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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-42

Filed 05 July 2023

N.C. Industrial Commission, No. 18-001543

SHARON W. UNDERWOOD, Employee, Plaintiff,

v.

INGLES MARKETS, INC., Employer, SELF-INSURED, Defendant.

Appeal by defendant from Opinion and Award entered 19 September 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2023.

Ganly & Ramer, P.L.L.C., by Thomas F. Ramer, for the plaintiff-appellant.

Roberts & Stevens, P.A., by Steven W. Sizemore, for the defendant-appellee.

TYSON, Judge.

Sharon W. Underwood (“Plaintiff”) appeals from an Opinion and Award filed 19 September 2022 by the North Carolina Industrial Commission (“Commission”). We affirm.

I. Background

Plaintiff has been employed by Ingles Markets, Inc. (“Defendant”) for twelve

years. Plaintiff was injured when a customer fell into her, pushed her into a metal cabinet, and injured her lower back, right knee, and right shoulder. Defendant filed a Form 63 with the Commission authorizing Plaintiff to be treated by Dr. Michael Goebel for lower back, right shoulder, and right knee pain on 4 October 2017.

Plaintiff was assigned to light duties at work. Plaintiff was also assigned to a knee specialist, Dr. Jay West. Plaintiff was seen by her general practitioner and complained of knee pain. Plaintiff sought an evaluation with Dr. Joseph Dement, a different knee specialist, without authorization by Defendant. Dr. Dement recommended surgery and requested authorization for arthroscopic knee surgery. Plaintiff subsequently underwent surgery with Dr. Dement on 12 June 2019, but failed to file a written request authorizing treatment until 19 June 2019.

The deputy commissioner filed an order denying Plaintiff's request for medical treatment. Plaintiff filed a Form 33, Request that Claim be Assigned for Hearing, on 4 September 2019.

The deputy commissioner denied Plaintiff's claim for the knee surgery by Dr. Dement to be covered by Defendant. At the conclusion of a hearing, the deputy commissioner stated to Plaintiff:

Do you have access to an email address that you could check on a regular basis? Sometimes it's a lot quicker if I can communicate through the parties via email rather than just through the regular mail and any orders I send will be sent to you by regular mail too, but that way [it] just speeds up the process if you have an email address that could be helpful as well if you want to – if you have one and you're

comfortable giving it to me.

In response, Plaintiff agreed and provided her email address to the deputy commissioner. The deputy commissioner sent the Opinion and Award to Plaintiff via both email and certified mail. The Opinion and Award was emailed to Plaintiff on 30 September 2020 at 1:19 p.m. The email read “Attached is the O&A for above matter. Can you please confirm you have received this email? I am also mailing a copy to you today as well.” Plaintiff responded on 5 October 2020 at 9:35 p.m. stating “Thank you, I got it.” The Opinion and Award, which was emailed and mailed to Plaintiff, stated:

THIS IS TO CERTIFY that on the date below a copy of the attached document was sent to the following parties and persons in the manner specified below. When sent by mail, the document was sent by certified mail, return receipt requested, to the specified address. When sent by email, the document was sent to the specified email address.

Within Plaintiff’s Certificate of Service, no email address was specified for service, only a physical address. Plaintiff received the Opinion and Award by certified mail on 15 October 2020.

Plaintiff again replied to the Opinion and Award email on 23 October 2020 and filed notice of appeal to the Full Commission. Defendant filed a motion to dismiss, which was granted by order entered 19 September 2022. Plaintiff appeals.

II. Jurisdiction

This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 97-86 (2021).

III. Issues

Plaintiff argues the Industrial Commission erred by (1) concluding her appeal was untimely; and, (2) ruling she did not show excusable neglect.

IV. Untimely Appeal to Full Commission

A. Standard of Review

“[W]hen reviewing findings of fact by the Commission on which the scope of its jurisdiction depends, we apply a de novo standard of review.” *Cunningham v. Goodyear Tire & Rubber Co.*, 381 N.C. 10, 16, 871 S.E.2d 724, 729 (2022) (citation omitted).

B. Analysis

Plaintiff argues the Industrial Commission erred by concluding she had received actual notice of the Opinion and Award on 5 October 2020, and her purported appeal on 23 October 2020 was untimely and subject to dismissal. N.C. Gen. Stat. § 97-85(a) and 11 N.C. Admin. Code § 23A.0701 governs the time requirement for appeals to the Commission. N.C. Gen. Stat. § 97-85(a) in relevant part states: “If application is made to the Commission within 15 days from the date when *notice* of the award *shall have been given*, the full commission shall review the award.” (emphasis supplied). 11 N.C. Admin. Code § 23A.0701 in relevant part states: “Application for review shall be made to the Commission within 15 days from the date

when *notice* of the Deputy Commissioner’s Opinion and Award *was given*.” (emphasis supplied).

North Carolina’s General Statutes and the Commission’s administrative rules do not define what is valid “notice” and when it is “given.” The Commission and the courts must construe the Workers’ Compensation Act liberally in favor of the injured worker. *McAuley v. N.C. A&T State Univ.*, 383 N.C. 343, 347, 881 S.E.2d 141, 145 (2022). However, if the language of a statute is unambiguous, the court must interpret the statute according to the plain meaning of its terms so long as it is reasonable to do so. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). We review the plain meaning of the word. *Id.*

This Court held the 15-day period commences on the date the appealing party is provided *notice* of the award. *Cornell v. W. & S. Life Ins. Co.*, 162 N.C. App. 106, 109, 590 S.E.2d 294, 296-297 (2004) (citing *Hubbard v. Burlington Industries*, 76 N.C. App. 313, 315-16, 332 S.E.2d 746, 747 (1985) (emphasis supplied). The statutory language clearly requires notice of the Opinion and Award to have been received. This Court has established there is no rule in place, which prohibits the use of email to notify plaintiffs of the Opinion and Award, but only if the recipient agreed to receive notices in that manner. *Egen v. Excalibur Resort Prof’l*, 191 N.C. App. 724, 730, 663 S.E.2d 914, 919 (2008). The record shows Plaintiff explicitly agreed to receive communications from the deputy commissioner via her provided email and acknowledged her receipt thereof.

Defendant asserts Plaintiff received actual notice of the Opinion and Award on 5 October 2020 at 9:35 p.m. when Plaintiff responded to the email. Defendant cites *Manone v. Coffee*, 217 N.C. App. 619, 720 S.E.2d 781 (2011), to support this argument. In *Manone*, the defendant attempted to appeal a ruling. *Id.* The defense counsel's office personally went to the courthouse to collect the ruling. *Id.* at 619, 720 S.E.2d at 782. This Court determined the act of picking up the ruling itself constituted sufficient notice. *Id.*

Plaintiff asserts this case is distinguishable from *Manone* because Plaintiff took no affirmative action. At the conclusion of a hearing before the deputy commissioner, Plaintiff specifically agreed to receive the Opinion and Award by email and by certified mail. Plaintiff affirmatively responded and acknowledged she had received the email containing the Opinion and Award from the deputy commissioner.

Had Plaintiff had not explicitly agreed to receive email communications or not have affirmatively confirmed receipt of the email and Opinion and Award, the circumstances of this case may be different. Plaintiff unquestionably received notice of the Opinion and Award on 5 October 2020 when Plaintiff confirmed she received the deputy commissioner's email. Plaintiff's appeal dated 23 October 2020 was not taken within the requisite 15-day period. The Commission correctly concluded her purported appeal was untimely. N.C. Gen. Stat. § 97-85(a) (2021).

V. Excusable Neglect

A. Standard of Review

“[T]he Commission has the inherent power and authority, in its discretion, to consider defendant’s motion for relief due to excusable neglect.” *Allen v. Food Lion, Inc.*, 117 N.C. App. 289, 291, 450 S.E.2d 571, 572 (1994) (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985)).

B. Analysis

The Full Commission did not find excusable neglect by Plaintiff for her failure to appeal the order within the requisite 15-day period. “[T]he Commission has the inherent power and authority, in its discretion, to consider defendant’s motion for relief due to excusable neglect.” *Allen v. Food Lion, Inc.*, 117 N.C. App. 289, 291, 450 S.E.2d 571, 572 (1994) (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985)). “[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case.” *Guidotti v. Moore*, 261 N.C. App. 773, 818 S.E.2d 647 (2018) (quoting *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986)).

N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2021) is the relevant statute concerning excusable neglect. “Whether excusable neglect has been shown is a question of law, not a question of fact.” *Engines & Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 122, 189 S.E.2d 498, 499 (1972). “Deliberate or willful conduct cannot constitute excusable neglect, . . . nor does inadvertent conduct that does not demonstrate diligence[.]” *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 103, 515 S.E.2d

30, 38 (internal citations omitted) (1999).

After considering all relevant circumstances, we agree with the Full Commission finding Plaintiff did not exercise proper attention to her case, and concluding excusable neglect does not apply. Plaintiff cites *Egen* to support her claim of excusable neglect, which is distinguishable. In *Egen*, the deputy commissioner emailed an opinion and award to a legal assistant instead of to the plaintiff's attorney. *Id.* at 726-727, 663 S.E.2d at 917. The legal assistant presumed she had only been copied on the email, rather than being the sole recipient. *Id.*

This Court held service upon the staff member of the plaintiff's attorney was proper, but the appeal should be allowed to proceed under excusable neglect. *Id.* at 731-732, 663 S.E.2d at 920. This Court recognized the email service differed from the previous services. *Id.* at 731, 663 S.E. 2d at 919. This Court reasoned that it was excusable neglect for the staff member to have reasonably believed the plaintiff's attorney was emailed a copy of the opinion and award, and she was not the sole recipient. *Id.*

Unlike *Egen*, Plaintiff was the sole recipient of and acknowledged receipt of the Opinion and Award. In *Egen*, a legal assistant, not a party or her attorney, was the sole recipient of the opinion and award. *Id.*

As a *pro se* litigant, Plaintiff was solely responsible for making an informed and timely decision regarding her appeal. Page eighteen of the Opinion and Award notified Plaintiff of the appeal deadline. If Plaintiff had paid proper attention to her

case, she would have recognized and adhered to the proper appeal deadline. The Full Commission properly concluded excusable neglect was not present.

VI. Conclusion

The Commission properly granted Defendant's motion to dismiss the appeal as untimely and concluded Plaintiff had failed to show excusable neglect. We affirm the order granting Defendant's motion to dismiss. *It is so ordered.*

AFFIRMED.

Judges MURPHY and STADING concur.

Report per Rule 30(e).