

Affirmed  
Author, Sellers  
Concurring:  
Bolch  
Scott

NO. COA00-933

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2001

TARIQ RASHEED

Employee-Plaintiff

v.

Industrial Commission  
No. I.C. 524921

T.J. MAXX,

Employer-Defendant,

and

CNA INSURANCE COMPANY,

Carrier-Defendant.

Appeal by plaintiff from order filed 28 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 October 2001.

*Pamela A. Hunter, for plaintiff-appellant.*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Erica B. Lewis and Shelley W. Coleman, for defendant-appellees.*

SMITH, Judge.

Plaintiff appeals from an order of the Industrial Commission denying his motion to reconsider the Commission's decision to dismiss for failure to prosecute his claim.

On or about 12 September 1997 plaintiff mailed a Form 33, "Request That Claim Be Assigned For Hearing," to the Industrial Commission. He requested a hearing because the parties had been unable to reach an agreement as to whether plaintiff had a

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compensable change of condition. Deputy Commissioner Edward Garner (Garner) calendared the matter for hearing in Charlotte at 9:00 a.m. on 15 July 1998. Neither plaintiff nor his counsel appeared in person for the hearing. Deputy Commissioner Garner called plaintiff's counsel and learned that plaintiff was out of state and would not be appearing at the scheduled time. The Deputy Commissioner granted defendants' motion to dismiss with prejudice but allowed plaintiff, with defendants' consent, to settle with defendants within thirty days. If the parties did not settle, the claim would be dismissed with prejudice effective 14 August 1998.

The record on appeal does not reflect any other activity in this matter until on or about 21 July 1999, when plaintiff filed an application for review with the full Commission seeking review of Deputy Commissioner Garner's decision. He alleged that "[d]ue to scheduling restraints, Plaintiff was unable to attend hearing because he was attending school in New York."

On 13 January 2000, the full Commission filed an order upholding the dismissal of the claim. It noted that plaintiff did not file a motion for reconsideration of the deputy commissioner's decision. It also found that plaintiff did not file notice of appeal to the full Commission within fifteen days after the deputy commissioner's decision as required by N.C. Gen. Stat. § 97-85. It further found that plaintiff failed to show excusable neglect sufficient to cause the Commission, in its discretion, to grant relief from the deputy commissioner's order.

On or about 28 January 2000, plaintiff filed a motion to

reconsider the full Commission's decision, alleging good cause existed to vacate the deputy commissioner's order because the order was "based upon a misapprehension of material facts and medical status of the Plaintiff's claim." On 28 March 2000, the Commission filed an order denying plaintiff's motion to reconsider. Plaintiff gave notice of appeal to this Court on or about 24 April 2000.

Plaintiff contends on appeal to this Court that the Commission abused its discretion by denying plaintiff a continuance of the hearing before the deputy commissioner and by refusing to grant plaintiff's motion for relief from judgment. Plaintiff asserts in his brief that "[u]nforeseen transportation difficulties made it impossible for him to appear at the scheduled hearing and he so advised his attorney on the morning of the hearing and she advised the Court." He contends that his counsel "appeared" for the hearing via telephone and that counsel would have appeared in person if the deputy commissioner had not indicated his intent to dismiss the case. Plaintiff also contends that the deputy commissioner abused his discretion by allowing plaintiff thirty days to accept defendants' settlement offer. He argues that the deputy commissioner's action had a coercive effect in violation of the purposes and intent of the Workers' Compensation Act.

We note that plaintiff has failed to include in the record on appeal any motion to continue the hearing before the deputy commissioner from 15 July 1998. We "are bound by the record as certified and can judicially know only what appears of record." *Vassey v. Burch*, 301 N.C. 68, 74, 269 S.E.2d 137, 141 (1980).

Without a motion to continue or an order ruling upon such in the record, we have nothing to review. Defendant's assignment of error addressed to the failure to grant a continuance is therefore dismissed.

A motion for relief from a prior judgment or order is addressed to the discretion of the Industrial Commission. *Hogan v. Cone Mills Corp.*, 326 N.C. 476, 477, 390 S.E.2d 136, 137 (1990). Rule 611(4) of the Rules of the Industrial Commission requires the Commission to give the parties reasonable notice of the hearing in each case. This rule further provides that postponement or continuance of a scheduled hearing "will rest entirely in the discretion of a Commissioner or Deputy Commissioner." Only in certain circumstances not applicable here is a hearing required to be cancelled or postponed. See Rule 611(7), Rules of the Industrial Commission.

Plaintiff does not contend that he did not receive adequate notice of the rescheduled hearing. The record does not reflect that plaintiff showed to the Commission that transportation difficulties made it impossible for him to attend. The record also does not show any reason why counsel for plaintiff could not personally appear before the deputy commissioner at the time the case was scheduled for hearing to request a continuance. Plaintiff did not give notice of appeal from the decision of the deputy commissioner within fifteen days as required by N.C. Gen. Stat. § 97-85. Plaintiff also offers no excuse for his failure to seek relief from judgment until approximately one year later. Having a

valid and reasonable basis for dismissing plaintiff's claim with prejudice, the deputy commissioner was not required to allow plaintiff additional time within which to reach a settlement.

We thus find no abuse of discretion. The decision of the Industrial Commission is affirmed.

Affirmed.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).

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