NO. COA12-1272
NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2013

HERBERT LEAKE,
Employee,
Plaintiff

v.

From the North Carolina Industrial Commission
I.C. No. X67191

NORTH CAROLINA DEPARTMENT OF CORRECTION,
Employer,
and
CORVEL,
Carrier,
Defendants

Appeal by plaintiff from interlocutory order entered 28 June 2012 by the Industrial Commission. Heard in the Court of Appeals 14 March 2013.

Kathleen G. Sumner for plaintiff-appellant.

Roy Cooper, Attorney General, by Lora C. Cubbage, Assistant Attorney General, for defendant-appellee.

STEELMAN, Judge.

Plaintiff's rights to worker's compensation benefits are statutory, and not constitutional. Where plaintiff fails to

demonstrate a substantial right affected by the denial of his motion to change treating physicians, his appeal is dismissed.

I. Factual and Procedural History

On 9 October 2011, Herbert Leake (plaintiff) sustained an injury to his back, neck, and shoulders while at work as a correctional officer at Harnett Correctional Center (HCC). On 12 October 2011, HCC filed a Form 19 with the Industrial Commission. On 9 November 2011, plaintiff filed an amended notice of his accident, and a Form 33 request for a hearing.

On 16 March 2012,[1] HCC filed a Form 60 admitting plaintiff's right to compensation for his 9 October 2011 injury.

On 30 April 2012, plaintiff filed a motion for change in treating physician with the Industrial Commission. Plaintiff contended that the North Carolina Department of Corrections and Corvel, its insurance carrier (collectively, defendants) had refused to accept or deny his worker's compensation claim. Plaintiff further contended that although he "has done everything to comply with defendants[,]" he received no compensation and "the medical providers selected by defendants, other than Dr. Allen, have refused to treat him." Plaintiff

[1] The form is actually dated 16 March 2011. As this date is prior to the date of injury, we assume the date on the form was in error.

sought to have Dr. James North approved as his authorized treating physician.

On 11 May 2012, a telephone conference was held before Deputy Commissioner Theresa B. Stephenson on plaintiff's motion for change in treating physician. On 22 May 2012, Deputy Commissioner Stephenson denied plaintiff's request to transfer his medical care to Dr. North. On 24 May 2012, plaintiff filed another Form 33, and gave notice of appeal of Deputy Commissioner Stephenson's order to the Full Commission.

On 26 June 2012, a telephone conference was held with the Full Commission. On 28 June 2012, the Full Commission affirmed Deputy Commissioner Stephenson's order, and denied plaintiff's request to change his authorized treating physician to Dr. North.

On 25 July 2012, plaintiff gave notice of appeal to this Court. Plaintiff requested that the Industrial Commission certify constitutional issues raised in his notice of appeal to the Court of Appeals. On 18 August 2012, the Industrial Commission entered an order denying plaintiff's motion to certify his appeal to the Court of Appeals.

This matter is before this Court upon plaintiff's appeal of the Industrial Commission's order denying his request to change his treating physician.

II. Appeal of an Interlocutory Order

We must first determine whether plaintiff's appeal of the Industrial Commission's order is properly before us.

A. Standard of Review

> "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. Parties have a right to appeal any final judgment of a superior court. Thus, an appeal of right arises only from a final order or decision of the Industrial Commission." ***Ratchford v. C.C. Mangum, Inc.***, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002) (internal citations and quotation marks omitted). A decision of the Industrial Commission "is interlocutory if it determines one but not all of the issues in a workers' compensation case." ***Id.*** A decision that "on its face contemplates further proceedings or which does not fully dispose of the pending stage of the litigation is interlocutory." ***Watts v. Hemlock Homes of the Highlands, Inc.***, 160 N.C. App. 81, 84, 584 S.E.2d 97, 99 (2003).

Perry v. N.C. Dep't of Corr., 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006).

> Nevertheless, an appeal from an interlocutory order may be proper when the

> order from which appeal is taken affects a substantial right of the appellant. N.C. Gen. Stat. §§ 7A-27(d) (1999); 1-277 (1999). This exception requires that the interlocutory order being appealed affect a right of the appellant which is a substantial one, the deprivation of which will potentially result in injury to the appellant if the order is not reviewed before final judgment. *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992); *see Plummer v. Kearney*, 108 N.C. App. 310, 423 S.E.2d 526 (1992) (applying substantial right analysis to workers' compensation case). Whether an order affects a substantial right is a case-by-case determination made by weighing the specific facts and procedural context. *Id.* "The party desiring an immediate appeal of an interlocutory order bears the burden of showing that such appeal is necessary to prevent loss of a substantial right." *Mills Pointe Homeowner's Association, Inc. v. Whitmire*, 146 N.C. App. 297, 299, 551 S.E.2d 924, 926 (2001) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). In *Jeffreys*, this Court stated that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order." 115 N.C. App. at 380, 444 S.E.2d at 254.

Ratchford v. C.C. Mangum Inc., 150 N.C. App. 197, 200, 564 S.E.2d 245, 247-48 (2002).

B. Analysis

On appeal, plaintiff contends that N.C. Gen. Stat. § 97-25 violates plaintiff's constitutional rights to due process and

equal protection, or alternatively that the Industrial Commission misapplied N.C. Gen. Stat. § 97-25.

N.C. Gen. Stat. § 97-25 provides:

> [I]f the employee so desires, an injured employee may select a health care provider of the employee's own choosing to attend, prescribe, and assume the care and charge of the employee's case subject to the approval of the Industrial Commission. In addition, in case of a controversy arising between the employer and the employee, the Industrial Commission may order necessary treatment. In order for the Commission to grant an employee's request to change treatment or health care provider, the employee must show by a preponderance of the evidence that the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability.

N.C. Gen. Stat. § 97-25 (2011). Plaintiff contends that this statute is unconstitutional as applied, because "the Commission refuses to approve the requests by the employee when they comply with the requirements of the Act and there is no way for the employee to produce further evidence during the expedited medical motion process because testimony is forbidden." Plaintiff contends that the fact that he has complied with Industrial Commission procedures and yet his motion to change his treating physician is denied violates his substantial rights to equal protection and due process.

Plaintiff contends that his right to relief under N.C. Gen. Stat. § 97-25 is a "constitutional right." However, worker's compensation is not a constitutional right; it is statutory in origin. This same statute vests discretion to grant or deny compensation in the Industrial Commission, which is itself a creature of statute. *See Buckner v. City of Asheville*, 113 N.C. App. 354, 360, 438 S.E.2d 467, 470 (1994) (holding that "[t]he Commission is not a court of general jurisdiction; its only jurisdiction being that "conferred upon it by statute.") (quoting *Bryant v. Dougherty,* 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966)).

We have previously held that:

> This provision [N.C. Gen. Stat. § 97-25] gives an injured employee, even in the absence of emergency, the right to choose her own physician. *See Schofield v. Great Atlantic & Pacific Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980). However, that right is subject to the Commission's approval of that physician. *Id.*; *Lucas v. Thomas Built Buses, Inc.*, 88 N.C. App. 587, 364 S.E.2d 147 (1988).
>
> The Commission has discretion to approve an injured employee's request for approval of a physician. *Kanipe*, 141 N.C. App. at 626, 540 S.E.2d at 789; *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (1996).

Lakey v. U.S. Airways, Inc., 155 N.C. App. 169, 173-74, 573 S.E.2d 703, 707 (2002). Plaintiff has not shown an abuse of the Commission's discretion, nor has plaintiff pointed us to any authority which would suggest that the right to worker's compensation and medical treatment is anything other than statutory.

Apart from his bombastic constitutional arguments, plaintiff fails to identify a substantial right that has been affected by the denial of his motion to change his treating physician.

We dismiss plaintiff's appeal as interlocutory.

DISMISSED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).