

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-376

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

ANDREW BERRIER,
CHRISTOPHER BOST,
and THOMAS MORGAN,
Employee-Plaintiffs,

v.

North Carolina
Industrial Commission
I.C. File No. 478731, 599789,
616555

RECOVERY CONSTRUCTION,
Employer, and
BUILDERS MUTUAL INS. CO.,
Carrier,
Defendant-Appellants.

Appeal by defendants from opinion and award entered 18 November 2008 by the Full Commission. Heard in the Court of Appeals 16 November 2009.

Egerton & Associates, P.A., by Samantha Clark Aktug, for plaintiffs.

Lewis & Roberts, PLLC, by Melissa K. Walker, for defendants.

ELMORE, Judge.

On 24 May 2004, Andrew Berrier, Christopher Bost, and Thomas Morgan (together, plaintiffs) were involved in a one-car accident while riding in a pick-up truck driven by Sid Doty, IV (Doty IV). The men were on their way back to a job site, where all four worked for Recovery Construction, owned by Sid Doty, III (Doty III),

father of Doty IV. The four men¹ were returning from a lunch break when the accident occurred, badly injuring plaintiffs. Plaintiffs sought benefits pursuant to the Worker's Compensation Act, but defendants Recovery Construction and Builders Mutual Insurance Company denied that the injuries arose out of or in the course of their employment with Recovery Construction. As such, this matter went before Deputy Commissioner George T. Glenn, II, who issued an opinion and award concluding that plaintiffs did not suffer their injuries while in the course of employment by defendant and thus denied plaintiffs' claims. Plaintiffs appealed to the Full Commission, which reversed the Deputy Commissioner's opinion and award; Commissioner Dianne Sellers filed a separate written dissent.

After reviewing the Commission's opinion and award, however, we find that this appeal is interlocutory, and thus dismiss it.

The Commission limited its review in this case solely to the question of whether plaintiffs sustained compensable injuries in the course and scope of their employment. In its opinion and award, the Commission, after concluding that plaintiffs' injuries did arise in the course and scope of their employment, remanded the matter to the deputy commissioner

for the taking of additional evidence or further hearing, if necessary, and the entry of an Opinion and Award, with findings of fact on the issues of: (1) the extent of Plaintiffs' disability; (2) the amount of

¹Two other men employed by Recovery Construction, Ron Davis and David Allen, were also involved in the accident but are not involved in this case.

indemnity benefits due Plaintiffs; (3) the extent of medical compensation due Plaintiffs; and (4) the determination of Plaintiffs' average weekly wage and resulting compensation rate.

Because the Commission did not fully dispose of the case, but rather left further issues to be resolved, the appeal from the Commission's opinion and award is interlocutory. See *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 546 (1997) (holding appeal interlocutory where opinion and award did not dispose of case but required further action in form of hearing on merits). Generally, there is no right to appeal from an interlocutory opinion and award. See *Brown v. Booker*, 121 N.C. App. 366, 368, 465 S.E.2d 75, 76 (1996) ("An appeal does not lie from an interlocutory order of the North Carolina Industrial Commission.") (citation omitted).

In *Riggins v. Elkay Southern Corporation*, this Court explained:

An appeal from an opinion and award of the Industrial Commission is taken "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." G.S. 97-86. Consequently, an appeal of right lies only from a final order or decision of the Industrial Commission, one that determines the entire controversy between the parties. An opinion and award that settles preliminary questions of compensability but leaves unresolved the amount of compensation to which the plaintiff is entitled and expressly reserves final disposition of the matter pending receipt of further evidence is interlocutory.

132 N.C. App. 232, 233, 510 S.E.2d 674, 675 (1999) (citation omitted). Although the parties in *Riggins* had not raised the

issue, this Court dismissed the appeal from an opinion and award concluding that the plaintiff was entitled to temporary total disability, but remanding for further proceedings to determine the dates for which plaintiff was entitled to receive temporary total or temporary partial disability compensation. *Id.* at 232, 510 S.E.2d at 674. *See also Fisher v. E. I. Du Pont De Nemours*, 54 N.C. App. 176, 177, 282 S.E.2d 543, 544 (1981) (holding appeal was interlocutory when Commission only determined plaintiff had sustained injury by accident, but question of amount of compensation plaintiff was entitled to receive had not been determined).

Since the Commission in this case did not enter a final award, but rather remanded for proceedings to determine the amount of workers' compensation benefits to which plaintiff is entitled, this appeal is not properly before this Court. Indeed, it is clear that the Commission did not intend for its opinion and award to be a final determination – it twice specifically identified the opinion and award as "Interlocutory."

The statement of the grounds for appellate review given by defendants is N.C. Gen. Stat. § 97-86, which generally addresses appeals taken from awards of the Industrial Commission. N.C. Gen. Stat. § 97-86 (2009). That statute does, however, provide that "[t]he Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court." N.C. Gen. Stat. § 97-86 (2009). In this case, however, the Commission did not make any such

certification and, in any event, the appeal primarily addresses questions of fact.

We thus hold that this case is not properly before the Court at this time, and as such it is dismissed. *See Riggins*, 132 N.C. App. at 233, 510 S.E.2d at 675 ("The present opinion and award on its face reserves issues for further determination. . . . It is our duty to dismiss an appeal *sua sponte* when no right of appeal exists.").

Dismissed.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).