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NO. COA07-570

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

JORGE RODRIGUEZ-CARIAS,  
Plaintiff/Employee,

v.

North Carolina Industrial Commission  
I.C. File No. 472777

NELSON'S AUTO SALVAGE &  
TOWING SERVICE,  
Defendant/Employer.

Appeal by Defendant from an Opinion and Award entered 17 January 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 November 2007.

*Scudder & Hedrick, by Alice Tejada, for Plaintiff-Appellee.*

*Bourlon & Davis, P.A, by Thomas E. Davis, for Defendant-Appellant.*

STEPHENS, Judge.

On 20 May 2004, Jorge Rodriguez-Carias ("Plaintiff"), a Honduran national who speaks only Spanish, was working on three wreckers for Nelson's Auto Salvage & Towing Service ("Defendant") when he felt an explosion. When he saw his face in the mirror of one of the wreckers, he went into Defendant's office. Plaintiff's "boss," Nelson Cabrera, president of Nelson's Auto Salvage & Towing Service, saw Plaintiff and told another employee to take Plaintiff to the emergency room. Plaintiff's co-worker, Roger Adolfo Dehai, took him to Durham Regional Hospital. Durham Regional personnel administered first aid and had Plaintiff transferred by ambulance to UNC Hospitals in Chapel Hill.

Plaintiff reported via interpreter that he was cutting metal at work while working on a truck and that he was heating the metal to cut when some hot hydraulic oil spilled out and splashed him on his face, neck, and arms. Plaintiff was admitted to UNC Hospitals for five days for treatment of his burns, and was diagnosed with three percent total body surface area burns to his face, neck and arms.

Upon his discharge from the hospital, Plaintiff sought ongoing treatment from Dr. Michael D. Peck, beginning 15 June 2004. Although Plaintiff was recovering overall, the scarring on his left lower lip began to increase in size. On 17 August 2004, Dr. Peck advised Plaintiff that he should stay out of the sun, not work outside, and work in a room temperature environment between 60 and 85 degrees. On 14 September 2004, Dr. Peck saw Plaintiff, noted the scar on his lip, continued the work restrictions, and decided to refer Plaintiff to Dr. Charles S. Hultman to evaluate and treat the scar on Plaintiff's lip. On 7 December 2004, Dr. Peck noted that the scar had grown beyond the boundaries of the original burn. He also noted that Plaintiff had an appointment with Dr. Hultman.

On 20 December 2004, Plaintiff was evaluated by Dr. Hultman. After examining the scar on Plaintiff's lip, Dr. Hultman recommended treatment of steroid injections and reserved surgery as a last resort if Plaintiff did not improve within a year after the accident.

Plaintiff filed a Form 18 Notice of Accident to Employer on 18 October 2004. Defendant filed a Form 61 Denial of Workers' Compensation Claim on 6 January 2005. A hearing on the matter was scheduled for 24 January 2005, but on 10 January 2005, Defendant made a motion to continue, requesting that "no hearing be scheduled prior to March, 2005, so as to provide alleged employer's counsel the necessary time to conduct an investigation and interview witnesses who will testify on behalf of the alleged employer[.]" On 14 January 2005, by order of Deputy

Commissioner George R. Hall, III, Defendant's motion was denied. However, when the hearing was held on 24 January, the matter was continued from the hearing docket "due to the fact that discovery ha[d] not been completed." The matter was rescheduled for hearing on 15 March 2005.

On 26 January 2005, U.S. Immigration and Custom Enforcement officers detained Plaintiff on an Order of Deportation that had been issued in 2000. Between 26 January and 11 February, Plaintiff was transferred from Durham County Jail, to Johnston County Jail, to Mecklenburg County Jail, and finally to a Louisiana jail. Plaintiff's counsel filed a motion on 27 January 2005 to take Plaintiff's deposition at the Mecklenburg County Jail. Before the deposition could be scheduled at a time convenient for defense counsel, Plaintiff was moved to Louisiana. On 8 March 2005, Plaintiff's counsel made a motion for a telephonic deposition of Plaintiff. Plaintiff's deposition was ultimately taken by telephone on 23 August 2005, after Plaintiff had been deported to Honduras.

The case was heard before Deputy Commissioner Hall on 9 May 2005. Following the hearing, the record was held open to allow the parties to submit additional evidence by post-hearing depositions. The depositions of Plaintiff and Dr. Peck, including attached exhibits, were submitted by Plaintiff and received into evidence. On 16 November 2005, Defendant made a motion to exclude certain documents and deposition testimony from the Record before the Commission. In an Opinion and Award filed 22 February 2006, the deputy commissioner denied Defendant's motion to exclude and awarded Plaintiff, *inter alia*, temporary total disability compensation, all medical expenses incurred and to be incurred as a result of Plaintiff's injury, and reasonable attorney's fees in addition to the compensation due Plaintiff. Defendant appealed to the Full Commission. The Full Commission reviewed the matter on 10 October 2006 and in an

Opinion and Award filed 17 January 2007, affirmed, with minor modifications, the Opinion and Award of the deputy commissioner. Defendant timely appealed to this Court.

On appeal, Defendant brings forth 11 assignments of error. “Appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.” *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006), *reh’g denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). Under our Workers’ Compensation Act, “the Commission is the fact finding body.” *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). “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). Thus, on appeal, appellate courts do “not have the right to weigh the evidence and decide the issue on the basis of its weight. The court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.” *Id.* at 434, 144 S.E.2d at 274.

Defendant first argues that the Full Commission erred in admitting into evidence Plaintiff’s telephonic deposition because Plaintiff was not in the physical presence of the person administering the oath.

The Commission may order testimony to be taken by deposition . . . . Depositions ordered by the Commission upon application of a party shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

N.C. Gen. Stat. §97-80(d) (2005). Rule 30(b)(7) of the North Carolina Rules of Civil Procedure permits telephone depositions if the court on motion orders them. When a deposition is taken in a

foreign country, Rule 28(b) provides that the deposition may be taken “[o]n notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States[.]” N.C. Gen. Stat. §1A-1, Rule 28(b) (2005). Defendant does not challenge the authority of the court reporter to administer the oath but instead asserts that, by stating that the deposition be taken “before a person authorized to administer oaths,” the rule requires that the person administering the oath and the deponent be physically present in the same room.

In *Clone Component Distrib., Inc. v. State*, 819 S.W.2d 593 (Tex. App. 1991), the court held that the requirement of the Texas Rules of Civil Procedure that a deposition be taken “‘before a person authorized to take oaths’ was satisfied by the court reporter’s being in the vocal and aural presence of the deponent through the use of the telephone.” *Id.* at 598.

To be “before” someone means to be “in the presence of” the person. 2 The Oxford English Dictionary 63, 64 (2d ed. 1989); Webster’s Third International Dictionary of the English Language 197 (1981). When two people talk to each other on the telephone, they are within each other’s vocal and aural presence. Appellants fail to explain why a deposition, which consists solely of the recording of the deponent’s spoken words, requires anything more than the vocal and aural presence of the deponent. *Id.* Accordingly, the court determined that the deponent need not be in the physical presence of the court reporter administering the oath.

In *Aquino v. Automotive Serv. Indus. Ass’n*, 93 F. Supp. 2d 922 (N.D. Ill. 2000), even though the court interpreted the Federal Rules of Civil Procedure to require that “the notary or court reporter [] be in the presence of the deponent during the telephonic deposition,” *id.* at 923-24, the court ruled that the failure to do so “was a technical and seemingly meaningless” error. *Id.* Thus, although the court ruled inadmissible the deposition testimony of three witnesses

deposed over the telephone where the court reporter who swore them was in a different state, the court allowed plaintiff leave to retake the depositions telephonically, with a court reporter in the district of the deponent, to ask each the single question as to whether the answers recorded at the prior deposition were true and correct. *Aquino*, 93 F. Supp. 2d 924.

Although the above authority is not binding on this Court, we agree with the reasoning in *Clone* and determine that the requirement that a deposition be taken “[o]n notice before a person authorized to administer oaths[,]” N.C. Gen. Stat. §1A-1, Rule 28(b), is satisfied “by the court reporter’s being in the vocal and aural presence of the deponent through the use of the telephone.” *Clone Component Distrib., Inc.*, 819 S.W.2d at 598. Accordingly, such requirement was met in this case where the court reporter was on the telephone during the deposition of Plaintiff.

N.C. Gen. Stat. §1A-1, Rule 30(f), sets out the procedure for conducting an oral deposition.

(1) The person administering the oath shall certify that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. This certificate shall be in writing and accompany the sound-and-visual or sound recording or transcript of the deposition.

N.C. Gen. Stat. §1A-1, Rule 30(f) (2005). Here, Janet M. Leggett, who is “duly commissioned and authorized to administer oaths and to take and certify depositions,” certified that Plaintiff was duly sworn by her and that the deposition “is a true and correct transcript of said proceedings[.]” This certificate was in writing and accompanied the transcript of the deposition. Thus, the requirements of Rule 30(f) were met. Accordingly, since depositions ordered by the Commission shall be taken in the manner prescribed by law for depositions in actions at law, and since none of the North Carolina Rules of Civil Procedure require that Plaintiff be in the physical

presence of the person authorized to administer oaths, either to be duly sworn or to record the testimony, Defendant's argument to exclude Plaintiff's deposition is without merit.

Defendant also argues that the Full Commission erred in admitting into evidence Plaintiff's telephonic deposition because, by admitting the testimony, "Plaintiff is being rewarded for his misconduct, being an illegal alien who was deported by federal authorities[.]" Generally, "all lay evidence must be offered at the initial hearing." N.C.I.C. Rule 612(3). However, under unusual circumstances, "[l]ay evidence can [] be offered after the initial hearing by order of a Commissioner or Deputy Commissioner." *Id.* Here, the initial hearing was scheduled for 24 January 2005 and Plaintiff was in attendance. However, on that date, the case was continued to a later date "due to the fact that discovery ha[d] not been completed." Then, on 26 January 2005, Plaintiff was detained by U.S. Immigration officers and within three weeks, after being transferred to several jails in the United States, was deported to Honduras. Such circumstances surely qualify as unusual and, contrary to Defendant's captious claim that "Plaintiff is being rewarded for his misconduct[.]" warrant the admission of Plaintiff's lay testimony by deposition after the completion of the hearing.

Next, Defendant contends the Commission erred in admitting into evidence the testimony of Lorie Bradley. The hearing took place on Monday, 9 May 2005. On Friday, 6 May 2005 at 4:27 p.m., Plaintiff added Lorie Bradley as a witness for the hearing. Defendant argues that a witness list was required, pursuant to a pre-trial order issued by the deputy commissioner, and that this late addition prevented defense counsel from adequately investigating and preparing for cross-examination of said witness.

First, the pre-trial order upon which Defendant bases this argument is not in the record. It is well established that only evidence in the record may be considered in an appellate review.

N.C. R. App. P. 28(b). Regardless, Defendant claims the order states that the parties shall “indicate those who will be called to testify.” It is notable, however, that when the hearing was originally scheduled for Monday, 24 January 2005, defense counsel submitted his witness list, naming at least 11 witnesses, on Friday, 21 January 2005. Presumably, at that point, Defendant considered such timing acceptable under the terms of any pre-trial order.

Furthermore, although Defendant claims “prejudicial surprise” from the admission of Ms. Bradley’s testimony and further alleges he was “never offered an opportunity to continue the matter to adequately prepare for cross examination,” the Commission allowed Defendant an opportunity to submit additional evidence after the hearing, and even granted Defendant an extension of time to submit evidence. Indeed, Defendant had more than five months’ additional time after the hearing to offer any evidence Defendant desired. Defendant could have taken Lorie Bradley’s deposition or could have presented or deposed witnesses to rebut Ms. Bradley’s testimony. Notably, Defendant offered no evidence whatsoever from the date of the hearing on 9 May 2005 until the record before the Commission closed on 17 October 2005.

Defendant cites *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983), *Pittman v. Barker*, 117 N.C. App. 580, 452 S.E.2d 326 (1995), and *Hill v. Hill*, 142 N.C. App. 524, 545 S.E.2d 442 (2001), all civil cases, to support his contention that Lorie Bradley’s testimony should have been excluded. However, the Commission is not bound by civil procedure rules in workers’ compensation claims. *Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 200 S.E. 438 (1939). Furthermore, in both *Maynard* and *Pittman*, the testimony in question was allowed, subject to opposing counsel being granted additional time to respond to the evidence. Likewise, here, the deputy commissioner afforded Defendant more than five months to cross-examine the witness or to submit rebuttal evidence, much more time than either complaining



party was allowed in *Maynard* or *Pittman*. Accordingly, Defendant's assignment of error is without merit.

Defendant also contends the Commission erred in admitting into evidence the testimony of Guillermo Rodriguez because Plaintiff did not provide Defendant with any prior notice that Mr. Rodriguez was going to testify. For the reasons stated above, we overrule this assignment of error.

Defendant next argues that the Commission erred in admitting into evidence Plaintiff's medical records and bills because the items were not admitted or authenticated according to the rules of evidence.

The Industrial Commission is an administrative board, with *quasi*-judicial functions. The manner in which it transacts its business is a proper subject of statutory regulation and need not necessarily conform to court procedure except where the statute so requires, or where, in harmony with the statute, or where it fails to speak, the Court of last resort, in order to preserve the essentials of justice and the principles of due process of law, shall consider rules similar to those observed in strictly judicial investigations in courts of law to be indispensable or proper. *Maley*, 214 N.C. at 594, 200 S.E. at 441. N.C. Gen. Stat. §97-80 empowers the Industrial Commission to make rules for carrying out the provisions of the Workers' Compensation Act and requires that Commission "[p]rocesses, procedure, and discovery . . . shall be as summary and simple as reasonably may be." N.C. Gen. Stat. §97-80(a) (2005). "The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner." N.C. Gen. Stat. §97-84 (2005). "Under these conditions we might expect a liberal treatment by the courts of the procedure adopted by the

Commission with respect to the reception and consideration of evidence upon a claim in 'dispute.'" *Maley*, 214 N.C. at 594, 200 S.E. at 441.

In conformity with the Commission's intent to keep processes and procedure summary and simple, the standard practice at the Commission is for the parties to stipulate to the admission in evidence of medical records.

In cases where a party, or an attorney for either party, refuses to stipulate medical reports and the case must be reset or depositions ordered for testimony of medical witnesses, a Commissioner or Deputy Commissioner may in his discretion assess the costs of such hearing or depositions, including reasonable attorney fees, against the party who refused the stipulation.

N.C.I.C. Rule 612(2). In the present case, Defendant refused to stipulate to any evidence, including Plaintiff's medical records. At the hearing on 9 May 2005, the deputy commissioner held the record open "to allow the parties to submit additional evidence by post-hearing depositions." Plaintiff subsequently introduced the medical records through Dr. Peck at his deposition on 13 September 2005. Given the different rules and procedures under which the Commission conducts its proceedings, Defendant's reliance on Rule 602 of the North Carolina Rules of Evidence to support his contention that "a deposition is not a means by which Plaintiff's counsel may introduce evidence into the record previously objected to by the Defendant" is misplaced.

Defendant further argues that the medical records were not properly authenticated pursuant to Rule 901 of the North Carolina Rules of Evidence, nor were they self-authenticating pursuant to Rule 902, and that "[w]ithout any evidence indicating that the alleged statements made by the Plaintiff to his attending physicians were translated into English, their authenticity and credibility are seriously undermined." Defendant again attempts to bind the Commission to

rules of evidence not required to be followed in Commission proceedings. Furthermore, the medical records are replete with documentation of the Spanish interpreters used to interpret Plaintiff's statements to the physicians and the physicians' statements to Plaintiff. For the foregoing reasons, Defendant's assignment of error challenging the Commission's admission of Plaintiff's medical records is overruled.

Defendant next argues that the Commission erred in admitting into evidence the deposition testimony of Dr. Peck. Defendant contends that without the admission of Plaintiff's medical records, Dr. Peck's testimony is irrelevant. However, as we have determined that the medical records were properly before the Commission, Dr. Peck's testimony was relevant and Defendant's assignment of error is overruled. Defendant further asserts that Dr. Peck's deposition testimony is limited by hearsay rules and that "all statements made by Dr. Peck referring to the cause of the Plaintiff's injuries should be deemed inadmissible."

The well founded common law rule excluding hearsay evidence is not followed so strictly in compensation procedure, though the courts will not permit an award to stand which is based on hearsay evidence uncorroborated by facts and circumstances of other evidence. . . . Where hearsay evidence has been admitted, an award will not be reversed where competent evidence on the same issue has been received but hearsay evidence uncorroborated by circumstantial evidence will not sustain an appeal. *Maley*, 214 N.C. at 594, 200 S.E. at 441 (quotation marks and citations omitted). Here, Plaintiff directly testified to the cause of his injuries, stating, "I was working on three wreckers, the ones that lift up the cars. I was cutting a metal piece at that time. . . . I felt an explosion. . . . I looked at my face in the mirror of the wrecker, and then I went inside." This statement corroborates Dr. Peck's statement that "patient was cutting metal at work, working on a truck. He was heating the metal to cut it when hot

hydraulic oil spilled out of the piece in question, splashing him on his face and arms.” Accordingly, the Commission did not err in allowing Dr. Peck’s deposition testimony into evidence.[**Note 1**]

Defendant next asserts that the Commission erred in concluding that Defendant defended this claim without reasonable ground. “In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. ‘The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.’” *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422 (1998) (quoting *Sparks v. Mountain Breeze Rest.*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)). “[A]n employer with legitimate doubt regarding the employee’s credibility, based on substantial evidence of conduct by the employee inconsistent with his alleged claim” is acting with reasonable ground in defending a hearing. *Sparks*, 55 N.C. App. at 664, 286 S.E.2d at 576. “Whether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*.” *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

In *Sparks*, this Court concluded that defendants had ample basis for defending plaintiff’s claim on the ground of the credibility of plaintiff’s assertions where the evidence tended to show the following:

There were no eyewitnesses to the alleged accident. Plaintiff did not advise defendants thereof on the date of the occurrence. He continued to work for the remainder of that day without telling his employers or fellow employees of his injury. He rode home with one of the employers that evening, and the employer could not recall his mentioning any pain or soreness in his back at that time. Two evenings later plaintiff called this employer, indicated that he was at the Dollar Store where “they had Bic pens on sale,” and

inquired whether the employer wanted him to purchase some for the restaurant. He also told the employer to have him picked up the next morning. None of the employers could recall any notification regarding the alleged accident until receipt of a letter from the Industrial Commission about 30 August 1980, some nineteen days later.

*Sparks*, 55 N.C. App. at 664-65, 286 S.E.2d at 576. The Court found that this was “substantial evidence of conduct by plaintiff inconsistent with his alleged claim.” *Id.* at 665, 286 S.E.2d at 576. Even though plaintiff was ultimately awarded compensation, “[g]iven this evidence, an award of compensation was not compelled; and defendants’ concerns regarding plaintiff’s credibility were not without reason.” *Id.*

In stark contrast to *Sparks*, the uncontradicted evidence in this case tends to show the following: Plaintiff was working on three wreckers for Defendant when he felt an explosion. When he saw his face in the mirror of one of the wreckers, he went into Defendant’s office. Plaintiff advised the president and owner of Defendant, Plaintiff’s supervisor, immediately of his injury and, at his supervisor’s direction, Plaintiff was taken to the emergency room by a co-employee. Plaintiff received first aid at Durham Regional Hospital and was then transferred by ambulance to UNC Hospitals in Chapel Hill. He was admitted to the hospital for five days to treat his burns. Upon release from the hospital, Plaintiff continued to seek medical treatment for his injuries.

While Defendant claims that “[c]redibility of the witnesses was a key aspect of this matter[,]” Defendant offered no evidence to impeach Plaintiff’s or any other witness’s credibility, offered no evidence to contradict Plaintiff’s or any other witness’s testimony, did not attend the depositions of Plaintiff or Dr. Peck, and did not attempt to cross-examine Plaintiff or Dr. Peck at any time. In fact, Defendant made no attempt to offer any evidence whatsoever. The uncontested evidence before the Commission reveals no conduct by Plaintiff inconsistent with

his claim. Thus, Defendant's defense of this claim could not have been based in reason and could only have been based in stubborn, unfounded litigiousness. We conclude that this assignment of error is without merit and, thus, overrule it.

Defendant next asserts that the Commission erred in denying Defendant's motion for a mistrial and for the recusal of Deputy Commissioner Hall. Industrial Commission Rule 615, entitled "Disqualification of a Commissioner or Deputy Commissioner," provides: "In their discretion, Commissioners or Deputy Commissioners may recuse themselves from the hearing of any case before the Industrial Commission. For good cause shown, a majority of the Full Commission may remove a Commissioner or Deputy Commissioner from hearing a case." N.C.I.C. Rule 615.

At the 9 May 2005 hearing, defense counsel asked Deputy Commissioner Hall to declare a mistrial and to consider recusing himself because Defendant alleged that Deputy Commissioner Hall's disparaging remarks demonstrated a bias against defense counsel. Deputy Commissioner Hall denied the motions.

Having carefully reviewed the record in this case, we hold that Deputy Commissioner Hall did not abuse his discretion in denying Defendant's motions, and that it was not error for the Full Commission to affirm the deputy commissioner's denial of the motions as good cause was not shown. Deputy Commissioner Hall allowed the testimony of all witnesses at the 9 May 2005 hearing and allowed both parties 161 days after the hearing to submit additional evidence. Defendant has not argued that Defendant was denied the opportunity to present evidence, although Defendant presented none. Furthermore, as the ultimate fact-finding authority is placed with the Full Commission, not the hearing officer, N.C. Gen. Stat. §97-85 (2005), and "[i]t is the Commission that ultimately determines credibility, whether from a cold record or from live

testimony,” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998), *reh’g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999), Defendant has failed to show how Deputy Commissioner Hall’s comments prejudiced his case. The Commission or any member thereof has the power to preserve order at hearings, N.C. Gen. Stat. §97-80 (2005), and Deputy Commissioner Hall acted well within his statutory authority to preserve order and to “get [the] record completed as best” he could, given the obviously tense and contentious environment extant during the proceedings.

Citing *State v. Fie*, 320 N.C. 626, 359 S.E.2d 774 (1987), Defendant states that “a party has a right to be tried before a judge whose impartiality cannot be reasonably questioned[.]” *id.* at 627, 359 S.E.2d at 775, and that on the motion of any party, a judge should disqualify himself in a proceeding in which his impartiality may be reasonably questioned, including but not limited to instances where he has a personal bias or prejudice concerning a party. However, in *Fie*, the Court relied on the Code of Judicial Conduct and N.C. Gen. Stat. §15A-1223 in determining the standard to be applied when a defendant in a criminal case makes a motion that a judge be recused. Such standard is not applicable in the case *sub judice*. Accordingly, Defendant’s assignment of error is without merit and is overruled.

By Defendant’s next three assignments of error, he contends there is no competent evidence to support three of the Commission’s findings of fact because the sole basis for these findings stems from Plaintiff’s deposition, which Defendant argues was inadmissible. Because we conclude that Plaintiff’s deposition was properly admitted into evidence, we find sufficient evidence to support the challenged findings of fact and, thus, overrule Defendant’s assignments of error asserting this argument.

In Defendant’s final assignment of error, he contends that there is insufficient evidence to support the Commission’s finding of fact that states: “As observed at the hearing before the Full

Commission, [P]laintiff has a thick scar on his left lower lip, near the corner of his mouth and scarring on his neck and left arm. . . .” Defendant argues that Plaintiff could not have appeared before the Full Commission at the hearing because it is undisputed that he was in Honduras at the time of the hearing. However, this finding is not crucial to the determination as the Full Commission did not award compensation based on Plaintiff’s disfigurement, finding that “[P]laintiff’s scarring does not warrant an award for disfigurement, as it does not rise to the level of being so serious that it hampers or handicaps [] [P]laintiff in his earnings or in securing employment.” Thus, without the questioned finding of fact, the same result would have been obtained. We therefore consider any error in the finding to be nonprejudicial. *Atwater v. Radio Station WJRI, Inc.*, 28 N.C.App. 397, 221 S.E.2d 88 (1976).[Note 2] Defendant’s assignment of error is overruled.

For the aforementioned reasons, the Opinion and Award of the Full Commission is

AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).

#### **NOTES**

1. Defense counsel did not attend Dr. Peck’s deposition, thereby foregoing the opportunity to cross-examine him on the challenges to his testimony which defense counsel now argues on appeal; nor did Defendant offer any independent medical testimony in support of its position.

2. Furthermore, the Commission had the opportunity to observe Plaintiff’s thick scar on his lower lip and the scarring on his neck and left arm in the photographs of Plaintiff that were entered into evidence. As this is competent evidence to support the Commission’s finding, the finding is binding on appeal.