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NO. COA12-349
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

MICHAEL JOSEPH ALLENDER,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
File No. 891525

STARR ELECTRIC COMPANY, INC.,
Employer,
and
GENERAL CASUALTY INSURANCE CO.,
Carrier,
Defendants.

Appeal by plaintiff from Order by the Full Commission entered 23 November 2011 by Commissioner Christopher S. Scott, Commissioners Bernadine S. Ballance and Staci T. Meyer concurring. Heard in the Court of Appeals 13 September 2012.

J. Randolph Ward for plaintiff appellant.

Teague, Campbell, Dennis & Gorham, LLP, by Melissa R. Cleary, for defendant appellees.

McCULLOUGH, Judge.

Michael J. Allender ("plaintiff") appeals from the Full Commission's order dismissing his appeal to the North Carolina

Court of Appeals on the grounds of timeliness. For the following reasons, we affirm.

I. Background

On 18 February 2008, plaintiff filed a claim for workers' compensation benefits with his employer, Starr Electric Company, Inc. ("Starr Electric"), and Starr Electric's insurance carrier, General Casualty Insurance Co. (together "defendants"). Plaintiff alleged that on 6 September 2007, while completing electrical work at Duke University Medical Center as an employee of Starr Electric, plaintiff inhaled airborne pathogens and viruses causing MRSA. As a result, plaintiff had both legs amputated and suffered impairment of his lungs, causing total permanent disability.

On 21 February 2008, defendants denied plaintiff's workers' compensation claim. Consequently, plaintiff requested that his claim be assigned for hearing. Plaintiff's request was received by the North Carolina Industrial Commission (the "Commission") on 29 April 2008. Plaintiff's claim came on for hearing on 31 July 2009 before Deputy Commissioner John B. Deluca. An Opinion and Award denying plaintiff's claim was filed 21 May 2010.

Plaintiff filed a motion for reconsideration on 7 June 2010 that was subsequently denied 22 June 2010. On 2 July 2010, plaintiff timely appealed to the Full Commission.

The case was heard 15 November 2010 before Commissioners Meyer, Scott, and Ballance. On 15 December 2010, an Opinion and Award for the Full Commission was issued denying plaintiff's claim.

Throughout the case, plaintiff had two attorneys of record, Kenneth P. Rothrock ("Mr. Rothrock") and J. Randolph Ward ("Mr. Ward"). Mr. Rothrock received notice of the Full Commission's Opinion and Award by certified mail on 16 December 2010. Mr. Ward received notice of the Full Commission's Opinion and Award by certified mail on 30 December 2010.

Plaintiff filed motions to receive further evidence and for reconsideration on 31 January 2011, to which defendants responded on 2 February 2011. On 16 February 2011, the Full Commission filed an Order denying plaintiff's motions to receive further evidence and for reconsideration.

Plaintiff's notice of appeal to the Court of Appeals was received by the Commission on 25 February 2011. In response, on 7 March 2011, defendants filed a motion to dismiss plaintiff's appeal. By Order filed 27 April 2011 by Commissioner Cheatham,

the Commission member assigned to settle the record on appeal, plaintiff's appeal was dismissed on the ground that it was untimely. Plaintiff appealed to the Full Commission on 29 April 2011. On 23 November 2011, the Full Commission filed an Order dismissing plaintiff's appeal. Plaintiff timely appealed the dismissal of his original appeal to this Court on 23 December 2011.

II. Analysis

Plaintiff raises two issues on appeal: (1) whether the appeal of the Full Commission's 15 December 2010 Opinion and Award was timely, and (2) whether the Commission retained jurisdiction to dismiss the appeal.

A. Standard of Review

Our review of a decision of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681-82, 509 S.E.2d 411, 414 (1998)). "The Commission's conclusions of law are subject to *de novo* review." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). In this

case, the facts are not in dispute. Therefore, we are limited to a review of the Commission's conclusions of law.

B. Timeliness

The first issue plaintiff presents on appeal is whether his original appeal from the Full Commission's 15 December 2010 Opinion and Award was timely. We find that it was not timely.

The Workers' Compensation Act provides a (thirty) 30-day period from receipt of an agency's final decision in which to file an appeal. See N.C. Gen. Stat. § 97-86 (2011) ("either party to the dispute may, *within 30 days from the date of such award or within 30 days after receipt of notice* to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals") (emphasis added).

In the present case, the Opinion and Award of the Full Commission was issued on 15 December 2010. Notice of the Opinion and Award was received by plaintiff's attorneys, Mr. Rothrock and Mr. Ward, on 16 December 2010 and 30 December 2010, respectively. Plaintiff did not file a notice of appeal until 24 February 2011, well beyond the (thirty) 30-day deadline.

Yet, plaintiff filed motions to present further evidence and for reconsideration with the Full Commission on 31 January 2011.

Plaintiff correctly asserts that the time for filing notice of appeal is tolled when a timely motion for reconsideration is filed. See N.C. Admin. Code tit. 4, r. 10A.0702(a) (September 2012) ("The running of the time for filing and serving a notice of appeal is tolled as to all parties by a timely motion filed by any party to amend, to make additional findings or to reconsider the decision, and the full time for appeal commences to run and is to be computed from the entry of an Order upon any of these motions[.]"). Nevertheless, we find that plaintiff's motions to present further evidence and for reconsideration were untimely and did not toll the period in which plaintiff was entitled to file notice of appeal.

Plaintiff asserts two arguments to support his contention that his motions to receive further evidence and for reconsideration were timely and tolled the time to file notice of appeal. First, plaintiff contends that the time period for filing a motion to reconsider an Opinion and Award of the Full Commission is (thirty) 30 days pursuant to N.C. Gen. Stat. § 97-86. Second, plaintiff contends that the Commission erred in running the (thirty) 30-day time period from Mr. Rothrock's

receipt of notice of the Full Commission's Opinion and Award on 16 December 2010.

As we have previously noted, the Workers' Compensation Act provides a (thirty) 30-day period from receipt of the Full Commission's Opinion and Award in which to give notice of appeal to the Court of Appeals. N.C. Gen. Stat. § 97-86. N.C. Gen. Stat. § 97-86 does not, however, concern motions to the Commission to receive further evidence or for reconsideration. In response to plaintiff's argument, defendants contend that motions to receive further evidence and for reconsideration are governed by N.C. Gen. Stat. § 97-85, which provides a (fifteen) 15-day period from receipt of notice of a Commission decision in which to file a motion for relief with the Commission. N.C. Gen. Stat. § 97-85 (2011). After reviewing the pertinent sections of the Worker's Compensation Act and Industrial Commission Rules regarding workers' compensation, it is clear that "either a motion for reconsideration to a deputy commissioner or an appeal to the full Industrial Commission must be filed within fifteen days of the award from which the party is seeking relief." *Moore v. City of Raleigh*, 135 N.C. App. 332, 335, 520 S.E.2d 133, 136 (1999) (citing N.C. Gen. Stat. § 97-85). However, the period for filing a timely motion for

reconsideration from a decision of the Full Commission is not so clearly stated. Yet, we need not address the issue any further given that our decision regarding plaintiff's second argument is dispositive.

Assuming *arguendo* that motions for reconsideration to the Full Commission are timely when filed within (thirty) 30 days of receipt of notice of the Opinion and Award, plaintiff's motion filed on 31 January 2011 was untimely given that Mr. Rothrock received notice of the Opinion and Award on 16 December 2010. Plaintiff argues that the trial court erred in running the time for filing an appeal and for filing motions for relief from Mr. Rothrock's receipt of notice on the grounds that the notice was erroneously sent to Mr. Rothrock. We disagree.

Although Mr. Rothrock may not have appeared on behalf of plaintiff before the Full Commission, or even been involved in the case beyond the hearing before the deputy commissioner, Mr. Rothrock remained an attorney of record on 15 December 2010 when the Full Commission issued its Opinion and Award. The N.C. Administrative Code governs the withdrawal of an attorney from representation and provides that:

(b) Any attorney who wishes to withdraw from representation in a proceeding before the Industrial Commission shall file with the Industrial Commission, in writing:

(1) A Motion to Withdraw

* * * *

(c) An attorney may withdraw from representation only by written order of the Industrial Commission. The issuance of an award of the Industrial Commission does not release an attorney as the attorney of record.

N.C. Admin. Code tit. 4, r. 10A.0614 (September 2012). In this case, Mr. Rothrock never took the necessary actions to withdraw and the Commission never issued an order granting withdrawal. Therefore, Mr. Rothrock remained an attorney of record.

Furthermore, it has long been established that service on a party's attorney is service on the party. See *Griffith v. Griffith*, 38 N.C. App. 25, 28, 247 S.E.2d 30, 33 (1978) ("No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And while his name continues there . . . service of notice upon him is as valid as if served on the party himself.") (quoting *United States v. Curry*, 47 U.S. 106, 111, 12 L. Ed. 363, 365 (1848)). Rule 614 of the Commission rules expressly requires that "all notices required to be served on a party shall be served upon the attorney." N.C. Admin. Code tit. 4, r. 10A.0614(a). Consequently, plaintiff is deemed to have been notified when Mr. Rothrock received notice of the Opinion and

Award on 16 December 2010 and the time for filing notice of appeal and for filing motions to the Commission for relief from the Opinion and Award began to run on 16 December 2010.

C. Jurisdiction

The second issue plaintiff presents on appeal is whether the Commission retained jurisdiction to dismiss plaintiff's original appeal as untimely after it reached the merits of plaintiff's motions to receive further evidence and for reconsideration. We find that the Commission retained jurisdiction to dismiss plaintiff's appeal.

We first note that the N.C. Rules of Appellate Procedure provide that:

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken[.]

[M]otions made under this rule to a commission may be heard and determined by the chair of the commission[.]

N.C.R. App. P. 25(a) (2012). Thus, where notice of appeal has been given but the appeal has not been filed in an appellate

court, the chair of the Commission retains jurisdiction to dismiss on grounds of timeliness. An order by the chair of the Commission dismissing the appeal may subsequently be appealed to the Full Commission like any other order of a single commissioner may be. See N.C. Admin. Code tit. 4, r. 10A.0703(d) (September 2012).

Plaintiff contends, however, that the Commission lacked jurisdiction to dismiss the original appeal after the Full Commission reached the merits of plaintiff's motions to receive further evidence and for reconsideration. Plaintiff filed his motions to receive further evidence and for reconsideration on 31 January 2011. In defendants' 2 February 2011 response to plaintiff's motions, defendants argued that the motions were untimely and, alternatively, should be denied because plaintiff already had numerous chances to submit evidence in support of his claim. In denying plaintiff's motions, the Full Commission found "that adequate grounds do not exist to reconsider or amend the December 15, 2010 Opinion and Award or to receive further evidence[.]"

Because the Full Commission reached the merits of the motions, plaintiff argues that the Commission cannot now dismiss on the grounds of timeliness because the Commission implicitly

determined the motions to be timely when it ruled on the merits of the motion. Thus, plaintiff argues that defendants' motion to dismiss is an appeal from a decision of the Full Commission to a single Commissioner. This argument is flawed.

If the Full Commission had granted plaintiff's motions for relief from the 15 December 2010 Opinion and Award, it implicitly follows that the Commission would have ruled that the motions were timely. However, where the Full Commission denied plaintiff's motions for relief from the Opinion and Award, it is not inherently the case that the Full Commission determined that the motions were timely. The Commission can deny a motion on grounds of timeliness or on the merits; either is sufficient to support the denial of plaintiff's motion. The Commission need not address procedural issues before substantive issues.

Furthermore, the Commission can consider motions to reconsider that are untimely without the effect of tolling the time for filing notice of appeal if the motion to reconsider is denied. See *Moore*, 135 N.C. App. at 335-36, 520 S.E.2d at 136-37 (concerning the timeliness of motions for relief and an appeal from a deputy commissioner's decision). Thus, having already denied plaintiff's motions to receive further evidence and for reconsideration based on the merits, the Commission may

still decide that the motions were untimely for the purpose of tolling the time to file an appeal.

III. Petition for Writ of Certiorari

Plaintiff filed a petition for writ of certiorari with this Court on 17 April 2011. In the petition, plaintiff repeats the arguments already before this Court concerning the timeliness of his appeal and additionally requests that we review the Commission's 15 December 2010 Opinion and Award and subsequent orders for errors of law. Plaintiff, however, fails to argue the merits of the case.

Having already determined that plaintiff's appeal was untimely and since plaintiff has not presented arguments on the merits for this Court to consider, plaintiff's petition for writ of certiorari is denied.

IV. Conclusion

For the reasons discussed above, we affirm the dismissal of plaintiff's appeal and deny plaintiff's petition for writ of certiorari.

Affirmed.

Judges HUNTER, JR., (Robert N.) and ERVIN concur.

Report per Rule 30(e).