

NO. COA10-694

NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2011

RICARDO DIAZ,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 792276

JERRY MARK SMITH, d/b/a
SMITH'S HOME REPAIR,
Employer,

TRAVELERS INDEMNITY
COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 19 March 2010
by the North Carolina Industrial Commission. Heard in the Court of
Appeals 10 January 2011.

*The Olive Law Firm, PA, by Juan A. Sanchez, for
plaintiff-appellant.*

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Kelli A.
Burns and M. Duane Jones, for defendant-appellee Travelers
Indemnity Company.*

HUNTER, Robert C., Judge.

Plaintiff Ricardo Diaz appeals from the Industrial Commission's
opinion and award in which it awarded plaintiff workers' compensation
benefits, but concluded that defendant-employer Jerry Mark Smith's

workers' compensation insurance policy had been effectively cancelled by defendant-carrier Travelers Indemnity Company. We agree with plaintiff's contention that the Commission applied the notice requirements of the incorrect statute in determining whether Smith's insurance policy was properly cancelled. Accordingly, the Commission's opinion and award is reversed and remanded.

Facts

Smith began Smith's Home Repair in the summer of 2006. After submitting an application with the North Carolina Rate Bureau, Smith obtained a workers' compensation insurance policy with Travelers as an assigned risk policy. Because Smith could not afford to pay his premium in full, he financed the premium through a third party known as Monthly Payment Plan, Inc. ("MPP"). MPP's financing agreement included a power of attorney provision authorizing MPP to cancel Smith's policy if he failed to make timely payments. Smith signed neither the Travelers' policy nor the MPP financing agreement; both were signed in Smith's name by his insurance agent, David Cantwell. An acknowledgment page, not normally contained in "regular policies," was included at the end of Smith's policy with Travelers, notifying him that, pursuant to the power of attorney clause in the financing agreement, MPP could cancel his policy for non-payment.

In November 2006, MPP cancelled Smith's policy for non-payment of premiums. The policy was reinstated, however, after MPP received

Smith's monthly premium payment. After Smith failed to make his premium payment for January 2007, MPP sent Smith a letter dated 2 January 2007, titled "Ten Day Notice," advising Smith that "unless payment is made within ten days from the date of th[e] letter," his workers' compensation policy would be "cancelled through the use of [the] power of attorney that [he] signed." MPP sent copies of this letter by regular mail to Smith's correct address in Asheville, North Carolina, as well as to Cantwell's office. Both Smith and Cantwell received their respective copy of the letter.

After MPP did not receive payment from Smith, MPP sent a "Notice of Cancellation" letter, dated 15 January 2007, notifying Smith of MPP's intent to cancel his policy through the power of attorney provision in the finance agreement. Copies of this notice were sent to Smith's address and Cantwell's; both received the notice. A copy of the notice of intent also was sent to Travelers, notifying the insurer of MPP's intent to cancel Smith's policy through its power of attorney.

By certified mail, Traveler's sent a letter headed "Notice of Cancellation — Nonpayment of Premium Financed Policy," explaining that MPP had "exercised its right to cancel th[e] policy as provided in its agreement with [Smith], due to [Smith]'s delinquent payment status." Although the notice of cancellation stated that it was "issue[d]" on 1 February 2007, it back-dated the cancellation to be

effective 25 January 2007. Travelers' notice of cancellation was sent to Smith at the last known address in its file, which was not Smith's then-current address. Smith did not receive the notice; the certified letter was returned undelivered to Travelers on 12 February 2007.

After conducting an audit on 5 March 2007, Travelers returned \$317.00 in unearned premiums to MPP. MPP issued Smith a refund check of \$225.00. Plaintiff cashed the check without contacting anyone but his insurance agent for an explanation of the refund.

Plaintiff began working for Smith around 17 April 2007 as a framer and roofer, working approximately 40 hours a week at \$10.00 an hour. On 20 July 2007, plaintiff fell off the roof on which he was working and injured his left arm. Plaintiff was seen in Mission Hospital's emergency room, where x-rays showed that he had fractured his left humerus and dislocated his left elbow. His elbow was splinted and reduced. On 1 August 2007, plaintiff underwent "open reduction, internal fixation of the humerus, and exploration of the radial nerve."

Plaintiff was released by his doctor to return to sedentary work, without any use of his left arm, on 17 September 2007. On that day, plaintiff filed his claim for workers' compensation benefits. Defendants denied plaintiff's claim "for lack of coverage" on 28 September 2007. Plaintiff did not return to work until 3 January

2008, when he started working for another employer at the same or greater average weekly wage. Plaintiff's doctor assigned a 20% permanent partial impairment rating to his left arm, with lifting restrictions of no more than 40 pounds with his left arm.

After conducting an evidentiary hearing on plaintiff's claim on 29 May 2008, the deputy commissioner entered an opinion and award on 23 December 2008, in which he concluded that plaintiff had sustained a compensable injury on 20 July 2007, and, as a result, was entitled to disability as well as ongoing medical benefits. The deputy commissioner also determined that Travelers had failed to comply with the notice requirements of N.C. Gen. Stat. § 58-36-105 (2009) in attempting to cancel Smith's workers' compensation policy. Thus, the deputy commissioner concluded, Travelers' cancellation was ineffective and the policy was "in full effect" on 20 July 2007.

Defendants appealed to the Full Commission, which issued an amended opinion and award on 19 March 2010, in which the Commission upheld the deputy commissioner's conclusion that plaintiff was entitled to disability and medical benefits as a result his compensable injury. The Commission ruled, however, that N.C. Gen. Stat. § 58-36-105 did not govern the cancellation of Smith's policy and that "Defendant Smith's policy was effectively and properly cancelled pursuant to the power of attorney held by MPP and in accordance with § 58-35-85." Based on this determination, the

Commission held that Smith, not Travelers, was liable for plaintiff's benefits. Plaintiff timely appealed to this Court.

I

Before reaching plaintiff's argument for reversal of the Commission's opinion and award, we address Travelers' contention that plaintiff, as he was awarded all workers' compensation benefits that he claimed, is not a "party aggrieved" by the Commission's decision. The Workers' Compensation Act provides that 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); *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002). Under N.C. Gen. Stat. § 1-271 (2009), "'[a]ny party aggrieved' is entitled to appeal in a civil action." *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 262-63, 664 S.E.2d 569, 574 (2008). A "party aggrieved" is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997). If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed. *Culton v. Culton*, 327 N.C. 624, 626, 398 S.E.2d 323, 325 (1990), *superseded by statute on other grounds as*

recognized in In re J.A.A., 175 N.C. App. 66, 72-73, 623 S.E.2d 45, 49 (2005).

Generally, when an employee has been awarded the benefits to which he or she claimed entitlement under the Workers' Compensation Act, the employee is not aggrieved and lacks standing to appeal the Industrial Commission's decision. *See Henke v. First Colony Builders, Inc.*, 126 N.C. App. 703, 705, 486 S.E.2d 431, 432 (concluding claimant, who had been "granted workers' compensation benefits, as well as attorney's fees" was not aggrieved by Commission's denial of request for interest to be included in payment to her attorney as "[p]laintiff suffer[ed] no direct legal injury in the denial of interest payments to her attorney"), *appeal dismissed, disc. review denied, and cert. denied*, 347 N.C. 266, 493 S.E.2d 455 (1997). Plaintiff acknowledges that the Commission's decision awards him all the benefits he requested, but contends that he is a "party aggrieved" in that "[t]he decision by the Full Commission adversely affects [his] ability to collect his monetary benefits and all but negates his ability to receive further treatment."

Although the parties fail to point to any North Carolina authority — and we have found none — directly on point, other appellate courts that have addressed this issue have held that an employee is "aggrieved" by a workers' compensation tribunal's

determination regarding workers' compensation insurance coverage. See, e.g., *Shope v. Workmen's Comp. Appeals Bd.*, 21 Cal. App. 3d 774, 777, 98 Cal. Rptr. 768, 770 (1971) ("Petitioner was affected by the decision of the Board determining that he had no recovery against Carrier and that he would have to look for recompense to an employer who was no longer in business and whose financial ability to pay the award was problematical. We, therefore, hold that petitioner has standing to have this court review the Board's determination as to the insurance coverage."); *Associated Theaters v. Industrial Acc. Commission*, 57 Cal. App. 105, 107, 206 P. 665, 666 (1922) (holding that employee was a "party aggrieved" entitled to seek review of industrial accident commission's determination that employee's injury was outside the scope of employer's insurance coverage and thus could recover only from employer); *In re Hughes*, 273 P.2d 450, 454 (Okla. 1954) (holding that where benefits for injuries to employee was awarded against employer by an order of the state's industrial commission relieving insurer from liability and there was a possibility that employer would not be able to satisfy award due to lack of assets, employee was a "party aggrieved" with standing to challenge order). Although not controlling, see *Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005) ("[W]hile decisions from other jurisdictions may be instructive, they are not binding on the courts of this State."), we find these

authorities persuasive and conclude that plaintiff is a "party aggrieved" by the Commission's determination that Smith's workers' compensation insurance was properly cancelled.

This conclusion is, moreover, consistent with the long-standing principle that courts "must construe the Work[ers'] Compensation Act liberally so as to effectuate its human purpose of providing compensation for injured employees." *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984); *see also Hughes*, 273 P.2d at 454 ("We think that, under the proper interpretation of our Workmen's Compensation Law, which we are bound to liberally construe in favor of the employee, when the protection of industrial insurance contemplated in the Act is denied such employee by a final order of the State Industrial Commission he certainly is an 'aggrieved' party").

II

Turning to plaintiff's contention on appeal, he argues that the Commission erroneously applied N.C. Gen. Stat. § 58-35-85 (2009), which provides the procedures for cancelling an insurance policy financed by a premium finance agreement, in determining whether Smith's workers' compensation insurance policy was effectively cancelled. Plaintiff contends that the procedures set out in N.C. Gen. Stat. § 58-36-105 for cancelling workers' compensation

insurance policies governed the cancellation of Smith's insurance policy. Because, plaintiff argues, Travelers failed to follow N.C. Gen. Stat. § 58-36-105's requirements in cancelling Smith's policy, the cancellation was ineffective and Smith's workers' compensation policy was in effect on the date of his compensable injury.

Issues involving statutory interpretation are questions of law, reviewed de novo on appeal. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009); *see also Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007) (reviewing de novo determination of which of two competing statutes controlled in workers' compensation case).

N.C. Gen. Stat. § 58-36-105, titled "Certain workers' compensation insurance policy cancellations prohibited," provides in pertinent part:

(a) No policy of workers' compensation insurance or employers' liability insurance written in connection with a policy of workers' compensation insurance shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons:

(1) Nonpayment of premium in accordance with the policy terms.

.

(b) Any cancellation permitted by subsection (a) of this section is not effective unless

written notice of cancellation has been given by registered or certified mail, return receipt requested, to the insured not less than 15 days before the proposed effective date of cancellation. . . . Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed. . . .

N.C. Gen. Stat. § 58-36-105(a) - (b). N.C. Gen. Stat. § 58-35-85 sets out the procedure for cancellation of an insurance policy by an insurance premium finance company:

When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless the cancellation is effectuated in accordance with the following provisions:

(1) Not less than 10 days' written notice is sent by personal delivery, first-class mail, electronic mail, or facsimile transmission to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. Notification thereof shall also be provided to the insurance agent.

(2) After expiration of the 10-day period, the insurance premium finance company shall send the insurer a request for cancellation and shall send notice of the requested cancellation to the insured by personal delivery, first-class mail,

electronic mail, electronic transmission, or facsimile transmission at his last known address as shown on the records of the insurance premium finance company and to the agent. . . .

(3) Upon receipt of a copy of the request for cancellation notice by the insurer, the insurance contract shall be cancelled with the same force and effect as if the request for cancellation had been submitted by the insured, without requiring the return of the insurance contract or contracts.

(4) All statutory, regulatory, and contractual restrictions providing that the insured may not cancel the insurance contract unless the insurer first satisfies the restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, an individual, or a person designated to receive the notice for said governmental agency, insurance carrier, or individual shall apply where cancellation is effected under the provisions of this section.

N.C. Gen. Stat. § 58-35-85(1)-(4).

While the title to N.C. Gen. Stat. § 58-36-105 explicitly provides that the statute applies to workers' compensation insurance policies, this Court, in *Graves v. ABC Roofing Company*, 55 N.C. App. 252, 253-55, 284 S.E.2d 718, 718-19 (1981), held that N.C. Gen. Stat. § 58-35-85's predecessor, N.C. Gen. Stat. § 58-60, applied to workers' compensation policies as well. Thus, both N.C. Gen. Stat. § 58-36-105 and N.C. Gen. Stat. § 58-35-85 appear to be applicable

in this case. The Supreme Court has set out the principles of statutory construction applicable when two statutes overlap:

"Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, . . . unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage."

National Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *Statutes* § 369 (1953)).

Plaintiff contends, and we agree, that N.C. Gen. Stat. § 58-35-85 deals with the cancellation of insurance policies in more "general and comprehensive terms" than N.C. Gen. Stat. § 58-36-105, as it applies to any insurance policy financed through a premium finance agreement that includes a power of attorney provision — irrespective of whether it is, for example, a life, automobile, homeowners', or workers' compensation insurance policy. N.C. Gen. Stat. § 58-36-105, in contrast, specifically, and "in a more minute and definite way," addresses the cancellation of workers'

compensation insurance policies. See *Oxendine*, 184 N.C. App. at 166, 645 S.E.2d at 866 (holding § 58-36-105, which "applies specifically to workers' compensation insurance," controlled over more general statute providing that fraudulent misrepresentations in "any application for a policy of insurance" may preclude recovery).

Travelers nonetheless points to this Court's holding in *Graves*, 55 N.C. App. at 255, 284 S.E.2d at 719, that the insurer "failed to follow the procedure[s]" set out in N.C. Gen. Stat. § 58-60 — the predecessor statute to N.C. Gen. Stat. § 58-35-85 — in cancelling the insured's workers' compensation insurance and thus the insured's policy was in effect at the time of the employee's compensable injury. *Graves*, however, was decided in 1981, 20 years before N.C. Gen. Stat. § 58-36-105's enactment in 2001. See 2001 N.C. Sess. Laws 241 § 2. Consistent with well-established principles of statutory interpretation, we presume that the General Assembly was aware in 2001 of N.C. Gen. Stat. § 58-35-85's applicability to workers' compensation insurance policies in light of *Graves*' holding, and that the legislature's failure to include any reference to N.C. Gen. Stat. § 58-35-85, to premium finance agreements, or to power of attorney provisions in the language of N.C. Gen. Stat. § 58-36-105 was purposeful. See *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) (explaining that "[t]o ascertain

legislative intent," courts must "presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts").

We hold, therefore, that the Commission erred in concluding that "Defendant Smith's policy was effectively and properly cancelled pursuant to the power of attorney held by MPP and in accordance with § 58-35-85." Travelers makes no argument in its brief that if, as we have held, N.C. Gen. Stat. § 58-36-105 is controlling, Travelers complied with that statute's requirements in cancelling Smith's workers' compensation insurance policy. Nor did the Commission, having ruled that N.C. Gen. Stat. § 58-35-85 was the governing statute, address whether Travelers complied with N.C. Gen. Stat. § 58-36-105. We, therefore, reverse and remand this case to the Commission for further proceedings to determine whether Travelers complied with N.C. Gen. Stat. § 58-36-105 in attempting to cancel Smith's workers' compensation insurance policy.

Reversed and remanded.

Chief Judge MARTIN and Judge THIGPEN concur.