

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-1721

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2003

CARRIE B. COBLE,
Employee,
Plaintiff;

v.

North Carolina Industrial Commission
I.C. File No. 696875

BLACK & DECKER,
Employer;

ESIS,
Carrier;
Defendants.

Appeal by plaintiff from opinion and award entered 11 October 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 October 2003.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by John A. Tomei, for defendant-appellees.
HUDSON, Judge.

Plaintiff appeals from an order of the North Carolina Industrial Commission allowing defendants' motion to dismiss her appeal from a Deputy Commissioner's opinion and award as untimely under N.C. Gen. Stat. §97-85 (2001). We affirm.

On 22 November 2000, Deputy Commissioner Kim L. Cramer filed an opinion and award finding plaintiff had suffered a non-disabling injury by accident on 19 May 1996, when she hit her head in the course of her employment as a mold machine operator for defendant-

employer. The Deputy Commissioner found no evidence “that this accident resulted in any serious head injury or any injury to Plaintiff’s neck.” She ordered defendants to pay for plaintiff’s initial medical assessment and treatment up to 24 October 1996, but denied plaintiff’s claim for temporary total disability benefits.

On 29 November 2000, plaintiff received a certified letter from her counsel, with a copy of the opinion and award, notifying plaintiff that counsel would not pursue her appeal. On 19 December 2000, plaintiff contacted her present appellate counsel, who immediately gave notice of appeal to the full Commission.

Defendants moved to dismiss plaintiff’s appeal as untimely under N.C. Gen. Stat. §97-85 (2001). After a hearing, the full Commission allowed defendants’ motion upon the following findings of fact:

1. Deputy Commissioner [Cramer] filed her Opinion and Award on November 22, 2000, and faxed and mailed it the same day to counsel of record.

2. Section 97-85 of the North Carolina General Statutes provides, in pertinent part: 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

3. If notice of an award is considered “given” on the day the award is faxed to counsel of record, any appeal from the award should have been filed with the Industrial Commission by Thursday, December 7, 2000.

4. If notice of an award is considered “given” on the day it is mailed by counsel of record to counsel’s client (here, the award was mailed by counsel on November 29, 2000 along with a letter telling client that counsel was withdrawing from the case and advising client to file an appeal if further review was desired), any appeal from the award should have been filed with the Industrial Commission by Monday, December 18, 2000.

5. Plaintiff herself received notice of the award by the aforesaid letter from her former counsel on November 29, 2000. She hired present counsel on December 19, 2000 and present counsel filed her notice of appeal with the Industrial Commission on the same day.

6. Plaintiff's notice of appeal was 12 days late if paragraph 3 above is the true state of the law. Plaintiff's notice of appeal was 1 day late if paragraph 4 above is the true state of the law.

Having determined that the notice of appeal was untimely, the Commission further concluded that "[p]laintiff's failure to file her appeal with the Industrial Commission within 15 days as required by N.C. Gen. Stat. §97-85 was not due to excusable neglect." The Commission determined plaintiff did not pay "proper attention to her case" when she failed to obtain new counsel within fifteen days of learning that her original counsel would not handle her appeal. Accordingly, it dismissed the appeal and declared the Deputy Commissioner's opinion and award to be the law of the case. *See* N.C. Gen. Stat. §97-86 (2001).

Plaintiff challenges the Commission's ruling dismissing her appeal as untimely. Although she assigns error in the record on appeal to the Commission's conclusion that she failed to show excusable neglect, she argues in her brief that the Commission "abused its discretion" under its administrative rules. Plaintiff claims she "did not know what the time was to perfect her appeal and immediately took action to locate new counsel." She further avers that her untimeliness did not prejudice defendants.

Under N.C. Gen. Stat. §97-85, a plaintiff must apply to the full Commission for review of a Deputy Commissioner's opinion and award "within 15 days from the date when notice of the award shall have been given." Although the fifteen-day deadline is mandatory, a plaintiff may avoid dismissal for non-compliance with N.C. Gen. Stat. §97-85 upon a showing of excusable neglect. *Moore v. City of Raleigh*, 135 N.C. App. 332, 336, 520 S.E.2d 133, 137 (1999), *disc.*

review denied, 351 N.C. 358, 543 S.E.2d 131 (2000). However, “ the Industrial Commission does not have authority to excuse plaintiff from complying with N.C. Gen. Stat. §97-85. Furthermore, its discretionary authority . . . does not allow the Industrial Commission to disregard the holdings of this Court as to what constitutes ‘excusable neglect.’” *Id.* at 337, 520 S.E.2d at 138. “[W]hat constitutes ‘excusable neglect’ is a question of law which is fully reviewable on appeal.” *Creasman v. Creasman*, 152 N.C. App. 119, 124, 566 S.E.2d 725, 729 (2002) (citations omitted).

In assessing whether plaintiff’s untimely action was the product of excusable neglect, the relevant inquiry is “what may be reasonably expected of a party in paying proper attention to h[er] case under all the surrounding circumstances.” *Dishman v. Dishman*, 37 N.C. App. 543, 547, 246 S.E.2d 819, 822 (1978), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 620 & n.1, 501 S.E.2d 898, 900 & n.1 (1998). “A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process.” *In re Hall*, 89N.C. App. 685, 688, 366 S.E.2d 882, 885, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). When a party “fails to give her [case] the attention which a person of ordinary prudence usually gives her important business, there is no excusable neglect.” *Id.* at 687, 366 S.E.2d at 884.

Plaintiff has not assigned error to the Commission’s findings of fact and, therefore, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991). As found by the Commission, plaintiff was on notice no later than 2 December 2000 that her trial counsel would not handle the appeal. *Cf. Briley v. Farabow*, 348 N.C. 537, 546-47, 501 S.E.2d 649, 655 (1998) (imputing counsel’s neglect or inattention to client). Moreover, because the Commission allowed plaintiff a full fifteen days after her receipt of counsel’s notice in which

to file notice of appeal, her period for giving notice of appeal was not abridged by counsel's inaction. Nor can any delay be ascribed to plaintiff's appellate counsel, who gave notice of appeal to the Commission on the same day plaintiff retained her. The Commission made no finding, and the record on appeal contains no evidence, of any effort by plaintiff to obtain appellate counsel prior to 19 December 2000. Thus, plaintiff's untimely notice of appeal is attributable solely to her own inaction. Accordingly, the Commission did not err in concluding she had failed to show excusable neglect.

Because we hold the Commission properly dismissed plaintiff's appeal, we need not address her remaining assignment of error.

Affirmed.

Judges MCGEE and GEER concur.

Report per Rule 30(e).