

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-1097
NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

KIMBERLY SUE PHELPS,
Administratrix of the Estate
of GAIL S. BLACKBURN, Deceased
Employee-Plaintiff,

v.

Industrial Commission
IC No. 563760

STABILUS,
Employer-Defendant,

and

FIREMAN'S FUND INSURANCE,
ROYAL & SUNALLIANCE INSURANCE
(now ARROWPOINT) and
TRAVELERS INSURANCE COMPANY,
Carrier-Defendants.

Appeal by defendant Stabilus and defendant Travelers Indemnity Company of America from an Opinion and Award entered 14 April 2010 by the Full Commission. Heard in the Court of Appeals 23 February 2011.

Edward S. Pauley for plaintiff.

McAngus, Goudelock & Courie, P.L.L.C., by Cameron S. Wesley and Raymond J. Williams, for defendant-appellee Fireman's Fund Insurance Company.

Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for defendant-appellee Arrowpoint Capital Insurance Company.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by J.A. Gardner, III, and M. Duane Jones, for defendant-appellants Stabilus and Travelers Indemnity Company of America.

ELMORE, Judge.

Stabilus (defendant employer) and Travelers Indemnity Company of America (defendant carrier) appeal from an opinion and award by the Full Commission. The Full Commission concluded that, as a result of her employment with defendant employer, Gail S. Blackburn (decedent-employee) developed the occupational disease of lung cancer from exposure to hexavalent chromium. The Full Commission concluded that decedent-employee "was totally disabled as a result of her occupational disease and entitled to temporary total disability compensation from the date of her last day of employment with" defendant employer until her death. The Full Commission also concluded that the Estate of Gail S. Blackburn (plaintiff), administered by Kimberly Sue Phelps, was "entitled to reimbursement for all medical treatment resulting from [decedent-employee's] compensable occupational disease to the extent that such treatment was designed to effect a cure, give relief or lessen the period of disability." The Full Commission concluded that decedent-employee's last injurious exposure occurred during

defendant carrier's coverage period, making defendant carrier the responsible carrier and liable for payment of compensation owed to plaintiff. Defendant carrier and defendant employer now appeal. The other two insurance carriers, Fireman's Fund Insurance and Arrowpoint Capital Insurance Company,¹ filed appellee briefs.

We do not review the merits of defendants' appeal because it is interlocutory and not properly before us. An order or judgment is interlocutory "if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *Norris v. Sattler*, 139 N.C. App. 409, 411, 533 S.E.2d 483, 484 (2000) (quotations and citation omitted). "Generally, there is no right of immediate appeal from an interlocutory order." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citation omitted). However, a party may appeal an interlocutory order if either "the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure" or "the trial court's decision deprives the appellant of a substantial

¹ Arrowpoint Capital Insurance Company was formerly Sun Alliance Insurance.

right that will be lost absent immediate review." *Gregory v. Penland*, 179 N.C. App. 505, 509, 634 S.E.2d 625, 628 (2006).

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 (2009). Thus, "[a] decision of the Industrial Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case. A decision that on its face contemplates further proceedings or . . . does not fully dispose of the pending stage of the litigation is interlocutory." *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006)) (quotations and citation omitted). Specifically, "[a]n opinion and award that settles preliminary questions of compensability but leaves unresolved the amount of compensation to which the plaintiff is entitled and expressly reserves final disposition of the matter pending receipt of further evidence is interlocutory." *Riggins v. Elkay Southern Corp.*, 132 N.C. App. 232, 233, 510 S.E.2d 674, 675 (1999).

Here, the Full Commission left unresolved the amount of compensation to which plaintiff is entitled, expressly reserving final disposition of the matter pending receipt of further

evidence. After concluding that decedent-employee's estate was entitled to temporary total disability compensation from the date of her last day of employment with defendant employer until the date of her death, the Full Commission made the following conclusion of law: "Decedent-Employee's compensation rate cannot be determined at this time and the matter should be held open only for the gathering of evidence on this limited issue for review by the Full Commission." The Full Commission then

ordered that this matter [be] referred to Chief Deputy Commissioner Wanda B. Taylor to be placed expeditiously on a hearing docket for the taking of additional evidence solely on the average weekly wage issue. The parties shall have 30 days following the closing of the record to submit briefs, after which the Deputy Commissioner shall return all evidence gathered to the Full Commission to review and make findings of fact and conclusions of law.

The opinion and award was entered on 14 April 2010, and defendants entered their notice of appeal thirty days later, on 14 May 2010. However, there is no evidence in the record that the Industrial Commission took additional evidence on the average weekly wage issue or that the Full Commission reviewed additional evidence and made findings of fact or conclusions of law. Furthermore, the parties do not argue that any substantial right will be affected if we do not review defendants' appeal.

Accordingly, we dismiss the appeal and remand the matter to the Full Commission to determine decedent-employee's compensation rate as ordered in the opinion and award.

Dismissed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).