

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA04-1048

NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2005

LEON McNAIR,
Employee-Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 248030

SUPERIOR CONSTRUCTION
COMPANY, INC.,
Employer-Defendant,

and

AETNA CASUALTY AND SURETY
COMPANY,
Carrier-Defendant.

Appeal by plaintiff from order entered 24 February 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 March 2005.

Leon McNair, pro se.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Edward L. Eatman, Jr. and W. James Flynn, for defendants-appellees.

CALABRIA, Judge.

This is the third appeal arising out of a workers' compensation action initiated by Leon McNair ("plaintiff") against employer Superior Construction Company, Inc. ("defendant"). In an opinion and award filed 19 September 1996, the North Carolina Industrial Commission ("Commission") found that plaintiff did not sustain a compensable injury by accident and denied

plaintiff's claim. On appeal, this Court affirmed the Commission's ruling. *McNair v. Superior Construction Co.*, 127 N.C. App. 556, 492 S.E.2d 389 (1997).

Plaintiff subsequently filed a motion with the Commission seeking review of his case. The Commission denied plaintiff's motion on 26 September 2002, and plaintiff appealed to this Court. Plaintiff's appeal was dismissed on the grounds that plaintiff's assignments of error failed to relate to the order from which plaintiff appealed in violation of N.C. R. App. P. 3(d). *McNair v. Superior Constr. Co.*, 161 N.C. App. 347, 588 S.E.2d 584 (2003). A month after this Court rendered its decision, plaintiff filed a "Motion for Reconsideration and Investigation" with the Commission. The Commission dismissed plaintiff's motion by order filed 24 February 2004 on the grounds that "[p]laintiff's claim is closed and all appeals have been exhausted." Plaintiff appeals.

In his first two assignments of error, plaintiff contends the Commission's dismissal of his motion for reconsideration and investigation is contrary to law. In the accompanying arguments in the brief, however, plaintiff actually argues that the Commission "[c]ondoned the [d]efrauding of [plaintiff]" and that defendants "have committed fraud and perjury," respectively. "When, as here, the argument in the brief does not correspond to the assignment of error, that assignment should be deemed abandoned under Rule 28 of the Rules of Appellate Procedure." *State v. Purdie*, 93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989). Plaintiff next challenges the Commission's statement in its 24 February 2004 order that "plaintiff's claim is closed and all appeals have been exhausted[;] [p]laintiff's appeal to the North Carolina Court of Appeals and all pending motions are hereby dismissed[.]" Plaintiff cites N.C. Gen. Stat. §§97-86, 97-88.2, 7A-26 and 7A-29 to support his contention that the statement is contrary to law. The statutes plaintiff cites, however, do not permit the reopening of cases in which the Commission has

issued an opinion and award subsequently upheld by this Court on appeal. Plaintiff has not shown the Commission erred in denying his motion for reconsideration. This assignment of error is without merit.

Plaintiff's fourth and final argument contends the Commission's refusal to consider and investigate "conclusive evidence proving the Full Commission's 19 September 1996 Opinion and Award was legally and factually marred by fraud . . . is contrary to law." Plaintiff argues the evidence in the record and in the appendix to his brief shows that he has been defrauded of his workers' compensation benefits. Plaintiff, however, is essentially seeking to challenge the Commission's 19 September 1996 opinion and award, which is not the subject of the instant appeal. We must therefore dismiss this assignment of error. *See* N.C. R. App. 3(d) (2004).

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Report per Rule 30(e).