

*An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA 04-187

NORTH CAROLINA COURT OF APPEALS

Filed: 15 March 2005

LINDA DARLENE LEE,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 983848

MANPOWER INC.,  
Employer,

SELF-INSURED,  
RSK COMPANY,  
Servicing Agent,  
Defendants.

Appeal by defendants from opinion and award entered by the North Carolina Industrial Commission on 30 September 2003. Heard in the Court of Appeals 2 November 2004.

*George W. Lennon, for plaintiff-appellee.*

*Teague, Campbell, Dennis & Gorham, L.L.P., by Season D. Atkinson, for defendant-appellants.*

HUDSON, Judge.

Chief Deputy Commissioner Stephen T. Gheen heard this case on 7 June 2002 and filed an opinion and award on 5 September 2002, awarding plaintiff the additional worker's compensation benefits she sought for bilateral carpal tunnel syndrome (CTS). Defendants appealed to the Full Commission which, on 30 September 2003, reached the same decision as the Chief Deputy. Defendants appeal. For the reasons discussed below, we affirm.

On 18 October 1999, plaintiff suffered from swollen and painful fingers after one day of filing metal flashings at a temporary employment assignment for Manpower, Inc. The following day, plaintiff telephoned and reported this problem to Manpower, who advised her to seek medical attention at Rutherford Hospital Occupational Center. There, the attending physician's assistant (PA) diagnosed plaintiff with right wrist tendonitis and allowed her to return to work, but advised her to rotate jobs every three to four hours, to lift no more than 15 to 25 pounds, and to limit the use of both hands, especially for repetitive motions. Plaintiff returned for follow-up a week later and reported that she was "a little better," but that pain and swelling continued. The PA gave her similar advice, and referred her to Dr. Anne Jackson, a neurologist.

Plaintiff attempted to work two more days for Manpower in early November 1999. Plaintiff asserted that she worked only these two days because she was otherwise unable to work due to her injuries, while defendants contended that plaintiff did not work due to self-imposed shift restrictions. The Commission found that plaintiff was unable to work due to injury.

On 23 November 1999, Dr. Jackson examined plaintiff for her continued complaint of pain, numbness, and tingling in her hands. Dr. Jackson performed electromyography and found evidence of median neuropathy at both wrists consistent with CTS, after which plaintiff went to Dr. Charles Bond for assessment and evaluation on 21 December 1999. Dr. Bond noted similar symptoms and diagnosed plaintiff with CTS, prescribed Naprosyn, and recommended that plaintiff not lift more than 10 pounds.

One month later, plaintiff returned to see Dr. Bond and reported that she had not experienced relief wearing wrist splints but instead had worsening pain. Dr. Bond scheduled surgery for 27 January 2000, for bilateral CTS. Defendant insurer refused to authorize payment for the surgery.

On or about 10 January 2000, defendants filed Form 28 (Return to Work Report), Form 28B (Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation), and Form 60 (Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. §97-18(b)). On the Form 60, defendants accepted, without limitation, plaintiff's claim of injury from 18 October 1999. Defendants contend that they filed this form as a means of limiting their liability to plaintiff's original complaints only and that they did not accept the compensability of plaintiff's CTS. However, the Commission found that the Form 60 was filed after plaintiff's diagnosis of CTS, and that "Manpower offered no reason of record . . . for denying [plaintiff's] claim once the Form 60 had been filed." In the Forms 28 and 28B filed the same day as the Form 60, defendants acknowledged payment for plaintiff's period of disability beginning 19 October 1999 and for medical compensation (for the CTS) which it indicated were not the final payments in this case.

On 27 June 2000, Dr. Bond wrote defendant's nurse case manager and stated that, "it is unlikely that she [plaintiff] developed carpal tunnel syndrome de novo from one to two weeks of work at a job, however, I cannot prove the exact causal relationship of her job and carpal tunnel syndrome." The Full Commission, noted that Dr. Bond did not give an opinion regarding whether plaintiff's employment at Manpower aggravated preexisting CTS.

On 9 April 2001, plaintiff presented to Dr. Dale Mabe of Swannanoa Medical Center for a disability determination evaluation. Dr. Mabe reported that plaintiff had numbness in the hands bilaterally and felt a needle sensation at times. Plaintiff reported that she had pain and numbness which caused her to have difficulty sleeping and frequently to drop things. Dr. Mabe noted generalized soft swelling of the hands and fingers, but did not give an opinion on disability.

Prior to addressing the substantive arguments, we note that plaintiff moved to dismiss this appeal for defendants' violation of Rule 28 (b)(6) of the North Carolina Rules of Appellate Procedure (2004). Rule 28 of the appellate rules requires that the argument section of an appellate brief refer "to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C.R. App. P. 28(b)(6) (2004). Plaintiff correctly asserts that defendants have failed to comply with this rule, as their brief contains no reference at all to the pertinent assignments of error. It is well-established that "the Rules of Appellate Procedure, are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (internal citations omitted). In *Steingress*, our Supreme Court upheld this Court's dismissal of the defendant's appeal for appellate rule violations. *Id.* at 64, 511 S.E.2d at 298. "[W]hen the appellant's brief does not comply with the rules by properly setting forth exceptions and assignments of error . . . it is difficult if not impossible to properly determine the appeal." *Id.* at 66, 511 S.E.2d at 299 (internal citations omitted).

However, this Court may agree to reach the merits of an appeal despite violations of the appellate rules, by exercising its discretion to "suspend or vary the requirements or provisions of any of these rules in a case pending before it." N.C.R. App. P.2 (2004). While we decline to dismiss the appeal, we conclude that as a result of these violations, defendant has not brought forward any issues for us to review.

Defendants argue that the Industrial Commission erroneously concluded that defendants admitted the compensability of plaintiff's CTS when they filed the Form 60 for plaintiff's injury sustained 18 October 1999. We disagree. The scope of this Court's review of an Industrial Commission decision is limited:

(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are 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) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). By failing to bring forward any assignments of error to specific findings of fact or conclusions of law, defendants have not sufficiently identified the parts of the opinion and award they dispute. Indeed, findings of fact of the commission are conclusive if the record contains "any evidence tending to support the finding." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (internal quotation marks and citation omitted). In turn, as defendants have failed to bring forward their assignments of error to any particular findings of fact or conclusions of law, the findings are conclusive, N.C. Gen. Stat. §97-86 (2003), and the assignments of error "will be taken as abandoned." N.C. R. App. P. 28(b)(6).

Here, the Commission found and concluded that the Form 60 was not limited in any way, based on evidence that the Form 60

was executed on January 10, 2000 when Manpower knew that Lee's condition was diagnosed as carpal tunnel syndrome rather than tendonitis. Manpower's own nurse accompanied Lee to Dr. Bond's office in December 1999 at which time Dr. Bond diagnosed carpal tunnel syndrome. Manpower was also aware of Dr. Jackson's tests. Both Dr. Jackson's report and Dr. Bond's diagnosis were subsequent to Lee's initial diagnosis of tendonitis and preceded the filing of the Form 60.

The Commission notes that "Manpower did not limit the Form 60 in any regard." Accordingly, the Commission's conclusions of law that "Manpower's filing of a Form 60 in the present action constitutes an admission of compensability of Lee's claim," and that "[t]he Form 60 filed on January 10, 2000 is sufficient to admit compensability for Lee's carpal tunnel syndrome," are

supported by the findings. Further, even if the issue were properly before us, the evidence supports the Commission's findings of fact here, and these findings of fact support its conclusions of law.

Defendants also assert that even if they accepted compensability for plaintiff's CTS when they filed the Form 60, later material evidence warrants a denial of plaintiff's claim. Here, defendants claim that a statement made by Dr. Bond in a 27 June 2000 letter solicited by the defendants constitutes such later material evidence. The Commission found that "Manpower's own nurse accompanied [plaintiff] to Dr. Bond's office in December 1999 at which time Dr. Bond diagnosed carpal tunnel syndrome" and that his later letter "did not express an opinion" about the pertinent issue of aggravation. These findings again have not been challenged and are conclusive.

In support of their legal argument, defendants cite N.C. Gen. Stat. §97-18 (d) (1999). This section, which applies where the employer is uncertain if the claim is compensable, allows an employer or insurer to pay "without prejudice" for 90 days from written or actual notice of the injury and still contest compensability of the claim. *Id.* However, if the claim is not contested within this 90-day period (or within one discretionary 30-day extension), then the right to contest compensability is lost. *Id.* An employer or insurer may contest compensability after this period has expired only when "it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier." *Id.* Thus, even if this issue had been properly presented, N.C. Gen. Stat. §97-18 (d) would not apply here, as defendants never paid "without prejudice," but admitted the compensability of the claim.

Defendants assert, in their final assignment of error, that the record lacks competent, credible medical evidence to support the Industrial Commission's findings regarding plaintiff's

ongoing disability and entitlement to ongoing indemnity compensation. The Commission found as fact:

20. Lee has proven by the greater weight of the evidence that she is incapable of earning wages at Manpower or any other employment as a result of her bilateral carpal tunnel syndrome. The record evidence also establishes that Lee has sought employment without success. Given Lee's age, former occupational experience with limited transferable skills, and severe medical restrictions imposed by her treating physicians she has been temporarily totally disabled since October 26, 1999, except for the two days she actually worked.

A plaintiff must establish one of the following to prove disability: 1) she is medically unable to return to work in any employment; 2) she is physically able to return to work but it would be futile for her to attempt to do so in light of her vocational limitations; 3) she is physically able to return to work but has been unable to do so in spite of reasonable efforts to find work; or 4) she has returned to work earning reduced wages. *Russell v. Lowes Prod. Dist.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted). Here, even if the issue had been properly presented, the opinion and the record satisfy the first *Russell* factor.

Although defendants contend that plaintiff failed to meet her burden of proof on this issue, the record indicates that the Commission applied the correct standard and found that plaintiff met her burden. In its conclusions of law, the Commission explicitly states that "Lee bears the burden of proof by the greater weight of the evidence as to the nature and extent of her disability. Lee has proven by the greater weight of the evidence that she is temporarily totally disabled." (internal citations omitted). Again, defendants' argument is not properly raised, because no assignments of error to the Commission's findings have been brought forward. But, even if it had been, this Court could not re-weigh the evidence when, as here, the Commission's findings are based on competent evidence and, in turn, support the conclusions of law.

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).