

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-1292
NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2011

RICKY CASSTEVENSON,
Employee/Plaintiff,

v.

North Carolina
Industrial Commission
IC File No. 885245

WAKE FOREST UNIVERSITY
HEALTH SERVICES
Employer/Defendant,

and

NORTH CAROLINA BAPTIST
HOSPITAL,
Self-Insured,
Defendant.

Appeal by Plaintiff from opinion and award entered 24 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 March 2011.

Ricky Casstevens, pro se.

Womble Carlyle Sandridge & Rice, by Clayton M. Custer and Gemma L. Saluta, for Defendant-Appellees.

BEASLEY, Judge.

Ricky Casstevens (Employee/Plaintiff) appeals from an Opinion and Award of the North Carolina Industrial Commission.

After a review of the record, we dismiss Plaintiff's appeal for the reasons discussed below.

On 30 January 2008, Plaintiff was employed by Wake Forest University Health Services (Employer/Defendant) as a laboratory animal technician. While engaging in his employment duties, Plaintiff was injured when "a utility vehicle resembling a golf cart" rolled down a hill and pinned him against a gate. Following the accident, Plaintiff was transported to a local hospital for treatment. At the hospital, Plaintiff underwent x-rays and received diagnoses of acute lumbar strain and acute right-sided sciatica with sensory loss.

On 4 February 2008, Plaintiff visited a physician's assistant at Defendant's Employee Health Services, and was diagnosed with "a minor contusion to the forearm, a back sprain/strain, and a minor sprain/strain of his right shoulder." The physician's assistant placed Plaintiff on light duty work restrictions and recommended that he begin attending physical therapy sessions. On 21 February 2008, Plaintiff began receiving temporary total disability compensation.

Over the course of several months Plaintiff participated in physical therapy and sought treatment from a number of different medical professionals. During the course of his treatment, Plaintiff would often assert that the treatment techniques and physical therapy sessions were ineffective, or actually

increased his pain. However, video surveillance reviewed by the Commission at Plaintiff's hearing, depicted Plaintiff participating in a number of physical activities that were inconsistent with Plaintiff's prior descriptions of his physical limitations.

On 24 April 2008, Plaintiff's work restrictions were increased. Defendant informed Plaintiff that it could offer him an employment position that would accommodate the new increased restrictions. Plaintiff refused Defendant's offer. On 28 April 2008, "Defendant denied the compensability of Plaintiff's claim via . . . form 61." In response, Plaintiff filed a Form 33 Request for Hearing in which he alleged that he was entitled to a number of workers' compensation benefits arising from injuries that he sustained on 30 January 2008.

On 13 October 2009, following a hearing, the Deputy Commissioner entered an Opinion and Award in which she concluded that: Plaintiff was not entitled to any additional temporary or permanent disability; Defendant was not responsible for medical treatment of Plaintiff's low back or right shoulder injury past 28 April 2008; and Defendant was to receive a credit on any temporary total disability to Plaintiff due to his receipt of unemployment benefits.

Two days later, Plaintiff submitted notice of his intent to appeal from the Deputy Commissioner's Opinion and Award. On 23

November 2009, the Industrial Commission granted a motion to withdraw filed by Plaintiff's counsel. Transcripts of the Industrial Commission hearing were transmitted to the parties on 3 December 2009. On 16 February 2010, the parties received a calendar for the oral argument that was to occur before the Full Commission. Having not received a Form 44 or accompanying brief from Plaintiff, Defendant moved to dismiss Plaintiff's action, or in the alternative, to dispense with oral argument.

On 28 February 2010, Plaintiff filed a Form 44 and accompanying brief with the Industrial Commission. A copy of this form was sent to Defendant, by a representative of the Industrial Commission on 6 April 2010. Following a hearing, the Full Commission issued an Opinion and Award in which it first denied Defendant's motion to dismiss, and granted Defendant's motion to dispense with oral arguments.

Addressing the merits of Plaintiff's appeal, the Full Commission determined that: Plaintiff sustained a compensable injury in which he aggravated a pre-existing back condition and injured his right shoulder; despite the injury, Plaintiff was not entitled to any temporary total disability compensation after 24 April 2010; and that Defendant was to pay all medical expenses incurred by Plaintiff until 22 July 2008. On 22 June 2010, Plaintiff filed notice of his intent to appeal from the Full Commission's Opinion and Award.

While Plaintiff raises several arguments on appeal, we first address Defendant's contention that the Full Commission erroneously denied its motion to dismiss.

The North Carolina General Assembly has empowered the North Carolina Industrial Commission to promulgate rules, not inconsistent with the Worker's Compensation Act, to carry out the various provisions of the act. *Chaisson v. Simpson*, 195 N.C. App. 463, 473, 673 S.E.2d 149, 158 (2009). "While the construction of statutes adopted by those who execute and administer them is evidence of what they mean, that interpretation is not binding on the courts." *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 433, 444 S.E.2d 191, 195 (1994) (internal quotation marks and citations omitted).

At issue in this case, is the Commission's denial of Defendant's motion to dismiss Plaintiff's appeal for failing to file a Form 44 within the applicable time period. Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission:

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the

grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44.

Workers' Comp. R. of N.C. Indus. Comm'n 701, 2010 Ann. R. (N.C.)

1006. The Workers' Compensation Rules also provide that:

[i]n the interest of justice, these rules may be waived by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.

Workers' Comp. R. of N.C. Indus. Comm'n 801, 2010 Ann. R. (N.C.)

1006. In several recent cases, our Court has reviewed these Rules and their application to facts similar to those presented for review in this case.

In *Roberts v. Wal-Mart Stores, Inc.*, the plaintiff appealed from a decision of the Deputy Commissioner, but failed to file a Form 44 or accompanying brief. 173 N.C. App. 740, 742, 619 S.E.2d 907, 909 (2005). The Full Industrial Commission waived oral arguments and issued an Opinion and Award based upon the record. *Id.* The defendants appealed from the Commission's decision. *Id.* at 743, 619 S.E.2d at 909. On appeal, our Court reversed and vacated the decision of the Full Industrial

Commission. *Id.* at 744, 619 S.E.2d at 910. This Court explained that while the Commission had the authority to waive oral arguments and the requirement that the plaintiff file a Form 44, "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission." *Id.*

In *Wade v. Carolina Brush Mfg. Co.*, a plaintiff, acting *pro se*, failed to file a Form 44 or brief when appealing from a decision of the Deputy Commissioner. 187 N.C. App. 245, 247, 652 S.E.2d 713, 715 (2007). The defendants moved to dismiss the plaintiff's appeal. *Id.* Denying the defendants' motion, the Full Industrial Commission applied Rule 801 and waived the requirement to file a Form 44. *Id.* Vacating and remanding the decision of the Full Industrial Commission, our Court held that "the Commission's application of Rule 801, in light of plaintiff's 'pro se status,' to waive compliance with the provisions of Rule 701 in the interest of justice was an abuse of discretion." *Id.* at 252, 652 S.E.2d at 718. Our Court reasoned that the actions of the Commission were "incompatible with the fundamental right of defendants to notice of the grounds for plaintiff's appeal." *Id.*

In *Soder v. CorVel Corp.*, the plaintiff did not file a Form 44 or brief until after the filing date. ___ N.C. App. ___, 690 S.E.2d 30, 31 (2010). The Full Commission dismissed the

plaintiff's appeal for a failure to "file any documentation identifying the particular grounds for [the] appeal." *Id.* at ___, 690 S.E.2d at 31. After considering *Roberts* and the Commission's interpretation of its own Rule, this Court agreed that Rule 701 required "the *timely* filing of a statement of the grounds for an appeal, and failure to comply with that requirement [would] result in abandonment." *Id.* at ___, 690 S.E.2d at 33 (emphasis added).

In *Soder*, the plaintiff also argued that the Full Commission erred by not suspending strict compliance with the Workers' Compensation Rules pursuant to Rule 801. *Id.* Our Court noted that the Full Commission did not mention any consideration of Rule 801. *Id.* at ___, 690 S.E.2d at 33. Accordingly, this Court reasoned that because the plaintiff failed to obtain a ruling on its Rule 801 motion, the issue was not properly preserved for appellate review. *Id.* at ___, 690 S.E.2d at 34.

In this case, the Full Commission erroneously failed to dismiss Plaintiff's appeal from the Deputy Commissioner. The transcripts from the hearing before the Deputy Commissioner were transmitted on 3 December 2009. Plaintiff failed to file a Form 44 and accompanying brief until 28 February 2008, well after the 25 day filing period. Additionally, in its order denying Defendant's motion to dismiss, the Full Commission based its

reasoning on Rule 701. Plaintiff did not request that the Commission review the merits of his appeal pursuant to Rule 801. The Full Commission's denial of Defendant's dismissal motion was not based upon Rule 801 and this issue is not preserved for appellate review. *See id.* Accordingly, we hold that the Full Commission erroneously denied Plaintiff's motion to dismiss.

While reading Plaintiff's appellate brief, we noticed several violations of the North Carolina Rules of Appellate Procedure. Though not dispositive of the case before this Court for review, we address several concerns. Plaintiff's trial counsel was granted leave to withdraw on 23 November 2009. There is no indication in the record that Plaintiff acquired new counsel before filing his appellate brief with this Court. On review, it appears that Plaintiff wrote only the first two pages of his thirteen page brief filed with this Court. The remainder of Plaintiff's appellate brief appears to be a copy of a brief submitted by Plaintiff's former counsel for consideration by the Deputy Commissioner. On appeal, Plaintiff does not indicate that the second half of his appellate brief was written by his former counsel. Additionally, the only signature page included anywhere in Plaintiff's brief was the one signed by his former counsel in the document submitted to the Deputy Commissioner.

The North Carolina Rules of Appellate Procedure require that every brief filed by an appellant include an

"[i]dentification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address." N.C.R. App. P. 28(b)(8). Undoubtedly, this rule requires *pro se* appellants to sign briefs submitted to this Court. Moreover, the Rules of Appellate Procedure provide that "[t]he signature of an attorney on a . . . brief . . . constitutes entry of the attorney as counsel of record for the parties designated and a certification that the attorney represents such parties." N.C.R. App. P. 33(a).

Plaintiff's failure to sign his brief and inclusion of the signature page from former counsel constitute violations of the Rules of Appellate Procedure. Because we have already concluded that Plaintiff's dismissal is appropriate for failing to file a Form 44, we do not think it necessary to determine whether Plaintiff's violations rise to the level of "substantial failure" or "gross violation." See *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008). We caution Plaintiff, along with future *pro se* appellants, to carefully review the North Carolina Rules of Appellate Procedure before filing appellate briefs.

Dismissed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).