

Affirmed  
Chair, Bullance  
Concurring, Bolch

NO. COA99-1515

NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 2001

ELLEN K. RENFRO,  
Employee,  
Plaintiff

v.

From the North Carolina  
Industrial Commission  
I.C. No. 640967

YANCEY NURSING CENTER,  
Employer,

SELF-INSURED (KEY RISK MANAGEMENT  
SERVICES, INC., SERVICING AGENT),  
Defendants

Appeal by defendants from Opinion and Award entered 30  
September 1999 by the North Carolina Industrial Commission. Heard  
in the Court of Appeals 12 February 2001.

*Roberts & Stevens, P.A., by Steven W. Sizemore, for plaintiff-appellee.*

*Gene Thomas Leicht, for defendant-appellant.*

CAMPBELL, Judge.

Yancey Nursing Center ("defendant-employer") and its insurance servicing agent, Key Risk Management Services, Inc., (collectively, "defendants") appeal from an opinion and award of the North Carolina Industrial Commission ("Full Commission") ordering defendants to pay Ellen K. Renfro ("plaintiff") temporary total disability compensation from 27 August 1996 and "continuing until plaintiff returns to work earning the same or greater wages or until further Order of the Industrial Commission." In its opinion and award, the

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Full Commission concluded that plaintiff's refusal to accept the light duty employment offered by defendant was justified. On appeal, defendant assigns as error: (1) the Full Commission's findings of fact, conclusions of law, and award, and (2) the Full Commission's alleged failure to review the evidence and determine the facts. Having carefully examined the record and briefs, we affirm the Full Commission's opinion and award. Plaintiff sustained an injury to her back on 5 May 1996 while employed as a Certified Nursing Assistant (CNA) at defendant-employer's nursing center. Plaintiff and her CNA partner were assisting a patient from the commode to a chair when the patient fell, causing plaintiff to fall as well. Plaintiff immediately felt a burning sensation in her lower back, with pain running into her left leg. Plaintiff reported the injury to the charge nurse, and continued to work the remainder of her shift.

Plaintiff initially sought treatment for her back from Dr. Richard Walton on 8 May 1996. Dr. Walton recommended conservative treatment and authorized plaintiff to return to limited duty work as of 9 May 1996, approving 27 of 31 job assignments necessary to the operation of defendant-employer's nursing center which were considered light duty or sedentary in nature. Plaintiff worked at a restricted level until she was taken out of work on 31 May 1996. On 4 June 1996, plaintiff was diagnosed as suffering from a lower back strain with a possible herniated disc, and was ordered to undergo an MRI. Plaintiff underwent an MRI on 10 June 1996, which revealed a mild central posterior disc protrusion and a mild

bilateral facet hypertrophy at the T12-L1 level, as well as a right posterior disc protrusion, degenerative changes, and mild spinal stenosis at the L1-L2 level. On 25 June 1996, plaintiff was examined by Dr. Donald Mullis, who found plaintiff having difficulty straightening and extending her back, and complaining of back pain, left buttock pain, and posterolateral thigh and calf pain.

On 26 June 1996, defendants admitted liability and plaintiff's right to compensation by filing Industrial Commission Form 60, "Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)." The Form 60 provided that defendants agreed to compensate plaintiff \$224.60 per week for temporary total disability beginning 31 May 1996, and continuing for the number of weeks of her total disability.

On 2 August 1996, Dr. Mullis diagnosed plaintiff as suffering from a lumbar strain related to her on-the-job injury, and continued her time out of work for two weeks. Dr. Mullis also recommended a lumbar CT scan to rule out a left-side disc herniation at the L4-L5 or L5-S1 level. The CT scan was performed, showing moderate spinal stenosis at the L1-L2 level, but no disc herniation. Dr. Mullis recommended continued anti-inflammatory medication and physical therapy.

Dr. Mullis again examined plaintiff on 16 August 1996, and found that her condition had improved. Consequently, Dr. Mullis advised plaintiff to return to work in a light duty capacity, with restrictions prohibiting plaintiff from lifting objects greater

than five pounds, and prohibiting plaintiff from stooping, squatting, or bending. These restrictions were to remain in place for four weeks, at which time Dr. Mullis wished to reexamine plaintiff.

On 20 August 1996, plaintiff presented Dr. Mullis with a light duty job description from defendant-employer for his approval. After reviewing the job description, Dr. Mullis authorized plaintiff to perform the following job assignments:

- 1) Shaves-Males and females as deemed necessary.
- 2) Nails-Cut and clean. Report any unusual circumstances to Charge Nurse.
- 3) Ice-Pass ice to SNF (Skilled Nursing Facility) once per shift.
- 4) SNF-Supervise residents in main dayroom.
- 5) Attend to dining room duty assisting residents with meal times.
- 6) Nourishments-Pass nourishments to designated residents and assist accordingly.
- 7) And duties as assigned by DON/ADON/Charge Nurse that fall within job descriptions.

Dr. Mullis superimposed on these job duties his earlier restrictions against lifting more than five pounds, stooping, squatting, or bending. On 12 September 1996, plaintiff was once again examined by Dr. Mullis, who determined that plaintiff had reached maximum medical improvement. Dr. Mullis gave plaintiff a ten percent permanent disability rating to her back, and imposed a permanent restriction of lifting no more than 15 pounds with no repetitive stooping, squatting or bending.

On or about 12 September 1996, defendant-employer offered plaintiff the light duty job previously approved by Dr. Mullis. Plaintiff refused the light duty job based on her belief that she was not physically capable of performing the work, and her fear that she would reinjure herself or injure a patient attempting to perform her duties. On or about 20 February 1997, defendants filed a Form 24 Application to Terminate Payment of Compensation, on the grounds that plaintiff had unjustifiably refused suitable employment. After an informal telephonic hearing, the special deputy commissioner entered an administrative decision and order on 21 April 1997 granting defendants' Form 24 application. Defendants were permitted to suspend payment of compensation to plaintiff beginning 27 August 1996, and continuing until plaintiff's refusal to return to suitable employment ceased. Plaintiff requested a formal hearing.

This case was heard before Deputy Commissioner Mary Moore Hoag on 27 April 1998. The parties presented evidence at the hearing, and later submitted depositions and medical records that became part of the record. On 25 November 1998, the deputy commissioner issued an opinion and award reversing the earlier administrative decision and order and, *inter alia*, reinstating compensation benefits for temporary total disability from 27 August 1996 and continuing "until plaintiff returns to work earning the same of greater wages or until further Order of the Industrial Commission." The deputy commissioner further found in her opinion and award that plaintiff's refusal to accept the employment offered by defendant-

employer was justified. The Industrial Commission affirmed the deputy commissioner's award on 30 September 1999. Defendants appeal from the opinion and award of the Full Commission.

I.

As a preliminary matter, we note that defendants' brief violates Rule 26(g) of the North Carolina Rules of Appellate Procedure, in that it contains more than sixty-five (65) characters and spaces per line. See N.C.R. App. P. 26(g); *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996). Further, defendants' brief does not comport to Rule 28(b) in that it does not contain references to the assignments of error upon which defendants' asserted issues and arguments are based. See N.C.R. App. P. 28(b); *Steingrass v. Steingrass*, 350 N.C. 64, 511 S.E.2d 298 (1999).

In light of the steady increase in appeals filed with this Court each year, we are particularly concerned with appellate rules violations. Accordingly, we remind our colleagues in the Bar of the importance of adhering to our appellate rules. See *Howell v. Morton*, 131 N.C. App. 626, 629, 508 S.E.2d 804, 806 (1998). These rules "prevent unfair advantage to any litigant" and insure a level playing field for all parties on appeal. *Lewis*, 122 N.C. App. at 147, 468 S.E.2d at 273.

In the instant case, the violations of the rules subject defendants' appeal to dismissal. *Howell*, 131 N.C. App. 626, 508 S.E.2d 804. Nevertheless, we elect to exercise our discretion pursuant to N.C.R. App. P. 2 to consider the merits of this appeal.

II.

Defendants assign error to several of the Full Commission's findings of fact, its conclusions of law, and its award. After a careful review of the evidence, we find that competent evidence supports the Full Commission's findings, and these findings support its conclusions of law and its award. Therefore, we reject these assignments of error.

"In workers' compensation cases the Industrial Commission is the fact-finding body." *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997). The standard of appellate review of an opinion and award of the Industrial Commission is (1) whether there is any competent evidence of record to support the Commission's factual findings and (2) whether those findings, in turn, provide support for the Commission's conclusions of law. *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 514 S.E.2d 517 (1999). To that end, the Commission's findings of fact are binding on the reviewing court if the record contains any competent evidence in their support, even when the record offers evidence that would support contrary findings. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). "In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997).

Specifically, defendants assign error to the following findings of fact regarding plaintiff's physical ability to perform the light duty job offered her by defendant-employer:

25. Plaintiff refused the light duty job because she had both performed the tasks identified on the light duty job description and had observed them being performed. She was aware of the physical requirements of these tasks and was certain she was physically incapable of performing them.

26. Plaintiff was unable to shave the patients and cut their nails because the patients often struggled with the nurse attempting to perform these duties and she was aware she would not be able to perform these tasks without re-injuring her back and possibly injuring the patients. Shaving patients often required bending and twisting in order to get into a position to perform the task.

27. Plaintiff was unable to perform the task of passing ice to the patients because it required the scooping of ice from a bin into a container on a rolling cart, pushing the cart down a hall, stopping at each patient's room, retrieving the patient's ice bucket, stooping or squatting down to the ice container on the cart, scooping ice into the bucket, standing from the stooped position, and returning the filled bucket to the patient's room. The Full Commission defers to the Deputy Commissioner's finding that plaintiff would have to stoop or squat in performing the duties of "passing ice" to the residents as the Deputy Commissioner was in a better position to determine the height of the ice cart from plaintiff's gestures.

28. Plaintiff was unable to supervise residents in the main day room because this often required moving or straightening patients in their chairs and wheelchairs, which was beyond plaintiff's lifting restrictions.

29. Plaintiff was unable to perform dining room duties because this task required plaintiff to carry trays of food to multiple

residents; these trays of food weighed more than the lifting restrictions imposed by Dr. Mullis.

30. Plaintiff felt she would not be able to work at the Nursing Center within the limitations imposed by Dr. Mullis because the patients all knew her and relied upon her to assist them in manners which would require her to exceed the restrictions imposed by Dr. Mullis subjecting plaintiff to possible re-injury and the residents to injury. Plaintiff explained she would be unable to refuse assistance to one of the patients who requested help from her; and, she feared she would attempt to help the patient, and would either injure herself or the patient because of her physical infirmities.

34. The light duty job offered plaintiff was not suitable employment because plaintiff was unable to perform the job duties due to her pain level and the physical limitations resulting from her compensable injury. Plaintiff's testimony that she knew based on experience she could not perform the job duties of the job offered is accepted as credible and persuasive.

Defendants argue that these findings of fact are not supported by competent evidence in the record, in that they are merely recitations of plaintiff's self-serving declarations that she is not physically able to perform the job assignments approved by Dr. Mullis. We disagree.

We begin by stressing that the Industrial Commission's findings of fact are binding on this Court if the record contains any competent evidence in their support, in spite of the existence of evidence supporting contrary findings. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997). We likewise stress that the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to

their testimony, and the Commission can entirely reject certain testimony if it so chooses. *Lineback*, 126 N.C. App. 678, 486 S.E.2d 252.

During the hearing before the deputy commissioner, plaintiff testified that she had performed all of the individual tasks approved by Dr. Mullis, and in her opinion she was physically unable to perform them within the restrictions imposed by Dr. Mullis. Plaintiff described in detail the characteristics of each separate task, and, as to each, plaintiff testified why it was physically impossible for her to perform the task within Dr. Mullis' restrictions. Further, plaintiff indicated her belief that she would not be able to work at the nursing center within the limitations imposed by Dr. Mullis, because she would be unable to refuse assistance to one of the patients who requested help from her. The deputy commissioner also heard testimony from Winnie Jo Allison, Director of Nursing at Yancey Nursing Center. Ms. Allison testified that the job duties approved by Dr. Mullis could be performed within the restrictions imposed on plaintiff by Dr. Mullis. The deputy commissioner also received into evidence the deposition testimony of Dr. Mullis and Dr. Keith Maxwell, both of whom examined plaintiff. Dr. Mullis testified that he advised plaintiff to return to light duty work within the restrictions he placed on lifting, stooping, squatting, and bending. Dr. Maxwell opined that some of the individual tasks approved by Dr. Mullis could be performed within plaintiff's restrictions. While some of the evidence is contrary to the Full Commission's findings of fact

regarding plaintiff's physical ability to perform the light duty job offered her, the Full Commission, acting within its discretion as the fact-finding body, gave more weight and credibility to the testimony of plaintiff. The Full Commission found that "[p]laintiff's testimony that she knew based on experience she could not perform the job duties of the job offered is accepted as credible and persuasive." We believe the Commission's acceptance and reliance on plaintiff's testimony was properly within its discretion as the fact-finding body. Therefore, we hold that competent evidence in the record supports the Commission's findings of fact concerning plaintiff's physical ability to perform the light duty job offered her by defendant, and, thus, those findings are conclusive on appeal.

Defendants also assign error to the Commission's conclusion of law that plaintiff's refusal to accept the employment offered by defendant was justified. We also disagree with this assignment of error.

"The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). N.C. Gen. Stat. § 97-32 provides that "[i]f an injured employee refuses employment procured for him *suitable to his capacity* he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32 (1999) (emphasis added). Suitable employment has been defined to be any job that a "claimant

is capable of performing considering his 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). In the instant case, the Full Commission made findings of fact supported by competent evidence that plaintiff was physically unable to perform the tasks included in the job offered her by defendants. Therefore, the position offered plaintiff was not "suitable to [her] capacity" within the meaning of G.S. § 97-32. Accordingly, we uphold the Full Commission's conclusion that plaintiff's refusal to accept the employment offered her by defendants was justified.

Defendants also assign error to the Full Commission's finding of fact that the light duty job offered to plaintiff was not a permanent job readily available in the job market, but was instead an accumulation of other employees' job duties that was specifically created as a light duty post to be offered to plaintiff. To the extent that this finding of fact supports the Full Commission's conclusion that plaintiff's refusal of the job was justified, defendants contend that such conclusion is based on a misapprehension of the law. Having already found that plaintiff's refusal of the job offered her by defendants was justified based on competent evidence in the record that plaintiff was physically unable to perform the tasks specifically approved by Dr. Mullis, we need not address this assignment of error.

III.

Defendants' final argument on appeal is that the Full Commission failed to properly review the matter and determine the facts. Specifically, defendant contends the Commission failed to make definitive findings to indicate that it considered and weighed the expert medical testimony and evidence with respect to plaintiff's ability to perform the job offered to her.

While the Full Commission must make "definitive findings to determine the critical issues raised by the evidence," *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980), and in doing so must indicate in its findings that it has "considered or weighed" all testimony with respect to the critical issues in the case, *Lineback*, 126 N.C. App. 678, 681, 486 S.E.2d 252, 254, the Full Commission is not required to "make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62, *disc. review denied*, 349 N.C. 352, 515 S.E.2d 700 (1998). In the instant case, the Full Commission made the definitive finding that plaintiff was physically unable to perform the job offered her by defendants. The findings indicate that the Full Commission, in reaching its determination, considered the expert testimony of Dr. Mullis, as well as the testimony of defendant-employer's Director of Nursing, Winnie Jo Allison. We acknowledge that the evidence reveals some testimony that would

support a finding that plaintiff was physically able to perform the job offered her. We further acknowledge that the Full Commission did not specifically find that it was rejecting the evidence that would support a finding that plaintiff was physically able to perform the job offered her. However, such "negative" findings are not required. *Bryant*, 130 N.C. App. at 139, 502 S.E.2d at 62. Because the Full Commission's findings on the critical issues in this case are supported by some competent evidence in the record, this Court is bound by those findings. Therefore, defendants' final assignment of error is overruled.

For the foregoing reasons, the Industrial Commission's opinion and award is

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

Report per Rule 30(e).