

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-1102  
NORTH CAROLINA COURT OF APPEALS

Filed: 17 May 2011

BARBARA L. WADDELL,  
Employee,  
Plaintiff

v.

N.C. Industrial Commission  
I.C. Nos. 328445, 351178

GOODYEAR TIRE & RUBBER CO.,  
Employer,

LIBERTY MUTUAL INSURANCE GROUP,  
Carrier,  
Defendants

Appeal by plaintiff's former counsel from Amended Opinion and Award filed 18 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 February 2011.

*Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, pro se.*

*Oxner, Thomas + Permar, by Thomas M. Clare, for plaintiff-appellee.*

*No brief filed for defendants.*

CALABRIA, Judge.

Kathleen G. Sumner ("Sumner") appeals an amended Opinion and Award from the North Carolina Industrial Commission ("the

Commission") denying Sumner's ongoing attorney's fees. We dismiss Sumner's appeal.

I. BACKGROUND

On 6 November 2002, Barbara L. Waddell ("plaintiff") sustained work-related injuries to her bilateral wrists, neck, and right shoulder. On 18 May 2003, plaintiff hired Sumner to represent her before the Commission. On 16 June 2003, plaintiff sustained a work-related injury to her lower left arm. Plaintiff, through Sumner, filed three "Notice of Accident to Employer and Claim of Employee" forms ("Form 18") with the Commission. Plaintiff sought compensation for her work-related injuries from Goodyear Tire & Rubber Co. and its insurance carrier, Liberty Mutual Insurance Group (collectively, "defendants").

Plaintiff, through Sumner, and defendants entered into an "Agreement for Compensation for Disability" ("Form 21") on 5 April 2006. The Form 21 provided that defendants would pay plaintiff \$654.00 per week for her work-related injury to her right shoulder for the periods of 9 July 2003 to 15 March 2004 and 7 June 2004 to the present, and continuing for an unknown duration. The Form 21 also awarded Sumner attorney's fees from the accrued and ongoing indemnity compensation in the amount of

25 per cent (%) of plaintiff's weekly compensation,<sup>1</sup> beginning 1 April 2006. This amount was awarded pursuant to plaintiff's fee agreement with Sumner.

On 2 January 2007, plaintiff requested that Sumner withdraw from representing her. On 23 January 2007, the Commission granted Sumner's request to withdraw and ordered that Sumner continue receiving weekly attorney's fees in the amount of 25% of plaintiff's weekly compensation. On 23 March 2009, plaintiff's new counsel filed a Form 33 with the Commission, seeking to terminate Sumner's weekly attorney's fees. The matter was held before the Deputy Commissioner on 21 April 2009. On 27 May 2009, the Deputy Commissioner filed an Opinion and Award in which he concluded that Sumner was entitled to ongoing weekly attorney's fees in the amount of \$163.50. Plaintiff appealed to the Full Commission.

Following a hearing, the Full Commission filed an Opinion and Award on 17 December 2009, ordering defendants to pay Sumner "ongoing attorneys [sic] fees in the amount of 25% of the sums due plaintiff until 15 December [] 2011 or until further Order of the Commission." Plaintiff filed a Motion to Reconsider, and on 18 May 2010, the Commission filed an Amended Opinion and

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<sup>1</sup> This amount totaled \$163.50 per week.

Award ("the Amended Opinion and Award"), denying Sumner's request for additional attorney's fees and ordering defendants to cease payment of attorney's fees to Sumner. Sumner appeals.

## II. ATTORNEY'S FEES

Sumner argues that the Full Commission does not have jurisdiction to interfere with the fee agreement between an attorney and an injured worker, once that fee agreement is determined reasonable and a fee is awarded pursuant to N.C. Gen. Stat. § 97-90.

### A. Standard of Review

A party may appeal an Opinion and Award of the Full Commission "to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (2009).

Under the Workers' Compensation Act, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. *Adams v. AVX Corp.*, 349 N.C. 676, 681-82, 509 S.E.2d 411, 414 (1998). This "court's duty goes no

further than to determine whether the record contains any evidence tending to support the finding." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

*Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999). Furthermore, findings of fact not assigned as error are binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). Since Sumner does not object to any of the Commission's findings in the Amended Opinion and Award, they are binding on this Court.

#### B. Jurisdiction

As an initial matter, we address whether this Court has jurisdiction to hear Sumner's appeal.

##### 1. Rules of Appellate Procedure

We first note that Sumner failed to articulate the grounds for appellate review in her appellate brief. North Carolina Rule of Appellate Procedure 28(b)(4) requires the appellant to set forth a statement of the grounds for appellate review, which "shall include a citation of the statute or statutes permitting

appellate review.” N.C. R. App. P. 28(b)(4) (2009). Our Supreme Court has held that Rule 28(b) is a “nonjurisdictional” rule. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). “Noncompliance with rules of this nature, while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction.” *Id.* Therefore, while this error does not preclude us from hearing Sumner’s appeal, we remind counsel that “the Rules of Appellate Procedure are mandatory and a party’s failure to comply with them frustrates the review process and subjects the party to sanctions[.]” *Dillingham v. N.C. Dep’t of Human Res.*, 132 N.C. App. 704, 707, 513 S.E.2d 823, 825 (1999).

2. N.C. Gen. Stat. § 97-90

“N.C. Gen. Stat. § 97-90 sets out the process through which attorney’s fees are approved by the Industrial Commission as well as the procedure for disputing a decision by the Industrial Commission on such matters.” *Davis v. Trus Joist MacMillan*, 148 N.C. App. 248, 255, 558 S.E.2d 210, 215 (2002). Under N.C. Gen. Stat. § 97-90, “[f]ees for attorneys . . . under this Article shall be subject to the approval of the Commission[.]” N.C.

Gen. Stat. § 97-90(a) (2009). Furthermore, N.C. Gen. Stat. §

97-90 provides, in pertinent part:

If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. *If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides;* and upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal.

N.C. Gen. Stat. § 97-90(c) (emphasis added).

Furthermore, this Court has held that N.C. Gen. Stat. § 97-90(c) requires that after the Full Commission renders a decision regarding attorney's fees, "the matter 'must' be appealed to the senior resident judge of the superior court in the county in which the cause of action arose or in which the plaintiff resides." *Russell v. Laboratory Corp. of Am.*, 151 N.C. App. 63, 70, 564 S.E.2d 634, 639 (2002) (citation omitted). Therefore, where a party "failed to appeal the dispute over attorney's fees according to the procedures set out in section 97-90(c), we determined that we are without jurisdiction to hear the issue and must dismiss the appeal." *Id.* (internal quotation and citation omitted).

In the instant case, on 8 May 2003, plaintiff hired Sumner to represent her in two worker's compensation claims against defendants. Plaintiff, through Sumner, and defendants entered into a Form 21 agreement for compensation for disability with the presumption of ongoing disability. As part of the agreement, Sumner was awarded attorney's fees of \$163.50 per week, which was 25% of plaintiff's accrued and ongoing indemnity compensation.



On 23 January 2007, the Commission ordered that Sumner was no longer representing plaintiff in her claims against defendants, but also ordered that "the weekly attorneys' fee shall continue to be paid" to Sumner "until further order of the Commission." On 27 May 2009, the Deputy Commissioner filed an Opinion and Award finding, *inter alia*, that the 25 percent contingency fee agreement between plaintiff and Sumner was reasonable, and concluding that Sumner was entitled to continue to receive ongoing attorney's fees in the amount of \$163.50 per week.

On 17 December 2009, the Full Commission entered an Opinion and Award finding, *inter alia*, that the 25 percent contingency fee agreement between plaintiff and Sumner was reasonable "for the duration of . . . Sumner's representation of plaintiff for a total of 245 weeks" and concluded that Sumner was "entitled to receive ongoing attorneys [sic] fees in the amount of 25% of the sums due plaintiff until 15 December 2011 or until further Order of the Commission."

On 18 May 2010, the Full Commission entered an Amended Opinion and Award, finding, *inter alia*, that

a reasonable fee for . . . Sumner is 25% of the total amount due plaintiff for the duration of . . . Sumner's representation of plaintiff for a total of 193 weeks. As . . .

. Sumner has already received attorney fees for a period in excess of 193 weeks, the Full Commission finds that [she] is not entitled to further attorney fees.

The Full Commission then concluded that, in its "discretion and in light of the nature and extent of services provided," Sumner was entitled to receive ongoing attorney's fees in the amount of 25% of the sums due plaintiff for 193 weeks. Since Sumner had already received such fees in excess of 193 weeks, she was not entitled to receive any further attorney fees. These facts show that plaintiff and Sumner disputed the award of attorney's fees. Therefore, since Sumner was the party appealing the award of attorney's fees, she was required to follow N.C. Gen. Stat. § 97-90(c). That statute requires a party disputing an award of attorney's fees to appeal to superior court if the Full Commission finds that the fee agreement between a plaintiff and her counsel "is unreasonable."

In the instant case, the Full Commission found that the fee agreement was reasonable, and that Sumner was entitled to compensation for 193 weeks. The Full Commission also found that Sumner was not entitled to additional compensation after that time period. Therefore, the reasonable, logical inference is that any additional compensation to Sumner after that period was unreasonable.

Therefore, Sumner was required to appeal the Commission's Amended Opinion and Award "to the senior resident judge of the superior court in the county in which the cause of action arose or in which the plaintiff resides." *Russell*, 151 N.C. App. at 70, 564 S.E.2d at 639. There is nothing in the record showing that Sumner followed this procedure. Therefore, we "are without jurisdiction to hear the issue and must dismiss the appeal." *Id.* (internal quotation and citation omitted).

### III. CONCLUSION

Plaintiff's appeal of the Commission's Amended Opinion and Award is dismissed.

Dismissed.

Judges STEELMAN and BEASLEY concur.

Report per Rule 30(e).