An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1195

Filed: 15 May 2018

North Carolina Industrial Commission, I.C. No. 13-731249

JAMIE E. PRINCE, Widow of MARK RANDALL PRINCE, SR., Deceased Employee, Plaintiff,

v.

UNDERGROUND CONSTRUCTION CO., INC., Employer, ALLIED EASTERN INDEMNITY COMPANY, Carrier (EASTERN ALLIANCE INSURANCE GROUP, Third-Party Administrator), Defendants.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 5 June 2017 by Commissioner Christopher C. Loutit. Heard in the Court of Appeals 21 March 2018.

Cox and Gage PLLC, by Robert H. Gage, and Bentley Law Offices, P.A., by Charles A. Bentley, Jr., for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Chad L. Halliday, for defendant-appellants.

ARROWOOD, Judge.

Underground Construction Co., Inc. ("employer"), and Eastern Alliance Insurance Group ("administrator") (together "defendants") appeal from the Opinion and Award of the North Carolina Industrial Commission awarding Jamie E. Prince

("plaintiff"), widow of Mark Randall Prince, Sr. ("employee"), continuing workers' compensation death benefits and determining an award of plaintiff's attorneys' fee. For the following reasons, we dismiss defendants' appeal.

I. Background

Employee was killed in a motor vehicle accident on 6 June 2013 while on the job for employer. As shown in a Form 19 report of the injury to the Commission completed by defendants on 7 June 2013, and in a Form 29 supplemental report for fatal accidents and a Form 60 admission of employee's right to compensation completed by defendants on 14 August 2013, defendants immediately acknowledged compensability and began paying death benefits to plaintiff.

Almost two years later on 28 May 2015, plaintiff completed a Form 33 request that her claim for a continuation of death benefits be assigned for hearing. Plaintiff alleged that she "is unable to support herself because of physical or mental disability as of the date of death of [employee]." Defendants completed a Form 33R response denying plaintiff's allegation on 29 June 2015.

The matter was heard by a deputy commissioner on 9 March 2016. The deputy commissioner filed an opinion and award on 18 October 2016 granting plaintiff continuing workers' compensation death benefits. Defendants gave notice of appeal from the deputy commissioner's opinion and award on 1 November 2016 and the matter was heard before the Full Commission on 21 March 2017. The Full

Commission filed an opinion and award on 5 June 2017. The Full Commission awarded plaintiff workers' compensation death benefits for the duration of her lifetime or until she remarries, and determined a reasonable attorneys' fee for plaintiff's counsel. Defendants' filed notice of appeal from the Full Commission's opinion and award on 6 July 2017.

After the filing of defendants' notice of appeal, on 6 July 2016, plaintiff filed a motion to amend the opinion and award to address perceived issues with the attorneys' fee award. Defendants filed their own motion to amend the opinion and award and a response to plaintiff's motion to amend on 17 July 2017. Plaintiff, in turn, filed a response to defendants' motion to amend on 27 July 2017. On 4 August 2017, the Full Commission filed an order denying the motions to amend as untimely.

On 15 August 2017, plaintiff filed with the Commission a motion to dismiss defendants' appeal for failing to perfect the appeal by serving a proposed record on appeal within 35 days of giving notice of appeal. The Commission filed an order denying plaintiff's motion to dismiss on 18 August 2017, explaining that the time for defendants to serve a proposed record on appeal did not begin until the Commission denied the motions to amend on 4 August 2017. Defendants later perfected their appeal and plaintiff approved the record on 5 October 2017.

II. Discussion

On appeal, defendants only take issue with the attorneys' fee portion of the Commission's award; even then, the issue is narrow.

After awarding plaintiff "workers' compensation death benefits[, subject to the attorneys' fee,] at a weekly rate of $884.00 for the duration of her lifetime or until she remarries[,]" the Commission awarded the attorneys' fee as follows:

> 2. A reasonable attorneys' fee in the amount of twenty-five (25%) of the compensation due plaintiff pursuant to this Award shall be paid as follows:
>
> a. Plaintiff's counsel shall receive a 25% attorneys' fee, based upon the commuted present value of plaintiff's claim in accordance with Industrial Commission Rule 04 NCAC 10A.0406. The present value of plaintiff's claim shall be commuted as of the date of this Opinion and Award.
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> b. Pursuant to the *Workers' Comp Contingent Fee Retainer Agreement*, Bentley Law Offices, P.A., and Cox and Gage, PLLC, shall share in the attorneys' fee awarded herein on "an equal 50/50 basis."
>
> c. Defendants shall pay every fourth check directly to Bentley Law Offices, P.A., until plaintiff's counsel has recovered the attorneys' fee awarded herein above in Award 2(a.). Bentley Law Offices, P.A., shall pay to Cox and Gage, PLLC, 50% of every fourth check received from defendants.

Defendants do not dispute that attorneys' fees are appropriate in this case or that a fee of 25% of the compensation due plaintiff is reasonable. Defendants instead "seek a remand simply for clarification" because the attorneys' fee award "is inherently ambiguous insofar as it purports to calculate a sum certain attorney fee

based upon an open-ended and uncertain award of compensation to [plaintiff]." More specifically, defendants contend that "absent any direction, whether in the [a]ward or in any other portion of the [o]pinion and [a]ward, with respect to the calculation of the number of payments (i.e. a sum certain) required to calculate present value of the open-ended award, the attorney fee cannot be mathematically calculated." Defendants further contend the award is unclear whether the payment of the attorneys' fee ceases upon plaintiff's death or remarriage or whether the payments must continue until 25% of the calculated lifetime compensation is paid.

While the Commission could have been more clear in drafting the attorneys' fee award, when the entire opinion and award is considered, the only reasonable interpretation of the award is that paragraph 2.a. establishes the maximum to be paid as an attorneys' fee to plaintiff's counsel out of the death benefits awarded to plaintiff, which are not challenged on appeal. That 25% portion of the death benefits designated as an attorneys' fee is to be allocated and paid as directed by the Commission in paragraphs 2.b. and c. of the award until the maximum amount is paid or until death benefits cease being paid to plaintiff because of death or remarriage. It appears both parties are satisfied with this understanding of the award and agree that it leads to an appropriate result. Nevertheless, defendants seek a remand for clarification from the Commission.

Upon review of the opinion and award and the arguments on appeal, it is clear that dismissal of defendants' appeal is required for lack of standing and ripeness.

Any party aggrieved may appeal from an order or judgment in a civil action. N.C. Gen. Stat. § 1-271 (2017). "A 'party aggrieved' is one whose rights have been directly or injuriously affected by the action of the [trial] court." *Moody v. Sears Roebuck and Co.*, 191 N.C. App. 256, 263, 664 S.E.2d 569, 574 (2008) (internal quotation marks and citation omitted). "If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed." *Diaz v. Smith*, 219 N.C. App. 570, 573-74, 724 S.E.2d 141, 144 (2012). Moreover, "[t]he courts of this state do not issue anticipatory judgments resolving controversies that have not arisen." *Bland v. City of Wilmington*, 10 N.C. App. 163, 164, 178 S.E.2d 25, 26 (1970), *rev'd on other grounds*, 278 N.C. 657, 180 S.E.2d 813 (1971).

In *Bailey v. State*, 353 N.C. 142, 540 S.E.2d 313 (2000), the Attorney General appealed an order granting attorneys' fees to counsel representing the prevailing class of plaintiffs in a class action against the State. *Id.* at 148, 540 S.E.2d at 317. Despite the Attorney General's assertion that he was acting in the public interest to challenge the "excessive" attorneys' fees, *id.* at 151-52, 540 S.E.2d at 319-20, our Supreme Court declined to review the attorneys' fees award, holding the Attorney General did not have standing to appeal, *id.* at 156, 540 S.E.2d at 322.

Although we recognize the present case is distinguishable from *Bailey*, we find the circumstances comparable and the Court's reasoning instructive. In *Bailey*, the Court noted that the Attorney General represented the State as defendant in the underlying action and the plaintiffs "were paying their attorneys not with State funds but with their own money. Thus, the Attorney General's client—the State as defendant—is without interest in either the allocation of attorneys' fees or the funds that paid them." *Id.* at 150, 540 S.E.2d at 319. In the present case, as stated above, the order provides that the attorneys' fee of 25% of the compensation due plaintiff shall be paid out of the continuing workers' compensation death benefits awarded to plaintiff by directing every fourth check to plaintiff's counsel. Because the opinion and award required defendants to pay plaintiff continuing workers' compensation death benefits and defendants have not appealed the continuing benefits, defendants' rights have not been directly or injuriously affected by the order requiring the payment of an attorneys' fee out of the compensation due plaintiff. Thus, defendants are not an aggrieved party and have no right to appeal the attorneys' fee award. The proper party to appeal the attorneys' fee award is plaintiff, whose death benefits are reduced by the attorneys' fee award.

Moreover, although it appears the attorneys' fee is only paid from the compensation due plaintiff and, therefore, will cease upon the death or remarriage of plaintiff, defendants express concern that they may be required to continue payments

to plaintiff's counsel after plaintiff's death or remarriage. That concern, however, is not ripe for review at this time and may never become ripe.

III. Conclusion

Because defendants lack standing to challenge the attorneys' fee award and because the issue raised about the payment of the attorneys' fee following plaintiff's death or remarriage is not ripe for determination, this appeal must be dismissed.

DISMISSED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).