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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-888

Filed: 5 July 2016

North Carolina Industrial Commission, I.C. No. W66377

BRENDA E. WRIGHT, Employee, Plaintiff

v.

WAL-MART, INC., #1127, Employer, CLAIMS MANAGEMENT, INC., Carrier,
Defendants

Appeal by plaintiff from orders entered 16 February 2015 and 28 April 2015.

Heard in the Court of Appeals 27 January 2016.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Elias W. Admassu and M. Duane Jones for defendants-appellees.

DAVIS, Judge.

Brenda E. Wright (“Plaintiff”) appeals from orders of the North Carolina Industrial Commission (the “Commission”) directing Wal-Mart, Inc., #1127 (“Wal-Mart”) and Claims Management, Inc. (collectively “Defendants”) to pay \$6,250.00 in attorneys’ fees and denying her motion for reconsideration of the amount of the award. On appeal, Plaintiff contends that the Commission abused its discretion by awarding an unreasonably low amount of attorneys’ fees. After careful review, we

vacate the Commission's orders and remand to the Commission for further proceedings.

Factual Background

This matter is before this Court for the second time. Because our prior opinion in the first appeal, *see Wright v. Wal-Mart, Inc.*, 225 N.C. App. 533, 737 S.E.2d 192 (2013) (unpublished) (“*Wright I*”), provides the facts of this case in detail, we have set out below only those facts essential for an understanding of the issues raised in the present appeal.

Plaintiff worked as a department manager for Wal-Mart in Wadesboro, North Carolina. A workplace accident on 17 July 2009 ultimately resulted in Plaintiff suffering injuries to her hands, wrists, and arms. By order of her physician, Plaintiff was taken out of work on 18 January 2010. Her doctor released her back to work — with certain restrictions — on 5 October 2010.

Plaintiff filed a workers' compensation claim and, upon Defendants' request for a hearing, Deputy Commissioner J. Brad Donovan (“Deputy Commissioner Donovan”) heard the matter on 15 November 2010. He issued an opinion and award on 8 July 2011 concluding, *inter alia*, that Plaintiff (1) was entitled to temporary total disability compensation from “18 January 2010 and continuing until she returns to

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work at the same or greater wages”; and (2) was not entitled to sanctions under N.C. Gen. Stat. § 97-88.1 for unfounded litigiousness on Defendants’ part.¹

Plaintiff and Defendants each filed notices of appeal to the Commission. Several months after their briefs were filed, Plaintiff moved for the Commission to reopen the record so she could offer evidence of the job search that she undertook following the hearing before Deputy Commissioner Donovan. The Commission held the motion in abeyance.

On 12 January 2012, the Commission issued an Opinion and Award, which (1) affirmed Deputy Commissioner Donovan’s conclusion that Plaintiff was entitled to temporary total disability payments from 18 January 2010 and continuing until she returned to work at the same or greater wages; (2) assessed attorneys’ fees against Defendants “equaling twenty-five percent (25%) of any accrued disability compensation payable to plaintiff” for “unfounded litigiousness” under N.C. Gen. Stat. §97-88.1; and (3) denied Plaintiff’s motion to reopen the record to provide additional evidence. Defendants filed a notice of appeal to this Court on the issues of compensability, disability, and unfounded litigiousness. Several days later, Plaintiff filed a notice of cross-appeal based on the denial of her motion to reopen the record.

¹ N.C. Gen. Stat. § 97-88.1 allows the Industrial Commission to assess attorneys’ fees and costs against a party who brings, prosecutes, or defends a hearing “without reasonable ground.” N.C. Gen. Stat. § 97-88.1 (2015).

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In *Wright I*, we (1) affirmed the Commission's conclusion that Plaintiff was entitled to disability benefits from 18 January 2010 to 5 October 2010; (2) determined that there was insufficient evidence before the Commission to conclude that Plaintiff was totally disabled after 5 October 2010; (3) reversed the Commission's denial of Plaintiff's motion to reopen the record for the purpose of offering evidence as to her job search; and (4) remanded the case for the Commission to take additional evidence on that issue. *Wright I*, slip op. at 5-7. In our opinion, we also stated that

[w]e do not address the merits of Defendant's appeal regarding attorneys' fees, but reverse that portion of the opinion and award in light of our remand for further proceedings. In entering a new opinion and award, the Commission may consider the question of attorneys' fees anew.

Id., slip op. at 8.

On remand, Deputy Commissioner George R. Hall, III conducted a hearing on 16 July 2013 to receive additional evidence regarding Plaintiff's ongoing disability, after which he transferred the case back to the Commission. The Commission filed an Amended Opinion and Award on 24 June 2014 concluding that (1) Plaintiff was, in fact, totally disabled after 5 October 2010 and thus was entitled to total disability benefits from 18 January 2010 and continuing until further order of the Commission; and (2) Plaintiff was not entitled to attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1. Neither party appealed the Amended Opinion and Award.

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Plaintiff subsequently filed a motion before the Commission for costs and attorneys' fees pursuant to a separate statute, N.C. Gen. Stat. § 97-88,² because she had been successful in defending her claim on appeal. On 16 February 2015, the Commission entered an order awarding Plaintiff \$6,250.00 in attorneys' fees pursuant to N.C. Gen. Stat. § 97-88 in connection with her defense of Defendants' appeals to the Commission and this Court but did not award her attorneys' fees related to her own cross-appeal to this Court. Despite this award of attorneys' fees, the Commission declined to award any costs to Plaintiff. Plaintiff filed a motion for reconsideration, which the Commission denied on 28 April 2015. Plaintiff appeals from these two orders.

Analysis

² This Court has explained the difference between N.C. Gen. Stat. § 97-88 and N.C. Gen. Stat. § 97-88.1 as follows:

An award of attorney's fees under [N.C. Gen. Stat. § 97-88.1] requires the Commission to find that the original hearing has been brought, prosecuted, or defended without reasonable ground. [Whereas N.C. Gen. Stat. § 97-88] applies to appeals to the Full Commission or appellate courts and allows an injured employee to move that his attorney's fees be paid whenever an insurer appeals the decision rendered in the original hearing and the insurer is required to make payments to the injured employee. An award of attorney's fees under [N.C. Gen. Stat. § 97-88] does not require the Commission to find that the appeal has been brought, prosecuted, or defended without reasonable ground.

Price v. Piggy Palace, 205 N.C. App. 381, 391-92, 696 S.E.2d 716, 723-24 (2010) (internal citation and quotation marks omitted).

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Plaintiff's primary argument on appeal is that the Commission's award of attorneys' fees was unreasonably low and that the Commission failed to make necessary findings of fact and conclusions of law explaining the basis for the amount of fees awarded. "This Court reviews the Commission's ruling on a motion for attorney's fees for an abuse of discretion." *Swift v. Richardson Sports Ltd. Partners*, 188 N.C. App. 82, 86, 658 S.E.2d 674, 676 (2008) (citation and quotation marks omitted). An abuse of discretion occurs when "a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Beard v. WakeMed*, 232 N.C. App. 187, 193, 753 S.E.2d 708, 712-13 (2014).

N.C. Gen. Stat. § 97-88 states as follows:

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.

N.C. Gen. Stat. § 97-88 (2015).

In the present case, the Commission's 16 February 2015 order stated the following regarding its award of attorneys' fees:

Counsel for plaintiff submitted as an exhibit to their

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motion for attorney fees affidavits detailing their time spent and costs incurred “defending [d]efendants’ appeal to the Full Commission in this matter, [d]efendants’ appeal to the Court of Appeal[s] and the remand in this matter.” Counsel for plaintiff’s affidavits indicate that they spent 59.5 and 30.5 hours, respectively, and incurred costs in the amount of \$452.28 and \$168.08, respectively in connection with this litigation.

. . . . An injured worker is only entitled to an award of attorney’s fees pursuant to N.C. Gen. Stat. § 97-88 “based on an insurer’s unsuccessful appeal.”

In this instant case, defendants’ appeal from Deputy Commissioner Donovan’s Opinion and Award and the Full Commission’s Opinion and Award were unsuccessful in that the resulting decisions of the Full Commission and the North Carolina Court Appeals ordered defendants to pay benefits to plaintiff. However, the portion of the Court of Appeals’ decision which remanded this matter to the Full Commission, and the litigation which stemmed therefrom, were the result of plaintiff’s cross-appeal from the Full Commission’s denial of her Motion to Reopen the Record to Receive Additional Evidence. The Full Commission declines to award attorney’s fees for time spent in connection with the remand from the Court of Appeals and the ensuing litigation before Deputy Commissioner Hall and the Full Commission.

In its discretion pursuant to N.C. Gen. Stat. § 97-88, the Full Commission hereby ORDERS that defendants pay a reasonable attorney’s fee to counsel for plaintiff in the amount of \$6,250.00 for legal services provided in connection with defendants’ appeals of this matter to the Full Commission and the North Carolina Court of Appeals. Also in its discretion, the Full Commission declines to award costs.

(Internal citation omitted and emphasis added).

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Plaintiff contends that because her cross-appeal was precipitated by *Defendants'* appeal to this Court, the Commission erred by declining to award attorneys' fees for proceedings related to the cross-appeal. *See Hodges v. Equity Grp.*, 164 N.C. App. 339, 347, 596 S.E.2d 31, 37 (2004) (holding that under N.C. Gen. Stat. § 97-88, the Commission is empowered to award attorneys' fees for the "portion of the case attributable to the insurer's appeal(s)" (citation and quotation marks omitted)). Plaintiff also asserts that even assuming *arguendo* that the Commission properly declined to award attorneys' fees incurred in her cross-appeal, \$6,250.00 was an insufficient amount of attorneys' fees based on the number of hours her counsel expended in defending Defendants' appeals, the complexity of the case, and the reasonableness of the hourly rates charged by her attorneys.

As noted above, the Commission's pertinent findings state that (1) Plaintiff's counsel represented that they spent 59.5 and 30.5 hours, respectively, for a total of 90 hours, litigating proceedings stemming from Defendants' unsuccessful appeals; and (2) Plaintiff was not entitled to recover attorneys' fees for the proceedings related to her cross-appeal.

We conclude that this case must be remanded for further proceedings. Because the Commission's order fails to contain any specific findings on how it arrived at the \$6,250.00 figure, we are unable to meaningfully address Plaintiff's arguments on appeal. *See Swift*, 188 N.C. App. at 86, 658 S.E.2d at 676 ("[A]lthough the

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Commission acts in its discretion in deciding whether to award attorney's fees under N.C. Gen. Stat. § 97-88, its Opinion must contain sufficient findings of fact for this Court to resolve appellate issues."); *see also Hodges*, 164 N.C. App. at 347, 596 S.E.2d at 37 ("As the Commission did not render any findings regarding the costs associated with defending Defendants' appeal of the deputy commissioner's opinion, this cause must be remanded to the Commission for further findings of fact and an entry of attorney's fees award reflective of Plaintiff's costs in defending the appeal.").

On remand, we direct the Commission to issue a new order containing findings of fact and conclusions of law explaining the amount of attorneys' fees that it is awarding Plaintiff. In so doing, the Commission may, in its discretion, determine that a different amount of attorneys' fees should be awarded. However, whatever the amount of attorneys' fees ultimately awarded on remand, the Commission is directed to make findings of fact supporting the amount awarded based on factors such as "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Brown's Builders Supply, Inc. v. Johnson*, ___ N.C. App. ___, ___, 769 S.E.2d 653, 657 (2015) (citation and quotation marks omitted).

Conclusion

For the reasons stated above, we vacate the Commission's 16 February 2015 and 28 April 2015 orders and remand to the Industrial Commission for further proceedings not inconsistent with this opinion.

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VACATED AND REMANDED.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).