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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-42

Filed 15 October 2024

N.C. Industrial Commission, I.C. No. 18-737155

ISRRAEL AGUILAR GUZMAN, Employee, Plaintiff,

v.

TRIPLE P ROOFING, Employer, Alleged Non-Insured, BUILDERS MUTUAL INSURANCE COMPANY (TRAVELERS INSURANCE COMPANY, Third-Party Administrator), Alleged Carrier, and H&S ROOFING CO., INC, Alleged Statutory Employer, BUILDERS MUTUAL INSURANCE GROUP, Carrier for Alleged Statutory Employer, Defendants.

NORTH CAROLINA INDUSTRIAL COMMISSION, Plaintiff/Petitioner,

v.

TRIPLE P ROOFING, INC., Employer, ALLEGED NONINSURED, and EPITACIO GERONIMO PONCE, Individually, Defendants/Respondents.

Appeal by plaintiff from order by the North Carolina Industrial Commission entered on 25 September 2023. Heard in the Court of Appeals 12 June 2024.

*Teague Rotenstreich Stanaland Fox & Holt, P.L.L.C., by Savannah E. Fox, Kara V. Bordman, and Kenneth B. Rotenstreich, and The Law Office of Mallory G. Horne, by Mallory G. Horne, for plaintiffs-appellants.*

*Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Neil P. Andrews, and Robert L. Creech, for defendant-appellee Builders Mutual Insurance Company and Travelers Insurance Company.*

DILLON, Chief Judge.

I. Background

This matter involves a claim by Plaintiff Isrrael Aguilar Guzman for workers' compensation coverage for a workplace accident which occurred on 3 July 2018. This appeal is interlocutory and concerns only the dismissal of claims against the insurance company Plaintiff contends was providing workers' compensation coverage for his employer at the time of the accident.

Sometime prior to 3 July 2018, Defendant H&S Roofing Co., Inc. ("Contractor") was retained to serve as a commercial roofing contractor on a particular job in Charlotte. Contractor retained Defendant Triple P Roofing ("Subcontractor") to perform a portion of the roofing work on that job. Plaintiff was employed by Subcontractor to work on the Charlotte job.

Defendant Builders Mutual Insurance Company ("Subcontractor's Insurer") had been providing workers' compensation coverage for Subcontractor but had cancelled the coverage on 1 June 2018 due to non-payment of premium.

On 3 July 2018, the month after Subcontractor's Insurer cancelled coverage, Plaintiff suffered a catastrophic injury when he fell off a roof while working on the Charlotte job.

On 13 July 2018, Plaintiff filed a workers' compensation claim in the Industrial Commission against Subcontractor and Contractor.

On 1 October 2019, the deputy commissioner presiding granted the motion to dismiss filed by Subcontractor's Insurer (based on the fact that the insurer was not providing coverage on the date of the accident). On 24 October 2019, the deputy commissioner granted the motion to dismiss filed by Contractor (and Contractor's insurance company) based on the lack of any showing of an employer-employee relationship between Plaintiff and Contractor, thus leaving Subcontractor as the only party-Defendant.

Plaintiff appealed both October orders to the Full Commission. However, by order entered 6 December 2019, the Full Commission denied Plaintiff's request for immediate appeals to the Full Commission, as Plaintiff's appeals were interlocutory. The Commission had not yet ruled on the compensability of Plaintiff's claim but only dismissed certain Defendants.

On 13 July 2022, after a hearing on the matter, the deputy commissioner filed an Opinion and Award, finding that Plaintiff suffered a compensable injury and awarding Plaintiff compensation against Subcontractor.

On 28 July 2022, Plaintiff filed a Notice of Appeal to the Full Commission "from the Opinion and Award/Order filed on 24 October 2019 [which was the deputy commissioner's Order dismissing the claims against the Contractor]." Plaintiff's

Notice of Appeal did not reference the 1 October 2019 Order dismissing the claims against the Subcontractor's Insurer or the 13 July 2022 Opinion and Award.

On 4 October 2022, Plaintiff filed Form 44 with Exhibit A, which listed the errors for which review was requested. Subcontractor's Insurer subsequently filed a Motion to Dismiss Appeal for any claims against it.

On 25 September 2023, the Full Commission in part granted Subcontractor's Insurer's motion (the "2023 Order"), concluding Plaintiff "failed to specifically appeal the October 1, 2019, Order, or the final July 13, 2022, Opinion and Award." However, the 2023 Order also vacated the October 24, 2019, Administrative Order dismissing Plaintiff's claim against Defendants Contractor and its insurer. Plaintiff appeals.

## II. Appellate Jurisdiction

This appeal is from an interlocutory order. Plaintiff argues that our Court has jurisdiction to hear this appeal, contending the 2023 Order affects a substantial right—namely, the right to avoid inconsistent verdicts.

Our Supreme Court has recognized that there can be a substantial right to avoid multiple trials on the same issues that create the possibility of inconsistent verdicts. *See Green v. Duke Power Co.*, 305 N.C. 603, 608 (1982).

Here, Plaintiff argues that the 2023 Order dismissing Subcontractor's Insurer from this proceeding could result in inconsistent verdicts. We agree. Therefore, we conclude that we have jurisdiction to consider Plaintiff's appeal. To the extent we do not have jurisdiction, we grant *certiorari* to consider Plaintiff's appeal.

III. Analysis

Plaintiff makes essentially two arguments on appeal, which we will address in turn.

A. Commission Granting Subcontractor’s Insurer’s Motion to Dismiss Appeal

Plaintiff argues that the Full Commission erred by concluding the Plaintiff did not properly appeal to the Full Commission from the deputy commissioner’s 1 October 2019 Order. He contends that his intent to appeal from the 1 October 2019 Order could be “fairly inferred” from his appeal.

An order by a deputy commissioner may be appealed to the Full Commission if an application for review of the order is filed within fifteen days from the date when notice of the order shall have been given. N.C.G.S. § 97-85 (2024). And “[a] letter requesting review shall be considered an application for review . . . provided that the letter specifies the Order or Opinion and Award from which appeal is taken.” 11 N.C. Admin. Code 23A.0701(a) (2024). Rule 701 ensures that the appellee is on sufficient notice of the appeal and of the specific issues to be addressed. *See Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744 (2005) (“Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission.”).

Plaintiff opted to send a letter as his notice of appeal to the Full Commission. Specifically, the letter stated as follows:

Please accept this letter as Plaintiff's Notice of Appeal from the Opinion and Award/Order filed on October 24, 2019. By copy of this letter, we are notifying Defendants of the appeal as set forth below.

Plaintiff contends that this letter put Subcontractor's Insurer on notice because it could be "fairly inferred" that he was challenging, in part, the dismissal of his claims against it. We disagree.

Plaintiff could have appealed from the final award of the deputy commissioner (the July 2022 Opinion and Award, finding Subcontractor liable), as *that* final order encompasses all interlocutory orders, including the 1 October 2019 order dismissing his claims against the Subcontractor's Insurer. Instead, Plaintiff only specifically references the 24 October 2019 order (dismissing the claims against the Contractor) in his appeal notice. A fair reading of the Notice of Appeal indicates that Plaintiff was only appealing the 24 October 2019 order. Therefore, we determine there is sufficient evidence to support the Full Commission's order dismissing the Plaintiff's appeal against Subcontractor's Insurer.

#### B. Failure to Rule on Rule 60 Motion

Plaintiff argues that the Full Commission erred by failing to rule on its Rule 60 motion. Specifically, in November 2022, after Subcontractor Insurer's motion to dismiss was pending at the Full Commission, Plaintiff filed a motion pursuant to Rule 60 of our Rules of Civil Procedure, asking the Full Commission to set aside the 1

October 2019 Order of the deputy commissioner. Plaintiff filed this motion as an alternate means by which to resurrect its claims against the Subcontractor's Insurer, should the Full Commission otherwise determine that his notice of appeal to the Full Commission failed to properly notice an appeal from the dismissal of his claims against the Subcontractor's Insurer.

We have held that

[t]he Commission has the power to set aside a judgment when there is mistake, inadvertence, surprise, or excusable neglect, or on the grounds of mutual mistake, misrepresentation, or fraud. The power of the Commission to set aside former judgments is analogous to that conferred upon the courts by N.C.R. Civ. P. 60(b)(6) and the remedy the Commission may provide is related to that traditionally available at common law and equity and codified by Rule 60(b). This power includes the ability to set aside judgments even when a party has not made a motion to do so.

*Carroll v. Living Ctrs. Se., Inc.*, 157 N.C. App. 116, 120 (2003) (cleaned up).

The Plaintiff argues that the Rule 60 Motion should have been granted under excusable neglect, namely his neglect to properly reference the correct order from which he was appealing to the Full Commission. However, Plaintiff's Rule 60 Motion does not identify any order from the Full Commission from which he was seeking relief. Indeed, at the time Plaintiff filed his Rule 60 motion, the Full Commission had not yet ruled on Subcontractor's Insurer's motion to dismiss.

We conclude that the Full Commission did not reversibly err by failing to expressly rule on Plaintiff's Rule 60 motion.

GUZMAN V. TRIPLE P ROOFING

*Opinion of the Court*

AFFIRMED.

Judges GORE and THOMPSON concur.

Report per Rule 30(e).