Affirmed and Memorandum Opinion filed April 20, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00377-CV

MICHAEL KENNEDY, Appellant

V.

TURNER INDUSTRIES GROUP, LLC, Appellee

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2008-55576

MEMORANDUM OPINION

Pro se appellant Michael Kennedy challenges the trial court's grant of summary judgment in favor of his former employer, Turner Industries Group, LLC, on Kennedy's causes of action arising from Turner's denial of his claim for workers' compensation benefits. Because Turner established that the trial court lacked jurisdiction over Kennedy's claims, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kennedy was terminated from his position at Turner Industries Group, LLC ("Turner") on October 4, 2006. He contends he sustained a work-related injury the same day, and he sought workers' compensation benefits from the Texas Department of Insurance, Division of Workers' Compensation (the "Division"). Turner disputed the claim.

A benefit review conference was held on October 17, 2007, but the parties were unable to reach an agreement. A contested case hearing was convened in December 2007, but was recessed to allow Kennedy to obtain counsel. After a continuance at Kennedy's request, the hearing was reconvened on May 30, 2008, but Kennedy did not appear. The hearing officer found that Kennedy (a) did not sustain an injury in the course and scope of his employment on October 4, 2006; (b) did not give his employer notice of the claimed injury within thirty days; and (c) did not have good cause for failure to give such notice. In a decision dated June 4, 2008, the hearing officer concluded that Turner's insurance carrier is relieved from liability due to Kennedy's failure to timely notify Turner of an injury. *See* TEX. LABOR CODE ANN. § 409.002 (Vernon 2006).

On September 16, 2008, Kennedy, acting pro se, sued Turner in a Harris County district court. He asserted that (a) Turner "denied [him] his due process rights to worker's compensation"; (b) Turner, its insurer, and its attorney denied him due process by failing to file a notice of injury with the Division; and (c) Turner discriminated against him on the basis of race by denying that Kennedy filed a notice of injury on October 4, 2006. In its answer, Turner responded that Kennedy failed to exhaust his administrative remedies.

On December 1, 2008, Kennedy amended his petition[1] and asserted that Turner acted in bad faith; committed perjury and aggravated perjury; deprived him of his rights to equal protection and equal opportunity to report injuries to the Division; and subjected him to cruel and unusual punishment. Turner successfully moved for traditional summary judgment on this pleading. In this pleading, Kennedy asserted claims against additional defendants, and both in response to the summary judgment motion and on appeal, Kennedy argued that a final judgment is improper because there are outstanding claims against some of these additional defendants. We notified the parties of our intent to dismiss the case on the grounds that the judgment was not final, *see* TEX. R. APP. P. 42.3, thereby giving Kennedy the opportunity to supplement the record to show that the additional defendants had been served, waived service, or answered, if such was the case. *See* TEX. R. CIV. P. 99, 119. Although Kennedy responded, he does not contend that any of the additional defendants have been or will be served or have filed an answer in the suit. We therefore treat the judgment as final and these defendants as nonsuited from the case, and we do not address Kennedy's arguments concerning the claims he pleaded against them. *See Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 232 (Tex. 1963).

Kennedy filed seven post-judgment motions rearguing his claims and attempting to assert additional causes of action. The post-judgment motions were overruled by operation of law, and Kennedy appeals the judgment as to some of his claims.

II. ISSUES PRESENTED

We understand appellant to present four issues for review.[2] In his first issue, Kennedy challenges the trial court's failure to make findings of fact. In his second issue,

[1] Although Kennedy refers to an amended complaint filed December 8, 2008 and Turner refers to an amended complaint filed November 23, 2008, no amended complaints were filed on either date, and it is clear from each party's discussion of the pleading's contents that they both intended to refer to this document, entitled "Plaintiff's First Motion to Amend Names and States Cause of Action."

[2] We have given Kennedy, who is appearing pro se, considerable latitude in the presentment of

he contends that the trial court erred in dismissing his suit for failure to exhaust administrative remedies. Kennedy argues in his third issue that Turner violated his due process rights by making false statements, and thus, the trial court erred in dismissing his claims for mental anguish arising from the denial of medical care. In his fourth issue Kennedy contends that the trial court erred in failing to consider his claims that Turner breached a duty to report Kennedy's injury and committed fraud, acted in bad faith, and breached a duty of fair dealing by falsely stating that no injury incurred.

III. STANDARD OF REVIEW

We review summary judgments de novo. *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009) (per curiam). We consider all grounds the appellant preserves for review that are necessary for final disposition of the appeal. *Diversicare G.P., Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). In a traditional motion for summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). To obtain traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Grinnell*, 951 S.W.2d at 425. Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once the defendant establishes its right to summary

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issues for review. *See Perez v. State*, 261 S.W.3d 760, 763 n.2 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Although we read a pro se appellant's brief "with patience and liberality" to identify the issues he is attempting to raise, the pro se appellant nevertheless is bound by the same laws and procedural rules that govern licensed attorneys. *See id.* (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978)). Thus, we do not consider appellate issues raised for the first time in a reply brief. S*ee* TEX. R. APP. P. 38.3. The pro se appellant also must present argument for the relief sought, supported by appropriate citations to the record and to relevant authority. *See* TEX. R. APP. P. 38.1(i). Where an appellant fails to provide appropriate argument and relevant citations, we will overrule the issue as waived. *See, e.g., Sterling v. Alexander*, 99 S.W.3d 793, 799 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982). In our review, we take as true all summary judgment evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004).

IV. ANALYSIS

A. Failure to Make Findings of Fact

In his first issue, Kennedy challenges the trial court's failure to make findings of fact after granting the summary judgment. Summary judgment is available only if there is no genuine issue of material fact or no evidence of an essential element of a claim or defense. TEX. R. CIV. P. 166a(c),(i). Because summary judgments are decided as a matter of law, a party is not entitled to findings of fact following summary judgment. *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994) (per curiam). We therefore overrule his first issue.

B. Dismissal for Failure to Exhaust Administrative Remedies

In his second issue, Kennedy contends that the trial court erred in dismissing his workers' compensation claims for failure to exhaust administrative remedies. The Workers' Compensation Act vests the power to award workers' compensation benefits solely in the Workers' Compensation Division, subject to judicial review. *See Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W. 2d 607, 612 (Tex. 1996). Judicial review of a Division decision is available only after the party has exhausted administrative review through a contested case hearing or arbitration, followed by an appeal to a Division appeals panel. TEX. LAB. CODE ANN. §§ 408.001(a), 410.251, 410.302(b); *O'Neal v. Ector County Indep. Sch. Dist.*, 251 S.W.3d 50, 51 (Tex. 2008) (per curiam).

A party wishing to appeal a hearing officer's decision must file a written request with the appeals panel and the other party not later than fifteen days after the date on which the hearing officer's decision was received. TEX. LAB. CODE ANN. § 410.202(a). The decision in this case was signed June 4, 2008. Kennedy had to appeal within fifteen days of receipt of that order, and the Commission had to receive that appeal. If an appeal is not timely filed, then administrative remedies have not been exhausted, and the district court lacks subject matter jurisdiction over the claims arising from the denial or delay of workers' compensation benefits. *See, e.g., Combined Specialty Ins. Co. v. Deese*, 266 S.W.3d 653, 658 (Tex. App.—Dallas 2008, no pet.); *Frank v. Liberty Ins. Corp.*, 255 S.W.3d 314, 320 (Tex. App.—Austin 2008, pet. denied); *Cont'l Cas. Co. v. Rivera*, 124 S.W.3d 705, 712 (Tex. App.—Austin 2003, pet. denied); *Old Republic Ins. Co. v. Weeks*, No. 13-07-00451-CV, 2009 WL 1740820, at *2 (Tex. App.—Corpus Christi June 11, 2009, pet. denied) (mem. op.).

In support of its argument that Kennedy failed to exhaust administrative remedies, Turner produced a letter to Kennedy from Division appeals panel judge Rafael Quintanilla regarding the finality of the hearing officer's decision. While that letter was not actually a decision of the appeals panel,[3] Turner moved for summary judgment on the basis that Kennedy failed to timely appeal. In the letter, dated December 4, 2008, Quintanilla wrote, "In response to your handwritten letter of November 2, 2008, please be advised that the Appeals Panel, Texas Department of Insurance, Division of Workers' Compensation, has no record of receiving an appeal in the above-described matter. The Decision . . . has become final. . . ." Kennedy failed to present any controverting evidence that he filed an appeal with the appeals panel within fifteen days of the receipt of the June 4, 2008 order, or that the appeals panel received his appeal.

[3] While this case was on appeal, Kennedy apparently secured a decision from the Appeals Panel, dated April 4, 2009, finding that Kennedy did not timely appeal.

Kennedy argues that the Division consented to this suit and instructed him to file it. In support of his argument, he relies on the letter in which Quintanilla stated, "If you are not satisfied with this decision and desire to have the dispute resolved in court, then you must file a lawsuit in the appropriate court." A district court has jurisdiction to determine whether a claimant timely appealed, even when the appeals panel contends otherwise. *See, e.g.*, *Deese*, 266 S.W.3d at 658. If the district court agrees that the claimant did not timely appeal then the underlying decision and order become final and not reviewable. *See Rivera*, 124 S.W.3d at 712.

In addition, an appeal to the appeals panel must clearly and concisely rebut or support the decision of the hearing officer on each issue for which review is sought. TEX. LAB. CODE ANN. § 410.202(c). A district court can review only those issues raised before the appeals panel. TEX. LAB. CODE ANN. §410.302(b). Not only did Kennedy fail to show a timely appeal, he failed to identify the issues for which he sought. We conclude that Kennedy failed to exhaust administrative remedies, and we overrule Kennedy's second issue.

C. Due Process Claims

Kennedy next appears to assert that Turner made false statements in violation of Kennedy's due process rights, and thus, the trial court erred in dismissing his claims for mental anguish arising from the denial of medical care. In support of this argument, he cites sections 409.003 and 411.108 of the Texas Labor Code. Section 409.003 provides that an employee must file a compensation claim with the Division not later than one year after the injury occurred, or if the injury is an occupational disease, within one year of the time the employee knew or should have known that the disease was related to his employment. TEX. LAB. CODE ANN. § 409.003. Section 411.108 provides that the Division "may require an employer and any other appropriate person to report accidents, personal injuries, fatalities, or other statistics and information relating to accidents on

forms prescribed by and covering periods designated by the commissioner." *Id.* § 411.108. Neither statute supports Kennedy's position.

Although Kennedy's argument is unclear, it is well-settled that the constitutional right to due process prohibits state action, not the conduct of private parties. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ."); *Blum v. Yaretsky*, 457 U.S. 991, 1002–03, 102 S. Ct. 2777, 2785, 73 L. Ed. 2d 534 (1982). Turner is a private entity, and Kennedy has not argued, at trial or on appeal, that Turner's conduct constitutes state action. If it is Kennedy's position that he has a constitutional right to continue litigating his claims against Turner in a state court, we must reject that argument as well. *See Pickett v. Tex. Mut. Ins. Co.*, 239 S.W.3d 826, 835 (Tex. App.—Austin 2007, no pet.) (holding that the requirement that claimants exhaust administrative remedies does not violate their federal right to due process or their state right to due course of law). We therefore overrule Kennedy's third issue.

D. Failure to Consider Additional Claims

In his final issue, Kennedy contends that the trial court erred in failing to consider his claims that Turner breached a duty to report his injury to the Division and committed fraud, acted in bad faith, and breached a duty of fair dealing by falsely stating that no injury incurred. All of his claims for damages for these claims are premised on the fact that he was not awarded benefits. These claims are precluded by the exclusive jurisdiction vested in the Workers' Compensation Commission and his failure to exhaust administrative remedies. *See Saenz*, 925 S.W. 2d at 612 (claims for bad faith and fraud are precluded); *see also Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (explaining that the workers' compensation process "precludes bad faith liability for denying benefits to which the claimant is not entitled"). We therefore overrule Kennedy's fourth issue.

V. CONCLUSION

Because Turner established that the trial court lacked jurisdiction over the claims at issue in this appeal, we affirm the trial court's judgment and deny Kennedy's pending motions as moot.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.