

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1598

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

ALFRED THOMAS DAYWALT,  
Employee-Plaintiff,

v.

N.C. Industrial Commission  
I.C. No. 155915

NORANDAL, USA,  
Employer-Defendant,

and

CIGNA/ACE USA/ESIS,  
Carrier-Employer-Defendant.

# Court of Appeals

## Slip Opinion

Appeal by plaintiff from Opinion and Award entered 19 September 2006 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 17 September 2007.

*Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Harmony Whalen Taylor, for defendant-appellees.*

CALABRIA, Judge.

Alfred Daywalt ("plaintiff") appeals from an Opinion and Award of the Industrial Commission ("the Full Commission") remanding his case to a deputy commissioner for a full evidentiary hearing. We dismiss this appeal as interlocutory.

The relevant factual and procedural history of this case is summarized as follows: In July of 2001, plaintiff filed a workers' compensation claim against his employer Norandal USA, Inc., ("defendant") seeking benefits for the occupational disease of asbestosis and pleural. Defendant and CIGNA/ACE USA ESIS ("CIGNA") (collectively "defendants") denied liability. On 1 and 2 March 2004, Deputy Commissioner George T. Glenn, II, held a hearing on plaintiff's claim. Later that month, plaintiff filed a "Motion for Post-Hearing Submission of Evidence and Motion for Sanctions" on the ground that defendants failed to disclose relevant information provided by defendants' consulting company, S&ME. Deputy Commissioner Glenn heard the motions on 21 April 2004. On 21 June 2004, Deputy Commissioner Glenn ordered S&ME's report to become part of the record and, as sanctions, struck defendants' defenses to the compensability of plaintiff's claim. On 8 March 2005, Deputy Commissioner Glenn entered an Opinion and Award in favor of the plaintiff. Defendants appealed this decision to the Full Commission.

The Full Commission heard defendants' appeal in February of 2006. On 19 September 2006, the Full Commission entered an "Interlocutory Order" finding that "the Deputy Commissioner improvidently allowed the submission of the S&ME report, which was not discoverable per N.C. Gen. Stat. § 1A-1, Rule 26" and "improvidently sanctioned the defendants for their withholding of non-discoverable material, and prejudiced the defendants by striking their defenses as to the plaintiff's exposure to

asbestos." The Full Commission vacated the deputy commissioner's order and remanded the matter "for the assignment of the case to a Deputy Commissioner for a full evidentiary hearing on the merits, including the defendants' defenses that were improvidently stricken by the Deputy Commissioner." Plaintiff appeals.

Although plaintiff brings forth seven assignments of error challenging the Full Commission's ruling regarding the S&ME report and sanctions, we do not reach the merits of the appeal. We conclude the order of the Full Commission is not properly before us for review.

An appeal from an opinion and award of the Industrial Commission is subject to the "same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (2006). Parties have a right to appeal any final judgment of a superior court. N.C. Gen. Stat. § 7A-27 (2006). Thus, an appeal of right arises only from a final order or decision of the Industrial Commission. *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 598-99, 482 S.E.2d 544, 545, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 550 (1997). A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court. *Ledford*, at 599, 482 S.E.2d at 545. Here, the Commission's order remanded plaintiff's case to a deputy commissioner for a full evidentiary hearing on the merits and is clearly interlocutory.

An appeal from an interlocutory order, however, may be proper

when the order from which appeal is taken affects a substantial right of the appellant. N.C. Gen. Stat. 7A-27(d) (1) (2006); 1-277 (2006). This exception requires that the interlocutory order appealed affects a right of the appellant which is a substantial one, the deprivation of which will potentially result in injury to the appellant if the order is not reviewed before final judgment. See *Plummer v. Kearney*, 108 N.C. App. 310, 313, 423 S.E.2d 526, 529 (1992). The party desiring an immediate appeal of an interlocutory order bears the burden of showing that such appeal is necessary to prevent loss of a substantial right. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

In acknowledging his appeal is interlocutory, plaintiff contends the Commission's order remanding the matter for a full evidentiary hearing affects a substantial right and is immediately appealable. "[T]he possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). This rule requires the party asserting a substantial right to show that the same factual issues would be present in both trials, and the possibility of inconsistent verdicts on those issues exists. *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994). Plaintiff contends "there could be inconsistent verdicts if the matter is tried twice." Plaintiff specifically

asserts that "a different Deputy Commissioner could preside over the second trial and reach different conclusions." Given that the Full Commission found that the deputy commissioner improvidently allowed the S&ME report and remanded the case for a full evidentiary hearing without the S&ME report, we discern no possibility of *inconsistent* decisions. Further, this Court has stated that "'avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal.'" *Banner v. Hatcher*, 124 N.C. App. 439, 442, 477 S.E.2d 249, 251 (1996) (quoting *Blackwelder v. Dep't of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). "Because this appeal is interlocutory and does not involve a substantial right that will be lost absent immediate review, we dismiss the instant appeal." *Perry v. N.C. Dep't. Of Corr.*, 176 N.C. App. 123, 124, 625 S.E.2d 790, 791 (2006). Failure to hear this appeal will not prejudice a substantial right of plaintiff. Therefore, plaintiff's appeal is dismissed.

Dismissed.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).