

STATE OF MICHIGAN
COURT OF APPEALS

W. H. ROGERS, JR.,

Plaintiff-Appellant,

v

CATTLEMAN'S MEAT COMPANY, INC.
and FIREMAN'S FUND INSURANCE
COMPANY,

Defendant-Appellees.

UNPUBLISHED
October 29, 1999

No. 209625
WCAC
LC No. 97 000434

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

The Worker's Compensation Appellate Commission dismissed plaintiff's timely claim for review because plaintiff failed to timely file hearing transcripts, despite a once-extended deadline, as required by MCL 418.861a(5); MSA 17.237(861a)(5). The WCAC subsequently denied plaintiff's motion for reconsideration. Plaintiff appeals by leave granted the WCAC's denial of reconsideration. We reverse.

The facts relevant to this appeal are not in dispute. In a May 19, 1997, decision, a hearing referee denied plaintiff's claim for benefits on the grounds that plaintiff was terminated from his employment for good cause and that plaintiff had recovered from any disability in any event. Plaintiff timely filed a claim for review on June 4, 1997, at the same time requesting the court reporter to prepare a transcript.

Pursuant to MCL 418.861a(5); MSA 17.237(861a)(5), plaintiff was responsible for filing a copy of the hearing transcript within sixty days after filing his claim for review. Thus, the transcript was due on August 4, 1997. In a standard acknowledgment letter sent to plaintiff shortly after his June 4, 1997, filing, the WCAC reminded plaintiff of this obligation. That letter advised not only that extensions of time must be requested within the time period sought to be extended, but also that dismissal was a possible sanction for failure to do so. On August 1, 1997, plaintiff filed a motion for an extension of

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

time on the ground that the court reporter had not furnished the transcript. In an August 6, 1997, letter the WCAC granted plaintiff a sixty-day extension, thus making October 6, 1997, the new deadline.

In a November 12, 1997, order, more than a month past the deadline, the WCAC dismissed plaintiff's pending claim of appeal because no transcript had yet been received and plaintiff had not filed for another extension. On December 12, 1997, plaintiff filed a motion for reconsideration seeking to reinstate the appeal. Plaintiff alleged that a "clerical error in failing to record the receipt" of the WCAC's August 6, 1997 letter resulted in plaintiff failing to note the October 6 deadline. Plaintiff further alleged a lack of prejudice to the parties, and noted that the delay in securing the transcript was out of plaintiff's control because the court reporter was under contract with the state. Plaintiff argued that he should not be held accountable for the reporter's delay.

In a January 14, 1998, order, the WCAC denied plaintiff's motion for reconsideration. The WCAC found that plaintiff's argument of a clerical error was not a sufficient excuse given that plaintiff failed to perfect his appeal within the additional two months granted. The order noted that the December 12, 1997, motion for reconsideration was the first correspondence from plaintiff since his August 1, 1997, request for an extension. The order also stated that plaintiff's conduct did not constitute "substantial compliance." The transcripts were ultimately filed on February 11, 1998.

We review for an abuse of discretion a WCAC decision to dismiss a plaintiff's appeal for failure to comply with a procedural deadline. *Pankey v Bigard/Drillers, Inc*, 222 Mich App 15, 19; 564 NW2d 464 (1997) (where plaintiff failed to timely file a claim for review); *Laudenslager v Pendell*, 215 Mich App 167, 170; 544 NW2d 721 (1996) (where plaintiff failed to timely file a brief).

The doctrine of substantial compliance applies to procedural deadlines in worker's compensation cases. *Laudenslager, supra* at 171. Factors to consider in determining whether dismissal is appropriate include the length of the delay, the reason for the delay and the existence of any resulting prejudice. *Id.*; see also *Pankey, supra* at 18. The WCAC based its dismissal in part on plaintiff's complete failure to keep the Commission informed regarding his difficulty in securing the transcripts from the reporter. In its denial of plaintiff's December 12, 1997, motion for reconsideration the WCAC noted that the motion was the first communication it had received from plaintiff since the August 1, 1997, request for a sixty-day extension. We agree with the WCAC that plaintiff's excuse of a clerical error does not justify the failure to keep the WCAC advised of the status of these proceedings. Nevertheless, while we acknowledge the WCAC's interest in managing its docket by enforcing its filing rules, we conclude that under the circumstances of this case plaintiff's inattentiveness is not fatal to his action.

The transcripts were originally due on August 4, 1997, sixty days after plaintiff filed his claim for review. Pursuant to MCL 418.861a(5); MSA 17.237(861a)(5), plaintiff requested and received a sixty-day extension of this deadline, resulting in a new due date of October 6, 1997. Ultimately not filed until February 11, 1998, plaintiff was over four months late in submitting the transcripts. Plaintiff argues, however, that he should not be held responsible for this delay as it was the court reporter who prepared the transcripts and the reporter's actions were out of plaintiff's control. Relevant to this argument is a comment of our Supreme Court. In *Marshall v Jacobetti Veterans Facility (After Remand)*, 447

Mich 544; 526 NW2d 585 (1994), a decision upholding the WCAC's revised policy of strict compliance with its procedural deadlines, the Court noted that "[w]hile the policy reasons for enforcing a deadline on the filing of transcripts may be at least as strong as those for enforcing a briefing deadline, there are circumstances in which an attorney cannot prevent the tardy filing of a timely ordered transcript." *Id.* at 550, n 9. We acknowledge the merit of plaintiff's argument to the extent that we do not ascribe to plaintiff responsibility for the court reporter's delay. Our position is supported in this case by defendants' concession that no prejudice has resulted from the delay in filing the necessary hearing transcripts.

Although there are no published cases dealing with late transcripts, several recent Supreme Court orders have summarily reversed WCAC dismissals grounded on untimely filed transcripts. See, e.g., *Horvath v Pegasus Tavern*, 454 Mich 912; 564 NW2d 894 (1997); *Wimbush v Noecker Vinyl & Plastics*, 453 Mich 963; 557 NW2d 314 (1996). In *Laudenslager, supra* at 172-173, where a brief was filed only a few days late, this Court concluded that the "harsh sanction" of dismissal was "wholly disproportionate to the relatively small procedural infraction involved" Despite the greater length of delay in this case, given the lack of prejudice and the fact that timely compliance was arguably out of plaintiff's control, we hold that dismissal was inappropriate.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Joseph B. Sullivan