NO. COA09-401

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

THOMAS F. ADCOX,
Employee,
Plaintiff,

v.

CLARKSON BROTHERS CONSTRUCTION COMPANY,
Employer,

and

UTICA NATIONAL INSURANCE GROUP,
Carrier,
Defendants.

N.C. Industrial Commission
I.C. No. 963100

Appeal by Plaintiff from Opinion and Award entered 25 November 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 October 2009.

R. James Lore for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Kari A. Lee and M. Duane Jones, for Defendants.

STEPHENS, Judge.

I. Procedural History and Factual Background

Plaintiff Thomas F. Adcox was born in 1947. On 28 February 1983, Plaintiff sustained an admittedly compensable injury to his head and brain while employed by Defendant Clarkson Brothers Construction Company ("Defendant Clarkson"). The injury left

Plaintiff permanently and totally disabled. Defendant Clarkson and Defendant Utica National Insurance Group (collectively, "Defendants") agreed to compensate Plaintiff for his disability at a weekly rate of $248.00.

On 18 September 2002, Plaintiff filed a request that his claim be assigned for hearing, alleging, *inter alia*, that Defendants had failed to pay for attendant care. Defendants denied the allegation, stating that they had "tried to initiate discussions with Plaintiff's Counsel on numerous occasions, both before and after he filed the pending Hearing Request, to address the issue of attendant care." Plaintiff's claim for reimbursement for attendant care services provided from 28 February 1983 until 3 February 2003 by his family members, including his wife Joyce Adcox to whom he has been married since 1968, was settled by agreement filed 26 February 2003 wherein Defendants agreed to pay Plaintiff a lump sum of $250,000.

On 30 December 2002, Plaintiff moved to compel Defendants to pay for attendant care for at least six hours per day at an hourly rate of $21.00. In early January 2003, Defendants authorized 60 hours of attendant care services per week, and Kelly Home Health Services ("Kelly Services") began providing Plaintiff with in-home professional attendant care at the end of January 2003.

On or around 22 February 2007, Plaintiff's counsel proposed to defense counsel that Mrs. Adcox assume the responsibility for providing attendant care for her husband. On 28 February 2007, Defendants denied the request, citing their concern with liability

issues that could arise were something to happen to Plaintiff or Mrs. Adcox. In mid-March 2007, Mrs. Adcox's newspaper job ended due to a reduction in force.

On 4 April 2007, Plaintiff filed a request that his claim be assigned for hearing, alleging that Defendants had refused to pay for attendant care as directed. Defendants filed a response to the request on 16 April 2007 denying Plaintiff's allegation. Defendants had been providing Plaintiff with 60 hours of attendant care services through Kelly Services since January 2003. Beginning 29 April 2007, and pending the outcome of the hearing, Defendants authorized 24-hour-per-day professional attendant care to be provided by Kelly Services.

The matter was heard by Deputy Commissioner John B. DeLuca on 30 August 2007. On 27 March 2008, Deputy Commissioner DeLuca entered an opinion and award allowing Mrs. Adcox to assume attendant care responsibilities seven days a week at a rate of $188.00 per day and denying Plaintiff's request for retroactive compensation for attendant care provided by Mrs. Adcox since February 2003.

Both parties appealed to the Full Commission. The matter was reviewed by the Full Commission on 23 September 2008. On 25 November 2008, the Full Commission entered an opinion and award allowing Mrs. Adcox to assume attendant care responsibilities seven days per week for 16 hours per day at a rate of $10.00 per hour. The Full Commission also denied Plaintiff's request for retroactive compensation for attendant care provided by Mrs. Adcox since

February 2003. From the opinion and award of the Full Commission, Plaintiff appeals.

II. Discussion

A. Denial of Motion to Add Additional Evidence

By Plaintiff's fourth assignment of error, Plaintiff argues that the Commission erred in denying his motion to add additional evidence to the record. We disagree.

N.C. Gen. Stat. § 97-85 provides:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award . . . .

N.C. Gen. Stat. § 97-85 (2007). Furthermore, Industrial Commission Rule 701(6) states that upon appeal to the Full Commission, "[n]o new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits." 4 N.C.A.C. 10A.0701(f) (2007). "[W]hether 'good ground be shown therefor[]' in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238, *cert. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979); *see also Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 20, 348 S.E.2d 596, 600 (1986), *disc. review denied*, 319 N.C. 103, 353 S.E.2d 106 (1987).

The present case was heard by Deputy Commissioner John B. DeLuca on 30 August 2007. Deputy Commissioner DeLuca entered an opinion and award on 27 March 2008. Both parties filed notices of appeal to the Full Commission. Attached to Plaintiff's brief to the Full Commission filed 19 June 2008 was a motion to consider additional evidence which included various medical records, questionnaires, and letters concerning Plaintiff.

Plaintiff contends that the additional evidence "clarifies in the interest of justice" findings made by Deputy Commissioner DeLuca which could lead to "improper inferences" and a "miscarriage of justice." However, Plaintiff has made no showing that the evidence sought to be introduced was not known to him at the time of the hearing on 30 August 2007, or that he did not have the opportunity to question witnesses regarding the documentation. Moreover, Plaintiff has offered no reason for his failure to provide the documentation in question prior to the hearing before Deputy Commissioner DeLuca. We also note that after the hearing, Deputy Commissioner DeLuca held the record open until 29 October 2007 to allow for the submission of additional evidence, but Plaintiff failed to submit the documentation at issue during this period and failed to provide any reason for this failure.

Furthermore, as Defendants were not provided with the documentation in a timely manner, they were denied the opportunity to depose and examine witnesses regarding the documentation or to address the documentation in their brief to the Full Commission.

Under these circumstances, we cannot conclude that the Commission abused its discretion by declining to receive additional evidence. Plaintiff's assignment of error is overruled.

B. Findings of Fact

Plaintiff next contends that the Commission erred in making its findings of fact by reciting the testimony of witnesses rather than making proper findings of fact.

"Findings of fact are statements of what happened in space and time." *State ex rel. Utilities Comm'n. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987). "They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them." *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 605-06, 70 S.E.2d 706, 709 (1952). Moreover, "findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony." *Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008).

Plaintiff argues that findings of fact 13 though 20 "merely recite or summarize witness testimony, but do not state what the Commission finds the facts to be." *Huffman v. Moore Cty.*, __ N.C. App. __, __, 669 S.E.2d 788, 792-93 (2008) (emphasis omitted). While we agree with Plaintiff that these findings of fact recite witness testimony, findings of fact 20 through 25 demonstrate that the Commission considered the recited witness testimony, resolved

conflicting evidence, and made "specific findings of fact as to each material fact upon which the rights of the parties . . . depend[ed]." *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981). Plaintiff's assignments of error relating to this argument are thus overruled.

C. Amount of Attendant Care

Plaintiff next contends that the Commission erred in awarding attendant care for only 16 hours per day instead of 24 hours per day. We disagree.

Appellate review of an opinion and award of the Full Commission is generally limited to (i) whether the Commission's findings of fact are supported by competent evidence, and (ii) whether the Commission's conclusions of law are justified by the findings of fact. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). "[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). The Full Commission's conclusions of law are reviewed *de novo*. *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000).

In this case, the Commission made the following findings of fact with regard to the number of hours of attendant care Plaintiff required:

6. Kelly Services began providing [P]laintiff with in-home professional attendant care in 2003, with care mainly being provided during the hours [P]laintiff would have been at home alone while Mrs. Adcox was working. In February[] 2007, Mrs. Adcox accepted a retirement package from her employer. Since her retirement, Mrs. Adcox is home more frequently and has thus requested [D]efendants pay her to provide her husband with 24-hour attendant care.

7. Prior to her retirement, Mrs. Adcox had not raised any concerns about the quality or continuity of care provided by Kelly Services. . . .

. . . .

11. During a typical day with [P]laintiff, Mrs. Adcox awakens and makes breakfast for herself and her husband. She makes sure that his clothes are on straight as he sometimes cannot button his shirt and takes him to the garden with her or helps him walk to his chair to sit and watch television. Plaintiff sits in his chair and watches approximately four to six hours of television per day. During the time when [P]laintiff is watching television, Mrs. Adcox is free to do household chores, such as washing dishes and laundry, in other parts of the house. Plaintiff typically sleeps between eight and ten hours per night. While he sometimes awakens in the middle of the night if he has to go to the bathroom, he otherwise sleeps through the night. Plaintiff occasionally wears diapers for his incontinence.

. . . .

14. Kelly Services aides Sonia McGee and her mother, Sandra Gray, also testified at the hearing before the Deputy Commissioner. Ms. Gray and Ms. McGee provide attendant care services to [P]laintiff. Most of their job is to "stand by" [P]laintiff and make sure he does not fall while he is walking.

15. Industrial Commission nurse Karen Smith opined that [Mrs.] Adcox was an appropriate caregiver, that 24-hour per day attendant care

was reasonable and necessary, and that 12 to 24 hours of respite care every 5 to 7 days was reasonable.

16. Marion Morrow, a Registered Nurse, also provided testimony. Ms. Morrow opined that it did not appear that there was any change in [P]laintiff's condition in February 2007 to warrant a change to 24-hour attendant care. . . .

17. Dr. Mark Lefebvre is [P]laintiff's treating psychologist. . . . Dr. Lefebvre opined that Mrs. Adcox was an appropriate person to provide companion or attendant care to [P]laintiff . . . [and] that while providing this care, Mrs. Adcox would be able to take care of things for herself and would not have to be sitting there constantly staring at [P]laintiff throughout the day. Dr. Lefebvre went on to note his opinion that [P]laintiff should not be left alone for extended periods of time and that someone should always be within earshot of him . . . .

18. Dr. Evangeline Lausier . . . believes that [P]laintiff requires 24-hour supervision and attendance . . . .

19. Dr. Thomas Gualtieri . . . does not believe Plaintiff requires 24-hour attendant care, but that [P]laintiff does require someone there at all times, which could be satisfied by notification devices, bracelets, and other equipment.

. . . .

22. As of April 2007, [P]laintiff's physicians have recommended [P]laintiff receive attendant care 24 hours a day, 7 days a week. Plaintiff is able to bathe, dress, and feed himself. Plaintiff sleeps through the night on most days and much of the attendant care needed is to watch over [P]laintiff, assist him with meal preparation, and assist him with walking. Therefore, the Commission finds that [P]laintiff requires attendant care an average of 16 hours per day. . . .

Mrs. Adcox testified that on a typical day, she wakes up and makes Plaintiff breakfast. She helps make sure his clothes are on straight and then takes him to the garden with her or helps him walk to his chair to sit and watch television. Plaintiff sits in his chair and watches approximately four to six hours of television per day. During the time Plaintiff watches television, Mrs. Adcox does household chores, such as washing the dishes and laundry, in other parts of the house. Plaintiff typically sleeps between eight and ten hours per night, although he occasionally awakens during the night to go to the bathroom. Mrs. Adcox sleeps while Plaintiff sleeps. Plaintiff occasionally wears diapers for his incontinence.

Nurse Marion Morrow, a registered nurse, nationally certified case manager, and certified life-planner, testified that she had reviewed Plaintiff's medical records dating from 1983 up until the time of the hearing and that she did not discern any drastic change in Plaintiff's medical condition that would have warranted a change from 60 hours per week to 24 hours per day attendant care.

Dr. Gualtieri testified that Plaintiff does not require attendant care 24 hours per day, but rather requires that someone be available at all times, which could be achieved by notification devices, bracelets, and other equipment. He testified that the type of care required is more akin to babysitting than certified nurse's aide ("CNA") care. Dr. Gualtieri further testified that if Mrs. Adcox were to provide her husband with 24-hour companionship, she could be doing the laundry, reading a book, talking on the

telephone, and carrying out activities of daily living for herself at the same time.

Although there was conflicting evidence as to whether Plaintiff required 24-hour attendant care, this Court does not re-weigh the evidence or assess the credibility of witnesses. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. As the findings of fact are supported by competent record evidence, even though there is evidence to the contrary, they are binding on appeal. *Pittman v. Int'l Paper, Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999). Furthermore, the findings of fact support the conclusion of law that "[P]laintiff is able to perform some functions on his own, such as dressing, bathing, and feeding himself, but requires attendant or supervisory care an average of 16 hours per day. . . ." Accordingly, the assignments of error upon which this argument is based are overruled.

D. Retroactive Reimbursement

Plaintiff next argues that the Commission erred by not awarding Plaintiff attendant care reimbursement for the period dating 3 February 2003 through 29 April 2007. Specifically, Plaintiff argues that the finding of fact supporting the Commission's conclusion to deny Plaintiff reimbursement for attendant care allegedly provided by Mrs. Adcox during that period was not supported by competent evidence of record.

In support of his position, Plaintiff attempts to present before this court the evidence submitted with his motion to add

additional evidence, which the Full Commission denied. However, as discussed *supra*, we have concluded that the Commission did not abuse its discretion in denying Plaintiff's motion to add this additional evidence to the record. Accordingly, such evidence is not properly before this Court and will not be considered on this appeal.

The Commission made the following finding of fact regarding reimbursement for attendant care provided to Plaintiff during the time period at issue:

> 24. Defendants provided attendant care services to [P]laintiff as prescribed and recommended by [P]laintiff's physicians. Plaintiff contends that he was in need of 24 hour care, which Mrs. Adcox provided, since 2003. Plaintiff has not shown through competent evidence that [P]laintiff was in need of 24 hour care prior to April 2007. Therefore, Mrs. Adcox is not entitled to reimbursement for any attendant care provided prior to April 2007.

On 30 December 2002, Plaintiff moved to compel Defendants to pay for attendant care for six hours per day at a rate of $21.00 per hour. In early January 2003, Defendants authorized 60 hours of attendant care services per week and Kelly Services provided Plaintiff with in-home professional attendant care. The 60 hours of attendant care was provided mainly during the hours Mrs. Adcox was working and Plaintiff was home alone. On 28 February 2007, Defendants denied Mrs. Adcox's request to discontinue outside attendant care services and, instead, to allow Mrs. Adcox to be paid for providing attendant care to Plaintiff. In mid-March 2007, Mrs. Adcox retired.

In April of 2007, Defendants received several forms executed by Plaintiff's physicians indicating that Plaintiff required companion or attendant care 24 hours a day. Defendants thus authorized 24-hour-per-day professional attendant care to be provided by Kelly Services starting 29 April 2007, pending a hearing before the Commission on the matter.

Ms. Morrow testified that there was no indication in the medical records she reviewed that Plaintiff's condition had worsened since he began receiving 60 hours of attendant care which warranted a change to 24-hour attendant care. Additionally, there is no record evidence that, during the time period at issue, Plaintiff or Mrs. Adcox indicated to Plaintiff's physicians, his family, or to Defendants that the amount of attendant care provided by Defendants was inadequate and that 24-hour care was needed. Accordingly, the Commission's finding of fact is supported by competent evidence and is binding on appeal. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. This finding of fact, moreover, supports the Commission's conclusion that "[P]laintiff's request for retroactive compensation for attendant care provided since 2003 is denied."

In response to Plaintiff's argument, Defendants further assert that Plaintiff was not entitled to reimbursement for attendant care services provided by Mrs. Adcox during the period at issue because Plaintiff did not obtain pre-approval from the Commission for Mrs. Adcox to render such services as required by Chapter 14 of the Workers' Compensation Medical Fee Schedule. However, as we

conclude that the evidence of record supports the Commission's finding that Plaintiff did not show he was in need of attendant care beyond that which was provided by Defendants, and this finding supports the conclusion to deny Plaintiff's request for retroactive compensation for attendant care, we need not address Defendants' contention. Plaintiff's argument is overruled.

E. Rate of Compensation

Plaintiff next contends that the Commission erred by setting the rate of compensation for Mrs. Adcox's attendant care services at $10.00 per hour rather than $15.00 per hour. We disagree.

We reiterate that if competent record evidence supports the Commission's findings, the findings are conclusive on appeal, even though the evidence may support contrary findings. *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001).

The Commission made the following finding regarding the pay rate for Mrs. Adcox's attendant care services:

> 23. Taking into account the rate charged by professional home health care agencies and the fact that Mrs. Adcox is not a professional and is an unskilled care provider without any business overhead, a fair rate of pay for Mrs. Adcox's attendant care services is $10.00 an hour.

Ms. Morrow testified that she performed a labor market survey of home healthcare agencies in the Raleigh area and that the average starting hourly wage for home healthcare attendants was $6.50, with the highest wage being $11.00. Furthermore, Ms. Morrow testified that the national average compensation for a CNA is $9.25 per hour, although that rate varies geographically. She testified

that in her experience, family members who are paid to provide attendant care are paid between $8.00 and $9.00 per hour, due to the fact that they lack the training of a CNA.

Nurse Donna Adams, a nursing supervisor for Kelly Services, testified that the Kelly Services aides caring for Plaintiff at the time of the hearing were paid $10.00 per hour. Stephen Carpenter, a vocational rehabilitation counselor, testified that if Mrs. Adcox were paid as a "shift worker," the average pay would be between $10.00 and $12.00 per hour.

We conclude that this testimony is competent to support the Commission's finding that "a fair rate of pay for Mrs. Adcox's attendant care services is $10.00 an hour." Because the Commission's finding is supported by competent evidence, this Court is bound by it, even though the record may contain contrary evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Furthermore, this finding of fact supports the Commission's conclusion of law approving "a rate of $10.00 per hour for Mrs. Adcox's attendant care services." The assignments of error upon which this argument is based are overruled.

F. Secondary Medical Conditions

Plaintiff next contends that the Commission erred in not making findings of fact regarding every secondary medical condition and impairment allegedly suffered by Plaintiff.

The Full Commission must make "specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend." *Hansel*, 304 N.C. at

59, 283 S.E.2d at 109. A case must be remanded for further findings of fact only where "the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy." *Id.*

Here, the Full Commission made the following findings regarding Plaintiff's injuries:

> 2. Plaintiff suffered a severe injury to his head in an admittedly compensable injury by accident on or about February 28, 1983.
>
> 3. Plaintiff suffered, at least, from the following conditions as a result of the compensable injury: depression, confused and disoriented state, difficulty in ambulation, poor balance, atlaxia or likelihood of falling, cognitive impairment, and frontal lobe syndrome (interference with decision-making and memory).

Plaintiff argues that the Commission erred in not making findings of fact regarding an additional 15 conditions and impairments upon which evidence was offered as "the degree and extent of his . . . conditions and impairments are inherently related to the hours of attendant care per day required." However, at issue was not the nature of Plaintiff's injury but the amount of attendant care required because of the injury. In determining the amount of attendant care required, the Commission considered the evidence and made findings of fact regarding the amount of attendant care Plaintiff had been receiving, the amount of attendant care recommended by Plaintiff's physicians, and the extent of Plaintiff's ability to care for himself and sleep through the night. Such findings are directly related to the degree and extent of Plaintiff's impairment, regardless of whether all of

Plaintiff's symptoms are listed in the findings of fact. As a finding of fact regarding each condition and impairment allegedly suffered was not required "to enable the court to determine the rights of the parties upon the matters in controversy[,]" *id.*, we need not remand this case to the Commission for further findings of fact. The assignments of error upon which this argument is based are overruled.

G. Attorneys' Fees

By his final argument, Plaintiff contends that the Commission erred in not taxing Defendants with Plaintiff's attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1. We disagree and are of the opinion that Plaintiff's argument is wholly void of merit.

N.C. Gen. Stat. § 97-88.1 provides: "If the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's attorney upon the party who . . . defended them." N.C. Gen. Stat. § 97-88.1 (2007). "In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. 'The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.'" *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422 (1998) (quoting *Sparks v. Mountain Breeze Rest. & Fish House , Inc.*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)). "Whether the defendant had a reasonable ground to bring a hearing

is reviewable by this Court *de novo*." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

In this case, conflicting evidence was offered by the parties concerning every issue in controversy. Plaintiff claims that "on the evidence, [Defendants] lost on all issues[.]" However, while we reiterate that "[t]he test is not whether the defense prevails[,]" *Sparks*, 55 N.C. App. at 665, 286 S.E.2d at 576, we note that Defendants did not lose on all or even most of the issues in controversy. Plaintiff did not prevail on his demand for attendant care 24 hours per day, his demand for a compensation rate of $15.00 per hour for such attendant care, or his demand for reimbursement for attendant care services allegedly provided by Mrs. Adcox between February 2003 and April 2007.

Plaintiff also demanded that Mrs. Adcox be allowed to provide attendant care services for Plaintiff in lieu of receiving such services from an outside professional. Prior to the hearing, Defendants were provided with evidence that Mrs. Adcox had recently retired from her job, that 24-hour companion care for Plaintiff was now being recommended, and that Plaintiff's physicians had indicated that Mrs. Adcox was an appropriate person to provide companion care. Defense counsel suggested to Plaintiff's counsel that rather than moving to a hearing, the quickest and easiest way for the parties to resolve the issues of the medical necessity of 24-hour attendant care, and Mrs. Adcox's qualifications to provide such care, would be to allow defense counsel to depose the

physicians making these recommendations. Defense counsel also proposed that he obtain the requested information by written questions agreed upon by both attorneys. Plaintiff's counsel denied these requests, stating that the hearing was needed "for purposes of obtaining sanctions against the defense." While Plaintiff ultimately prevailed on his demand to substitute Mrs. Adcox for Plaintiff's attendant care provider, Plaintiff, not Defendants, compelled the hearing, and did so for the admitted purpose of attempting to have sanctions imposed. Defendants had no option *but* to defend the hearing. Thus, we fail to see how Defendants' actions in this case could possibly be construed as stubborn and unfounded litigiousness. On the contrary, we question the propriety of Plaintiff's strategy.

Based on the record evidence before us, we conclude that Defendants have not engaged in stubborn, unfounded litigiousness. Accordingly, the Commission did not err in refusing to tax Defendants with Plaintiff's attorneys' fees under N.C. Gen. Stat. § 97-88.1.

The opinion and award of the Full Commission is affirmed.

AFFIRMED.

Judges HUNTER, JR. and BEASLEY concur.

Report per Rule 30(e).