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NO. COA06-35

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

ANDREW GOETZ and CATHERINE GOETZ,
Personal Representatives and
Guardians *Ad Litem* for HAYDEN L.
GOETZ, Minor Child,

Plaintiff,

v.

Industrial Commission
I.C. No. V-00021

WYETH-LEDERLE VACCINES and N.C.
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Defendants.

Appeal by defendants from decision and order entered 29 December 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Laura J. Gendy, for defendant-appellant North Carolina Department of Health and Human Services.

Wallace, Nordan & Sarda, L.L.P., by Peter J. Sarda, for plaintiff-appellee.

ELMORE, Judge.

The North Carolina Department of Health and Human Services (defendant or DHHS) appeals from a decision and order filed 29 August 2005 by the North Carolina Industrial Commission (Commission), concluding that plaintiffs are entitled to

compensation under the North Carolina Childhood Vaccine-Related Injury Compensation Program, N.C. Gen. Stat. §§ 130A-422 to -434 (2006), for a vaccine-related injury sustained by Hayden L. Goetz. Because the decision and order is not a final order subject to appeal under N.C. Gen. Stat. § 7A-29 (2006), we dismiss the appeal for want of jurisdiction.

As recounted in *Goetz v. Wyeth-Lederle Vaccines*, 168 N.C. App. 712, 714, 608 S.E.2d 810, 811 (2005), Hayden, the minor child of Andrew and Catherine Goetz, experienced fevers ranging from 102-106 degrees and other symptoms after receiving doses of diphtheria/pertussis/tetanus (DPT) vaccine on 6 July, 31 August, and 19 November 1993. The vaccine was manufactured by Wyeth-Lederle Vaccine's predecessor, Lederle Labs. Following the second and third doses of the vaccine, the Goetzes noticed that Hayden was lethargic, walked with a limp, and exhibited developmental delays. See *id.* at 714, 608 S.E.2d at 811. In 1996, three-year-old Hayden was diagnosed with "static encephalopathy" and mental retardation. See *id.*

After exhausting their federal remedies under the National Vaccine Injury's Compensation Program, claimants sought relief under the North Carolina Childhood Vaccine-Related Injury Compensation Program. See *Goetz*, 168 N.C. App. at 714, 608 S.E.2d at 811. A deputy commissioner denied their claim in March, 2003, whereupon they appealed to the full Commission pursuant to N.C. Gen. Stat. § 130A-428(b). One of the three commissioners who heard oral arguments in the cause recused himself prior to reviewing the

appeal. See *id.* The two remaining commissioners reviewed claimant's appeal and denied their claim in a Decision and Order filed 15 December 2003.

On appeal, this Court held that "the review of claimants' appeal by only two commissioners violated N.C. Gen. Stat. § 130A-428(b) and made the 'Decision and Order' invalid as a matter of law." *Goetz*, 168 N.C. App. at 717, 608 S.E.2d at 813. We vacated the Commission's Decision and Order and remanded for a new hearing before "'the Commission, sitting as a *full commission* . . . [,]' meaning a panel of three commissioners.'" *Id.* at 716, 608 S.E.2d at 813 (quoting N.C. Gen. Stat. § 130A-428(b) (2005)) (alteration in original).

On remand from our decision in *Goetz*, the Commission entered the instant Decision and Order on 29 August 2005, concluding that claimants:

are entitled to damages for a vaccine-related injury sustained by their child, Hayden, when he had an allergic reaction to the bacillus pertussis contained in the DPT vaccines given to him on July 6, August 31, and November 19, 1993, which caused him to suffer from a static encephalopathy that was a direct and proximate result of the DPT vaccines. N.C. Gen. Stat. § 130A-426.

In light of its conclusion, the Commission remanded to a deputy commissioner "for the taking of additional evidence or further hearing, if necessary, and the entry of a Decision and Order with findings regarding the compensatory damages that plaintiffs are entitled to recover." (Emphasis added). Defendant DHHS filed timely notice of appeal from the Commission's 29 August 2005

Decision and Order.

As grounds for appellate review of the Decision and Order, defendant points to a prior stipulation entered by the parties that the damages sustained by Hayden exceed the statutory cap for monetary compensation of \$300,000.00. Because the stipulation is binding, DHHS avers that it "obviates the need for further proceedings on the issue of damages," and renders the Commission's Decision and Order a "final judgment as to all triable issues in the case." On the merits of its appeal, defendant asserts (1) that the claimants' claim was barred by the statute of limitations, and (2) that the Commission erred in relying on the opinion testimony of Dr. Allan Lieberman regarding the etiology of Hayden's static encephalopathy.

"Appeal from an order of the Industrial Commission lies only from a final order." *Nash v. Conrad Industries*, 62 N.C. App. 612, 618, 303 S.E.2d 373, 377 (citation omitted), *aff'd*, 309 N.C. 629, 308 S.E.2d 334 (1983); N.C. Gen. Stat. § 7A-29 (granting right of appeal from "any final order or decision of the . . . North Carolina Industrial Commission"). "An order is not final if it fails to determine the entire controversy between all the parties." *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 545 (citation omitted), *disc. review denied*, 346 N.C. 280, 487 S.E.2d 550 (1997). Moreover, "an interlocutory judgment or order which does not affect a substantial right of one of the parties or is not otherwise appealable . . . may not be appealed." *Leasing Corp. v. Myers*, 46 N.C. App. 162, 168, 265 S.E.2d 240, 245

(1980).

The Decision and Order filed by the Commission on 29 August 2005 "expressly reserved final disposition" in this cause pending the outcome of further proceedings before a deputy commissioner. *Nash*, 62 N.C. App. at 618, 303 S.E.2d at 377. While the Commission acknowledged the parties' stipulation "that the damages sustained by Hayden Goetz in lost income, loss of future earnings, and pain and suffering, exceed the statutory amount of damages allowed (\$300,000) [,]" it did not enter an award but remanded the cause to the Chief Deputy Commissioner for "entry of a Decision and Order with findings regarding the compensatory damages that plaintiffs are entitled to recover." We note that, under N.C. Gen. Stat. § 130A-427, an award for vaccine-related injury may include a "monetary compensation component" not exceeding \$300,000.00 and/or a requirement that DHHS provide services to the injured party, the value of which "is in addition to the total amount of money compensation, and is not included in the [\$300,000] limitation . . . on the amount of money compensation that may be awarded." N.C. Gen. Stat. § 130A-427(b) (2005). Accordingly, the Commission's decision and order is not a final order subject to appeal. *Id.*

Inasmuch as defendant makes no attempt to demonstrate that the interlocutory order threatens a substantial right or is otherwise immediately appealable, we lack jurisdiction to consider its substantive arguments and, therefore, dismiss its appeal. *Johnson v. Lucas*, 168 N.C. App. 515, 518-19, 608 S.E.2d 336, 338 (2005) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377,

380, 444 S.E.2d 252, 254 (1994)), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005).

Appeal dismissed.

Judges WYNN and GEER concur.

Report per Rule 30(e).