

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-955

NORTH CAROLINA COURT OF APPEALS

Filed: 21 April 2009

IRENE PAIT,

Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 426774

SOUTHEASTERN REGIONAL HOSPITAL,

Employer,

and

NORTH CAROLINA INSURANCE
GUARANTY ASSOCIATION,
Statutory Insurer
Defendant.

Appeal by plaintiff-appellant from judgment entered 14 March 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 February 2009.

R. James Lore for plaintiff-appellant.

Young, Moore, and Henderson, P.A., by Zachary C. Bolen for defendant-appellee.

ERVIN, Judge.

Irene Pait (Appellant) suffers from a compensable occupational disease resulting from her exposure to formalin in the course and scope of her employment by Southeastern Regional Hospital. Appellant receives weekly compensation as a result of her compensable condition

pursuant to a North Carolina Industrial Commission Form (NCIC Form) 21 Agreement which the Commission approved on 16 May 1994. The insurance carrier that was originally responsible for making compensation payments to Appellant went into liquidation, so that the North Carolina Insurance Guaranty Association (NCIGA) assumed responsibility for paying Appellant's benefits.

On 30 October 2006 NCIGA filed an NCIC Form 33, in which it requested that the Commission convene a hearing for the purpose of making a final determination of the extent of Appellant's disability. Appellant filed a motion to dismiss NCIGA's request on 31 January 2008. On 5 February 2008, NCIGA filed a response to Appellant's dismissal motion, and Appellant filed a reply to NCIGA's response. On the same date, Robert J. Harris, Deputy Commissioner, (Deputy Commissioner Harris) entered an order denying Appellant's dismissal motion.

On 14 February 2008, Appellant filed a notice of appeal to the Full Commission from Deputy Commissioner Harris' order. On 20 February 2008, NCIGA filed a motion to dismiss Appellant's appeal. Appellant filed a response to NCIGA's motion to dismiss on 4 March 2008. The Commission denied Appellant's request to be allowed to take an interlocutory appeal from Deputy Commissioner Harris' order on 14 March 2008 by means of an order that stated that Appellant's "right to appeal the February 5, 2008, interlocutory Order of the Deputy Commissioner is preserved until the issuance of a final Opinion and Award by a Deputy Commissioner, at which time defendant's may raise any issues on appeal to the Full Commission"

On 20 March 2008, Appellant filed a motion requesting that the Commission reconsider the 14 March 2008 order. NCIGA urged the Commission to affirm its decision to dismiss

Appellant's appeal. On 16 May 2008, the Commission denied Appellant's reconsideration motion. On 27 May 2008, Appellant appealed to this Court from the 16 May 2008 order.

According to N.C. Gen. Stat. §97-86, an appeal may be taken from "the decision of [the] Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." "No appeal lies from an interlocutory order of the" Commission. *Lynch v. M.B. Kahn Construction Co.*, 41 N.C. App. 127, 129, 254 S.E.2d 236, 237 (1979) *dis. rev. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). "An order is not final if it fails to determine the entire controversy between all the parties." *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 545 (1997). An order declining to allow an interlocutory appeal to the full Commission from an order entered by a Deputy Commissioner denying a dismissal motion is quintessentially interlocutory, since it "contemplate[s] further proceedings . . . at the trial level." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

An appeal may be taken from an interlocutory order that "[a]ffects a substantial right." N.C. Gen. Stat. §7A-27(d)(1) (2007). Under the "substantial right" exception to the general rule prohibiting appeals from interlocutory orders, "a two-part test has developed--the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). After acknowledging that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied," the Supreme Court indicated that "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343.

The extent to which a substantial right is implicated in a particular case hinges upon “whether that right is one which will be lost or irremediably and adversely affected if the order is not reviewed before final judgment.” *Southern Uniform Rentals, Inc. v. Iowa Nat. Mut. Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988). “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.” *Mills Pointe Homeowner’s Association, Inc. v. Whitmire*, 146 N.C. App. 297, 299, 551 S.E.2d 924, 926 (2001).

Appellant argues that NCIGA’s request for a final determination of disability seeks to curtail or eliminate death claim benefits for her putative beneficiaries or next of kin and that allowing the Commission to proceed to hearing on NCIGA’s request for a final disability determination may result in the entry of a void judgment, given that these interested persons will not have had an adequate opportunity to be heard. Appellant further argues that, if the proceedings currently pending before the Commission are allowed to go forward, there is a risk of inconsistent adjudication of the type found sufficient to support an immediate appeal in *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 8, 362 S.E.2d 812, 816 (1987). Assuming *arguendo* that the appealability issue should be analyzed by focusing on the potential merits of Appellant’s original motion, we are not persuaded her argument has merit.

As a general proposition, the avoidance of a trial or other proceedings in the court below does not implicate a substantial right. *Waters*, 294 N.C. at 208, 240 S.E.2d at 344. “The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims.” *Allen v. Sea Gate Ass’n*, 119 N.C. App. 761, 763, 460 S.E.2d 197, 199 (1995), (citing *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982)). Here,

however, there is no risk that Appellant herself will be subjected to an inconsistent adjudication of claims she is attempting to assert or defend.

Appellant's "inconsistent adjudication" argument hinges solely upon the rights available to any dependents or next of kin who may become eligible to assert a claim for workers compensation death benefits in the event that she dies from a compensable cause. Needless to say, since no claim for death benefits has accrued, it is impossible to identify the individual or individuals who may be able to assert such a claim in the future. Given that Appellant herself does not face any risk of having to deal with the problems posed by an inconsistent adjudication in the event that the Commission makes a final determination of disability, it is clear that no substantial right of Appellant's is affected by the denial of her motion to dismiss NCIGA's request for a hearing.

A careful analysis of our decision in *Slurry* confirms the correctness of this conclusion. In that case, the trial court granted the defendant's motion for summary judgment against the plaintiff and dismissed plaintiff's claims against the defendants. *Slurry*, 88 N.C. App. at 8, 362 S.E.2d at 817. However, the trial court did not decide defendant's pending counterclaim against the plaintiff. *Id.* Since "the possibility of an inconsistent verdict in defendants' counterclaim trial could irreparably prejudice any subsequent trial of plaintiff's negligence and contract claims," this Court concluded that a "substantial right" was involved and allowed an immediate appeal from the order granting summary judgment in favor of the defendants. *Slurry*, 88 N.C. App. at 9, 362 S.E.2d at 817. In this case, unlike *Slurry*, the plaintiff does not face the same risk of harm due to inconsistent adjudications. Simply put, Appellant is only facing one claim, which arises from NCIGA's request that the Commission make a final determination of disability. Thus,

Slurry simply does not support an argument that Appellant's appeal in this case should be allowed to proceed.

As a result, Appellant has not met either prong of the two-part test used to evaluate the appealability of interlocutory orders pursuant to N.C. Gen. Stat. §7A-27(d)(1). Thus, this appeal has been taken from an interlocutory order that does not affect a substantial right and should be dismissed.

Dismissed.

Chief Judge Martin and Judge Wynn concur.

Report per Rule 30(e).