IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GEORGE W. CLIFTON, *Petitioner Employee*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent*,

INTEGRITY STAFFING SOLUTIONS, *Respondent Employer*,

ZURICH AMERICAN INSURANCE COMPANY, *Respondent Carrier*.

No. 1 CA-IC 19-0014
FILED 12-24-2019

Special Action - Industrial Commission
ICA Claim No. 20153-490136
Carrier Claim No. 001627102932WC01
C. Andrew Campbell, Administrative Law Judge

AFFIRMED

COUNSEL

George W. Clifton, Palmdale, California
Petitioner Employee

Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent

Lundmark, Barberich, La Mont & Slavin, P.C., Phoenix
By Kirk A. Barberich
Counsel for Respondent Employer and Respondent Carrier

MEMORANDUM DECISION

Presiding Judge Maria Elena Cruz delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Michael J. Brown joined.

C R U Z, Judge:

¶1 This statutory special action appeal to review an award of the Industrial Commission of Arizona ("ICA") comes to us by way of Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) and 23-951(A), and by Arizona Rule of Procedure for Special Actions 10. *See Indus. Comm'n v. Cameron*, 103 Ariz. 613, 615 (1968) (Arizona Supreme Court "has consistently held that proceedings . . . to review awards of the Industrial Commission are, in substance, appeals . . . ."). In this appeal, we addresss whether the Administrative Law Judge ("ALJ") abused his discretion by imposing on Petitioner George W. Clifton the ultimate sanction—dismissal of his case before hearing—for failing to cooperate during pre-hearing discovery. For reasons that follow, we affirm the dismissal.

FACTUAL AND PROCEDURAL HISTORY

¶2 Clifton was injured when he struck his head while working for Integrity Staffing Solutions on November 30, 2015. Respondent Zurich American Insurance Company ("Zurich") accepted the claim. When Zurich closed the claim in March 2016, Clifton challenged the closure and requested a hearing. In May 2017, an ALJ found that Clifton's injury had become medically stationary with no permanent disability or work restrictions, and awarded temporary benefits only.

I. Procedural History

¶3 In March 2018, Clifton filed a complaint charging several infractions by Zurich during the processing of his claim. The ICA investigated the charges and in May 2018 denied all but one claim, for which Zurich was fined $500 to be paid to Clifton. In April 2018, Clifton filed a second complaint, and this time he alleged he was entitled to wages from Integrity Staffing Solutions for a portion of the day he was injured and

several days after that. The ICA summarily denied that claim. Clifton challenged both decisions by requesting hearings. A consolidated hearing date was set in September 2018. In August 2018, while the September hearing date was approaching, Clifton filed a Request for Investigation under A.R.S. § 23-1061(J) about payment of the wages that were the subject of the April 2018 complaint. By letter dated September 4, 2018, that request was consolidated with the other two complaints that were already set for hearing.

¶4 Meanwhile, on August 7, 2018, counsel for Respondents filed a motion to dismiss the cases due to Clifton's failure to appear for a properly noticed deposition the day before, and because Clifton had not answered interrogatories. In the alternative, counsel requested that Clifton be ordered to appear for a deposition on August 20, 2018. Three days before the deposition, Clifton filed a response denying that he received notice of the deposition and asserting that he had not received interrogatories from Respondents. He also objected to attending any deposition as currently scheduled. Based on his reading of an ICA rule regarding out-of-state depositions, Clifton asserted that as a resident of California, he was not required to attend a deposition unless Respondents obtained prior written permission for the deposition from the ALJ.

¶5 When Clifton did not appear for the August 20, 2018 deposition, counsel for Respondents filed another motion to dismiss the case. Counsel also requested a telephonic pre-hearing conference to discuss the pending issues in the consolidated cases. Clifton responded to the second motion to dismiss by asserting the same objections that he had raised in the first motion to dismiss. On August 28, 2018, the ALJ denied both motions to dismiss and ordered Clifton to respond to the interrogatories and participate in a telephonic deposition as properly noticed by Respondents. Clifton was advised that failure to cooperate in the discovery process could result in dismissal of his case. Also, the September hearing date was postponed to December 2018 to allow time for the parties to conduct discovery.

¶6 On September 4, 2018, Clifton filed "APPLICANT'S SUBMISSION OF ITEMS INTO EVIDENCE IN PREPARATION OF IMPENDING HEARING," which primarily objected to using the courtesy title "Mr." to refer to him in correspondence he had received from the ICA and others, and also pointed out typographical errors in correspondence he had received. He also restated his complaints.

¶7 On September 10, 2018, Clifton filed a request for change of ALJ as a matter of right, as provided by ICA rule. The matter was promptly assigned to a different ALJ. In late September 2018, Clifton filed a document with the Chief ALJ complaining about a lack of response to (1) his request for payment of the $500 penalty, (2) the typos in the correspondence, and (3) a letter from the ICA that had been damaged in the mail and for which he asked that another copy be issued to him.[1] He also criticized the hearing process and referred to Respondents as incompetent. On September 26, 2018, two days before a telephonic deposition was set, Clifton sent Respondents' counsel a written statement advising that he did not own a telephone and would not be participating in a telephonic deposition. In response, counsel rescheduled the telephonic deposition and requested that the ALJ order Clifton to call in at the appointed time from a telephone of his choosing or, in the alternative, that the ALJ dismiss the matter. Clifton responded to this by filing a response cursing and objecting to the use of the title "Mr." to refer to him in the letter from counsel to the ALJ and by threatening to sue Respondents' counsel for "sexual harassment" and report him to the State Bar. Clifton claimed that counsel was engaging in "malicious badgering." He also stated that he does not own a telephone and has "no legal duty" to own one. The ALJ issued an order requiring Clifton to participate in a duly noticed deposition and warning him that failure to do so could lead to sanctions, including dismissal of the case.

¶8 On October 16, 2018, Respondents'counsel issued Clifton a notice of telephonic deposition for October 29, 2018. A few days later, Clifton requested an order from the ALJ that would prohibit counsel from referring to him as "Mr." On October 29, 2018, counsel filed another motion to dismiss the matter, asserting that Clifton had called in for the deposition at the appointed time but that the deposition had not taken place because Clifton "presented in such an angry and disturbing fashion that [counsel] did not believe that it was possible to proceed in a professional or constructive manner." He noted that Clifton "yelled at the court reporter and he threatened to sue her if she called him 'mister.'" The ALJ gave Clifton a chance to file a written response. On November 13, 2018, Clifton filed a response offering his version of events. He asserted that before the deposition began, he forbade anyone from calling him "mister" to "lay the groundwork" for "how he wanted the deposition to proceed." He admitted that he told the court reporter that he would sue her if she called him "mister." He stated that the telephone was hung up and he tried to call

[1] The ALJ sent Clifton another copy of the letter within a few days.

back three times, but the phone was hung up three more times. He objected to dismissal.

¶9 The ALJ denied the motion to dismiss. On December 12, 2018, the ALJ postponed the hearing to January 30, 2019, and issued the following directive:

> Applicant is ordered to appear for and attend a rescheduled deposition upon Notice of the same. The deposition can be scheduled as a telephonic deposition and the Applicant is obligated to attend.
>
> The parties are reminded of their respective obligation to act professionally in this matter, in all communications and interactions, including the deposition. Of course, the parties should respect the other's stated preference in identifying an individual by their given name, if requested.
>
> Although I was not present at the prior telephonic deposition, it appears the situation warrants an additional reminder. The court reporter at the deposition is providing a vital service to the parties and to the Industrial Commission in creating an accurate record of the deposition. The court reporter is a professional and should be treated as such. Any action, comment, or communication directed at the court reporter, directly or indirectly, that in any way creates an inhospitable work environment for the court reporter will be viewed as obstructing the deposition.

A new date for deposition was set for January 2, 2019. In response, on December 31, 2018, Clifton filed "APPLICANT'S NOTICE OF DEFENDANTS' AND THE ICA'S UNLAWFUL BEHAVIOR" arguing that the telephonic deposition set for January 2 and the ALJ's postponement of the hearing date from December to January were both "unlawful" because they did not follow ICA rules. Clifton argued that under the rules, he was entitled to notice of the deposition at least forty days in advance of the initial hearing date, which had been in September 2018. He also asserted that ICA rules prohibited an ALJ from postponing a hearing date for failure to take a deposition, or as Clifton stated, "because Defendants' lawyer wimped out on the Depo. of 29 Oct. 2018." Clifton expressly stated that "there will be no depo[sition] because Applicant will take no part in the ICA's unlawful behavior. Shameful!" On January 3, 2019, Respondents filed another motion to dismiss based on Clifton's failure to participate in discovery.

II. ALJ Dismissal and Review

¶10 On January 7, 2019, the ALJ issued an award dismissing the consolidated claims. After setting forth the procedural history, the ALJ found that Clifton had repeatedly refused to appear for a deposition or properly participate in one, even though he was given many chances to do so. The ALJ noted that Clifton had refused to comply with the latest attempt at taking his deposition. The ALJ determined that Clifton had either engaged in a pattern of failure to cooperate with the discovery process, including failure to comply with ALJ orders, or had abandoned his hearing requests by his conduct. All three requests for hearing were dismissed.

¶11 Also on January 7, 2019, Clifton moved for a change of ALJ for cause, alleging that the ALJ had not ruled on motions he had filed. The Chief ALJ promptly denied the motion. Clifton then filed a lengthy request for review of the ALJ decision. He incorporated many of his prior motions into his review request. Respondents filed a response, and on February 28, 2019, the ALJ issued a decision affirming the award. In affirming the dismissal, the ALJ noted that Clifton's objections to the deposition based on his out-of-state status had been overruled in late August 2018, and his objection based on his lack of a telephone was overruled in October 2018. Finally, the ALJ noted that Clifton's unequivocal statement that there would be no deposition, had been made just before the most recently noticed deposition. For those reasons, the ALJ affirmed the award.

DISCUSSION

¶12 Clifton alleges the ALJ erred when it concluded that Clifton had willfully failed to appear for a deposition on January 2, 2019, and dismissed his case.[2] An ALJ has the discretion to determine what sanctions to impose when a party willfully fails to appear for a properly noticed deposition. *King v. Indus. Comm'n*, 160 Ariz. 161, 163 (App. 1989). The sanction imposed by an ALJ will not be overturned absent an abuse of discretion. *Id.* When determining whether a sanction of dismissal is proper in a case where a claimant has failed to cooperate, an ALJ should consider several factors, including the party's explanation for the failure, whether a pattern of failure to cooperate exists, whether counsel acted with due

[2] The ALJ's conclusion that Clifton refused to appear at the January 2, 2019 deposition necessarily implies the finding of a willful failure to appear. *See Nolden v. Indus. Comm'n*, 127 Ariz. 501, 504 (App. 1980) (finding that willfulness may be implied by the factual findings).

diligence, whether a claimant has offered some evidence to support the claim, whether the other party suffered prejudice due to the failure of the claimant, the context of the failure, and whether the failure has imposed an unwarranted administrative burden. *Id.*; *see also Brown v. Indus. Comm'n*, 154 Ariz. 252, 254 (App. 1987) (listing factors to consider for dismissal for failure to appear for hearing).

¶13 Here, the ALJ explicitly found that Clifton failed to cooperate and rejected Clifton's reasons for not appearing at the deposition. We agree that Clifton's refusal to participate in the January 2, 2019 deposition was not reasonable. In his statement accusing the Respondents and the ICA of acting "unlawfully," Clifton argued that under ICA rules found at Arizona Administrative Code ("A.A.C.") R20-5-143(I) and R20-5-142(A) he was entitled to notice of the January 2 deposition at least forty days in advance of the initial hearing date, which had been in September 2018. That argument is meritless on its face. Moreover, he argued that A.A.C. R20-5-143(I) and R20-5-142(F), which state that a hearing may not be postponed "because a party fails to take or complete a deposition," prohibited the ALJ from postponing the December hearing date. That argument presumes that counsel for Respondents failed to take or complete the deposition in October 2018. The record does not support that argument and the ALJ properly rejected it. The ALJ had the authority to postpone the December hearing date so that a deposition could be taken. *See* A.R.S. § 23-941(F) (ALJ may conduct the hearing "in any manner that will achieve substantial justice").

¶14 Besides Clifton's failure to cooperate and his unreasonable explanation for the failure, several other factors support the ALJ's dismissal. Respondents' counsel has acted with due diligence, and Respondents have been unable to obtain discovery from Clifton, which has prejudiced them.[3] Repeated scheduling of depositions has burdened the process with unwarranted administrative costs. Finally, Clifton has been so focused on his objection to the use of the word "mister" and his disapproval of the process that he has not provided any substantial evidence in support of his complaints. His filing on September 4, 2018, titled "submission in preparation for impending hearing," did not contain evidence supporting his claims, but merely included his comments on various documents that he had received during the complaint and hearing processes. Thus, the factors listed above do not weigh in his favor.

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[3] The record on appeal reveals no evidence that Clifton ever answered the interrogatories.

¶15 Postponing the hearing date was not an abuse of discretion. As part of his argument, Clifton urges that Respondents failed to take his deposition on October 29, 2018, even though he was present telephonically. However, there was substantial evidence of Clifton's misconduct at that time such that the ALJ had a basis for finding that Clifton failed to cooperate with the deposition. Rather than dismiss the cases as Respondents were urging, the ALJ allowed another date for deposition to be set and postponed the hearing, an act well within the ALJ's discretion and designed to give Clifton a chance to cooperate. Clifton was also warned that a lack of cooperation could result in the sanction of dismissal. We find this course of conduct to be a prudent exercise of the ALJ's discretion.

¶16 Clifton's argument on appeal that a hearing was never set on his August 23, 2018 request for an investigation under A.R.S. § 23-1061(J) is contradicted by the ALJ's letter of September 4, 2018, stating that the claim was being consolidated with the other complaints. The consolidated cases were set for hearing on December 18, 2018.

CONCLUSION

¶17 Having reviewed the record and considered Clifton's arguments on appeal, we affirm the ICA award dismissing his consolidated case for failure to cooperate with discovery.

AMY M. WOOD • Clerk of the Court
FILED: AA