2016 IL App (3d) 150423WC-U

FILED: November 17, 2016

NO. 3-15-0423WC

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

LAWRENCE DASSINGER, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Tiffany Express, Inc., Appellee).	))))))))	Appeal from Circuit Court of Will County No. 14MR1072 Honorable John Anderson, Judge Presiding.

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

ORDER

¶ 1 *Held*: The Commission committed no error in denying claimant's motion to reinstate his case after it had been dismissed for want of prosecution.

¶ 2 On January 27, 2004, claimant, Lawrence Dassinger, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2002)), seeking benefits from the employer, Tiffany Express, Inc. On October 19, 2012, the arbitrator dismissed the case for want of prosecution. Claimant filed a motion to reinstate, which the arbitrator denied. On review, the Illinois Workers' Compensation Commission

(Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Will County confirmed the Commission. Claimant appeals, arguing the Commission erred in denying his motion to reinstate. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 27, 2004, claimant filed an application for adjustment of claim, alleging he sustained injuries to his right upper extremity, neck, and body, as a result of a work-related accident on December 30, 2003. From 2008 to 2010, the parties attempted to negotiate a settlement of the claim. During the underlying proceedings, claimant repeatedly took the position the employer agreed to his settlement demands in June or July 2008, but, thereafter, unreasonably delayed in signing a settlement contract. The employer maintained no final agreement was ever reached by the parties and they reached an impasse regarding the employer's liability for certain medical expenses. In any event, the record fails to show that a settlement agreement was ever signed by the parties, or that a settlement contract was ever presented to the Commission for approval.

¶ 5 The record does show, on November 23, 2009, the arbitrator dismissed the case for want of prosecution, noting the matter was called for hearing and claimant failed to appear. On March 4, 2010, the matter was reinstated on claimant's motion. On June 4, 2010, claimant filed a motion to enforce the parties' alleged settlement agreement and for penalties and attorney fees. Specifically, he sought an order that required the employer "to execute the settlement contract." The record fails to show the motion was ruled upon; however, claimant asserts it was not granted.

¶ 6 Thereafter, the employer filed a series of applications for the issuance of a *dedimus potestatem*, seeking to schedule the deposition of Dr. David Tulipan, a physician who

had examined claimant at the employer's request. The employer's first two applications were filed on October 13, 2011, and December 27, 2011. Following both applications, claimant filed motions objecting to the employer's applications on technical grounds, arguing they failed to comply with the Commission's rules; seeking enforcement of the parties' alleged settlement agreement; and seeking penalties, attorney fees, and costs. The record does not reflect the disposition of either application; however, during the underlying proceedings, claimant maintained the employer's October 2011 application was denied for noncompliance with the Commission's rules and both parties have maintained the December 2011 application was never ruled upon due to confusion as to which arbitrator was assigned to the case.

¶ 7 On February 21, 2012, the employer filed a third *dedimus potestatem* application. On March 7, 2012, claimant filed a motion objecting to the application because it failed to comply with the Commission's rules; seeking enforcement of the parties' alleged settlement agreement; and seeking penalties, attorney fees, and costs. On March 8, 2012, a hearing was conducted before Arbitrator George Andros. The record reflects claimant argued, in part, that the employer's application was untimely, in that it was not "mailed at least five days before the date of the docket call." In turn, the employer challenged claimant's objection as untimely, asserting it was filed less than 24 hours prior to the hearing. As both parties raised timeliness objections, the arbitrator continued the matter, giving the employer leave to refile its application for the issuance of a *dedimus potestatem* and claimant leave to file a response "without any prejudice based upon any prior filings or objections."

¶ 8 On August 17, 2012, the employer filed a fourth application for the issuance of a *dedimus potestatem*, seeking to take Dr. Tulipan's deposition on September 26, 2012. On August 29, 2012, Arbitrator Andros granted that application. The parties agree that, in early September

2012, claimant's attorney contacted the employer's attorney, stating he had a conflict with respect to the September 26, 2012, deposition date and the deposition did not occur. They also agree that the employer filed a fifth *dedimus potestatem* application, seeking to take Dr. Tulipan's deposition; however, they disagree as to the date the application was filed and the record does not show when the filing occurred. On October 4, 2012, the matter was set for a status call before Arbitrator Andros. The case was then set for hearing on October 19, 2012.

¶ 9 On October 18, 2012, claimant's attorney emailed Arbitrator Andros, stating as follows:

> "The above case is set before you in Joliet on October 19, 2012. You may recall that I have filed several motions based on what I believe to be the fact that this case was settled several years ago.
>
> I must try a Sec[tion] 19(b) case in Urbana on October 19, 2012. On Monday, October 15, 2012, I telephoned [the employer's attorney] to let him know this and I left a phone message asking if he would be willing to appear on this case on October 18, 2012[,] instead. I did not hear back [from the employer's attorney]. On October 15, 2012[,] [the employer's attorney] mailed me a motion for [*dedimus potestatem*], which I received by mail on October 16, 2012."

Claimant's attorney then requested that Arbitrator Andros deny the employer's *dedimus potestatem* application on the basis that it was untimely filed under the Commission's rules.

¶ 10 The record next reflects that, on October 19, 2012, the matter was called for hear-

ing before Arbitrator Andros. Claimant failed to appear and Arbitrator Andros dismissed the matter for want of prosecution. The record contains a notice of case dismissal, stating the cause was "CALLED FOR HEARING UPON APPLICATIONF FILED BY" claimant, claimant failed to appear, and the case was dismissed for want of prosecution.

¶ 11 On February 11, 2013, claimant filed a motion to reinstate his case before the Commission. In his motion, he asserted as follows:

> "[C]laimant has wanted this case to be set for hearing for years, because the case was settled nearly five years ago. However, the case has repeatedly been continued solely to accommodate the [employer], who has refused to honor the settlement and has claimed that it must take the deposition of its examining doctor, which it has failed to do since February of 2008. Further, the [employer] has failed to request continuances leaving this to [claimant's] attorney, who finally decided not to request a continuance at the October 4, 2012[,] docket but instead to allow the case to be set for hearing. Unfortunately, due to some sort of clerical error or miscommunication between [claimant's] attorney and his clerk, [claimant's] attorney understood that the case had once again been continued when, in fact, it had been given a hearing date, October 19, 2012. [Claimant's] attorney would have appeared before the Arbitrator on that date if it had not been for the mistaken communication or his oversight."

¶ 12 On April 16, 2013, Arbitrator Andros conducted a hearing on claimant's motion to

reinstate. At the hearing, claimant's attorney, Thomas Lichten, reiterated claimant's position that the parties had settled the case in 2008. Lichten asserted that, since that time, he made "many attempts to get [the employer] to provide [him] with the settlement contract that reflected [their] agreement." He also argued the case was "repeatedly continued to accommodate [the employer]" until October 4, 2012, when Lichten "decided [he] was not going to request another continuance *** but instead, allow the case to be set for hearing." Lichten asserted he did not appear on the October 19, 2012, hearing date because he had to attend an emergency hearing in an unrelated workers' compensation case.

¶ 13 The employer's counsel, Daniel Crowe, maintained there was no settlement between the parties in 2008 and only a tentative agreement in 2010, which fell through due to a disagreement over the employer's liability for $30,000 in medical expenses. He asserted that, thereafter, the employer indicated its intention to schedule Dr. Tulipan's deposition. Crowe stated, initially, the parties agreed to take the deposition and it was scheduled for July or August 2011. The deposition was then cancelled after Lichten asserted he "couldn't make it." According to Crowe, the employer tried to negotiate a different date for the deposition; however, Lichten would not agree to another date and told Crowe " [']you need a *dedimus*.['] "

¶ 14 Crowe noted that, in August 2012, the employer's *dedimus potestatem* application was granted and Dr. Tulipan's deposition was scheduled for September 26, 2012. He then asserted as follows:

> "Lichten call[ed] me a few days prior to the deposition and says he can't make it. I extend courtesy, I say fine, we'll reschedule it.

> So I have my assistant call his office, call his office[,] and call his office and then I finally get him on the phone and he tells me [']you got to file another *dedimus*.['] "
>
> ***
>
> So *** we sent out a notice for deposition, for another *dedimus* and we put it in front of you [at the October 4, 2012, status call]."

Crowe stated the employer's *dedimus potestatem* application was set to be heard on October 19, 2012. However, on October 18, 2012, Lichten sent emails to Crowe and the arbitrator, asserting he could not attend the hearing the following day and objecting to the employer's *dedimus potestatem* application.

¶ 15 In response to Crow's description of events, Lichten asserted he could not attend the September 26, 2012, deposition because he had another deposition scheduled for the same afternoon. He also maintained he spoke with someone in Crowe's office a day or two before the deposition, who reported that there had been a mistake and the deposition could not take place because Dr. Tulipan had not been notified. Licthen further stated he did not recall "ever having agreed to take Dr. Tulipan's deposition initially" or that he ever "waive[d] [his] right to request that the deposition be scheduled by *dedimus*." He argued claimant should not be blamed if the employer "doesn't comply with the rules for the issuance of a motion for *dedimus*." Finally, with respect to the issue of diligence, Lichten stated as follows:

> "[Claimant] was ready for trial on the date, whatever the date was in July of 2008 ***. We've been ready for trial ever since then. We're still ready for trial.

> It's been the [employer] that hasn't been ready for trial because they didn't want to proceed without Dr. Tulipan's deposition."

¶ 16 On June 10, 2013, Arbitrator Andros denied claimant's motion to reinstate. His decisions stated as follows:

> "The Arbitrator has carefully listened to the Petition and Response on the record. The Arbitrator has dealt with this case in detail during many status calls and conferences since being assigned to the Will County status call in January 2012.
>
> After deliberating on the same, the Arbitrator finds the facts against the reinstatement to be compelling.
>
> Considering the grounds relied upon by [claimant] and the objections of [the employer] while applying standards of equity[,] the Arbitrator finds as a matter of fact and conclusion of law that [claimant] in the case at bar has failed to establish the grounds to reinstate this case."

¶ 17 On April 7, 2014, the Commission affirmed the arbitrator's decision. It found "[t]he record demonstrate[d] the Arbitrator's abject frustration with [claimant's] refusal to allow the matter to proceed and with his refusal to allow for its presentation at trial." The Commission also found the arbitrator was "frustrated by endless delays that were the result of an intentional strategy employed by [claimant] to ensure that the matter never moved forward." On May 15, 2015, the circuit court of Will County confirmed the Commission's decision.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, claimant argues the Commission erred in refusing to reinstate his claim after it was dismissed by the arbitrator for want of prosecution on October 19, 2012. He argues his case was not properly dismissed because it had not been set for trial on the day of dismissal. Claimant also challenges the Commission's finding that he "refus[ed] to allow the matter to proceed" or "to allow for its presentation at trial."

¶ 21 "Where a cause has been dismissed from the arbitration call for want of prosecution, the parties shall have 60 days from receipt of the dismissal order to file a petition for reinstatement of the cause onto the arbitration call." 50 Ill. Adm. Code 9020.90(a) (2015). A claimant petitioning for reinstatement of his claim before the Commission has the burden to allege and prove facts justifying the relief sought. *Bromberg v. Industrial Comm'n*, 97 Ill. 2d 395, 400, 454 N.E.2d 661, 663 (1983). "Whether to grant or deny a petition to reinstate rests within the sound discretion of the Commission." *Banks v. Industrial Comm'n*, 345 Ill. App. 3d 1138, 1140, 804 N.E.2d 629, 631 (2004).

¶ 22 On appeal, claimant first argues the Commission erred in denying his motion to reinstate because the arbitrator's dismissal for want of prosecution was improper. He contends his case was not set for trial on October 19, 2012, and, as a result, it was "not proper" for the arbitrator to dismiss it. Claimant contends the employer never requested that the case be set for hearing on October 19, 2012, as it could have done under the Commission's rules. Further, he asserts the only action the arbitrator should have taken on that day was to grant or deny the employer's *dedimus potestatem* application, which he argues was the only matter set to be addressed.

¶ 23 We disagree with claimant's assertions and find the record indicates claimant's

case was set for trial on October 19, 2012. The Commission's rules provide that, for all cases which have been on file with the Commission for three years or more, "the parties or their attorneys must be present at each status call on which the case appears." 50 Ill. Adm. Code 9020.60(b)(2)(C)(i) (2015). "The case will be set for trial unless a written request has been made to continue the case for good cause." *Id.* A request to continue a case "shall be made part of the case file." *Id.* Further, it must be in writing, "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." *Id.* "Where the Arbitrator has set the matter for trial, the case shall proceed on the date set by the Arbitrator." *Id.*

¶ 24 On October 4, 2012, claimant's case was set for a status call before the arbitrator. Although the record does not explicitly set forth what occurred that day, it does show the matter was called for hearing on October 19, 2012, on claimant's "APPLICATION." Further, the record shows claimant's case had been on file with the Commission since January 2004, well in excess of the three years referenced in the Commission's rules. Thus, given the length of time the matter had been pending, the rules required that, at the October 4, 2012, status call, the matter would to be set for trial in the absence of a written request for a continuance by one of the parties.

¶ 25 In this instance, the record fails to reflect that either party requested a continuance as provided in the Commission's rules. Moreover, in his motion to reinstate and during the hearing on that motion, claimant's counsel expressly denied requesting a continuance at the October 4, 2012, status call. Specifically, he acknowledged that he elected not "to request another continuance *** but instead, allow the case to be set for hearing." Finally, although claimant emailed the arbitrator on October 18, 2012, to inform him that he could not be present for a hearing the following day, such action was not the appropriate manner in which to request a continu-

ance.

¶ 26 Here, given the history of the case, the Commission's rules, and the acknowledgements of claimant's counsel, we find claimant's case was set for trial on October 19, 2012, and claimant's assertions to the contrary have no merit. Further, even if we were to accept claimant's contention that the matter had not been set for trial and only for a hearing on the employer's *dedimus potestatem* application, we would find no error. First, claimant failed to cite any legal authority to support his bald assertion that "[i]f a case is not set for trial, it is not proper for an Arbitrator to dismiss it." Second, the record shows claimant failed to appear before the arbitrator on October 19, 2012, even though the matter had clearly been set for a hearing on that date, claimant was aware the case had been set, and his case had been pending before the Commission for a significant length of time. Under those circumstances, we find no error.

¶ 27 As stated, claimant also argues the Commission erred in finding he "refus[ed] to allow the matter to proceed" or "to allow for its presentation at trial." Rather, he contends he acted appropriately by "tr[ying] his best to effectuate the settlement that had been agreed upon [by the parties] and fil[ing] proper objections to" the employer's *dedimus potestatem* applications. After reviewing the record, we find no abuse of discretion by the Commission.

¶ 28 During the underlying proceedings, claimant's attorney repeatedly put forth the argument that the parties had reached a settlement agreement in June or July 2008. In June 2010, he filed a motion to enforce the alleged agreement. He also asserted the existence of a settlement agreement as a basis for each of claimant's objections to the employer's *dedimus potestatem* applications. However, despite claimant's assertions, it is undisputed that the parties never signed a settlement contract, nor did they present one to the Commission for approval. Additionally, correspondence between the parties—attached to various filings in the record or admitted as exhibits

at arbitration hearings—actually refutes the assertions of claimant's attorney, showing that, although the parties engaged in settlement negotiations, they never reached a meeting of the minds as to all of the agreement's terms. Therefore, because claimant's counsel persisted in trying to enforce a settlement agreement when no such agreement had been executed by the parties, we can find no error in the Commission's determination that claimant refused to allow the matter to proceed or to be presented for trial.

¶ 29 Further, although claimant argues he only filed proper objections to the employer's *dedimus potestatem* applications, the record indicates his objections failed to comply with the Commission's rules on at least two occasions and he repeatedly raised the issue of a nonexistent settlement agreement when responding to the employer's applications. Additionally, the employer's counsel described a lack of cooperation by claimant's counsel that only served to delay the proceedings. We note that, "[w]ith respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom." *Bolingbrook Police Department v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130869WC, ¶ 38, 48 N.E.3d 679. In this instance, the Commission was free to accept the description of events provided by the employer's counsel, which it apparently did. We find no error in the Commission's determination that the actions of claimant's counsel caused delay and frustrated the underlying proceedings.

¶ 30 Here, the record contains support for the Commission's decision. It did not abuse its discretion in refusing to grant claimant's motion for reinstatement of his case.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the circuit court's judgment, confirming the

Commission's decision.

¶ 33 Affirmed.