An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-487

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

KIRK K. HOWARD,
Employee,
Plaintiff,

v.

UNC-Chapel Hill,
Employer,

and

KEY RISK MANAGEMENT SERVICES,
Carrier,
Defendants.

North Carolina Industrial Commission
I.C. File No. 149985

Appeal by defendant from opinion and award entered by the North Carolina Industrial Commission on 23 January 2006. Heard in the Court of Appeals 14 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for defendant-appellants.

Jay A. Gervasi, Jr., for plaintiff-appellee.

HUDSON, Judge.

In June 2002, plaintiff filed a workers' compensation claim, alleging that he was injured in October 2000 while working as an electrician for defendant-employer. Defendant subsequently accepted compensability of plaintiff's claim. In December 2002, plaintiff filed a Form 33 Request for Hearing, claiming that he was incapable of working. The deputy

commissioner heard the matter on6 October 2003, and on 28 January 2005, issued an opinion and award to plaintiff of temporary total disability and attorney's fees as a sanction for unreasonable defense by defendants. Defendant-employer appealed, and on 23 January 2006, the Full Commission issued an opinion and award affirming the deputy commissioner's decision with some modifications. Defendant-employer appeals.

The facts as found by the Commission show that plaintiff suffered a compensable injury by accident on 25 October 2000, when a light fixture fell and struck his right elbow. Plaintiff missed no time from work, choosing instead to enter a light duty program offered by defendant. After plaintiff's condition did not improve with conservative treatment, he underwent elbow surgery on 19 February 2002, performed by Dr. Donald K. Bynum, Jr. Thereafter, plaintiff developed complex regional pain syndrome, also known as reflex sympathetic dystrophy. Plaintiff's condition deteriorated, and he suffered extreme pain in his right arm and lost bone density in his right hand. Plaintiff also became depressed and lost weight, to the extent that the deputy commissioner described him at the time of his hearing as "emaciated." During his time in the light duty program, plaintiff's job title was "processing assistant"; plaintiff spent the first several months in the program doing nothing at all, and Dr. Bynum, also an employee of defendant, testified that the light duty program as applied to plaintiff was for "administrative" and therapeutic purposes, to help him keep his job and distract him from his pain, and was not productive work. Plaintiff left the light duty program on 18 September 2002 because of severe pain and anxiety. Defendant refused to pay compensation, claiming that plaintiff had refused suitable employment.

Pursuant to N.C. Gen. Stat. §97-88.1 (2005), the Commission may assess attorney's fees where a claim is "defended without reasonable ground." *Id.* We review "[w]hether the defendant

had a reasonable ground to bring a hearing . . . de novo." *Troutman v. White & Simpson, Inc.,* 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995). *See also Hodges v. Equity Group*, 164 N.C. App. 339, 348, 596 S.E.2d 31, 37 (2004); *Johnson v. United Parcel Service*, 149 N.C. App. 865, 868, 561 S.E.2d 349, 351 (2002). If we conclude that the Commission correctly determined that grounds exist to award fees pursuant to N.C. Gen. Stat. §97-88.1, then "[t]he decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman*, 121 N.C. App. at 54-55, 464 S.E.2d at 486.

Defendant first argues that the Full Commission erred in concluding that it unreasonably defended this claim. We disagree.

Defendant contends that its defense was not unreasonable because it offered plaintiff light-duty employment within his restrictions, and thus when plaintiff discontinued this work, he bore the burden of showing that his refusal of this employment was justified. N.C. Gen. Stat. §97-32 (2005); *Lowery v. Duke Univ.*, 167 N.C. App. 714, 718, 609 S.E.2d 780, 783 (2005). In *Lowery*, this Court stated that N.C. Gen. Stat. §97-32 "requires that the proffered employment be suitable to the Employee's Capacity." *Id.* "We have defined suitable employment, in the context of G.S. §97-32, as any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience." *Id.* (internal citation and quotation marks omitted). Although we are not bound by the Commission's findings of fact in conducting a *de novo* review, we note the following findings of fact made by the Commission and unchallenged by defendant on appeal:

> 5. *Plaintiff left defendant's light duty program on September 18, 2002 because his pain and anxiety resulting from his compensable injury were so severe that he was unable to attend.* Dr. Bynum and Dr. John E. Begovich, who treated plaintiff

> for pain control since October 17, 2002, were of the opinion that *plaintiff has been unable to work in any productive employment since his departure from defendant*. Dr. Bynum's suggestion that plaintiff return to one-handed activity with defendant in November of 2002 was intended to help plaintiff keep his job. Dr. Bynum also thought that the light duty position might be therapeutic, by distracting plaintiff so that he would not think so much about his pain.
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> 6. Despite *the testimony of both treating physicians that plaintiff is unable to work*, plaintiff attempted to find work that would make use of his skills, while also allowing him to avoid using his right hand. Plaintiff has failed to obtain employment and most of the potential employers have refused to consider plaintiff because of his impaired condition. Plaintiff's attempt to find employment has been reasonable under the circumstances. Considering plaintiff's impaired condition caused by his injury, his prior work experience, which is limited to playing guitar and working with both hands as an electrician, his depression, and his overall unhealthy physical condition, *any attempt to find work in the absence of substantial improvement to his condition is futile.*

(Emphasis added). Our review of the record similarly indicates that there was overwhelming, uncontradicted evidence of plaintiff's disability. As the evidence indicates that plaintiff was unable to work, it is irrelevant whether defendant offered plaintiff employment. We conclude that defendant unreasonably defended this claim. Accordingly, we overrule this assignment of error.

Defendant also argues that the Commission abused its discretion in imposing sanctions pursuant to N.C. Gen. Stat. §97-88.1. As discussed, once we determine that the Commission correctly concluded that grounds exist to award fees pursuant to N.C. Gen. Stat. §97-88.1, we review the decision of whether to make such an award, and the amount of any such award, for abuse of discretion. *Troutman,* 121 N.C. App. at 54-55, 464 S.E.2d at 486. An abuse of discretion results only where a decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Long v. Harris*, 137 N.C. App. 461,

465, 528 S.E.2d 633, 635 (2000). Here, as discussed, the Commission concluded that defendant had unreasonably defended this claim. The Commission further concluded that the unreasonable defense entitled plaintiff to sanctions, including attorney's fees, per N.C. Gen. Stat. §97-88.1. The Commission concluded that the proper measure of attorney's fees is the contingency fee incurred by plaintiff and awarded plaintiff a fee of 25% of the compensation due and "[t]hereafter, every fourth week that plaintiff is paid ongoing compensation, defendant will make an additional payment in the amount of the weekly compensation, directly to plaintiff's attorney." Defendant asserts that the award of attorney's fees to plaintiff based on future compensation is unreasonable. However, as we cannot conclude that the Commission's decision was "manifestly unsupported by reason," we overrule this assignment of error.

Affirmed.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).

The judges participated and submitted this opinion for filing prior to 1 January 2007.