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NO. COA10-249

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

JULIA L. DAWES,
Plaintiff

v. From the Industrial Commission
I.C. No. 473729

AUTUMN CARE OF MARSHVILLE,
Employer

and

KEY RISK MANAGEMENT SERVICES,
Insurer,

Defendants

Appeal by Defendants from Opinion and Award entered 3 December 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 September 2010.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Shelley W. Coleman, and M. Duane Jones, for Defendants.

ERVIN, Judge.

Defendants Autumn Corporation and Key Risk Management Services appeal from an Opinion and Award entered by Commissioner Danny Lee McDonald, with the concurrence of former Commissioner Dianne C. Sellers and Commissioner Christopher Scott, directing that a medical examination be performed in order to enable the Commission

to resolve the "existence and compensability of Plaintiff's possible injuries to her left knee and leg." After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude that Defendants' appeal has been taken from an unappealable interlocutory order and must be dismissed.

I. Factual Background

Plaintiff was employed by Defendant Autumn Care of Marshville as a Certified Nursing Assistant from 16 December 2002 until 21 December 2005. According to a stipulation between the parties, "Plaintiff sustained a compensable injury on October 16, 2004 when a large patient fell on her, spraining and fracturing her left ankle." Although Defendants treated Plaintiff's ankle-related injuries as compensable, they denied the compensability of the injuries that Plaintiff allegedly sustained to her left knee and leg on the grounds that these injuries were not caused by the 16 October 2004 accident. On 11 January 2006, Defendants filed a Form 33 Request for Hearing, noting, in pertinent part, that the parties disagreed about the "existence and compensability" of Plaintiff's left knee and leg injuries.

After a hearing conducted on 26 October 2006, Deputy Commissioner J. Brad Donovan issued an Opinion and Award dated 11 May 2007 addressing Plaintiff's claim. At that time, Deputy Commissioner Donovan denied Plaintiff's claim for additional temporary total disability benefits, but awarded Plaintiff medical and permanent partial disability benefits. Plaintiff noted an

appeal to the Commission from Deputy Commissioner Donovan's order. On 3 December 2007, the Commission issued an Opinion and Award in which it concluded, among other things: that Plaintiff had received all of the temporary total disability compensation to which she was entitled; that Plaintiff reached maximum medical improvement on 19 July 2005 and; that Plaintiff was entitled to medical benefits to "pay for medical expenses incurred or to be incurred as a result of the compensable injury." Plaintiff noted an appeal to this Court from the Commission's order.

On 6 January 2009, this Court filed an unpublished opinion in *Dawes v. Autumn Care of Marshville*, 194 N.C. App. 820, 671 S.E.2d 598 (2009). At that time, we affirmed the Commission's determination that Plaintiff had reached maximum medical improvement with respect to her ankle injury. On the other hand, we reversed the Commission's conclusion that there was no evidence tending to show that Plaintiff's current condition was disabling. After noting that the Commission "'has the duty and responsibility to decide all matters in controversy between the parties, and, if necessary, the [F]ull Commission must resolve matters in controversy even if those matters were not addressed by the deputy commissioner,'" we stated that:

[P]laintiff argues that the Commission erred by failing to address plaintiff's argument that she is entitled to further medical treatment. We agree. . . . [T]he Full Commission failed to resolve the disputed issues[.] . . . Accordingly, we are constrained to remand to the Full Commission for resolution of the existence and compensability of plaintiff's possible injuries to her left knee and leg.

Id. (quoting *Perkins v. U.S. Airways*, 177 N.C. App. 205, 215, 628 S.E.2d 402, 408 (2006), *disc. rev. denied*, 361 N.C. 356, 644 S.E.2d 231 (2007)).

On remand, the Commission "reopened the record to allow the parties to submit additional briefs . . . which were received on May 18, 2009." On 3 December 2009, the Commission filed an Opinion and Award finding, in pertinent part, that Plaintiff sustained a compensable injury on 16 October 2004 and that she reached maximum medical improvement with respect to her ankle on 19 July 2005. The Commission also found that:

12. At the hearing, Plaintiff testified that this accident affected her left knee. She testified that when she fell, she struck her left knee on the cement, and that since the accident, it gives out and forces her to catch herself. . . . Plaintiff's testimony as to her left knee that was injured in this accident is corroborated by her physical therapy records immediately following the accident. These records reflect that Plaintiff was complaining of left knee pain and that she received treatment for her left knee at physical therapy. While these records reflect that Plaintiff had some pre-existing left knee problems, her testimony that her knee never went back to its pre-accident level is credible and shows that any pre-existing condition in her left knee was exacerbated by this fall. Plaintiff's left knee injury has never been evaluated for its relatedness to her compensable accident.

Based on its findings of fact, the Commission concluded that:

1. Plaintiff sustained an injury by accident arising out of and in the course of her employment on October 16, 2004. N.C. Gen. Stat. § 97-2(6).

2. Plaintiff reached maximum medical improvement from her ankle injury from her compensable accident on July 19, 2005. . . .

3. Plaintiff was terminated for reasons any non-injured employee would have been terminated [for]. . . .

4. Plaintiff is entitled to have defendants pay for medical expenses incurred or to be incurred as a result of the compensable injury. . . .

5. The Court of Appeals mandate requires "the Full Commission [to resolve] the existence and compensability of plaintiff's possible injuries to her left knee and leg" The competent evidence of record shows that she struck her left knee on the ground when her compensable accident occurred and that it has remained swollen and painful since that time, not returning to her baseline condition prior to her injury. An expert evaluation would be probative on the issue of causation and should be ordered and, if [causation is] established or found [the evaluation should include] the type of treatment which may be required to provide relief, effect a cure or lessen the period of disability. . . .

6. Determining whether plaintiff has reached maximum medical improvement . . . can not be determined until the evaluation of her left knee is completed as maximum medical improvement requires evaluation of all medical conditions caused by the injury by accident. . . . Therefore, any determination as to whether Plaintiff should receive benefits under [§] 97-30 or [§] 97-31 of the General Statutes is reserved for a later time.

As a result, the Commission ordered that:

1. Defendants shall authorize and pay for a second opinion on Plaintiff's rating to her left foot with the physician of her choosing to evaluate, test, make treatment recommendations and treat.

2. Plaintiff and Defendants shall confer and recommend a physician to evaluate plaintiff's left knee. If the parties are unable to agree, each party shall submit the name of [a] qualified physician. The parties

shall complete this mandate within fourteen (14) days of the date of this Award.

3. Defendants shall pay for medical treatment for Plaintiff's left foot and ankle as may be required to provide relief, effect a cure or lessen the period of disability.

Defendants noted an appeal to this Court from the Commission's decision.

II. Legal Analysis

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2009). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "An interlocutory order is generally not immediately appealable." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citing *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999)). However:

[A] party is permitted to appeal from an interlocutory order when "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." . . . [I]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting *Southern Uniform Rentals v. Iowa*

Nat'l Mutual Ins. Co., 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988), and citing N.C. Gen. Stat. § 1-277).

This Court has stated with respect to the appealability of interlocutory Commission orders that:

N.C. Gen. Stat. § 97-86 . . . provides that any party . . . may "appeal from the decision of [the] Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." . . . "Thus, an appeal of right arises only from a final order or decision of the Industrial Commission." . . . "A decision that on its face contemplates further proceedings or . . . does not fully dispose of the pending stage of the litigation is interlocutory." Even where a decision is interlocutory, however, immediate review of the issue is proper where the interlocutory decision affects a substantial right. To qualify, the right affected must be substantial, and "the deprivation of that substantial right must potentially work injury if not corrected before appeal from a final judgment."

Cash v. Lincare Holdings, 181 N.C. App. 259, 263, 639 S.E.2d 9, 13 (2007) (quoting *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002), and *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006)).

In its order, the Commission noted our mandate directing it to resolve the issues pertaining to Plaintiff's claim for compensation relating to the injuries that she allegedly sustained to her left leg and knee and concluded that an expert medical examination would be helpful in resolving the issue of whether Plaintiff's injuries to her left leg and knee resulted from the 16 October 2004 compensable accident. The Commission also specifically reserved

its decision with respect to the issue of whether Plaintiff's left leg and knee had reached maximum medical improvement until after the completion of the required medical examination. As a result, given that it contemplates the necessity for further proceedings after the required medical examination has been conducted, the Commission's order is clearly interlocutory in nature.

In their brief, Defendants incorrectly assert that their appeal has been taken from a final Commission order. As a result, Defendants neither acknowledge that they have attempted to appeal from an interlocutory order nor assert that a failure to permit immediate appellate review of the Commission's order will deprive them of a substantial right. Instead, Defendants simply attack the Commission's order on the merits, arguing that it is legally defective because the Commission failed to resolve the causation issue on the basis of the existing record and did not conclude, considering only the existing evidentiary record, that Plaintiff's left leg and knee condition did not stem from the 16 October 2004 accident. "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*, 115 N.C. App. at 380, 444 S.E.2d at 254. Defendants have failed to demonstrate that they have a right to take an interlocutory appeal from the Commission's order. Furthermore, even though we are not required

to examine this issue independently, our review of the record demonstrates that no substantial right of Defendants' will be lost by declining to hear Defendants' appeal at this time. *Berardi v. Craven County Schools*, __ N.C. App. __, __, 688 S.E.2d 115, 117, *disc. review denied*, 364 N.C. 128, 695 S.E.2d 755 (2010) (holding that an attempted appeal from a Commission order entered in compliance with the Expedited Medical Motion Procedure adopted pursuant to N.C. Gen. Stat. §§ 97-78(f) and (g), predicated on the theory that "the medical conditions of which plaintiff complains were not caused by a compensable injury," did not affect a substantial right and was not immediately appealable). Thus, Defendants have no right to appeal from the Commission's order at this time.

III. Conclusion

Therefore, for the reasons stated above, we conclude that Defendants have attempted to appeal from an unappealable interlocutory order in this case. In light of that determination, we have no jurisdiction over Defendants' appeal. Thus, Defendants' appeal should be, and hereby is, dismissed.

DISMISSED.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).