An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-615
NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

CINDI CORY,
Employee,
Plaintiff,

v.

DEBBIE'S STAFFING SERVICES, INC.,
Employer,
WAUSAU INSURANCE COMPANIES,
Carrier,
Defendants.

North Carolina
Industrial Commission
I.C. No. 895393

Appeal by plaintiff from opinion and award entered 30 December 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 October 2010.

Kenneth M. Johnson, P.A., by Kya Johnson, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Matthew J. Ledwith, for defendants-appellees.

GEER, Judge.

Plaintiff Cindi Cory appeals from an opinion and award denying her workers' compensation claim. Plaintiff's arguments emphasizing the deputy commissioner's superior fact-finding ability and highlighting the evidence favorable to plaintiff's position overlook

the established law regarding the Full Commission's paramount fact-finding role and the standard of review of this Court. We, therefore, affirm.

Facts

In its opinion and award, the Commission made the following findings of fact, most of which have not been challenged on appeal. Plaintiff began her employment with defendant Debbie's Staffing Services in approximately October 2007. In February 2008, plaintiff was assigned to after-school tutoring for first and second grade at Washington Elementary School in Greensboro, North Carolina. Her job duties included maintaining order in the classrooms and taking the children to the bathroom.

On 21 February 2008, the last day of plaintiff's assignment at Washington Elementary School, plaintiff returned to her classroom following a general announcement over the loudspeaker that it was time to dismiss the after-school students. Plaintiff claimed that she heard sounds of an altercation coming from the boys' restroom and, upon entry, discovered two students fighting. Plaintiff further alleged that while attempting to break up the fight, she was punched in the right eye and was scratched above her right eyebrow.

In the sole finding of fact specifically challenged on appeal, the Commission found:

> 3. Plaintiff testified that she sent the boys to catch their bus and did not report the incident to either school officials or representatives of defendant-employer. April Durham, an administrative assistant for defendant-employer, spoke with plaintiff on 29 February 2008 and on March 4, 2008. Plaintiff did not report the incident on either occasion. On 22 February 2008, Nicole Horn, a service coordinator for defendant-employer, spoke with plaintiff about another tutoring job. Ms. Horn spoke with plaintiff again on 29 February 2008. Plaintiff did not mention the alleged incident of being punched in the eye while trying to break up a fight on either occasion. On 17 March 2008, plaintiff informed Ms. Horn of the alleged incident. It was not until 19 March 2008 that plaintiff reported the incident to Ms. Durham and Ms. Horn.

On 26 February 2008, plaintiff saw her primary care physician, Dr. Michael Norins, because she had a swollen right eye. Plaintiff reported a 36 to 48 hour history of sudden onset of painful swelling around the right periorbital region. Plaintiff did not indicate to Dr. Norins why her eye was swollen. In examining plaintiff, Dr. Norins did not note a break or abrasion of the skin. Dr. Norins admitted plaintiff through the emergency room to Moses Cone Hospital for treatment. A culture was taken of the infection, and it was determined to be methicillin-resistant staphylococcus aureus ("MRSA"). Plaintiff was admitted to the hospital and was treated with various antibiotics. She remained hospitalized through 29 February 2008. Dr. Norins was not able to form an opinion as to the cause of the infection.

Although plaintiff testified that she reported the alleged incident to Dr. Norins' nurse and that the nurse wrote it down on her intake sheet, Dr. Norins' office does not have intake sheets. Plaintiff also testified that Dr. Norins did not perform a physical examination and that when he first saw plaintiff on 26 February 2008, he stated, "What the hell happened to you?" Dr. Norins, however, did perform a thorough physical examination on 26 February 2008, and Dr. Norins testified that it would have been out of character for him to speak to a patient in the way described by plaintiff.

Dr. Norins explained that the MRSA bacteria, as well as many other strains, lives on the body and does not cause infection until it can enter the blood system through a break in the skin. He further noted that once a person has a colony of MRSA living on the skin or in nasal passages, successful treatment of a specific infection would not necessarily eradicate the colony entirely. The colony could continue to live outside the body and wait for another opportunity to enter through a break in the skin.

Following plaintiff's release from the hospital, she developed gastrointestinal issues. Plaintiff saw Dr. Norins on 4 March 2008 for treatment of this condition. Dr. Norins was unable to state whether there was a causal connection between the gastrointestinal problems and the antibiotic treatment plaintiff received from the infection. He was only able to suggest it was "a possibility that

was not ruled out." On this same date, plaintiff reported concern about having had small furuncles and abscesses over the past year. Plaintiff also admitted that she manipulates the furuncles and abscesses.

On 11 March 2008, plaintiff visited Dr. Norins with diffuse myalgia complaints that Dr. Norins diagnosed as fibromyalgia. Dr. Norins explained that fibromyalgia "is a poorly understood syndrome that we don't really have a good idea exactly where it originates, what its cause is." He was unable to establish a causal connection between plaintiff's previous MRSA infection and the myalgia or offer any opinion to any degree of medical certainty as to the cause of plaintiff's myalgia complaints. Suzann Hedgecock, PA-C, who provided treatment for plaintiff for a number of ailments, expressed an opinion that plaintiff's myalgia complaints were caused by an unrelated knee injury and were not related to the MRSA hospitalization.

On 18 May 2008, plaintiff was admitted to Moses Cone Hospital with a second MRSA infection. It was noted at the time of her admission that plaintiff had squeezed a pimple on her cheek, which had provided an entry point for the bacteria, resulting in the infected area. Plaintiff remained hospitalized through 24 May 2008. She was released to return to work on 30 May 2008.

At the request of defendant carrier Wausau Insurance Company, plaintiff produced a copy of Dr. Norins' 26 February 2008 note, but it contained a blacked out statement. According to Dr. Norins, the statement that had been partially blacked out actually read, "'concerned for MRSA infection, with the patient having had previous MRSA infection.'" Dr. Norins testified that he would never alter an existing medical record, but instead would create an addendum. Therefore, the medical record provided by plaintiff had been redacted by someone other than Dr. Norins. In addition, according to defendant carrier's notes dated 31 March 2008, plaintiff was refusing to provide defendant carrier with her previous medical records so that it could make a compensability decision.

Ultimately, the Commission found that plaintiff's testimony was inconsistent and thus not credible. The Commission further found that based upon the greater weight of the evidence, plaintiff failed to show that she suffered an injury by accident on 21 February 2008. Based on its findings of fact, the Commission concluded that plaintiff had failed to prove that she sustained a compensable injury by accident arising out of and in the course of her employment and, therefore, denied plaintiff's claim. Plaintiff timely appealed the opinion and award to this Court.

Discussion

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). Findings of fact not specifically challenged in the appellant's brief are binding on appeal. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

Plaintiff first argues that the Commission's opinion and award should be reversed because the deputy commissioner, who in this case found that plaintiff did sustain a compensable injury, "is in the best position to decide questions pertaining to truthfulness and credibility of the witnesses whose testimony he must weigh and accept or reject in that he is the only official to observe the witness first hand." The law is to the contrary. It is well established that "'the Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made

by the deputy commissioner.'" *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 590, 551 S.E.2d 486, 491 (2001) (quoting *McGee v. N.C. Dep't of Revenue*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87 (1999)) (rejecting plaintiffs' contention that responsibility of weighing witness' credibility lies solely with deputy commissioner, and that Commission erred in making findings contrary to those made by deputy commissioner), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002). *See also Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (holding that Commission is sole judge of credibility of witnesses, and Commission need not provide any explanation for deciding credibility differently from deputy commissioner).

The Commission was, therefore, entitled to reach a different conclusion regarding plaintiff's credibility. The Commission's credibility determination -- and not the deputy commissioner's -- is binding on this Court and may not be reviewed.

Next, plaintiff challenges finding of fact number 3 of the Commission's opinion and award, specifically arguing that the evidence did not support the findings regarding the date when Ms. Durham and Ms. Horn were first notified of the alleged incident. According to plaintiff, the evidence instead showed that Ms. Durham "was aware of 'something' happening at the school" as of 29 February 2008 and the first week of March 2008. While plaintiff has cited

to various portions of the hearing transcript, she did not file that transcript with this Court.[1] We cannot, therefore, review the sufficiency of the evidence to support the Commission's finding of fact. *See Algary v. McCarley & Co.*, 74 N.C. App. 125, 126-27, 327 S.E.2d 296, 297-98 (1985) ("This contention must be and is rejected without either discussion or consideration of the legal principles that could apply to it, because plaintiff failed to include the transcript of the evidence in the record on appeal and we have no basis at all for holding that the Commission's findings of fact . . . [are] erroneous, as plaintiff contends. Under the circumstances the Commission's findings of fact are presumed to be correct . . . .").

Finally, we address plaintiff's contention that the Commission erred in concluding that she failed to prove that she sustained a compensable injury. Plaintiff does not contend that the record lacks any evidence supporting the Commission's findings, but rather simply argues that the Commission should have accepted her evidence as credible and made different findings of fact. Under the proper standard of review, the Commission was not required to do so. *See Griffey v. Town of Hot Springs*, 87 N.C. App. 290, 292, 360 S.E.2d

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[1]The record on appeal erroneously indicates that the transcript was filed simultaneously with the record on appeal. That transcript was never received by the Court. Despite requests made to counsel, this Court has not received a motion to amend the record to add the transcript.

457, 458 (1987) ("In not accepting plaintiff's contrary version of the event involved the Commission but exercised its prerogative under the law to determine the credibility and weight of the evidence presented."). We, therefore, affirm the opinion and award.

Affirmed.

Judges ROBERT C. HUNTER and CALABRIA concur.

Report per Rule 30(e).