

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-77

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2005

GARY M. SANDERS,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 063225

BRAD FARRAH PONTIAC
GMC NISSAN,
Employer,

and

BRENTWOOD SERVICES,
Servicing Agent,
Defendants.

Appeal by plaintiff from opinion and award entered 7 October 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 2005.

Hodgman and Oxner by Todd P. Oxner for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P. by Tara D. Muller for defendant-appellees.

LEWIS, Judge.

Gary M. Sanders (“plaintiff”) appeals from an opinion and award of the North Carolina Industrial Commission (“Full Commission”). For reasons stated herein, we affirm the opinion and award of the Full Commission.

The pertinent facts in this case are as follows: On 13 December 2002, the Industrial Commission entered an order approving a settlement agreement between plaintiff and Brad

Farrah Pontiac GMC Nissan (“Farrah”), a qualified self-insured, and Brentwood Services (“Brentwood”), servicing agent (collectively, “defendants”). The order approving the agreement was faxed to counsel for the parties on 13 December 2002 by the Commission. On 6 January 2003, counsel for plaintiff faxed a copy of the order approving the settlement agreement to counsel for defendants. Plaintiff’s counsel had inquired about payment on 6 January 2003 and defense counsel indicated the settlement had not been approved. Defendants issued payment with a letter dated 14 January 2003. Plaintiff filed a motion seeking a ten percent penalty for late payment on 25 July 2003. Plaintiff’s motion was denied by the Executive Secretary of the Industrial Commission on 16 September 2003. Plaintiff appealed the order of the executive secretary and a full evidentiary hearing was conducted by a deputy commissioner on 30 October 2003. The deputy commissioner denied plaintiff’s motion in an Opinion and Award filed 22 January 2004. Plaintiff appealed to the Full Commission. In an Opinion and Award filed 7 October 2004, the Full Commission denied plaintiff’s motion for a late penalty. Plaintiff appeals and defendants cross-appeal.

The issues on appeal are (I) whether the findings of fact of the Full Commission are supported by competent evidence and (II) whether the findings of fact support the conclusions of law.

Appellate review of a decision of the Full Commission is “limited to reviewing whether any competent evidence supports the Commission’s findings of fact and whether the findings of fact support the Commission’s conclusions of law.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). “The Commission’s findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a

contrary finding.” *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). This Court’s function is “to determine whether the record contains any evidence tending to support the finding.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Full Commission is the “sole judge of the weight and credibility of the evidence.” *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

N.C. Gen. Stat. §97-18(g) governs the payment of settlement proceeds and provides that:

If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

A late penalty may be assessed if payment of an approved compromise settlement is not made within twenty-four days. *Carroll v. Living Ctrs. Southeast*, 157 N.C. App. 116, 120-21, 577 S.E.2d 925, 929 (2003).

In the instant case, plaintiff contends there is not competent evidence of record to establish defendants did not receive a copy of the Order Approving Settlement faxed to the parties’ attorneys on 13 December 2002.

The Full Commission made the following findings of fact:

1. The parties entered into a Compromise Settlement Agreement which was approved by Order filed on December 13, 2002. The Order was faxed on December 13, 2002 to plaintiff’s and defendant’s counsel from the Executive Secretary’s Office. No evidence was presented that defendant received the fax on that date.

2. Plaintiff’s counsel contacted defendant in early January of 2003 to inquire as to when to expect issuance of the settlement check.

3. Defendant ceased paying plaintiff's temporary total disability benefits as of December 24, 2002.

4. Plaintiff's counsel faxed a copy of the Order to defense counsel, who then faxed a copy of the Order approving the Compromise Settlement Agreement on or about January 6, 2003 to the servicing agent.

5. By letter dated January 14, 2003, Sandra Har[t]is, Senior Claims Representative for the servicing agent, wrote to plaintiff's counsel to advise that enclosed were two checks representing the final settlement. An I.C. Form 28B was also enclosed.

6. Defendant issued the check within twenty-four days from receipt of the Order.

We conclude the Full Commission's findings are supported by competent evidence. In an affidavit, defense counsel's legal secretary, Annette Sills ("Sills"), states that if any order of the Industrial Commission had been sent to the firm, she would have received it. She also states she was not aware the Industrial Commission had approved the settlement until she received a telephone call from plaintiff's counsel's office inquiring when payment would be made. Sills responded that defense counsel's office had not received an order approving the settlement. Sills then requested plaintiff's counsel fax a copy of the order. Sills states she received a faxed copy of the order later that day from plaintiff's counsel. The record also contains an affidavit of Sandra Hartis ("Hartis"), senior claims administrator for Brentwood. Hartis states that as of 6 January 2003, she was not aware that the Industrial Commission had approved the settlement agreement. She states she received a copy of the order approving the settlement from defense counsel on 7 January 2003 and issued a check to plaintiff's attorney on 15 January 2003. Thus there is competent evidence to support the Full Commission's findings of fact. Defendants produced evidence they had not received a copy of the order as of 6 January 2003. Plaintiff had nothing to contradict that evidence such as convinced the Commission.

The findings of fact support the conclusions of law that defendants' payment was made within twenty-four days from receipt of the order and therefore, timely. Thus, we affirm the denial of plaintiff's motion for the assessment of a late payment penalty.

Defendants cross-appeal and contend that the Commission erred by not awarding defendants attorneys' fees pursuant to Rule 11 of the North Carolina Rules of Civil Procedure and Rule 802 of the Rules of the Industrial Commission. Where the issue is properly raised before the Commission, it is error for the Commission to fail to rule on whether sanctions should be awarded under N.C. Gen. Stat. §97-88.1. *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 358, 581 S.E.2d 778, 789 (2003). In this case, the record evidences no ruling by the Commission on the issue of sanctions, and we must remand this case for a determination of this issue.

Affirmed in part and remanded.

Judges HUDSON and ELMORE concur.

Report per Rule 30(e).