NO. COA10-1066
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

ALONZO BLAKENEY,
Employee/Plaintiff,

v.

North Carolina
Industrial Commission
I.C. File No.: 872311

BLYTHE CONSTRUCTION, INC.
Employer,

LIBERTY MUTUAL INSURANCE COMOPANY,
Carrier/Defendants.

Appeal by Plaintiff from an opinion and award filed 9 June 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2011.

Poisson, Poisson & Bower, PLLC, by Fred D. Poisson, Jr. and E Stewart Poisson, for Plaintiff-Appellant.

Stiles, Byrum & Horne, by B. Jeanette Byrum and Henry C. Byrum, Jr., for Defendant-Appellees.

BEASLEY, Judge

Alonzo Blakeney, Jr. (Plaintiff) appeals from an order of the North Carolina Industrial Commission. In its order the Commission concluded that while Plaintiff did suffer a

compensable work injury on 14 November 2007, Plaintiff is not entitled to workers' compensation benefits for medical issues arising after 25 January 2008. Because the Commission's findings of fact are supported by competent evidence, and those facts support the Commission's conclusions of law, we affirm the Commission's order.

Plaintiff began his employment relationship with Blythe Construction, Inc. (Defendant/employer) as a laborer on or about 23 September 2007. Plaintiff's employment responsibilities included "stump removal and driving a large, heavy roller machine" used to pack dirt and asphalt. On 14 November 2007, Plaintiff's heavy roller machine collided with a fuel truck. The collision occurred at a low speed and caused no visible damage to either the fuel truck or the heavy roller machine. Immediately following the accident, Plaintiff told his supervisors that he had not been injured. Because Plaintiff had already received a warning for an earlier accident which occurred while he operated the heavy roller machine, his employment with Defendant/employer was terminated and he was taken home.

Later that day, Plaintiff presented to the emergency room of Carolinas Medical Center-Union (CMC-Union) complaining of neck and back pain. Plaintiff "underwent x-rays and was diagnosed with cervical sprain/strain and back sprain/strain and

was prescribed Flexeril and Vicodin." Plaintiff was discharged from the hospital without any work restrictions. Following his initial visit, Plaintiff was transported to the emergency room of CMC-Union on 6 December 2007, 25 January 2008, and 2 February 2008. During his December visit to CMC-Union, Plaintiff was diagnosed with a back sprain/strain, was not prescribed any medication, and was discharged without any work restrictions. In January, Plaintiff was diagnosed with "low back pain/injury," received prescriptions for Toradol and Flexeril, and was discharged without any work restrictions. "During [Plaintiff's] February 2, 2008 visit to the emergency room, the medical provider diagnosed [Plaintiff] with kidney stones." The kidney stones were found to be unrelated to Plaintiff's 14 November 2007 accident.

Acting upon a referral from his attorney, Plaintiff presented to Dr. Joseph Estwanik (Dr. Estwanik) on 17 April 2008. Dr. Estwanik conducted a clinical evaluation of Plaintiff in which he examined Plaintiff's cervical spine, lumbar spine, and his lower and upper extremities. Dr. Estwanik also reviewed prior x-rays of Plaintiff's left shoulder and lumbar spine which did not reveal any abnormalities. Following the examination, Dr. Estwanik diagnosed Plaintiff with neck and back sprains and prescribed an anti-inflammatory to help with pain and swelling. Additionally, "Dr. Estwanik recommended that [Plaintiff] undergo

an MRI to rule out any potential disc problems. Dr. Estwanik did not assign [Plaintiff] any work restrictions."

Plaintiff was a "no show" for his next scheduled appointment with Dr. Estwanik on 16 May 2008. Plaintiff next saw Dr. Estwanik on 28 July 2008. During his second visit, Plaintiff informed Dr. Estwanik that he had been incarcerated for a brief period following his first visit. Dr. Estwanik noted that Plaintiff's continuing lower back pain could be correlated to activities in which Plaintiff participated while he was incarcerated. Dr. Estwanik did not assign any disability rating to Plaintiff's back. On 4 September 2008, Plaintiff sought a second opinion and was evaluated by Stephen R. Shaffer, M.D. (Dr. Shaffer). Plaintiff indicated to Dr. Shaffer that he "was driving a roller on an asphalt job when apparently the brakes caught unevenly and threw him to one side wrenching his neck and low back." Following a comprehensive medical evaluation, Dr. Shaffer assigned a 4% permanent partial disability rating to Plaintiff's back.

On 17 January 2008, Plaintiff filed a Form 18 notifying Defendant/employer that he sustained injuries as a result of the 14 November 2007 accident. On 22 October 2008, Defendant/employer denied Plaintiff's workers' compensation claim. Thereafter, Plaintiff requested a hearing with the Industrial Commission, arguing that he was entitled to

compensation for medical expenses, days missed from work, and permanent partial disability. On 2 December 2009, the Deputy Commissioner issued an Opinion and Award in which he determined that Plaintiff failed to produce sufficient medical evidence that he suffered a compensable work injury arising from his employment, or that he suffered from a disability as a result of the accident. Plaintiff appealed the Deputy Commissioner's Opinion and Award. On 9 June 2010, the Full Commission issued an Opinion in which it concluded that Plaintiff did suffer a compensable work injury and was entitled to payment for medical treatment received up until 25 January 2008.

Plaintiff appeals from the Opinion and Award of the Full Commission arguing that: (I) the Commission erroneously applied the incorrect legal standard when determining that he was not entitled to compensation for medical treatment beyond 25 January 2008; (II) the Commission's findings of fact and conclusions of law are not supported by competent evidence in the record; (III) the Commission erred by failing to determine that Plaintiff was entitled to payment pursuant to N.C. Gen. Stat. § 97-31 (2009); (IV) the Commission erroneously failed to make findings of fact regarding Plaintiff's complaints of pain in determining the existence of a disability; (V) the Commission erred by failing to find that Defendant/employer did not have reasonable grounds to defend the action; and (VI) the Commission erred by failing

to assess attorneys' fees against Defendant/employer pursuant to N.C. Gen. Stat. § 97-88.1 (2009).

Standard of Review

The role of an appellate Court in reviewing an order from the Industrial Commission has been well established by North Carolina authority:

> In reviewing a decision by the Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." ***Cross v. Blue Cross/Blue Shield***, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The Commission's findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding. ***Morrison v. Burlington Industries***, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). On appeal, this Court may not reweigh the evidence or assess credibility. ***Adams v. AVX Corp.***, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), reh'g denied, 350 N.C. 108, 532 S.E.2d 522 (1999). Findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" ***Young v. Hickory Bus. Furn.***, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

Kelly v. Duke Univ., 190 N.C. App. 733, 738-39, 661 S.E.2d 745, 748 (2008). Additionally, "failure to assign error to the Commission's findings of fact renders them binding on appellate review." ***Estate of Gainey v. Southern Flooring & Acoustical Co.***, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007). The Commission's conclusions are reviewed ***de novo*** on appeal.

Strezinski v. City of Greensboro, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007).

I.

In its order the Industrial Commission concluded that "[g]iven the equivocal medical testimony, [Plaintiff] has produced insufficient evidence to prove that his back problems after January 25, 2008," were a result of the 14 November 2007 accident. On appeal, Plaintiff first argues that the "industrial commission erred by applying the wrong legal standard to [his] entitlement to continuing medical treatment in this case." We disagree.

"The plaintiff in a workers' compensation case bears the burden of initially proving each and every element of compensability, including causation." *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003) (citation omitted). A claimant "must prove by a 'preponderance of the evidence' that the accident was a causal factor resulting in the disability." *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 262, 614 S.E.2d 440, 445 (2005) (citation omitted). Our appellate Courts have also recognized that once a claimant meets the initial burden of causation, a presumption arises that continuing medical treatment is related to the original compensable injury. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). "The employer may rebut the

presumption with evidence that the medical treatment is not directly related to the compensable injury." *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005). Though Plaintiff correctly recites the Court's holdings in *Parsons* and *Perez*, both cases can be distinguished from the facts presented in this case.

In *Parsons*, the plaintiff established the element of causation in an initial hearing before the Industrial Commission. *Parsons*, 126 N.C. App. at 540, 485 S.E.2d at 868. Thereafter, the Commission ordered the employer to pay for the plaintiff's medical expenses and for her future medical treatment. *Id.* at 540-41, 485 S.E.2d at 868. Several months later, the plaintiff requested a second hearing because the employer failed to pay the required medical expenses. *Id.* at 541, 485 S.E.2d at 868. In the second hearing, "[t]he deputy commissioner concluded [and the full Commission later affirmed,] that plaintiff was not entitled to further medical treatment as a result of her compensable injury absent a change of condition, but ordered defendants to pay her medical bills to the date of the filing of that opinion and award." *Id.* On appeal, this Court held that the Commission erred by placing the burden of causation on the plaintiff in the second hearing. *Id.* at 542, 485 S.E.2d at 869. We reasoned that the plaintiff met her initial burden of establishing the causation as evidenced by the

Commission's original opinion and award. *Id.* To require "that plaintiff once again prove a causal relationship between the accident and her headaches in order to get further medical treatment ignores this prior award." *Id.*

In *Perez*, following an accident to plaintiff, the employer immediately admitted to plaintiff's right to workers' compensation benefits. *Perez*, 174 N.C. App. at 129, 620 S.E.2d at 289. Later, plaintiff requested a hearing, seeking additional compensation. *Id.* at 130, 620 S.E.2d at 289. In its hearing the Commission applied the presumption from *Parsons*, concluding that plaintiff was entitled to a presumption that her continuing medical ailments were related to her original compensable injuries. *Id.* at 136, 620 S.E.2d at 293. On appeal, this Court held that the filing of a Form 60 is a determination of compensability and, therefore, the *Parsons* presumption is applicable. *Id.* The holdings in *Perez* and *Parsons* were based upon a *prior* determination of compensability. In this case, unlike the facts reviewed by this Court in *Parsons* and *Perez*, there was no prior determination of compensability or causation. Because there was only a single hearing in this case, the *Parsons* presumption is not applicable. *See also Gross v. Gene* Bennett, __ N.C. App. __, 703 S.E.2d 915, 917 (2011) (holding Full Commission erred in applying the *Parsons* presumption "at the initial hearing on compensability" as

"employee has the [initial] burden of proving that his claim is compensable." (internal quotation marks and citations omitted)). Accordingly, Plaintiff still had the burden of initially proving each element of his workers' compensation claim and his first argument on appeal is without merit.

II.

Plaintiff next argues that "[t]he Industrial Commission's findings of fact and conclusions of law with regard to [his] entitlement to continuing medical treatment are not supported by competent evidence." We disagree.

Employers are required "to pay future medical compensation when the treatment lessens the period of disability, effects a cure or gives relief." *Parsons*, 126 N.C. App. at 541-42, 485 S.E.2d at 869. However, "'[l]ogically implicit' in this statute is the requirement that the future medical treatment be 'directly related to the original compensable injury.'" *Id.* (quoting *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286 (1996)). "In cases involving 'complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.'" *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (quoting *Click v. Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). When reviewing testimony from multiple experts, the Industrial

Commission is entitled to place greater weight on the testimony of one expert over that of another. *See Perkins v. U.S. Airways*, 177 N.C. App. 205, 211, 628 S.E.2d 402, 406 (2006).

In this case, the Industrial Commission's findings regarding Plaintiff's entitlement to continuing medical treatment are supported by competent evidence in the record. In its order the Commission found that:

> 11. Plaintiff next sought medical treatment on April 17, 2008, when he saw Dr. Joseph Estwanik, an orthopedic surgeon, upon referral from his attorney. The medical note from this visit indicates that plaintiff gave Dr. Estwanik a history that plaintiff "fell off a roller" while at work on November 13, 2007. Dr. Estwanik reviewed plaintiff's medical history and performed a comprehensive examination of plaintiff's cervical spine, lumbar spine, left shoulder, and left foot and ankle. He obtained x-rays of plaintiff's left shoulder and lumbar spine, and the films were interpreted as normal. Prior x-ray reports of plaintiff's cervical spine and thoracic spine were reviewed and found to be normal. Dr. Estwanik recommended that plaintiff undergo an MRI to rule out any potential disc problems. Dr. Estwanik did not assign plaintiff any work restrictions.
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> 12. Dr. Estwanik was unable to testify to any degree of medical certainty that plaintiff's conditions were related to the incident of November 14, 2007. Furthermore, Dr. Estwanik never wrote plaintiff out of work or approved work restrictions for plaintiff.
>
> 13. Plaintiff next sought medical attention on September 4, 2008, when he was referred by his attorney to Dr. Steven [Shaffer] for

> a second opinion on his permanent partial impairment rating. According to the medical record generated by this visit, plaintiff told Dr. [Shaffer] that he "was driving a roller on an asphalt job when apparently the brakes caught unevenly and threw him to one side wrenching his neck and low back." Dr. [Shaffer] also noted that "[plaintiff] is considered to be a somewhat weak historian." Nevertheless, [Dr. Shaffer] assigned a 4% permanent partial disability rating to plaintiff's back.
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> 14. Having considered the opinions of Dr. Estwanik and Dr. [Shaffer] taken with their expertise and relative treatment histories with plaintiff, the Full Commission gives greater weight of the testimony and expert opinions of Dr. Estwanik.
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> . . . .
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> 16. Considering the greater weight of the totality of the medical evidence and testimony, plaintiff's continuing back problems after January 25, 2008, were not causally related to the incident of November 14, 2007. Plaintiff was never written out of work by his medical providers and was not disabled from employment at anytime.

The Commission's findings are supported by competent evidence in the record. Following Plaintiff's accident in November 2007, he visited the emergency room of CMC-Union on four separate occasions between November 2007 and February 2008. Plaintiff was diagnosed with neck and back strains in his November, December, and January visits to CMC-Union. In his February 2008 visit, Plaintiff received treatment for kidney stones, an ailment unrelated to his compensable work injury.

Following his treatment for kidney stones, Plaintiff was not examined again until his appointment with Dr. Estwanik in April 2008. Later, Dr. Estwanik would opine that the delay between that date of accident and the date on which he examined Plaintiff "created less specificity" as to the actual cause of Plaintiff's continuing medical ailments. Even noting that other issues such as kidney stones could cause the Plaintiff's continuing discomfort.

Because Plaintiff was actually treated for kidney stones on February 2008, there is competent evidence to support the Commission's finding that Plaintiff could not show with any degree of medical certainty that his continuing back pain was related to his work injury and the emergency room visit in January 2008. Accordingly, the Commission's determination that Plaintiff is not entitled to continuing medical treatment is supported by competent evidence in the record.

III.

The Industrial Commission made no findings of fact or conclusions of law as to whether Plaintiff was entitled to compensation under N.C. Gen. Stat. § 97-31(23). Plaintiff next argues that "the Industrial Commission erred by failing to determine whether [he] was entitled to any payment pursuant to [N.C. Gen. Stat. § 97-31]." We disagree.

The North Carolina Workers' Compensation statute provides that a plaintiff may recover compensation benefits for a "partial loss of use of the back." N.C. Gen. Stat. § 97-31(23) (2009). "It is the duty and responsibility of the Full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it. The Commission must decide all of the matters in controversy between the parties." *Reaves v. Industrial Pump Serv.*, 195 N.C. App. 31, 35, 671 S.E.2d 14, 18 (2009) (internal citations and quotations omitted). In this case, the Industrial Commission did not erroneously fail to determine whether Plaintiff was entitled to compensation for "partial loss of use of the back." In support of his argument on appeal, Plaintiff primarily relies on Dr. Shaffer's decision to assign a 4% permanent partial disability rating to his back after a medical evaluation. However, as discussed above, the Commission placed greater weight on the testimony of Dr. Estwanik. Following two examinations, Dr. Estwanik was unable to determine, with any degree of medical certainty, that Plaintiff's condition was related to his 14 November 2007 work injury. Moreover, Dr. Estwanik did not assign any disability rating to the Plaintiff's back. Despite the existence of contrary evidence, the Industrial Commission was entitled to place greater weight on the testimony of Dr. Estwanik. *See Counts v. Black & Decker*

Corp., 121 N.C. App. 387, 389, 465 S.E.2d 343, 345 (1996). Accordingly, the trial court did not err by failing to find that Plaintiff was entitled to compensation pursuant to N.C. Gen. Stat. § 97-31.

IV.

Plaintiff next argues that "the Industrial Commission erred by failing to make findings of fact regarding [his] complaints of pain in determining disability in this case." We disagree.

"'Disability,' within the North Carolina Workers' Compensation Act, means 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." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (citation and quotations omitted). A claimant seeking workers' compensation benefits has the burden of establishing "the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). The claimant may meet this burden with:

> (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 v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations and quotations omitted).

In this case, Plaintiff tends to argue that the trial court erroneously failed to determine that pain arising from the accident rendered him physically incapable of obtaining employment. Our Courts have recognized that physical pain is evidence of a disability. *See Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002) (holding that "[t]his Court has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work."); *see Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000) (holding that in determining whether a claimant has met his burden of establishing disability, "the Commission must consider not only the plaintiff's physical limitations, but also his testimony as to his pain in determining the extent of incapacity to work and earn wages such pain might cause."). However, while we have acknowledged that pain can support a finding of disability, Plaintiff in this case failed to submit medical evidence to

prove the existence of pain so severe that it prevented him from obtaining employment.

Plaintiff presented to CMC-Union in November 2007, December 2007, and January 2008 complaining of neck and back pain. During his emergency room visits, Plaintiff was diagnosed with either neck or back strains, and on two occasions received medication. However, Plaintiff was always discharged without any work restrictions. Plaintiff was examined by Dr. Estwanik on two separate occasions. Following each examination, Dr. Estwanik declined to assign Plaintiff with any work restrictions. While Plaintiff did offer evidence that he was in pain following his accident, there was competent evidence in the record that the pain was not so severe that it prohibited him from obtaining employment. Standing alone, evidence that Plaintiff was in pain following an accident is not sufficient to sustain a Commission's finding of disability. *See Johnson v. Southern Tire Sales and Service*, 358 N.C. 701, 707, 599 S.E.2d 508, 513 (2004) (holding that although pain can support a finding of disability, the pain must be to such a degree that it prohibits a claimant from performing work.).

Plaintiff also seeks to establish the existence of a disability by arguing that he was unable to locate employment, despite reasonable efforts on his part, and that though he is capable of some work, a job search would have been futile

because of several pre-existing conditions. However, Plaintiff fails to point to any evidence in the record indicating that his search was diligent or that pre-existing conditions would render his job search futile. At his hearing, Plaintiff explained that he did not begin searching for employment until approximately two weeks before the date of the hearing. The Plaintiff's own account of his job search supports the Commission's determination that Plaintiff did not meet his burden of establishing the existence of a disability.

V.

In its order the Industrial Commission concluded that Defendant/employer "did not timely file a response to plaintiff's Form 18, in violation of N.C. Gen. Stat. § 97- 18(j) and [is] therefore subject to the imposition of reasonable sanctions." However, the Commission also concluded that "[Defendant/employer] did not defend this matter in an unreasonable manner or without reasonable grounds and, therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1." In his final two arguments on appeal, Plaintiff argues that the trial court's failure to award him attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1 was erroneous. We disagree.

With respect to the award of attorneys' fees in a workers' compensation case, our General Assembly has provided that "[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). "Review of an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 requires a two-part analysis." *Meares v. Dana Corp.*, 193 N.C. App. 86, 93, 666 S.E.2d 819, 825 (2008), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 359 (2009).

First, under *de novo* review, our Court must determine whether the party had reasonable grounds to defend the hearing. *Id.* To determine whether a party had reasonable grounds to defend an action, this Court must examine the evidence introduced at the hearing. *Ruggery v. N.C. Dep't of Corr.*, 135 N.C. App. 270, 274, 520 S.E.2d 77, 80 (1999). "The purpose of this threat of attorney's fees is to prevent 'stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees.'" *Bradley v. Mission St. Joseph's Health Sys.*, 180 N.C. App. 592, 596, 638 S.E.2d 254, 258 (2006) (quoting *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995)).

Next, if this Court determines that a party did not have reasonable grounds to defend the action, the decision to award attorney's fees "'in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion.'" *Meares*, 193 N.C. App. at 94, 666 S.E.2d at 825 (citation omitted). However, if this Court determines that "the party requesting the hearing had reasonable grounds to request the hearing, any award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 will be reversed by this Court." *Id.*

In this case, Plaintiff's actions and statements following the accident provided Defendant/employer with reasonable grounds to defend Plaintiff's actions. In November 2007, a heavy roller machine operated by Plaintiff collided with a fuel truck. It was a low speed collision that caused no visible damage to either vehicle. Immediately following the incident, Plaintiff told supervisors he was unable to avoid the collision because the heavy roller machine malfunctioned. However, after an inspection it was determined that the heavy roller machine was functioning properly. Because there was a reasonable concern as to Plaintiff's credibility, Defendant/employer was entitled to a hearing in which Plaintiff would be required to sustain his burden of proof. *See Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982) (holding that this Court does not "attribute to the General Assembly an intent

to deter an employer with legitimate doubt regarding the employee's credibility, based on substantial evidence of conduct by the employee inconsistent with his alleged claim, from compelling the employee to sustain his burden of proof.").

This Court has recognized that in some instances pain associated with a compensable injury may not arise until sometime after an accident. *See Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 769, 394 S.E.2d 191, 192 (1990) (holding that the "fact that [a] claimant did not experience pain contemporaneously with [an] incident does not, by itself, justify defendant's decision to contest this claim."). However, the nature of the accident, and Plaintiff's statements indicate that Defendant/employer's decision to defend Plaintiff's action was not unreasonable.

Plaintiff also contends that he is entitled to an award of attorneys' fees because Defendant/employer failed to respond in a timely manner after receiving notification of Plaintiff's injuries. We disagree. N.C. Gen. Stat. § 97-18(j) provides, in relevant part:

> The employer or insurer shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation as provided in subsections (b), (c), or (d) of this section. When an employee files a claim for compensation with the Commission, the Commission may order

> reasonable sanctions against an employer or insurer which does not, within 30 days following notice from the Commission of the filing of a claim, or within such reasonable additional time as the Commission may allow, do one of the following:
>
> (1) Notify the Commission and the employee in writing that it is admitting the employee's right to compensation and, if applicable, satisfy the requirements for payment of compensation under subsection (b) of this section[;]
>
> (2) Notify the Commission and the employee that it denies the employee's right to compensation consistent with subsection (c) of this section[; or]
>
> (3) Initiate payments without prejudice and without liability and satisfy the requirements of subsection (d) of this section.

While it is true that Defendant/employer did wait approximately 10 months before denying Plaintiff's request for workers' compensation benefits, this delay does not warrant an award of attorneys' fees in Plaintiff's favor. As we have discussed above, Defendant/employer's defense of this action was reasonable. A delay in filing a denial of Plaintiff's action does not render Defendant/employer's reasoning invalid. Additionally, a delay in filing a response is governed by N.C. Gen. Stat. § 97-18(j). The Commission appropriately used to this provision to sanction Defendant/employer.

Affirmed.

Judges MCGEE and BRYANT concur.

Report per Rule 30(e).