IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-155

No. COA21-299

Filed 1 March 2022

North Carolina Industrial Commission, I.C. No. 15-721067

MAXIMINO VIZCAINO, Employee, Plaintiff,

v.

AMERICAN EMERALD TRANSPORTATION SERVICES, INC. and WATKINS AND SHEPARD TRUCKING, INC., alleged Employers; ARCH INSURANCE COMPANY, Carrier for Watkins & Shepard; NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, Statutory-Defendant; Defendants.

Appeal by defendants Watkins & Shepard Trucking, Inc., and Arch Insurance Company, and cross-appeal by defendant North Carolina Insurance Guaranty Association, from opinion and award entered 14 January 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 December 2021.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers and John F. Ayers, III, for plaintiff-appellee.

Goldberg Segalla LLP, by Ben S. Greenberg and Allegra A. Sinclair, for defendants-appellants Watkins & Shepard Trucking, Inc., and Arch Insurance Company.

Nelson Mullins Riley & Scarborough, LLP, by Joseph W. Eason and Christopher J. Blake, and Anderson & Jones, PLLC, by Matthew P. Blake, for defendant-cross-appellant North Carolina Insurance Guaranty Association.

ZACHARY, Judge.

¶ 1 Defendants Watkins & Shepard Trucking, Inc., ("W & S") and Arch Insurance Company ("Arch Insurance") appeal from an Opinion and Award entered by the Full Commission of the North Carolina Industrial Commission on 14 January 2021. Defendant North Carolina Insurance Guaranty Association ("NCIGA") cross-appeals from the same Opinion and Award. After careful review, we affirm.

I. Background

¶ 2 Pursuant to an agreement with W & S, on 29 March 2015, Plaintiff Maximino Vizcaino was driving a Freightliner truck that he owned and operated when he collided with another truck at 65 miles per hour while changing lanes to avoid a disabled vehicle. As a result of this accident, Plaintiff suffered multiple injuries, including head trauma, for which Plaintiff received compensation from Guarantee Insurance Company ("GIC"), the alleged insurer. Plaintiff participated in what was represented as a "group purchase workers compensation program" by application to Defendant American Emerald Transportation Services, Inc. ("AETS"). GIC issued a binder to AETS for workers' compensation insurance, and the policy named AETS, as the insured. Upon GIC's insolvency, NCIGA covered Plaintiff's benefits under a reservation of right to determine coverage under the Insurance Guaranty Association Act (the "Guaranty Act"), N.C. Gen. Stat. § 58-48-1 *et seq.* (2021).

¶ 3 There is no dispute in this case that Plaintiff's injuries were compensable under the North Carolina Workers' Compensation Act, *id.* § 97-1 *et seq.* Rather, this

appeal concerns the interplay between the Workers' Compensation Act and the Guaranty Act in determining whether W & S and Arch Insurance or NCIGA is liable for payment of Plaintiff's temporary total disability benefits and medical compensation.

¶ 4 The parties stipulated to the relevant underlying facts, which the Full Commission set forth in its Opinion and Award:

> 2. This claim involves workers' compensation insurance by [GIC], which is now insolvent.
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> 3. Under the North Carolina Workers' Compensation Act, a third-party administrator affiliated with GIC filed a Form 60 *Employer's Admission of Employee's Right to Compensation* identifying [the GIC] policy . . . as providing workers' compensation coverage.
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> . . . .
>
> 8. On the date of injury, Defendant W & S was an interstate motor carrier regulated by the Federal Motor Carrier Safety Administration (FMCSA) and had maintained operating authority since 19 February 1985.
>
> 9. On the date of injury, Plaintiff was an Owner-Operator of a 2005 Freightliner Tractor Trailer which he drove only for Defendant W & S pursuant to an agreement, under the name "Watkins & Shepard" using Defendant W & S's USDOT # . . . .
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> . . . .
>
> 11. On 12 March 2010, Plaintiff signed a document with Defendant W & S titled "Van Division Independent Contractor Agreement."

12. Plaintiff was paid for his driving on behalf of Defendant W & S pursuant to his agreement with Defendant W & S, which issued him a 1099 for all revenue generated from operation of his truck for them.

13. On or about 28 December 2012, Plaintiff applied to Defendant American Emerald Transportation Services (hereinafter AETS), through Trinity Risk (hereinafter Trinity), for inclusion in what AETS called a "group purchase workers compensation program."

14. Defendant W & S submitted Plaintiff's application by facsimile on 28 December 2012.

15. On 24 January 2013, AETS confirmed to Trinity that Defendant W & S drivers were covered in the AETS "program" effective on 1 January 2013.

16. On 3 April 2013, a certificate of workers' compensation insurance identifying AETS as the insured was issued for Plaintiff . . . for coverage to run from 1 April 2013 to 1 April 2014.

17. On 7 January 2014, a certificate of insurance for workers' compensation coverage by Zurich American Insurance Company was issued to Defendant W & S.

18. On or about 22 May 2014, Plaintiff signed documentation pertaining to use of his equipment with Defendant W & S.

19. On 12 November 2014, Plaintiff and Defendant W & S entered into a new agreement titled "Van Division Independent Contractor Agreement."

20. Plaintiff's 2014 Tax Return only reports income from Defendant W & S. It reports a deduction for insurance in the amount of $5,680.

21. On 2 January 2015, GIC issued a binder for insurance of Defendant AETS for workers' compensation at locations

in numerous states.

22. GIC issued a policy of insurance [(the "GIC policy")] for the period from 1 January 2015 to 1 January 2016. The policy named the insured as Defendant AETS, Inc. . . .

23. On 9 January 2015, Bernie Clegg issued a certificate of insurance to Defendant W & S.

24. Defendant AETS created a spreadsheet bearing the date 28 January 2015 showing seven (7) North Carolina drivers for Defendant W & S.

25. Plaintiff was involved in a motor vehicle accident on 29 March 2015. This accident occurred while Plaintiff was operating the vehicle he owned under the USDOT number and FMCSA operating authority of Defendant W & S.

26. On 17 April 2015, Plaintiff filed a Form 18 with the North Carolina Industrial Commission.

27. On 2 November 2016, Patriot Risk Services, Inc. filed a Form 60 in Plaintiff's claim for workers' compensation benefits arising from the 29 March 2015 accident. The form identified head trauma as the injury for which compensation was paid. It named "Patriot Risk Services, Inc." as the insurance carrier and identified [the GIC] policy . . . as the applicable policy. The Form named Defendant AETS as the Employer.

28. On 19 December 2016, Plaintiff provided unverified responses to pre-hearing interrogatories from Defendant AETS and Patriot Risk Services, Inc.

29. On 3 March 2017, Patriot Risk Services, Inc. filed a Form 62 *Notice of Reinstatement or Modification of Compensation* modifying Plaintiff's compensation rate. The Form named Defendant AETS as Plaintiff's employer and Patriot Risk Services, Inc. as the carrier. The form identified [the GIC] policy . . . as the applicable policy.

> 30. On the date of Plaintiff's injury, Defendant W & S maintained workers' compensation insurance with Defendant Arch Insurance Company (hereinafter Arch [Insurance]) . . . . The dates of this policy were from 1 May 2014 to 1 May 2015.
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> 31. On 20 January 2017, counsel for Defendant AETS and Patriot Risk Services filed unverified responses to pre-hearing interrogatories and document production requests.
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> 32. On 12 June 2017, the Industrial Commission ordered Defendant AETS and Patriot Risk Services to authorize and pay for a recommended CPAP titration study and treatment, recommended psychotherapy, and a follow-up appointment with Dr. Lefkowitz following the CPAP therapy.
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> 33. On 27 November 2017, GIC (insolvent insurer) was ordered into liquidation. The order identified Patriot Risk Services, Inc. as an affiliate of the insolvent insurer.
>
> 34. On 25 January 2018, Defendant NCIGA provided Plaintiff notice that it would continue payments under a reservation of right to determine coverage under the [Guaranty Act] . . . .
>
> 35. On 5 September 2018[,] Plaintiff filed an Amended Form 18 with the Industrial Commission naming Defendant AETS as Plaintiff's Employer and GIC/NCIGA as its Carrier.

¶ 5 On 11 April 2019, the matter came on for hearing before Deputy Commissioner Mary Claire Brown. On 16 April 2019, Deputy Commissioner Brown filed an interim order for medical compensation, compelling NCIGA to provide Plaintiff's medical treatment under a reservation of right, pending the final determination of issues in her opinion and award. On 20 December 2019, Deputy Commissioner Brown filed her

Opinion and Award, which, *inter alia*, compelled NCIGA to pay Plaintiff's continuing temporary total disability and to provide for his medical treatment. NCIGA filed its notice of appeal to the Full Commission on 27 December 2019. The matter came on for hearing before the Full Commission on 5 May 2020, and the Full Commission filed its Opinion and Award on 14 January 2021.

¶ 6 Based in part on the stipulated facts quoted above, the Full Commission in its Opinion and Award determined that the terms of the GIC policy "only provided coverage to AETS as the insured" and that Plaintiff was not covered by the GIC policy. Plaintiff did not present a "covered claim," the existence of which is a statutory prerequisite to NCIGA coverage, because he was not covered by the GIC policy:

> Given that NCIGA is an entity with obligations solely defined by statute and is not a legal successor to GIC, Plaintiff, who was never an employee or contractor of AETS, was not covered by the workers' compensation insurance policy "as issued" by GIC with an effective date of 1 January 2015 and a policy period of 1 January 2015 to 1 January 2016.

Moreover, the Commission determined that "NCIGA's obligation in this matter cannot be expanded via estoppel by virtue of GIC's pre-insolvency course of dealings in this claim."

¶ 7 Applying the provisions of N.C. Gen. Stat. § 97-19.1(a), the Full Commission concluded that Plaintiff was an employee of W & S under both common law and statutory tests for employment status. The Full Commission further determined that

Plaintiff satisfied the burden of proving that he had a disability resulting from his compensable injury, and "Plaintiff is therefore entitled to temporary total disability compensation to be paid by Defendants W & S and Arch [Insurance] at the rate of $637.48 per week from 29 March 2015 until Plaintiff returns to work or [until] further order of the Commission" and "to have Defendants W & S and Arch [Insurance] provide all medical treatment, including psychological treatment, incurred or to be incurred, necessitated by the 29 March 2015 compensable accident when bills for the same have been approved pursuant to Industrial Commission procedures," subject to N.C. Gen. Stat. § 97-25.1.

¶ 8 Additionally, the Full Commission considered NCIGA's request for reimbursement of amounts it paid to and on behalf of Plaintiff from W & S and Arch Insurance under N.C. Gen. Stat. § 58-48-50 of the Guaranty Act, but concluded that it was "without jurisdiction to rule on this issue." It "expressly decline[d] to address whether [N.C.] Gen. Stat. § 97-86.1(d) [of the Workers' Compensation Act], which was not argued or cited by the parties, would require reimbursement by Arch [Insurance] of NCIGA's outlays in this claim."

¶ 9 W & S and Arch Insurance filed notice of appeal from the Full Commission's Opinion and Award on 15 February 2021. NCIGA filed notice of appeal from the Opinion and Award on 25 February 2021. Neither Plaintiff nor AETS filed notices of appeal.

II. Discussion

¶ 10 On appeal, W & S and Arch Insurance argue that the Full Commission erred by (1) concluding that Plaintiff's claim was not a "covered claim" under the Guaranty Act; (2) failing to rule that NCIGA was estopped from denying coverage to Plaintiff; (3) concluding that Plaintiff was an employee of W & S for purposes of workers' compensation; and (4) ordering W & S and Arch Insurance to pay Plaintiff temporary total disability benefits and medical compensation.

¶ 11 On cross-appeal, NCIGA argues that the Full Commission erred by concluding that it lacked ancillary jurisdiction to order W & S and Arch Insurance to reimburse NCIGA for interim benefits it paid to or on behalf of Plaintiff under the Guaranty Act and the interim orders of the Commission.

A. Standard of Review

¶ 12 "The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of" our Supreme Court. *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008), *reh'g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009).

> Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law.

Id. (citations and internal quotation marks omitted). On review of an opinion and award of the Full Commission, an appellate court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (citation omitted).

¶ 13 The Full Commission's conclusions of law, however, are reviewed de novo. *Walker v. K&W Cafeterias*, 375 N.C. 254, 258, 846 S.E.2d 679, 682 (2020). When reviewing an opinion and award of the Full Commission, "the jurisdictional facts found by the Commission are not conclusive even if there is evidence in the record to support such findings. Instead, reviewing courts are obliged to make independent findings of jurisdictional facts based upon consideration of the entire record." *Salvie v. Med. Ctr. Pharmacy of Concord, Inc.*, 235 N.C. App. 489, 491, 762 S.E.2d 273, 276 (2014) (citations and internal quotation marks omitted).

B. W & S and Arch Insurance's Appeal

1. Covered Claim

¶ 14 W & S and Arch Insurance first argue that the Full Commission erred by concluding that Plaintiff's claim did not constitute a "covered claim" as defined by the Guaranty Act because Plaintiff was covered by the GIC policy, and because the filed Form 60 conclusively established that Plaintiff's claim was a covered claim. W & S and Arch Insurance thus challenge the Full Commission's conclusion of law that "the worker's compensation insurance policy in question, as issued by GIC, only provided

coverage to AETS as the insured." We disagree.

¶ 15 "[A] guaranty association is not the legal successor of the insolvent insurer; rather, it is obligated to pay claims *only to the extent of covered claims* . . . ." *City of Greensboro v. Reserve Ins. Co.*, 70 N.C. App. 651, 664, 321 S.E.2d 232, 240 (1984) (emphasis added); *see also* N.C. Gen. Stat. § 58-48-5 ("The purpose of this Article is to provide a mechanism for the payment of covered claims under certain insurance policies . . . ."). Under the Guaranty Act, when a member insurer is determined to be insolvent, NCIGA shall "[b]e deemed the insurer *to the extent of the Association's obligation on the covered claims* and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." N.C. Gen. Stat. § 58-48-35(a)(2) (emphasis added). Accordingly, the existence of a "covered claim" is a prerequisite to NCIGA's obligation as an insurer.

¶ 16 The Guaranty Act defines a "covered claim" as:

> an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars ($50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State.

Id. § 58-48-20(4). Under this definition, eligibility for benefits, that is, whether a

"covered claim" has been presented, is ascertained according to the terms of the policy and endorsements issued by the insolvent insurer.

¶ 17 As part of the conclusion of law that W & S and Arch Insurance now challenge, the Full Commission analyzed the statutory definition of "covered claim"—particularly, the Guaranty Act's use of the word "as" in the phrase "an insurance policy to which this Article applies *as issued by an insurer*[.]" *Id.* (emphasis added). The Full Commission explained:

> In adding the word "as" to the phrase "as issued by an insurer", the legislature deliberately enacted a clarifying amendment, limiting any inquiry into whether a claim is a "covered claim" under the Guarant[y] Act to the terms of the policy in question at the time it was initially issued by the now-insolvent insurer.

Therefore, the Full Commission applied the Guaranty Act's definition of "covered claim" when it concluded that "the worker's compensation insurance policy in question, *as issued by GIC*, only provided coverage to AETS as the insured." (Emphasis added).

¶ 18 W & S and Arch Insurance contend that the terms of the GIC policy "do not limit workers' compensation coverage just to employees of AETS and should not be construed to do so." In support of this contention, W & S and Arch Insurance invoke the well-established principle that "the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon

mere technicalities or strained and narrow interpretations of its provisions." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008) (citation omitted). However, W & S and Arch Insurance fail to acknowledge the limiting precept that "such liberality should not . . . extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of judicial legislation." *Id.* (citation and internal quotation marks omitted).

¶ 19 In fact, this Court has already rejected the argument that the liberal construction that we accord the Workers' Compensation Act should be extended to the Guaranty Act. In *Booth v. Hackney Acquisition Co.*, the plaintiff requested that this Court "construe the [Guaranty Act's] bar date provision and statute of repose liberally, . . . in line with the way our Courts interpret workers' compensation statutes." 270 N.C. App. 648, 652, 842 S.E.2d 171, 174 (2020), *disc. review denied*, 376 N.C. 674, 853 S.E.2d 168 (2021). However, this Court analyzed the plain text of the Guaranty Act and concluded that "in order to reach the result for which [the p]laintiff advocates, this Court would be required to ignore the clearly expressed language" of the Guaranty Act. *Id.* at 654, 842 S.E.2d at 175.

¶ 20 In the instant case, the plain text of the Guaranty Act similarly does not support the result that W & S and Arch Insurance seek. The Full Commission properly recognized that the Guaranty Act's definition of "covered claim"

intentionally "limit[s] any inquiry into whether a claim is a 'covered claim' under the . . . Act to the terms of the policy in question at the time it was initially issued by the now-insolvent insurer." *See* N.C. Gen. Stat. § 58-48-20(4). Further, as the Full Commission found:

> The . . . GIC policy, as issued, recites that it "is a contract between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy." On the Information Page referenced, GIC is identified as the insurer. *Item 1 on the Information Page asks for "The Insured/Mailing address." In this field is "American Emerald Transportation Services, Inc.," with AETS' Oklahoma address also provided. No other entities are named in this "Insured/Mailing address" field. Therefore, the relevant policy, as issued by GIC, only provided workers' compensation insurance coverage to AETS, with AETS the sole named insured.* None of the participating owner-drivers or motor carriers were identified in the policy or added via endorsement

(Emphasis added).

¶ 21 Although W & S and Arch Insurance urge us to conclude that the GIC policy covered Plaintiff's claim, this interpretation strains the plain language of the policy "as issued by" GIC. *Id.* "[E]ven applying the liberal rules of construction articulated by the North Carolina Supreme Court in interpreting workers' compensation statutes, we cannot reach [W & S and Arch Insurance]'s desired result." *Booth*, 270

N.C. App. at 652–53, 842 S.E.2d at 175. Thus, the Full Commission did not err in concluding that the GIC policy did not cover Plaintiff's claim.

2. Estoppel

¶ 22 In the alternative, W & S and Arch Insurance argue that, even if Plaintiff's claim was not a "covered claim" under the Guaranty Act, NCIGA was estopped from denying coverage to Plaintiff because the Form 60 filed by Patriot established that AETS was Plaintiff's employer. We disagree.

¶ 23 W & S and Arch Insurance's estoppel argument is premised on the well-settled rule that an "employer's filing of a Form 60 is an admission of compensability. Thereafter, the employer's payment of compensation pursuant to the Form 60 is an award of the Commission on the issue of compensability of the injury." *Spivey v. Wright's Roofing*, 225 N.C. App. 106, 111, 737 S.E.2d 745, 749 (2013) (citation omitted); N.C. Gen. Stat. § 97-82(b). "Thus, an employer who files a Form 60 waives the right to contest a claim that it is liable for a claimant's injury . . . ." *Spivey*, 225 N.C. App. at 112, 737 S.E.2d at 749.

¶ 24 In the present case, on 2 November 2016, Patriot filed a Form 60 that identified AETS as Plaintiff's employer on the date of the accident. W & S and Arch Insurance argue that this Form 60 conclusively established that Plaintiff was an employee of AETS. However, this argument lacks merit for several reasons.

¶ 25 First, a filed Form 60 "is an admission of *compensability*[,]" not employment

status. *Id.* at 111, 737 S.E.2d at 749 (emphasis added) (citation omitted). Indeed, as the Full Commission noted, "[h]ad GIC not become insolvent, pursuant to the applicable provisions of the Workers' Compensation Act and the case law relevant to that scenario, GIC would have been obligated to continue to provide Plaintiff'[s] indemnity and medical benefits." However, as the Full Commission concluded, this hypothetical obligation would have arisen by operation of the Workers' Compensation Act; it does not change the analysis of NCIGA's obligation under the Guaranty Act. Statutorily, NCIGA "is not the legal successor of the insolvent insurer; rather, it is obligated to pay claims *only to the extent of covered claims*, which shall not include any amount in excess of the obligation of the insolvent insurer *under the policy from which the claim arises*." *City of Greensboro*, 70 N.C. App. at 664, 321 S.E.2d at 240 (emphases added). As previously discussed, Plaintiff's claim was not a "covered claim" under the GIC policy. Accordingly, neither his claim nor any hypothetical obligation of NCIGA, by way of AETS, arises from that policy.

¶ 26 Furthermore, although W & S and Arch Insurance do not specify whether NCIGA should be estopped from denying that Plaintiff presented a "covered claim" under theories of equitable estoppel or quasi-estoppel, our Supreme Court has noted that each theory "requires mutuality of parties; the doctrine[s] may not be asserted by or against a 'stranger' to the transaction that gave rise to the estoppel." *Whitacre*

P'ship v. BioSignia, Inc., 358 N.C. 1, 19, 591 S.E.2d 870, 882 (2004).[1] The Full Commission appropriately recognized that NCIGA was a "stranger" to the filing of the Form 60, the transaction that gave rise to the alleged estoppel in this case. As such, neither equitable estoppel nor quasi-estoppel may be invoked to override the plain text of the Guaranty Act, which requires the presence of a "covered claim" in order to trigger the NCIGA's obligations. N.C. Gen. Stat. §§ 58-48-20(4), 58-48-35(a)(2).

¶ 27 The cases that W & S and Arch Insurance cite in support of their estoppel argument are similarly unavailing, in that they concern *covered claims*. In *Bowles v. BCJ Trucking Services, Inc.*, this Court concluded that NCIGA was obligated to pay the plaintiff's claim, but only after determining that due to a novation, the underlying claim—as issued by the insolvent insurer—was, in fact, a covered claim. 172 N.C. App. 149, 155, 615 S.E.2d 724, 728, *disc. review denied*, 360 N.C. 60, 623 S.E.2d 579

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[1] The doctrine of equitable estoppel applies

> when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Whitacre, 358 N.C. at 17, 591 S.E.2d at 881 (citation omitted). In contrast, "[u]nder a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Id.* at 18, 591 S.E.2d at 881–82.

(2005). Similarly, in *Goodwin v. CAGC Insurance Co.*, an unpublished opinion, this Court concluded that NCIGA was estopped from denying coverage of a plaintiff's covered claim. 239 N.C. App. 133, 769 S.E.2d 423, 2015 WL 234293, at *6 (unpublished), *disc. review denied*, 368 N.C. 264, 772 S.E.2d 862 (2015). Thus, because we have already determined that Plaintiff's claim in the case at bar was not a covered claim, *Bowles* and *Goodwin* are inapposite.

¶ 28 On this issue, we agree with the Full Commission that "NCIGA's obligation in this matter cannot be expanded via estoppel by virtue of GIC's pre-insolvency course of dealings in this claim." As the Full Commission explained, "NCIGA did not engage in this matter until 25 January 2018[,]" when it "provided Plaintiff notice that it would continue payments under a reservation of right to determine coverage" under the Guaranty Act. Therefore, the Full Commission correctly concluded that "[t]he Form 60 filed by Patriot in this matter on 2 November 2016 cannot create a 'covered claim,' as NCIGA was a stranger to that filing and is not a legal successor to insolvent insurer GIC." W & S and Arch Insurance's argument to the contrary is overruled.

3. Plaintiff's Employer

¶ 29 W & S and Arch Insurance next argue that the Full Commission erred by concluding that Plaintiff was a W & S employee for the purposes of the Workers' Compensation Act under both the common law of North Carolina and N.C. Gen. Stat. § 97-19.1(a). We disagree.

¶ 30 Section 97-19.1(a) contains two relevant provisions for determining the employment status of truck drivers for the purposes of workers' compensation. First, it establishes that North Carolina courts apply "the common law test for determining [the] employment status" of any "individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by a governmental motor vehicle regulatory agency[.]" N.C. Gen. Stat. § 97-19.1(a). Second, it provides that

> [a]ny principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in G.S. 97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

Id.

¶ 31 N.C. Gen. Stat. § 97-93(a) provides, in relevant part, that:

> Every employer subject to the provisions of this Article relative to the payment of compensation shall either:
>
> (1) Insure and keep insured his liability under this Article

> in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized; or
>
> . . . .
>
> (3) Obtain a license from the Commissioner of Insurance under Article 5 of this Chapter or under Article 47 of Chapter 58 of the General Statutes.

Id. § 97-93(a).

¶ 32 In the instant case, the Full Commission first determined that Plaintiff was an employee of W & S for the purposes of workers' compensation by applying the common law test for employment status. Our courts have recognized the common law rule "that lessors who operate in interstate commerce under the license tags and authority granted to the lessee by [a federal regulatory agency] are deemed employees of the lessee for the duration of the trip." *Parker v. Erixon*, 123 N.C. App. 383, 389, 473 S.E.2d 421, 425 (1996); *accord Brown v. L. H. Bottoms Truck Lines*, 227 N.C. 299, 42 S.E.2d 71 (1947). W & S and Arch Insurance argue that the enactment of § 97-19.1(a) abrogated this line of precedent, and that therefore the Full Commission erred by invoking *Brown* and its progeny in its analysis. On the other hand, NCIGA argues that § 97-19.1(a) reaffirmed *Brown* by explicitly endorsing the common law test for determining employment status in the carrier industry. However, we need not determine whether the common law rule applied in *Brown* survived the enactment of § 97-19.1(a), as the Full Commission also independently determined that Plaintiff

was a statutory employee of W & S under § 97-19.1(a).

¶ 33 Applying the statutory test of § 97-19.1(a), the Full Commission found that W & S "was a princip[al] contractor within the meaning of N.C. Gen. Stat. § 97-19.1(a), and . . . that Plaintiff was 'an individual in the interstate or intrastate trucking industry who operates a truck . . . licensed by the USDOT,' pursuant to N.C. Gen. Stat. § 97-19.1(a)[.]" Accordingly, the Full Commission concluded that W & S was "liable as an employer" under § 97-19.1(a) because it "contracted with Plaintiff to operate a truck federally licensed" through W & S, and did not "secure the payment of compensation" in accordance with the statutory requirements of N.C. Gen. Stat. § 97-93(a).

¶ 34 W & S and Arch Insurance contend that although W & S did not "secure the payment of compensation," the Full Commission's findings and conclusion on this issue are unsupported by the record because "Plaintiff had secured workers' compensation for himself by participating in the AETS program and was covered by the [GIC] policy." However, it is clear that Plaintiff's participation in the AETS program was not equivalent to W & S's compliance with § 97-19.1(a), in that Plaintiff did not "secure the payment of compensation *in the manner provided for employers set forth in G.S. 97-93* for himself personally and for his employees and subcontractors, if any[.]" N.C. Gen. Stat. § 97-19.1(a) (emphasis added). We find no error in the Full Commission's application of § 97-19.1(a) in this case.

¶ 35 Lastly, W & S and Arch Insurance argue that "Plaintiff was an employee of AETS as a matter of law by virtue of the filed Form 60[.]" In support of their argument, they note that "it is undisputed that [GIC] and AETS accepted Plaintiff's claim as compensable by filing a Form 60 and identified AETS as Plaintiff's employer. Further, [GIC] never disputed liability for Plaintiff's claim and continued to pay medical and indemnity benefits for nearly three years until [GIC] was liquidated." However, the filing of a Form 60 and payment of benefits "constitute an award of the Commission *on the question of compensability of and the insurer's liability for the injury*[.]" *Id.* § 97-82(b) (emphasis added). The filing of the Form 60 thus conclusively established that Plaintiff's injury was compensable and that GIC was liable; nevertheless, it did not conclusively foreclose W & S's status as Plaintiff's statutory employer under § 97-19.1(a).

¶ 36 W & S and Arch Insurance support this final argument by relying primarily on *Spivey*, which is inapt. In *Spivey*, this Court held that the plaintiff's employer was "not entitled to have the Form 60 *in which* [*it*] *admitted liability to Plaintiff* set aside." 225 N.C. App. at 117, 737 S.E.2d at 752 (emphasis added). However, neither *Spivey* nor any other case that W & S and Arch Insurance cite in support of their argument that AETS was Plaintiff's employer as a matter of law involved a statutory employer status pursuant to N.C. Gen. Stat. § 97-19.1. And as the filing of a Form 60 is conclusive "on the question of compensability of and the insurer's liability for the

injury[,]" N.C. Gen. Stat. § 97-82(b), but not conclusive on the question of employment status, *Spivey* is inapposite to this specific argument.

¶ 37 Further, to the extent that this argument is intended to ultimately bind NCIGA by way of AETS and GIC, NCIGA was a stranger to the Form 60 here, unlike the defendants in *Spivey*. *See Spivey*, 225 N.C. App. at 115, 737 S.E.2d at 751. And, as previously discussed, GIC's liability as an insurer—established by the filed Form 60—cannot be transferred to NCIGA by estoppel. *Whitacre*, 358 N.C. at 19, 591 S.E.2d at 882. Accordingly, W & S and Arch Insurance's argument is overruled.

4. W & S's Liability

¶ 38 In their final argument on appeal, W & S and Arch Insurance contend that the Full Commission erred by ordering them to pay Plaintiff temporary total disability benefits and medical compensation. However, this final argument is a composite of each of their prior arguments, which we have already addressed. W & S and Arch Insurance again assert that they "are not liable to Plaintiff for workers' compensation benefits as *Brown* is no longer good law, and Plaintiff was an independent contractor who secured his own workers' compensation, precluding liability under Section 97-19.1 of the General Statutes." W & S and Arch Insurance also repeat their argument that NCIGA must assume GIC's liability as an insurer. As we have overruled each of these arguments, so too do we overrule this final argument on appeal. W & S and Arch Insurance's arguments are without merit, and the Full Commission's order is

affirmed with respect to each argument W & S and Arch Insurance raise.

C. NCIGA's Cross-Appeal

¶ 39 On cross-appeal, NCIGA argues that the Full Commission reversibly erred by concluding that it lacked jurisdiction to award reimbursement to NCIGA pursuant to N.C. Gen. Stat. § 58-48-50 for benefits paid to Plaintiff under the Guaranty Act and the interim orders of the Industrial Commission. We disagree.

¶ 40 "The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms." *Clark v. Gastonia Ice Cream Co.*, 261 N.C. 234, 238, 134 S.E.2d 354, 358 (1964) (citation omitted). The Workers' Compensation Act provides that "[a]ll questions arising under this Article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided." N.C. Gen. Stat. § 97-91. In *Clark*, our Supreme Court interpreted § 97-91 and observed that "[q]uestions 'arising under this [A]rticle' would seem to consist primarily, if not exclusively, of questions for decision in the determination of rights asserted by or on behalf of an injured employee or his dependents." 261 N.C. at 240–41, 134 S.E.2d at 360 (quoting N.C. Gen. Stat. § 97-91).

¶ 41 With limited exception, the Workers' Compensation Act provides the Industrial Commission with exclusive jurisdiction over an employee's rights under

the Act:

> The North Carolina Workers' Compensation Act was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence. In exchange for these limited but assured benefits, the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act.

Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 635, 652 S.E.2d 231, 234 (2007) (citations and internal quotation marks omitted).

¶ 42 In addition, this Court has held that "[t]he Industrial Commission has jurisdiction to interpret laws bearing on the claims before it. Its jurisdiction also includes the right and duty to decide questions of fact and law regarding the liability of an insurance carrier." *N.C. Ins. Guar. Ass'n v. Int'l Paper Co.*, 152 N.C. App. 224, 227, 569 S.E.2d 285, 287 (citations omitted), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 786 (2002).

¶ 43 Here, NCIGA asserts that "the interim payments [it] made to or for the benefit of Plaintiff required interpretation and application of the Effect of Paid Claims provision of the Guaranty Act, codified at N.C. Gen. Stat. § 58-48-50"; therefore, "the application and enforcement of this statute fell within the Commission's ancillary jurisdiction, and the Commission erred in concluding to the contrary."

¶ 44 However, in *Clark*, our Supreme Court summarized the general rule of ancillary jurisdiction for workers' compensation commissions as follows:

> The general rule appears to be that, when it is ancillary to the determination of the employee's rights, the compensation commission has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, and construction of extent of coverage. This is, of course, in harmony with the conception of compensation insurance as being something more than an independent contractual matter between insurer and insured. On the other hand, *when the rights of the employee in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that* [*it*] *has been made to pay an undue share of an award to a claimant, the award itself not being under attack.*

261 N.C. at 239–40, 134 S.E.2d at 359 (emphasis added) (citation omitted).

¶ 45 NCIGA states that it "was added as a statutory defendant in a proceeding still pending before the Industrial Commission to determine the unresolved claim for additional medical compensation" under the Worker's Compensation Act, at which point Plaintiff's claim remained undetermined and the scope of NCIGA's reimbursement right "essentially would be determined by the Industrial Commission's ultimate findings and conclusions[.]" Regardless, this does not establish that Plaintiff's rights are "at stake" with respect to NCIGA's request for reimbursement of benefits *already paid* to Plaintiff by Arch Insurance.

¶ 46 W & S and Arch Insurance argue, and we agree, that NCIGA's request for reimbursement "ha[d] no impact on the rights of Plaintiff. It d[id] not affect Plaintiff's entitlement to benefits, the amount of benefits Plaintiff [would] receive, or Plaintiff's right to any benefits moving forward." There is no dispute that the benefits *already paid to Plaintiff*, for which NCIGA seeks reimbursement, were not under attack. As such, this case appears to be beyond the Commission's ancillary jurisdiction, as it is a "question . . . purely . . . between two insurers, one of whom alleges that [it] has been made to pay an undue share of an award to a claimant, the award itself not being under attack." *Id.* at 240, 134 S.E.2d at 359 (citation omitted). Thus, the Full Commission did not have jurisdiction under the Guaranty Act to order that NCIGA be reimbursed for benefits paid to or on behalf of Plaintiff. NCIGA's argument in its cross-appeal is overruled.[2]

D. Plaintiff's Arguments on Appeal

¶ 47 Lastly, we note that Plaintiff filed an appellee's brief requesting that this Court affirm the findings and conclusions of the Full Commission's Opinion and Award, but also urging this Court to remand this matter to the Full Commission for further findings, arguing that (1) NCIGA is liable for his workers' compensation benefits, and

[2] As the Full Commission noted, it "expressly decline[d] to address whether [N.C.] Gen. Stat. § 97-86.1(d), which was not argued or cited by the parties, would require reimbursement by Arch [Insurance] of NCIGA's outlays in this claim."

(2) NCIGA is estopped from denying him benefits. Yet Plaintiff did not file a notice of appeal or cross-appeal from the Full Commission's Opinion and Award in accordance with Rule 3 of the North Carolina Rules of Appellate Procedure.

¶ 48 Appellate Rule 28(c) provides that "[w]ithout taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 28(c). "However, the proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal." *Erie Ins. Exch. v. Smith*, 276 N.C. App. 166, 2021-NCCOA-63, ¶ 28 (citation and internal quotation marks omitted), *disc. review denied*, 377 N.C. 560, 858 S.E.2d 119 (2021).

¶ 49 Plaintiff's brief raises "alleged errors that purport to show that the judgment was erroneously entered[,]" and seeks remand for the entry of a new order with additional findings rather than simple affirmance of the Full Commission's Opinion and Award. *Id.* (citation omitted). These "alleged error[s] should have been separately preserved and made the basis of a separate cross-appeal." *Id.* at ¶ 29 (citation omitted). Accordingly, because Plaintiff did not notice his appeal from the Full Commission's Opinion and Award "as required by Rule 3, this Court does not have jurisdiction under Rule 28(c) over [his] arguments." *Id.*

III. Conclusion

¶ 50 For the foregoing reasons, the Full Commission's Opinion and Award is affirmed.

AFFIRMED.

Judges DILLON and COLLINS concur.

Report per Rule 30(e).