NO. COA10-269

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

MICHAEL INFORZATO,
Employee, Plaintiff,

v.

North Carolina
Industrial Commission
I.C. File No. 502682

MAI HEALTHCARE, INC.,
Employer,

KEY RISK INSURANCE COMPANY,
Carrier, Defendants.

Appeal by defendants from order entered 27 October 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 September 2010.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Megan V. Johnson and M. Duane Jones, for defendants-appellants.

MARTIN, Chief Judge.

On 15 February 2005, plaintiff suffered an injury to his left shoulder in the course and scope of his employment with defendant-employer. Defendants admitted the compensability of the injury, and plaintiff underwent a surgical repair of his shoulder by Dr. Richard Mandel on 25 March 2005. Dr. Mandel rated him at maximum medical improvement and released him to return to work on 27 October 2005.

Plaintiff continued to have shoulder symptoms, and was seen by Dr. Mandel on five occasions between 26 January 2006 and 26 March 2008. Dr. Mandel noted that plaintiff needed no additional surgery, was at maximum medical improvement, and again released him to return to work with restrictions.

On 6 February 2009 and 3 March 2009, plaintiff sought treatment from Dr. Kevin Freedman, an orthopedic specialist, who identified surgery as a treatment option. By letter of 29 May 2009, Dr. Freedman opined that plaintiff's ongoing left shoulder pain and instability was related to his 16 February 2005 workplace injury and took plaintiff out of work pending surgery.

On 11 May 2009, plaintiff filed an IC Form 33 in which he alleged a change in condition and sought an order authorizing additional surgery by Dr. Freedman and reinstatement of temporary total disability compensation. In response, defendants alleged that plaintiff had received all benefits to which he was entitled and that the requested medical treatment and surgery was not related to the 2005 compensable injury.

Following proceedings before two deputy commissioners, the Full Commission filed its order on 27 October 2009 allowing plaintiff's motion for surgical treatment by Dr. Freedman. No order was entered with respect to plaintiff's motion for reinstatement of compensation for temporary total disability. Defendants gave notice of appeal.

Plaintiff has moved to dismiss defendants' appeal as being interlocutory. We allow the motion.

"A decision of the Industrial Commission that determines one but not all of the issues in a case is interlocutory, as is a decision which on its face contemplates further proceedings or 'does not fully dispose of the pending stage of the litigation.'" *Berardi v. Craven Cty Schs.*, __ N.C. App. __, __, 688 S.E.2d 115, 116 (quoting *Cash v. Lincare Holdings*, 181 N.C. App. 259, 263, 639 S.E.2d 9, 13 (2007)), *disc. review denied*, 364 N.C. 230, 698 S.E.2d 74 (2010).

The Commission's 27 October 2009 Order was interlocutory. By his motion, plaintiff sought approval for surgery and reinstatement of compensation for temporary total disability. The Industrial Commission ordered that defendants provide the surgical treatment; however, it refrained from ruling on the issue of disability compensation. Under similar facts we have held "[w]here defendants appeal from an order of the North Carolina Industrial Commission issued under the Expedited Medical Motions Procedure, such appeal is interlocutory and not properly before this Court." *Berardi*, __ N.C. App. at __, 688 S.E.2d at 116; *see id.* ___, 688 S.E.2d at 117 (explaining that "the enactment of N.C. Gen.Stat. § 97-78(f) and (g) by the General Assembly mandates that medical treatment issues be handled expeditiously . . . [and that i]n order to comply with these statutory amendments, rulings must necessarily be expedited, are interlocutory, and entered without prejudice to the subsequent resolution of the contested issues in the case").

Of course, this Court recognizes that immediate review of an interlocutory decision is still proper where it affects a substantial right. *Cash*, 181 N.C. App. at 263, 639 S.E.2d at 13.

> Our cases have established a two-part test for determining whether an interlocutory order affects a substantial right. First, the right itself must be substantial. *Ward v. Wake Cty. Bd. of Educ.*, 166 N.C. App. 726, 729, 603 S.E.2d 896, 899 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 853 (2005). Second, the deprivation of that substantial right must potentially work injury if not corrected before appeal from a final judgment. *Id.* at 729-30, 608 S.E.2d at 899.

Perry v. N.C. Dep't. of Corr., 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006). Here, there is no such "substantial right" at issue. *See id.* at 130, 625 S.E.2d at 795 ("When the sole issue is the payment of money pending the litigation, we see no reason why a different result [from earlier cases holding that there was not a substantial right at issue] should occur in workers' compensation cases.").

Appeal dismissed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).