NO. COA02-940

NORTH CAROLINA COURT OF APPEALS

Filed: 1 April 2003

RUTH P. SUTTLES,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 902686

SOUTHEASTERN HEALTH FACILITIES
d/b/a MOUNTAIN VIEW MANOR,
Employer,

SELF-INSURED,
Key Risk Management Services,
Servicing Agent,
Defendants.

Appeal by plaintiff from opinion and award filed 14 February 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 March 2003.

*Ruth P. Suttles, pro se, plaintiff-appellant.*

*Young Moore and Henderson, P.A., by Jeffrey T. Linder, for defendant-appellee.*

ELMORE, Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission (Commission) awarding plaintiff compensation for temporary total disability from 29 November 1998 through 27 January 1999. Her claim was initially denied on 19 March 2001 by a deputy commissioner, who concluded that plaintiff did not sustain an injury by accident arising out of

and in the course of her employment with the defendant-employer on or about 28 November 1998.

Plaintiff appealed this decision to the full Commission, which found that plaintiff, who was employed by the employer as a nursing assistant, injured her back while lifting a patient and when a laundry basket struck her ankle at work on 28 November 1998. The Commission also found that plaintiff was released to return to work on 27 January 1999 and was offered suitable and available employment by the employer. The Commission found that plaintiff refused the offer of employment and that plaintiff has not sought employment since 27 January 1999. The Commission concluded that plaintiff did sustain an injury by accident arising out of and in the course of the employment on 28 November 1998. The Commission further concluded that plaintiff was totally disabled from 29 November 1998 to 27 January 1999 when she was released to return to work. The Commission also concluded that plaintiff failed to show she continued to be disabled after her release to return to work, and that plaintiff refused to accept suitable employment offered to her by her employer.

Preliminarily, we note that defendant has filed motions to dismiss this appeal, asserting plaintiff committed multiple violations of the Rules of Appellate Procedure. Exercising the discretion given to us by Rule 2 of the Rules of Appellate Procedure, we overlook the rule violations and consider the merits of the appeal.

Plaintiff states in her brief that she is bringing this appeal "because the facts in the case have not truly been seen and ruled upon fairly on my behalf." She asks this Court to rule in her favor "because it is the right thing to do." She accuses the defense of misrepresenting the facts. In support of her arguments, she has attached to her brief a copy of a Social Security

Administration administrative law judge's decision, dated 21 May 2002, awarding her disability from 1 June 2000 through at least the date of the decision.

As a general principle of law, an appellate court may consider only evidence presented to and passed upon by the court below that is contained in the record on appeal. *Long v. City of Charlotte*, 306 N.C. 187, 190, 293 S.E.2d 101, 104 (1982). Because the administrative law judge's decision was neither presented to the Industrial Commission prior to the time it rendered its decision, nor included in the settled record on appeal, it will not be considered.

Under the Workers' Compensation Act, the Industrial Commission is the fact-finding body and the sole judge of the credibility of witnesses and the weight to be given their testimony. *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). The role of the appellate court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The appellate court does not weigh the evidence and decide an issue on the basis of its weight. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). If there is any evidence to support the finding of fact made by the Commission, then it is binding on the appellate court, even if there is substantial evidence to support a contrary finding. *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965).

To obtain compensation under the Workers' Compensation Act, a claimant must prove the existence of disability and its extent. *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 29, 398 S.E.2d 677, 680 (1990). Disability is defined by the Act as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2001). To support a conclusion of law that the

claimant is disabled, the Commission must find the employee is incapable after the injury of earning the same wages in the same or other employment and that the incapacity to earn wages was caused by the injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

The stipulated records of Dr. James H. Lipsey, plaintiff's treating physician, show that Dr. Lipsey discharged plaintiff from his care on 27 January 1999. Dr. Lipsey was of the opinion that plaintiff was completely recovered. He did not consider plaintiff to have any disability. He did not order any restrictions except to advise plaintiff to be cautious with lifting. Kathy Ann Simonds, plaintiff's supervisor, testified at the hearing before the deputy commissioner that upon being informed of plaintiff's discharge from the care of Dr. Lipsey, she spoke with plaintiff on 27 January 1999 and advised plaintiff that she was placing plaintiff back on the regular work schedule. Plaintiff responded that she would be at work that night. Plaintiff never reported for work.

We hold the foregoing evidence supports the Commission's findings of fact, which in turn support its conclusions of law. The opinion and award is affirmed.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).