NO. COA07-865-2

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

ROBERT BAXTER,
EMPLOYEE, PLAINTIFF,

v.

From the North Carolina Industrial Commission
IC No. 687008

DANNY NICHOLSON, INC., EMPLOYER SELF-INSURED, (KEY RISK MANAGEMENT SERVICES, INC., SERVICING AGENT),
DEFENDANT.

On remand from the North Carolina Supreme Court in 363 N.C. 829, 690 S.E.2d 265, reversing and remanding the decision of the Court of Appeals, *Baxter v. Danny Nicholson, Inc.*, 191 N.C. App. 168, 661 S.E.2d 892 (2008), for consideration of the remaining issues. Appeal by defendant from opinion and award entered 5 February 2007 by the North Carolina Industrial Commission. Originally heard in the Court of Appeals 16 January 2008.

DeVore, Acton & Stafford, PA, by William D. Acton, Jr., for the plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Shelley Coleman, for the defendant-appellant.

BRYANT, Judge.

Defendant employer Danny Nicholson, Inc., with servicing agent Key Risk Management Services, appeals from an opinion and award entered by the North Carolina Industrial Commission, (hereinafter "the Commission"), awarding plaintiff Robert Baxter full disability

benefits. For the reasons stated herein, we affirm the decision of the Industrial Commission.

Facts

On 23 December 1996, while working for defendant as a truck driver, plaintiff injured his back. On 6 January 1997, defendant filed a Form 19 (Employer's Report of Injury to Employee) which described the extent of plaintiff's injury. On 5 August 1997, defendant filed a Form 63 (Notice To Employee of Payment of Compensation Without Prejudice to Later Deny the Claim Pursuant To N.C. Gen. Stat. § 97-18(d)). Plaintiff's worker's compensation benefits began 6 January 1997 and continued until 13 July 1998.

Medical records reflect that as a result of his injury, plaintiff suffered a herniated disk at L5-S1 which encroached on the S1 nerve root. On 11 March 1997, Dr. Al Rhyne performed a microdiscectomy which failed to relieve plaintiff's back pain. A subsequent MRI revealed that plaintiff's chronic back pain was caused by scar tissue around the S1 nerve root; plaintiff was diagnosed with "failed back surgery syndrome" with chronic S1 radiculopathy. The pain continued through October 1997 when Dr. Rhyne wrote that plaintiff could "try to return to work" up to six hours per day but not lift over 35 pounds. On 6 February 1998, medical case manager Emily Watts, R.N., C.C.N., wrote the claims adjuster stating that plaintiff's treating physicians agreed: "there was nothing more to do except pain management . . . ."

Having reached maximum medical improvement, plaintiff looked for a job with the aid of Job Specialist Anne Welch. Plaintiff was

able to find a part-time security job at Burns Security. On 1 June 1998, Dr. Rhyne reviewed a description of the job and approved the position. On 8 June, plaintiff participated in an orientation where he was given assignments and a work schedule. Plaintiff worked for Burns Security on 13 and 14 June 1998; however, the security job required plaintiff to walk up and down stairs. Plaintiff later testified that when he used the stairs, his leg would "give way"; therefore, he did not feel he could perform the required tasks. After working two weekends, plaintiff surrendered the position. Plaintiff testified that he looked for other jobs but could not find anything that he could do. Plaintiff informed Welch that he quit the security guard position due to increased pain; however, plaintiff did not notify defendant pursuant to a Form 28U and did not present medical confirmation that he was physically unable to continue in his employment.

On 30 June 1998, Welch provided Key Risk Claims Representative Janice Sherrell with a summary of her contact with plaintiff:

> [Plaintiff] called and stated he did not feel like he could work or perform the duties of the job he had been working. He said he just was not ready to go back to work. [Plaintiff] requested that [Welch] contact the Claims Representative to have another visit with the doctor.

In the summary of her communications with the claims representative, Welch stated that "[she] has been in contact with the Claims Representative . . . [and] [her] impressions from talking with the Claims Representative is [sic] she would not authorize this next visit with the doctor."

Meanwhile, on 25 June 1998, Key Risk filed with the Commission a Form 28T (Notice of Termination of Compensation by Reason of Trial Return to Work Pursuant to N.C. Gen. Stat. § 97-18.1(b) and N.C. Gen. Stat. § 97-32.1). Plaintiff's benefit payments stopped 13 July 1998. Key Risk then made several requests for plaintiff's pay stubs in an attempt to adjust plaintiff's disability benefits. Despite acknowledging that plaintiff was out of work, Key Risk, on 2 November 1998, filed with the Commission a Form 24 (Application to Suspend Benefits). As a ground for suspending plaintiff's benefits, Claims Representative Sherrell stated that "[plaintiff] has failed to provide . . . wages for consideration of [temporary partial disability] benefits . . . ." On 23 November 1998, the Commission ordered that the Form 24 be treated as withdrawn. On 25 January 1999, plaintiff requested that the Commission order Key Risk management services to resume plaintiff's benefit payments and apply a penalty against Key Risk for failing to continue the weekly benefit payments. On 23 February 1999, plaintiff filed a Form 33 request for hearing and alleged that defendant terminated his temporary total disability compensation despite the lack of a Form 24 order from the Commission. In response, on 1 March 1999, the Commission's Executive Secretary, Tracey Weaver, issued a memorandum regarding plaintiff's benefits, stating in pertinent part:

> [I]f the plaintiff entered into a trial return to work, then the temporary total disability would appropriately be stopped pursuant to a Form 28T. Temporary total disability would not appropriately be reinstated until a Form 28U is properly completed [by plaintiff] and filed

> with the defendant. If the defendant does not reinstate and the Form 28U is properly completed, then a Motion may be made on that basis.

Plaintiff did not make any subsequent requests to return to the doctor and did not file a Form 28U. On 6 October 2003, plaintiff filed a Form 33 (Request that Claim be Assigned for Hearing) seeking compensation from 13 July 1998 to "the present," payment of medical expenses and treatment, payment for permanent partial disability, and attorney fees.

Procedural History

On 3 May 2006, Deputy Commissioner Ronnie Rowell filed an opinion and award concluding that defendant unilaterally terminated plaintiff's benefits by erroneously filing a Form 28T without seeking the Commission's approval and awarded plaintiff a ten percent penalty on all unpaid total disability compensation and continuing medical benefits necessitated by the compensable injury occurring 23 December 1996. Defendant appealed to the Full Commission. In a split decision, the Commission concluded that plaintiff proved he had been totally disabled since his injury, entitling plaintiff to a resumption of benefits from 13 July 1998 until the Commission issued an order to the contrary, plus a ten percent penalty on unpaid disability compensation; and defendant had unlawfully terminated medical benefits and wrongfully refused to re-start disability benefits in violation of N.C. Gen. Stat. §§ 97-18.1, 97-25, 97-32.1. The Commission also awarded plaintiff an attorney's fee of twenty-five percent of the compensation due. Defendant appeals.

On appeal, defendant raises the following issues: whether the Commission erred in finding and concluding that (I) plaintiff met the burden of establishing ongoing disability; (II) defendant improperly terminated plaintiff's benefits; and (III) defendant was to be sanctioned.

Standard of Review

Our review of an opinion and award from the Industrial Commission is limited to determining whether competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law. *Calloway v. Mem'l Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000) (citing *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980)). Findings supported by competent evidence are conclusive on appeal even if there is evidence to support contrary findings. *Id.* (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). Conclusions of law are reviewed *de novo* by the appellate court. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 602, 615 S.E.2d 350, 355 (2005).

I

Defendant contends the Commission erred in finding and concluding that plaintiff met his burden of proving ongoing disability. Defendant contends that, while plaintiff has demonstrated some ill-effects from the injury, his inability to find employment derived from an unreasonable effort and that, absent evidence to demonstrate permanent disability, plaintiff has

failed to satisfy any element necessary to find him disabled. We disagree.

The North Carolina Workers' Compensation Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2009).

> [T]o support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this [plaintiff's] incapacity to earn was caused by [his] injury.

Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)). "Initially, the claimant must prove both the extent and the degree of his disability." *Demery v. Converse, Inc.*, 138 N.C. App. 243, 249, 530 S.E.2d 871, 876 (2000) (citation omitted). An employee may meet his or her burden of proving disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related [sic] injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Barrett v. All Payment Servs., Inc., ___ N.C. App. ___, ___, 686 S.E.2d 920, 923 (2009) (quoting *Russell v. Lowe's Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). But, "credibility and weight of . . . testimony [is] for the Commission to decide, not us." *Perkins v. Broughton Hospital*, 71 N.C. App. 275, 279, 321 S.E.2d 495, 497 (1984) (citing *Crawford v. Central Bonded Warehouse*, 263 N.C. 826, 140 S.E.2d 548 (1965)).

In the production of evidence that an employee is capable of some work, but, after a reasonable effort on his part, has been unsuccessful in obtaining employment, "this Court has approved methods of proof other than medical evidence to show that an employee has lost wage earning capacity, and is therefore, entitled to total disability benefits." *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 343, 561 S.E.2d 298, 302 (2002) (citation omitted) (where the plaintiff presented evidence of his original average weekly wage as a waiter and the wages earned after his compensable injury); *see, e.g., Perkins*, 71 N.C. App. at 279, 321 S.E.2d at 497 (reasoning "[t]he ordinary person knows, without having to consult a medical expert, when it is necessary to lie down and rest because his or her own body is tired, exhausted, or in pain, and the law has no inhibition against testimony to that effect."). "[I]f [the] plaintiff satisfie[s] his burden of proof to establish one of the elements under *Russell*, the burden shifts to [the] defendant to come forward with evidence to show not only that suitable jobs [were] available, but also that the plaintiff [was] capable of getting one . . . ." *Workman v. Rutherford Elec.*

Mbrshp. Corp., 170 N.C. App. 481, 490, 613 S.E.2d 243, 250 (2005) (citation and quotations omitted) (emphasis suppressed).

Here, plaintiff testified that he worked for defendant as a truck driver and that he injured his back on the job. The parties stipulated that plaintiff's average weekly wage was $538.26, and his compensation rate was $358.86. Stipulated medical records indicate that plaintiff suffered a herniated disk at L5-S1 which encroached on the S1 nerve root. Plaintiff's physician, Dr. Rhyne, performed a microdiscectomy but failed to relieve plaintiff's pain. Plaintiff was diagnosed with "failed back surgery syndrome" with chronic S1 radiculopathy. In October 1997, Dr. Rhyne wrote that plaintiff could "try to return to work" up to six hours per day but not lift over 35 pounds. Plaintiff later testified that he "can walk for a while. . . . can stand but not long in one position. [And, he] can't sit too long in one position." "If I moves the oddest way, it [sic] just like when I first injured it. Sharp pains go through it all the way to my rectum." After being medically released to return to work with restrictions, plaintiff applied for more than one job, and ultimately accepted part-time employment as a security guard with Burns Security, working four days over two weekends before quitting due to physical inability to perform the job's required tasks: plaintiff testified that when he walked up steps, his leg would "give way," and he would fall. Plaintiff earned $191.20 during his four days working for Burns Security. Plaintiff testified that he looked for other jobs but

could not find anything that he could do. The Commission made the following pertinent findings of fact:

> 22. Although Plaintiff has been found to be capable of light duty work, the job at Burns Security did not constitute suitable employment. Plaintiff was physically unable, due to his physical limitations from his injury, to perform the duties required. The job offered was part time and the wages Plaintiff earned during the brief period he was able to work, were not indicative of his capacity to earn wages in the competitive marketplace.
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> 23. Plaintiff has looked for other jobs since his disability compensation was terminated but has been unable to find another job. Plaintiff's efforts to locate suitable employment have been reasonable.
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> 24. Plaintiff has established by the greater weight of evidence that as a result of his injuries he was unable to successfully perform even the part-time work offered and that he has been unable to locate suitable employment due to his physical limitations resulting from his compensable injury. At the time of the hearing before the Deputy Commissioner, Plaintiff could not stand or sit for long periods of time, he could not sleep well, and he took ibuprofen for pain. Additionally, Plaintiff fully cooperated with all vocational efforts and medical treatment provided by Defendant.
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> 25. As a result of his admittedly compensable injury Plaintiff has been totally disabled from work in the competitive job market from the date of his injury on December 23, 1996 through the date of hearing before the Deputy Commissioner and continuing.

These findings of fact by the Commission are well supported by competent evidence in the record and are therefore binding. *See*

Calloway, 137 N.C. App. at 484, 528 S.E.2d at 400. Further, the findings support the Commission's conclusion that plaintiff

> established by the greater weight of the evidence that his physical limitations and permanent restrictions from his compensable injury prevented him from performing the part-time work at Burns Security and he has been unsuccessful in locating suitable employment without vocational assistance, after making reasonable efforts. . . . Accordingly, Plaintiff has proven that he has been totally disabled from working in the competitive marketplace since the date of his injury.

While defendant argued that plaintiff was capable of light duty work, defendant presented no evidence to show that suitable jobs were available or that plaintiff was capable of getting one. Accordingly, the Commission did not err in concluding that plaintiff met his burden of proving ongoing disability.

II

Next, defendant contends the Commission erred in concluding that defendant unlawfully terminated medical benefits and wrongfully refused to re-start disability benefits when plaintiff returned to work for a different employer. Defendant argues that the physical requirements of plaintiff's security job were within plaintiff's prescribed limitations, and thus, his return to work was not unsuccessful. Furthermore, defendant asserts that the version of Workers' Compensation Rule 404A(2) in effect in 1998 required plaintiff to file a Form 28U to resume benefit payments after an unsuccessful trial return to work and, plaintiff having failed to file a Form 28U, defendant was not required to reinstate benefits. We disagree.

Pursuant to the North Carolina Workers' Compensation Act, General Statute § 97-18.1(b) (Termination or suspension of compensation benefits), "[a]n employer may terminate payment of compensation for total disability . . . when the employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1 [(Trial return to work)] . . . ." N.C. Gen. Stat. § 97-18.1(b) (1997). However, "[i]f the trial return to work is unsuccessful, the employee's right to continuing compensation . . . *shall be unimpaired* unless terminated or suspended thereafter pursuant to the provisions of this Article." N.C. Gen. Stat. § 97-32.1 (1997) (emphasis added). Previously, Workers' Compensation Rule 404A(2) (1998), stated that where "the employee must stop working due to injury for which compensation had been paid, the employee *shall* complete and file a Form 28U . . . ." Workers' Comp. R. of N.C. Indus. Comm'n. 404A(2) (1998) (emphasis supplied). In 2000, Rule 404A(2) was amended to state that the employee "*should* complete and file . . . a Form 28U . . . ." Workers' Comp. R. of N.C. Indus. Comm'n. 404A(2) (2000) (emphasis supplied). The amended Rule 404A(2) (2000) was made retroactive to 15 February 1995 and is therefore applicable to this case. Further, in *Burchette v. E. Coast Millwork Distribs., Inc.*, 149 N.C. App. 802, 562 S.E.2d 459 (2002), this Court noted "[t]he revised IC Rule 404A(2) is now not in conflict with N.C.G.S. § 97-32.1" as the employee's benefits, following an unsuccessful trial return to work, should be "unimpaired unless terminated or

suspended thereafter pursuant to the provisions of this Article." *Id.* at 809, 562 S.E.2d at 463.

In *Burchette*, the defendants argued the plaintiff's failure to file a Form 28U after the defendants filed a Form 28T relieved the defendants of the responsibility of resuming disability benefit payments, despite knowledge that the plaintiff's return to work was unsuccessful. *Id.* at 808, 562 S.E.2d at 463. The defendants contended that they followed the appropriate rules as set out by the Industrial Commission in 1996. We noted that under N.C.G.S. § 97-32.1, "the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article." *Id.* at 809, 562 S.E.2d at 463. Additionally, Rule 404A(2), as amended in 2000 and made retroactive to 1995, stated that "the employee *should* complete and file with the Industrial Commission, a Form 28U" if the employee must stop work due to an injury for which compensation had been paid. *Id.* at 809, 562 S.E.2d at 463.

> [A]fter a failed trial return to work, N.C.G.S. § 97-32.1 directs the employer that the compensation shall not be terminated without following the provisions of the General Statutes. This language directs the employer back to N.C.G.S. § 97-18.1(c), which sets forth the procedures for all termination requests other than the exceptions listed in N.C.G.S. § 97-18(b).

Id. We held that "once defendants had knowledge that [the] plaintiff's trial return to work was unsuccessful, they were required to reinstate compensation" pursuant to the form agreement awarding the plaintiff compensation. *Id.* We note the form

agreement in *Burchette* was a Form 21 (Agreement for Compensation for Disability), which stipulates to a continuing presumption of disability, as compared to the instant case, where defendant filed a Form 63 (Notice to Employee of Payment of Compensation without Prejudice to Later Deny the Claim Pursuant to N.C. Gen. Stat. § 97-18(d)).

Here, the Commission made the following pertinent findings of fact, which are supported by competent evidence in the record:

> 9. On June 15, 1998, Ms. Welch prepared a report documenting Plaintiff's return to work. On June 25, 1998, Defendant's adjuster, Janice Sherrill [sic] filed a Form 28T with the Industrial Commission stating Plaintiff's temporary total disability compensation was terminated on June 8, 1998, when he returned to work. On June 30, 1998 Ms. Welch sent a report to Janice Sherrill [sic], the adjusting agent, stating that Plaintiff did not believe he could perform the job with Burns and that Plaintiff had requested authorization to see a doctor. . . .
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> 10. . . . On July 8, 1998 Defendant terminated all compensation to Plaintiff even though Defendant knew, or had reason to know from the reports of Ms. Welch, that Plaintiff was not working and had never worked more than part time, earning diminished wages.
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> 11. . . . The Full Commission finds that Defendant had actual knowledge that Plaintiff's trial return to work was unsuccessful on or about June 30, 1998 and despite this knowledge, Defendant proceeded to terminate Plaintiff's temporary total disability compensation on July 13, 1998 and did not notify the Commission that Plaintiff was no longer working.

As in *Burchette*, defendant filed a Form 28T terminating plaintiff's disability compensation benefits with knowledge that plaintiff's trial return to work was unsuccessful. Defendant "did not qualify for the exception listed in N.C.G.S. § 97-18.1(b)[,]" and was, therefore, required to reinstate compensation pursuant to the Form 63, albeit with prejudice. *See, e.g., id.* at 809, 562 S.E.2d at 464.

In *Johnson*, our Supreme Court recognized that "[a]n employee seeking compensation under the Workers' Compensation Act for an injury arising out of and in the course of employment bears 'the burden of proving the existence of his disability and its extent.'" 358 N.C. at 706, 599 S.E.2d at 512 (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). "[A] presumption of disability in favor of an employee arises only in limited circumstances." *Id.* at 706, 599 S.E.2d at 512. Our Supreme Court noted that neither it nor this Court had previously held "that a presumption of disability is created when a Form 63 is executed by the parties, followed by payments to the employee by the employer beyond the ninety-day period without contesting the compensability of or the liability for a claim." *Id.* Therefore, "the burden [of proof] remain[s] on [the] plaintiff to prove his disability, [and] the Commission [is] obligated to make specific findings regarding the existence and extent of any disability suffered by [the] plaintiff." *Id.* at 707, 599 S.E.2d at 512-13.

Here, the Commission made the following findings:

1. . . . On December 23, 1996, Plaintiff was working as a truck driver with Defendant when he injured his back while on the job. On January 8, 1997, Defendant filed a Form 63, agreeing to pay without prejudice. Defendant did not subsequently deny this claim; therefore the claim became an admitted claim.

. . .

3. On March 11, 1997, [plaintiff's physician] performed a microdiscetomy on Plaintiff . . . . The surgery was unsuccessful and Plaintiff experienced residual nerve damage. [Plaintiff's physician] treated Plaintiff . . . for residual back pain radiating into his leg.

4. On October 29, 1997, Dr. Rhyne released Plaintiff to return to work with restrictions, including not lifting more than thirty-five (35) pounds and not working more than six hours per day. . . . Dr. Rhyne assigned a twelve percent (12%) permanent partial impairment rating to Plaintiff's back.

5. At Plaintiff's request for a second opinion, Dr. Rhyne referred him to Dr. Michael Heafner, a neurosurgeon. On January 15, 1998, Dr. Heafner examined Plaintiff and diagnosed him with failed back syndrome. . . . In a March 8, 1998 letter Dr. Heafner . . . assigned Plaintiff a fifteen percent (15%) impairment rating to his back. On February 4, 1998, Dr. Rhyne indicated that Plaintiff was capable of performing light-duty work and released him from care, except for follow-ups as needed.

. . .

7. Defendant provided Plaintiff with vocational rehabilitation services following his release to light-duty work. In May 1998, Plaintiff's assigned vocational rehabilitation professional, Anne Welch, secured for Plaintiff a security guard position with Burns

Security. . . . On June 1, 1998, Dr. Rhyne reviewed a job description for the security job and ultimately approved the position. . . .

8. Plaintiff worked for Burns Security on June 13, 1998 and June 14, 1998. As part of his job responsibilities, Plaintiff was required to walk up and down stairs, which caused him to experience increased back and leg pain. . . . After working two weekends, Plaintiff informed Welch that he had quit the security guard position due to his increased pain.

9. On June 15, 1998, Ms. Welch prepared a report documenting Plaintiff's return to work. On June 25, 1998, Defendant's adjuster, Janice Sherrill [sic] filed a Form 28T with the Industrial Commission stating Plaintiff's temporary total disability compensation was terminated on June 8, 1998, when he returned to work. On June 30, 1998[,] Ms. Welch sent a report to Janice Sherrill [sic], the adjusting agent, stating that Plaintiff did not believe he could perform the job with Burns and that Plaintiff had requested authorization to see a doctor. Ms. Welch documented in her report that after she spoke with Ms. Sherrill [sic] concerning Plaintiff's request, she called Plaintiff and advised him that Defendant would not authorize another visit to his doctor.

10. On July 8, 1998[,] Defendant terminated all compensation to Plaintiff . . . .

. . .

20. Defendant contends it properly terminated Plaintiff's temporary total disability benefits based on the filing of the Form 28T and Plaintiff is not entitled to reinstatement of compensation benefits based on his failure to file a Form 28U. Defendant has maintained this position even after *Burchette v. East* [sic] *Coast Millwork Distributions, Inc.*, 149 N.C. App. 802 (2002) was decided and after the

> revisions to Industrial Commission Rule 404A(2).
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> 22. Although Plaintiff has been found to be capable of light duty work, the job at Burns Security did not constitute suitable employment. Plaintiff was physically unable, due to his physical limitations from his injury, to perform the duties required. The job offered was part time and the wages Plaintiff earned during the brief period he was able to work, were not indicative of his capacity to earn wages in the competitive marketplace.
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> 23. Plaintiff has looked for other jobs since his disability compensation was terminated but has been unable to find another job. Plaintiff's efforts to locate suitable employment have been reasonable.

The Commission reached the following conclusion:

> 1. . . . Plaintiff has established by the greater weight of the evidence that his physical limitations and permanent restrictions from his compensable injury prevented him from performing the part-time work at Burns Security and he has been unsuccessful in locating suitable employment without vocational assistance, after making reasonable efforts. . . . Plaintiff has fully cooperated with all vocational efforts and medical treatment provided by Defendant. . . . Accordingly, Plaintiff has proven that he has been totally disabled from working in the competitive marketplace since the date of his injury.

As discussed in issue I, we hold that plaintiff met his burden of proof establishing ongoing disability. Further, the Commission made adequate findings regarding the existence and extent of plaintiff's disability to support its conclusion that defendant unlawfully terminated plaintiff's medical benefits and wrongfully

refused to re-start disability benefits after plaintiff's unsuccessful return to work. Accordingly, defendant's argument is overruled.

III

Defendant contends that the Commission unjustifiably sanctioned defendants by awarding plaintiff attorney's fees. We disagree.

"The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason." *Thompson v. Fed. Express Ground*, 175 N.C. App. 564, 570, 623 S.E.2d 811, 815 (2006) (citation omitted).

Under North Carolina General Statute section 97-88.1, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2009).

Here, the Commission made the following findings of fact:

> 20. Defendant contends it properly terminated Plaintiff's temporary total disability benefits based on the filing of the Form 28T and Plaintiff is not entitled to reinstatement of compensation benefits based on his failure to file a Form 28U. Defendant has maintained his position even after *Burchette v. East Coast Millwork Distributions, Inc.*, 149 N.C. App. 802 (2002) was decided and after the revisions to Industrial Commission Rule 404(2).
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> . . .

> 27. Plaintiff contends that Defendant's termination of temporary total disability benefits based on the erroneous filing of a Form 28T, and its subsequent refusals to reinstate compensation benefits constituted stubborn, unfounded litigiousness. Plaintiff further contends that at the time the Defendant filed the Form 28T, Defendant had actual knowledge that Plaintiff's trial return to work was unsuccessful; that Defendant terminated temporary total disability compensation without prior approval of the Commission and that Plaintiff should be awarded attorney fees pursuant to N.C. Gen. Stat. § 97-88.1. Plaintiff's contentions are persuasive and the Full Commission finds that Defendant's conduct herein was unreasonable and constituted stubborn, unfounded litigiousness, justifying an award of attorney fees.

The record evidence indicates that defendant refused to reinstate plaintiff's benefits for more than six years after the unsuccessful return to work. This, and other competent evidence, supports the findings which are, thus, conclusive on appeal. *See Calloway*, 137 N.C. App. at 484, 528 S.E.2d at 400 (citation omitted). The findings in turn support the sanction of attorney's fees imposed by the Commission. Therefore, we cannot say that the Commission's award of attorney's fees for "stubborn, unfounded litigiousness" is manifestly unsupported by reason. Accordingly, defendant's assignment of error is overruled.

Affirmed.

Judges HUNTER, Robert C., and JACKSON concur.

Report per Rule 30(e).