refusal of an offer of suitable employment shall specify what actions the employee should take to end the suspension and reinstate the compensation. Nothing in this Article prohibits an employer from contacting the employee directly about returning to suitable employment with contemporaneous notice to the employee's counsel, if any.

2011 N.C. Sess. Law. ch. 287, § 12. The 2011 amendment applies only to claims arising on or after 24 June 2011. 2011 N.C. Sess. Law ch. 287, § 23.

Plaintiff argues that this "new language clarifies the procedural obligations of the Industrial Commission." Upon our review of the original and amended statutes, the amendment does not clarify an otherwise unclear portion of the statute, but rather changes the substance of the law by imposing a new duty upon the Industrial Commission. Under the amended statute, the Commission is charged with "specify[ing] what actions the employee should take to end the suspension and reinstate the compensation," whereas under the prior statute, no such duty existed. The amendment to N.C. Gen. Stat. § 97-32 is a substantive change to the statute, and the 24 June 2011 effective date controls. The amendment does not apply to plaintiff's claims because her claim arose prior to 24 June 2011.

This argument is without merit.

IV. Motion to Compel Reinstatement

In her second argument, plaintiff contends that the Commission erred by denying her motion to compel reinstatement of benefits. We disagree.

An employee who refuses suitable employment "shall not be entitled to any compensation at any time during the continuance of such refusal. . . ." N.C. Gen. Stat. § 97-32. "In assessing the sincerity of plaintiff's representations, the Commission [may] appropriately consider. . . . plaintiff's lack of recent conduct suggesting a willingness to cooperate and any recent conduct inconsistent with [her] expressed intent." *Alphin v. Tart L.P. Gas Co.*, 192 N.C. App. 576, 593, 666 S.E.2d 160, 171 (2008). In *Thornton I*, we remanded the case for findings of fact on this issue, noting that "in *Alphin*, the Commission made a specific finding of fact that the plaintiff's willingness to cooperate was not credible before denying his motion to reinstate benefits." *Thornton I*, No. COA11-1503, __ N.C. App. __, 731 S.E.2d 721, slip op. at 15 (unpublished).

In the instant case, plaintiff does not challenge any of the Commission's findings of fact, but rather only challenges the Commission's conclusion of law that plaintiff was not entitled to a reinstatement of disability benefits. The Commission found as fact: that defendant offered plaintiff the

gate attendant job on 1 July 2009; plaintiff never tried the booth attendant position and never visited a booth to investigate the position before refusing it; that Dr. Kirk Harum testified that plaintiff was released to return to work in the booth attendant position in late July or early August 2009; and that Dr. Kevin McKnight, who treated plaintiff from 2005 to 2010, testified there was no reason why plaintiff could not try the booth attendant position. The Commission further found:

> 23. The Full Commission finds that the booth attendant position is suitable employment and that Plaintiff's refusal to attempt the booth attendant position is not justified.
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> . . .
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> 28. In August 2009, Plaintiff was notified that the security booth position could not be held open indefinitely. Despite an administrative finding by the Industrial Commission in September 2009 that the security booth position was suitable, Plaintiff continued to contest the suitability of the position and continued to refuse the job through 2010 and part of 2011. In March 2010, Plaintiff was informed that the security booth position could no longer be held open and that Plaintiff would cease to be an employee if she did not return to work by May 21, 2010. Plaintiff did not respond.
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> 29. The Full Commission finds that Plaintiff's offer as of March 25, 2011, almost two years after the position was offered to Plaintiff, to return to work for Defendant in the security booth position is not credible and that her conduct from August 2009 through March 25, 2011 is

> inconsistent with her expressed intent to return to the suitable security booth position with Defendant as of March 25, 2011.
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> 30. The Full Commission finds that Plaintiff's professed willingness to accept the security booth position in March 2011 was not a legitimate cessation of her previous refusal to attempt the job. As such, the Full Commission finds that Plaintiff's refusal of suitable employment had not yet ceased as of the date of the hearing before the Full Commission.

These findings clearly establish that plaintiff's willingness to return to work was not credible and that plaintiff failed to establish that her refusal of suitable employment had ceased. As in *Alphin*, the Commission has now made "ample findings of fact explaining its reasoning[] and the basis for its credibility determination[.]" *Alphin*, 192 N.C. App. at 593, 666 S.E.2d at 171. It is not the role of this Court to reconsider the Commission's decision regarding plaintiff's credibility. *Id.* We hold that the Commission's findings of fact support its conclusion of law that plaintiff was not entitled to the reinstatement of disability benefits.

This argument is without merit.

AFFIRMED.

Judges HUNTER, ROBERT C., and BRYANT concur.

Report per Rule 30(e).