

Riggsbee - affirmed
Bolch
Scott - dissent

NO. COA99-845

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2000

FILED
00 APR -4 AM 6:52
IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

BARBARA McNEILL,
EMPLOYEE/APPELLANT

v.

PURULATOR PRODUCTS CO.,
EMPLOYER,

North Carolina
Industrial Commission
I.C. Nos. 638707, 625217,
871825

ITT HARTFORD,
INSURER/APPELLEE

Appeal by plaintiff-employee from opinion and award filed 22 January 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 March 2000.

Eller and Mallard, by Sanya T. Eller, for plaintiff-employee.

Lewis & Roberts, P.L.L.C., by Brian D. Lake and Jeffrey A. Misenheimer, for defendant-employer.

Teague, Campbell, Dennis & Gorham, L.L.P., by Melissa R. Garrell and Tracey L. Jones, for defendant-employer and defendant-carrier CIGNA Ins. Co.

EAGLES, Chief Judge.

Barbara McNeill (plaintiff) filed a claim for compensation approximately eight years after the accident which allegedly caused her injury. The Full Commission, with Commissioner Scott dissenting, held that Purolator Products Co. (defendant-employer) and defendant-carriers were not estopped from pleading the two-year limitation of N.C. Gen. Stat. § 97-24 and that plaintiff's claim for compensation was barred as a result.

The record before the Full Commission shows the following: Plaintiff worked for defendant-employer from December of 1971 until 7 February 1994. She testified she began having problems with pain in her neck and shoulders in the Spring of 1988. Plaintiff informed her supervisor, who directed her to come in early the next day and see the nurse. The nurse saw plaintiff the next day and informed her that she had probably pulled a muscle and that she should put an ice pack on her shoulder.

When plaintiff's pain persisted into the month of October, the nurse took her to a doctor at Urgent Care. A doctor examined plaintiff and informed her that she had a pulled muscle in her shoulder. The doctor prescribed a muscle relaxer and therapy for plaintiff, and he also indicated that plaintiff was able to work. Plaintiff stated she did not miss any time from work as a result of the injury. Following an MRI on 18 February 1994 and subsequent conservative treatment by a doctor, plaintiff underwent a cervical diskectomy and fusion on 4 May 1994.

Plaintiff did not file a Form 18 [Notice of Accident to Employer] initially, and she conceded no one told her not to file a workers' compensation claim. On 8 April 1996, plaintiff filed a Form 18 with the Commission which listed 2 February 1996 as the date of injury. Plaintiff also filed a Form 33 [Request that Claim be Assigned for Hearing] on 9 February 1996 and on 22 June 1996. Defendant-employer filed a Form 19 [Employer's Report of Injury to Employee] which listed 27 October 1988 as the date of plaintiff's injury.

A deputy commissioner initially heard the matter on 22 January 1997 and continued the matter so that a carrier could be added to the action. After conducting a hearing on 16 July 1997, the deputy commissioner found "there [was] insufficient evidence of record to support a finding that the defendant-employer engaged in actions in an effort to induce the plaintiff to not timely file her claim within two years of an injury by accident or specific traumatic incident" The deputy commissioner then concluded plaintiff's claims were barred by the provisions of N.C. Gen. Stat. § 97-24 and filed an order of dismissal on 5 August 1997. The order dismissed plaintiff's claims for an injury by accident or specific traumatic incident and also dismissed defendant-carrier Cigna from plaintiff's remaining occupational disease claim. On 17 February 1998, the deputy commissioner filed an opinion and award in which he denied plaintiff's disability claim after concluding plaintiff had failed to prove she suffers from an occupational disease. Plaintiff appealed that order to the Full Commission, which reviewed the matter on 19 October 1998. The parties stipulated that plaintiff did not file a Form 18 "alleging injury on 2 February 1994 until 8 April 1996" and did not file a Form 33 until 9 February 1996.

After reviewing the record before it, the Full Commission adopted the findings of fact made by the deputy commissioner and made the following findings of fact and conclusions of law:

1. Defendant-employer did not engage in any conduct which would have led plaintiff to believe that she did not have to file her claim within two years of an injury by

accident that allegedly occurred in 1988 or on 2 February 1994.

2. Plaintiff knew in the Spring of 1988 that she was suffering from neck and shoulder pain, which she attributed to her employment.

3. Any misdiagnosis of plaintiff's injury or condition was not the cause of plaintiff's failure to file her claim within two years of any injury by accident in 1988 or on 2 February 1994.

4. Plaintiff did not file a claim with the Industrial Commission within two years of the alleged injury by accident in 1988 or on 2 February 1994.

.

1. Plaintiff's claims for injury by accident or specific traumatic incident occurring on either 7 February 1994 or anytime in 1988 are barred. G.S. 97-24.

2. Defendants are not estopped from asserting G.S. 97-24 as a bar to plaintiff's claim.

The Full Commission then denied plaintiff's claim for compensation, with Commissioner Scott filing a dissenting opinion. From the Full Commission's opinion and award, plaintiff appeals.

Plaintiff contends the Full Commission erred in its opinion and award by concluding that the defendants were not estopped from invoking the jurisdictional bar of N.C. Gen. Stat. § 97-24. We disagree.

"The right to compensation under this Article [Article 1 of Chapter 97] shall be forever barred" unless a plaintiff's claim is filed with the Industrial Commission within two years after the accident. N.C. Gen. Stat. § 97-24(a) (1999). This filing requirement "is not a statute of limitation, but a condition

precedent to the right to compensation." *Perdue v. Daniel International*, 59 N.C. App. 517, 518, 296 S.E.2d 845, 846 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 647 (1983). Failure to file timely is a jurisdictional bar for the Industrial Commission. N.C. Gen. Stat. § 97-24. When there is an absence of "evidence that the Industrial Commission acquired jurisdiction either by the timely filing of a claim or by the submission of a voluntary settlement agreement," dismissal of a claim is proper. *Barham v. Hosiery Co.*, 15 N.C. App. 519, 521, 190 S.E.2d 306, 308 (1972).

However, if the circumstances are deemed egregious, the doctrine of estoppel will be employed and a party will be prevented from raising the time limitation of N.C. Gen. Stat. § 97-24. *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Parker v. Thomas-Arthur Paving Co., 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990). "When such facts are established by the evidence, the lateness of the claim has ordinarily been excused." *Belfield*, 77 N.C. App. at 336, 335 S.E.2d at 47.

The Full Commission here found that defendant-employer "did not engage in any conduct which would have led plaintiff to believe that she did not have to file her claim within two years" Defendant-employer did not tell plaintiff that it would file her workers' compensation claim or that she should not file her claim. Plaintiff knew in the Spring of 1988 of her neck and shoulder pain, which she attributed to her employment, and she was not lulled into a false sense of security by defendants. Accordingly, defendants were not estopped from asserting the jurisdictional bar in N.C. Gen. Stat. § 97-24. Plaintiff's assignment of error is overruled.

Affirmed.

Judges WALKER and SMITH concur.

Report per Rule 30(e).