

# APPEALS TO THE FULL COMMISSION

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## IMPORTANT DEADLINES

ACTION	TRIGGER	DEADLINE
File Notice of Appeal to Full Commission	Receipt of Deputy Commissioner Opinion & Award	15 Days
File Motion to Reconsider Deputy Commissioner Opinion & Award	Receipt of Deputy Commissioner Opinion & Award	15 Days
File Form 44 and Appellant Brief	Receipt of the Transcript	25 Days
File Appellee Brief	Filing of Opposing Counsel's Form 44 & Appellant Brief	25 Days
File Motion to Reconsider Full Commission Opinion & Award	Receipt of Full Commission Opinion & Award	15 Days
File Notice of Appeal to the Court of Appeals	Receipt of Full Commission Opinion & Award or receipt of Ruling on Motion to Reconsider	30 Days for Industrial Commission to <b>receive</b>

## DEADLINE TO APPEAL THE DEPUTY COMMISSIONER OPINION & AWARD

- The first deadline that you will face will be the deadline to appeal the Deputy Commissioner Opinion & Award.
- This appeal is governed by G.S. § 97-85 and 04 NCAC 10A .0701(a).
- The statute and regulation makes clear the appellant has 15 days from the date of receipt of the Deputy Commissioner Opinion & Award to appeal to the Full Commission.
- If you want to appeal on any part of the Deputy Commissioner Opinion & Award, you must appeal. If you do not, you may not later raise that issue on appeal to the Full Commission or the Court of Appeals.

## DEADLINE TO FILE A MOTION TO RECONSIDER

- Another option is to file a Motion to Reconsider with the Deputy Commissioner who authored the Opinion & Award.
- Filing a Motion to Reconsider tolls the 15 day deadline to file a Notice of Appeal to the Full Commission. When the Deputy Commissioner rules on the Motion to Reconsider, the receiving of the Order restarts the 15-day deadline.
- However, 04 NCAC 10A .0701(c) allows an opposing party to divest the Deputy of jurisdiction to hear the motion if they file a letter requesting review of the Deputy Commissioner Opinion & Award with the Docket Director.
- The party propounding the Motion to Reconsider may then file a motion with the Chair of the Industrial Commission requesting remand of the matter back to the Deputy.

## DEADLINE TO FILE THE FORM 44 AND THE BRIEF(S)

- The next deadlines are the filing of the Form 44 and Brief(s), which are governed by 04 NCAC 10A .0701(a).
- These deadlines run from the delivery of the Transcript, and are governed by 04 NCAC 10A .0701(b).
- After receiving the Transcript, you must complete the Transcript and Form 44 Receipt Certification. The deadline to file the Form 44 and Brief begins to run from the date the Transcript is received.
- You have 25 days from the date of receipt of the Transcript to file your Form 44 and Brief if you are the appellant. If you are the appellee, you have 25 days from the date opposing counsel filed his or her Brief.
- You must file a Brief if you want to participate in oral argument, and the Brief must include a Certificate of Service.
- Some Transcript notices have been known to go into spam or junk mail folders. You need to call the Industrial Commission if you have not received your Transcript within 30 days following an appeal acknowledgement letter. Hard copies are sent to *pro se* parties only.

## DEADLINES TO FILE A MOTION TO RECONSIDER A FULL COMMISSION OPINION & AWARD AND/OR TO FILE NOTICE OF APPEAL TO THE COURT OF APPEALS

- After you receive the Full Commission Opinion & Award, you have 30 days from the date of receipt to file a Notice of Appeal to the Court of Appeals.
- The appeal process to the Court of Appeals is governed by G.S. § 97-86 and makes clear that the Notice of Appeal must be received by the Industrial Commission within the 30-day deadline.
- In addition, 04 NCAC 10A .0703 allows the filing of a Motion to Reconsider with the Full Commission.
- A Motion to Reconsider must be filed within 15 days of receipt of notice of the Opinion & Award.
- The filing of a Motion to Reconsider will toll the time for filing a Notice of Appeal to the Court of Appeals. The 30 days to file the Notice of Appeal to the Court of Appeals will run from the receipt of the Order on the Motion to Reconsider.

## DECIDING WHETHER TO APPEAL A DEPUTY COMMISSIONER OPINION & AWARD

- After determining what your appeal deadline is, the next step is to evaluate whether or not you want to file an appeal from the Deputy Commissioner Opinion & Award.
- If you are sure you want to appeal, then there is no need to wait for the deadline to draw near. If you are not going to appeal unless opposing counsel is going to appeal, reach out to opposing counsel and advise him or her of this. Most opposing counsel will comply with a request to be advised if they plan to file a Notice of Appeal.
- Even so, make sure that you do not miss your deadline to appeal just because you are waiting to see what the other side is going to do.

## WHAT IF YOU DON'T FILE A NOTICE OF APPEAL BEFORE THE FULL COMMISSION?

- There are two lines of cases on whether you can argue errors of the Deputy Commissioner before the Full Commission if you did not file a Notice of Appeal before the Full Commission.
- One line follows the premise that the Full Commission should decide all matters in controversy, and therefore the failure to appeal is not dispositive on whether you can argue errors of the Deputy before the Full Commission. The other line follows the premise that if you do not appeal, you do not get to argue errors. This latter line of cases appears to be where the appellate courts are these days.
- Following the first line in *Joyner v. Rocky Mount Mills*, 92 N.C.App. 478, 374 S.E.2d 610 (1988), Defendants appealed to the Full Commission, but Plaintiff did not. The Full Commission refused to rule on an issue that Plaintiff did not preserve for review. The Court of Appeals rejected this rationale and directed “it was the duty and responsibility of the Full Commission to decide all of the matters in controversy between the parties.” *Id.* at 482, 374 S.E.2d at 613.
- Following the other line, in *Reed v. Carolina Holdings*, \_\_\_ N.C.App. \_\_\_, 796 S.E.2d 102, (2017) and *Bentley v. Jonathan Piner Construction*, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2017 N.C. App. LEXIS 561 (2017), the Court of Appeals dismissed appeals on issues that were not raised in the Form 44 and preserved for Full Commission review.

## WHAT IF YOU DON'T FILE A NOTICE OF APPEAL BEFORE THE FULL COMMISSION?

- *Reed* and *Bentley* make clear that if you do not file a Notice of Appeal and do not raise the issue with particularity in your Form 44, be prepared to lose the ability to argue the issue at the Full Commission or beyond.
- Remember that the Full Commission is not a true appellate court, inasmuch as it has the power to take evidence and is the ultimate fact-finder in the case; as a result, it is possible to raise issues for the first time in a Form 44.
- In *Bowman v. Cox Toyota Scion*, 244 N.C.App. 1, 737 S.E.2d 384 (2012), the Court of Appeals held that it was permissible to challenge the foundation of evidence for the first time before the Full Commission (the party challenging the foundation of the evidence had appealed and filed a Form 44 and Appellant Brief addressing this issue).
- The bottom line is that you should give Notice of Appeal if you have any issues to which you want to assign error and argue before the Full Commission. You must then allege the errors with particularity in your Form 44 in order to preserve those issues for review.

## WHAT IF YOU AND YOUR CLIENT DO NOT AGREE ON WHETHER TO APPEAL A CASE OR NOT?

- If this situation arises, please note 04 NCAC 10A .0617(d), which states: “An attorney withdrawing from representation whose client wishes to appeal an Order, Decision, or Award to the Full Commission **shall** timely file a Notice of Appeal, as set out by this Subchapter, on behalf of his or her client before or with his or her Motion to Withdraw.” (emphasis added)

# FILING AND CONTENT OF THE NOTICE OF APPEAL

- If you decide to appeal, the next step is to give Notice of Appeal.
- 04 NCAC 10A .0701(a) addresses the content of your Notice of Appeal and requires “[a] letter expressing a request for review is considered an application for review to the Full Commission within the meaning of G.S. 97-85, provided that the letter specifies the Order or Opinion and Award from which appeal is taken.”

## YOUR FULL COMMISSION BRIEF

- You need to be familiar with the style and formatting requirements for Full Commission Briefs. Below are the applicable rules:
- “Case citations shall be to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. If no reporter citation is available at the time a brief is filed or if an unpublished decision is referenced in the brief, the party citing to the case shall attach a copy of the case to its brief.” 04 NCAC 10A .0701(g)
- “Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.” *Id.*
- “Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit applies to the length of attachments.” 04 NCAC 10A .0701(i)
- “Briefs shall be prepared using a 12 point type, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom of the page.” *Id.*

## YOUR FULL COMMISSION BRIEF

- “When a party quotes or paraphrases testimony or other evidence from the appellate record in the party's brief, the party shall include, at the end of the sentence in the brief that quotes or paraphrases the testimony or other evidence, a parenthetical entry that designates the source of the quoted or paraphrased material and the page number within the applicable source. The party shall use ‘T’ to refer to the transcript of hearing testimony, ‘Ex’ for exhibit, and ‘p’ for page number. For example, if a party quotes or paraphrases material located in the hearing transcript on page 11, the party shall use the following format ‘(T p 11),’ and if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format ‘(Ex p 12).’” 04 NCAC 10A .0701(i).
- “When a party quotes or paraphrases testimony in the transcript of a deposition in the party's brief, the party shall include the last name of the deponent and the page on which such testimony is located. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of such deposition, the party shall use the following format ‘(Smith p 11).’” *Id.*

# YOUR FULL COMMISSION BRIEF

- Your Brief should contain a Statement of the Case, a Statement of the Facts, an Argument, and a Conclusion.
- Your Statement of the Case should provide a brief procedural history. Your Statement of the Facts should provide a non-argumentative overview of the facts.
- You should provide a deposition or transcript citation after each factual assertion.
- Your Argument section needs to make sure to address every issue. If you are the appellant, then you need to make sure to address every issue that you wish to appeal. Address these issues in sub-headings set apart by Roman Numerals. If you are the appellee, then you need to address every issue that your opposing counsel raises in his or her Appellant Brief.
- Your Conclusion should state succinctly the relief you seek. If you are requesting that the defendants reinstate temporary total disability benefits, provide the date from which these benefits should be reinstated. Make sure that you address all of your requests for relief in your Conclusion.

# THE FULL COMMISSION'S STANDARD OF REVIEW

- You need to make sure that you understand the standard of review applicable to cases before the Full Commission. These are not appeals in the traditional sense of the word – the Full Commission is not simply reviewing the Deputy Commissioner Opinion & Award for errors of law.
- The Full Commission is able to make its own findings of fact and is the “ultimate fact-finding” body. *Adams v. AVX Corporation*, 349 N.C. 676, 681, 509 S.E.411, 413 (1998). The Full Commission is not bound by the credibility determinations of the Deputy Commissioner and does not have to give deference to such findings.

## PREPARING YOUR FORM 44

- Your Form 44 is the outline of all of the issues you have with the Deputy Commissioner's Opinion & Award. 04 NCAC 10A .0701(d) states that you must "state the grounds for the review" and that "[t]he grounds shall be stated with particularity, including the errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the Transcript on which the alleged errors are recorded."
- The Rule further states that "[g]rounds for review not set forth in the Form 44 *Application for Review* are deemed abandoned, and argument thereon shall not be heard before the Full Commission." This is consistent with the recent precedent on this issue.

## PREPARING YOUR FORM 44

- The Form 44 needs to specify each error alleged and the reason for your allegation of error. If, for example, you contend that Finding of Fact 3 is contrary to the greater weight of the evidence, then explain why. If you also allege that Finding of Fact 3 is based on a misapprehension of the law, then explain why, and cite the applicable law.
- The Form 44 needs to be specific. Commissioners often will look at the Form 44 before the Brief so as to ascertain a cursory understanding of the appellant's issues. If you state only that Finding of Fact 3 is contrary to applicable law, the Full Commission gains little insight into the specific issue being raised.
- You should sign your Form 44 and print your name beside your signature. It is sometimes difficult for the Commissioners to discern who signed the Form 44 just based on the signatures.
- You should attach additional pages as necessary to fully outline the errors alleged.

## EXTENSIONS OF TIME

- 04 NCAC 10A .0701(e) states that “If the matter has not been calendared for hearing, any party may file with the Docket Director a written stipulation to a single extension of time not to exceed 15 days. In no event shall the cumulative extensions of time exceed 30 days.”
- Most of the time, the matter has not yet been scheduled for hearing when Briefs are due. Call opposing counsel to make sure that there is no issue with the extension, and then file a letter with Docket Director Langdon notifying her of the stipulation.
- You do not need to obtain an Order regarding the agreed-upon extension; it is sufficient to notify the Industrial Commission of the written stipulation pursuant to 04 NCAC 10A .0701(e).

## MOTIONS TO RECEIVE ADDITIONAL EVIDENCE

- G.S. § 97-85 states: “if good ground be shown therefor,” the Full Commission may “receive further evidence.” The Court of Appeals reviews the decision to receive additional evidence based on an abuse of discretion standard. See generally *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E.2d 857 (1965).
- In *Allen v. K-Mart*, 137 N.C.App. 298, 528 S.E.2d 60 (2000), the Court of Appeals held that it was a denial of due process to deprive the opposing party of the right to cross-examine or impeach evidence that is newly admitted pursuant to G.S. § 97-85. Thus, if the Full Commission grants a Motion to Receive Additional Evidence, it must allow the opposing party the right to cross-examine this evidence.
- When deciding whether to file a Motion to Receive Additional Evidence, you will need to look at the facts and circumstances surrounding your particular case. These motions seem to be granted when there has been some kind of change in circumstances since the hearing.

## MOTIONS TO AMEND THE RECORD

- 04 NCAC 10A .0701(f) addresses Motions to Supplement the Record. It states:“After a request for review has been submitted to the Full Commission, any motions related to the issues for review shall be filed with the Full Commission, with service on the other parties. Motions related to the issues for review, including motions for new trial, to supplement the record, including documents from offers of proof, or to take additional evidence, filed during the pendency of a request for review to the Full Commission, shall be argued before the Full Commission at the time of the hearing of the request for review, except motions related to the official transcript and exhibits. The Full Commission, for good cause shown, may rule on such motions prior to oral argument.”
- If there is a good reason why the Commission should rule upon this request prior to oral argument, make sure that you include it in your motion.

# ORAL ARGUMENT

- When your case is set for oral argument, you will receive an email from the Industrial Commission providing you with the oral argument calendar. You will not receive a hard copy of the oral argument calendar.
- If you are the appellant, you will argue first. If both parties have appealed, the parties should discuss the order of argument prior to the call of the calendar. You will have twenty minutes to argue your case. You should save at least five minutes for rebuttal if you are the appellant; if you are the appellee, you will have no opportunity for rebuttal.
- Make sure that you are prepared for oral argument with all of the papers you need. You will need, at a minimum, the Deputy Commissioner Opinion & Award, the Transcript and paginated exhibits from the Industrial Commission, all deposition transcripts, the Briefs of the parties, and any pending motions.

# THE FULL COMMISSION OPINION AND AWARD

- When you receive the Full Commission Opinion & Award, you need to review it immediately. Per 2017 N.C. Sess. Laws 57, which the General Assembly ratified in the 2017 long session, the Industrial Commission may now email or mail Full Commission Opinion & Awards.
- Promptly calendar the deadline to file a Notice of Appeal and contact your client to discuss the Opinion & Award.
- You should also review the Full Commission Opinion and Award to ensure that all issues raised in the Pre-Trial Agreement have been addressed and resolved. If they are not, you may want to file a Motion for Reconsideration.
- If the Full Commission Opinion & Award contains a blatant legal or factual error, then a Motion to Amend the Opinion & Award or a Motion to Reconsider the Opinion & Award might be appropriate.

## INTEREST ON AWARDS PURSUANT TO G.S. § 97-86.2

- Any amounts awarded in a Full Commission Opinion & Award are also subject to an interest payment pursuant to G.S. § 97-86.2. The statute is mandatory, not discretionary, and it does not matter who filed the appeal. All that matters is that there is an appeal and an ultimate award to Plaintiff. The interest is paid to Plaintiff only, not Plaintiff's attorney.
- In I.C. No. 241740, *Moore v. FoamEx*, the Full Commission held that there are two periods over which to calculate the interest: (1) From the first date of disability through the date of the hearing; and (2) from the date following the date of the hearing through the date of payment.
- For the first period, the interest is calculated as follows:  $((\# \text{ of days of disability prior to the date of hearing} / 7) \times \text{compensation rate}) \times .08 \times ((\# \text{ of days from date of hearing to date of payment}) / 365)$ .
- For the second period, which runs from the date of the initial hearing before the Deputy Commissioner through the date that the compensation and interest are paid, you must use a more complicated formula: Each weekly compensation payment due is time weighted and multiplied by the weekly interest rate. The interests thus calculated on each weekly compensation payment is then added and the resulting amount is due for that period of time.
- The interest for both periods is 8% per annum.

## MOTIONS FOR ATTORNEY'S FEES PURSUANT TO G.S. § 97-88

- G.S. § 97-88 states, “If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.”
- Therefore, if a Full Commission Opinion & Award awards your client medical or indemnity benefits following an appeal by a defendant, you may wish to file a Motion for Attorney's Fees and Costs.
- You may ask for § 97-88 attorney's fees even when both parties appeal. These fees are limited to the portion of the case attributable to defending the insurer's appeal, so leave out the time spent preparing the Appellant Brief. See *Troutman v. White & Simpson, Inc.*, 121 N.C.App. 48, 464 S.E.2d 481 (1995).

## MOTIONS FOR ATTORNEY'S FEES PURSUANT TO G.S. § 97-88

- In the Motion for Attorney's Fees, provide a procedural history of the case, attach the Form 33, the Deputy Commissioner Opinion & Award, any Notice of Appeal, and the Full Commission Opinion & Award. Also attach an affidavit of time spent defending the appeal.
- Outline your experience in the field pursuant to the requirements of Rule 1.5 of the Rule of Professional Conduct and state the hourly rate you are seeking. Attach prior § 97-88 or 97-88.1 orders awarding that same hourly rate to you.
- It is important to explain to the Full Commission why you feel that you should be awarded § 97-88 attorney's fees. This is not an automatic award.

## MISCELLANEOUS POINTS

- Often clients will ask how long it takes to receive a Full Commission Opinion & Award. The parties typically receive the transcript within 30 days of the filing of the notice of appeal. You can then anticipate 50 to 80 days for the parties to brief the case. You can then anticipate another month to three months for oral argument. Then you can anticipate approximately three months to receive an Opinion & Award, although this all depends upon the complexity of the case and the case load of the Full Commission.
- You may notice that materials submitted to the Deputy Commissioner do not make it into the Transcript exhibits provided by the Industrial Commission. If this happens, you should contact opposing counsel and ask if he or she has any objection to a Motion to Amend the Record to add those exhibits. This is different than asking for the Full Commission to receive additional evidence, because the Deputy Commissioner also received and reviewed these items as evidence.

## MISCELLANEOUS POINTS

- Some practitioners submit a proposed Full Commission Opinion & Award even though this is not required by the rules. This is a good idea if you are the appellant.
- When submitting a written and oral argument to the Full Commission, be mindful of what you say about the Deputy Commissioner issuing the Opinion & Award. The Deputies are Judges, and the Rules of Professional Conduct require you to treat Judges with respect, and to defend them against unwarranted attacks when necessary. See *generally* NC Rules Prof. conduct, R. 8.2, Comments 3 & 4 (2017).

# CONCLUSION

- The Full Commission is not a scary place to be once you know the rules of the road. While it is always nice to prevail in a Deputy Commissioner Opinion & Award, most of the time, it is vital that you prevail at the Full Commission. You should be prepared, know your case, know the law, follow the rules and find the ethos of your case to argue at oral argument so that the Full Commission wants to and can find in your favor in its Opinion & Award.