

APPENDIX TO PETITION FOR
A WRIT OF CERTIORARI

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IN THE COURT OF APPEALS OF NORTH
CAROLINA

No. COA17-1058

Filed: 16 October 2018

North Carolina Industrial Commission, I.C. No.
Y22434

VINCENT MASTANDUNO, Employee, Plaintiff,

v.

NATIONAL FREIGHT INDUSTRIES, Employer,
and AMERICAN ZURICH INSURANCE CO.,
Carrier, Defendants.

Appeal by Plaintiff from order entered 22 May
2017 by the Full Commission of the North Carolina
Industrial Commission. Heard in the Court of
Appeals 5 March 2018.

*Law Offices of John M Kirby, by John M.
Kirby for plaintiff-appellant.*

*Teague, Campbell, Dennis & Gorham, L.L.P.,
by S. Scott Farwell and Bruce A. Hamilton, for
defendants-appellees.*

MURPHY, Judge.

This case requires that we examine the relationship between a public document entitled an “Opinion and Award” (“Award”) and a workers’ compensation claimant’s privacy interest in the personal medical information relevant to the resolution of his claim. Every year, the North Carolina Industrial Commission enters hundreds of Awards, which are the written records of decision for adjudicated workers’ compensation claims. After these Awards are entered, they are uploaded to a publicly accessible and searchable online database.¹ Due to the fact that workers’ compensation claims arise from physical injuries suffered at work, the evidentiary findings contained within an Award often directly address a claimant’s medical conditions and employment history.

In prior proceedings before the Industrial Commission, Plaintiff unsuccessfully moved to have his entire case file sealed. He complained that due to the Commission’s policy to make Awards available to the public online, Plaintiff’s personal and medical information (which becomes part of that Award) will be disseminated and his privacy interest in avoiding the disclosure of this information will be compromised. On appeal, Plaintiff argues that he has a privacy interest rooted in statute and the U.S. Constitution, and contends this interest can only be protected by a judicial order that preemptively seals his entire workers’ compensation case file, including

¹ See *Searchable Databases*, N.C. INDUSTRIAL COMMISSION, <http://www.ic.nc.gov/database.html> (last accessed 27 August 2018).

any future Award entered for his claim. After careful review, we conclude that there is no statutory or constitutional basis that obligates the Industrial Commission to seal Plaintiff's workers' compensation file.

BACKGROUND

On 29 May 2012, Vincent Mastanduno ("Plaintiff"), while employed as a truck driver, slipped and fell on a wet floor while moving a pallet during work, injuring his lower back. On 11 September 2012, Plaintiff filed a *Notice of Accident* with the Industrial Commission to obtain workers' compensation benefits. His employer at the time, Defendant National Freight Industries, filed a Form 60 Employer's Admission of *Employee's Right to Compensation* on 19 November 2012 for temporary total compensation in the amount of \$740.56 per week. National Freight Industries was covered by a workers' compensation insurance policy through American Zurich Insurance Company (collectively "Defendants").

Several years later on 14 March 2016, Defendants filed a Form 33 with the Industrial Commission requesting that Plaintiff's workers' compensation claim be assigned for a hearing. Defendants alleged that Plaintiff was no longer disabled and refused to cooperate with medical treatment authorized and paid for by Defendants. Plaintiff filed his response, denying that he had not been compliant with Defendant's direction for medical care and further claiming that he remained disabled. On 29 March 2016, the Industrial

Commission entered an order permitting Plaintiff's counsel at the time to withdraw. Plaintiff then proceeded pro se. Plaintiff's initial hearing was set for 12 July 2016, and the matter was assigned to Deputy Commissioner Tyler Younts.

On 6 June 2016, prior to Plaintiff's July 2016 evidentiary hearing, Plaintiff moved to have all information regarding his hearing sealed "so that it is not a matter of public record." Deputy Commissioner Younts subsequently entered an order denying Plaintiff's request to seal his file, concluding that "Plaintiff's Workers' Compensation claim file is not a public record[,] and "to the extent that certain Orders and Awards of the Commission are public records, Plaintiff has provided no factual or legal basis for the relief sought." Plaintiff then requested Deputy Commissioner Younts to reconsider his previous motion and a conference call was held on 24 June 2016. Plaintiff expressed various privacy concerns associated with the potential use of his personal medical information. Deputy Commissioner Younts again denied Plaintiff's request to seal his file, concluding:

Nevertheless, it remains the case that all injured workers involved in litigation before the Industrial Commission operate under the same privacy rules. Thus, the undersigned finds insufficient basis for the extraordinary relief Plaintiff seeks.

Plaintiff then appealed Deputy Commissioner Younts' denial to the Full Commission. Because the

Deputy Commissioner's order was interlocutory, Plaintiff was required to submit reasons warranting immediate review by the Full Commission. Plaintiff's primary privacy concern is that Awards of the Industrial Commission are made available to the public and immediately placed online, and, therefore, third parties could use personal and medical information included therein to his detriment.² Plaintiff also alleged that the denial of his motion to seal infringed on his Ninth and Fourteenth Amendment rights under the U.S. Constitution.

On 10 April 2017, Plaintiff's Motion to Seal was heard by the Full Commission, and on 22 May 2017 the Commission denied Plaintiff's motion. The Full Commission concluded that pursuant to N.C.G.S. § 97-92(b), the Opinions and Awards of the Commission are public records, but the medical records and other evidence upon which an Award would be premised are not. The Commission also concluded that "Plaintiff has offered no evidence or legal argument which would justify his claim being treated differently than that of any other injured

² For example, Plaintiff claimed that his record should be sealed because otherwise: (1) his insurance premium rates could increase because he would be considered a greater risk; (2) he could be denied visas for travel to other countries; (3) there is risk that he could be blackmailed; (4) he could be prohibited from adopting a child; (5) he could be prevented from renting an apartment; and (6) the posting of these records could result in cyberbullying, identify theft, and impairment of his ability to obtain lines of credit.

worker who is seeking benefits under the Act.” Finally, the Full Commission’s order correctly recognized that it did not have jurisdiction to rule on Plaintiff’s Ninth and Fourteenth Amendment arguments because the Commission does not have jurisdiction to rule on constitutional issues.³ Plaintiff timely appealed the Full Commission’s 22 May 2017 denial of his Motion to Seal.

Represented by counsel on appeal, Plaintiff argues that the Industrial Commission was obligated to seal his entire file upon request because “[p]ursuant to North Carolina statutory law and federal Constitutional law, a person has a right to privacy with respect to his or her medical information.”

GROUNDS FOR APPELLATE REVIEW

Plaintiff’s appeal is interlocutory as the Full Commission’s order does not finally dispose of all issues in the matter. However, “immediate appeal may be taken from an interlocutory order when the challenged order affects a substantial right of the appellant that would be lost without immediate review.” *France v. France*, 209 N.C. App. 406, 411, 705 S.E.2d 399, 404-05 (2011) (citation and alteration omitted). “No hard and fast rules exist for determining which appeals affect a substantial right.

³*In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (“[I]t is a ‘well-settled rule that a statute’s constitutionality shall be determined by the judiciary, not an administrative board.’”).

Rather, such decisions usually require consideration of the facts of the particular case.” *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citation omitted).

Plaintiff argues that a substantial right is affected because any Award in this matter will necessarily contain some of Plaintiff’s medical information and this information will be made available online at the time the Award is entered. Thus, because the Full Commission has denied his motion to seal on the grounds that there is no legal basis for Plaintiff’s requested relief, Plaintiff’s privacy rights will be lost absent review by this court. Plaintiff cites several cases in support of his right to appellate review. *See France*, 209 N.C. App. at 411, 705 S.E.2d at 405 (“Absent immediate review, documents that have been ordered sealed will be unsealed, and proceedings will be held open to the public. Because the only manner in which Plaintiff may prevent this from happening is through immediate appellate review, we hold that a substantial right of Plaintiff is affected”); *Velez v. Dick Keffer Pontiac GMC Truck, Inc.*, 144 N.C. App. 589, 592, 551 S.E.2d 873, 875 (2001) (“While certainly if the Financial Privacy Act was implicated here, it would raise a substantial right”).

For the purpose of determining whether the challenged order affects a substantial right, we need not definitively decide at the outset whether Plaintiff’s personal or medical information would fall within the scope of any specific statutory or constitutional privacy protections. Rather, it is sufficient that absent immediate review, some of

Plaintiff's personal and medical information will be made available to the public upon entry of a final Award and that some of this information might be subject to statutory and constitutional privacy protections. *See Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 124, 678 S.E.2d 787, 791 (2009) (finding the production of documents which might be protected by statute to affect a substantial right). Plaintiff has therefore demonstrated that the order denying his motion to seal by the Full Commission affects a substantial right.

Finally, since the Industrial Commission did not have jurisdiction to pass upon Plaintiff's constitutional privacy claims, it is appropriate for this Court, as the first destination for the dispute in the General Court of Justice, to address these constitutional arguments even though they were not passed upon below. *See Redmond*, 369 N.C at 497, 797 S.E.2d at 280 ("When an appeal lies directly to the Appellate Division from an administrative tribunal, in the absence of any statutory provision to the contrary a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.").

ANALYSIS

Plaintiff argues that he has "a Constitutional and statutory right to confidentiality over his private medical information." We initially note that Plaintiff relies heavily on the United States Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869 (1977), to support his contention that an Award

of the Industrial Commission implicates a constitutional “privacy right.” However, the U.S. Supreme Court has not explicitly recognized a constitutional right to keep one’s personal information private. Rather, *Whalen* and its progeny stand for the proposition that there may be a “constitutional privacy ‘interest in avoiding disclosure of personal matters.’” *See Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147, 131 S. Ct. 746, 756 (2011) (citing *Whalen*, 429 U.S. at 599-600, 97 S. Ct. at 876; *Nixon v. Administrator of General Services*, 433 U.S. 425, 457, 97 S. Ct. 2777, 2797 (1977)). With this constitutional backdrop in mind, we first address Plaintiff’s claim that he has a statutory right to have his workers’ compensation file sealed.

A. Statutory Right to Privacy

An individual’s privacy interest in their personal information may be protected by statute. Our Supreme Court has recognized that although the Public Records Act “provides for liberal access to public records,” the General Assembly may dictate “that certain documents will not be available to the public.” *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999); see also N.C.G.S. § 131E-95(b) (2017) (“The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1”); N.C.G.S. § 7B- 2901(d) (2017) (“The court’s entire record of a proceeding involving consent for an abortion of an unemancipated minor . . . is not a

matter of public record"); N.C.G.S. § 132-1.4(a) (2017) ("Records of criminal investigations conducted by public law enforcement agencies . . . are not public records"). With respect to Workers' Compensation proceedings, the General Assembly has already provided that certain records of the Industrial Commission that are not Awards are not public records:

The records of the Commission *that are not awards* under G.S. 97-84 and that are not reviews of awards under G.S. 97-85, insofar as they refer to accidents, injuries, and settlements are not public records under G.S. 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

N.C.G.S. § 97-92(b) (2017) (emphasis added).

Turning to the instant case, because of N.C.G.S. § 97-92(b), Plaintiff's medical records and any other documents that are not Awards which refer to accidents and injuries are already shielded from public disclosure. Any order to seal these records would be superfluous as they are already, in effect, sealed by statute. With respect to the Awards of the Industrial Commission, the General Assembly has not provided any exemption from the Public Records Act. If we were to adopt Plaintiff's position and instruct the Industrial Commission to seal a yet to be entered Award, then we would contravene the

legislative intent expressed in N.C.G.S. § 97-92(b). Specifically, applying the doctrine of *expressio unius est exclusio alterius* to § 97-92(b), we conclude that by expressly listing the subset of records of the Industrial Commission that are exempted from the Public Records Act (i.e. records that are not Awards), the legislature intended that Awards of the Industrial Commission are to be public records. *See Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (“[T]he doctrine of *expressio unius est exclusio alterius* provides that the mention of such specific exceptions implies the exclusion of others.”).

Plaintiff also points us to N.C.G.S. §§ 8-53 and 122C-52 to support his position that his private medical information is not a matter of public record. N.C.G.S. § 8-53, which codifies the physician-patient privilege, is a qualified evidentiary privilege that is waivable by the patient, *Adams v. Lovette*, 105 N.C. App. 23, 411 S.E.2d 620 (1992), and must yield in some instances when certain medical information “is necessary to a proper administration of justice.” N.C.G.S. § 8-53 (2017). More importantly, the mere existence of the physician-patient privilege has no bearing on whether an Award of the Industrial Commission is a public record or whether the Commission is statutorily obligated to seal any Award that makes reference to a claimant’s medical information. Turning to N.C.G.S. § 122C-52, this statute does provide that confidential information acquired in attending or treating a client is not a public record. However, Plaintiff’s reliance is inapposite because § 122C-52 only applies to services for the “mentally ill, the developmentally disabled, or substance abusers.” N.C.G.S. § 122C-3(14) (2017).

Plaintiff makes no argument addressing how any of these mental health services are relevant to his workers' compensation claim arising from a lower back injury.

Plaintiff next cites a federal statute relevant to health information privacy, the Health Insurance Portability and Accountability Act of 1996 (HIPAA). See Health Insurance Portability and Accountability Act of 1996 Pub.L. 104-191, 110 Stat. 1936, (1996). Although a primary goal of HIPAA is to assure that an individual's health information is properly protected from unauthorized disclosure, Plaintiff has failed to recognize that the HIPAA Privacy Rule does not apply to the Industrial Commission because they are not a "covered entity." 45 C.F.R. § 160.103 (2014). Furthermore, HIPAA regulations expressly permit covered entities, such as a patient's doctor, to disclose protected health information to workers' compensation agencies without first obtaining patient authorization. See 45 C.F.R. § 164.512 (a) (2016).

In sum, none of the above cited statutory provisions support Plaintiff's position that he possesses a statutory privacy right in his personal medical information that obligates the Industrial Commission to seal his workers' compensation case file on request, including any Award. Pursuant to N.C.G.S. § 97-92(b), Plaintiff's medical records are already exempted from the Public Records Act. Regarding Plaintiff's request to seal any Award entered by the Commission, we again emphasize the General Assembly is the body vested with the authority to determine which kinds of otherwise public records "shall be shielded from public

scrutiny.” France, 209 N.C. App. at 413, 705 S.E.2d at 406. While the General Assembly could have exempted the Awards of the Industrial Commission from the Public Records Act, they did not. “Absent clear statutory exemption or exception, documents falling within the definition of public records in the Public Records Law must be made available for public inspection.” Virmani, 350 N.C. at 462, 515 S.E.2d at 685 (citation and quotation marks omitted).

B. Constitutional Right to Privacy

Plaintiff also contends “even if the Public Records Act applied to this matter, this act does not trump an individual’s Constitutional right to privacy over his or her private health information.” As the U.S. Supreme Court did in *Whalen* and *National Aeronautics & Space Administration*, we will assume for present purposes that the Industrial Commission’s refusal to seal Plaintiff’s case file implicates a privacy interest of constitutional significance. *See Nat’l Aeronautics & Space Admin.*, 562 U.S. at 147, 131 S. Ct. at 756 (“As was our approach in *Whalen*, we will assume for present purposes that the Government’s challenged inquiries implicate a privacy interest of constitutional significance.”).

Initially, our review of the Industrial Commission’s decision to not preemptively seal Plaintiff’s Award must consider the “context” of a workers’ compensation proceeding. *See Id.* at 148, 131 S. Ct. at 757 (“[J]udicial review of the Government’s challenged inquiries must take into account the context in which they arise.”). The Workers’ Compensation Act was enacted in 1929,

and its purpose was not only to offer a swift and certain remedy for an injured worker, but also to ensure a limited and determinate liability for employers. *See S.L. 1929-120.* In 2017, the Industrial Commission had exclusive original jurisdiction over 64,000 filed workers' compensation claims, and approximately 1,800 claims were scheduled for hearings before a Deputy Commissioner. Over 400 of these claims were appealed to the Full Commission.⁴ Our assessment of the constitutionality of the challenged publicizing of medical information in an Award must take into account the crucial role the Industrial Commission plays for workers and the State's economy, as well as the sheer magnitude of claims that must be adjudicated in a timely manner.

Next, we must weigh Plaintiff's privacy interests implicated by the public dissemination of an Award against the public interest. *Nixon*, 433 U.S. at 458, 97 S. Ct. at 2798 ("[A]ny intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening."); *see also France*, 209 N.C. App. at 417, 705 S.E.2d at 408 (holding plaintiff's claim to be without merit since he "fail[ed] to show that any such right to privacy outweighs the qualified right of the public to open proceedings").

⁴ North Carolina Industrial Commission, *Fiscal Year 2017 Annual Report*, <http://www.ic.nc.gov/2017AnnualReport.pdf> (last accessed 27 August 2018).

As discussed *supra*, by not exempting the Awards of the Industrial Commission from the Public Records Act, our legislature has determined that these records are of special public interest and are to be made available in their original form. The Industrial Commission's policy of providing web access to final Awards is a reasonable, cost-effective manner of making these records available for public inspection. Furthermore, N.C.G.S. § 97-84 expresses other important public interests at stake:

The case shall be decided and findings of fact issued based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings

N.C.G.S. § 97-84 (2017). We recognize that the findings of fact of an award will often include potentially sensitive information that might otherwise be considered private, such as a claimant's identity, a claimant's employment history, a description of the injury suffered at work, and the effects of the injury on the claimant's physical and mental capabilities. However, the inclusion of pertinent and relevant information such as this is necessary because it ensures that workers' compensation claims are resolved impartially with well-reasoned decisions. Not only does this serve the public's interest in government transparency, but, without this information, our ability to conduct effective appellate review would be significantly

impaired. *See Wilkes v. City of Greenville*, 369 N.C. 730, 746, 799 S.E.2d 838, 849 (2017) (“[T]he Commission must make specific findings that address the ‘crucial questions of fact upon which plaintiff’s right to compensation depends.’”).

Regarding Plaintiff’s asserted privacy interests, we are not unsympathetic to his concerns regarding the disclosure and potential use of personal information contained in an Award. To illustrate his concerns, Plaintiff submitted a publicly available final Opinion and Award from another workers’ compensation claim.⁵ Plaintiff directs our attention to certain findings of this Award which went beyond the details of the worker’s accident, indicating that the worker experienced episodes of crying, panic attacks, and was diagnosed with Post-Traumatic Stress Disorder (PTSD). Sensitive as these topics may be, Plaintiff wholly overlooks the crucial role this personal medical information had in the Commission’s resolution of the claim. Specifically, crying and panic attacks were some of the symptoms the claimant presented to her treating physicians after the workplace accident. Furthermore, based on these symptoms, the claimant’s psychiatrist ultimately diagnosed her with PTSD, and this evidence supported the Commission’s conclusion that the claimant’s PTSD was a compensable injury.

Plaintiff nevertheless argues, “It is inconceivable that a ‘proper administration of justice’

⁵ I.C. NO. 307020.

would require the Commission (which is not a court, and thus not subject to open courts provisions) to disseminate the Plaintiff's protected, private health information to the entire world via the Internet." This argument fails to grasp the role of an Award in our Workers' Compensation system. The Industrial Commission does not make its Awards available online merely because it is necessary for the proper administration of justice, but a claimant's Award is made publicly available because this document is, as a matter of law, an official public record.

Plaintiff's constitutional privacy argument also overlooks critical distinctions between the facts of his case and those present in *Whalen*. In *Whalen*, a New York statute that required physicians to identify patients obtaining certain prescription drugs having potential for abuse was challenged as violating the plaintiff's privacy rights. *Whalen*, 429 U.S. at 592, 97 S. Ct. at 873. Doctors were required to disclose the name, age, and address of the patients for which they prescribed Schedule II drugs and this information was stored in a government office building. *Id.* The *Whalen* plaintiffs argued that patient-identification requirements created a risk of public disclosure and impaired their interests in avoiding disclosure of personal matters and "making important decisions independently." *Id.* at 599, 97 S. Ct. at 877 "After evaluating the security issues regarding the patient-identification requirements of the statute, the Supreme Court upheld the statute, stating that the statute 'does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.'" *ACT-UP Triangle v. Comm'n for Health Servs. of the State of*

N.C., 345 N.C. 699, 710, 483 S.E.2d 388, 394 (1997) (citing *Whalen*, 429 U.S. at 600, 97 S. Ct. at 877).

The most obvious distinction between *Whalen* and the instant case is that the personal medical information at issue in *Whalen* was not directly at issue in an active legal dispute. Unlike the plaintiff-patients in *Whalen*, the Plaintiff here is a workers' compensation claimant who alleges that he is entitled to disability compensation as a result of a workplace accident. Because Plaintiff seeks compensation based on his injury, his privacy interest in avoiding the disclosure of medical information relevant to this claim is lessened, if not waived, due to his status as a party in the present action.

Plaintiff also avers that the statutory scheme in *Whalen* was upheld because of the security measures taken by the government to protect the patient's information. *See Whalen*, 429 U.S. at 607, 97 S. Ct. at 880 (Brennan concurring) ("In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure."); *see also ACT-UP Triangle*, 345 N.C. at 712, 483 S.E.2d at 396 ("We conclude that the statutory security provisions are adequate to protect against potential unlawful disclosure which might otherwise render the confidential HIV testing program constitutionally infirm."). We agree with Plaintiff that the presence of "safeguards" were considered by cases such as *Whalen* and *ACT-UP Triangle*. However, subsequent U.S. Supreme Court decisions have clarified that *Whalen* does not stand for the proposition "that an

ironclad disclosure bar is needed to satisfy privacy interests that may be ‘rooted in the Constitution.’” *Nat’l Aeronautics & Space Admin.*, 562 U.S. at 157, 131 S. Ct. at 762 (alterations omitted) (citing *Whalen*, 429 U.S. at 605, 97 S. Ct. 869).

To the extent that *Whalen* is applicable here, we note that there are “safeguards” in place which mitigate against the risk of unwarranted and indiscriminate disclosure of Plaintiff’s personal information. N.C.G.S. § 97-92 already exempts Plaintiff’s medical records from the Public Records Act, and the risk of any unwarranted disclosure of these records is very low. While an Award will invariably contain some personal medical information, N.C.G.S. § 97-84 provides that the Awards of the Industrial Commission are only allowed to include information “pertinent to the questions at issue.” Thus, this statute guides the pen of the Commissioners and mitigates against the risk that non-pertinent personal information will be indiscriminately included in an Award.

In light of the critical role that the Opinion and Award plays in our State’s workers’ compensation system and our General Assembly’s determination that these documents are public records, we conclude that Plaintiff’s asserted privacy interests do not outweigh the public interests at stake here. Accordingly, we conclude that the Industrial Commission is not obligated to seal Plaintiff’s workers’ compensation file, including any Award, due to any constitutional privacy interest.

CONCLUSION

Plaintiff has no statutory or constitutional right to have his entire workers' compensation case file, including any Award, sealed. Accordingly, the order of the Industrial Commission denying Plaintiff's Motion to Seal is affirmed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

No. 20P18-2

TENTH DISTRICT

Supreme Court of North Carolina

VINCENT J. MASTANDUNO, Employee

NATIONAL FREIGHT INDUSTRIES, Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,
Carrier

From N.C. Court of Appeals
(17-1058)

From N.C. Industrial Commission
(Y22434)

ORDER

Upon consideration of the petition filed by Plaintiff on the 2nd of November 2018 in this matter for a writ of certiorari to review the order of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

“Denied by order of the Court in conference,
this the 30th of January 2019.”

**s/Earls, J.
For the Court**

Upon consideration of the petition filed on the 20th of November 2018 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

“Denied by order of the Court in conference,
this the 30th of January 2019.”

**s/Earls, J.
For the Court**

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of February 2019.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina
/s/ M.C. Hackney
M.C. Hackney Assistant Clerk,
Supreme Court of North Carolina

Copy to:

North Carolina Court of Appeals Mr.
John M. Kirby, Attorney at Law, For Mastanduno,
Vincent J. - (By Email)
Mr. Bruce A. Hamilton, Attorney at Law, For National Freight Industries, et al - (By Email)
Mr. S. Scott Farwell, Attorney at Law, For National Freight Industries, et al - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Vincent Mastanduno
1120 Highland Avenue
Greensboro, NC 27403
June 6, 2016

North Carolina Industrial Commission Clerk's Office
4336 Mail Service Center
Raleigh, North Carolina 27699-4336

Re: Vincent Mastanduno v. National
Freight Industries and Zurich American
Insurance Company
NCIC File No.: 7Y22434
Motion to seal Hearing Records for
Hearing on July 12, 2016

Deputy Commissioner Tyler Younts:

I would like to put forth a motion to have all
information regarding my hearing sealed so that it is
not a matter of public record. I also request a
continuance until this motion is approved

.
If you need any clarification or relevant information
on this matter it is available upon request. I may be
reached at (336) 253-9595

Sincerely,
/s/ Vincent Mastanduno
Vincent Mastanduno
cc: Leann A. Gerlach (via regular U.S. mail)

NORTH CAROLINA INDUSTRIAL COMMISSION

I. C. No. Y22434, VINCENT J. MASTANDUNO, Employee, Plaintiff v. NATIONAL FREIGHT INDUSTRIES, INC., Employer, and AMERICAN ZURICH INSURANCE COMPANY, Carrier, Defendants.

ORDER DENYING REQUEST TO SEAL FILE by TYLER YOUNTS, Deputy Commissioner.

FILED: June 9, 2016

This matter is set to be heard before the undersigned on July 12, 2016. Plaintiff, who is now *pro se* has filed correspondence with the Industrial Commission dated June 6, 2016, in which he made a motion for an order to have all information regarding his hearing sealed so that it is not a matter of public record, and further Plaintiff requested a continuance until such motion is approved. Plaintiff did not provide any details regarding the necessity for such orders.

APPEARANCES

Plaintiff: *Pro Se.* 1120 Highland Avenue, Greensboro, NC 27403.

Defendants: Teague Campbell Dennis & Gorham, LLP, Raleigh, NC; Leann A. Gerlach, Counsel of Record. Email: Igerlach@teaguecampbell.com.

* * * * *

Public records in North Carolina are governed principally by N.C. Gen. Stat. § 132-1, *et seq.* The public record status of Workers' Compensation files, however, is specifically controlled by N.C. Gen. Stat. § 97-92(a) which provides:

The records of the Commission that are not awards under G.S. 97-84 and that are not reviews of awards under G.S. 97-85, insofar as they refer to accidents, injuries, and settlements are not public records under G.S. 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

In light of this statute, the undersigned concludes as a general matter that Plaintiff's Workers Compensation claim file is not a public record in the first place. Further, to the extent that certain Orders and Awards of the Commission are public records, Plaintiff has provided no factual or legal basis for the relief sought.

* * * * *

THEREFORE, Plaintiff has not shown good cause to grant his motion to seal his Workers' Compensation file nor to continue the matter to another hearing date. Plaintiff's motions are therefore DENIED.

/s/Tyler
Younts
TYLER
YOUNTS
DEPUTY
COMMISSIONER

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. 22434, VINCENT J MASTANDUNO,
Employee, Plaintiff v NATIONAL FREIGHT
INDUSTRIES, INC , Employer, AMERICAN
ZURICH INSURANCE COMPANY, Carrier,
Defendants

ORDER OF CONTINUANCE by TYLER YOUNTS,
Deputy Commissioner.

FILED: June 27, 2016

This matter is set to be heard before the undersigned on July 12, 2016, and is currently before the undersigned on plaintiff's request for reconsideration of the June 9, 2016 Order denying his request that he workers compensation file be sealed so that his claim will not be a matter of public record. The matter is also before the undersigned on Defendant's Motion to Continue due to the fact that this matter was inadvertently set for hearing during a secure leave period for Defendant's counsel. Subsequent to the June 9, 2016 order denying the motion to seal, Plaintiff communicated timber with the legal assistant of the undersigned, whereupon a telephonic conference was held on June 24, 2016 by the undersigned with Plaintiff and counsel for Defendants. During this conference, Plaintiff expressed concerns regarding being denied employment as well as lending services on account of his workers compensation claim being discoverable through Internet searches of his name, and that

certain sensitive medical records would become public .

APPEARANCES

Plaintiff: Pro Se. 1120 Highland Avenue,
Greensboro, NC 27403

Defendants: Teague Campbell Dennis &
Gorham, LL , Raleigh, NC; Leann
A Gerlach, Counsel of Record
Email:
gerlaclrabteaguecampbell.com

* * * * *

The undersigned is sensitive to Plaintiff's privacy concerns. The undersigned explained during the telephonic conference, in the June 9, 2016 Order, and in other correspondence, that workers compensation files are not generally public records, except as provided in N C Gen Stat N C Gen Stat 97-92(a) which states:

The records of the Commission that are not awards under G S 97-84 and that are not reviews of awards under G S 97-85, insofar as they refer to accidents, injuries, and settlements are not public records under G S 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and

federal agencies pursuant to G S 97—81.

The undersigned explained during the telephonic conference that any information, including medical information, which may be reflected in findings of fact in a final Opinion and Award will unavoidably become part of a public record. Also explained were the undersigned's belief and conclusion that all injured workers with claims before the Industrial Commission are subject to the same privacy considerations.

Further, it is the conclusion of the undersigned, as explained during the telephonic conference, that issuing an order sealing Plaintiff's file, for the purpose of preventing lenders and others from finding otherwise publicly available information during routine background investigations and due diligence would be improper. The protection of Plaintiff's sensitive medical records presents a more substantial basis for concern, however. Nevertheless, it remains the case that all injured workers involved in litigation before the Industrial Commission operate under the same privacy rules. Thus, the undersigned finds insufficient basis for the extraordinary relief Plaintiff seeks. Further, Plaintiff has not presented and the undersigned has not discovered any legal basis for such relief.

Regarding the setting of this matter during the secure leave period for Defendants' counsel, Rule 04 NCAC 10E .0104(1) provides in such instances that the case, "shall be rescheduled for a time that is not within the attorney's secure leave period."

* * * * *

In light of the forgoing, the undersigned enters the following ORDER:

1. Upon reconsideration, Plaintiff has not shown good cause to grant his motion to seal his workers' compensation file. Consequently, Plaintiff's motion to seal his file is DENIED.
2. For good cause shown, Defendants' Motion to Continue is GRANTED. This matter shall be REMOVED from the July 12 hearing calendar and shall be reset on the undersigned's next available hearing calendar in August 2016.

/s Tyler Younts
TYLER YOUNTS DEPUTY
COMMISSIONER

Vincent Mastanduno
1120 Highland Avenue
Greensboro, NC 27403
June 30, 2016

North Carolina Industrial Commission Clerk's Office
4336 Mail Service Center
Raleigh, North Carolina 27699-4336

Re: Vincent Mastanduno v. National
Freight Industries and Zurich American
Insurance Company
NCIC File No.: 7Y22434
Appeal -Denial of Motion to seal
Hearing Records dated June 27,2016

Deputy Commissioner Tyler Younts:

I am appealing your decision dated June 27, 2016
denying my N.C. Industrial Commission Hearing be
sealed. You state my Hearing records will not be
public record citing N.C. Gen Stat. 132-1,et seq. and
by N.C. Gen Stat. 97-92(a).

On the Industrial Commission's livelink public
databases there are hundreds of hearing records
easily accessible on the deputy commission and full
commission level. These records are available for the
world to review. I am alarmed my Hearing records
will become part of this public database. I have
already been denied employment on the grounds that
my Hearing Docket is public record. I have been
victimized by the North Carolina Workers
Compensation System since May 30, 2012. Sealing
my record is a way to mitigate the prejudice I have
experienced in the past. Please consider the very real

effect on my privacy if my Hearing records are not sealed.

I respectfully request a special hearing of the Full Commission on this matter allowing for due process. If you need any clarification or relevant information pertaining to this matter I may be reached at (336) 253-9595.

Sincerely,

/s/ Vincent Mastanduno

Vincent Mastanduno

cc: Leann A. Gerlach (via Certified U.S. mail)
Charlton L. Allen-Chairman (via Certified U.S. mail)

Merideth R Henderson— Executive Secretary
(Via Certified U S mail) Bernadine Ballance-
Commissioner via Certified U S mail

Linda Cheatham- Commissioner (via Certified U S mail)

Bill Daurhridge, Jr. - Commissioner(Via Certified U S mail)

Christopher Loutit- Commissioner(Via Certified U S mail)

Tammy Nance— Commissioner(Via Certified U S Mail)

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. Y22434, VINCENT J. MASTANDUNO, Employee, Plaintiff v. NATIONAL FREIGHT INDUSTRIES, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Carrier, Defendants.

ORDER by CHARLTON L. ALLEN, Chairman.

Filed: NOV 17 2016

This matter is before the Undersigned on Plaintiff's request for immediate review by the Full Commission of the Order filed by Deputy Commissioner Tyler Younts on 27 June 2016

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APPEARANCES

Plaintiff: *Pro se.*

Defendants: Teague Campbell Dennis & Gorham, LLP, Raleigh, North Carolina; Leann Gerlach, Counsel of Record.

* * * * *

On 9 June 2016, Deputy Commissioner Younts entered an Order denying Plaintiff's motion for an Order sealing "all information regarding [his] hearing." On 9 June 2016, Deputy Commissioner Younts entered an Order denying Plaintiff's motion. Plaintiff moved for reconsideration of Deputy Commissioner Younts' 9 June 2016, Order, and on 27 June 2016, Deputy Commissioner Younts entered an

Order denying Plaintiff's motion for reconsideration and reaffirming his previous denial of Plaintiff's motion to seal. Plaintiff seeks immediate review of this Order by the Full Commission.

In his appeal from Deputy Commissioner Younts' 27 June 2016 Order, Plaintiff asserts that “[o]n the Industrial Commission's livelink public database there are hundreds of hearing records easily accessible on the deputy commission and full commission level.” Plaintiff further asserts that he has “already been denied employment on the grounds that [his] Hearing Docket is public record.”

N.C. Gen. Stat. § 97-92(b) provides:

The records of the Commission that are not awards under G.S. 97-84 and that are not reviews of awards under G.S. 97-85, insofar as they refer to accidents, injuries, and settlements, are not public records under G.S. 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

Thus, under the Act, Opinions and Awards of Deputy Commissioners and of the Full Commission are public records. Opinions and Awards may be accessed by the public via the Livelink database Plaintiff refers to in his appeal. However, in this matter, the Deputy Commissioner has not yet taken the evidence on which his Opinion and Award will be based, much less issued an Opinion and Award. As

such, Plaintiff's motion is not ripe with respect to the publication of the Deputy Commissioner's Opinion and Award.

Insofar as Plaintiff objects to the listing of this claim on hearing calendars issued by the Commission, the mere fact of a claim is not private. The only information specific to claims listed on the Commission's hearing calendars is the names of the parties involved in the claim, the identity of their legal counsel, if any, and the file number assigned to the claim by the Commission. Thus, no private information is disclosed on the hearing calendar.

For the foregoing reasons, Plaintiff's request for immediate review of Deputy Commissioner Younts' 27 June 2016 Order is DENIED at this time.

This the 17th day of November, 2016.

/s/ Charlton
L. Allen
CHARLTON
L. ALLEN
CHAIRMAN

Vincent John Mastanduno II
1120 Highland Avenue
Greensboro, NC 27403
December 04, 2016

Office of the Clerk
Attention: Ms. Megan Jost
North Carolina Industrial Commission
4336 Mail Service Center Raleigh
North Carolina 27699-4336

Re: Vincent Mastanduno v. National
Freight Industries and Zurich American
Insurance Company
NCIC File No: 7722434
Re: Appeal of Order (Sealing of Hearing
Records) Dated November 17, 2016.

Dear Chairman Allen:

I Vincent John Mastanduno II, am appealing your order dated November 17, 2016. In which you denied my Hearing Record be sealed. I again demand the sealing of my Workers Compensation Hearing Record given the position of the Defense.

You quote the N.C. Gen Stat. 97-92(b) "The records of the commission that are not awards under G.S. 97-84 and that are not reviews of awards under G.S. 97-85, insofar as they refer to accidents, injuries, and settlements are not public record under G.S. 132-1 and shall not be open to the public, but only to parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and Federal agencies pursuant to G.S. 97-81."

The issue I have with this law is that finding of fact from a hearing is a matter of Public Record. . . . The North Carolina Industrial Commission is violating Federal HIPAA laws. But most alarmingly infringing on my rights granted under the United States Constitution.

Sincerely,
/s/Vincent John Mastanduno II
Vincent John Mastanduno II
cc: Bruce A. Hamilton (certified U.S. Mail)

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. Y22434, VINCENT J. MASTANDUNO, Employee, Plaintiff v. NATIONAL FREIGHT INDUSTRIES, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Carrier, Defendants.

ORDER for the Full Commission by TAMMY R. NANCE, Commissioner.

Filed: MAY 22 2017

This case was reviewed by the Full Commission on April 10, 2017 pursuant to Rule 702(d) of the Workers' Compensation Rules of the North Carolina Industrial Commission, upon Plaintiff's appeal of Chairman Charlton L. Allen's November 17, 2016 one-signature Order denying Plaintiff's request for immediate appeal of Deputy Commissioner Tyler Younts' June 27, 2016 Order. Pursuant to N.C. Gen. Stat. S 97-85(a), Chairman Allen appointed Deputy Commissioner David Mark Hullender to serve on the review of this matter before the full Commission.

APPEARANCES

Plaintiff: *Pro se.*

Defendants: Teague Campbell Dennis & Gorham, LLP, Raleigh, North Carolina; Bruce Hamilton, appearing.

* * * * *

This matter was originally placed on Deputy Commissioner Tyler Younts' July 12, 2016 hearing docket following Defendants' filing of a Form 33 *Request that Claim be Assigned for Hearing*. Prior to the hearing, on June 8, 2016, Plaintiff filed a motion for an Order sealing "all information regarding [his] hearing." On June 9, 2016, Deputy Commissioner Younts entered an ICI Order denying Plaintiff's motion. Plaintiff then requested reconsideration of his motion and on June 27, 2016, Deputy Commissioner Younts denied said request. Plaintiff thereafter appealed to the Full Commission. On July 15, 2016, Deputy Commissioner Younts filed an Order continuing the evidentiary hearing in this matter pending resolution of Plaintiff's appeal.

In his appeal from Deputy Commissioner Younts' June 27, 2016 Order, Plaintiff asserts that "on the Industrial Commission's livelink public databases there are hundreds of hearing records easily accessible on the deputy commission [sic] and full commission level." Plaintiff further asserts that he has "already been denied employment on the grounds that his Hearing Docket is public record."

NC Gen Stat 97-92(b) provides:

The records of the Commission that are not awards under G.S 97- 84 and that are not reviews of awards under GS 97- 85, insofar as they refer to accidents, injuries, and settlements are not public records under G S 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the

right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

Thus, under the Act, only Opinions and Awards of Deputy Commissioners and of the Full Commission are public records. Opinions and Awards may be accessed by the public via the Livelink database plaintiff refers to in his appeal. However, the medical records and other evidence upon which an Opinion and Award by the Deputy Commissioner or Full Commission would be premised are not public records.

In this matter, the Deputy Commissioner has not yet taken any evidence in the case, much less issued an Opinion and Award. As such, plaintiff's motion is not ripe with respect to the publication of the Deputy Commissioner's Opinion and Award. The evidence that will be taken at the hearing before the Deputy Commissioner, including but not limited to medical records, will never be a matter of public record.

Insofar as plaintiff objects to the listing of this claim on hearing calendars issued by the Commission, the mere fact of a claim is not private. The only information specific to claims listed on the Commission's hearing calendars is the names of the parties involved in the claim, the identity of their legal counsel, if any, and the file number assigned to the claim by the Commission. Thus, no private information is disclosed on the hearing calendar.

Plaintiff has offered no evidence to support his concerns regarding national security, visas, life and car insurance rates, blackmail, revocation of licenses,

cyber-bullying, discrimination by his neighbors, membership in clubs and organizations, his ability to adopt a child, rent an apartment or volunteer, or making him the target of a physical assault plaintiff has offered no evidence or legal argument which would justify his claim being treated differently than that of any other injured worker who is seeking benefits under the Act.

With regard to plaintiff's argument that the Commission's refusal to seal his records infringes on his Ninth and Fourteenth Amendment rights, the Commission does not have jurisdiction to rule on constitutional issues

Given the above, plaintiff's motion to seal his file is DENIED, and this matter is HEREB
REMANDED to Deputy Commissioner Younts to conduct a full evidentiary hearing in this matter
Counsel for Defendants shall immediately notify Deputy Commissioner Younts that this matter is ready to be calendared on his next available hearing docket.

This the 12th day of May, 2018.

/s/Tammy Nance
TAMMY R. NANCE
COMMISSIONER

evidence in the case
LINDA CHEATHAM
COMMISSIONER

/s/ David Mark Hullender

42a

DAVID MARK HULLENDER
DEPUTY COMMISSIONER

I.C. NO. Y22434

STATE OF NORTH CAROLINA
BEFORE THE NORTH CAROLINA INDUSTRIAL
COMMISSION

VINCENT J. MASTANDUNO,)
Plaintiff;)
v.)
)
NATIONAL FREIGHT)
INDUSTRIES,)
Employer;)
)
AMERICAN ZURICH)
INSURANCE)
COMPANY,)
Carrier;)
Defendants.)
)
	TRANSCRIPT OF
	THE EVIDENCE

* * *

This claim came on and was heard before the North Carolina Industrial Commission in Raleigh, North Carolina, on April 10, 2017. Chair of Panel Linda Cheatham, Commissioner Tammy R. Nance, and Deputy Commissioner David Mark Hullender presided. At the aforesaid time and place, the following proceedings were had, to wit:

* * *

MR. MASTANDUNO: Yes, I am. Okay. I Vincent J. Mastanduno, I am appealing your Order . . . The issue I have with this law is the finding of fact from a hearing is a matter of public record. . . . The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. If it's not stated in amendments one through eight that does not mean that it can't be other rights, including privacy retained by the people; will infringe on my fourteenth amendment rights guaranteed by the United States Constitution. "All persons born or naturalized to the United States or subject to the jurisdiction thereof or citizens of the United States and the State where they reside. No State shall make or enforce any law or shall abridge the privileges or immunity of citizens of the United States or property without due process of law, nor deny any person within its jurisdiction the equal protections of the law." . . . What are you doing to the citizens of North Carolina? It's bad enough they received an on-the-job injury. You are disclosing personal, sensitive, medical information via the Internet for the world to review,