NO. COA09-435

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

TARA R. STOTTLEMYER,
Employee, Plaintiff,

v.

CITY OF CHARLOTTE,
Employer, Defendant.

North Carolina
Industrial Commission
No. 514648

Appeal by defendant from opinion and award entered 6 January 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 October 2009.

The Roberts Law Firm, P.A., by D. Brad Collins and Joseph B. Roberts, III, for plaintiff-appellee.

Jones Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant City of Charlotte appeals from the Industrial Commission's opinion and award concluding that plaintiff Tara R. Stottlemyer is temporarily totally disabled and awarding her benefits. The City primarily argues that plaintiff failed to present sufficient evidence of her disability to support the Commission's determination of disability, and that, in any event, it rebutted plaintiff's evidence by showing that alternative suitable employment was available to plaintiff. We conclude, however, that there is sufficient evidence to support the

Commission's conclusions that plaintiff established her disability and that the City failed to rebut her evidence. We, therefore, affirm the Commission's opinion and award.

Facts

Plaintiff is currently 39 years old. She graduated from college in May 1991, began employment for defendant as a police officer in July 1991, and graduated from the police academy in November 1991. Plaintiff worked as a community police officer with the Charlotte-Mecklenburg Police Department until 10 March 2005, when she injured her back. While preparing to transport a suspect to jail, plaintiff reached over the backseat of the suspect's car to retrieve the suspect's prescription medication. As she was getting out of the backseat of the car, plaintiff felt a "pop" in her back. After finishing the call, plaintiff went home because her back was not "feeling a hundred percent."

Plaintiff went to see Dr. David Marshall Peterson, who diagnosed her with a muscular back strain and wrote her out of work until 29 March 2005. Dr. Peterson also ordered a modified work duty consisting of no patrol duty. He also referred plaintiff for physical therapy.

Plaintiff remained out of work from 11 March 2005 through 29 March 2005. The City admitted that the 10 March 2005 injury was compensable, and when she returned to work, the City assigned her to a position in which she investigated fraud cases but did not have to go out into the field. In the modified position, the City accommodated plaintiff's work restrictions, allowing her to sit and

stand as needed and to use gym mats to stretch out her back when she experienced pain. The City also permitted her to work half days on days on which she had physical therapy appointments.

Plaintiff returned to Dr. Peterson on 18 July 2005, complaining of lower back pain. Dr. Peterson referred plaintiff to Dr. Eric Brian Laxer, an orthopaedist, who first saw her on 1 August 2005. Dr. Laxer diagnosed plaintiff with a lumbar strain and continued plaintiff on light-duty work restrictions. An MRI was taken of plaintiff's back, which showed degenerative changes with an annular tear at the L4-L5 level of her spine. Dr. Laxer believed that the 10 March 2005 work injury caused this condition as well as her back pain. Plaintiff returned to Dr. Laxer on 12 December 2005, reporting intensified lower back pain that was aggravated by sitting, standing, or walking.

On 19 June 2006, Dr. Laxer determined that plaintiff had reached maximum medical improvement with respect to the 10 March 2005 injury, and assigned a 7.5% permanent partial disability rating to her back. Dr. Laxer also assigned plaintiff permanent work restrictions consisting of sitting and standing as needed, lifting no more than 15 pounds, and avoiding situations potentially involving physical altercations, including car patrol duty. These restrictions prevented plaintiff from returning to work as a police officer with the City and Dr. Laxer believed that she would be unable to perform the essential job functions of a police officer.

Plaintiff also began treatment with her longtime primary care physician, Dr. Wesley Lee Marquand, for complaints of depression.

Although Dr. Marquand had previously treated plaintiff for post-traumatic stress disorder, after witnessing two fellow police officers die in the line of duty, Dr. Marquand had not diagnosed plaintiff with depression at that time. On 11 November 2005, Dr. Marquand diagnosed plaintiff with manic depression. Dr. Marquand also treated plaintiff for back pain, and, on 28 August 2006, diagnosed plaintiff with chronic lower back pain, believing it to be caused by the 10 March 2005 work injury.

Plaintiff was seen by a psychologist, Dr. Brian A. Simpson, on 29 June 2007. Based on his evaluation, Dr. Simpson believed that plaintiff's manic depression was the result of her loss of employment, diminished functional capacity, and chronic lower back pain. At the City's request, plaintiff was also seen by psychiatrist Dr. Gerald Martin Aronoff. Based on his evaluation, Dr. Aronoff believed that plaintiff was only "mildly depressed" and did not require any medication for her lower back pain or depression; that neither her lower back nor her depression prevented her from engaging in full-time employment; that plaintiff was never incapable of full-time employment; and, that she did not need any further medical treatment for her back pain or her depression.

Sometime after she reached maximum medical improvement and was assigned permanent work restrictions by Dr. Laxer, plaintiff met with Melinda File Daniel, plaintiff's claims manager in the City's Human Resources Department. Ms. Daniel provided plaintiff with a list of vacant employment positions with the City. The job

descriptions for these positions, however, were not provided to plaintiff or her treating physicians and it was not determined whether these positions were compatible with plaintiff's work restrictions. After a month with no response from the City regarding future employment, plaintiff applied for disability benefits through the State's disability program. Plaintiff began receiving disability benefits on 7 November 2006 and retired through the disability program on 30 November 2006.

The deputy commissioner conducted a hearing on 13 November 2007, at which plaintiff testified about her lower back pain, stating: "Some days I wake up, and I'm level two [out of 10], and I'm happy go lucky, and some days I wake up, I'm six, seven, eight, and ready to be sitting in my massage chair, and eat ice, and taking medicine." Plaintiff also explained that the pain in her back often "hurts so bad" that she loses her balance and falls.

In an opinion and award entered 2 June 2008, the deputy commissioner awarded plaintiff temporary total disability benefits. The City appealed to the Full Commission, which entered an opinion and award on 6 January 2009, affirming the deputy commissioner's decision with minor modifications. Based on plaintiff's testimony regarding her pain and Dr. Marquand's deposition testimony that the frequent but unpredictable "periodicity" of plaintiff's pain would prevent her from obtaining any employment, the Commission determined that plaintiff was incapable of earning wages in any employment. The Commission further concluded that it would be futile for plaintiff to seek employment, "considering her physical

limitations on her activities due to her chronic lower back pain, her psychological condition, as well as the fact that her prior work history and training is related to being a police officer, which she can no longer do." The Commission also determined that the City had failed to show the availability of suitable employment and that plaintiff was capable of obtaining employment. Thus the Commission held that plaintiff was entitled to temporary total disability benefits. The City appealed to this Court.

Discussion

The City contends that there is insufficient evidence to support the Commission's conclusion that plaintiff is entitled to temporary total disability benefits. The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is limited to determining "(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." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). As the "Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,]" *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), its findings are conclusive and binding on appeal "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, . . . even though there is evidence that would have supported a finding to the contrary[,]'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140,

144, 266 S.E.2d 760, 762 (1980)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). The Commission's findings may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). The Commission's conclusions of law, however, are reviewed de novo on appeal. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

To "obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his [or her] disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). To support a conclusion of disability, the plaintiff must show that he or she is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment, and that the incapacity to earn is caused by plaintiff's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff may prove this incapacity in one of four ways: (1) the production of medical evidence that the plaintiff, as a consequence of the work-related injury, is physically or mentally incapable of work in any employment; (2) the production of evidence that the plaintiff is capable of some work, but that the plaintiff has, after a reasonable effort, been unsuccessful in obtaining employment; (3) the production of evidence that the plaintiff is capable of some work but that it would be futile because of preexisting conditions, such as age, inexperience, lack of education, to seek other employment; or (4) the production of

evidence that the plaintiff has obtained other employment at a wage less than that earned prior to the injury. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

The Commission concluded that plaintiff had proven disability under both the first and third prongs of *Russell*. The City contends that there is no competent evidence to support the Commission's determination that plaintiff satisfied her burden of proving disability under either prong.

In determining if plaintiff has met the burden of proving loss of wage earning capacity under *Russell's* first prong, "the Commission must consider not only the plaintiff's physical limitations, but also [plaintiff's] testimony as to his [or her] pain in determining the extent of incapacity to work and earn wages such pain might cause." *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000), *cert. denied*, 353 N.C. 398, 548 S.E.2d 159 (2001). "[M]edical evidence that a plaintiff suffers from genuine pain as a result of a physical injury, combined with the plaintiff's own credible testimony that [the] pain is so severe that [plaintiff] is unable to work, may be sufficient to support a conclusion of total disability by the Commission." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 8, 562 S.E.2d 434, 440 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003).

With respect to *Russell's* first method of proving disability, the Commission found:

> Plaintiff testified that she has lower back pain on a daily basis. Plaintiff's lower back pain fluctuates widely in degree and intensity on a weekly and even daily basis, but there is no day when she is without pain. Sometimes the pain radiates down Plaintiff's leg and is so severe that she losses her balance and falls. The pain also interferes with Plaintiff's sleep. Plaintiff testified that some days her pain is relatively manageable at "a level two out of ten and I'm happy go lucky, and some days I wake up, I'm six, seven, eight, and ready to be sitting in my massage chair, and eat ice, and taking medicine." Driving a car significantly aggravates Plaintiff's lower back pain and precludes her from driving distances of more than 40 miles round trip on a regular basis. The Full Commission finds Plaintiff's testimony regarding her chronic lower back pain to be credible.

(Alterations omitted.) Although the City assigned error to this finding on the basis that it is "unsupported by the evidence," the City fails to make any argument challenging the sufficiency of the evidence supporting this finding. The underlying assignment of error is thus deemed abandoned and the finding is binding on appeal. *See Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 402 n.2, 653 S.E.2d 181, 184 n.2 (2007) (deeming abandoned assignment of error that was referenced in brief but not specifically argued), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008).

As for the medical evidence addressing disability, the Commission's unchallenged findings establish that Dr. Laxer diagnosed plaintiff with "degenerative changes with an annular tear at the L4-L5 level of the spine" and that Dr. Marquand diagnosed her with chronic lower back pain related to her March 10, 2005 work injury." In another unchallenged finding, the Commission

incorporated Dr. Laxer's medical opinion that plaintiff had reached maximum medical improvement on 19 June 2006 and assigned her a 7.5% disability rating to her back. Dr. Laxer also imposed permanent work restrictions consisting of sitting or standing as needed to relieve plaintiff's lower back pain, lifting not more than 15 pounds, and avoiding situations involving possible altercations with suspects. These restrictions, the Commission found, effectively prevented plaintiff from serving as a police officer based on Dr. Laxer's evaluation of the essential job functions.

In addition, Dr. Marquand explained in his deposition that plaintiff's

> problem currently is the periodicity of her pain. When it exacerbates and get[s] worse she is pretty much bedridden for several hours at a time throughout the day. That's unpredictable but it's frequent enough that it would cause problems with any employer as far as having a reliable employment five days a week for eight hours a day. I think if she were to try to find gainful employment full-time an employer would be quickly fed up with her absences due to her back pains and find reason to separate her.

The Commission incorporated this testimony into its findings of fact addressing plaintiff's disability under *Russell's* first prong.

The evidence in the record, including the medical evidence, and the Commission's unchallenged findings are sufficient to support its determination that plaintiff proved disability under *Russell's* first prong. *See Knight*, 149 N.C. App. at 8, 562 S.E.2d at 440 (holding plaintiff had proven disability under *Russell's* first prong where doctor "testified that plaintiff continues to suffer from genuine pain due to his back injury" and "plaintiff

testified that the pain in his lower back and left leg is so severe that, not only is he unable to work in any employment, he is often unable to undertake even simple chores, such as sweeping, for more than thirty minutes"); *Webb*, 141 N.C. App. at 512, 540 S.E.2d at 793-94 (finding sufficient medical evidence to support conclusion of disability where plaintiff testified to degree of back pain and doctor "testified that plaintiff suffered from a herniated disc and a protruding disc in his back and that such an injury was consistent with plaintiff's complaints of pain"). The Commission's findings, in turn, support the corresponding conclusion of law that plaintiff satisfied her initial burden of proving disability under *Russell's* first prong.

The City argues, however, that Dr. Marquand's testimony regarding plaintiff's inability to obtain any gainful employment is incompetent because Dr. Marquand has no "expertise in vocational issues," and "[a]n expert's testimony should be limited to the expert's field of expertise." "The determinative test for the admission of expert testimony is 'whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his [or her] expertise is in a better position to have an opinion on the subject than is the trier of fact.'" *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 245, 335 S.E.2d 327, 331 (1985) (quoting *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978)). However, "[a] medical witness need not, as a matter of law, be a specialist in a

particular subject to give an opinion on it." *Robinson v. J. P. Stevens*, 57 N.C. App. 619, 624, 292 S.E.2d 144, 147 (1982).

This Court has consistently held that medical experts may provide opinion testimony regarding the nature and extent of a plaintiff's disability. *See, e.g., Moody v. Mecklenburg Cty.*, 165 N.C. App. 869, 875, 600 S.E.2d 39, 43 (2004) (concluding plaintiff's neuropsychologist's testimony that plaintiff's "brain injury would '[a]bsolutely' prevent his return to work as a deputy" was sufficient medical evidence to support a finding of disability under *Russell's* first prong); *Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 518, 577 S.E.2d 326, 331 (rejecting argument that psychologist "could not provide competent testimony 'about whether plaintiff could return to work based upon her pain' because he is a psychologist and not a medical doctor"), *disc. review denied*, 357 N.C. 256, 583 S.E.2d 290 (2003); *Grant*, 77 N.C. App. at 246-47, 335 S.E.2d at 331 (concluding family practitioner was qualified to testify regarding "nature and extent of [plaintiff]'s disability" and thus Commission erred in excluding practitioner's opinion that plaintiff was "permanently and totally disabled for any type of gainful employment that would require anything beyond mild exertion").

Moreover, as the Commission's opinion and award explicitly states, it relied on Dr. Marquand's testimony as to the "periodicity" of plaintiff's pain as "corroborat[ion] [of] plaintiff's description of the nature and severity of her pain." This Court has held that the plaintiff's testimony regarding the

plaintiff's pain and its effect on the plaintiff's ability to work is sufficient to support a determination of disability under *Russell's* first method of proof. *See Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 265-66, 423 S.E.2d 532, 536 (1992) ("[T]he Commission, in its proper role as sole judge of the credibility of witnesses, found [plaintiff's] testimony that he was unable to work due to pain more credible than the expert testimony that [plaintiff] was capable of performing medium to light work. Therefore, despite contrary evidence in the record, the medical experts' testimony that [plaintiff] does suffer real pain and [plaintiff's] testimony that the pain is so severe that he is unable to work and earn wages supports the Commission's finding that [plaintiff] is temporarily totally disabled."). Thus, the record evidence and unchallenged findings of the Commission support its conclusion that plaintiff established disability under *Russell's* first prong.

As for *Russell's* third method of proving disability, the plaintiff must produce evidence that the plaintiff is capable of some work but that it would be futile because of preexisting conditions — such as age, inexperience, or lack of education — to seek other employment. 108 N.C. App. at 765, 425 S.E.2d at 457. With respect to this issue, the Commission found that plaintiff is 39 years old. She graduated from college in 1991, and, that same year, entered the police academy, and became a police officer with the City. After her work-related injury, plaintiff's doctor determined that she reached maximum medical improvement on 19 June

2006 and assigned a 7.5% permanent partial disability rating to plaintiff's lower back. As addressed above, the Commission's finding that the "periodicity" of plaintiff's lower back pain would prevent her from working eight hours a day, five days a week, is supported by plaintiff's and Dr. Marquand's testimony.

The Commission also noted that plaintiff's doctor's permanent work restrictions consisted of sitting and standing as needed, lifting no more than 15 pounds, and avoiding physical altercations, which effectively precluded plaintiff from working as a police officer with the City. The Commission further found: "Driving a car significantly aggravates Plaintiff's lower back pain and precludes her from driving distances of more than 40 miles round trip on a regular basis." These unchallenged findings support the Commission's ultimate finding on the issue:

> It would be futile for Plaintiff to seek employment on her own, despite her relatively young age and advanced education, without such assistance, considering her physical limitations on her activities due to her chronic lower back pain, her psychological condition, as well as the fact that her prior work history and training is related to being a police officer, which she can no longer do.

These findings support the Commission's conclusion that plaintiff "satisf[ied] prong three (3) of *Russell* by the production of evidence that even if she is capable of some work, it would be futile, under the circumstances, to seek other employment."

The City next argues that even if plaintiff proved that she is incapable of earning wages under *Russell*, it rebutted her evidence by presenting its own evidence that suitable employment was

available and that plaintiff could have obtained such employment. Where, as here, "an employee presents substantial evidence he or she is incapable of earning wages, the employer must then 'come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.'" *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 435, 517 S.E.2d 914, 920 (1999) (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). A "suitable" job is one the plaintiff is capable of performing considering the plaintiff's "age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). The plaintiff is "capable of getting" a job if there is a reasonable likelihood that the plaintiff would be hired if the plaintiff diligently sought the job. *Id.* at 73-74, 441 S.E.2d at 149. The burden is on the employer to show that the plaintiff refused suitable employment, and once the employer establishes that the plaintiff was offered suitable work, the burden shifts to the plaintiff to show that the employee's refusal was justified. *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 82, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 599 (2007).

On this issue, the Commission made the following findings:

> 18. Plaintiff met with Ms. Melinda File Daniel, Defendant's claims manager assigned to her claim, sometime after she reached maximum medical improvement and Dr. Laxer assigned the permanent work restrictions which precluded her from working as a police officer for

Defendant. Ms. Daniel provided Plaintiff with a copy of a printout listing vacant employment positions with Defendant. At no time did either Ms. Daniel or any other agent of Defendant attempt to provide any vocational rehabilitation assistance to Plaintiff, or make any other attempts to assist Plaintiff in finding suitable employment once she reached maximum medical improvement and received her permanent work restrictions. Neither Ms. Daniel nor any other agent of Defendant provided Plaintiff or any of her treating physicians with any specific job descriptions to determine whether any of the vacant employment positions on the printout provided to Plaintiff were within Plaintiff's permanent work restrictions. After waiting for more than a month and not receiving communication from Defendant regarding future employment prospects, Plaintiff applied for disability benefits provided by the North Carolina State Disability program that covers Defendant's employees, believing this was her only viable option.

19. On November 7, 2006, Plaintiff began to receive disability benefits provided by the North Carolina State Disability program that covers Defendant's employees. On November 30, 2006, Plaintiff retired pursuant to the North Carolina State Disability program. Dr. Laxer completed the paperwork required by the North Carolina State Disability program on August 25, 2006 and on September 20, 2007. Plaintiff continues to receive disability benefits pursuant to the North Carolina State Disability program as a result of her March 10, 2005 work injury and the resultant permanent work restrictions.

. . . .

21. The Full Commission further finds, based upon the greater weight of the evidence, that even if Plaintiff is capable of some work, she would need vocational rehabilitation assistance and probably job re-training, neither of which Defendant provided. It would be futile for Plaintiff to seek employment on her own, despite her relatively young age and advanced education, without such assistance, considering her physical limitations on her

> activities due to her chronic lower back pain, her psychological condition, as well as the fact that her prior work history and training is related to being a police officer, which she can no longer do. Further, based upon the the greater weight of the evidence and reasonable inferences that may be drawn therefrom, it is apparent that Plaintiff wants to work, and despite her pain, demonstrated that she was willing to make the effort to go to work and perform to the best of her ability the make-work duties that Defendant provided to her.
>
> 22. Since Plaintiff's March 10, 2005 work injury, she remains incapable of earning wages in the competitive job market. Plaintiff's attempt to return to work performing her regular duties was unsuccessful. Thereafter, Defendant assigned Plaintiff light-duty tasks that constituted make work; however, she continued to receive her pre-injury wage until November 20, 2006. The Full Commission finds, based upon the greater weight of the evidence, that there is insufficient evidence to establish that Plaintiff refused suitable employment sufficient to suspend her entitlement to temporary total disability compensation, or that her choice of disability retirement constituted a constructive refusal of suitable employment.

The City claims that Stephanie Whitesides, from its Human Resources Department, identified at the hearing before the deputy commissioner "several employment positions within the City of Charlotte which would allow the plaintiff to sit and stand as needed, did not involve lifting more than 15 pounds and did not involve the potential physical altercation required of police officers." Notably, the City does not point to any specific place in the record in support of this contention. Review of Ms. Whitesides' testimony indicates that the City failed to produce

evidence of suitable employment for plaintiff, and, therefore, did not rebut plaintiff's evidence of loss of wage-earning capacity.

Ms. Whitesides testified that she knew of four positions with the City — a code enforcement officer, a customer service representative, a customer revenue service position, and a police tele-communicator — that accommodate plaintiff's permanent work restrictions. She stated, however, that she found these job descriptions two weeks prior to the hearing for purposes of the litigation and that they had not been provided to plaintiff or the City's counsel prior to the hearing. She also explained that she did not know if any of the positions were available in 2006, but the police tele-communicator and customer service representative positions "probably" were.

In light of Ms. Whitesides' testimony, there is competent evidence in the record supporting the Commission's finding and conclusion that the City failed to prove that suitable employment was available for plaintiff. Although Ms. Whitesides' testimony might have been sufficient to support a contrary finding, the Commission was entitled as the fact-finder to accord her testimony little or no weight, as it apparently did here. *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. Thus the Commission's opinion and award is affirmed.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).