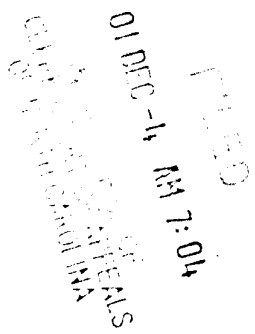
Affirmed in part
Reversed in part
Author, Sellers
Concurring: Mavretic
Dissenting: Bolch

NO. COA00-1452

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2001



CHARLES L. McKOY,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. File No. 815591

CITY OF DUNN,
Employer,
Self-Insured,

ZENITH INSURANCE COMPANY,
Third-Party Administrator,
Defendant.

Appeal by plaintiff from opinion and award entered 13 September 2000 by Commissioner Dianne C. Sellers of the North Carolina Industrial Commission. Heard in the Court of Appeals 10 October 2001.

Brent Adams and Associates, by Brenton D. Adams, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Jay E. Bingham, for defendant appellees.

McCULLOUGH, Judge.

Plaintiff, Charles L. McKoy, appeals from a ruling by the North Carolina Industrial Commission denying him benefits and awarding costs and attorney fees associated with a deposition to defendants.

Plaintiff, a fifty-one-year-old male, had been employed by defendant for approximately twenty-three years prior to 1997. In

1995, plaintiff had begun to see a series of doctors about pain in his back and legs. In 1996, an MRI revealed that plaintiff had a herniated disc in his back.

Plaintiff contends that on 1 October 1997 he was injured while lifting a water valve. Specifically, he claims that he felt a "pop" in his back. Plaintiff was out of work 2-3 October 1997. Plaintiff continued to work until 9 January 1998, when he had surgery on his back. Plaintiff returned to work in April of 1998 on restricted duty. Plaintiff was released by his doctor to full duty in May of 1998, which was understood to mean lifting up to fifty pounds without assistance. Plaintiff stopped working completely on 1 July 1998.

Plaintiff did not notify defendant of any incident that occurred on the job that caused him pain until 26 February 1998. It was at this time plaintiff tried to file for workers' compensation. Plaintiff could not remember the date his injury took place, so he chose 1 October 1997.

At the hearing before the Full Commission discrepancies in the plaintiff's story came to light. Plaintiff had denied having previous back trouble at the hearing before the Deputy Commissioner. Plaintiff gave conflicting stories as to where he was and what he was lifting on 1 October 1997 and as to when he left work on that day. Plaintiff missed doctors' appointments after 1 October 1997. When he did go to the doctor, plaintiff did not mention back pain at first, and when he did, he did not reference a work-related injury or recent accident. In fact, he

affirmatively stated that it was not an accident or job-related visit.

Plaintiff makes the following assignments of error: (I) that the Industrial Commission erred by requiring the plaintiff to prove a specific date upon which the injury occurred, and (II) that the Industrial Commission erred by imposing sanction upon plaintiff's attorney by requiring him to pay cost and attorney's fees in the amount of seven hundred dollars ($700.00).

I.

Plaintiff claims that he was denied benefits by the Full Commission because he could not pinpoint the exact date on which his injury occurred. He contends that this is error. We disagree.

N.C. Gen. Stat. § 97-2(6) specifically provides a claimant can receive compensation for an injury resulting from a "specific traumatic incident." N.C. Gen. Stat. § 97-2(6) (1999). "A specific traumatic incident need not involve unusual conditions or a departure from the claimant's normal work routine." *Lettley v. Trash Removal Service*, 91 N.C. App. 625, 627, 372 S.E.2d 747, 749 (1988).

In *Richards v. Town of Valdese*, 92 N.C. App. 222, 374 S.E.2d 116 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989), this Court said:

> The 1983 amendment to N.C.G.S. § 97-2(6) relaxes the requirement that there be some unusual circumstance that accompanies a back injury. We believe that through the amendment, the General Assembly also recognized the complex nature of back injuries, and did not intend to limit the definition of specific

> traumatic incident to an instantaneous occurrence. Back injuries that occur gradually, over long periods of time, are not specific traumatic incidents; however, we believe that events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature.

Id. at 225, 374 S.E.2d at 118-19.

Further, in *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 449 S.E.2d 233 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995), this Court said:

> *Judicially cognizable* does not mean "ascertainable on an exact date." Instead, the term should be read to describe a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

Id. at 709, 449 S.E.2d at 238. *Fish* also held that "cognizable time . . . does not compel the plaintiff to allege the specific hour or day of the injury." *Id.* at 708, 449 S.E.2d at 237.

The findings of fact by the Commission are conclusive and binding on this Court if supported by competent evidence. *Id.* at 708, 449 S.E.2d at 237. This is so even if evidence exists which would support a contrary finding. *Id.* Conclusions of law predicated on these findings are subject to review by appellate courts. *Id.*

The Commission found from the evidence that plaintiff was not

credible and that he had suffered no compensable injury. The Commission found as a conclusion of law:

> 1. Plaintiff has failed to prove by the greater weight that he sustained a compensable injury by accident or sustained a compensable specific traumatic incident to his back on or about October 1, 1997. N.C. Gen. Stat. § 97-2(6)

Its findings of fact support this conclusion. As stated above, "the evidence must show that there was some event that caused the injury, not a gradual deterioration." *Fish*, 116 N.C. App. at 709, 449 S.E.2d at 238. Here, the evidence shows that plaintiff had a pre-existing back injury for sometime.

> 3. In January of 1995, prior to the alleged injury of October 1, 1997, plaintiff began treating with Dr. Jennifer Seddon for back and left leg pain. Plaintiff continued to treat with Dr. Seddon intermittently for similar symptoms during 1995, 1996, and 1997.
>
> 4. In 1996, Dr. Seddon referred plaintiff to Dr. Charles Matthews, a neurologist. Dr. Matthews recommended a lumbar MRI which revealed a herniated disc at L4-5.
>
> . . . .
>
> 12. Plaintiff testified at the hearing before the Deputy Commissioner and stated in his recorded statement that he had not suffered problems with his back prior to October 1, 1997 and that he had never been disagnosed [sic] with any back problems prior to October 1, 1997. However, the greater weight of the medical evidence indicates otherwise.

This the plaintiff apparently attempted to hide.

All the evidence points to a gradual deterioration, even though the Commission never specifically said so.

5. Plaintiff contends that he injured his back on October 1, 1997 in the course and scope of his employment with defendant-employer while lifting a pump. However, although plaintiff was scheduled to treat with Dr. Seddon on October 2, 1997 for a follow-up of tendonitis of the left elbow, plaintiff did not attend this appointment. Nevertheless, plaintiff did treat with Dr. Seddon on October 6, 1997 for tendonitis. Significantly, plaintiff made no mention of a back injury allegedly occurring 5 days earlier. Furthermore, plaintiff again missed another appointment scheduled on October 20, 1997.

6. Plaintiff next treated with Dr. Seddon on October 28, 1997. Although plaintiff complained of low back pain that had existed for two weeks, plaintiff specifically reported to Dr. Seddon that he had not suffered any recent injuries. Dr. Seddon believed that plaintiff's complaints were related to the herniated disc diagnosed in 1996. Plaintiff returned to Dr. Seddon on November 18, 1997 continuing to complain of low back pain with radicular symptoms. Plaintiff again gave no history of a work-related injury. Dr. Seddon referred plaintiff to Dr. Allen for a surgical consultation.

7. Dr. Allen first treated plaintiff on November 24, 1997. Plaintiff indicated to Dr. Allen that he had suffered from back and left leg symptoms for approximately three months. Dr. Allen recommended an MRI which showed a disc herniation and lateral recess stenosis at L4-5 which is consistent with the 1996 MRI taken prior to the alleged injury. Dr. Allen performed a left L4-5 partial hemilaminectomy and decompression of lateral recess stenosis and lateral disc herniation on plaintiff on January 9, 1998.

8. On February 26, 1998, after his surgery, plaintiff entered Ronald Autry's office, told Mr. Autry that his vacation and sick time was almost depleted, and asked whether he could file for workers' compensation. Plaintiff did not report or discuss a work-related injury. Mr. Autry told plaintiff that he would have to see the City

> Clerk, Joyce Valley. Plaintiff saw Ms. Valley and then reported back to Mr. Autry's office to fill out an accident report. Plaintiff then visited with Lisa Daniel, assistant to Mr. Autry, who helped plaintiff fill out a Report of Injury. The Report of Injury plaintiff filled out indicated a date of injury in November of 1997. Mr. Autry pointed out to plaintiff that the date plaintiff had picked was a date after which Dr. Allen had recommended surgery. Therefore, plaintiff returned to Ms. Daniel, reviewed his work history, and selected October 1, 1997 for his date of injury. Plaintiff selected this date because he was out of work on October 2, 1997 and October 3, 1997. Plaintiff told Ms. Daniel to type October 1, 1997 on the revised Report of Injury. Plaintiff had not reported any injury to Mr. Autry, Ms. Daniel, or Ms. Valley until this time.

Finding of Fact No. 8 is especially telling of what the Commission was presented with. Plaintiff was trying to obtain workers' compensation because he was out of vacation and sick time. "The legislative intent seems clear that our Workmen's Compensation Act is an industrial injury act, and not an accident and health insurance act. We should not overstep the bounds of legislative intent, and make by judicial legislation our Compensation Act an Accident and Health Insurance Act." *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 403, 82 S.E.2d 410, 414 (1954). As evidenced by the findings of fact, the discrepancies in the plaintiffs' story show that he was trying to fit his injury under the act. The Commission did not believe that he was injured at work.

This assignment of error is overruled.

II.

Plaintiff's final assignment of error is to the Full

Commission's award of attorney's fees and costs to defendant associated with a deposition.

The Full Commission made the following finding of fact:

> 16. Attorney for defendant properly noticed the depositions of Ms. Joyce Valley and Dr. Jennifer Seddon to take place at 1:00 p.m. and 4:00 p.m. on March 10, 1999 in Dunn. Prior to March 10, 1999, attorney for plaintiff did not notify attorney for defendant that attorney for plaintiff was in trial. On the morning of March 10, 1999, plaintiff's attorney's assistant contacted attorney for defendant and stated that plaintiff's attorney was in trial, but would attend the deposition scheduled for 1:00 p.m. Thus, attorney for defendant appeared at the deposition along with the court reporter and witness. Attorney for plaintiff did not attend the 1:00 deposition, or the 4:00 deposition. *This conduct was unreasonable and unexcusable*. As a result of plaintiff's attorney's failure to notify defendant's attorney of the fact that he was in trial and would be unable to attend the depositions, defendant incurred legal fees in the amount of $475.00, court reporter fees in the amount of $150.00, and travel expenses in the amount of $27.00. The total reasonable fees, travel expenses, paralegal fees and court reporter expenses incurred are $700.00.

(Emphasis added.) The Full Commission based its Conclusion of Law No. 2 on this finding of fact: "Defendant are [sic] entitled to recover costs and attorney fees associated with the depositions scheduled on March 10, 1999 in the amount of $700.00. I.C. Rule 802." Plaintiff contends that the Full Commission was without legal authority to make such an award to the defendant. We agree.

The Full Commission based its conclusion of law on Rule 802. Rule 802(1) says:

> (1) Upon failure to comply with any of

> the aforementioned rules, the Industrial Commission may subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure, including reasonable attorney fees to be taxed against the party or his counsel whose conduct necessitates the order.

Workers' Comp. R. of N.C. Indus. Comm'n 802(1), 2001 Ann. R. (N.C.) 765, 765. Rule 802 allows the Industrial Commission to sanction those who violate its rules. There has been no finding that any of the rules promulgated by the Industrial Commission have been violated. There are other specific rules which give the Industrial Commission authority to sanction, but none of them are invoked here. *See* Workers' Comp. R. of N.C. Indus. Comm'n 612(2), 2001 Ann. R. (N.C.) 761, 761; *see also Hawley v. Wayne Dale Construction*, ___ N.C. App. ___, ___ S.E.2d ___ (filed 2 October 2001) (No. COA00-976).

It is clear that the Industrial Commission must prove a violation of its rules to obtain the authority to impose sanctions. Our case law makes it clear that the Industrial Commission does not sit as a general court of justice. In a concurring opinion in *Fennell, ex rel. Estate of Fennell v. N.C. Dept. of Crime Control & Pub. Safety*, ___ N.C. App. ___, 551 S.E.2d 486 (2001), Judge Hudson explains:

> [U]nder the Workers' Compensation Act, the Industrial Commission was created by the General Assembly as "a commission." The commission is "primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina Workers' Compensation Act." The Commission is explicitly *not* a court of general jurisdiction, but is a quasi-judicial

> board with jurisdiction limited to that conferred upon it by the legislature. In workers' compensation cases, the Rules of Civil Procedure and the Rules of Evidence do not apply, and the Commission is empowered to make its own rules; in fact, the statute requires that "[p]rocesses, procedures and discovery under this Article shall be as summary and simple as reasonably may be."

Fennell, ___ N.C. App. at ___, 551 S.E.2d at 492-93.

Rule 802 acknowledges the fact that the Industrial Commission does not have the full power of a court of general jurisdiction. It requires that a rule must be violated before the Commission can invoke the powers of a court of general jurisdiction. In *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 510 S.E.2d 388, *disc. review denied*, 350 N.C. 834, 538 S.E.2d 197 (1999), this Court examined Rule 802 and its application. In that case, the dismissal of a case by the Industrial Commission as a sanction was based on Rule 802. It was held that

> the Commission, its members, and its deputies (adjudicators) may order dismissal of an action or proceeding for violation of the Rules. We hold that such an order must specifically enumerate which of the Rules have been violated and what actions constitute the violations. Because [the] Deputy . . . made no findings of a rules violation and because there is not other statutory authorization for the dismissal of proceedings, dismissal was inappropriate.

Id. at 16, 510 S.E.2d at 392.

It seems clear to this Court that the Commission, not basing the sanctions on one of its own rules or anything more than a belief that the "conduct was unreasonable and is unexcusable," was without authority to make the award of attorney's fees and costs to

defendant.

In light of our holding, plaintiff's assignment of error is sustained, and the Commission's order mandating sanctions is reversed.

Affirmed in part, reversed in part.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).