

NOTICE
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2012 IL App (2nd) 100959WC-U

No. 2-10-0959WC

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

NOTICE
Decision filed 2/17/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

SUSAN C. WAGNER, Widow of Robert)	Appeal from the
Wagner, Deceased,)	Circuit Court of
)	Lake County.
Appellant,)	
)	
v.)	No. 09-MR-929
)	
THE ILLINOIS WORKERS')	
COMPENSATION COMMISSION,)	
(Lake County Grading Company of)	
Libertyville, Inc., n/k/a LCGLV, Inc., and)	
LCG, n/k/a Lake County Grading Company)	
of Libertyville, Inc.,)	Honorable
)	David M. Hall,
Appellees).)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman, Hudson, and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The Commission did not abuse its discretion in affirming the arbitrator's denial of the claimant's motion to reinstate where the claimant's attorney did not allege or prove any facts to justify reinstatement.

¶ 2 This case originated in 1997 when Robert Wagner, an employee of Lake County Grading Company of Libertyville, Inc. (employer), was working as a truck driver. After Robert's death on August 23, 2003, his widow, Susan C. Wagner (the claimant), filed an application for benefits under the Illinois Worker's Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2004)) and under the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2004)). Before his death, Robert had filed claims in 1997 and 1999 for the same condition of ill-being as alleged in this claim. The claims filed in 1997 and 1999 were each dismissed for want of prosecution.

¶ 3 On June 13, 2008, the arbitrator dismissed this claim for want of prosecution, and on October 30, 2008, he denied the claimant's motion to reinstate her claim. On June 15, 2009, the Worker's Compensation Commission (the Commission) affirmed and adopted the arbitrator's decision. After a timely appeal to the circuit court of Lake County, the court confirmed the Commission's decision and, on August 18, 2010, denied the claimant's motion for reconsideration. This appeal followed.

¶ 4 **FACTS**

¶ 5 The claimant filed an application for adjustment of claim on January 20, 2004, alleging that her late husband Robert, the decedent employee, was injured on July 29, 1997, due to his inhalation of large quantities of dust entering the cab of his company-owned semi-trailer. The claimant acknowledged that claims had

been filed by the decedent in 1997 and 1999 and that both were dismissed for want of prosecution.

¶ 6 On September 17, 2004, the parties appeared before the arbitrator for a hearing on the claimant's request for death benefits. Before presenting any evidence, the claimant's attorney announced that he and the employer's attorney had agreed that Dr. Robert Cohen, "a treating physician and expert will testify" on October 20, 2004. The arbitrator acknowledged that the parties had agreed "to make every effort to proceed with the doctor's testimony on the 20th" and that the employer was to make every effort to deliver a report from its expert to Dr. Cohen before that date. The arbitrator stated, "And if there is some problem, the attorneys will contact the Arbitrator either by conference call or at the call date or next available trial date to discuss the matter."

¶ 7 During the hearing on September 17, 2004, the claimant testified that her husband began working for the employer in May 1988 as a truck driver, and, at that time, he was 44 years old and healthy. He hauled sand, gravel, asphalt, building materials, and coal ash. The claimant testified that around 1992, her husband began coughing constantly, and around 1993, he also experienced shortness of breath. On July 2, 1997, he went home from work early and saw a doctor. He did not return to work after that date. When the claimant finished testifying, the arbitrator said that the parties were "done for today." The claimant's attorney did not ask to present any witnesses besides the claimant and did not offer

any exhibits into evidence. Both parties acknowledged that the hearing was continued until October 20, 2004.

¶ 8 There is nothing in the record after September 17, 2004, until April 13, 2007, when the arbitrator dismissed the claim for want of prosecution. On May 9, 2007, the claimant was mailed a notice of case dismissal, and on May 24, 2007, the claimant's attorney filed a hand-written change of address form indicating that his address had changed on July 21, 2006. On June 6, 2007, the claimant's attorney filed a petition to reinstate the case, alleging facts only about his change of address and indicating absolutely no activity on the case before learning of the dismissal on May 17, 2007. On August 17, 2007, the arbitrator reinstated the case.

¶ 9 After the August 17, 2007, order reinstating the case, there is nothing in the record until June 13, 2008, when the arbitrator entered another order dismissing the claim for want of prosecution because the claimant failed to appear at a status call or trial date after receiving due notice. On July 3, 2008, the claimant filed another petition to reinstate. The employer filed a written objection to the petition to reinstate, and on August 14, 2008, the claimant's attorney filed an amended petition to reinstate, alleging that before the June 13, 2008, dismissal, he had been "in the process of scheduling Dr. Robert Cohen, the deceased petitioner's treating physician for an evidentiary deposition." The claimant's attorney offered no other explanation for the lack of activity on the case, and the record includes no explanation for why no hearing was conducted on October 20, 2004. Apparently,

the claimant's attorney decided at some point not to call Dr. Cohen as a witness but to take his evidence deposition instead.

¶ 10 On August 28, 2008, the parties appeared before the arbitrator. At the beginning of that hearing, the arbitrator stated that the trial of that claim had been "commenced sometime ago," at which time the claimant had testified, and the matter had been continued. The arbitrator noted that the case was "continued from time to time on the Arbitrator's call" with the understanding that the claimant was trying to obtain evidence depositions. The arbitrator stated that, when the case came up on his status call on June 13, 2008, and "no one appeared on behalf of " the claimant, the case was dismissed for want of prosecution "per Commission Rules."

¶ 11 The claimant's attorney explained that he did not realize that the case was "up" until the morning of June 13, 2008, and that he had tried to call the employer's attorney, but that he could not reach him in the morning before the hearing began. He noted that Dr. Cohen was available for deposition on September 10 and 11, 2008. The arbitrator admonished the claimant's attorney to argue the merits of his motion, to which he responded that "the point of the motion [to reinstate] is simply that the case has merit" and was "brought in good faith."

¶ 12 The employer's attorney reminded the arbitrator that the history of the case went back to "an alleged date of accident or last exposure on July 29, 1997," and that the claims that had been filed in 1997 and 1999 had both been dismissed for want of prosecution. He argued that the current case was the third filing and that it

had been pending since 2004 when they continued the evidentiary hearing in order for the claimant's attorney to obtain the testimony of Dr. Cohen. The employer's attorney noted that the claim filed in 2004 had been dismissed once already, on April 13, 2007, more than a year earlier, and that the arbitrator had reinstated it but was "emphatic that we do something."

¶ 13 The employer's attorney argued that, since the case was continued in 2004, nothing had happened. No medical records had been delivered, and no releases had been issued so that he could order the records himself. The employer's attorney stated that the Commission's rules (50 Ill. Admin. Code §7020.60(b)(2)(C)(ii) (West 2008)) required the claimant to show good cause for reinstatement but that she had not done so. He argued:

"I would also tell the Arbitrator that the first time anyone contacted me with a date certain which was possible for the taking of any testimony was after this matter was dismissed for want of prosecution. I don't want any misunderstanding regarding the conduct of the case. I have never received a phone call, a letter, a telegram or an email that said Dr. Anyone is available for testimony on a date certain before this matter was dismissed for want of prosecution."

¶ 14 The arbitrator asked the claimant's attorney what he needed to complete the case. The claimant's attorney responded that he needed to introduce the medical records into evidence, and he wanted to call two truck drivers who could testify that the decedent's lung problems were not caused by smoking cigarettes or

drinking alcohol. The claimant's attorney also acknowledged that he would need Dr. Cohen's testimony because the employer was objecting to the introduction of the doctor's report without his testimony.

¶ 15 The arbitrator took the motion to reinstate under advisement after allowing the claimant's attorney to meet with the employer's attorney on September 12, 2008, "for the exchange of documents and the setting of, hopefully, the setting of a deposition schedule."

¶ 16 On October 30, 2008, the employer's attorney appeared before the arbitrator, but no one appeared for the claimant. The arbitrator noted:

"[T]his case has a prolonged and protracted history, but the matter was last up on September 12 of 2008, at which time an extensive off-the-record conversation was conducted between the parties. Settlement negotiations were discussed and a plan for getting this matter tried, settled or dismissed before the end of the year was outlined by the Arbitrator, who made it clear to the parties that he was not going to tolerate any further delay in this matter and that the matter was going to be resolved one way or another before the end of this year."

The arbitrator stated that he had not received any phone calls or correspondence from the claimant or her attorney. The employer's attorney told the arbitrator that he had faxed an offer of settlement to the claimant's attorney, and on October 27, 2008, the claimant's attorney had called him to say that he had not been able to contact the claimant, but that he would "be getting a letter out and get back in

touch" with the employer's attorney. The employer's attorney stated that he had not heard from the claimant's attorney since October 27, 2008, that he had called his office just before walking into the hearing on October 30, 2008, but that he had no messages from the claimant's attorney. The arbitrator denied the claimant's motion to reinstate.

¶ 17 The claimant filed a timely petition for review of the arbitrator's decision, and the Commission affirmed and adopted the arbitrator's denial of the claimant's motion to reinstate her case. The claimant filed a timely petition for judicial review, and the circuit court confirmed the Commission's decision on June 3, 2010. On July 1, 2010, the claimant filed a motion for reconsideration, which the trial court denied on August 18, 2010. This appeal followed.

¶ 18 ANALYSIS

¶ 19 We note at the outset that the briefs filed by the claimant's attorney are virtually incomprehensible, make numerous factual assertions not supported by the record¹, are illogical, and mostly cite irrelevant case law. We choose to address the merits of this case rather than strike the claimant's/appellant's briefs in order to provide some finality for the claimant, who has been "represented" by the same

¹ For example, the claimant's attorney attaches a copy of a document entitled "Continuing Medical Opinion," dated September 30, 2005, and ostensibly signed by Dr. Cohen. The claimant's attorney refers to this report in his initial brief at page 38 without citing to the record. However, this report is not part of the record on appeal, and the claimant's attorney did not offer it into evidence or attach it to any pleading of record. Additionally, the claimant's attorney continually refers to this case as having been commenced under section 19(b) of the Act. This case was never noticed for an expedited hearing pursuant to section 19(b).

attorney since at least 2004. The crux of this case involves the unexplained failure of the claimant's attorney to follow the Commission's rules in the prosecution of the claimant's case. From the record of the proceedings before the arbitrator, it is clear that the claimant's attorney did not obtain any medical testimony from any physician or other medical provider before the September 17, 2004, evidentiary hearing or in the next four years before the final dismissal. The arbitrator appears to have bent over backwards trying to help the claimant's attorney get his case ready for a final resolution. Unfortunately, the arbitrator's efforts were unsuccessful due to the claimant's attorney's failure to act on the claimant's behalf. The claimant's attorney's arguments about the failures of the arbitrator and opposing counsel are entirely without support in the record and are not worthy of being addressed.

¶ 20 The issue on appeal is whether the Commission abused its discretion in affirming the arbitrator's denial of her motion to reinstate. See *Banks v. Industrial Comm'n*, 345 Ill. App. 3d 1138, 1140, 804 N.E.2d 629, 631 (2004) ("Whether to grant or deny a petition to reinstate rests within the sound discretion of the Commission.") In order to decide that issue, we first consider the Commission's rules. The Commission's rules are clear that, after a case has been on file for three years, the parties risk dismissal if they do not appear at each status call.

"i) In all cases which have been on file at the Industrial Commission for three years or more, the parties or their attorneys must be present at each status call on which the case appears. The case will be set for trial unless a

written request has been made to continue the case for good cause. Such request shall be made part of the case file. The written request must be received by the Arbitrator at least fifteen days in advance of the status call date and contain proof of service showing that the request for a continuance was served on all other parties to the case and/or their attorneys. *** The parties must appear at the status call even if there is no objection to the continuance.

ii) Failure of the Petitioner or the Petitioner's attorney to request or answer a request for a continuance in accordance with subsection (b)(2)(C)(i) above and to appear at the monthly status call on which the case appears shall result in the case being dismissed for want of prosecution, except upon a showing of good cause." 50 Ill. Admin. Code 7020.60(b)(2)(C) (West 2008).

¶ 21 The claimant filed this case for the third time on January 20, 2004, and on January 20, 2007, the case was three years old. At that time, the arbitrator clearly had authority to place her case on the monthly status call. After the September 17, 2004, hearing, the claimant's attorney did little else than respond to notices of dismissal, yet none of those responses indicated any reason for his failure to obtain medical evidence in support of the claim. The record is silent as to the reason the case was not called for hearing on October 20, 2004, but it was not the responsibility of the arbitrator to move the case along. It was the claimant's responsibility to ascertain the progress of her case and to move it along. See

Bromberg v. Industrial Comm'n, 97 Ill. 2d 395, 401-02, 454 N.E.2d 661, 664 (1983). When the arbitrator dismissed the case for want of prosecution on April 13, 2007, the case had been on file for more than three years, and the claimant was required to appear at each status call or file and serve on opposing counsel a motion for continuance 15 days before appearing at the status call, neither of which occurred. Since the claimant's attorney did not comply with the rules, the arbitrator was well within his discretion to dismiss the case for want of prosecution.

¶ 22 The Commission's decision to grant or deny a timely petition to reinstate is a matter within the sound discretion of the Commission, whose decision will not be overturned on review absent an abuse of that discretion. *TTC Illinois, Inc./Tom Via Trucking v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 344, 355, 918 N.E.2d 570, 579 (2009). The Commission's rules provide as follows:

"a) Where a cause has been dismissed from the arbitration call for want of prosecution, the parties shall have 60 days from the receipt of the dismissal order to file a petition for reinstatement of the cause onto the arbitration call. ***

b) Petitions to Reinstate must be in writing. The petition shall set forth the reason the cause was dismissed and the grounds relied upon for reinstatement. The petition must also set forth the date on which Petitioner will appear before the Arbitrator to present his petition. ***

c) *** Parties will be permitted to present evidence in support of, or in opposition to, the petition. The Arbitrator shall apply standards of fairness and equity in ruling on the Petition to Reinstate and shall consider the grounds relied on by Petitioner, the objections of Respondent and the precedents set forth in Commission decisions." 50 Ill. Admin. Code 7020.90 (West 2008).

¶ 23 In this case, the claimant's attorney filed an amended petition/motion for reinstatement on August 14, 2008. In that motion, the claimant's attorney alleged, in relevant part, as follows:

"Prior to Friday, June 13, 2008 [the date of dismissal], I conferred with opposing counsel and was in the process of scheduling Dr. Robert Cohen, the deceased petitioner's treating physician for an evidentiary deposition. This was rather than subpoena the Doctor to appear and give testimony as previously intended. I failed to telephone opposing counsel prior to June 13, 2008 to continue my efforts of agreeing to a date for the deposition.

On the morning of June 13, 2008, I realized my error and my inability to notify the arbitrator I would not appear. I telephoned opposing counsel's office and requested he telephone me."

The amended motion to reinstate also set forth that Dr. Cohen had agreed to have his deposition taken on September 10 or 11, 2008, that opposing counsel's

objections were not valid, and that the arbitrator "ought to reinstate the case so that a determination on the merits may be obtained."

¶ 24 During the hearing on the motion to reinstate, held in August 2008, the claimant's attorney provided no explanation for his failure to complete the proof of the claimant's case since September 17, 2004, a period of almost four years. The claimant's attorney's argument was the same as in his written motion, that he had inadvertently missed the June 13, 2008, status call but that the claimant's case had merit. The claimant's attorney offered the arbitrator absolutely no explanation for the lack of any action to complete the claimant's case during the intervening years. Even after the arbitrator gave the claimant's attorney another chance to complete the claimant's case by meeting with the employer's attorney on September 12, 2008, to exchange documents and schedule Dr. Cohen's deposition, nothing was resolved, and neither the claimant nor her attorney appeared at the hearing on October 30, 2008.

¶ 25 Under these circumstances, the Commission was well within its discretion to affirm the arbitrator's dismissal of the case for want of prosecution. After the case had been on file for three years, the claimant failed to comply with the requirement that she or her attorney appear "at each status call on which the case appears," and she did not file any written request to continue the case for good cause. 50 Ill. Admin. Code 7020.60(b)(2)(C)(i) (West 2008). When the arbitrator dismissed the claimant's case for want of prosecution, the claimant's attorney did not offer any explanation for his inaction during the intervening years. "On a

petition to reinstate before the Commission, the burden is on the claimant to allege and prove facts justifying the relief sought." *Banks*, 345 Ill. App. 3d at 1140, 804 N.E.2d at 631. Here, the claimant's attorney did not allege or prove any facts to justify reinstatement, and the Commission did not abuse its discretion in affirming the arbitrator's dismissal.

¶ 26

CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court confirming the decision of the Commission.

¶ 28 Affirmed.