

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1315

NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 2007

CHARLES M. BEE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 140822

PURSER CONSTRUCTION SERVICE,
Employer,

and

CINCINNATI CASUALTY COMPANY,
Carrier,
Defendants.

Appeal by defendants from order entered 11 August 2006 by Commissioner Thomas J. Bolch for the North Carolina Industrial Commission. Heard in the Court of Appeals 28 March 2007.

Brinkley Walser, PLLC, by G. Thompson Miller, for plaintiff appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant appellants.

McCULLOUGH, Judge.

Charles Bee (“plaintiff”) sustained an admittedly compensable injury on 17 April 2001 when he was injured by an accident arising out of and in the course of employment with Purser Construction Services, defendant-employer. On 9 May 2006, the North Carolina Industrial Commission (“the Commission”) entered an opinion and award finding and concluding that

plaintiff was totally and permanently disabled; plaintiff is not required to participate in vocational rehabilitation; plaintiff is entitled to receive ongoing compensation and medical benefits under the Workers' Compensation Act; and Purser Construction Services and Cincinnati Casualty Company ("defendants") is ordered to pay the costs of the action. On 2 June 2006, defendants gave notice of appeal to the opinion and award averring on appeal that the Commission erred in concluding that plaintiff was totally and permanently disabled and that plaintiff was not required to participate in vocational rehabilitation. Subsequently, on 31 July 2006, plaintiff motioned the Commission for counseling and medication for depression. Thomas J. Bolch thereafter entered an order on behalf of the Commission on 11 August 2006 ordering that defendants provide and pay for counseling and medication for plaintiff's depression. From this order, defendants appeal.

Defendants contend on appeal the Commission lacked jurisdiction over plaintiff's motion for counseling and medication for depression where their notice of appeal to this Court divested the Commission of jurisdiction.

The general rule states that appeal from an order or judgment divests the lower tribunal of jurisdiction over matters contained therein. *See* N.C. Gen. Stat. §1-294 (2005). However, the exception to the general rule states, "but the court below may proceed upon any other matter included in the action and **not affected** by the judgment appealed from." *Id.* (emphasis added).

Defendants' notice of appeal was filed in the instant case before plaintiff's medical motion was filed with the Commission. However, the decision required by plaintiff's medical motion was not affected by the Commission's opinion and award or the matters appealed therefrom. Defendants have never contested the compensability of plaintiff's claim and did not attempt to contest such issue on appeal. In fact, in defendants' prior appeal to this Court, the only

contested issues were the Commission's conclusions that plaintiff was totally and permanently disabled and that plaintiff was not required to participate in vocational rehabilitation. A decision on these issues would not affect any order entered by the Commission as to plaintiff's medical motion for counseling and medication, and therefore it cannot be said that the Commission was without jurisdiction.

Defendants further contend the order is invalid where it was rendered by only one Commissioner.

The Commission is "authorized by N.C. Gen. Stat. §97-80(a) [(2005)] to promulgate its own rules to carry out the provisions of the Workers' Compensation Act, and it has exercised such authority by adopting the Workers' Compensation Rules of the North Carolina Industrial Commission." *See Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 108, 590 S.E.2d 294, 296 (2004).

Rule 609 of the Workers' Compensation Rules sets forth the practice and procedure for filing motions with the Commission in contested cases. While the drafters attempted to promulgate procedure for each contemplated time that a motion could be filed, there will be times when a situation arises that does not fall squarely within the rules such as that in the instant case. It is in these instances that we must look to the most analogous rule for guidance.

Rule 609(1)(e) states: "Motions filed after the filing of an Opinion and Award by the Full Commission but prior to giving notice of appeal to the Court of Appeals shall be directed to the Commissioner who authored the Opinion and Award." Workers' Comp. R. Of N.C. Indus. Comm'n 609(1)(e), 2007 Ann. R. (N.C.) 1013, 1032.

Where the medical motion in the instant case was filed after the entry of the Opinion and Award and filed with the Commissioner who authored such opinion and award, we cannot say

that entry of the order by that very Commissioner was in error, even where appeal had already been taken. Therefore, this assignment of error is overruled.

Defendants aver the Commission erred in failing to apply the principles of estoppel to plaintiff's medical motion.

““The law of estoppel applies in [workers'] compensation proceedings as in all other cases.” . . .” *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 691, 606 S.E.2d 379, 383-84 (2005) (citations omitted). “The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are companion doctrines which have been developed by the Courts ‘for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.’” *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999) (citation omitted).

In the instant case, the pretrial agreement listed the following issues to be those that the parties agreed were to be determined by the initial hearing before the Commission:

- a. Has the pre-existing condition of Plaintiff's right knee been aggravated as a result of his compensable back injury?
- b. Is the Plaintiff permanently and totally disabled as a result of his compensable injury?
- c. What additional medical and disability compensation is Plaintiff entitled to?
- d. Is Plaintiff required to participate in vocational rehabilitation?

Plaintiff testified at the original hearing that he was depressed and was taking medication for the depression. After the entry of the Opinion and Award plaintiff filed a medical motion attached with plaintiff's affidavit, a letter from plaintiff's treating physician and e-mails between counsel for plaintiff and defendants regarding coverage of counseling and medication for

plaintiff's depression. Plaintiff's affidavit states even though he was currently taking 150 mg. of Zoloft, his depression had reached an intolerable point. The letter attached from his treating physician, Dr. Donald Adams, stated that plaintiff was in need of counseling for depression and the e-mails attached to the medical motion show that defendants denied coverage for the counseling recommended by the doctor. It is clear that plaintiff's depression was so exacerbated between the time of the original hearing and the medical motion that treatment additional to that originally contemplated was necessary. This case is not one in which the parties are attempting to relitigate matters which have been or previously should have been decided.

Finally, defendants contend the Commission erred in ruling on plaintiff's motion without taking additional evidence.

The gravamen of defendants' final contention on appeal is that they were deprived of an opportunity to cross-examine the family physician regarding the depression and recommendation of counseling. However, there is no indication in the record that defendants ever requested a hearing on the matter and as such any contention relating to failure to hold a hearing has been waived.

Accordingly, the order of the Commission is affirmed.

Affirmed.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).