

NO. COA14-698

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

CHARLES CLARK, Employee,
Plaintiff,

v.

North Carolina Industrial
Commission
I.C. No. X79163

SUMMIT CONTRACTORS GROUP, INC.,
Employer, AMERICAN INTERSTATE
INSURANCE COMPANY, Carrier,
Defendants.

Appeal by plaintiff from order entered 10 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 November 2014.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr. and W. Chad Winebarger, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Nicholas P. Valaoras, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff Charles Clark appeals from the order of the North Carolina Industrial Commission denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina under N.C. Gen. Stat. § 97-24(a).

After careful review, based on *McGhee v. Bank of America Corp.*, 173 N.C. App. 422, 618 S.E.2d 833 (2005), we reverse the

Full Commission's order because plaintiff timely filed his claim under section 97-24(a)(ii) and remand for further proceedings.

Background

The facts of this case are largely undisputed. Plaintiff is a resident of Florida, and defendant-employer Summit Contractors Group, Inc. ("Summit") is a Florida company doing business in North Carolina. American Interstate Insurance Company ("AIIC") is Summit's carrier on the risk (collectively, Summit and AIIC are referred to as "defendants"). In 2009, plaintiff was employed by Summit as a superintendent to supervise the construction of apartment complexes in Greensboro, North Carolina. While on the job on 5 August 2009, plaintiff injured his shoulder; he reported his injury to defendants the next morning. Plaintiff initially received medical care from a chiropractor in Greensboro, and, sometime thereafter returned to his home in Florida where he continued to receive medical treatment. On 12 August 2009, a "First Report of Injury or Illness" was filed on behalf of plaintiff with the Florida Department of Financial Services Division of Workers' Compensation. Plaintiff received indemnity benefits for his injury under Florida law until 25 August 2011.

On 20 January 2012, more than two years after he was

injured, plaintiff filed a Form 18 "Notice of Accident to Employer" with the North Carolina Industrial Commission for the 5 August 2009 injury. Defendants consequently filed a Form 61 "Denial of Workers' Compensation Claim" on 1 March 2012, asserting that the North Carolina Industrial Commission did not have jurisdiction over the matter because plaintiff did not file his claim with the Commission within two years from the date of the alleged incident pursuant to N.C. Gen. Stat. § 97-24.

The matter came on for hearing before the Full Commission on 9 December 2013. The Full Commission entered an order denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina. Specifically, the Full Commission concluded that because plaintiff failed to file a claim within two years after "the last payment of compensation 'under this Article,' i.e., the North Carolina Workers' Compensation Act[,]" the Industrial Commission lacked jurisdiction over his claim. Plaintiff timely appealed.

Standard of Review

"Appellate review of a decision by the Industrial Commission is limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of

law." *Heatherly v. The Hollingsworth Co.*, 211 N.C. App. 282, 285, 712 S.E.2d 345, 348-49 (2011) (internal quotation marks omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 285, 712 S.E.2d at 349.

Analysis

Appellant's sole argument on appeal is that the Full Commission erred by concluding that plaintiff's claim was not timely filed. We agree.

"Dismissal of a claim is proper where there is an absence of evidence that the Industrial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement[.]" *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86-87, 401 S.E.2d 138, 140 (1991). "[T]he timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." *Id.* at 86, 401 S.E.2d at 140.

N.C. Gen. Stat. § 97-24 (2013) establishes the timeframe within which a claim for compensation must be filed with the North Carolina Industrial Commission. Section 97-24(a) provides that

[t]he right to compensation under [North Carolina's Workers' Compensation Act] shall

be forever barred unless

(i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or

(ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a). On appeal, plaintiff does not allege that he filed his claim in North Carolina within two years after the accident, as set out in subsection (i); instead, he contends that his claim was timely filed under subsection (ii) because he filed the North Carolina claim within two years after defendants last provided "medical compensation" in Florida.

Under section 97-24(a) (ii), a plaintiff must show that: (1) his claim was filed within two years after the last payment of "medical compensation," (2) no "other compensation" was paid, and (3) the employer's liability has not otherwise been established under the Act. *Id.* Here, the record clearly shows that defendant's liability had not otherwise been established under the Act because defendants had not been held liable for

plaintiff's injuries pursuant to a North Carolina workers' compensation claim; defendants' liability had only been established under Florida's workers' compensation laws. Thus, the third element is satisfied. Accordingly, whether plaintiff can satisfy the remaining two elements of N.C. Gen. Stat. § 97-24(a)(ii) turns on this Court's understanding of the terms "medical compensation" and "other compensation" as they are contemplated within the North Carolina Workers' Compensation Act.

A. "Medical Compensation"

While it is clear that, pursuant to plaintiff's Florida workers' compensation claim, defendants made payments for his medical treatment in Florida, the issue is whether those payments constituted "medical compensation" under the Act.

N.C. Gen. Stat. § 97-2(19) states that:

[t]he term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original

artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

Defendants contend that "[n]one of plaintiff's medical payments were made 'in the judgment of' the North Carolina Industrial Commission or in a matter before the North Carolina Industrial Commission." Thus, according to defendants, plaintiff did not receive any payments of "medical compensation" and subsection (ii) is inapplicable. In contrast, plaintiff contends that defendants' last payment of "medical compensation" was on 14 November 2012, eleven months after he filed his Form 18; therefore, he satisfied section 97-24(a)(ii) because he filed his North Carolina claim within two years after that last payment.

There is no basis for defendants' contention that "medical compensation" only includes payments made in a matter pending before the North Carolina Industrial Commission. In contrast, our caselaw establishes that an employee's claim is timely filed under section 97-24(a)(ii) if it is filed within two years after the defendant's last payment of "medical compensation" to the plaintiff regardless of where the medical treatment occurs and regardless of whether that payment was ordered as a result of a

pending workers' compensation action in North Carolina. See *McGhee v. Bank of America Corp.*, 173 N.C. App. 422, 427-27, 618 S.E.2d 833, 836 (2005). In *McGhee*, the plaintiff-employee lived and worked in Richmond, Virginia, and the employer's home office was in North Carolina. *Id.* at 424, 618 S.E.2d at 835. While returning from a business trip, the plaintiff got into a car accident in Wilmington, North Carolina on 1 August 1998. *Id.* The plaintiff did not file a Form 18 with the North Carolina Industrial Commission until 9 August 2001, more than two years after the accident. *Id.* at 426, 618 S.E.2d at 836. However, the Full Commission concluded that plaintiff had timely filed a claim within two years after the last payment of medical compensation pursuant to N.C. Gen. Stat. § 97-24(a)(ii) because the employer paid medical providers in Virginia in August 2000 to treat the plaintiff's medical condition that arose as a result of the car accident. *Id.*

On appeal, this Court agreed, concluding that the employer's payments to medical providers in Virginia constituted "medical compensation" under section 97-2(19). *Id.* Specifically, this Court noted that "[n]othing in the definition [of 'medical compensation'] limits the geographical locale of the medical treatment to North Carolina[.]" *Id.* Furthermore,

at the time those payments were made, the defendants "had paid no other compensation pursuant to the Workers' Compensation Act, nor had their liability been otherwise established." *Id.* There is no indication that the defendants' payments to the Virginia medical providers were ordered by the Industrial Commission; in fact, the plaintiff's Form 18 "Notice of Accident" had not been filed with the Industrial Commission at the time that "[the] defendants last paid medical compensation for [the] plaintiff's compensable injuries[.]" *Id.* Consequently, defendants' contention that "medical compensation" only includes payments for medical treatment "made pursuant to the judgment or umbrella of the North Carolina Industrial Commission" is without merit.

Here, as in *McGhee*, defendants admitted, and the Full Commission found as fact, that they paid plaintiff's out-of-state medical expenses on 14 November 2012 pursuant to plaintiff's Florida workers' compensation claim, months after plaintiff filed his Form 18 in North Carolina. Furthermore, as in *McGhee*, those payments had not been ordered as a result of a pending workers' compensation claim in North Carolina. Therefore, defendants' payment of medical expenses in 14 November 2012 constituted "medical compensation" as set out in section 97-2(19). Since plaintiff filed his Form 18 before this

last payment of "medical compensation," he met the first element under section 97-24(a)(ii).

B. "Other Compensation"

The next issue is whether the benefits plaintiff received under Florida law constitute "other compensation" for purposes of section 97-24(a)(ii). If they do, plaintiff would be unable to satisfy the second element under section 97-24(a)(ii).

"'Compensation' under the Workers' Compensation Act means 'the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.'" *McGhee*, 173 N.C. App. at 427, 618 S.E.2d at 836 (citing N.C. Gen. Stat. § 97-2(11) (2003)) (emphasis added). In *McGhee*, this Court interpreted the term "other compensation" and determined that any benefits "paid . . . in lieu of workers' compensation benefits and not made payable . . . pursuant to [North Carolina's] Workers' Compensation Act" did not qualify as "other compensation," *id.*, and we are bound by that definition, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). In *McGhee*, 173 N.C. App. At 427, 618 S.E.2d at 836, the plaintiff received short-term disability benefits from the employer. On appeal, the defendants argued that the short-term disability benefits constituted "other compensation," making

section 97-24(a)(ii) inapplicable. *Id.* However, this Court disagreed, concluding that because the short-term disability benefits were "paid to [the] plaintiff in lieu of workers' compensation benefits and not made payable to [the] plaintiff pursuant to the Workers' Compensation Act[,] " they did not qualify as "other compensation" under section 97-24(a)(ii). *Id.* at 427, 618 S.E.2d at 836-37.

Based on *McGhee*, since the workers' compensation benefits plaintiff received in Florida were also "not made payable to [him] pursuant to [North Carolina's] Workers' Compensation Act," *id.*, they do not qualify as "compensation," as defined in section 97-2(11) (2013), or "other compensation," as defined in *McGhee*, for purposes of N.C. Gen. Stat. § 97-24(a)(ii). Accordingly, plaintiff has also satisfied the second element under section 97-24(a)(ii).

Conclusion

In sum, plaintiff timely filed his Form 18 because: (1) it was filed before defendants' last payment of "medical compensation" in Florida; (2) based on *McGhee*, which we are bound by, see *In re Civil Penalty*, 342 N.C. at 384, 379 S.E.2d at 37, plaintiff has been paid no "other compensation" since the Florida workers' compensation benefits do not qualify as "other

compensation"; and (3) defendant's liability has not otherwise been established under North Carolina's Workers' Compensation Act. Therefore, we reverse the Full Commission's order denying plaintiff's claim for compensation and remand for further proceedings.

REVERSED.

Chief Judge MCGEE and Judge BELL concur.