NO. COA10-1203
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

Willie James Cain, Jr.
Plaintiff

v. NC Industrial Commission
I.C. No. 194512

Ingersoll Rand Company

and

Gallagher Bassett Services, Inc.
Defendants.

Appeal by Defendants from opinion and award entered 27 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 2011.

Laura S. Jenkins, P.C., by Laura S. Jenkins, for Plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Laura Carter and Layla T. Santa Rosa, for Defendants-appellants.

HUNTER, JR., Robert N., Judge.

Ingersoll Rand Company and Gallagher Bassett Services, Inc. ("Defendants") appeal from an opinion and award of the North Carolina Industrial Commission (the "Commission") contending the Commission erred (1) in finding Willie J. Cain, Jr. ("Plain-

tiff") sustained a compensable injury arising out of and in the course of his employment; (2) in finding Plaintiff temporarily totally disabled; (3) in failing to address Plaintiff's alleged constructive refusal of suitable work, and (4) in awarding attorney's fees to Plaintiff upon concluding Defendants engaged in stubborn, unfounded litigiousness by defending this action without reasonable grounds. For the following reasons, we affirm in part, vacate in part, and remand.

I. Factual and Procedural History

Plaintiff was employed by the Ingersoll Rand Company as an assembler. On 8 May 2008, Plaintiff was injured while performing leak testing, which occurs after commercial machine starters are assembled.

Two days after Plaintiff's injury, he sought treatment at an urgent care facility and was assigned light duty work restrictions. On 21 June 2008, Plaintiff underwent an MRI and was diagnosed with an osteochondral injury, tendinopathy, and rotator cuff arthropathy of the right shoulder. Dr. George Veasy examined Plaintiff, concurred with the diagnosis, and opined the injury was consistent with Plaintiff's description of how the injury occurred. Dr. Veasy recommended arthroscopic surgery, and referred Plaintiff to Dr. Mark Brenner for a second opinion.

Dr. Brenner encouraged Plaintiff to follow-up as needed if he wished to proceed with surgery. On 21 November 2008, Dr. Veasy wrote a note to Defendants excusing Plaintiff from work pending surgery.

On 8 December 2008, after having paid for medical treatment until Plaintiff was recommended for surgery, Defendants filed a Denial of Workers' Compensation Claim Form 61 ("Form 61"), denying Plaintiff's claim to workers' compensation benefits. Plaintiff remained out of work due to his financial inability to undergo the recommended surgery after Defendants denied his claim. On 30 April 2009, Plaintiff was laid off due to a company-wide reduction in force.

In Defendants' plant, leak testing requires that assembled starters be moved onto a cart and then moved by hoist from the cart to a table. The hoist has two cables coming down from the ceiling on a moving track. One has a "J-hook" that is used to pick up and move the starters, and the other cable has a control box that controls the hoist. Workers use the control box to raise the starters and then guide them from the cart to the leak-testing table. After the starter is placed on the leak-testing table, the "J-hook" is removed from the round opening at the top of the starter, and the control box is used to move the

hoist up and out of the way. The control box has a green button to move a starter up and a red button to move a starter down.

Plaintiff testified that on the date he was injured, he was removing the hoist's J-hook from the starter when it suddenly rose, catching his arm and jerking it quickly upwards. This occurred either as a result of a mechanical malfunction or due to Plaintiff unintentionally touching the green button.

The Commission heard testimony from Ben Harris, Rufo Sanchez, Matt Sloan, Michael Dupree, and Marion McKenna. Harris, who began working for Defendants in March of 2006, testified the hoist used by Plaintiff had an inconsistent rate of ascension, and sometimes the hoist would move erratically and quickly in an upward direction. Sanchez, a production and engineering manager, testified the control box could be operated with the left hand, with the J-hook being guided with the right hand without crossing the hoist's cables if its operator approached the hoist from the assembly side of the plant. Sloan, who was employed by Defendants as a team leader, testified Plaintiff came to him after the incident and explained he had injured his right shoulder with the hoist. Dupree, who was employed by Defendants for thirty years, testified the control boxes operated based on the degree of pressure applied to its

buttons and that there were reports of hoists' inconsistent retraction rates after a reconfiguration of Plaintiff's department and after his injury. He was unaware, however, of any complaints prior to May 2008 (the month of Plaintiff's injury). Marion McKenna, a certified ergonomics assessment specialist, testified she observed an employee operating a hoist and she felt it would be difficult to pull a shoulder or cause a tear based on the rate of ascension of the hoist. But she could not confirm she was observing the same work area Plaintiff used on the date of his injury.

Deputy Commissioner Bradley W. Houser found for Plaintiff Defendants appealed to the Full Commission.

The Commission found that (1) on 8 May 2008 Plaintiff suffered a compensable injury by accident arising out of and in the course of his employment; (2) Plaintiff's testimony was credible in part because of the corroborative testimony of Harris, Sanchez, Sloan, and Dupree; (3) from 21 November 2008 through the present, Plaintiff remained out of work due to being unable to undergo the recommended surgery after Defendants' denial of his claim and because of a lack of personal means; (4) on 30 April 2009, Plaintiff's employment was terminated due to a workforce reduction; (5) Plaintiff produced sufficient evidence to

find that his disability and inability to earn wages subsequent to 30 April 2009 was causally related to his 8 May 2008 injury; (6) as a result of Plaintiff's 8 May 2008 injury, he has been unable to earn any wages in his former position with Defendants or in any other employment for the period of 21 November 2008 through the hearing date; and (7) Defendants' defense of this case was unreasonable and indicative of stubborn, unfounded litigiousness. Defendants timely appealed.

II. Jurisdiction

We have jurisdiction over Defendants' appeal of right. *See* N.C. Gen. Stat. § 7A-27(b) (2009) (stating appeal lies of right to this Court from judgments of an administrative agency).

III. Analysis

A. Compensability

Defendants first contend Plaintiff failed to meet his burden of showing he sustained a compensable injury arising out of and in the course of his employment. We disagree.

On appeal, we review "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109,

116, 530 S.E.2d 549, 553 (2000)). The Commission's findings of fact are conclusive on appeal when supported by competent evidence, even if the record contains evidence that would support contrary findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Commission's conclusions of law are reviewed *de novo*. *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007) (citing *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003)).

Defendants argue the Commission erred in finding the testimony offered by Sanchez, Sloan, and Dupree supported Plaintiff's account of the injury-causing incident. They contend Plaintiff is not credible by asserting that Sanchez's testimony regarding the hoist cables' propensity to tangle if one used their right hand on the J-Hook with the control box in the left hand indicates Plaintiff did not operate the hoist with his right hand. Defendants also maintain Sloan and Dupree's testimony indicates no complaints were made regarding the hoist's inconsistent rate of ascension until Plaintiff's department was reconfigured after his injury.

This argument mischaracterizes Plaintiff's evidence. Sanchez's testimony indicates Plaintiff could have operated the

hoist with his right hand had he approached the controls from the assembly side of the plant. Sloan's testimony indicates Plaintiff approached him after the incident and explained he had injured his shoulder with the hoist. While Sloan stated he was unaware of anyone other than Plaintiff being injured by the hoist, he never addressed whether any complaints were made to him about the hoist during his deposition as Defendants suggest. Dupree's testimony indicates there were complaints about the hoist's inconsistent rate of ascension after a reconfiguration of Plaintiff's department and after his injury, but he was unaware of any complaints prior to May 2008.

Defendants also contend Harris's testimony is not credible and that the Commission erred in giving little weight to McKenna's testimony because she could not confirm whether the hoist she observed was the same one used by Plaintiff. This contention overlooks the limited scope of our review. "The Commission's credibility determination is unreviewable and binding on appeal." *Rogers v. Lowe's Home Improvement*, 169 N.C. App. 759, 767, 612 S.E.2d 143, 148 (2005); *see also Rogers v. Smoky Mountain Petroleum Co.*, 172 N.C. App. 521, 529, 617 S.E.2d 292, 298 (2005) ("The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their

testimony, and may reject a witness'[s] testimony entirely if warranted by disbelief of that witness.").

Defendants' arguments regarding Harris's and McKenna's testimony relate solely to credibility determinations on the part of the Commission, which will not be re-evaluated here. We conclude competent evidence supports the challenged findings of fact and these findings support the Commission's conclusion that Plaintiff sustained an injury arising out of and in the course of his employment.

B. Temporary Total Disability

Defendants next argue the Commission erred in concluding Plaintiff was temporarily totally disabled. Specifically, they contend (1) Plaintiff failed to establish a causal relationship existed between his work-related accident and his shoulder condition and (2) he has been able to earn wages since 21 November 2008. We disagree.

Defendants first assert Dr. Veasy's testimony concerning Plaintiff's injury can be given no weight because it was the by-product of a hypothetical posed to him by Plaintiff's attorney. The Commission found that Dr. Veasy determined Plaintiff's injury was the cause of the shoulder conditions for which he treated Plaintiff and recommended surgery. This finding is supported by

Dr. Veasy's response to the following hypothetical posed by Plaintiff's attorney:

> Q: Assuming the Industrial Commission finds the following[] . . . that before May 8, 2008, Willie Cain did not suffer any disabling right-shoulder pain and that he was able to maintain regular heavy-duty employment, and that on May 8, 2008 Mr. Cain's right arm was suddenly jerked upwards, assuming those facts as true, do you have an opinion to a reasonable degree of medical certainty whether it is more likely than not that that incident of May 8, 2008, caused the right-shoulder injury that was described in the MRI?
> A: It is my medical opinion that is the cause.

"As long as an expert witness is qualified to render an opinion concerning the subject at issue and bases his or her opinions on evidence properly contained in the record, the Commission is entitled to rely on that testimony in making its decision." *Huffman v. Moore County*, __ N.C. App. __, __, 704 S.E.2d 17, 30 (2010) (citations omitted). The response to a hypothetical is not competent evidence if the hypothetical question requires the witness to assume facts not supported by the record. *See Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 675, 482 S.E.2d 20, 23 (1997). The hypothetical posed by Plaintiff's attorney required Dr. Veasy to assume Plaintiff did not suffer any disabling shoulder injury prior to 8 May 2008 and

that Plaintiff's arm was suddenly jerked upwards. The evidence provided by Plaintiff and Harris regarding the hoist's inconsistent rate of ascension supports both facts. Therefore, the Commission correctly treated Dr. Veasy's testimony on this point as competent evidence.

Defendants next assert that, because Dr. Veasy assigned Plaintiff light work duty and Defendants had light work for Plaintiff to perform at the time of the evidentiary hearing, Plaintiff failed to show he was unable to earn wages since 21 November 2008. The Commission found, based upon Plaintiff's injury and the medical and vocational evidence, that Plaintiff was unable to earn wages after 21 November 2008 because light duty work was aggravating his shoulder injury. The record indicates the Commission had two bases for this finding: (1) Plaintiff's testimony and (2) a notation by Dr. Brenner that Plaintiff's light duty work was aggravating his shoulder injury.

However, no such notation exists in the record. To the contrary, on 18 November 2008, Dr. Brenner noted, "[A]ppropriate work-related restrictions have been provided and [Plaintiff] is encouraged to continue in this regard." Furthermore, not only did Dr. Veasy believe Plaintiff was capable of light work, but when asked why he recommended Plaintiff remain out of work from

18 November 2008 until he underwent surgery, Dr. Veasy replied he did so for "convenience sake" rather than medical necessity.

There is competent evidence supporting the finding that Plaintiff was unable to earn wages after 21 November 2008 because of the risk of aggravating the injury: Plaintiff's testimony. He testified as follows:

> Q: Tell us about your limitations with your shoulder that exist now.
> A: [I]f I try to do those certain activities as far as raising my hand above your head at a certain . . . level or intensity or any kind of motion or intensity that I try to do . . . it re-aggravates . . . the injury and flares up, and I feel a substantial amount of pain . . . .
> Q: Were there any of the light duty jobs that you were trying to do at Ingersoll Rand between May 2008 and November 2008 that did not make your shoulder injury worse?
> A: Doing the kits. Doing the little kits and stuff, that didn't bother my shoulder.
> Q: And why didn't you just keep doing that?
> A: Well, the supervisor——they told me where to go and what to do.
> Q: And were you pretty clear about the kinds of jobs that you were able to do and not able to do secondary to shoulder pain?
> A: I was pretty clear about it, but if . . . management tells you to do something, then——and a few times I had to go and get a human resource lady to basically confirm because they was trying to get me to do certain things that was out of——that wasn't——you know, was out of the restriction's that I had.

As we have repeatedly held, "an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work." *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 82 (2007) (citing *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002)). Therefore, competent evidence exists to support the Commission's finding that Plaintiff was unable to earn wages after 21 November 2008. This finding supports its conclusion of law that Plaintiff should be awarded benefits for the eligible time-period after 21 November 2008.

C. Constructive Refusal of Suitable Work

Defendants next contend Plaintiff constructively refused suitable work and is therefore not entitled to disability benefits. We disagree.

Defendants turn to *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), for the proposition that, where an employee who is working following an injury by accident is terminated and the termination is not related to the injury, the inability to earn wages following the termination is considered a constructive refusal of suitable work if the employee's loss of wages is attributable to the termination and not the workers' compensation injury. Defendants' reading of

Seagraves is overbroad. "[T]o bar payment of benefits [for refusal of suitable employment], an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *Eudy v. Michelin N. Am., Inc.*, 182 N.C. App. 646, 655, 645 S.E.2d 83, 89 (2007) (quoting *McRae,* 358 N.C. at 493, 597 S.E.2d at 699) (alteration in original).

> [T]he test is whether the employee's loss of . . . wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss . . . in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability.

Seagraves, 123 N.C. App. at 234, 472 S.E.2d at 401.

Under the *Seagraves* analysis,

> the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage compara-

> ble to that earned prior to the injury, is due to the work-related disability.

Id. Plaintiff did not engage in misconduct and Defendants have made no such showing. On the contrary, he worked light duty until he was medically excused from work by Dr. Veasy and was later laid off in a company-wide reduction in force. Furthermore, the Commission found Plaintiff's loss of earning capacity subsequent to 30 April 2009 was attributable to his work-related disability, and this finding is supported by the competent evidence provided by Dr. Veasy discussed above. While Dr. Veasy provided testimony indicating he believed Plaintiff was capable of light duty work, recommended Plaintiff remain out of work from 18 November 2008 until he underwent surgery, and made that recommendation for "convenience sake" (rather than medical necessity), Plaintiff's testimony, as discussed above, is competent evidence concerning his ability to work. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (The Commission's findings of fact are conclusive on appeal when supported by competent evidence, even if the record contains evidence that would support contrary findings). Therefore, the Commission did not err by not concluding Plaintiff constructively refused suitable work.

D. The Commission's Grant of Attorney's Fees and Defendants' Stubborn, Unfounded Litigiousness

Defendants next contend the Commission erred in awarding attorney's fees to Plaintiff upon concluding Defendants engaged in stubborn, unfounded litigiousness by defending this action without reasonable grounds.

Section 97-88.1 provides that, "[i]f the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's attorney upon the party who has . . . defended them." N.C. Gen. Stat. § 97-88.1 (2009). The standard of review for an award or denial of attorney's fees under section 97-88.1 requires a two-part analysis. *Blalock v. Se. Material*, __ N.C. App. __, __, 703 S.E.2d 896, 899 (2011) (citing *Meares v. Dana Corp*, 193 N.C. App. 86, 93, 666 S.E.2d 819, 825 (2008)). Whether Defendants had reasonable grounds to bring a hearing is reviewed *de novo*. *Id.* If we conclude Defendants did not have reasonable grounds to defend the hearing, then we review the decision to make an award and the amount of the award for abuse of discretion. *Id.* The Commission abuses its discretion when its 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, 464–65, 528 S.E.2d 633, 635 (2000)

(quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). "In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. 'The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.'" *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422 (1998) (quoting *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)).

In finding of fact 32, the Commission found the following:

> [D]efendants' defense of this matter was unreasonable and indicative of stubborn, unfounded litigiousness. Although Defendants filed a Form 60 *Employer's Admission of Employee's Right to Compensation* on January 25, 2010, the actions of defendants through the time of the hearing before the Deputy Commissioner indicate that they had denied plaintiff's claim. Defendants were aware of plaintiff's need for surgery as of plaintiff's visit with Dr. Veasy on October 29, 2008. On November 18, 2008 Dr. Brenner agreed with Dr. Veasy's opinion that surgery was warranted. Despite the surgical recommendation of Dr. Veasy and Dr. Brenner, defendants had failed to authorize the surgery as of July 31, 2009, the date of the hearing before the Deputy Commissioner. Additionally, the Full Commission finds that defendants were without grounds to deny the credibility of plaintiff with regard to his injury when plaintiff's testimony was corrobo-

> rated by the testimony of Mr. Harris, Mr. Sanchez, Mr. Sloan, and Mr. Dupree. For these reasons, the Full Commission finds that defendants' defense of this matter was unreasonable and indicative of stubborn, unfounded litigiousness.[1]

The Commission then awarded Plaintiff attorney's fees equaling twenty-five percent of the indemnity compensation awarded to Plaintiff.

Defendants maintain finding of fact 32 implies they were estopped from denying Plaintiff's claim after having paid for medical treatment prior to their filing of an Employer's Admission of Employee's Right to Compensation Form 60 ("Form 60") on 25 January 2010. Defendants are correct that the mere payment of workers' compensation benefits is not an admission of liability and that an employer paying medical expenses and then denying liability is insufficient to invoke the doctrine of estoppel. *See Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E.2d 777

[1] While Defendants have not raised the issue, the finding indicates Dr. Brenner concurred with Dr. Veasy's opinion that Plaintiff required surgery. To the contrary, Dr. Brenner's note encouraged Plaintiff "to follow-up on an as needed basis if he wishes to proceed with surgery," and makes no mention whether he concurred with Dr. Veasy's opinion that surgery was required. However, we find Dr. Veasy's testimony regarding Plaintiff's need for surgery to be competent evidence for the Commission to use as support in finding Defendants acted unreasonably in defending this case, particularly when Dr. Brenner's notes seem to indicate Plaintiff could receive surgery should he follow-up as needed.

(1953). However, Defendants are incorrect that finding of fact 32 indicates they were estopped from denying Plaintiff's claim. Instead, it expressly states the reasons why the Commission determined Defendants engaged in stubborn, unfounded litigiousness, and in no way alludes to the prior payment of medical expenses as a reason for this finding. Such a finding of fact does not implicate the doctrine of estoppel and Defendants' arguments to the contrary fail.

Defendants appealed this case to the Full Commission principally arguing Plaintiff did not sustain an injury by accident arising out of and in the course of his employment. Plaintiff's testimony clearly contradicts this argument, as does the expert opinion of Dr. Veasy and the corroborative testimony provided by Harris, Sanchez, and Sloan. Although Defendants do not raise the argument with respect to attorney's fees, Dupree's testimony does not support Plaintiff's testimony regarding the hoist's inconsistent rate of retraction because he received no complaints about the hoist until after Plaintiff's injury. In light of the substantial evidence indicating Plaintiff suffered an injury by accident arising out of and in the course of his employment, we conclude Defendants unreasonably defended this claim. While it is reasonable for "an employer with *legitimate* doubt regarding

the employee's credibility, based on *substantial evidence* of conduct by the employee inconsistent with his alleged claim" to defend a hearing, *Sparks*, 55 N.C. App. at 664, 286 S.E.2d at 576 (emphasis added), substantial evidence provided by Plaintiff, Dr. Veasy, Harris, Sanchez, and Sloan indicate Plaintiff sustained an injury by accident arising out of and in the course of his employment. One of the few witnesses providing testimony favorable to Defendants, McKenna, could not confirm the hoist she observed was operated by Plaintiff, and Defendants could produce only speculative evidence as to why the other witnesses' testimony was not credible.[2] Thus, Defendants did not have reasonable grounds to bring a hearing before the Commission yet did so in a manner tantamount to stubborn, unfounded litigiousness.

Defendants next contend the Full Commission abused its discretion by considering their Form 60 filed on 25 January 2010 because the record of evidence compiled by the Deputy Commissioner was closed on 2 November 2009. "[T]he full Commission shall review the award, and, if good ground be shown therefor, . . . *receive further evidence* . . . ." N.C. Gen. Stat. § 97-85 (2009) (emphasis added); *see also Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 149, 676 S.E.2d 604, 610 (2009)

[2] For example, Defendants assert Harris's testimony is not credible because he was laid off on 12 June 2009.

("The Full Commission, when reviewing an award by a deputy commissioner, may receive additional evidence . . . ."). "Whether such good ground [to receive further evidence] has been shown is discretionary and 'will not be reviewed on appeal absent a showing of manifest abuse of discretion.'" *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992) (quoting *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238 (1979)).

Although the Full Commission has the authority pursuant to section 97-85 to receive further evidence in addition to that considered by the Deputy Commissioner, in this case, the Commission specifically declined to do so. The Full Commission's Opinion and Award specifically states that

> The Full Commission reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Houser and the briefs and oral arguments before the Full Commission. The appealing party has not shown good grounds to reconsider the evidence; receive further evidence; rehear the parties or their representatives; or amend the Opinion and Award, except for minor modifications.

Despite this statement, in finding of fact 32, the Full Commission states that

> The Full Commission, upon review of the evidence of record, finds that defendants' defense of this matter was unreasonable and

> indicative of stubborn, unfounded litigiousness. *Although Defendants filed a Form 60 Employer's Admission of Employee's Right to Compensation on January 25, 2010,* the actions of defendants through the time of the hearing before the Deputy Commissioner indicate that they had denied plaintiffs claim. (Emphasis added.)

Thus, there is an internal inconsistency within the Opinion and Award. Despite the statement that the Full Commission considered only the record before the Deputy Commissioner, it did consider additional evidence, since the Form 60 was filed on 25 January 2010, and the record evidence before the Deputy Commission was closed on 2 November 2009. As the Form 60 was not a part of the record before the Full Commission, the finding of fact that the Form 60 was filed on 25 January 2010 is not supported by any evidence. *See Barham v. Food World, Inc.*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980) ("In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, this Court is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." (quoting *Byers v. Highway Commission*, 275 N.C. 229, 166 S.E.2d 649 (1969))). We also note that the Form 60 in question is not in our record on appeal. Defendants assert in their brief that "[t]he form 60 was filed

erroneously and it is clear defendants were appealing the Deputy Commission's [sic] Opinion and Award in its entirety." Plaintiff responds that Plaintiff's counsel "only became cognizant of [the Form 60] in preparing this brief" and that "[P]laintiff's counsel has yet to see the Form 60." We cannot speculate upon how or why the Form 60 came to be filed, but there is no dispute that the Form 60 was not part of the record before the Full Commission and the Commission specifically declined to consider additional evidence. We find that, to the extent the Full Commission's finding of fact No. 32 as to Plaintiff's entitlement to sanctions pursuant to section 97-88.1 is based upon the Form 60, this finding was not supported by the evidence. It is possible that the Commission may have awarded sanctions in its discretion even without consideration of the Form 60, but we are unable to make this determination. The Commission also had the discretion to receive additional evidence, including the Form 60 or evidence regarding its filing, but specifically stated that it did not consider additional evidence. We therefore remand this matter to the Full Commission for reconsideration of the issue of sanctions only. On remand, the Full Commission may determine in its discretion if additional evidence regarding the sanctions issue only will be

received and shall determine the plaintiff's entitlement to an award of attorney fees based only upon the record as properly constituted.

For the foregoing reasons, the Commission's opinion and award is

Affirmed in part, vacated in part, and remanded.

Judges STROUD and THIGPEN concur.

Report per Rule 30(e).