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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1314

Filed: 15 May 2018

North Carolina Industrial Commission, I.C. No. 031980

MICHELLE KISH, Employee, Plaintiff,

v.

FRYE REGIONAL MEDICAL CENTER, Employer, SELF-INSURED (SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., Third-Party Administrator), Defendant.

Appeal by plaintiff from opinion and award entered 27 June 2017 and order entered 22 August 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 April 2018.

Devore, Acton & Stafford, P.A., by William D. Acton, Jr., for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by John F. Morris and Daniel P. O'Shea, for defendants-appellees.

ARROWOOD, Judge.

Michelle Kish ("plaintiff") appeals from the Full Commission of the North Carolina Industrial Commission's ("the Commission") opinion and award, and order denying plaintiff's motion to reconsider the attorney's fees assessed by the

Commission. For the reasons stated herein, we affirm the opinion and award and the decision to deny plaintiff's motion to reconsider.

I. Background

Plaintiff was employed by Frye Regional Medical Center as a staff registered nurse when, on 31 October 1999, she herniated a disc in her back while lifting a patient. Plaintiff reported her injury, and defendants accepted her claim, filing a Form 60 that admitted plaintiff's right to compensation for the injury.[1] On 19 May 2006, the Commission issued an opinion and award finding that plaintiff developed an infection in the herniated disc and bilateral carpel tunnel syndrome as a result of the injury. The Commission held that plaintiff's compensable injuries include the back injury, the disc infection, resulting blood infection, and the bilateral carpal tunnel syndrome, and ordered defendants to pay medical benefits and plaintiff's attorney fees pursuant to N.C. Gen. Stat. § 97-88.1 (2017) for defendants' unreasonable defense of plaintiff's claim for retroactive and ongoing attendant care.

On 20 March 2009, the Commission allowed plaintiff's motion for attorney's fees of 25 percent "of the compensation due plaintiff in this matter[,]" and ordered "that every fourth check be sent directly to plaintiff's counsel."

[1] At the time of the filing, Crawford and Company represented Frye Regional Medical Center as the third-party administrator. Presently, Sedgwick Claims Management Services, Inc. is the third-party administrator.

On 26 September 2014, plaintiff moved to compel defendants to provide previously authorized medical treatment that the motion alleged defendants refused to authorize, and for sanctions per N.C. Gen. Stat. § 97-88.1. On 15 October 2014, Special Deputy Commissioner Michael R. Kelly ordered defendants to authorize and pay for plaintiff's medical prescriptions within 15 days, but denied the motion for attorney's fees and sanctions. On 12 November 2014, plaintiff renewed her motion for sanctions and attorney's fees because defendants did not comply with the order by refusing to provide a prescribed medication. On 20 November 2014, defendants responded to plaintiff's motion that they were compliant because they authorized the prescription at issue on 13 November 2014.

On 4 February 2015, plaintiff filed a Form 33 request for hearing, seeking sanctions and attorney's fees because defendants repeatedly denied plaintiff's medical benefits in violation of the Commission's orders. Executive Secretary Meredith R. Henderson denied the motion. Plaintiff appealed, filing a Form 33 on 11 March 2015, and amendments thereof on both 13 March 2015 and 17 April 2015. On 22 April 2015, defendants filed a Form 33R responding to the amended Forms 33, alleging they had not denied plaintiff's medical benefits. Deputy Commissioner Jesse M. Tillman heard this matter on 25 September 2015. Deputy Commissioner Tillman entered an opinion and award on 18 April 2016, holding that defendants delayed and/or denied plaintiff's prescriptions without a legal basis, in violation of both the

Commission's 2006 opinion and award, and the 2014 order. He also held that plaintiff was entitled to attorney fees and costs deriving from this matter, based on defendants' unreasonable handling and defense of plaintiff's claim, citing N.C. Gen. Stat. § 97-25(f)(5) and § 97-88.1.

On 18 April 2016, plaintiff moved for reconsideration and amendment of Deputy Commissioner Tillman's 2016 opinion and award, alleging that defendants should also be fined at least the amount that defendants retained by not authorizing plaintiff's prescriptions. Plaintiff additionally argued that Sedgwick Claims Management Services, Inc. should be removed as the third-party administrator because it intentionally disobeyed the Commission's orders. Deputy Commissioner Tillman denied plaintiff's motion to reconsider and amend the opinion and award. Defendants and plaintiff both appealed.

The Commission heard this matter on 8 March 2017. On 27 June 2017, the Commission entered an opinion and award, finding that "Defendant continued denying medical treatment, recommendations and prescriptions made by the authorized treating physicians" in violation of the Commission's 2006 opinion and award and 2014 order.

> As a consequence of the denials of her medications, Plaintiff's physical and mental conditions declined. In her February 18, 2015 report, Ms. Woolf[, plaintiff's medical case management services provider,] noted Plaintiff's sleeping habits were poor, her emotional state was depressed, her blood pressure had gotten very high, she

> was experiencing vomiting episodes, and her pain had increased. Ms. Woolf attempted to contact [the Sedgwick Claims Management Services, Inc. case manager] to discuss the file but did not receive any response.

On appeal, defendants argued they had not "denied" certain prescribed treatments, but had not "authorized" them. The Commission disagreed, and found that the failure to authorize the treatments constituted a denial. Defendants also attempted to place the blame for the denials on other individuals, including plaintiff, but the Commission found fault with defendants, and also found: "The extent of the protracted prescription issues in this case demonstrates a complete lack of regard for the severity of Plaintiff's condition, the recommendations of the authorized treating physicians, and Defendant's responsibility under the Act to provide medical compensation."

The Commission held that defendants' "actions constitute an unreasonable defense, unfounded litigiousness, and warrant the assessment of sanctions under N.C. Gen. Stat. § 97-88.1." The Commission also held plaintiff was entitled to a reasonable attorney's fee pursuant to N.C. Gen. Stat § 97-88, and reimbursement for payment of prescriptions pursuant to N.C. Gen. Stat. § 97-25. The Commission ordered that plaintiff's ongoing attorney fee from the 2009 order now be paid in addition to, instead of out of, plaintiff's disability compensation, and ordered defendants to pay attorney's fees for the time plaintiff's attorney spent defending defendants' appeal, per § 97-88. However, the Commission declined to assess a

$26,922.00 sanction against defendants and to order defendant to retain a new third-party administrator because:

> [a]fter the adoption of the revised Industrial Commission Rules in 2014, the Commission's authority to sanction a party is limited to costs and attorney's fees assessed pursuant to N.C. Gen. Stat. § 97-88.1 and § 97-25(f)(5), and the specific sanctions set forth in § 97-18 (g), (h), (i), and (j). The Industrial Commission no longer has general authority to assess other monetary penalties or sanctions against a party.

The Commission further concluded that any ongoing failure by either defendant "to comply with an order of the Commission may subject any person who has the ability [to] bring either of these parties into compliance with an order to civil contempt proceedings, including an order to show cause, referral to a contempt docket, and a judgment of civil contempt."

On 10 July 2017, plaintiff submitted a motion for reconsideration and amendment of the 2017 opinion and award, arguing that the Commission erred by failing to award attorney fees pursuant to § 97-25(f) and § 97-88.1 for the prosecution of plaintiff's motion to compel. On 22 August 2017, the Full Commission ordered defendants to pay a reasonable attorney's fee pursuant to N.C. Gen. Stat § 97-88 in the amount of $10,300.00 for legal services provided in connection with defendants' appeal. That same day, the Commission denied plaintiff's motion to reconsider awarding attorney fees pursuant to § 97-25(f) and § 97-88.1.

Plaintiff appeals.

II. Discussion

On appeal, plaintiff argues that the Commission erred by holding it did not have the authority to sanction defendants with a fine, and abused its discretion by refusing to fine defendants at least the funds they retained by denying plaintiff her medications in defiance of the Commission's orders. Plaintiff also argues that the Commission abused its discretion by: (1) refusing to order defendant-employer to replace its third-party administrator; (2) refusing to award attorney's fees for the time spent by plaintiff's counsel on plaintiff's motion to compel medical treatment; and (3) limiting plaintiff's recourse if defendants deny her medications in the future to filing civil contempt motions. We address each argument in turn.

A. Sanctions

Plaintiff argues that the Commission erred by holding it did not have authority to sanction defendants with a fine not specified by the Workers' Compensation Act ("the Act") because the Commission has inherent authority and judicial power to administer the Act and enforce its own orders. Based on this premise, plaintiff also contends that the Commission abused its discretion by refusing to fine defendants at least the value of the funds retained by denying plaintiff medications in defiance of the Commission's orders. We disagree.

"[T]he Commission 'is not a court with general implied jurisdiction' but 'primarily is an administrative agency of the state' granted judicial power 'as is

necessary to perform the duties required of it by the law which it administers.' " *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (quoting *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985)). As an administrative agency, the Commission is a creature of statute and "must act consistently with the intent of the General Assembly." *Mehaffey v. Burger King*, 367 N.C. 120, 126, 749 S.E.2d 252, 256 (2013) (citation omitted).

> When it hears a matter in dispute, the Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the act, and necessary to determine the rights and liabilities of employees and employers.

Hogan, 315 N.C. at 138, 337 S.E.2d at 483 (internal quotation marks and citation omitted).

The General Assembly has provided specific statutory means by which the Commission may assess sanctions, which were already considered in this case. *See* N.C. Gen. Stat. §§ 97-25(f)(5), 97-88, and 97-88.1. Nonetheless, plaintiff contends that the Commission has the power to impose additional sanctions not specified by the Act so that the Commission can perform the duties prescribed therein, relying on *Hogan* and *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 498 S.E.2d 818 (1998).

In *Hogan*, our Supreme Court held that the Commission could set aside a former judgment of the Commission, and the statutes creating the Commission "have

by implication clothed the Commission with the power to provide this remedy," which "derives from the Commission's supervisory power over its judgments." *Hogan*, 315 N.C. at 137, 139, 337 S.E.2d at 483-84. In *Pearson*, the Supreme Court held that when defendants are liable for plaintiff's reasonable and necessary medical expenses, the Commission retains jurisdiction over the case to determine which expenses must be paid and in what amount, as the authority to set and approve medical fees is granted to the Commission by statute. *Pearson*, 348 N.C. at 242, 498 S.E.2d at 820. Plaintiff's reliance on *Hogan* and *Pearson* is misplaced because neither case addresses the Commission's authority to impose a penalty not specified by the Act. Although *Hogan* holds that setting aside a former judgment is an inherent and necessary judicial power implicit in the statutes creating the Commission, *Hogan*, 315 N.C. at 137, 139, 337 S.E.2d at 483-84, no authority supports the argument that there is an inherent judicial power with respect to sanctions that may be imposed in any case.

Thus, as the Commission does not have the power to impose a penalty that is not specified by the Act, plaintiff's argument is without merit and the Commission correctly observed that its authority to sanction a party is limited to costs and attorney's fees assessed pursuant to N.C. Gen. Stat. §§ 97-18(g)-(j), 97-25(f)(5), 97-88, and 97-88.1. *See* 04 N.C.A.C. 10A. 0101 *et seq*. Based on this conclusion, we also hold there is no authority to support plaintiff's argument that the Commission abused its

discretion by refusing to sanction defendants the amount of funds retained by denying plaintiff's medications.

B. Third-Party Administrator

Next, Plaintiff argues that the Commission abused its discretion by refusing to order defendant-employer Frye Regional Medical Center to replace the third-party administrator, which she maintains "is necessary to ensure compliance with the Act[.]" We disagree.

Although the Commission determined that defendants acted egregiously in this case, and then defended against plaintiff's prosecution of those actions with an unreasonable defense, the Commission is a creature of statute, and must act consistently with the authority and powers granted to it by the General Assembly. *See Mehaffey*, 367 N.C. at 126, 749 S.E.2d at 256 (citation omitted).

Plaintiff offers no statute or case law to show that the power to remove a third-party administrator from a case has been granted to the Commission. We find without some support in the statutes or laws, the Commission cannot fashion such a remedy. We agree that the actions of the third-party administrator in dealing with plaintiff's claim were egregious and their repeated refusal to comply with the Commission's orders were reprehensible. However, without some statutory authority, we are unable to find support for the sanction requested.

C. Attorney's Fees

Plaintiff argues that the Commission abused its discretion by refusing to order defendants to pay attorney fees to plaintiff's counsel per N.C. Gen. Stat. § 97-88.1 and § 97-25(f)(5) for prosecuting the matter by seeking enforcement of the Commission's orders and defendants' duty to provide medical benefits.

N.C. Gen. Stat. § 97-88.1 provides, "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it *may* assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." (Emphasis added). The purpose of N.C. Gen. Stat. § 97-88.1 is "to deter unfounded litigiousness[,]" *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 21, 510 S.E.2d 388, 395, *disc. review denied,* 350 N.C. 834, 538 S.E.2d 197 (1999), and the language of the statute "clearly indicates that an award of attorneys' fees is not required to be granted." *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 397, 298 S.E.2d 681, 684 (1983). Whether to grant an award under § 97-88.1, "and the amount of the award, is in the discretion of the Commission[.]" *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 486 (1995) (citations omitted), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

N.C. Gen. Stat. § 97-25(f)(5) provides, "If the Commission determines that any party has acted unreasonably by initiating or objecting to a motion filed pursuant to this section, the Commission *may* assess costs associated with any proceeding,

including any reasonable attorneys' fees and deposition costs, against the offending party." (Emphasis added). Like sanctions imposed under N.C. Gen. Stat. § 97-88.1, whether sanctions are ordered pursuant to § 97-25(f)(5), and the amount of such a sanction, is within the Commission's discretion. *See id.*

In its discretion, the Commission affirmed the Deputy Commissioner's award of attorney's fees pursuant to § 97-88.1, which granted 25 percent of the indemnity compensation for the life of the claim, "but *modified* the manner in which the fee would be paid. Instead of ordering Defendant to pay Plaintiff's counsel a one-time, lump sum fee based upon the time he spent litigating the medical motion," the Commission ordered defendants to pay the ongoing fees in addition to, instead of out of, plaintiff's disability compensation. The Commission also awarded plaintiff's counsel $10,300.00 in attorney's fees under N.C. Gen. Stat. § 97-88. Also in its discretion, the Commission declined to assess attorney's fees under § 97-88.1 or § 97-25(f) for the "time spent prosecuting this action from the Motion to Compel Medical Treatment" that plaintiff filed on 26 September 2014. Plaintiff has not shown that these discretionary rulings were manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision, and the language of the statutes at issue clearly contemplates that the Commission is never required to assess attorney's fees under § 97-88.1 or § 97-25(f). Therefore, the Commission did

not abuse its discretion by refusing to assess attorney fees per N.C. Gen. Stat. § 97-88.1 and § 97-25(f)(5) for plaintiff's prosecution of the matter.

D. Recourse for Denied Medications

Plaintiff argues that conclusion of law number 11 constituted an abuse of the Commission's discretion because it limits plaintiff's recourse if defendants deny plaintiff's medications again to filing a contempt motion. However, plaintiff cites no statute or case law to support this argument, but contends that this conclusion of law will make it impossible for plaintiff to ask the Commission to enforce the Act and its orders. However, conclusion of law number 11 does not limit plaintiff's recourse, as it merely states that defendants' noncompliance "*may* subject any person who has the ability bring [*sic*] either of these parties into compliance with an order to civil contempt proceedings[.]" (Emphasis added). Nowhere in the Commission's opinion or award does it state that filing a contempt motion is plaintiff's only recourse. Plaintiff's argument is without merit.

III. Conclusion

Plaintiff appeals an opinion and award that clearly finds defendants denied plaintiff medical treatment, recommendations, and prescriptions in violation of the Commission's orders. The extent of the violations demonstrates a complete lack of regard for the severity of plaintiff's condition and defendants' responsibility under the Act. However, the Act only empowers the Commission to impose sanctions as

provided in the Act, N.C. Gen. Stat. § 97-1 *et seq*. Therefore, for the reasons discussed, we affirm the opinion and award and the decision to deny plaintiff's motion to reconsider.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).