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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-510

Filed: 7 April 2015

From the North Carolina Industrial Commission, I.C. No. X67842

DAVONYA CAMPBELL PAYTON,
Minor Child of DAVID TERRY PAYTON,
Deceased Employee-Plaintiff,

v.

BARNES TRANSPORTATION,
Employer,

and

NATIONAL INTERSTATE INSURANCE, CO.,
Carrier,
Defendants.

Appeal by plaintiff's counsel from order entered 20 November 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 November 2014.

Pamela A. Hunter, pro se appellant.

No brief filed on behalf of plaintiff-appellee.

No brief filed on behalf of defendant-appellees.

CALABRIA, Judge.

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Pamela A. Hunter (“Attorney Hunter”) appeals from an order of the North Carolina Industrial Commission concluding that her request for attorney’s fees in the amount of \$37,537.50 was unreasonable and approving only \$3,000.00 in attorney’s fees. Attorney Hunter contends that the Industrial Commission (1) committed reversible error in determining that the claim was uncontested and (2) abused its discretion by determining that she was entitled to only \$3,000.00 of \$37,537.50 in requested fees. We dismiss the appeal.

I. Factual & Procedural History

On 4 October 2011, David Payton (“deceased-employee”), was killed when he was involved in a single-vehicle accident while driving a tractor trailer for his employer, Barnes Transportation (“defendant”) (collectively with National Interstate Insurance Co., “defendants”). Deceased-employee was unmarried at the time of his death and survived by three biological children: fifteen-year-old Davonya Campbell Payton (“plaintiff”), twenty-seven-year-old Marquita Payton, and thirty-one-year-old David Payton.

On 11 October 2011, plaintiff’s mother, Ms. Annette Campbell, hired Attorney Hunter to represent plaintiff “for award of workers’ compensation benefits” through “a contingency fee of TWENTY FIVE PERCENT (25%) of the gross amount of any workers [sic] compensation benefits to Client[.]” On 17 October 2011, Defendant filed a Form 19, “Employer’s Report of Employee’s Injury or Occupational Disease to the

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Industrial Commission,” wherein defendant acknowledged that deceased-employee had died at approximately 9:16 a.m. on 4 October 2011 while driving on Interstate 95, near Walterboro, South Carolina.

On 20 December 2011, Attorney Hunter filed a Form 33, “Request that Claim be Assigned for Hearing,” wherein she failed to state any specific grounds for her hearing request. On 3 February 2012, defendant filed a Form 33R, “Response to Request that Claim be Assigned for Hearing,” wherein defendant stated “There are no specific grounds for dispute listed on Plaintiff-Decedent’s potential beneficiary’s request for hearing, so Defendants cannot respond with specificity.” Defendant’s Form 33R also noted that an employment relationship existed between deceased-employee and defendant, that an injury by accident arising out of and in the course of employment resulting in death had occurred, and that defendant’s request for a hearing concerned “a final and binding determination of Plaintiff-Decedent’s beneficiaries under NCGS § 97-38 pursuant to NCIC Rule 409.”

On 15 February 2012, defendant filed a Motion to Dispense with Mediation, wherein it noted that “[d]efendants do not contest the compensability of the claim.” Rather, “[d]efendants replied to the Request for Hearing seeking a formal determination of the Plaintiff-Decedent’s beneficiaries by a Deputy Commissioner pursuant to N.C.I.C. Rule 409(2)(c).” Defendant’s motion was granted on 19 March

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2012 and referred the matter to the Industrial Commission for a “hearing on the issue of Deceased-Employee’s beneficiaries under N.C. Gen. Stat. § 97-38.”

A pre-trial agreement dated 17 May 2012, and signed by plaintiff’s counsel, provides in pertinent part:

The parties stipulate and agree that the contested issues to be tried by the Industrial Commission are as follows:

- a.) What benefits are payable under N.C.G.S. § 97-38 on account of Plaintiff-Decedent’s death?
- b.) Who is entitled to benefits payable under N.C.G.S. § 97-38 on account of Plaintiff-Decedent’s death and in what proportion?

On 4 June 2012, this matter was heard before Deputy Commissioner Philip A. Baddour, III (“Deputy Commissioner Baddour”). During the hearing, it was determined that deceased-employee had three biological children; that plaintiff was a dependent, as she was under eighteen years old; that David was an independent adult, who claimed no dependency; and that Marquita claimed partial dependency. At the conclusion of the hearing, Deputy Commissioner Baddour stated: “I don’t think there’s any need for arguments, you know, in the — legal arguments in the case. Ms. Hunter, if you’ll submit – since this is not a contested death claim, it’s just a – it’s a dependency hearing, if you could submit your time records or an affidavit of the time that you’ve spent on the case, and I think that will take care of everything.”

On 26 July 2012, Attorney Hunter submitted an affidavit and fee petition. In her affidavit, Attorney Hunter stated that she believed “350.00 is a reasonable and

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fair hourly rate for attorneys with the same or similar experience and knowledge who undertake matters such as this representation.” In the fee petition, Attorney Hunter claimed she had spent 107.25 billable hours on plaintiff’s case. Therefore, Attorney Hunter was petitioning for attorney’s fees of \$37,537.50.

On 27 December 2012, Deputy Commissioner Baddour issued an Opinion and Award after considering Attorney Hunter’s counsel’s fee affidavit and petition.

Deputy Commissioner Baddour made the following pertinent findings of fact:

12. Pamela A. Hunter, counsel of record for Davonya Campbell Payton, by and through her Court Appointed Guardian *Ad Litem*, Annette Campbell, has submitted a Fee Affidavit in accordance with Industrial Commission Rule 409(7). It is noted that this is an admittedly compensable death claim that was set for hearing to determine the proper beneficiaries of death benefits. The minor child, Davonya Campbell Payton, is conclusively presumed to be a whole dependent under the law. No other persons claim to be whole dependents. Accordingly, contentions were not required from the parties, and a proposed Opinion and Award was drafted by Defense Counsel. Based upon the foregoing and a review of Plaintiff’s Counsel’s fee petition, the undersigned finds the amount of attorney time claimed to be unreasonable. Numerous hours are claimed under vague descriptions such as “legal research” and “discussions” that appear excessive considering the uncontested nature of this matter and the well-established law regarding payment of death benefits. Additionally, some of the time requested appears to be for matters unrelated to the payment of death benefits, such as over six hours for “sporadic research regarding fee agreements” and over three hours for “preparation of fee agreement.” Finally, Plaintiff’s Counsel acknowledges in her affidavit that because a contingency fee agreement was signed, she “failed to

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maintain records which recorded the exact date and times to which [she has] expended during the course of this representation.”

13. The undersigned finds a reasonable fee for Plaintiff's Counsel in this matter to be \$3,000.00.

Deputy Commissioner Baddour made the following pertinent conclusions of law:

1. On October 4, 2011, Deceased-Employee sustained an admittedly compensable injury by accident arising out of and in the course and scope of his employment with Employer-Defendant which resulted in his death.

....

14. An attorney seeking fees for representation in an uncontested death claim shall file an affidavit or itemized statement in support of an award of attorney fees. I.C. Rule 409(7). Pamela A. Hunter, counsel of record for Davonya Campbell Payton, by and through her Court Appointed Guardian *Ad Litem*, Annette Campbell, has submitted a Fee Affidavit in accordance with I.C. Rule 409(7). Based upon the above findings of fact, the undersigned finds a reasonable fee for Plaintiff's Counsel in this matter to be \$3,000.00.

On 2 January 2013, Attorney Hunter appealed the 27 December 2012 Opinion and Award to the Full Commission, “as it relates to the award of attorney fees and determination of purported attorney-client conflict of interest.” In February 2013, Attorney Hunter filed a motion for an expedited hearing on the issue of attorney's fees in which she asserted “the only issue in appeal is the determination of attorney fees.” This motion was denied on 7 March 2013. The 7 May 2013 Order of the Full

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Commission contains language which states: “The appeal by plaintiff’s counsel to the Full Commission is *solely directed* at the issue of attorney’s fees awarded in Deputy Commissioner Baddour’s 27 December 2012 Opinion and Award.” (emphasis added).

The Full Commission reviewed the case on 1 October 2013. On 20 November 2013, the Full Commission filed its order, which affirmed Deputy Commissioner Baddour’s 27 December 2012 Opinion and Award, and concluded that Attorney Hunter’s requested fees were unreasonable and that \$3,000.00 was reasonable. In reaching this decision, the Full Commission explained that it took into account the following:

(1) The lack of complexity of this case; (2) Attorney Hunter filed the Form 33, *Request that Claim be Assigned for Hearing*, in this matter without specifying any grounds for requesting said hearing; (3) Defendants admitted the compensability of this claim; (4) while Defendants did request a hearing in their Form 33R, *Response to Request that Claim be Assigned for Hearing*, said request was for the purpose of obtaining “a final and binding determination of Plaintiff-Decedent’s beneficiaries” under N.C. Gen. Stat. § 97-38 in accordance with Rule 409(2) of the *Workers’ Compensation Rules of the North Carolina Industrial Commission . . .*; (5) the issue of who Deceased-Employee’s beneficiaries were under N.C. Gen. Stat. § 97-38 was not contested by Defendants or any other party in this matter and was straightforward under established law, such that there were no real contingencies to the recovery of death benefits of Davonya Campbell Payton’s status under the law as the sole statutory beneficiary of Deceased-Employee under the Workers’ Compensation Act; (6) the certificate of death essentially conclusively established the compensability of this claim; and (7) it is the customary and usual practice of the Commission to deny requests for

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attorney's fees for 25% of the amount awarded in uncontested death benefits cases.

Attorney Hunter appeals the Full Commission's order affirming Deputy Commissioner Baddour's Opinion and Award.

II. Analysis

Attorney Hunter argues that the Full Commission (1) committed reversible error in determining that the claim was uncontested, and (2) abused its discretion by determining that she was entitled only to \$3,000.00 of \$37,537.50 in requested fees. We dismiss her appeal for lack of subject matter jurisdiction, and note that Attorney Hunter would be well served to review the North Carolina Rules of Appellate Procedure before filing an appeal with this Court.

A. Contestability of Claim

Attorney Hunter contends that the Full Commission erred because the "finding that the defendants accepted compensability of Davonya Campbell's claim is not support [sic] by competent evidence in the record." The crux of her argument is that "[a]t no time did the Defendants file a Form 60 with the Industrial Commission as required by N.C. [Gen. Stat.] § 97-18." However, because Attorney Hunter failed to properly preserve this issue for appellate review, this Court cannot now consider it for the first time.

Review of an opinion and award of the Full Commission "is limited to consideration of whether competent evidence supports the Commission's findings of

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fact and whether the findings support the Commission's conclusions of law. This '[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' ” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). However, under Rule 10 of the North Carolina Rules of Appellate Procedure,

[i]n order to preserve an issue for appellate review, a party must have presented to the [Full Commission] a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the [Commission] to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10 (a)(1); *see also Soder v. CorVel Corp.*, 202 N.C. App. 724, 731, 690 S.E.2d 30, 34 (2010) (“Because Plaintiff failed to obtain a ruling on his request that the Industrial Commission exercise its authority under Rule 801 and further failed to properly argue that this was error, we overrule this portion of his argument.”).

Here, the record shows that Attorney Hunter appealed Deputy Commissioner Baddour's 27 December 2012 Opinion and Award to the Full Commission. In her 2 January 2013 “Notice of Appeal” to the Full Commission, Attorney Hunter stated that her appeal was taken “as it relates to the award of attorney fees and determination of purported attorney-client conflict of interest,” and listed eleven bases of appeal, all related to the award of attorney fees. The only basis that arguably comes close to the proper preservation of the issue for which Attorney Hunter now appeals is her

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seventh basis, which states: “At the time in which the Agreement of Compensation was entered, [neither] the plaintiff nor counsel were aware of any ‘admittedly compensable death claim in this matter, as there has not been a Form 30 filing.[’]” The record shows that in February 2013, Attorney Hunter filed a motion for an expedited hearing on the issue of attorney’s fees in which she asserted, “the only issue in appeal is the determination of attorney fees.”

In a 7 March 2013 order denying “Plaintiff’s motion filed February 26, 2013 for an expedited hearing on the issue of attorney’s fees,” the Commission noted that Attorney Hunter’s only issue concerned attorney’s fees. A 7 May 2013 Order of the Full Commission contains language which states: “The appeal by plaintiff’s counsel to the Full Commission is *solely directed* at the issue of attorney’s fees awarded in Deputy Commissioner Baddour’s 27 December 2012 Opinion and Award.” (emphasis added). The Full Commission’s 20 November 2013 Opinion and Award from which Attorney Hunter appeals to this Court notes that: “The *sole issue appealed* to the Full Commission is whether Deputy Commissioner Baddour erred by only awarding Attorney Hunter \$3,000.00 in attorney’s fees for representing Plaintiff in this matter. Because this is the sole issue before the Full Commission, *all other issues not appealed from will remain in force and effect as set forth in Deputy Commissioner Baddour’s 27 December 2012 Opinion and Award.*” (emphasis added). In other words, Attorney Hunter made no request, objection, or motion on the issue for which she now seeks

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appellate review by this Court, nor did the Full Commission make any ruling on it that confers jurisdiction for this Court to review her challenge.

Because the issue of the accepted compensability of the claim has not been properly preserved for appeal, we must dismiss it. *See Dogwood Development and Management Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364-65 (2008) (“The appellant’s compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case.”).

B. Reduction of Attorney’s Fees

Attorney Hunter also contends that the Full Commission abused its discretion by awarding only \$3,000.00 of her requested \$37,537.50 in attorney’s fees. Because Attorney Hunter failed to follow the statutory requirements to appeal the Commission’s decision as to the reasonableness of attorney’s fees 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[.]” N.C. Gen. Stat. § 97-90(c) (2013), this Court is without jurisdiction to consider the issue. *See Davis v. Trus Joist MacMillan*, 148 N.C. App. 248, 255, 558 S.E.2d 210, 215, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 564-65 (2002) (dismissing issue and noting that “After the Full Commission renders a decision [as to the reasonableness of attorney’s fees,] the matter must be appealed

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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.’ ”); *Russell v. Laboratory Corp. of Am.*, 151 N.C. App. 63, 71, 564 S.E.2d 634, 639 (2002) (dismissing issue because “[t]he record contains no indication that plaintiff appealed this matter to the senior resident judge of the superior court in the county in which the cause of action arose or in which plaintiff resides.”); *Creel v. Town of Dover*, 126 N.C. App. 547, 486 S.E.2d 478 (1997) (holding that plaintiff’s failure to comply with appeal procedures pursuant to N.C. Gen. Stat. § 97-90 required dismissal).

Rule 18 of the North Carolina Rules of Appellate Procedure provides: “The times and methods for taking appeals from an agency shall be as provided in this Rule 18 *unless the statutes governing the agency provide otherwise, in which case those statutes shall control.*” N.C.R. App. P. 18(b)(1) (emphasis added). N.C. Gen. Stat. § 97-90 governs the Industrial Commission’s approval of attorney’s fees and “the procedure for disputing a decision by the Industrial Commission on such matters.” *Davis*, 148 N.C. App. at 255, 558 S.E.2d at 215. Specifically, subsection (c) provides:

[i]f 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 . . . the reasons therefore shall be given and what is considered to be a reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall

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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. . . .*

N.C. Gen. Stat. § 97-90(c) (2013) (emphasis added). Our Supreme Court has stated that “[a] jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal.” *Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365 (citations omitted).

In the instant case, the record fails to establish that Attorney Hunter followed the procedures outlined in the statute for appealing the Full Commission's determination as to the reasonableness of attorney's fees. The record contains no indication that Attorney Hunter appealed this matter to the senior resident judge of the superior court in the county in which the cause of action arose or in which plaintiff resides. Therefore, we do not have jurisdiction over this issue and must dismiss it.

III. Conclusion

For the reasons stated herein, we dismiss Attorney Hunter's appeal.

DISMISSED.

Judges STROUD and McCULLOUGH concur.

Report per Rule 30(e).