

NO. COA14-662

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2015

GILBERT E. SILVA,  
Employee-Plaintiff

v.

Industrial Commission  
I.C. File No. 203347

LOWES HOME IMPROVEMENT,  
Employer, SELF-INSURED,  
SEDGWICK CLAIMS MANAGEMENT  
SERVICES, SERVICER,  
Defendant

Appeal by Plaintiff from opinion and award entered 3 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2014.

*Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson,  
for Plaintiff-appellant.*

*Moore & Van Allen PLLC, by Anthony T. Lathrop and E. Taylor  
Stukes, for Defendant-appellee.*

DILLON, Judge.

Gilbert E. Silva ("Plaintiff") appeals from the North Carolina Industrial Commission's ("the Commission") opinion and award. For the following reasons, we affirm.

I. Background

This present appeal represents the third appeal to this Court on this matter.

On 26 May 2001, Plaintiff sustained a compensable work injury while employed with Lowes Home Improvement ("Defendant"). Plaintiff returned to work following his injury. In 2002, however, he was terminated from his employment, and Defendant ceased paying him workers' compensation benefits.

Thereafter, Plaintiff filed a Form 33 requesting a hearing to reinstate his workers' compensation benefits; however, Defendant denied liability on the basis that Plaintiff's employment was terminated for reasons unrelated to his work injury.

On 28 September 2004, the Commission ordered Defendant to pay ongoing disability compensation at the rate of \$459.14 per week from 16 April 2002 to the present and all medical expenses related to his compensable injury. Following appeal by Defendant, this Court remanded to the Commission for further findings as to Plaintiff's continued disability. See *Silva v. Lowe's Home Improvement*, 176 N.C. App. 229, 625 S.E.2d 613 (2006).

On remand, the Commission again ordered Defendant to pay ongoing disability compensation at the rate of \$459.14 per week from 16 April 2002 to the present, all medical expenses related to his compensable injury, and attorney's fees. Defendant again

appealed, and this Court affirmed the Commission's award. See *Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 676 S.E.2d 604 (2009).

On 7 July 2009, Defendant paid Plaintiff a lump sum payment in the amount of \$221,158.84 for the temporary total disability benefits that had accrued since 16 April 2002; and since 7 July 2009, Defendant has made payments to Plaintiff in the amount of \$459.14 per week to the present.

On 6 July 2012, Plaintiff filed a motion for additional relief, contending, *inter alia*, that he was entitled to (1) a 10% penalty for Defendant's late payment of the lump sum amount following the second appeal to this Court; (2) reimbursement for certain other expenses; and (3) recovery of attorney's fees. Following a hearing on the matter, a deputy commissioner filed his opinion and award, denying Plaintiff's motion. On 3 March 2014, the Commission affirmed the deputy commissioner's opinion and award with minor modifications. Plaintiff filed timely notice of appeal from the Commission's opinion and award.

## II. Analysis

On appeal, Plaintiff contends that the Commission erred (1) in concluding that he was not entitled to a 10% penalty due to Defendant's untimely payment of disability benefits following

the second appeal to this Court; (2) in not awarding reimbursement for certain expenses; and (3) in not awarding attorney's fees to Plaintiff. We address each argument below.

A. 10% Late Penalty

A 10% penalty is imposed under N.C. Gen. Stat. § 97-18(e) (2013) if compensation is not paid within 14 days of it becoming due. Specifically, under G.S. 97-18(e), where an appeal has been taken, compensation "shall become due 10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. . . ." *Id.* (emphasis added). Further, G.S. 97-18(g) provides, in pertinent part, that if an installment is "not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof[.]" *Id.*

Here, the mandate from this Court's opinion from the second appeal awarding Plaintiff benefits issued on 8 June 2009. Defendant paid the benefits on 7 July 2009. Plaintiff argues that the benefits were due on 18 June 2009, ten days after this Court's mandate; that Defendant was required to pay the benefits by 2 July 2009, within 14 days of when the payment was due, to

avoid the 10% late penalty; and that since Defendant did not pay the benefits until 7 July 2009, Plaintiff was entitled to the 10% penalty.

Defendant argues that "the time for appeal" under G.S. 97-18 did not expire until the time to petition the Supreme Court for discretionary review of this Court's opinion had expired, which would have been 23 June 2009, fifteen days after the mandate pursuant to N.C.R. App. P. 15(b).

Questions of statutory interpretation are questions of law and are reviewed *de novo* by an appellate court. *Applewood Props., LLC v. New South Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* (citation omitted).

In interpreting G.S. 97-18(e), this Court has stated that "[i]t follows that when an employer has been ordered to pay compensation pursuant to an award, but maintains an appeal, payment will not become due until the party waives the right to appeal or all appeals have been exhausted." *Norman v. Food Lion, LLC*, 213 N.C. App. 587, 591, 713 S.E.2d 507, 510 (2011). The question before us is whether the "appeal[,]" as used in

G.S. 97-18, includes only an appeal of right or whether it also includes petitions for discretionary review. We note that the Workers' Compensation Act does not define "appeal[.]"

Black's Law Dictionary supports the broader interpretation. Specifically, this source includes in the definition of "appeal" two different subcategories, "appeal by application[,]" which is "[a]n appeal for which permission must first be obtained from the reviewing court[,]" and "appeal by right[,]" which is "[a]n appeal to a higher court from which permission need not be first obtained." Black's Law Dictionary, 94 (7<sup>th</sup> ed. 1999).

Our relevant statutes support the proposition that an "appeal by application" such as a petition for discretionary review would be considered an appeal pursuant to G.S. 97-18(e).

Turning to our statutes, N.C. Gen. Stat. § 7A-31 (2013) provides for discretionary review from the Industrial Commission and states in subsections (b) and (c) that this review is an "appeal[.]" Therefore, we hold that "appeal" under G.S. 97-18(e) includes the period during which a party may seek discretionary review by the Supreme Court of an opinion from this Court.

As applied to the present case, the mandate for *Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 676 S.E.2d 604

(2009) was issued on 8 June 2009, pursuant to N.C.R. App. P. 32(b). The Commission properly determined that the time for appeal expired 23 June 2009, fifteen days after the mandate issued and the time to file for a petition for discretionary review ended, pursuant to N.C. Gen. Stat. § 7A-31 and N.C.R. App. P. 15; the first installment was due 3 July 2009, 10 days following the expiration of the time for appeal, pursuant to G.S. 97-18(e); to avoid the penalty, payment had to be made by 17 July 2009, fourteen days after payment became due, pursuant to G.S. 97-18(g); and Defendant avoided the penalty by making payment on 7 July 2009. As Defendant's payment was not untimely, the Commission did not err in failing to provide a 10% late penalty pursuant to G.S. 97-18(g). Plaintiff's argument is overruled.

#### B. Compensation for expenses

Plaintiff next contends that the trial court erred in not compensating him for educational expenses and accountant's fees. "[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law." *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 183, 639 S.E.2d 429, 432 (2007)

(citation, brackets, ellipsis, and quotation marks omitted). Unchallenged findings of fact, however, "are presumed to be supported by competent evidence and are binding on appeal." *Bishop v. Ingles Markets, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 756 S.E.2d 115, 118 (2014) (citation and quotation marks omitted).

#### 1. Educational Expenses

Plaintiff argues that the Commission erred in not reimbursing him for educational expenses. Defendant responds that Plaintiff failed to carry his burden by producing sufficient evidence to show that his educational expenses were incurred to improve his chances of employment and there was no evidence that these educational expenses were recommended by a rehabilitation or medical professional as part of an individualized rehabilitation plan.

The North Carolina Workers' Compensation Act requires employers to provide medical compensation to workers "who suffer disability by accident arising out of and in the course of their employment." *Henry v. Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). Additionally, "the Industrial Commission may order necessary treatment." N.C. Gen. Stat. § 97-25 (c).

The Worker's Compensation Act's definition of "medical compensation" includes "vocational rehabilitation . . . and



other treatment . . . as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . ." N.C. Gen. Stat. § 97-2(19) (emphasis added). "In construing N.C.G.S. §§ 97-25 and 97-2(19), it appears that the Commission has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability." *Foster v. U.S. Airways Inc.*, 149 N.C. App. 913, 923, 563 S.E.2d 235, 242, *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002).

Here, the trial court found that Plaintiff was seeking reimbursement for \$513.31 in educational expenses from classes taken at Vance-Granville Community College and for a North Carolina Process Tech Certification Fee. However, it found that Plaintiff took these classes "in an effort to regain some kind of employment that [he] could accomplish with his injuries[,] and "admitted that he was not referred but 'just was trying to do something about his situation.'" No additional evidence, including testimony from any rehabilitation professional or medical provider was submitted regarding the reasonableness of these expenses nor of the expenses for the North Carolina

Process Tech Fee. For instance, there are not findings or evidence in the record showing that any medical or rehabilitative professional recommended Plaintiff's educational pursuits as part of a rehabilitation plan or that those educational pursuits were reasonably necessary to effect a cure, give relief, or will lessen a claimant's period of disability. Accordingly, we conclude that the Commission did not abuse its discretion in denying reimbursement of Plaintiff's educational expenses.

## 2. Accountant's fees

Plaintiff argues that the Commission erred in denying reimbursement of his accounting fees because our Courts have recognized a broad definition of the term "medical compensation" in N.C. Gen. Stat. §§ 97-2(19) and 97-25. Though accounting fees are not expressly included in the definition of "medical compensation" in N.C. Gen. Stat. § 97-2(19), Plaintiff contends that such fees are analogous to a "life care plan" in which calculations of future expenditures are made and were found to be compensable in *Timmons, v. North Carolina Depart. Of Transp.*, 351 N.C. 177, 182, 522 S.E.2d 62, 65 (1999) and *Scarboro v. Emery Worldwide Freight Corp.*, 192 N.C. App. 488, 495, 665 S.E.2d 781, 786-87 (2008).

In *Timmons*, the Court concluded that there was sufficient evidence presented "to support a finding by the Commission that preparation of a life care plan was a rehabilitative service necessary to give relief to the paraplegic claimant within the meaning of N.C.G.S. § 97-25." 351 N.C. at 182, 522 S.E.2d at 65. This evidence included testimony from a rehabilitation specialist that "strongly recommended the development of a life care plan to evaluate plaintiff's present and future needs" as her "spinal cord injuries require[d] constant monitoring of bowel/bladder, skin, orthopedic issues, neurological issues, and respiratory issues, as well as physical therapy and occupational therapy" but she had not been consistently receiving the care that she needed on a regular basis. *Id.*

In *Scarboro*, a life care plan was prepared for the plaintiff by a nurse and certified life care planner which recommended that he be provided with lawn care services because of his disability and his neurologist agreed that these recommendations were reasonably and medically necessary. 148 N.C. App. at 489-90, 665 S.E.2d at 783. The Commission "denied plaintiff compensation for lawn care services and ordered defendants to reimburse plaintiff for the costs associated with preparing his life care plan[,] " concluding that even though

"[e]xtraordinary and unusual expenses" are compensable as "other treatment" in G.S. 97-25, lawn care expenses recommended by the life care plan are ordinary expenses of life and not "[e]xtraordinary and unusual expenses" incurred as a result of his work-related injury. *Id.* at 490-91, 665 S.E.2d at 784. We affirmed, holding that evidence presented by the defendant supported the conclusion that lawn care expenses were ordinary expenses. *Id.* at 492-94, 665 S.E.2d at 784-85. This conclusion also supported the Commission's other conclusion that lawn care expenses did not rise to the level of being "other treatment" in G.S. 97-25, stating that "just because the life care plan was determined to be a reasonable medical expense, defendants are not necessarily required to pay for each item mentioned in the plan." *Id.* at 493-94, 665 S.E.2d at 785-86.

In the present case, the Commission made the following finding regarding the accounting fees:

9. With respect to the \$2,860.00 sought by Plaintiff for the services of Mitchell and Nemitz, CPA, Plaintiff testified that he asked his accountant to prepare a compilation of amounts allegedly owed to him in connection with his workers' compensation claim, including medical expenses, travel expenditures, and temporary total disability payments. No additional evidence was submitted regarding the reasonableness of these expenses.

Based on this finding, the Commission concluded that "[i]nsufficient evidence exists to determine that Plaintiff's incurred accounting expenses constitute a necessary medical or rehabilitative service; therefore, Plaintiff is not entitled to have Defendant reimburse him for his accounting expenses. N.C. Gen. Stat. §§ 97-2(19) and 97-25."

We conclude that the Commission did not err in its conclusion. We note that unlike either *Timmons* or *Scarboro*, there was no evidence presented here that the accounting fees were part of any life care plan nor was there testimony or evidence from a medical or rehabilitative specialist stating that this expense is medically necessary because of Plaintiff's specific injuries. Accordingly, Plaintiff's argument is overruled.

#### C. Attorney's fees

Lastly, Plaintiff argues that the Commission erred in not awarding him attorney's fees.

"If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or

defended them." N.C. Gen. Stat. § 97-88.1 (2013). We have further stated that "[w]hether a defendant had reasonable ground to bring a hearing is a matter reviewable by this Court *de novo*. . . . The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Ruggery v. N.C. Dep't. of Correction*, 135 N.C. App. 270, 273-74, 520 S.E.2d 77, 80-81 (1999).

In his motion, Plaintiff made several claims against Defendant. Defendant responded and disputed on multiple grounds Plaintiff's contentions and included supporting documents, including letters showing their attempts to respond to Plaintiff's requests and Plaintiff's need to provide further documentation for payment. At the hearing before the deputy commissioner and, shortly thereafter, the parties were able to resolve the majority of their differences; and the only remaining issues to resolve were (1) how much Plaintiff was owed for reimbursement expenses; (2) sanctions against Defendant for late payment of the lump sum payment; (3) attorney's fees award; and (4) sanctions against Defendant for defending its claims without reasonable grounds. Therefore, it appears that Defendant had reasonable grounds to defend Plaintiff's claims. Accordingly, we overrule Plaintiff's argument that the

Commission erred in failing to make an award of attorney's fee pursuant to G.S. 97-88.1.

III. Conclusion

For the foregoing reasons, we affirm the Commission's opinion and award.

AFFIRMED.

Judge BRYANT and Judge DIETZ concur.