

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-246

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

ROBERT THOMPSON,
Employee,
Plaintiff;

v.

North Carolina
Industrial Commission
No. 742391

ARAMARK, INC.,
Employer;
SPECIALTY RISK SERVICES,
Carrier,
Defendant.

Appeal by defendants from an Opinion and Award entered 16 December 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 2010.

Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellee.

Cranfill, Sumner, & Hartzog, LLP, by J. Michael Ricci and Ashley Baker White, for defendant-appellants.

STEELMAN, Judge.

Where the Industrial Commission has not yet determined plaintiff's average weekly wage, and not yet determined the amount of compensation due to plaintiff, defendants' appeal is interlocutory and must be dismissed.

I. Factual and Procedural History

On 23 February 2007, Robert Thompson ("plaintiff") had been working as a route sales representative for Aramark Corporation ("Aramark"), for 14 years. Aramark rents uniforms, shop towels, mats and similar supplies to businesses. As a route sales representative, plaintiff drove a truck on a regular route delivering supplies to customers and picking up soiled supplies. Plaintiff manually loaded and unloaded these supplies. On 23 February 2007, plaintiff felt pain in his right shoulder while lifting mats into his truck at a Harris Teeter store. On 26 February 2007, plaintiff completed an injury report relating to the incident. On 12 September 2007, plaintiff underwent arthroscopic surgery on his right shoulder.

On 16 December 2009, the North Carolina Industrial Commission held that plaintiff's rotator cuff tear and bursitis and synovitis in his right shoulder were compensable occupational diseases under N.C. Gen. Stat. §§ 97-53(13), (17), and (20) (2009). However, the Full Commission was unable to determine plaintiff's average weekly wage based on the Form 22 submitted by the parties, and directed the parties to either stipulate to plaintiff's average weekly wage or submit a completed Form 22 for the period of 12 September 2006 through 12 September 2007 within 15 days. On 28 December 2009, Aramark and Specialty Risk Services (collectively "defendants") gave notice of appeal to this Court.

II. Interlocutory Appeal

We dismiss this appeal as interlocutory, and not properly before this Court.

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." G.S. § 97-86 (2001). Parties have a right to appeal any final judgment of a superior court. G.S. § 7A-27 (2001). Therefore, an appeal as of right can arise only from a final order of the Industrial Commission. *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002).

"A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court." *Id.* We have said that "[a]n opinion and award of the Industrial Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case." *Id.*; see also *Fisher v. E.I. DuPont De Nemours*, 54 N.C. App. 176, 177-78, 282 S.E.2d 543, 544 (1981) (holding that an order is not final where the amount of compensation is not determined). Moreover, while we recognize that a workers' compensation claim may continue under an open award for many weeks or even years, an opinion and award that on its face contemplates further proceedings or which does not fully dispose of the pending stage of the litigation is interlocutory. See *Riggins v. Elkay Southern Corp.*, 132 N.C. App. 232, 233, 510 S.E.2d 674 (1999) ("An 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").

Watts v. Hemlock Homes of the Highlands, Inc., 160 N.C. App. 81, 84, 584 S.E.2d 97, 99 (2003). In *Watts*, this Court held that plaintiff's appeal was interlocutory, because the plaintiff's average weekly wage had not been established by the Full Commission. *Id.* The Full Commission remanded the case in *Watts* for a hearing before a Deputy Commissioner to determine the

"plaintiff's average weekly wage at the time of plaintiff's compensable injury by accident and plaintiff's resultant weekly compensation rate." *Id.* at 83, 584 S.E.2d at 99.

In the instant case, the Full Commission's opinion and award required the parties to either stipulate to plaintiff's average weekly wage or submit a completed Form 22 for the period of 12 September 2006 through 12 September 2007 within 15 days. Nothing in the record brought before this Court indicates that the issue of average weekly wage has been resolved by the Commission. The amount of compensation to which plaintiff is entitled is not resolved, this appeal is interlocutory, and must be dismissed.

We further note that defendants-appellants' brief failed to state their grounds for appellate review as required by N.C. Rule of Appellate Procedure 28(b)(4) (2009).

DISMISSED.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).