

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-80

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

JOE L. ANDERSON,
Employee, Plaintiff,

v.

N.C. Industrial Commission
I.C. Nos. 014208, 977407,
983955

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION,
Employer, Self-Insured,
Defendant.

Appeal by defendant from order entered 14 October 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 2005.

Attorney General Roy Cooper, by Assistant Attorney General Gary A. Scarzafava, for defendant-appellant.

David Gantt for plaintiff-appellee.

ELMORE, Judge.

The North Carolina Department of Transportation (defendant) appeals from an order of the North Carolina Industrial Commission (Commission) awarding attorneys' fees to Joe L. Anderson (plaintiff). Because we determine that the Commission failed to make sufficient findings in support of its award of attorneys' fees, we remand to the Commission for further findings.

Defendant assigns error to the Commission's award of attorneys' fees pursuant to section 97-88 of our General Statutes, which provides 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 (2003).

The Commission has the discretion to award attorneys' fees for work done in connection with an appeal to the Commission or an appellate court, and we review the decision to award attorneys' fees under an abuse of discretion standard. *See Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 394, 298 S.E.2d 681, 683 (1983). In awarding attorneys' fees pursuant to N.C. Gen. Stat. § 97-88, the Commission may not include in its calculation any fees which pre-date the defense of the insurer's appeal. Rather, "the Commission is empowered to award to the injured employee attorney's fees *only for the portion of the case attributable to the insurer's appeal(s).*" *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 53, 464 S.E.2d 481, 485 (1995) (emphasis added), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

Defendant challenges both the authority of the Commission to award attorneys' fees and the amount of the award. Defendant cites to *Buck v. Proctor & Gamble*, 58 N.C. App. 804, 295 S.E.2d 243 (1982), in stating that this Court, not the Commission, should determine whether to award fees for the appeal to an appellate court. *Buck* relies upon *Taylor v. J.P. Stevens*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), a decision that was later modified by the Supreme Court, in determining that the Commission's power to award attorneys' fees is limited. In *Taylor*, the plaintiff sought attorneys' fees for work done in defense of the insurer's appeals to the Commission and to the Supreme Court. 57 N.C. App. at 648, 292 S.E.2d at 280. This Court held that the Commission lacked authority to award fees for work done in defense of the appeal to the Supreme Court. *Id.* However, the Supreme Court disagreed with the reasoning of this Court, stating that the Commission has authority to award fees in connection with an appeal to an appellate court. *Taylor v. J.P. Stevens Co.*, 307 N.C. at 398-99, 298 S.E.2d at 685. Thus, the Commission may award fees "if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee." *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994) (citing *Taylor*, 307 N.C. at 399, 298 S.E.2d at 685). As these statutory requirements are present here, we affirm the decision of the Commission to award attorneys' fees.

In the alternative, defendant argues that the record does not

support the Commission's award of fees, citing to *Hodges v. Equity Grp.*, 164 N.C. App. 339, 596 S.E.2d 31 (2004). In *Hodges*, the defendants appealed from a deputy commissioner's opinion and award, and the Commission affirmed the opinion and award of compensation to the plaintiff. *Id.* at 347, 596 S.E.2d at 37. The Commission awarded the plaintiff attorneys' fees of \$5,000.00 pursuant to N.C. Gen. Stat. § 97-88. *Id.* at 348, 596 S.E.2d at 37. A panel of this Court reversed the Commission's award of attorneys' fees, holding that since "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." *Id.* at 347, 596 S.E.2d at 37.

Here, as in *Hodges*, the Commission did not make any findings on the costs incurred by plaintiff in defending the appeals to the Full Commission and to this Court. The order of the Commission states:

Given the circumstances of this case, plaintiff is awarded \$4,000.00 pursuant to N.C.G.S. 97-88 for the work done in defending the appeal before the Full Commission and the North Carolina Court of Appeals. This amount is a reasonable fee based upon the hours attorney for plaintiff worked during the appeal multiplied by a fair hourly fee given the plaintiff attorney's field of practice, experience, and expertise. The Full Commission considered a specific hourly accounting of the work done that was submitted pursuant to Hodges v. Equity Group[.]

Plaintiff's attorney has included in the record an itemized accounting of hours worked on the case and a description of the tasks performed. But this list dates back to the initial contact between plaintiff and his attorney. Also, the list of case expenses contained within the record cannot be considered as part of the award of fees because each of these expenses was incurred prior to defendant's appeals. Thus, the award of \$4,000.00 in attorneys' fees is not supported by the record where the record lists expenses incurred only prior to defendant's appeals and includes hours for work done before defense of the appeal began. Although plaintiff's attorney submitted a list of expenses and work done, there are no findings regarding plaintiff's costs specifically within the time frame of defendant's appeals. Accordingly, we must remand this matter to the Commission for further findings to support its award of \$4,000.00 pursuant to N.C. Gen. Stat. § 97-88. See *Hodges*, 164 N.C. App. at 347, 596 S.E.2d at 37 (remand necessary where Commission did not make findings on plaintiff's costs in defending appeal).

Affirmed in part, remanded in part.

Judges HUDSON and LEWIS concur.

Report per Rule 30(e).