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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-944

Filed: 15 August 2017

North Carolina Industrial Commission, I.C. No. 893252

ANA S. MEZA, Employee, Plaintiff

v.

BCR JANITORIAL SERVICES, INC., Employer, THE HARTFORD, Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 29 April 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 April 2017.

Merritt, Webb, Wilson & Caruso, PLLC, by Joseph M. Wilson, Jr., and Joy Rhyne Webb, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Jennifer Morris Jones, for defendant-appellees.

BRYANT, Judge.

Where plaintiff failed to prosecute her claim for over five years after she moved the Commission to remove her claim from the Industrial Commission's hearing docket and failed to take any action to notify the Commission or her defendant-employer that she underwent six surgical procedures and therapy in the interim, we

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affirm the Commission's conclusion that defendants were prejudiced by plaintiff's failure to prosecute her claim and that the sanction of dismissal was appropriate.

On 24 March 2007, Ana Meza ("plaintiff") was cleaning and stripping a floor while working for BCR Janitorial Service, Inc., ("defendant-employer") when she slipped and fell. Plaintiff reported injuries to her back/spine, head, neck, left arm, left shoulder, left hand, right hand, left leg, right leg, chest, ribs, and groin. On 27 March 2007, plaintiff returned to work and informed a supervisor of the injury. The supervisor sent her to human resources, who called plaintiff's supervisor. Plaintiff's supervisor instructed her to go to the emergency room and, once there, to "call him . . . for him to give the insurance information." He also told her that he would pay for her medical treatment. A year later, on 31 March 2008, plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee regarding the 24 March 2007 injury.

On 14 April 2008, defendant-employer and its carrier, The Hartford, (collectively, "defendants") filed a Form 19 Employer's Report of Employee's Injury. Defendants acknowledged that on 27 March 2007, plaintiff reported to her supervisor an injury sustained while stripping wax from a floor. On the Form 19, defendants reported an injury to plaintiff's head, that she was treated by a physician, and that she continued to receive her salary in full. However, on 17 July 2008, plaintiff filed a Form 33 Request that Claim be Assigned for Hearing, again alleging injuries to her

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“back/spine, shoulder, head, groin, left arm, left leg, right leg, chest, [and] ribs” as a result of the fall. Defendants filed a Form 33R Response and Form 61 denial of workers’ compensation claim, in which they disputed the nature and extent of plaintiff’s injuries, and denied plaintiff’s claim that her injuries were causally related to the incident at work.

On 7 August 2009, a deputy commissioner entered an order on plaintiff’s motion. The matter was removed from the hearing docket, and the parties were directed to mediation. On 3 December 2009, the parties participated in mediation, which ended in an impasse.

Almost five years later, on 16 October 2014, plaintiff filed a Request that Claim be Assigned for Hearing. During the five-year interim between plaintiff’s withdrawal of her request for a hearing (7 August 2009) and the filing of her second Form 33 request for hearing (14 October 2014), plaintiff underwent several surgical procedures that plaintiff alleges were causally linked to the injury sustained on 24 March 2007.

On 27 October 2014, defendants filed a Motion to Dismiss Plaintiff’s Claim with Prejudice. Defendants’ motion to dismiss was denied on 7 November 2014, and their motion for reconsideration was denied on 10 December 2014. On 3 February 2015, the parties participated in a second mediation conference, which ended in another impasse.

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On 27 March 2015, the matter was heard before Deputy Commissioner Chrystal Redding Stanback. By an opinion and award filed on 13 October 2015, the deputy commissioner dismissed plaintiff's claim with prejudice. The deputy commissioner concluded that plaintiff's failure to request a hearing on her claim within two years of the filing date of the order which initially removed the matter from the hearing calendar severely prejudiced defendants and no sanction short of dismissal would suffice. Plaintiff appealed to the Full Commission ("the Commission"). Following a hearing, the Commission filed an opinion and award on 29 April 2016 dismissing plaintiff's claim with prejudice. Plaintiff appeals.

On appeal, plaintiff contends the Commission erred by finding plaintiff's unreasonable delay in prosecuting her claim prejudiced defendants and granting defendant's motion to dismiss as a sanction for plaintiff's delay.

Standard of Review

"This Court reviews an opinion and award by the Commission to determine (1) whether there is any competent evidence in the record to support the Commission's finding[s] of fact, and (2) whether the Commission's conclusions of law are justified by the findings of fact." *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 294, 713 S.E.2d 68, 74 (2011) (citation omitted). The Commission's findings of fact are binding

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on appeal when they are supported by competent evidence. *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999).

Unreasonable Delay

Plaintiff first argues the Commission erred by finding that the unreasonable delay in prosecuting her claims prejudiced defendants. Specifically, plaintiff contends that no competent evidence exists to support the Commission's findings that plaintiff's unreasonable delay hindered defendants' ability to (A) investigate plaintiff's initial claim of injury, as well as the medical necessity and causal relationship between plaintiff's treatment and her 24 March 2007 injury, and (B) provide medical treatment to lessen plaintiff's period of disability. Plaintiff also argues that no competent evidence exists to support the Commission's conclusion that (C) no sanctions short of dismissal would suffice to remedy the prejudice defendants suffered due to plaintiff's delay. We disagree.

“[T]he Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the [Workers' Compensation Act], and necessary to determine the rights and liabilities of employees and employers.” *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 138, 337 S.E.2d 477, 483 (1985) (citation omitted). Even in the absence of a statute or rule, “[o]ne of the powers inherent in the courts and thus also in the . . . Commission is the ‘power of the court to dismiss a case for want of prosecution.’ ”

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Harvey v. Cedar Creek BP, 149 N.C. App. 873, 874, 562 S.E.2d 80, 81 (2002) (quoting *Swygert v. Swygert*, 46 N.C. App. 173, 178, 264 S.E.2d 902, 905 (1980)). Section 97-80 of our General Statutes empowers and directs the Industrial Commission to adopt rules establishing processes and procedures to be used under the Workers' Compensation Act. N.C. Gen. Stat. § 97-80(a) (2013). At the time defendants filed their motion to dismiss plaintiff's claim, Workers' Compensation Rules governing the dismissal and removal of claims stated the following:

(1) Dismissals

....

(c) Upon notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission.

(2) Removals

....

(d) When a plaintiff has not requested a hearing within two years of the filing of an Order of Removal requested by the plaintiff or necessitated by the plaintiff's conduct, and not pursued the claim, upon proper notice and an opportunity to be heard, any claim may be dismissed with prejudice by the Industrial Commission, in its discretion . .

..

Workers' Comp. R. of N.C. Indus. Comm'n 613(1)(c), (2)(d), 2014 Ann. R. (N.C.) 1275, 1299 (emphasis added); *cf.* N.C. Admin. Code tit. 4, r. 10A.0616(c) (2017) ("In a denied

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[Workers' Compensation] claim, if a plaintiff has not requested a hearing within two years of the filing of the Order removing the case from a hearing calendar and has not pursued the claim, upon notice and opportunity to be heard, any claim *shall* be dismissed with prejudice by the Commission, on its own motion or by motion of any party." (emphasis added) (effective 1 November 2014).

Our courts have stated that dismissal with prejudice is the most severe sanction available to the court in a civil case This principle applies equally to the dismissal of a workers' compensation claim at the Industrial Commission since prosecution pursuant to the Workers' Compensation Act is an injured worker's exclusive remedy.

Lee v. Roses, 162 N.C. App. 129, 132, 590 S.E.2d 404, 407 (2004) (citations omitted).

In *Lee*, this Court stated the following factors the Commission is to consider when presented with a motion to dismiss: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant [caused by the plaintiff's failure to prosecute]; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* at 133, 590 S.E.2d at 407.

In regard to the *Lee* factors, plaintiff challenges the Commission's finding of fact number seven.

7. Plaintiff has acted in a manner which deliberately and unreasonably delayed the prosecution of the matter. Plaintiff's unreasonable delay hindered Defendants' ability to investigate not only the merits of the initial claim of injury but also the medical necessity and causal

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relationship of the extensive medical treatment she received over many years to the injury she claims she sustained on March 24, 2007. By unreasonably delaying a timely determination of the compensability of her claim, Plaintiff's conduct deprived Defendants of any opportunity to provide medical treatment to lessen Plaintiff's period of disability, which was prejudicial to Defendants, particularly given the fact that Plaintiff is claiming permanent and total disability. At this juncture in the claim, sanctions short of dismissal would not suffice to remedy the prejudice Defendants have suffered as a result of Plaintiff's deliberate and unreasonable delay.

A. Deliberate or unreasonable delay

In her brief submitted to this Court, plaintiff does not dispute the Commission's finding that "[p]laintiff has acted in a manner which deliberately and unreasonably delayed the prosecution of the matter."

The findings of fact as set out in the Commission's 29 April 2016 opinion and award are unchallenged as to the sequence of events and duration of the action. Plaintiff alleged injuries sustained while working for defendant-employer BCR Janitorial Services on 24 March 2007. Over one year later, plaintiff filed a Form 18, *Notice of Accident to Employer and Claim of Employee*. After an investigation, defendants acknowledged a soft tissue injury to plaintiff's head, but per defendant's Form 61, denied the claim (plaintiff alleged injury to her back/spine, shoulder, head, groin, left arm, left leg, right leg, chest, and ribs). On 15 July 2008, plaintiff filed a Form 33 requesting that her claim be assigned for hearing. Plaintiff then filed a motion to remove her action from the hearing docket and to redirect the parties to

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mediation. By order entered 7 August 2009, plaintiff's motion was granted. On 23 November 2009, plaintiff's attorney filed a motion to withdraw as counsel. Plaintiff's attorney noted that there were no pending due dates and that plaintiff had retained new counsel. On 3 December 2009, the parties participated in a mediation which ended in an impasse. On 7 December 2010, plaintiff's second attorney filed a motion to withdraw as plaintiff's counsel. Plaintiff's attorney similarly noted there were no pending due dates and that plaintiff had retained new counsel. Almost four years later, on 14 October 2014, plaintiff's attorney filed a Form 33 requesting that her claim be assigned for hearing, prompting defendants to move for the dismissal of plaintiff's action for failure to timely prosecute her claim following its removal from the hearing docket.

Plaintiff's inaction for almost four years following a mediation which ended in an impasse is sufficient to support the Commission's finding that "[p]laintiff has acted in a manner which deliberately and unreasonably delayed the prosecution of the matter" in satisfaction of the first prong of the *Lee* test. See *Lentz v. Phil's Toy Store*, 228 N.C. App. 416, 423–24, 747 S.E.2d 127, 133 (2013) ("[The] [p]laintiff's failure to appear at hearings, failure to obtain competent medical authority regarding his claim, and failure to prosecute his claim for six years is sufficient competent evidence to support the findings of fact and the conclusions of law of the Commission that

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plaintiff has unreasonably delayed the matter, satisfying the first prong of the *Lee* test.”).

B. Prejudice due to plaintiff’s failure to prosecute

Plaintiff contends that there is no evidence in support of the Commission’s finding that her unreasonable delay hindered defendant’s ability to investigate plaintiff’s claim of injury or deprived defendants of any opportunity to provide medical treatment.

The second prong of the *Lee* test requires that the Commission consider “the amount of prejudice, if any, to the defendant [caused by the plaintiff’s failure to prosecute.]” *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 407.

The Commission’s opinion and award indicates that defendants investigated plaintiff’s claim following her initial report and participated in two mediations which ended in impasse. On 27 March 2015, a hearing was conducted on the appeal of the orders denying defendants’ motions to dismiss plaintiff’s action. At the hearing, defense counsel argued that after plaintiff’s second attorney withdrew from the case,

plaintiff took no further efforts to prosecute her claim . . . in any manner whatsoever until she filed a new Form 33 hearing request on October 14, 2014[,] [m]ore than five and a half years after . . . [the] order was entered removing the claim from the active hearing docket. . . . In fact, defendants’ very first notice that plaintiff was seeking additional benefits was her [F]orm 33, which was filed on October 14, 2014.

.....

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It was only at that time that we learned that plaintiff had undergone six separate surgeries since her motion to renew her Form 33 was granted.

Furthermore, plaintiff testified that she did not notify the Commission that she had undergone six surgeries to address her medical problems since notifying defendants of her claim.

[Defense counsel]. From the time that your case was initially removed from the calendar in 2009 until the time that you filed your new Form 33 hearing request in 2014, isn't it true that you did not contact the Industrial Commission regarding that same medical treatment that you thought you required in relation to this incident?

. . . .

[Plaintiff]. No. I did not.

On the issue of prejudice, defense counsel argued that

if [plaintiff] had timely prosecuted her claim and provided . . . defendants with notice of these surgeries and her contentions that they were related to the work incident, then we certainly would have had the opportunity to . . . mitigate damages, get [independent medical examinations], look into this case and conduct any kind of investigation. But we were not partied [sic] to any of these procedures. And we would have wanted to know whether any treatment short of surgery could have been appropriate.

Therefore, we find sufficient evidence to support the Commission's finding that

Plaintiff's unreasonable delay hindered Defendants' ability to investigate not only the merits of the initial claim of injury but also the medical necessity and causal

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relationship of the extensive medical treatment she received over many years to the injury she claims she sustained on March 24, 2007. By unreasonably delaying a timely determination of the compensability of her claim, Plaintiff's conduct deprived Defendants of any opportunity to provide medical treatment to lessen Plaintiff's period of disability, which was prejudicial to Defendants, particularly given the fact that Plaintiff is claiming permanent and total disability.

We find this reasoning persuasive. *See generally Gregory*, 212 N.C. App. at 295–96, 713 S.E.2d at 74 (“[T]he purpose of providing the employer with written notice within 30 days of the injury . . . is twofold: ‘First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury.’” (citation omitted)).

Accordingly, defendant's arguments challenging the Commission's finding of fact number seven on the first two prongs of the *Lee* test are overruled.

C. Sanctions

As for plaintiff's argument that the Commission erred in granting defendants' motion to dismiss as a sanction for her unreasonable delay, the record provides support for the Commission's finding: “By unreasonably delaying a timely determination of the compensability of her claim, Plaintiff's conduct deprived Defendants of any opportunity to provide medical treatment to lessen Plaintiff's period of disability, which was prejudicial to Defendants, particularly given the fact

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that Plaintiff is claiming permanent and total disability.” Thus, we agree with the Commission’s conclusion that “sanctions short of dismissal would not suffice to remedy the prejudice Defendants have suffered as a result of Plaintiff’s deliberate and unreasonable delay.” This satisfies prong three of the *Lee* test and all of the factors the Commission was to consider before dismissing plaintiff’s action with prejudice. *See Harvey*, 149 N.C. App. at 874, 562 S.E.2d at 81 (“One of the powers inherent in the courts and thus also in the . . . Commission is the power of the court to dismiss a case for want of prosecution.” (citation omitted)). Accordingly, plaintiff’s arguments are overruled.

AFFIRMED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).