

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-985

Filed: 3 May 2016

North Carolina Industrial Commission, I.C. No. 13-737359

BRUCE HENDERSON, Employee, Plaintiff,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants.

Appeal by plaintiff and defendants from opinion and award entered 17 June 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2016.

*Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Matthew J. Ledwith and M. Duane Jones, for defendants.*

GEER, Judge.

Both plaintiff Bruce Henderson and defendants The Goodyear Tire & Rubbery Company and Liberty Mutual Insurance Company appeal from an opinion and award of the Industrial Commission finding plaintiff sustained compensable injuries to his neck, right elbow, and right shoulder as a result of a workplace accident. Defendants previously admitted liability for plaintiff's low back injury pursuant to a Form 60. On appeal, plaintiff primarily argues that the Commission erred in failing to apply a

*Opinion of the Court*

rebuttable presumption, pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), that additional medical treatment for injuries to body parts other than the admittedly compensable low back injury was also compensable. Because the Commission had not previously established a causal relationship between injuries to these parts of plaintiff's body and the accident and defendants had only admitted liability for the low back injury, we hold that plaintiff was not entitled to this presumption. We, therefore, affirm this conclusion of the Commission.

Plaintiff also challenges the Commission's conclusion that the injury to his neck resolved without any compensable consequences and the Commission's denial of a statutorily mandated late payment penalty and sanctions. We agree with plaintiff's contentions and, therefore, reverse the erroneous conclusions pertaining to these issues and remand for further findings of fact.

Defendants primarily argue the Commission erred in concluding that plaintiff's neck and elbow injuries were compensable. However, these conclusions are adequately supported by findings of fact that are in turn supported by competent medical evidence.

Facts

Plaintiff was injured in an accident at work on 11 July 2013, "when a steel plate came off a tread spool and fell on top of him." Immediately following the accident at plaintiff's workplace, he was examined by defendant-employer's in-house

*Opinion of the Court*

medical facility, where he complained of pain to his lower back, mid back, neck, right elbow, and right shoulder. The following day, defendant-employer's medical director, Dr. Marcelo Perez-Montes, examined plaintiff's injuries and diagnosed plaintiff as suffering a cervical sprain, right rotator cuff strain, and lumbar spine degenerative disc disease with low back pain.

On 29 July 2013, plaintiff filed a Form 18 describing injuries of "neck, shoulder, right elbow, thoracic & lower back pain radiating everywhere" and also filed a corresponding Form 33, requesting a hearing to determine the workers' compensation benefits due. Ultimately, defendants filed a Form 60 on 5 September 2013, admitting compensation for plaintiff's "[m]usculoskeletal low back injury" and also describing plaintiff's injury as "PAIN IN LOWER BACK, (R) SHOULDER & NECK . . . ." Defendants thereafter began paying temporary total disability benefits at an average weekly wage of \$838.60.

On 22 January 2014, a deputy commissioner conducted a hearing to determine the extent of the injury to plaintiff's neck, right shoulder, right elbow, and thoracic spine. At this hearing, the parties stipulated that Dr. David S. Jones, a back specialist, was plaintiff's authorized treating physician for his back, and that Dr. Christopher J. Barnes, a certified orthopedic surgeon, was the authorized treating physician for his shoulder and elbow. The parties disputed whether Dr. Albert K.

*Opinion of the Court*

Bartko or Dr. David Kishbaugh should be plaintiff's treating physician for his pain management.

After the hearing before the deputy commissioner, the parties deposed Dr. Barnes and Dr. Kishbaugh. Dr. Barnes testified that the medical treatment he provided to plaintiff for his right shoulder and right elbow was related to the compensable injury by accident. Dr. Barnes also acknowledged that although plaintiff received specific treatments for pain in his right elbow, plaintiff did not complain of pain in his last visit because the treatment "really seemed to help." Dr. Barnes indicated that he would, however, continue treatment or send plaintiff to an elbow specialist "[i]f it continued to bother him[.]" Dr. Kishbaugh testified in his deposition that in his professional opinion, "the reported mechanism of injury . . . would be consistent" with the injuries to plaintiff's neck, right shoulder, and back, but that he could not "put the two together."

On 25 November 2014, the deputy commissioner filed her opinion and award, denying the compensability of the cervical spine, thoracic spine, and right elbow. Although neither party had raised the issue of ongoing disability, she also concluded that "Plaintiff has produced insufficient evidence to prove that the admittedly compensable July 11, 2013 accident caused his subsequent ongoing disability." However, the deputy commissioner did not order plaintiff's compensation terminated. Both parties requested review of this opinion and award by the Full Commission.

*Opinion of the Court*

Immediately after the 25 November 2014 opinion and award, defendants terminated Mr. Henderson's ongoing total disability compensation, despite the lack of any order authorizing suspension of benefits in the deputy commissioner's opinion and award. Plaintiff later filed a motion to reinstate his benefits and to stay the deputy commissioner's opinion and award. In this motion, plaintiff also requested a late payment penalty pursuant to N.C. Gen. Stat. § 97-18(g) and an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. Commissioner Tammy Nance granted this motion in part on 9 January 2015, finding that the deputy commissioner had erred in concluding that plaintiff failed to establish ongoing disability. Commissioner Nance also stayed this portion of the opinion and award and ordered that defendants reinstate plaintiff's disability compensation retroactively and continue payment until further order of the Commission. However, Commissioner Nance did not address plaintiff's request for a late payment penalty or attorney's fees.

On 17 June 2015, the Full Commission filed an opinion and award concluding that "Defendants' acceptance of a '[m]usculoskeletal low back injury' on a Form 60 does not confer upon plaintiff a presumption that the injuries he alleges to other body parts, to wit: right shoulder, right elbow, thoracic spine, and cervical spine, are likewise compensable." The Commission did, however, conclude that defendants had "since indicated on the record that they accept liability for plaintiff's right shoulder injury" and also that plaintiff's neck and right elbow injuries were compensable.

*Opinion of the Court*

Although concluding that plaintiff's neck injury was compensable, the Commission further determined that the injury "has since resolved without any compensable consequences, including the need for medical treatment." The Commission also determined there was "no evidence of record that plaintiff sustained an injury to his thoracic spine on July 11, 2013."

Lastly, the Commission concluded that plaintiff was not entitled to a late payment penalty or attorney's fees because defendant, in unilaterally terminating plaintiff's benefits, relied on the deputy commissioner's erroneous conclusion that " 'plaintiff has produced insufficient evidence to prove that the admittedly compensable July 11, 2013 accident caused his subsequent ongoing disability[.]'" The Commission therefore determined that "defendants' defense of this matter was reasonable and was not grounded in stubborn or unfounded litigiousness[.]" All parties timely appealed to this Court.

Discussion

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "Before making findings of fact, the Industrial Commission must consider *all* of the evidence.

*Opinion of the Court*

The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it.” *Weaver v. Am. Nat’l Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). “[A]ppellate courts may set aside a finding of fact only if it lacks evidentiary support.” *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). Conclusions of law, however, are reviewed de novo. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000).

I

Plaintiff and defendants appeal the Commission’s opinion and award as it pertains to the alleged injuries to plaintiff’s elbow, neck, and thoracic spine. Because each alleged injury presents its own unique issue on appeal, we address the parties’ appeals as they relate to each injury.

A. Plaintiff’s Thoracic Spine Injury and the *Parsons* Presumption

We must first address plaintiff’s contention that the Full Commission erred in concluding that plaintiff was not entitled to a presumption, pursuant to *Parsons* and its progeny, that his complaints of injury to his right shoulder, right elbow, thoracic spine, and neck were causally related to the admittedly compensable low back injury incurred on 11 July 2013. Specifically, plaintiff claims that because defendants accepted liability for plaintiff’s “[m]usculoskeletal low back injury” pursuant to a Form 60, he is entitled to a presumption that additional medical treatment for all other alleged injuries arising out of the same accident is compensable as well.

*Opinion of the Court*

We first note that because the Full Commission has ordered defendants to file an amended Form 60 including plaintiff's right shoulder injury, and because it has concluded that the injuries to plaintiff's right elbow and neck were causally related to the 11 July 2013 accident, the Full Commission's conclusion that the *Parsons* presumption is inapplicable to plaintiff's injuries only affects the alleged injury to plaintiff's thoracic spine. *See, e.g., Carr v. Dep't of Health & Human Servs.*, 218 N.C. App. 151, 156, 720 S.E.2d 869, 874 (2012) ("Therefore, regardless of the presumption, plaintiff proved the neck injury was causally related to the left hand injury and was therefore compensable.").

The rule established in *Parsons* holds that once a plaintiff has met the burden of establishing a causal relationship between an accident and an injury, the burden then falls on the defendant to dispel a causal relationship between the accident and the plaintiff's need for additional medical treatment for that injury. *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. This presumption is based on the rationale that "[t]o require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Id.* The exact dispute in *Parsons* concerned which party had "the burden to prove whether plaintiff's current medical problems and the compensable injury are causally related for purposes of awarding additional medical

*Opinion of the Court*

compensation.” *Id.* at 541, 485 S.E.2d at 868. The *Parsons* Court held that the Commission had erred in making the plaintiff reprove causation in order to receive additional medical treatment for her recurring headaches, the same injury that the Commission originally found compensable. *Id.* at 542, 485 S.E.2d at 869.

In *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136, 620 S.E.2d 288, 293 (2005), this Court extended the application of the *Parsons* presumption to injuries the employer admits as compensable pursuant to a Form 60. Specifically, the *Perez* Court upheld the Full Commission’s opinion and award presuming the causal relationship between the plaintiff’s herniated disc, diagnosed in 2002, and the plaintiff’s admittedly compensable lower back injury, suffered in 1998. *Id.* at 129, 134, 620 S.E.2d at 289, 292. Furthermore, in a footnote, the *Perez* Court acknowledged: “The presumption of compensability applies to future symptoms allegedly related to the original compensable injury. We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. But the burden of rebutting the presumption of compensability in this situation, although slight, would still be upon the employer.” *Id.* at 136 n.1, 620 S.E.2d at 293 n.1.

Only a few months after *Perez*, this Court published an opinion reiterating the holding in *Parsons* that the presumption should apply only to the “ ‘very injury’ ” previously determined compensable. *Clark v. Sanger Clinic, P.A.*, 175 N.C. App. 76,

*Opinion of the Court*

79, 623 S.E.2d 293, 296 (2005) (quoting *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869). Thus, the *Clark* Court found that “in *Parsons*, the plaintiff was suffering from the exact same complaint (headaches) for which she was initially awarded medical expenses and future medical treatment. . . . [R]equiring the plaintiff to prove a causal relationship between her accident and her current headaches in order to get further medical treatment ignored the prior award.” *Id.* In the case before it, the *Clark* Court determined that the “plaintiff’s reliance on *Parsons* [was] misplaced” because the plaintiff was “suffering from degenerative arthritis, while at the time of the initial award plaintiff suffered a compensable knee injury caused by falls related to her compensable injury by accident.” *Id.*

The Commission in this case relied on *Clark* in denying plaintiff the *Parsons* presumption for additional medical treatment to his thoracic back, neck, shoulder, and elbow injuries because defendants only admitted liability for his low back injury. Plaintiff, however, argues that the Commission erred in relying on *Clark*, citing to a recent case decided by this Court, which holds that “the *Parsons* presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable.” *Wilkes v. City of Greenville*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 777 S.E.2d 282, 287, *temp. stay allowed*, \_\_\_ N.C. \_\_\_, 778 S.E.2d 97 (2015).

*Opinion of the Court*

In *Wilkes*, the issue before the Court was whether the *Parsons* presumption applied to the plaintiff's medical treatment for his anxiety and depression when the defendant-employer had only accepted the compensability of injuries to the plaintiff's ribs, neck, legs, and entire left side. *Id.* at \_\_\_, 777 S.E.2d at 286-87. In rejecting the defendant's contention that the plaintiff was not entitled to the *Parsons* presumption for these psychological conditions because the defendants had not yet admitted liability for them, this Court relied on the footnote in *Perez*, which stated: "The presumption of compensability applies to future symptoms allegedly related to the original compensable injury.'" *Id.* at \_\_\_, 777 S.E.2d at 287 (quoting *Perez*, 174 N.C. App. at 137 n.1, 620 S.E.2d at 293 n.1). Thus, the *Wilkes* Court found that the Commission erred in failing to apply the *Parsons* presumption to plaintiff's alleged *psychological symptoms* that arose out of plaintiff's admittedly compensable physical injuries. *Id.* at \_\_\_, 777 S.E.2d at 287.

Here, plaintiff argues the *Parsons* presumption should apply to all his physical conditions requiring additional medical compensation even though defendants have never admitted liability for those specific physical injuries and the Commission has never determined a causal relationship exists between the accident and those injuries. Because plaintiff argues we should apply the *Parsons* presumption to physical conditions allegedly resulting from an accident that are distinct from injuries previously acknowledged to be caused by the workplace accident, *Wilkes* is inapposite

*Opinion of the Court*

to this case. Thus, the *Parsons* presumption was not applicable to plaintiff's wholly separate physical injuries until defendants either admitted they were compensable or the Commission found a causal relationship exists between the accident and that specific injury.

Having distinguished *Wilkes*,<sup>1</sup> we find that under *Clark*, because defendants have only admitted liability for plaintiff's "[m]usculoskeletal low back" and right shoulder injuries, and the Commission has only found plaintiff's right elbow and neck injuries causally related to his workplace accident, the Commission's refusal to apply the *Parsons* presumption to plaintiff's alleged thoracic spine injury is not erroneous.

Also with regard to plaintiff's alleged thoracic spine injury, plaintiff contends the Commission failed to give proper weight and consideration to the stipulated medical records discussing that injury. He argues that the finding of fact that there was "no evidence of record that plaintiff sustained an injury to his thoracic spine on July 11, 2013" is not supported by competent evidence. We do not agree.

Plaintiff cites to a voluminous sequence of pages in the record reflecting his stipulated medical records from defendant-employer's on-site medical staff. Defendant-employer's in-house medical records demonstrate that plaintiff initially

---

<sup>1</sup>Defendants argue that *Wilkes* conflicts with the precedents established in *Parsons* and *Clark*, and for that reason we should refuse to follow the holding in *Wilkes*. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). However, we note that because we have distinguished *Wilkes* from the facts of this case, we need not address this issue.

*Opinion of the Court*

experienced pain in this region and throughout his back in general days after the accident. However, defendant fails to draw our attention to any evidence of a specific diagnosis, a specific treatment of the thoracic spine condition, or any evidence of causation. Accordingly, we hold the Commission did not err in concluding that plaintiff's thoracic spine injury was supported by competent evidence.

B. Compensability of Plaintiff's Neck Injury

Both parties appeal the Full Commission's opinion and award as it relates to plaintiff's neck injury. Findings of Fact Nos. 16 and 17 are pertinent to both parties' arguments. They state the following:

16. When Dr. Kishbaugh testified, he was asked whether the July 11, 2013 injury by accident caused plaintiff's neck, right shoulder, right elbow, right thigh, back and mid-back pain, to which he responded, "The . . . reported mechanism of injury and his complaints of neck, back and right shoulder pain would be consistent." He went on to testify, without further explanation, "I cannot put the two together." Dr. Kishbaugh's testimony in this regard is confounding, particularly since defendants from the outset had accepted plaintiff's low back injury as compensable and later accepted the right shoulder as compensable.

17. Immediately following the injury of July 11, 2013, plaintiff complained of neck pain and was diagnosed by the Concentra medical providers at defendant-employer's facility with a cervical sprain. However, the evidence of record does not support a finding that plaintiff continues to suffer from a neck problem that is causally related to the July 11, 2013 injury by accident. The Full Commission, therefore, finds that, to the extent plaintiff sustained a cervical sprain as a result of the July 11, 2013

*Opinion of the Court*

injury by accident, that neck injury has since resolved with no compensable consequences.

We first address defendants' contention that the Commission erred in finding plaintiff's cervical sprain compensable based on stipulated medical records when the expert testimony of Dr. Kishbaugh required a finding of no causation. First, we note that "[i]t is for the Commission to determine the credibility of the witnesses, the weight to be given the evidence, and the inferences to be drawn from it." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002). Thus, the fact that the Commission gave more weight to the stipulated medical records than to Dr. Kishbaugh's testimony is not grounds for reversal.

Furthermore, "[i]t is reversible error for the Commission to fail to consider the testimony or records of a treating physician." *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 784 (2003) (emphasis added). Rule 612 of the Workers' Compensation Rules emphasizes the value of using stipulated medical records. It provides that "[t]he parties shall stipulate in a Pre-Trial Agreement to the admission of all relevant medical records, reports, and forms . . . with the goal of minimizing the use of post-hearing depositions." Workers' Comp. R. of N.C. Indus. Comm'n 612(a), 2016 Ann. R. N.C. 1396. Thus, this rule "encourages parties to stipulate medical records into evidence, as opposed to taking multiple depositions," and suggests that expert opinion testimony is not always necessary, or even preferable, to a treating

*Opinion of the Court*

physician's medical records indicating causation. *Whitfield*, 158 N.C. App. at 349, 581 S.E.2d at 784.

Here, even though plaintiff did not request a deposition of two of his treating physicians, Dr. Jones and Dr. Perez-Montes, the parties stipulated to the admission of the medical records produced by Drs. Jones and Perez-Montes shortly after the accident. Specifically, the records indicate that on the day after the workplace accident, Dr. Perez-Montes, the "Concentra medical provider" as indicated in Finding of Fact No. 17, diagnosed plaintiff with a cervical sprain. Dr. Perez-Montes diagnosed this same injury again on 24 July 2013, and further diagnosed plaintiff with cervical degenerative disc disease on 7 August 2013. Dr. Jones' medical records from 6 August 2013 further indicate plaintiff's neck pain. We can infer from these stipulated medical records, as did the Commission, that plaintiff's neck pain and his cervical sprain were the result of the accident that occurred on 11 July 2013.

Accordingly, because Dr. Perez-Montes' and Dr. Jones' medical records are sufficient to establish a causal relationship between plaintiff's workplace accident and the injury to his neck, we reject defendants' contentions that Findings of Fact Nos. 16 and 17 are unsupported by competent evidence simply because they are not supported by any medical opinion testimony regarding the cause of plaintiff's injury or because the Commission gave the medical records of plaintiff's treating physicians greater weight than the testimony of Dr. Kishbaugh.

*Opinion of the Court*

We next address plaintiff's argument that the Commission erred by concluding the neck injury resolved without any compensable consequences, including the need for additional medical treatment. In Finding of Fact No. 6, the Full Commission noted Dr. Jones' treatment suggestions for plaintiff's neck as of 23 September 2013. Specifically, Dr. Jones concluded that plaintiff would be best treated with medical therapy, pain management therapy, and possibly injection therapy. The opinion and award did not make any other specific findings of fact regarding plaintiff's neck pain subsequent to this consultation with Dr. Jones, but made the conclusory finding that plaintiff no longer needed medical treatment for his neck based on the evidence in the record.

Although during plaintiff's visit with Dr. Barnes on 4 November 2013, plaintiff denied any neck pain, on 15 November, Dr. Jones referred plaintiff to pain management with Dr. Bartko with diagnostic codes that indicate treatment to plaintiff's neck. Thus, the record suggests that as of mid-November 2013, plaintiff was still receiving treatment to his neck in the form of pain management and therapy. This evidence undercuts Finding of Fact No. 17, which states that plaintiff's neck injury "has since resolved with no compensable consequences."

Therefore, if plaintiff continues to receive additional medical treatment for his neck pain from Dr. Bartko, as the record suggests, for the purpose of "effect[ing] a cure, provid[ing] relief, or lessen[ing] the period of disability" pursuant to N.C. Gen.

*Opinion of the Court*

Stat. § 97-25(c) (2015), Finding of Fact No. 17 is not supported by competent evidence. Accordingly, the corresponding Conclusion of Law No. 4 is also unsupported. We, therefore, remand to the Commission for further findings of fact regarding plaintiff's pain management and therapy treatment for his compensable neck injury.

C. Compensability of Plaintiff's Elbow Injury

Defendants also contend that the Full Commission erred by concluding that plaintiff's elbow injury was causally related to the 11 July 2013 accident. Specifically, defendants challenge Finding of Fact No. 18. Finding of Fact No. 18 reads in pertinent part:

When Dr. Barnes testified, he was asked whether “all the medical treatment that you’ve provided for Mr. Henderson for his right shoulder and his right elbow [has] been related to the compensable injury that he sustained on July 11th, 2013 . . .” to which he responded, “Yes.” . . . [I]t necessarily follows that the conditions that required the treatment were related to the injury by accident. Therefore, the Full Commission finds that the right elbow pain plaintiff has experienced since July 11, 2013 is causally related to the injury by accident he sustained on that date.

Defendants argue that the Commission erred in making Finding of Fact No. 18 because the question posed to Dr. Barnes which is the basis for the finding, required the doctor “to assume the truth of facts that the record does not support[.]” *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 675, 482 S.E.2d 20, 23 (1997). In *Thacker*, the plaintiff's attorney asked a medical expert if the plaintiff's preexisting neck injuries were aggravated by a car accident assuming that certain facts -- namely

*Opinion of the Court*

that the plaintiff had “struck his head on the roof” of the vehicle -- were true. *Id.* Because there was no evidentiary basis for those facts, this Court found the medical expert’s answer to the hypothetical question was “based on conjecture” and, therefore, incompetent. *Id.* Thus, it would appear defendants argue that the question posed to Dr. Barnes improperly assumed that the Commission had already deemed plaintiff’s right elbow injury compensable.

However, the question posed to Dr. Barnes is not a hypothetical question attempting to establish a complicated question of medical causation. Rather, the question at issue, although poorly worded, was aimed at determining a causal relationship between the treatment for the pain in plaintiff’s elbow and the workplace accident. It is apparent to us and was apparent to the Commission, from the context, that counsel was asking whether the treatment to plaintiff’s elbow was related to plaintiff’s compensable accident on 11 July 2013. And, in addition to Dr. Barnes’ testimony, the medical records to which both parties stipulated -- particularly the medical records from Dr. Perez-Montes -- show plaintiff’s immediate and persistent pain in his elbow following the accident. Accordingly, the evidence supporting Finding of Fact No. 18 is competent and supports the Commission’s determination that plaintiff’s elbow injury was causally related to the 11 July 2013 workplace accident.

*Opinion of the Court*

Lastly, defendants challenge Finding of Fact No. 9, which states that the parties stipulated to Dr. Barnes being the authorized treating physician for plaintiff's elbow. The transcript of the hearing before the deputy commissioner on 22 January 2014 indicates the parties did not agree on Dr. Barnes because defendants had not yet seen the records of Dr. Barnes' examination of plaintiff's elbow. Plaintiff concedes this finding is unsupported by competent evidence but argues it has no effect on the conclusion of causation, which is supported by other competent findings. We agree with plaintiff that this error has no effect on the Full Commission's conclusion as to the cause of plaintiff's elbow injury. However, we remand to the Commission to amend this finding, as it is not supported by competent evidence.

II

Plaintiff next argues that the Commission erred by failing to make the appropriate findings of fact and conclusions of law regarding plaintiff's ongoing total disability compensation. Specifically, plaintiff contends this issue of ongoing disability was before the Full Commission because Commissioner Nance noted in her order that plaintiff's treating physician continued to write him out of work. We disagree.

The deputy commissioner erroneously concluded that “[p]laintiff has produced insufficient evidence to prove that the admittedly compensable July 11, 2013 accident caused his subsequent ongoing disability[,]” prompting defendants to “unilaterally

*Opinion of the Court*

stop[] payment of temporary total disability benefits.” Plaintiff thereafter filed an emergency motion to reinstate his ongoing disability compensation and to stay the effect of the deputy commissioner’s opinion and award. On 9 January 2015, Commissioner Nance found that “neither party raised any issue [before deputy commissioner] regarding plaintiff’s entitlement to ongoing temporary total disability benefits” and further that “Dr. David Jones has been the authorized treating physician for treatment of the accepted low back injury and has continued to write plaintiff out of work.” Commissioner Nance then concluded that the deputy commissioner’s conclusion was not supported by any findings of fact regarding disability. She, therefore, stayed the conclusion challenged by plaintiff and ordered defendants to “immediately reinstate payment of temporary total disability benefits back to the date of last payment” and to continue payment “until further order of the Commission.”

Although defendants appealed Commissioner Nance’s order in addition to the deputy commissioner’s opinion and award, they did not raise any issue regarding plaintiff’s ongoing disability in their appeal to the Full Commission. The Commission has not issued any further order altering the 9 January 2015 order and defendants maintain they have continued to pay disability compensation to plaintiff as of the date of the filing of their appellate brief.

*Opinion of the Court*

Plaintiff argues that in failing to address the issue of ongoing disability, the Full Commission erred because it “ ‘has the duty and responsibility to decide all matters in controversy between the parties . . . even if those matters were not addressed by the deputy commissioner.’ ” *Perkins v. U.S. Airways*, 177 N.C. App. 205, 215, 628 S.E.2d 402, 408 (2006) (quoting *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 501, 616 S.E.2d 356, 360 (2005), *appeal dismissed*, 360 N.C. 483, 632 S.E.2d 489 (2006)). Although it is true that the Commission “must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend[,]” the case must only be remanded “[i]f the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties *upon the matters in controversy*[,]” *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981) (emphasis added).

Here, the issue of ongoing disability was not in controversy before the Full Commission because defendants did not challenge the 9 January 2015 order reinstating plaintiff’s temporary total disability. Commissioner Nance’s finding that plaintiff’s treating physician continues to write him out of work speaks to plaintiff’s temporary disability and does not raise issues of his ongoing permanent disability as plaintiff suggests. Furthermore, defendants have continued to make these temporary disability payments and are ordered to do so until further order of the Commission pursuant to Commissioner Nance’s 9 January 2015 order. Accordingly, there is no

*Opinion of the Court*

present controversy at issue regarding plaintiff's ongoing compensation benefits. We, therefore, find no error in the Full Commission's omission of findings of fact and conclusions of law pertaining to plaintiff's ongoing disability benefits.

III

Plaintiff further argues that the Full Commission erred by concluding that defendants were not subject to a 10% late payment penalty, pursuant to N.C. Gen. Stat. § 97-18(g) (2015), when defendants terminated plaintiff's temporary total disability compensation without an express directive in the deputy commissioner's opinion and award allowing such termination. We agree.

We first note that defendants' only argument in opposition to plaintiff's appeal of this issue is procedural. Specifically, defendants claim that because Commissioner Nance failed to address late payment penalties and attorney's fees in her 9 January 2015 order and because plaintiff failed to assign error to this issue in his Form 44 request for review before the Full Commission, he therefore failed to preserve this issue before the Full Commission. It follows, defendants argue, that he is precluded from bringing this issue before this Court.

However, "[t]his Court has held that when the matter is 'appealed' to the full Commission . . . , it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992). Furthermore, this Court has

*Opinion of the Court*

recognized that the absence of an issue from a party's Form 44 request for review does not preclude the Full Commission from reviewing that issue if it is included in the party's brief or another document filed with the Full Commission. *Cooper v. BHT Enters.*, 195 N.C. App. 363, 369, 672 S.E.2d 748, 753-54 (2009) ("Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error."). Because plaintiff raised this issue in his motion to reinstate his benefits to the Commission,<sup>2</sup> we reject defendant's procedural arguments and review this issue on its merits.

N.C. Gen. Stat. § 97-18(g) provides:

If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof . . . unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

Thus, if a defendant unilaterally suspends payments due to a plaintiff and makes "no showing that these payments were not made due to conditions over which defendant

---

<sup>2</sup>We also note the briefs to the Full Commission were not included in the Record. Therefore, we cannot determine whether the issue was in fact briefed. However, it seems likely that it was.

*Opinion of the Court*

had no control[,]” *Fonville v. Gen. Motors Corp.*, 200 N.C. App. 267, 273, 683 S.E.2d 445, 449 (2009), plaintiff is entitled to a mandatory 10% late payment penalty pursuant to N.C. Gen. Stat. § 97-18(g).

Here, even though the deputy commissioner concluded -- albeit erroneously -- in her 25 November 2014 opinion and award that “[p]laintiff has produced insufficient evidence to prove that the admittedly compensable July 11, 2013 accident caused his subsequent ongoing disability[,]” she did not decree that defendants were to suspend payment of plaintiff’s temporary disability compensation. Regardless of this omission, defendants unilaterally suspended plaintiff’s compensation. Furthermore, we note that although defendants could have filed a motion to suspend plaintiff’s benefits as a result of the deputy commissioner’s opinion and award, they did not do so.

In affirming the propriety of defendants’ unilateral termination of plaintiff’s benefits, the Full Commission, in Conclusion of Law No. 7, cited to *Valles de Portillo v. D.H. Griffin Wrecking Co.*, 134 N.C. App. 714, 718, 518 S.E.2d 555, 557 (1999). Specifically, the Full Commission relied on the *Valles de Portillo* holding that: “defendants’ non-payment of benefits was excused by the Commission because defendants were complying with an order of the Commission.”

We find this interpretation of *Valles de Portillo* and, therefore, Conclusion of Law No. 7 erroneous. In *Valles de Portillo*, this Court excused the defendant’s non-

*Opinion of the Court*

payment “because the Executive Secretary ordered that payments be made only to a general guardian,” which was “a mandate with which defendant could not comply” given that the minor had a biological guardian and the appointment of a “general guardian” violated N.C. Gen. Stat. § 35A-1224(a) (1995). 134 N.C. App. at 717, 718, 518 S.E.2d at 557. Thus, the employer literally could not comply with such a mandate and the matter was out of its control. *Id.* at 718, 518 S.E.2d at 557. Here, to the contrary, the deputy commissioner’s erroneous conclusion was not a condition that prevented defendants from paying plaintiff’s benefits because the deputy commissioner did not order plaintiff’s payments suspended. Accordingly, we reverse Conclusion of Law No. 7.

Furthermore, because defendants made no other showing that they were unable to make a payment due to a circumstance over which they had no control, as required in *Fonville*, we find they violated N.C. Gen. Stat. § 97-18(g) by an inexcusable late payment of compensation owed to plaintiff. 200 N.C. App. at 273, 683 S.E.2d at 449. In keeping with *Fonville*, we remand to the Full Commission “for a determination of the amount of late fees due to plaintiff as a result of [defendant’s] failure to make timely payments.” *Id.*

IV

Plaintiff’s final argument asserts that the Full Commission erred by failing to address plaintiff’s additional request for sanctions and attorney’s fees pursuant to

*Opinion of the Court*

N.C. Gen. Stat. § 97-88.1 (2015) based on defendants' unilateral termination of plaintiff's benefits. In support of this argument, plaintiff cites again to the rule that "it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Vierегge*, 105 N.C. App. at 638, 414 S.E.2d at 774.

With regard to plaintiff's request for attorney's fees, the Full Commission made the following finding in its opinion and award:

19. Defendants' defense of this matter was not unreasonable or grounded in unfounded litigiousness. Dr. Kishbaugh's testimony regarding the causation issue provided a factual basis for defendants to dispute their liability for some of the injuries plaintiff has alleged in this case.

Furthermore, in Conclusion of Law No. 8, the Full Commission addressed plaintiff's requests for attorney's fees specifically: "Because defendants' defense of this matter was reasonable and was not grounded in stubborn or unfounded litigiousness, plaintiff is not entitled to an award of attorney's fees. N.C. Gen. Stat. § 97-88.1; *Effingham v. Kroger Co.*, 149 N.C. App. 105, 116-17, 561 S.E.2d 287, 295 (2002)."

These findings of fact and conclusions of law fail to address whether plaintiff is entitled to sanctions and attorney's fees in addition to the late payment penalty based on defendants' erroneous and unilateral termination of plaintiff's benefits. We, therefore, remand to the Full Commission to address plaintiff's argument regarding additional sanctions and attorney's fees. Nothing in this opinion should be construed as expressing any view on the merits of plaintiff's demand for fees and sanctions.

*Opinion of the Court*

Conclusion

In conclusion, we find that the Commission's reliance on *Clark*, in refusing to apply the *Parsons* presumption for additional medical treatment to plaintiff's alleged injuries not yet determined causally related to the workplace accident, is affirmed. Furthermore, although we find the conclusions of law that plaintiff sustained injuries to his neck and right elbow as a result of the accident are supported by competent evidence, we reverse the Full Commission's conclusion that plaintiff's neck injury has resolved, and we remand for further findings on the treatment for this injury. We also reverse the trial court's determination that plaintiff was not entitled to a mandatory fee resulting from defendants' unilateral suspension of plaintiff's temporary ongoing disability benefits and remand for calculation of those fees. Lastly, we remand for findings specifically regarding whether defendants' unilateral termination of plaintiff's benefits is grounds for sanctions and attorney's fees.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge McCULLOUGH concur.

Report per Rule 30(e).