

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-1396
NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2013

KENNETH R. McNEILL,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. Nos. W61904
PH-2513

SHAWN McNEILL and/or GARNIE
McNEILL d/b/a FERRELL'S
CONSTRUCTION and/or
FERRELLS' CONSTRUCTION,
Employer,

NONINSURED, and SHAWN McNEILL
and/or GARNIE McNEILL,
Individually,

and/or TRAVELERS,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 30 July
2012 by the North Carolina Industrial Commission. Heard in the
Court of Appeals 25 April 2013.

*Greg Jones & Associates, by Cameron D. Simmons, for
plaintiff-appellant.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Shelley W.
Coleman and M. Duane Jones, for defendant-appellee
Travelers.*

*No brief filed on behalf of defendants-appellees Shawn
McNeill and Garnie McNeill.*

GEER, Judge.

Plaintiff Kenneth R. McNeill appeals from an opinion and award of the North Carolina Industrial Commission concluding that defendant Travelers had properly canceled the workers' compensation insurance policy of plaintiff's employer, defendant Shawn McNeill, and, therefore, was not providing workers' compensation insurance coverage to plaintiff's employer on the date of plaintiff's workplace injury. We hold that plaintiff's appeal is interlocutory and, since plaintiff does not argue that his appeal affects a substantial right, we dismiss the appeal.

Facts

On 6 January 2010, defendant employer Shawn McNeill completed an "Employer's Report of Employee's Injury" form stating that plaintiff fractured his foot while pulling plywood on 30 December 2009. Also on 6 January 2010, the carrier denied plaintiff's claim on the grounds that the carrier had cancelled any workers' compensation coverage on 17 November 2009, prior to the alleged date of injury. On 19 January 2010, plaintiff filed a "Notice of Accident to Employer and Claim of Employee" regarding the same accident, which stated plaintiff broke his heel in three places while roofing.

Plaintiff's request that the claim be assigned for hearing was filed on 28 January 2010. The deputy commissioner "instructed the parties to brief just the coverage issue" and

limited his opinion and award to the issue whether there was valid coverage in place at the time of plaintiff's injury. That opinion and award found that defendant Travelers had issued a policy effective on the date of plaintiff's injury. Although Travelers had subsequently purported to cancel the policy, the deputy commissioner concluded that the cancellation was ineffective under N.C. Gen. Stat. § 58-36-105, and, therefore, Travelers was required to provide coverage for plaintiff's injury.

The deputy commissioner, however, "reserve[d] any award until further findings of fact can be had on the merits of this case." He ordered: "This case shall be reset on the Undersigned's Fayetteville, North Carolina hearing docket as further testimony must be taken on Plaintiff's disability and entitlement to medical compensation."

Defendant Travelers appealed to the Full Commission, and, on 30 July 2012, the Commission entered an opinion and award reversing the deputy commissioner's opinion and award. The Commission addressed only coverage issues and concluded that, under N.C. Gen. Stat. § 58-36-105, defendant Travelers effectively cancelled its policy prior to the date of plaintiff's injury and, therefore, was not liable. The Commission remanded the case to the deputy commissioner "for a

penalty hearing pursuant to N.C. GEN. STAT. §97-94 for failing to maintain workers' compensation insurance coverage in accordance with N.C. GEN. STAT. §97-93." Plaintiff timely appealed to this Court.

Discussion

We must first address this Court's jurisdiction to hear plaintiff's appeal. "[A]n order and award from the Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case." *Plummer v. Kearney*, 108 N.C. App. 310, 312-13, 423 S.E.2d 526, 528 (1992). In *Plummer*, the plaintiff appealed from the Commission's opinion and award addressing only coverage, and "the record d[id] not reveal that the Commission ha[d] decided whether [the plaintiff] was in fact injured, the nature and extent of his injury, if any, or whether the injury occurred in the scope and in the course of his employment." *Id.* at 314, 423 S.E.2d at 529. Under those circumstances, this Court dismissed the appeal as interlocutory despite the fact that "the Deputy Commissioner and the parties agreed to generate a record by stipulation from which findings of fact and conclusions of law could be made as to the coverage issue only." *Id.*

Plummer controls this case. The Commission's opinion and award addressed only coverage, and there is no indication in the

record that the Commission determined whether plaintiff sustained a compensable injury or the amount of compensation, if any, to which plaintiff is entitled. Therefore, as in *Plummer*, plaintiff's appeal is interlocutory.

"[I]nterlocutory orders are generally not appealable." *Id.* at 313, 423 S.E.2d at 529. However, "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (internal quotation marks omitted).

In his Statement of Grounds for Appellate Review, plaintiff does not address the interlocutory nature of his appeal, but rather asserts in his brief that "[t]he Full Commission's 7/30/12 Opinion & Award is a final judgment" While it may be that plaintiff could have argued that he would lose a substantial right in the absence of an immediate appeal, he did not do so. This Court has held: "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Because plaintiff has made no substantial right argument, he has failed to meet his burden of showing that this Court has jurisdiction. We are, therefore, required to dismiss plaintiff's appeal.

Dismissed.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).