NO. COA13-157
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

DONALD EDWARD OWEN, JR.,
Employee/Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. W85154

BRUCE HOGSED and/or TAMMY HOGSED,
d/b/a HOGSED LANDSCAPING & TREE
SERVICE,
Non-Insured Employer;

and

ST. PAUL TRAVELERS/ZURICH,
Carrier/Defendants.

Appeal by plaintiff and defendants Bruce Hogsed and/or Tammy Hogsed from the Opinion and Award of the Industrial Commission filed 8 November 2012. Heard in the Court of Appeals 14 August 2013.

Leicht & Associates, by Gene Thomas Leicht and Judy Fraser, for plaintiff appellant.

Van Winkle Buck Wall Starnes & Davis, P.A., by Allan R. Tarleton, for defendant-employer appellant.

Mullen Holland & Cooper, P.A., by James R. Martin, for St. Paul Travelers/Zurich defendant appellee.

McCULLOUGH, Judge.

Donald Edward Owen, Jr., ("plaintiff") and his employer Hogsed Landscaping & Tree Service ("Hogsed Landscaping") appeal from the Opinion and Award for the Full Commission that dismissed St. Paul Travelers/Zurich (the "carrier") from the claim. For the following reasons, we dismiss the appeal.

I. Background

On 19 April 2010, plaintiff sustained multiple injuries when he allegedly fell forty to fifty feet from a tree while working for Hogsed Landscaping. As a result of his injuries, plaintiff instituted this workers' compensation action on 1 June 2010 with the filing of a Form 18, notifying Hogsed Landscaping of the accident and his claim.

Following the initiation of his claim, plaintiff filed a Form 33, requesting a hearing on 6 July 2012, an amended Form 18 on 2 August 2010, and a motion to add the carrier as a party defendant on 19 January 2011. The Commission granted plaintiff's motion to add the carrier as a party defendant by order filed 25 January 2011 and on 18 February 2011, the carrier filed a Form 61 denying the claim on the basis that there was no policy in effect at the time of the injury. The carrier

additionally filed a Form 33R responding to plaintiff's request for a hearing on 14 March 2011.

By letter to the Deputy Commissioner on 15 November 2011, the parties requested that the issues in the workers' compensation claim be bifurcated and that litigation be stayed until the completion of mediation. The Deputy Commissioner granted the parties' request by order filed 17 November 2011.

On 12 January 2012, the parties entered into a pretrial agreement stipulating to facts and exhibits to be used by the Deputy Commissioner in deciding the issue of coverage. Upon consideration of the stipulated facts and exhibits, the Deputy Commissioner filed an Interlocutory Opinion and Award on 30 April 2012, holding the unilateral cancellation of coverage by the carrier prior to the plaintiff's injury was valid and effective pursuant to N.C. Gen. Stat. § 58-36-105(a)(4). As a result, the Deputy Commissioner dismissed the carrier from the claim and referred the matter back to the Asheville non-insured docket for resolution of all other issues that were previously reserved by the remaining parties. Plaintiff and Hogsed Landscaping appealed to the Full Commission.

The Full Commission filed an Interlocutory Opinion and Award on 8 November 2012, upholding the Deputy Commissioner's

decision concerning coverage. The Full Commission held the cancellation valid and effective pursuant to N.C. Gen. Stat. § 58-36-105(a)(2) & (4) and therefore dismissed the carrier from the claim and referred the matter back to the Asheville non-insured docket for resolution of all other issues that had previously been reserved by the remaining parties. Plaintiff and Hogsed Landscaping appealed to this Court.

II. Analysis

The first issue we must address is this Court's jurisdiction to hear the appeal. We hold this issue dispositive and dismiss the appeal as interlocutory. "Although this issue was not raised by the parties, it is appropriately raised by this Court *sua sponte*." *Plummer v. Kearney*, 108 N.C. App. 310, 312, 423 S.E.2d 526, 528 (1992) (citing *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)).

This Court's jurisdiction over interlocutory appeals from decisions of the Commission is summarized as follows:

> An appeal is taken from an order and award of the Commission "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C.G.S. § 97-86 (1991). These terms and conditions are set forth in N.C.G.S. § 7A-27, which provides that appeal is available to this Court from final judgments, "including any final judgment entered upon review of a

> decision of an administrative agency . . . ." N.C.G.S. § 7A-27 (1989). An order is not final, and therefore interlocutory, if it fails to determine the entire controversy between all the parties. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Thus an order and award from the Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case. *Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 178, 282 S.E.2d 543, 544 (1981) (order not final when amount of compensation not determined). Even if the parties request and agree that only a specific issue rather than the entire controversy is to be decided by the Commission at a particular hearing, the order which issues is not a final order. *Fisher*, 54 N.C. App. at 177-78, 282 S.E.2d at 544 (parties cannot by agreement modify the scope of appellate review prescribed by statute).

Plummer, 108 N.C. App. at 312-13, 423 S.E.2d at 528-29.

Applying the law above, in *Plummer* this Court dismissed a plaintiff's appeal from an order and award of the Commission that, by agreement, resolved only the issue of insurance coverage. *Id.* at 314, 423 S.E.2d at 529-30. We reasoned that, despite the agreement to address the single issue of coverage, the appeal was interlocutory because "[t]he Commission ha[d] made no award of compensation. Indeed, the record d[id] not reveal that the Commission ha[d] decided whether [the plaintiff] was in fact injured, the nature and extent of [the plaintiff's] injury, if any, or whether the injury occurred in the scope and

in the course of his employment." *Id.* at 314, 423 S.E.2d at 529.

We hold *Plummer* is controlling in the present case where the Commission bifurcated the issues at the request of the parties and decided the issue of coverage without determining the compensability of plaintiff's injury or the amount of compensation, if any. Furthermore, we note that the Commission's decision, which is entitled "Interlocutory Opinion and Award" in the caption, "referred [the matter] back to the Asheville non-insured docket for resolution of all other issues that had previously been reserved by the remaining parties." Consequently, plaintiff's appeal is interlocutory.

It is well established that interlocutory decisions are generally not immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Immediate appeal is available, however, where the trial court certifies a decision as immediately reviewable pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the Commission certifies questions of law for review pursuant to N.C. Gen. Stat. § 97-86, or where a party appeals a decision pursuant to N.C. Gen. Stat. § 7A-27(d) or § 1-277 because it affects a substantial right, determines the action, discontinues the action, or grants or

refuses a new trial. *Plummer*, 108 N.C. App. at 313, 423 S.E.2d at 529.

In the present case, none of the grounds for immediate appeal of an interlocutory order apply. Moreover, appellants do not address the interlocutory nature of the appeal but instead assert that the Interlocutory Opinion and Award of the Commission was a final award of an administrative agency. "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[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Accordingly, we dismiss this appeal as interlocutory.

Dismissed.

Judges HUNTER (Robert C.) and GEER concur.

Report per Rule 30(e).