

Cite as 2009 Ark. App. 668

ARKANSAS COURT OF APPEALSDIVISION II
No. CA 08-668EVLYNENE KIRKENDOLPH
APPELLANT

V.

DF&A REVENUE SERVICES DIVISION
and DEATH AND PERMANENT TOTAL
DISABILITY TRUST FUND
APPELLEES**Opinion Delivered** SEPTEMBER 30, 2009APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F503749]REVERSED IN PART;
AFFIRMED IN PART**M. MICHAEL KINARD, Judge**

Appellant, Evlynene Kirkendolph, appeals from the decision of the Workers' Compensation Commission dismissing her appeal to the Commission and denying her motion to reopen her claim for additional evidence. We reverse in part and affirm in part the decision of the Commission.

A hearing on the issue of whether appellant is permanently totally disabled due to carpal tunnel injuries to both of her hands was held before an administrative law judge (ALJ) on September 26, 2007. On December 21, 2007, the ALJ issued an opinion denying appellant's claim. The record contains a copy of a return receipt indicating that a copy of the ALJ's opinion was delivered to appellant's counsel of record on January 2, 2008. There is no evidence in the record as to when or if appellant personally received a copy of the opinion. Appellant's counsel of record was suspended from the practice of law by our supreme court

Cite as 2009 Ark. App. 668

on January 28, 2008. Appellant filed a pro se notice of appeal from the decision of the ALJ on February 12, 2008. Appellee DF&A Revenue Services Division filed a motion to dismiss the appeal as untimely. On April 24, 2008, the Commission issued an opinion dismissing appellant's appeal as untimely. Appellant has filed a timely appeal from the decision of the Commission.

Appellant is appealing from the grant of a motion to dismiss her appeal. When reviewing the Commission's ruling on motions, we use an abuse of discretion standard. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 82, 250 S.W.3d 263, 273 (2007). The time given to parties to appeal to the Commission from decisions of an ALJ is governed by Arkansas Code Annotated section 11-9-711(a)(1) (Supp. 2007), which states:

A compensation order or award of an administrative law judge or a single commissioner shall become final unless a party to the dispute shall, within thirty (30) days from the receipt by him or her of the order or award petition in writing for a review by the full commission of the order or award.

In its opinion, the Commission determined that the thirty-day time period in which appellant was required to file her notice of appeal began to run from the date that her counsel of record received a copy of the opinion. Appellant argues that the time to file her appeal should have been extended because she never personally received a copy of the opinion.

Pursuant to Arkansas Code Annotated section 11-9-704(c)(3) (Repl. 2002), the provisions of the Workers' Compensation Act are to be strictly construed. Strict construction requires that nothing be taken as intended that is not clearly expressed, and the doctrine of strict construction is to use the plain meaning of the language employed. *Taylor v. Lubritech*,

Cite as 2009 Ark. App. 668

75 Ark. App. 68, 54 S.W.3d 132 (2001). In addition, the purpose of the Workers' Compensation Act is to secure compensation for legitimately injured workers, and the statutes must be strictly construed without broadening or narrowing their scope. *See* Ark. Code Ann. § 11-9-1001 (Repl. 2002). The question before us in this case is whether, under the specific facts of this case, the receipt of the ALJ opinion by appellant's attorney of record was sufficient to satisfy the requirements of section 11-9-711.

Arkansas Code Annotated section 11-9-711(b)(1) (Supp. 2007), like section 11-9-711(a)(1), states that orders of the Commission do not become final until thirty days after "a party" receives a copy of the order or award. The specification in sections 11-9-711(a)(1) and (b)(1) that the thirty day period begins once the order is received by the party as opposed to when the copy of the order or award is mailed to the party demonstrates a clear intent by the legislature that a party shall have a full thirty days in which to file an appeal, regardless of the date the order or award is actually rendered. Appellant's attorney was barred from the practice of law twenty-six days after the record reflects that he received a copy of the ALJ opinion.

Receipt by an attorney employed by a party will normally be considered sufficient, because the attorney is usually able to appeal to the Commission on the party's behalf. In this case, however, the attorney for appellant did not have a full thirty days in which to file an appeal because he was barred from the practice of law before the thirty days had run. Under these circumstances, in order to give full effect to the intent of the legislature in drafting

Cite as 2009 Ark. App. 668

section 11-9-711 (in keeping with the legislative declaration of Arkansas Code Annotated section 11-9-1001), the order of the ALJ must not become final until thirty days after the order was received by appellant. There is no evidence in the record, however, as to when or even if appellant received a copy of the ALJ opinion. Absent evidence as to when appellant received a copy of the opinion, the Commission had no basis under section 11-9-711(a)(1) to find that appellant's notice of appeal was untimely. We hold that the Commission abused its discretion by dismissing the appeal and, therefore, the Commission is reversed on this point.

Appellant's second point on appeal is that the Commission erred by denying her motion to reopen the claim for new evidence. The Commission has broad discretion regarding the admission of evidence, and its decision will not be reversed absent a showing of abuse of discretion. *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996). In addition, Arkansas Code Annotated section 11-9-705(c)(1)(A) (Repl. 2002) states that all evidence must be submitted at the initial hearing on a claim. In order to submit new evidence, a party must show that the new evidence is relevant, not cumulative, that the party was diligent in presenting the evidence, and that the evidence would change the result of the case. *Hargis Transport v. Chesser*, 87 Ark. App. 301, 19 S.W.3d 309 (2004).

In this case, the proffered evidence was a forty-two percent impairment rating to appellant's hands that was issued by Dr. Collins at a point in time that was after the hearing before the ALJ. The Commission denied the motion to admit the new evidence based on

Cite as 2009 Ark. App. 668

its determination that the evidence would not change the outcome of the claim. A claimant cannot receive wage loss benefits in excess of his or her degree of permanent impairment for a scheduled injury unless the claimant is found to be permanently totally disabled. Ark. Code Ann. § 11-9-521(g). In this case, the ALJ found that appellant was not permanently totally disabled. In support of her argument that the impairment rating is evidence of permanent total disability, appellant cites Arkansas Code Annotated section 11-9-519(b) (Repl. 2002), which states that, in the absence of evidence to the contrary, the loss of both hands constitutes permanent total disability. However, the impairment rating from Dr. Collins is not evidence that appellant lost both of her hands; it is instead evidence that she sustained a degree of permanent impairment to both of her hands that is less than 100-percent impairment. We hold that the Commission did not abuse its discretion in denying appellant's motion to reopen her claim.

Appellant's final point on appeal is that the Commission erred by denying her motion to set aside the decision of the ALJ under Ark. R. Civ. P. 60, based upon appellant's lack of notice of the opinion of the ALJ. As we have reversed the Commission's decision to dismiss appellant's appeal to the Commission, this point is moot.

Reversed in part; affirmed in part.

VAUGHT, C.J., and PITTMAN, J., agree.