

*An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA03-887

NORTH CAROLINA COURT OF APPEALS

Filed: 18 May 2004

PAULINE KELLY,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 974696

ADVANCED HOMECARE, INC.,  
Employer,

ZENITH INSURANCE COMPANY, (NC),  
Carrier,  
Defendants.

Appeal by plaintiff from opinion and award filed 19 February 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 March 2004.

*James A. Dickens for plaintiff-appellant.*

*Stiles Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., for defendant-appellees.*

BRYANT, Judge.

Pauline Kelly (plaintiff) appeals an opinion and award of the North Carolina Industrial Commission (the Commission) filed 19 February 2003, concluding plaintiff was not an incompetent adult at the time of her accident and that the statute of limitation for plaintiff to present her workers' compensation claim was not tolled.

Procedural History

On 19 October 1999, plaintiff filed a Form 18 notice of accident with her employer Advanced Home Care, Inc. (defendant) for a work-related injury she sustained to her lower back on or about 15 May 1995. Defendant filed a Form 19 employer's report of injury on 20 July 2000, and subsequently denied plaintiff's claim on 25 August 2000. On 20 September 2000, plaintiff filed a Form 33 request for hearing, and defendant filed a Form 33R response to request for hearing on 7 November 2000.

This matter came for hearing on 1 February 2002 before Deputy Commissioner George T. Glenn, II. By opinion and award filed on 29 April 2002, the deputy commissioner concluded that the Industrial Commission did not have jurisdiction to determine plaintiff's competency at the time of her injury, and removed the claim from the hearing docket until plaintiff's competency had been determined by the clerk of superior court. Both plaintiff and defendant appealed to the full Commission.

On 16 October 2002, this matter came before the full Commission. By opinion and award filed 19 February 2003, the Commission modified and reversed the opinion and award of the deputy commissioner, concluding plaintiff was not incompetent at the time of her injury, and her claim was barred by the statute of limitations. Plaintiff appealed.

#### Facts

Plaintiff was born on 19 February 1956. In 1967, plaintiff was diagnosed as "educable mentally retarded," and was eventually placed in special education classes. She graduated from high school in 1974, although plaintiff did not know how to read, spell, or do arithmetic.

While in the tenth grade, plaintiff began work at Evergreen Nursing Home. She worked at Evergreen for five years, then at Carolina Nursing Home, and later in the dish room at Jonesbury Elementary School. Plaintiff left her job at Jonesbury to work at Greenhaven Nursing

Home, and later returned to Evergreen. After leaving Evergreen for the second time, plaintiff worked as a private duty nurse with Medical Personnel Pool. In January 1994, she began working for defendant as a certified nursing assistant (CNA). Plaintiff allegedly sustained a work-related injury to her lower back on or about 15 May 1995 while “[t]ransferring [a] male patient from the bed to a wheelchair.”

---

The issues are whether the Commission erred in failing to: (I) conclude plaintiff was an incompetent adult at the time of her injury; (II) address all of her assignments of error concerning the deputy commissioner’s rulings; and (III) grant plaintiff’s motion to take additional evidence.

#### I

First, plaintiff argues that the Commission erred in failing to: (1) find as fact and conclude that plaintiff was an incompetent adult as defined by N.C. Gen. Stat. §35A-1101(7) at the time of her injury, and (2) conclude that the statute of limitations declared in N.C. Gen. Stat. §97-24 was tolled until plaintiff was informed of her right to file a workers’ compensation claim in 1999.

Pursuant to N.C. Gen. Stat. §97-24 of the Workers’ Compensation Act, the right to compensation is barred if a claim is not filed within two years of the injury. N.C.G.S. §97-24 (2003). However, “[n]o limitation of time provided in this Article for the giving of notice or making claim under this Article shall run against any person who is mentally incompetent.” N.C.G.S. §97-50 (2003).

The Commission relied on N.C. Gen. Stat. §35A-1101(7) in making its determination that plaintiff was not an incompetent adult at the time of the injury. N.C. Gen. Stat. §35A-1101(7) reads:

“Incompetent adult” means an adult or emancipated minor who lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C.G.S. §35A-1101(7) (2003). Plaintiff contends the Commission erred when it concluded plaintiff was not an incompetent adult, as defined by N.C. Gen. Stat. §35A-1101(7), at the time of her injury.

Opinions and awards of the Commission are reviewed to determine whether competent evidence exists to support the Commission’s findings of fact, and whether the findings of fact support the Commission’s conclusions of law. *See Deese v. Champion Int’l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000). If supported by competent evidence, the Commission’s findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr’rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission’s conclusions of law are reviewed *de novo*. *Allen*, 143 N.C. App. at 63, 546 S.E.2d at 139.

The Commission made the following findings of fact:

7. Plaintiff . . . began her employment with defendant-employer in January 1994.

8. Plaintiff took job applications and other required forms home and friends helped her to complete them. Plaintiff then copied the forms in her own handwriting.

9. Plaintiff began living outside her parents’ home when she turned 18. She has lived alone most of the last 25 years. Friends have helped plaintiff fill out lease applications and set up utilities when she changed residences. In the past, friends have read and explained documents to her, but plaintiff always made the final decisions concerning her affairs.

10. Plaintiff obtained a driver's license and drove herself to places of employment. A friend drove a route with plaintiff until she learned it, and then she commuted to her job alone. She was considered a safe driver by friends and understood traffic signs. Plaintiff's driver's license has never been restricted.

11. Plaintiff has always cared for herself, cooked for herself, and cleaned and maintained her own living space.

12. Plaintiff had difficulty balancing her checkbook and sought assistance from friends in making financial decisions. Plaintiff had someone explain her options and then she decided what to do. Plaintiff at times wrote checks without any assistance.

13. Plaintiff maintained her own time records in order to be paid from her employment. She kept up with changing work schedules and hourly wages.

. . . .

16. Plaintiff was good at her job and considered competent by her supervisors. Her position required her to be responsible for the care, safety and welfare of elderly and disabled patients. Plaintiff was familiar with the limitations on care she could provide as a CNA. She knew that she could not administer medications or give shots, and she never attempted to provide those services.

17. Plaintiff has never been adjudged incompetent by any court or judicial agency. Plaintiff never had a guardian appointed and stated at the hearing before the Deputy Commissioner that she never felt she needed a guardian.

18. Plaintiff alleges that she sustained an injury by accident arising out of and in the course of her employment with defendant-employer on [May] 15, 1995. Plaintiff did not file a claim with the Commission until she submitted a Form 18 on October 4, 1999. This form was filed without an attorney.

19. . . . [T]he Full Commission reverses the Deputy Commissioner's decision and finds by the greater weight of the evidence that plaintiff was competent to manage her own affairs at the time of her injury and during the two year period following. Plaintiff had a history of twenty years of continuous employment before the date of the accident, held a valid driver's license, obtained special state licensing as a Certified Nurses Aide I, made

financial and personal decisions for herself, and lived alone and cared for herself.

Based on these findings of fact, the Commission concluded:

5. In the case at bar the greater weight of the evidence shows the plaintiff was not incompetent at the time of her alleged injury by accident or during the following two years. N.C. Gen. Stat. §35A-1101(7); 94-24; 97-50. During the time period in question, plaintiff was capable of managing her own affairs, could exercise rational judgment and was able to understand the consequences of her actions. . . . “[M]ere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs.”

Plaintiff assigned as error only findings of fact 9 and 12, and conclusion of law 5. These findings of facts are supported by competent evidence in that plaintiff testified that she began living on her own when she turned 18 and had lived alone for most of the last 25 years. She testified that friends helped her complete lease applications and set up utilities when she changed residences, read and explained documents to her, but she always made the final decisions. In addition, Cornelia Raleigh, Christine Boler, and Amy Smith testified that plaintiff needed help balancing her checkbook and they assisted her in making financial decisions, but plaintiff decided what to do and at times wrote checks without any assistance.

The findings, both those assigned as error and those not assigned as error, support the Commission’s conclusion that plaintiff was not an incompetent adult at the time of the injury (conclusion of law 5), and the statute of limitations was not tolled until plaintiff was made aware of her right to file a claim. This assignment of error is overruled.

## II

Second, plaintiff argues that the Commission erred in failing to address her assignments of error concerning the deputy commissioner’s sustaining of defendant’s objections to: (1) testimony regarding whether plaintiff could understand information or questions her friends read

or explained to her; and (2) statements plaintiff made to a witness during plaintiff's alleged period of incompetency. Plaintiff asserts that these rulings significantly restricted her ability to present evidence regarding the effects her mental retardation had on her mental competency.

“[T]he exclusion of evidence, including the testimony of witnesses, cannot be held prejudicial when the record fails to show what evidence would have been introduced or what testimony would have been given by the witness.” *Thompson v. Lenoir Transfer Co.*, 48 N.C. App. 47, 52, 268 S.E.2d 534, 537 (1980) (citation omitted). “The burden is on the appellant not only to show error, but that the alleged error was prejudicial and amounted to the denial of some substantial right.” *Id.* (citation omitted).

Here, the record is devoid of any indication that plaintiff presented to the Commission an offer of proof concerning the excluded testimony. Moreover, plaintiff has not presented to this Court an offer of proof showing what evidence would have been tendered if the excluded testimony had been allowed.

Our courts have consistently held that the Commission is required to “make findings from which an appellate court may reasonably infer that it gave proper consideration to all relevant testimony.” *Smith v. Beasley Enters.*, 148 N.C. App. 559, 562, 577 S.E.2d 902, 904 (2002). In the instant case, however, the record does not indicate that plaintiff presented the Commission with an offer of proof from which it could make findings concerning the admissibility, relevancy, or credibility of the excluded evidence; nor determine whether exclusion of the evidence was prejudicial. Therefore, having failed to present the Commission with adequate evidence for it to make a proper review, plaintiff cannot show the Commission erred in not reviewing all of the assignments of error. Moreover, without the necessary offer, plaintiff cannot meet her burden to show prejudice. This assignment of error is overruled.

### III

Last, plaintiff argues that the Commission erred in denying plaintiff's motion to take additional evidence.

The decision to receive additional evidence is within the sound discretion of the Commission. *Keel v. H&V, Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 366 (1992). Moreover, the Commission's decision in this regard "will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Keel*, 107 N.C. App. at 542, 421 S.E.2d at 367.

At the hearing before the Commission, plaintiff attempted to offer the affidavit of plaintiff's former supervisor Yvonne Kirkwood to show that plaintiff, in fact, reported her accident to her employer the day after the injury. The Commission refused to accept the affidavit into evidence.

On appeal, plaintiff argues that defendant would not have been prejudiced by admission of the affidavit. However, whether defendant would have been prejudiced by admission of the affidavit does not in itself demonstrate that the Commission erred in not allowing the affidavit into evidence. This assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).