NO. COA12-846
NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2013

ANTHONY ANTELO, Employee,
Plaintiff,

v.

North Carolina Industrial Commission
IC No. 702263

WAL-MART ASSOCIATES, INC., Employer,
AMERICAN HOME ASSURANCE, Carrier,
(CLAIMS MANAGEMENT, INC., Third-Party Administrator),
Defendants.

Appeal by defendants from opinion and award entered 5 April 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 December 2012.

Greg Jones & Associates, P.A., by Cameron D. Simmons, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Dalton B. Green, for Defendants-Appellants.

ERVIN, Judge.

Defendants WalMart Associates, Inc., and American Home Assurance (Claims Management, Inc.) appeal from an order entered by the Industrial Commission awarding Plaintiff Anthony Antelo medical and disability workers' compensation benefits. On appeal, Defendants argue that the Commission erred by awarding

benefits to Plaintiff on the grounds that Plaintiff had constructively refused employment and failed to demonstrate that he was disabled. After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

On 7 February 2007, Plaintiff, who was employed as a member of Defendant WalMart's floor maintenance crew, suffered an admittedly compensable injury to his left wrist while pushing a pallet holding exercise equipment. Subsequently, Plaintiff returned to work on a light duty basis as a people greeter subject to instructions that he not lift, push, pull, or grip objects weighing more than thirty pounds.

As a WalMart employee, Plaintiff was subject to Defendant WalMart's four-step disciplinary procedure, which consisted of a verbal warning (which Defendants refer to as a "coaching"), a written warning (which is also referred to as a "coaching"), a final warning (which Defendants refer to as a "decision day"), and termination. However, if an employee who has received a verbal warning engages in no further misconduct for the ensuing

year, the warning "expires," so that the employee starts again with a "clean slate."

On 22 April 2007, Plaintiff received a warning for having five unauthorized absences from work during a six-month period. As a result of the fact that Plaintiff had no further formal reprimands during the following year, this verbal warning "expired" on 23 April 2008. On 2 November 2008, however, Plaintiff received a verbal warning for failing to take scheduled meal breaks. Plaintiff received a written warning for smoking in the store restroom on 12 January 2009 and a final warning for unauthorized smoking in the parking lot on 26 September 2009. The 26 September 2009 warning was Plaintiff's final warning, or his "decision day" in WalMart parlance. On 15 November 2009, Plaintiff's employment was terminated on the grounds that he had taken an unauthorized smoking break.

After his termination, Plaintiff unsuccessfully sought alternative employment. Plaintiff, who was forty-eight years old at the time of the hearing held before the Deputy Commissioner, has earned a GED degree. During the ten year period prior to the hearing held in this case, Plaintiff had worked as a truck driver and held maintenance-related positions, jobs which he cannot perform consistently with the work-related

restrictions to which he is subject as a result of his injury.[1] As a result of the fact that he did not own a car or a computer, Plaintiff sought employment through the Employment Security Commission and by calling on prospective employers in person. Plaintiff kept a log book memorializing his attempts to find work, in which Plaintiff indicated that he had contacted an average of three potential employers a week after 2 April 2010. As of the date of the hearing, however, Plaintiff had not found other employment.

B. Procedural History

On 8 February 2007, Defendants filed an Industrial Commission Form 19 reporting that Plaintiff had sustained a compensable injury on 7 February 2007. On 3 January 2008, Defendants filed a Form 60 acknowledging Plaintiff's right to workers' compensation benefits. After Plaintiff was terminated from his employment with Defendant WalMart, Defendants stopped paying Plaintiff's workers' compensation benefits. On 21 July 2010, Plaintiff filed a Form 33 in which he requested the Commission to set the issues arising from Defendants' refusal to

[1]At the time of the hearing, Plaintiff was still under a doctor's care for the effects of his injury. Among other things, Plaintiff testified that he had unbearable pain in the event that he was exposed to cold temperatures, had trouble sleeping, and was unable to drive for more than forty miles without experiencing pain.

continue to pay his workers' compensation benefits for hearing. On 7 September 2010, Defendants filed a Form 33R in which they alleged that they were paying Plaintiff all of the workers' compensation benefits to which he was entitled.

A hearing was held before Deputy Commissioner Phillip A. Holmes on 23 March 2011. On 20 September 2011, Deputy Commissioner Holmes entered an order concluding that Plaintiff was not entitled to receive workers' compensation benefits from and after the date of his termination from Defendant WalMart's employment on the grounds that Plaintiff had been terminated for reasons unrelated to his compensable injury, that Plaintiff had constructively refused to accept suitable employment, and that Plaintiff had not met his burden of demonstrating that he had conducted a reasonable job search. Plaintiff noted an appeal to the Commission from Deputy Commissioner Holmes' order.

On 5 April 2012, the Commission, by means of an order entered by Commissioner Christopher Scott with the concurrence of Chair Pamela T. Young and Commissioner Danny Lee McDonald, reversed Deputy Commissioner Holmes' decision and awarded workers' compensation disability and medical benefits to Plaintiff. In reaching this decision, the Commission determined that Defendants had failed to demonstrate that Plaintiff had been terminated for misconduct, that a non-disabled employee in

Plaintiff's position would have been terminated for engaging in the same conduct, that Plaintiff's termination had no relation to his compensable injury, and that Plaintiff had not constructively refused employment. In addition, the Commission determined that Plaintiff had shown that he had conducted a reasonable, albeit unsuccessful, search for employment. Defendants noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. N.C. [Gen. Stat.] § 97-86 [(2012)]. Under the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965), and citing *Adams v. AVX Corp.*, 349 N.C. 676,

680-81, 509 S.E.2d 411, 414 (1998) (other citation omitted). "[T]he Commission's findings of fact 'are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.'" *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (quoting *Adams*, 349 N.C. at 681, 509 S.E.2d at 414, and citing *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). "Thus, on appeal, [an appellate court] 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' . . . [Further,] '[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.'" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552-53 (2000) (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274, and *Adams*, 349 N.C. at 680-81, 509 S.E.2d at 413-14). "The Commission's conclusions of law are[, however,] reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)).

B. Constructive Refusal of Employment

In their initial challenge to the Commission's order, Defendants contend that the Commission erred by concluding that Plaintiff was eligible to receive ongoing disability benefits. More specifically, Defendants assert that "Plaintiff constructively refused suitable employment" and that the Commission erroneously determined that they had failed to establish that Plaintiff was terminated for misconduct, that a nondisabled employee would have been terminated for the same behavior, and that Plaintiff's termination was unrelated to his compensable injury. We do not find Defendants' argument persuasive.

The test for whether Plaintiff constructively refused employment was stated in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 233-34, 472 S.E.2d 397, 401 (1996), and adopted by the Supreme Court in *McRae*, 358 N.C. at 495, 597 S.E.2d at 700. According to that test:

> where an employee, who has sustained a compensable injury and has been provided light duty or rehabilitative employment, is terminated from such employment for misconduct or other fault on the part of the employee, such termination does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving benefits for temporary partial or total disability. . . . Therefore, in such cases 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.

Seagraves, 123 N.C. App. at 233-34, 472 S.E.2d at 401. "In applying the *Seagraves*' test, with respect to the burden of proof, the Commission must determine first if the employer has met its burden of showing that the employee was terminated for misconduct, that such misconduct would have resulted in the termination of a nondisabled employee, and that the termination was unrelated to the employee's compensable injury." *McRae*, 358 N.C. at 496-97, 597 S.E.2d at 701. As a result, the employer has the initial burden of proving that the employee was terminated for misconduct that would have resulted in the termination of a nondisabled employee and that the employee's termination was unrelated to his compensable injury.

In its order, the Commission found as fact that:

> 19. Following the February 7, 2007 accident, plaintiff continued to work for defendant-employer and worked at times in a light duty capacity as a people greeter at the front door of the store. The people greeter position was within plaintiff's work restrictions. . . .
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> 20. After his return to work for defendant-employer following his injury, plaintiff began to receive a number of reprimands, called coachings, from store managers for alleged violations of company

policy. Eventually plaintiff was terminated by defendant-employer on November 15, 2009.

21. Plaintiff's first coaching occurred on April 22, 2007 for unauthorized absences from work. Plaintiff testified before the Deputy Commissioner that the absences that led to this coaching were due to pain caused by the February 7, 2007 accident, and that he called to inform defendant-employer of such prior to each absence.

22. Plaintiff was reprimanded by defendant-employer a second time on November 11, 2008 for working longer than six hours without taking at least a thirty minute meal break on two occasions in that week.

23. On January 12, 2009, plaintiff was reprimanded a third time for smoking in the restroom at work.

24. Plaintiff received his fourth and final coaching on September 26, 2009 for taking an unauthorized smoking break. Plaintiff testified before the Deputy Commissioner that on this occasion, he received permission to leave his position as a greeter to assist a disabled customer in a wheelchair with transporting purchased items to the customer's car. Plaintiff stated that on the way back from the customer's car he inadvertently took a couple of puffs off of a cigarette while in the parking lot before returning to work. As a[n] habitual smoker for over 30 years, plaintiff explained that he is prone to smoking while outside without thinking about what he's doing.

25. Plaintiff was terminated on November 15, 2009 for allegedly taking an unauthorized smoking break.

26. Plaintiff testified that, on November 15, 2009, he was . . . asked by the cashier manager to work through his lunch break as a front door greeter, so that the greeter on duty could take a lunch break. Plaintiff agreed to this request on the condition that he was allowed to take a five minute smoking break prior to relieving the greeter. Plaintiff stated that he received permission to have a smoking break from the cashier manager and that he was customarily permitted to take similar smoking breaks when he worked through his lunch break. After taking his approved smoking break and relieving the greeter, plaintiff was informed by the greeter, upon the greeter's return, that the store manager wanted to see plaintiff. Plaintiff was then informed by the store manager that he was terminated effective immediately for taking an unauthorized smoking break. Plaintiff stated that he tried to explain to the store manager that he had permission to take a break from the cashier manager, but the store manager did not follow up with the cashier manager.

27. The Full Commission finds plaintiff to be credible in his account of the circumstances of his termination.

28. Plaintiff testified that he received annual performance reviews from defendant-employer. According to plaintiff, he received a grade of "exceeds expectations" in the two years prior to his injury and a grade of "meets expectations" in the two years subsequent to his injury. He attributed the change in his performance review after his injury to an adjustment in terminology used by defendant-employer, as well as defendant-employer's asking him to do more physical work, which he was unable to perform due to his injuries. Plaintiff stated that he never received a grade below

> "meets expectations" in a performance review.
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> 32. According to Mr. Karwacki, the cashier manager had the authority to permit plaintiff . . . to take smoking breaks and it would not be appropriate to discipline plaintiff for smoking after receiving permission. . . .

As a result of the fact that Defendants have not challenged the sufficiency of the evidentiary support for these findings, they are "presumed to be supported by competent evidence" and are, for that reason, "conclusively established" for purposes of appellate review. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003) (internal citation omitted)). Instead, the only finding which Defendants have challenged is Finding of Fact No. 34, which provides that:

> 34. Based upon the preponderance of the evidence, and in view of the entire record, the Full Commission finds that defendants have not met their burden of proving that plaintiff was terminated for misconduct, that another nondisabled employee would have been terminated for the same conduct, and that the termination was unrelated to plaintiff's compensable injury.

As this Court and the Supreme Court have stated on many occasions, the "'Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

The courts may set aside findings of fact only upon the ground they lack evidentiary support.'" *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. In this case, the Commission specifically found Plaintiff "to be credible in his account of the circumstances of his termination." The Commission's unchallenged findings of fact show that Plaintiff testified that (1) Plaintiff's "coaching" reprimands began after his injury; (2) his first reprimand was for unexcused absences, although these absences were a direct result of his injury and he had notified his supervisor prior to each absence;[2] (3) his performance evaluations were generally good; and (4) his final reprimand, which resulted in his termination, was for smoking, even though he had permission to take a smoking break. These unchallenged findings of fact amply support the Commission's determination that Defendants had failed to establish that Plaintiff was fired for misconduct or that his termination was unrelated to his compensable work-related injury. As a result, we conclude that Finding of Fact No. 34 has adequate record support and that the Commission's findings support its conclusion of law that "[D]efendants have not met their burden

[2]Although this warning had "expired" by the time of Plaintiff's termination, the Commission could still take it into consideration in assessing the credibility of the parties and evaluating the circumstances surrounding Plaintiff's termination.

of proving that plaintiff was terminated for misconduct unrelated to his injury, and that the same misconduct would have resulted in the termination of a nondisabled employee."

In seeking to persuade us to reach a different result, Defendants direct our attention to evidence tending to show that Plaintiff's termination resulted from a proper application of Defendant WalMart's disciplinary procedures and a WalMart official's testimony that any employee with Plaintiff's record would have been terminated. The existence of such evidence should not, however, obviate the fact that the Commission reached a contrary determination with respect to the reason for Plaintiff's termination and that the determination that the Commission did make has adequate evidentiary support. As a result, the fact that the record contains substantial evidence tending to support a determination that Plaintiff's termination had no relation to his compensable work-related injury does not justify a decision to overturn the Commission's order.

In addition, Defendants note that "there is no evidence in the Record, and the Full Commission made no findings of fact, that Employer-Defendant terminated Plaintiff due to his work injury." This aspect of Defendants' challenge to the Commission's order rests upon a misapprehension of the applicable burden of proof. Simply put, the Commission was not

required to find that Defendant WalMart fired Plaintiff because of his compensable work-related injury; instead, Defendants had an obligation to satisfy the Commission that Plaintiff had not been terminated because of his injury. Similarly, Defendants' argument that Plaintiff failed to identify the manager who gave him permission to smoke or call as a witness the cashiers' manager to confirm his account of the events which transpired immediately prior to his termination overlooks the fact that Defendants, rather than Plaintiff, had the burden of persuasion with respect to this issue. As a result, we conclude that the Commission did not commit an error of law in the course of determining that Plaintiff had not constructively refused employment.

C. Disability

Secondly, Defendants argue that the Commission erroneously concluded that Plaintiff met his burden of establishing that he was subject to a continuing disability. More specifically, Defendants contend that Plaintiff failed to show that he had conducted a reasonable job search following his termination from Defendant WalMart's employment and that he "cannot show that his inability to earn wages is related to his work injury." Once again, we conclude that Defendants' argument lacks merit.

"An employee injured in the course of his employment is disabled . . . if the injury results in an 'incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.'" *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (quoting N.C. Gen. Stat. § 97-2(9) [(2012)]). "Accordingly, 'disability' as defined in the [Workers' Compensation] Act is the impairment of the injured employee's earning capacity rather than physical disablement." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986)). "[I]n order to 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 individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

An "employee seeking compensation under the Act bears 'the burden of proving the existence of [his] disability and its extent.'" *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491,

493 (2005) (quoting ***Hendrix v. Linn-Corriher Corp.***, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)).

> The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related 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.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

In its order, the Commission found that, although Plaintiff had undertaken a reasonable job search, his efforts to find employment following his termination from Defendant WalMart's employment had proven unsuccessful. This determination tracks the second prong of *Russell* and suffices, assuming the existence of adequate record support, to support a conclusion that Plaintiff was disabled. As a result, given that Defendants have not challenged the sufficiency of the evidentiary support for the majority of the Commission's disability-related findings of fact, the ultimate question raised by this aspect of Defendants'

challenge to the Commission's order is the extent, if any, to which the Commission's determination that Plaintiff was disabled under the second prong of *Russell* is supported by the Commission's unchallenged findings of fact.

In support of its disability determination, the Commission found, in pertinent part, that:

> 35. Since his termination plaintiff has sought out numerous jobs and submitted documentation of his job search. Plaintiff has been unsuccessful in his job search, and has not yet retained employment. Plaintiff testified that his job search was limited because he did not own a car or a computer and he was forced to search for jobs primarily within walking distance of his residence.
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> 36. . . . Edwina Carnes, [an] expert in the field of vocational rehabilitation, conducted labor market surveys to identify potential suitable employment opportunities available to plaintiff. . . .
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> 37. Ms. Carnes testified that she identified no suitable employment opportunities available for plaintiff. Ms. Carnes searched only for full-time employment within all of plaintiff's physical restrictions, but she stated that if the restrictions in her search were limited to those related to plaintiff's compensable left arm condition, then she would still conclude that there are no suitable job openings for plaintiff. The search performed by Ms. Carnes was limited to a 30 mile radius from plaintiff's residence and was conducted after meeting with plaintiff. Ms. Carnes stated that she usually uses a search radius between "40 and

> 50 miles or even less," and her search radius for plaintiff was lower based on his bilateral arm restrictions.
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> 38. Regarding plaintiff's vocational experience and abilities, Ms. Carnes's report states that plaintiff has a GED and has work experience primarily as a truck driver. Plaintiff does not have any computer experience.
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> 40. Based upon the preponderance of evidence, and in view of the entire record, the Full Commission finds that plaintiff has conducted a reasonable job search that has not yet been successful. Based upon the preponderance of evidence, and in view of the entire record, the Full Commission further finds that plaintiff's current inability to find employment and wage loss is due to his compensable injuries sustained on February 7, 2007.

We conclude that the unchallenged findings of fact adequately support the Commission's determination that "[P]laintiff has presented evidence that he is capable of some work, but he has been unsuccessful, after a reasonable effort, in obtaining employment," and that Plaintiff's "inability to find employment is due to his compensable work injuries." As a result, we conclude that the Commission did not commit any error of law in the course of determining that Plaintiff was disabled under the second prong of *Russell*.

In urging us to reverse the Commission's order, Defendants argue that the Commission "erred in Finding of Fact No. 35 and No. 40 in stating that Plaintiff had conducted a reasonable job search and that his inability to find work is related to his compensable injury."[3] In support of this assertion, Defendants contend that Plaintiff "did not utilize the classified ads or the internet in his job search," that Plaintiff did not produce evidence that he had applied for advertised positions, and that the record contained evidence from which the Commission could have found that there were jobs for which Plaintiff could have been hired. In spite of Defendants' argument to the contrary, these contentions amount to a request that we reweigh the evidence and make a factual determination contrary to the decision which the Commission actually made, an action which is not within the scope of our authority under the applicable standard of review. *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

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[3]As a result of the fact that Finding of Fact No. 35 does not include either of the statements upon which Defendants' argument rests and the fact that Defendants have not argued that any of the specific factual statements contained in Finding of Fact No. 35 lack adequate evidentiary support, we conclude that Defendants' ultimate challenge to the validity of the Commission's disability determination rests upon a contention that the decision embodied in Finding No. 40 is not supported by the Commission's other findings of fact.

In addition, Defendants argue that Plaintiff failed to show that his "medical restrictions [were] prohibiting [him] from obtaining a job" or that he "was refused employment as a result of his physical restrictions[.]" This argument, however, rests upon a misapprehension of the applicable law. As we have already established, a workers' compensation claimant may establish disability through "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." *Russell*, 108 N.C. App at 765, 425 S.E.2d at 457. Acceptance of Defendants' argument would amount to the establishment of additional requirements for showing disability under the second prong of *Russell*, a step which the doctrine of *stare decisis* does not allow us to take. As a result, for all of these reasons, we conclude that all of Defendants' challenges to the Commission's disability determination lack merit.[4]

[4]In its brief, Plaintiff requests this Court to award attorney's fees on appeal pursuant to N.C. Gen. Stat. § 97-88. In the exercise of our discretion, we deny Plaintiff's request. *Guerrero v. Brodie Contrs., Inc.*, 158 N.C. App. 678, 686, 582 S.E.2d 346, 351 (2003) (stating that, "[e]ven assuming plaintiff had properly moved for expenses and fees under [N.C. Gen. Stat. §] 97-88, this Court declines in its discretion to issue such an order").

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendants' challenges to the Commission's order lack merit. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges STROUD and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).