*346 Ill. App. 3d 550, *; 805 N.E.2d 255, **;*
*2004 Ill. App. LEXIS 103, ***; 281 Ill. Dec. 887*

CAROLYN HESTER, Plaintiff-Appellant, v. THEODORE DIAZ, DAVID DUGAN, and DUGAN & DIAZ, P.C., Defendants-Appellees.

NO. 5-02-0588

APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

346 Ill. App. 3d 550; 805 N.E.2d 255; 2004 Ill. App. LEXIS 103; 281 Ill. Dec. 887

February 6, 2004, Filed

PRIOR HISTORY: **[***1]** Appeal from the Circuit Court of Madison County. No. 02-L-342. Honorable A. A. Matoesian, Judge, presiding.

DISPOSITION: Reversed; cause remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff, a former client, sued defendants, attorneys and a law firm, for legal malpractice. The Circuit Court of Madison County (Illinois) granted defendants' motion to dismiss the action, and denied the client's motion to reconsider. The client appealed the judgment.

OVERVIEW: The client was injured in the course of her employment with a school. The client retained defendants to represent her in a **workers' compensation** action. Defendants failed to notify the client of a settlement offer, and failed to attend a hearing. Defendants failed to reinstate the action, and failed to notify the client of the dismissal of the action for almost five years. The client filed the instant action shortly after being notified of the dismissal. The trial court dismissed the action on grounds that it was filed outside of the statute of limitations, 735 Ill. Comp. Stat. Ann. 5/13-214.3(b) (2000), and the statute of repose, 735 Ill. Comp. Stat. Ann. 5/13-214.3(b), (c) (2000). The appellate court found that there appeared to be no doubt that the statute of limitations had expired. The appellate court further held that as the date when the statute of repose began to run was the date the action was dismissed for want of prosecution, the instant action was also filed outside of the statute of repose. However, the appellate court held that there was a triable issue of fact as to whether estoppel applied to save the action.

OUTCOME: The judgment was reversed and remanded.

CORE TERMS: repose, statute of limitations, omission, malpractice, discovery rule, legal malpractice, raising, reinstatement, advise, school district, arbitrator, reinstate, expired, offer to settle, misrepresentation, equitable estoppel, issue of material fact, equitably estopped, equitably, estoppel, genuine, law firm, want of prosecution, workers' compensation, compensation case, reconsider, reinstated, secretary, utilizing, conveyed

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 On an appeal from a trial court's involuntary dismissal of a complaint pursuant to 735 Ill. Comp. Stat. Ann. 5/2-619 (2000), Illinois appellate courts must determine whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. In other words, review is de novo. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Procedure > Statutes of Limitations > General Overview
Torts > Procedure > Statutes of Repose > Professional Malpractice

HN2 The statute of limitations for legal malpractice is two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought, 735 Ill. Comp. Stat. Ann. 5/13-214.3(b) (2000). The statute of limitations incorporates the discovery rule, which serves to toll the limitations period to the time when a person knows or should reasonably know of his or her injury. More Like This Headnote | *Shepardize:* Restrict By Headnote

Torts > Procedure > Statutes of Repose > General Overview

HN3 See 735 Ill. Comp. Stat. Ann. 5/13-214.3(b), (c) (2000).

Civil Procedure > Discovery > General Overview

Governments > Legislation > Statutes of Limitations > Time Limitations
Governments > Legislation > Statutes of Repose
HN4 The Illinois statute of repose is designed to place an outer limit on the time for commencing an action. The statute of repose operates to curtail the "long tail" of liability that results from the discovery rule. If the statute of repose did not exist, then the statute of limitations, with its discovery rule, would essentially be limitless in certain undiscovered situations. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Legislation > Statutes of Limitations > General Overview
Governments > Legislation > Statutes of Repose
Torts > Procedure > Statutes of Repose > General Overview
HN5 A statute of repose is not tied in any way to an accrual of a cause of action, and therefore, the injury need not have occurred, much less have been discovered. More Like This Headnote

Governments > Legislation > Statutes of Repose
Torts > Malpractice & Professional Liability > Attorneys
Torts > Procedure > Statutes of Repose > Professional Malpractice
HN6 The Illinois statute of repose for legal malpractice begins upon the last act of representation with regard to the omission upon which the malpractice is founded. Although omissions may cause the injury, those omissions must occur in the context of some affirmative acts of representation. When the acts of representation end, the period of repose must begin, even if the continuing omissions may contribute to injury. More Like This Headnote | *Shepardize:* Restrict By Headnote

JUDGES: JUSTICE KUEHN delivered the opinion of the court. HOPKINS and DONOVAN, JJ., concur.

OPINION BY: KUEHN

OPINION

[257]** **[*551]** JUSTICE KUEHN delivered the opinion of the court:

Carolyn Hester appeals from the trial court's July 12, 2002, order dismissing her case on the basis of the running of the statute of limitations and the statute of repose, and she also appeals from the trial court's August 28, 2002, order denying her motion to reconsider the earlier order. We reverse and remand.

Carolyn Hester (Carolyn) was an employee of Collinsville Unit 10 School District. On November 14, 1990, while working, she fell down a flight of stairs and sustained bodily injuries and damages.

She retained David Dugan as her attorney on March 14, 1991. The record does not detail if he was a sole practitioner or worked in a firm at the time of this retention. An application for adjustment of claim was filed with the Illinois Industrial Commission on August 2, 1991, by attorney Theodore Diaz of **[***2]** Lakin & Herndon, P.C.

On August 19, 1993, a stipulation was filed with the Illinois Industrial Commission to substitute Theodore Diaz, and the law firm of Pitts, Dugan & Diaz, P.C., for The Lakin Law Firm as Carolyn's attorneys.

On October 31, 1994, the case was called for hearing. No one appeared on Carolyn's behalf and the arbitrator dismissed the case for want of prosecution. A notice of this dismissal was mailed to Carolyn's attorneys, the defendants herein, on December 9, 1994. The notice stated, "Unless a **petition to reinstate** is filed with the Industrial Commission within 60 days of receipt of this dismissal, this cause cannot be reopened." A motion to reinstate the case was filed on February 2, 1995. On March 7, 1995, the arbitrator heard the motion to **[*552]** reinstate and continued the motion until December 3, 1996, noting on the order that the "case may be reinstated at trial only."

On September 20, 1995, attorney Theodore Diaz made a settlement demand, the details of which are not contained within the record. On May 13, 1996, Theodore Diaz received a $ 10,000 offer to settle from the attorney for the school district. The file contains no reference that this offer was ever conveyed **[***3]** to Carolyn. On September 4, 1996, Collinsville Unit 10 School District filed a petition to strike the motion **[**258]** to reinstate. The motion was denied on October 1, 1996. On November 6, 1996, the school district submitted to Theodore Diaz a reduced $ 5,000 offer to settle the case.

Nothing happened on December 3, 1996, which was the date the arbitrator had indicated was the final reinstatement date and the date the trial was supposed to have been held.

On January 8, 1997, Theodore Diaz conveyed to Carolyn the $ 5,000 offer to settle the case. By this time, Carolyn resided in Arkansas. She rejected the offer on January 20, 1997. By a letter from attorney Rod Pitts to Carolyn, dated April 13, 2000, we know that Theodore Diaz's secretary reported that Carolyn had frequently called the office for information from October 1997 to January 29, 1999. This secretary spoke with Carolyn on several occasions and also reported that Carolyn had spoken with Theodore Diaz on occasion but that the content of these discussions was unknown. The letter from attorney Rod Pitts was in response to a letter Carolyn had written to the firm. Rod Pitts advised Carolyn to hire an attorney to review this matter.

[*4]** Finally, on December 10, 2001, attorney Theodore Diaz and his firm, Dugan & Diaz, P.C., notified Carolyn by letter that her **workers' compensation** case had been dismissed with prejudice, apologetically stating that they had no "legitimate excuse" for failing to advise her of that fact. Theodore Diaz provided Carolyn with his malpractice insurance company's name and address and his policy number.

On March 1, 2002, Carolyn filed a legal malpractice case against Theodore Diaz, David Dugan, and Dugan & Diaz, P.C. The complaint alleged malpractice in allowing her case to be dismissed in 1994 and also contained allegations of misrepresentation related to the failure to advise her of the true status of her case.

On May 28, 2002, the defendants filed a motion to dismiss, arguing that the statute of limitations and the statute of repose began running on October 31, 1994, when the order of dismissal was entered, and that neither the discovery rule nor equitable estoppel was available to expand either statute.

Carolyn responded on June 13, 2002, and in this response asked **[*553]** the trial court to grant her request to amend her complaint to add the additional facts contained within the April 13, 2000, letter **[***5]** from Rod Pitts. The defendants replied to the response on July 9, 2002.

The motion to dismiss was argued and granted on July 12, 2002. Carolyn filed a motion to reconsider on July 24, 2002. On August 28, 2002, the trial court denied the motion. Carolyn appeals.

HN1 On an appeal from a trial court's involuntary dismissal of a complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)), we must determine "'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.'" *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 109-10, 708 N.E.2d 1140, 1144, 237 Ill. Dec. 100 (1999) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17, 619 N.E.2d 732, 735, 189 Ill. Dec. 31 (1993)). In other words, our review is *de novo*. *In re Estate of Mayfield*, 288 Ill. App. 3d 534, 542, 680 N.E.2d 784, 789, 223 Ill. Dec. 834 (1997). If a motion to dismiss is filed upon any of the possible bases listed in section 2-619, the party opposing the motion can **[***6]** present "affidavits or other proof denying the facts alleged or establishing facts obviating the **[**259]** grounds of defect." 735 ILCS 5/2-619(c) (West 2000).

HN2 The statute of limitations for legal malpractice is two years "from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2000). The statute of limitations incorporates the "discovery rule," which serves to toll the limitations period to the time when a person knows or should reasonably know of his or her injury. *Sorenson v. Law Offices of Theodore Poehlmann*, 327 Ill. App. 3d 706, 708, 764 N.E.2d 1227, 1229, 262 Ill. Dec. 110 (2002). At issue in this case is the statute of repose for legal malpractice. Section 13-214.3 of the Code of Civil Procedure provides as HN3 follows: "An action for damages based on tort, contract, or otherwise *** against an attorney arising out of an act or omission in the performance of professional services" "may not be commenced in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(b) **[***7]** , (c) (West 2000). HN4 The statute of repose is designed "to place an outer limit on the time for commencing an action." *Sorenson*, 327 Ill. App. 3d at 708, 764 N.E.2d at 1230. The statute of repose operates to "'curtail the 'long tail' of liability that results from the discovery rule.'" *Sorenson*, 327 Ill. App. 3d at 708, 764 N.E.2d at 1230 (quoting *Meyers v. Underwood*, 316 Ill. App. 3d 970, 985-86, 738 N.E.2d 118, 129, 250 Ill. Dec. 154 (2000)). If the statute of repose did not exist, then the statute of limitations, with its discovery rule, would essentially be limitless in certain undiscovered situations. *Sorenson*, 327 Ill. App. 3d at 708, 764 N.E.2d **[*554]** at 1230 (relying on *Meyers*, 316 Ill. App. 3d at 986, 738 N.E.2d at 129 (relying on *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d 684, 691, 663 N.E.2d 13, 19, 215 Ill. Dec. 263 (1995))).

HN5 A statute of repose is not tied in any way to an accrual of a cause of action, and therefore, the "'injury need not have occurred, much less have been discovered.'" *Goodman*, 278 Ill. App. 3d at 691, 663 N.E.2d at 18 (quoting *Bradway v. American National Red Cross*, 992 F.2d 298, 301 (11th Cir. 1993)). **[***8]**

Initially, we must address the question of when the statutes began to run. Carolyn filed her cause of action on March 1, 2002. The defendants argue that the relevant date was the date when the **workers' compensation** case was dismissed for want of prosecution-October 31, 1994. Applying that date, the defendants argue that the statute of limitations ran on October 31, 1996, while the statute of repose expired on October 31, 2000. Carolyn argues that the relevant date was December 3, 1996, the date by which the arbitrator indicated that the case could be reinstated "at trial only." Utilizing this later date, the statute of limitations would not have run until December 3, 1998, while the statute of repose would not have expired until December 3, 2002.

With respect to the arguments presented by counsel, there seems to be no doubt that the statute of limitations expired in this case prior to the malpractice suit's filing date. [1] At issue, then, is the expiration of the statute of repose. HN6 The statute of repose for legal malpractice begins upon "the last act of representation **[**260]** with regard to the omission upon which the malpractice is founded." *O'Brien v. Scovil*, 332 Ill. App. 3d 1088, 1090, 774 N.E.2d 466, 468, 266 Ill. Dec. 360 (2002). **[***9]** "Although omissions may cause the injury, those omissions must occur in the context of some affirmative acts of representation. When the acts of representation end, the period of repose must begin, even if the continuing omissions may contribute to injury." *Fricka v. Bauer*, 309 Ill. App. 3d 82, 87, 722 N.E.2d 718, 722, 242 Ill. Dec. 934 (1999).

FOOTNOTES

1 Although it would not be relevant in light of the applicable statute of repose, Carolyn could argue, utilizing the discovery rule, that she did not discover the legal malpractice until her receipt of the April 13, 2000, letter from attorney Rod Pitts and that, therefore, the March 1, 2002, filing of her complaint was timely.

We conclude that the applicable date is the earlier, October 31, 1994, date. We reach this determination because of the finality of the dismissal. Malpractice occurred at that time when the case was allowed to be dismissed for want of prosecution. While there was case activity both within and without the **workers' compensation** file **[***10]** after **[*555]** that date, that activity does not change the status of the case, which was "dismissed." If filing a motion for reinstatement, without the occurrence of an actual reinstatement, bumped back the beginning of the statute of repose, then, conceivably, there might never be an effective termination to litigation. That is especially true in this case, where the setting leaves us to wonder if the case could not yet be resurrected. We cannot conclude that the failure to appear at the December 3, 1996, setting was the relevant act or omission. As of that date, the case had been dismissed. There were no guarantees relative to reinstatement on that date. We will not speculate that simply because reinstatement is freely allowed in the **workers' compensation** arena, this particular case would have enjoyed that treatment. No one can know that for certain.

The filing of the lawsuit on March 1, 2002, was not timely under either the statute of limitations or the statute of repose.

The final matter to be determined on appeal is whether the trial court appropriately dismissed this case in light of the estoppel

allegations. Did Carolyn adequately raise the estoppel issue, and if so, did the actions **[***11]** of the defendants equitably bar the defendants from raising the statute of limitations and the statute of repose? In her complaint, Carolyn alleges that during the seven years following the dismissal of her case, her attorneys failed to advise her that her case had been dismissed. She alleges that attorney Theodore Diaz "continued to tell and reassure Carolyn that her case was pending before the Illinois Industrial Commission and was proceeding as it should, knowing when he made these representations that they were untrue." She also alleged that in making those statements, attorney Theodore Diaz "intended or reasonably expected that she would believe and rely on the representations he made to her." Carolyn stated that she relied in good faith on his statements, had no reason to disbelieve him, and "was not in a position to inspect her file at the Illinois Industrial Commission[,] which is located in Chicago, Illinois." She alleged prejudice in her good-faith reliance upon Theodore Diaz's misrepresentations. Carolyn finally alleged that Theodore Diaz "was fully aware of the statutory time limit for making this claim throughout the time that he was misrepresenting the status of her **[***12]** underlying claim to [her][] and intended or reasonably expected Carolyn Hester to rely on misrepresentations made by him throughout that time, so that her time for bringing this claim would expire."

It seems clear that while the allegations are not precisely labeled as being designed to equitably estop the defendants from raising the statutes of limitations and repose in response to her complaint, the allegations are sufficiently clear that such a claim is raised.

[261]** **[*556]** The defendants argue that they should not be equitably estopped from raising the argument because Carolyn could have independently discovered the dismissal of her claim at any time, and they cite *McIntosh v. Cueto*, 323 Ill. App. 3d 384, 390, 752 N.E.2d 640, 644, 256 Ill. Dec. 760 (2001), in support of this position.

In *McIntosh v. Cueto*, this court found that the claim was barred by both the statute of limitations and the statute of repose and that the defendants were not equitably estopped from raising those defenses because the plaintiffs' complaint was somewhat deficient in its pleading of the claim and because they should have discovered the failings of their attorney. *McIntosh*, 323 Ill. App. 3d at 391-92, 752 N.E.2d at 645-46. **[***13]** Specifically, the plaintiffs accused their attorney of not responding to their numerous calls and letters relative to whether or not a medical malpractice case had been filed on their behalf. *McIntosh*, 323 Ill. App. 3d at 390, 752 N.E.2d at 645. We concluded that because all the plaintiffs had to do was contact the circuit clerk's office to ascertain whether or not a case had been filed, it was unreasonable to place trust and confidence in the unanswered calls and letters of this attorney. *McIntosh*, 323 Ill. App. 3d at 390, 752 N.E.2d at 645.

We find that this case is factually distinguishable from *McIntosh v. Cueto*, in that Carolyn's case was actually filed, her attorney and his staff did not ignore her calls and letters, from Theodore Diaz's own admission via correspondence he neglected to advise her that her case had been dismissed, and the ascertainment of the status of her case was not as simple as a check of the courthouse records. For these reasons, we conclude that Carolyn is not barred from raising the issue of equitable estoppel. We further conclude that given this rather unique set of facts, a genuine issue of material fact precluded **[***14]** a dismissal at this stage of the pleadings on the basis of the statutes of limitations and repose. See *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 516, 701 N.E.2d 99, 101, 233 Ill. Dec. 456 (1998).

For the foregoing reasons, the judgment of the circuit court of Madison County is hereby reversed, and the cause is remanded.

Reversed; cause remanded.

HOPKINS and DONOVAN, JJ., concur.

*50 Ill. 2d 346, *; 278 N.E.2d 784, **;*
*1972 Ill. LEXIS 493, ****

KARL G. ZIMMERMAN, JR., Appellant, v. THE INDUSTRIAL COMMISSION et al. -- (Caterpillar Tractor Company, Appellee)

Nos. 44119, 44120 cons.

Supreme Court of Illinois

50 Ill. 2d 346; 278 N.E.2d 784; 1972 Ill. LEXIS 493

January 28, 1972, Filed

PRIOR HISTORY: [***1] APPEAL from the Circuit Court of Peoria County; the Hon. ROBERT E. HUNT, Judge, presiding.

DISPOSITION: Orders affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner worker challenged two orders of the Circuit Court, Peoria County (Illinois) each quashing a writ of certiorari and sustaining appellee Industrial Commission's refusal to reinstate either of the worker's two **workmen's compensation** cases. The worker allegedly suffered two injuries in the course of his employment with appellee employer. Both cases were dismissed for want of prosecution and unverified motions to reinstate were denied.

OVERVIEW: The court noted that in a petition for reinstatement before the commission, the burden was on the employee to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rested in the sound discretion of the commission. The court found that the petition did not set forth reasons why the employee did not follow his cases or why his counsel ignored so many final notices of hearing. Likewise, the petitions did not disclose why the worker or his counsel did not attend the final hearing, or appear on the date that the claims were dismissed for want of prosecution. At the hearing on the **petition to reinstate,** counsel for the worker informed the commissioner that his absence at the final hearing was due to inadvertence. Affirming, the court held that the **Workmen's Compensation** Act Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1969), was remedial in nature and had to be liberally construed. However, the commission had before it the **petitions to reinstate** and heard the explanation for the failure to appear. Under the facts presented, the court did not find that the commission abused its discretion in its failure to allow the motions to reinstate.

OUTCOME: The court affirmed the orders of the circuit court quashing the writs of certiorari issued on behalf of the worker and confirming the order of the commission.

CORE TERMS: reinstate, final notice, compensation cases, petitioner filed, quashing, unauthorized acts, notices of hearing, petitioner's attorney, want of prosecution, relief prayed, sustaining, unverified, workmen's, times

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview

HN1 In a petition for reinstatement before the Industrial Commission, the burden is on the petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
Civil Procedure > Dismissals > Involuntary Dismissals > Hearings
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

HN2 The **Workmen's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1969) is remedial in nature and must be liberally construed. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Fraud
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN3 Only in the limited area of showing illegal or unauthorized acts or conduct on the part of the Commission may evidence dehors the record be presented to the court on review. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN4 The circuit court in a compensation case on certiorari tries the case on the record alone and has no authority to try the case de novo or to hear evidence. More Like This Headnote | Shepardize: Restrict By Headnote

COUNSEL: MATHIS, SLOAN & LITTLER, of Peoria, for appellant.

WESTERVELT, JOHNSON, NICOLL & KELLER, of Peoria, (DAVID A. NICOLL and ROBERT D. JACKSON, of counsel,) for appellee.

JUDGES: Mr. Justice RYAN delivered the opinion of the court.

OPINION BY: RYAN

OPINION

[*347] **[**785]** This is a combined appeal from the circuit court of Peoria County which entered orders each quashing a writ of *certiorari* and sustaining the Industrial Commission's refusal to reinstate either of two **workmen's compensation** cases filed by Karl G. Zimmerman, Jr., who allegedly sustained two separate injuries in the course of his employment at Caterpillar Tractor Company. The first occurred on May 7, 1965, and the second occurred on **[*348]** November 29, 1966. An application for adjustment of claim was filed with the Industrial Commission for each injury. Over a period of two years, in addition to notices of hearing on said claims which were not marked "final notice", one case was set for hearing on "final notice" 19 times, and the other case was set for hearing on "final notice" 6 times. **[***2]** Both cases were set for hearing on "final notice" on December 11, 1968. On that date the petitioner and his counsel did not appear and both cases were set for hearing the next day, December 12. On that date again neither the petitioner nor his attorney was present and both cases were dismissed for want of prosecution.

The petitioner filed unverified motions to reinstate before the Industrial Commission. In them he alleged that he was continuing to receive treatment, that the petitioner's attorney had been in communication with the attorney for the respondent concerning settlement and that he had no reason to believe that he would be defaulted. Each motion further alleged that the petitioner has a meritorious claim. At the hearing on the motion the petitioner's attorney acknowledged that neither he nor the petitioner had been present at the hearing set for December 11. The Commission denied the motion to reinstate in both cases.

Petitioner sought review in each case by *certiorari* in the circuit court of Peoria County. In support of the *certiorari* proceedings petitioner filed in the circuit court affidavits which set forth the practice of the Industrial Commission of **[***3]** setting all Caterpillar Tractor Company cases for one day. He alleged that this extended to Caterpillar preferential treatment and inconvenienced petitioners inasmuch as more than 20 cases involving Caterpillar were **[**786]** set for the one day. The circuit court entered orders quashing the writs of *certiorari* and sustaining the orders of the Industrial Commission.

Petitioner contends that the respondent's failure to file answers to his **petitions to reinstate** constitutes an **[*349]** admission of the allegations thereof and that the same should therefore have been allowed. In support of his position the petitioner cites several cases which involve section 72 of the Civil Practice Act. (Ill.Rev.Stat. 1969, ch. 110, par. 72.) However, this is not a section 72 proceeding and we deem it unnecessary to discuss the applicability of such authority to this case. Assuming, *arguendo*, that the respondent's failure to answer the unverified petition does constitute an admission of the allegations thereof, these admissions will only justify the allowance of the petition if the facts pleaded and admitted are sufficient to authorize the relief prayed.

HN1 In a petition for reinstatement **[***4]** before the Industrial Commission, the burden is on the petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission. In our case the allegations of the petition do not set forth reasons why the petitioner did not follow his cases or why his counsel ignored so many final notices of hearing. Likewise, the petitions do not disclose why the petitioner or his counsel were not present on December 11, 1968, the final hearing date, or on December 12, 1968, the date that the claims were dismissed for want of prosecution. At the hearing on the **petition to reinstate**, counsel for the petitioner informed the commissioner that his absence on December 11, 1968, was due to inadvertence. HN2 The **Workmen's Compensation** Act (Ill.Rev.Stat. 1969, ch. 48, par. 138.1 *et seq.*) is remedial in nature and must be liberally construed. However, the Industrial Commission had before it the **petitions to reinstate** and heard the explanation of counsel for the failure to appear. Under the facts presented in this case we do not consider that the Industrial Commission abused its discretion in its failure to **[***5]** allow the motions to reinstate.

On *certiorari* to the circuit court in each case **[*350]** petitioner filed affidavits attempting to set forth the practice of the Commission by setting all of Caterpillar Tractor Company cases for one day, thereby favoring Caterpillar and inconveniencing the claimants. Petitioner cites *State ex rel. Madison Airport Co. v. Wrabetz, 231 Wis. 147, 285 N.W. 524*, as authorizing the introduction of evidence when a compensation case is pending on review in the circuit court. Without comparing the Illinois Act with the Wisconsin Act we point out that the Wisconsin case holds that HN3 only in the limited area of showing illegal or unauthorized acts or conduct on the part of the Commission may evidence *dehors* the record be presented to the court on review. The allegations of the affidavits filed in our case allude to no illegal or unauthorized act or conduct on behalf of the Industrial Commission. Even under the rule of the Wisconsin case cited, evidence of the nature offered here would not be admissible. This court has held that HN4 the circuit court in a compensation case on *certiorari* tries the case on the record alone and has no authority to **[***6]** try the case *de novo* or to hear evidence. (*Plano Foundry Co. v. Industrial Com., 356 Ill. 186, 191.*) For the purposes of this case we need not decide whether, given the factual picture present in the Wisconsin case, evidence could be presented in the circuit court for the limited purposes allowed in Wisconsin.

The orders of the circuit court of Peoria County quashing the writs of *certiorari* issued on behalf of the petitioner and confirming the order of the Industrial Commission are hereby affirmed.

Orders affirmed.

Date/Time: Thursday, May 6, 2010 - 9:23 AM EDT

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*53 Ill. 2d 519, *; 292 N.E.2d 386, **;*
*1973 Ill. LEXIS 394, ****

RAYMOND SHIFFER, Appellant, v. THE INDUSTRIAL COMMISSION et al. -- (Nelson Laundry & Dry Cleaning System, Appellee)

No. 44667

Supreme Court of Illinois

53 Ill. 2d 519; 292 N.E.2d 386; 1973 Ill. LEXIS 394

January 26, 1973, Filed

PRIOR HISTORY: [***1] APPEAL from the Circuit Court of Cook County; the Hon. EDWARD J. EGAN, Judge, presiding.

DISPOSITION: Order affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant former employee sought review of an order from the Circuit Court of Cook County (Illinois), which confirmed an industrial commission's decision denying his motion to reinstate his case for want of prosecution. The former employee filed an application for adjustment of a **workmen's compensation** claim, which was opposed by appellee employer.

OVERVIEW: The former employee was granted seven continuances for an industrial commission hearing on the adjustment of his claim. His attorney failed to appear for a second motion to vacate a dismissal order and also failed to appear for a hearing on his writ of certiorari to the trial court. On review, the court affirmed. The court held the former employee failed to satisfy his burden of proving facts to justify the relief prayed for, and the commission did not abuse its discretion. The court stated that the commission was extremely patient and accommodating, and the case was dismissed on two occasions for the identical reason.

OUTCOME: The court affirmed the denial of the former employee's motion to reinstate his case.

CORE TERMS: reinstate, continuance, secretary, reinstated, want of prosecution, reinstatement, dismissal order, appearing, vacate

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Civil Procedure > Pretrial Matters > Continuances
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN1 In a petition for reinstatement before the Industrial Commission, the burden is on a petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: CARLINS & KAMENSKY, of Chicago, for appellant.

WILLIAMS, DISCIPIO & DeCARLO, of Chicago (DONALD L. MASON, of counsel), for appellee.

JUDGES: Mr. Justice KLUCZYNSKI delivered the opinion of the court.

OPINION BY: KLUCZYNSKI

OPINION

[*520] **[**386]** Raymond Shiffer appeals from an order of the circuit court of Cook County confirming the Industrial Commission's decision denying his motion to reinstate his case, which cause had been dismissed for want of prosecution.

On February 6, 1966, appellant filed an application for adjustment of claim with the Industrial Commission for alleged injuries incurred on April 20, 1965, while employed by appellee. The cause was set for hearing on six different occasions with final notice that it be heard on August 23, 1968. The cause was dismissed on that date for want of prosecution, no one appearing in appellant's behalf.

Through his attorney, he filed a **petition to reinstate** alleging, *inter alia*, that the attorney was at trial in Iowa on the day the cause

was dismissed. The Commission, on February 5, 1969, reinstated the **[***2]** cause, setting trial for May 28, 1969. No one appearing, **[**387]** the cause was again dismissed for want of prosecution.

Thereafter, appellant, through his attorney, moved that the second dismissal order be vacated and the cause reinstated. This motion alleged that on the last date set for hearing, the attorney was engaged in a criminal trial in Geneva, Illinois, and because said trial would not be concluded he notified his secretary and ordered her to call the Industrial Commission and request a continuance. He further claimed that the secretary was informed by the Commission that he must appear to obtain a continuance.

The hearing on this motion to vacate was continued to August 27, 1969, and at this time appellant's attorney again did not appear and the motion was denied on November 14, 1969. About one month later appellant, through his attorney, filed another motion to vacate the dismissal order and reinstate the cause alleging that on the date set for hearing on the prior motion he had been in Greece on business and that the Commission had refused **[*521]** to continue the hearing on the motion to reinstate when his secretary had called. This motion was denied on January **[***3]** 12, 1971.

A hearing was set for May 5, 1971, on appellant's writ of *certiorari* to the circuit court of Cook County. At the request of all parties, it was continued to June 8, 1971, and we were informed during oral argument of this cause by appellant's attorney that he did not appear on the latter date after informing the judge's secretary that he did not believe it necessary. The circuit court entered an order affirming the Commission's dismissal of the cause.

Appellant here contends that the Commission abused its discretion in refusing to reinstate his case and by not granting him a continuance from May 28, 1969, the date on which the cause was dismissed. In a comparable factual situation, we have recently held that, HN1"In a petition for reinstatement before the Industrial Commission, the burden is on the petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission." (*Zimmerman v. Industrial Com.*, 50 Ill.2d 346, 349.) The record before us indicates that the Commission was extremely patient and accommodating to appellant's attorney. This cause was dismissed on two **[***4]** occasions for the identical reason. After the original dismissal the Commission reinstated the matter at his request and set another hearing date. However, he did not appear on this date or the date which was initially set for hearing on his subsequent petition for reinstatement.

Under the circumstances we do not believe that appellant has sustained his burden, and neither the Commission's refusal to reinstate the cause nor its failure to grant a further continuance in this matter amounted to an abuse of discretion requiring reversal of the circuit court's order.

Order affirmed.

*78 Ill. 2d 251, *; 399 N.E.2d 1316, **;*
*1980 Ill. LEXIS 255, ***; 35 Ill. Dec. 788*

THOMAS CRANFIELD, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Uniroyal Company, Appellee)

No. 52056

Supreme Court of Illinois

78 Ill. 2d 251; 399 N.E.2d 1316; 1980 Ill. LEXIS 255; 35 Ill. Dec. 788

January 23, 1980, Filed

PRIOR HISTORY: [***1] Appeal from the Circuit Court of Cook County, the Hon. Richard Curry, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant sought review from the Circuit Court of Cook County (Illinois), which had confirmed the industrial commission's decision denying the reinstatement of his case, which had been dismissed by the arbitrator for want of prosecution.

OVERVIEW: After five continuances before the arbitrator, the claimant failed to appear at the rescheduled hearing and the arbitrator dismissed the case for want of prosecution. Claimant filed a document titled "petition for review" with the commission, more than 15 days after the date of dismissal. The employer had argued that the commission lacked jurisdiction to review the dismissal because it was not filed within 15 days. However, although a petition for review was required to be filed within 15 days, a petition for reinstatement for want of prosecution was timely if filed within 60 days. The court held that the document was properly interpreted as a petition for reinstatement, but upheld the commission's denial of reinstatement. Counsel argued that the failure to appear was a result of co-counsel's failure to notify the claimant. However, the court noted that counsel for claimant gave no persuasive reason for further delay when the claimant failed to appear.

OUTCOME: The court affirmed the commission's judgment denying the claimant's **petition to reinstate** his claim after it was dismissed for want of prosecution.

CORE TERMS: claimant's, arbitrator, reinstatement, want of prosecution, continuance, rules governing, arbitrators' decisions, dismissal order, abuse of discretion, reinstate, different dates, unable to proceed, proceed to trial, co-counsel, withdrawal, shouldn't, handling, resigned, illness

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Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Occupational Diseases

HN1 Under circumstances where a case is dismissed for want of prosecution, a claimant is entitled to seek reinstatement within 60 days of receipt of the dismissal order. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pretrial Matters > Continuances
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution

HN2 In a petition for reinstatement before the industrial commission, the burden is on the petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the commission. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Charles Kraut Ltd., of Chicago, for appellant.

Terrance J. Van Driska and Mark A. Potter, of Chicago, for appellee.

JUDGES: Mr. Justice UNDERWOOD delivered the opinion of the court.

OPINION BY: UNDERWOOD

OPINION

[*252] **[**1316]** Claimant, Thomas Cranfield, appeals from an order of the circuit court of Cook County confirming the Industrial Commission's decision denying the reinstatement of his case, which had been dismissed by the arbitrator for want of prosecution.

On March 24, 1976, claimant filed an application for adjustment of claim with the Industrial Commission for alleged injuries sustained while employed by Uniroyal Company. After having been assigned to an arbitrator, the case was set for hearing on five different dates. On the final date, September 15, 1977, claimant failed to appear and his counsel stated that he was unable to proceed. The arbitrator refused to grant another continuance and, after hearing argument on the employer's motion to dismiss for want of prosecution, dismissed the case by a written order dated September 23. The **[***2]** relevant argument there presented was as follows:

> **[**1317]** "MR. KRAUT: Well, I would respectfully request that the matter be continued. Mr. Cranfield is not here today and I am unable to proceed at this time. I certainly believe that if it were not for the fact that it was -- that this case traveled with the other case that there probably **[*253]** would be no question about a continuance; and the mere fact it happens to go along with another case shouldn't make any difference. And I think that the request should be granted, your Honor.
>
> MR. VAN DRISKA: For the record, the respondent moved to dismiss the case for want of prosecution; and points out to the Industrial Commission that the respondent has been ready to proceed to trial in this case each and every time, and we are here today this afternoon with the understanding that we were to proceed to trial. We ask this case be dismissed for want of prosecution.
>
> MR. KRAUT: I would just point out one other matter. For the record, I am Charles Kraut, co-counsel appearing with Joshua Landau in this matter. And again I say that if it was an independent case I feel there would be no question about the fact that **[***3]** we would get continuance and the fact it was allied with the other case really shouldn't make any difference.
>
> THE ARBITRATOR: Well, counsel, I think that you have had ample opportunity to proceed in this case. The case will be dismissed. I'll write it in the form."

Notice of that decision was received by the parties on October 3.

On October 19 claimant filed a document, apparently a Commission form entitled "petition for review" and customarily used for the review of arbitrators' decisions. A hearing on that petition was set for five different dates. On the last of those dates, June 26, 1978, the Industrial Commission conducted a hearing and found that the petition for review had not been filed within 15 days after receipt of a copy of the arbitrator's decision as required by statute (Ill. Rev. Stat. 1969, ch. 48, par. 138.19(b)). However, the Commission concluded that the document filed by claimant was in substance a petition for reinstatement, and found satisfactory compliance with Rule No. 4 -- (1) of the rules governing practice before the Industrial Commission, which permits a petition for reinstatement to be filed within 60 days from receipt of the dismissal order. **[***4]** (Rules Governing Practice Before the Industrial Commission Under the **Workmen's Compensation** **[*254]** and Occupational Diseases Act sec. 4, Rule 4 -- (1) (1977).) After a hearing during which both parties presented argument, the Commission denied claimant's petition for reinstatement. The relevant portion of that argument follows:

> "COMMISSIONER: * * * At this point, however, Mr. Kraut, please explain to me why you believe that the petition for reinstatement should be allowed?
>
> MR. KRAUT: Because the first place, the matter was never heard on its merits.
>
> When this matter came up, I explained to Mr. Cranfield, to Mr. Van Driska and to the Court that Mr. Landau, who originally filed this case and who was originally following the case, was handling it right along, and about that time Mr. Landau had become ill and he has since resigned. He hasn't resigned, but he no longer practices before the Commission here, I understand.
>
> This hearing was at about the time when Mr. Landau was having problems and at that time he had just returned, was in the process of returning a large number of files to my office that I had referred to him.
>
> For that reason, since I had relied upon him to **[***5]** notify Mr. Cranfield to be present on that date and apparently Mr. Cranfield was not notified and I had tried to call him at his office.
>
> It was a rather confusing situation and it was totally unfair to the petitioner to be denied a hearing simply because of the problems of Mr. Landau's office and our office.
>
> Further, Mr. Landau no longer practices before the Commission. He is not here. I am taking control of the file now.
>
> **[**1318]** It would have no catastrophic event would have happened if he had continued it and given him his day in court.
>
> It was not that old of a case. There are a lot of cases older than that before the Commission and I submit, in order to have justice done, we should permit the man to have his hearing."

In this appeal respondent contends that the Commission had no jurisdiction to review the arbitrator's decision since the claimant failed to file his petition for review **[*255]** within the 15-day limitation period (Ill. Rev. Stat. 1969, ch. 48, par. 138.19(b)). Had claimant in fact sought review of an arbitrator's award or other disposition of the case on the merits, we would agree. (*City of Chicago v. Industrial Com.* (1976), 63 **[***6]** Ill. 2d 99, 103; *Sweitzer v. Industrial Com.* (1946), 394 Ill. 141, 146-47; *Dyer v.*

Industrial Com. (1936), 364 Ill. 161, 163.) Here, however, the arbitrator had simply dismissed the case for want of prosecution. HN1 In these circumstances a claimant is entitled to seek reinstatement within 60 days of receipt of the dismissal order under Rule 4 -- (1) of the Commission's rules of practice (Rules Governing Practice Before the Industrial Commission Under the **Workmen's Compensation** and Occupational Diseases Act sec. 4, Rule 4 -- (1) (1977)). In this situation, we find no error in the Commission's consideration of claimant's petition for review as a petition for reinstatement.

Claimant also contends that it was an abuse of discretion for the arbitrator to have refused another continuance and for the Commission to have denied reinstatement of his case. In response to similar claims this court has held: HN2 "'In a petition for reinstatement before the Industrial Commission, the burden is on the petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission.'" *Shiffer v. Industrial* [***7] *Com.* (1973), 53 Ill. 2d 519, 521; quoting *Zimmerman v. Industrial Com.* (1972), 50 Ill. 2d 346, 349; see also *South Chicago Community Hospital v. Industrial Com.* (1969), 44 Ill. 2d 119, 123.

The record indicates that the arbitrator initially accommodated claimant's repeated requests for continuances. When, however, claimant failed to appear for the September 15, 1977, hearing and respondent moved to dismiss for want of prosecution, counsel for claimant gave no persuasive reason for further delay. In the hearing before the Commission on the motion to reinstate, claimant's **[*256]** counsel emphasized the activity of Joshua Landau in filing and handling the case, his subsequent illness and his withdrawal. We note, however, that counsel's only reference to attorney Landau in his argument before the arbitrator was that he and Joshua Landau were "co-counsel." The factual discrepancies in the arguments before the arbitrator and the Commission, coupled with the vagueness of the references to another case and the time of Landau's illness and withdrawal, when considered with the absence of supporting testimony which the Commission invited, all militate in favor of the Commission's **[***8]** ruling. Rather clearly there has been no abuse of discretion.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

*96 Ill. 2d 475, *; 451 N.E.2d 857, **;*
*1983 Ill. LEXIS 401, ***; 71 Ill. Dec. 703*

MERLE ROBERTS, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Drovers National Bank of Chicago, Appellee)

No. 56516

Supreme Court of Illinois

96 Ill. 2d 475; 451 N.E.2d 857; 1983 Ill. LEXIS 401; 71 Ill. Dec. 703

June 17, 1983, Filed

PRIOR HISTORY: [***1] Appeal from the Circuit Court of Cook County, the Hon. James C. Murray, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee sought review of a decision of the Circuit Court of Cook County (Illinois) that affirmed an order of appellee industrial commission dismissing his action for increased disability for want of prosecution.

OVERVIEW: The employee's action for increased disability was dismissed for want of prosecution after neither side appeared for a scheduled hearing. The employee appealed, alleging the fact that neither side appeared at the hearing constituted proof of lack of notice and therefore reinstatement of his claim was justified. The court disagreed, first noting that the commission's order showed that proper notice was given. Furthermore, the fact that neither party appeared was not proof that proper notice was not given. Finally, the case had been continued many times before, and the commissioner had said that no more continuances would be granted. Accordingly, the commission acted within its discretion.

OUTCOME: The trial court's decision was affirmed.

CORE TERMS: industrial, want of prosecution, reinstatement, Limitations Act, reinstate, sound discretion, commencing, claimant's, refile, proper notice, notice

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Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
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HN1 In proceedings before the Industrial Commission to vacate dismissals for want of prosecution and to reinstate claims, the burden is on the petitioner to allege and prove facts in order to justify reinstatement. It is within the sound discretion of the Commission to grant or deny reinstatement. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Richard P. Bogusz, Ltd., of Chicago (Richard P. Bogusz and Thomas E. Strzalka, of counsel), for appellant.

Braun, Lynch, Smith & Strobel, Ltd., of Chicago (Francis J. Lynch, of counsel), for appellee.

JUDGES: JUSTICE CLARK delivered the opinion of the court. JUSTICE SIMON, dissenting.

OPINION BY: CLARK

OPINION

[*476] **[**857]** On April 1, 1977, Merle E. Roberts brought this action before the Industrial Commission pursuant to section 19 (h) of the **Workmen's Compensation** Act (Ill. Rev. Stat. 1975, ch. 48, par. 138.19(h)) seeking recovery for an alleged increased disability resulting from a prior industrial accident. The Industrial Commission dismissed the action for want of prosecution.

The petitioner appealed the decision of the Industrial Commission to the circuit court of Cook County, which affirmed the dismissal. The petitioner then appealed directly to this court (87 Ill. 2d R. 302(a)).

On December 18, 1979, the case was called by Commissioner **[*477]** Duncan and no one appeared on behalf of either side. The transcript shows that Commissioner **[***2]** Duncan said that because the case had been continued many times before, and since he

had previously stated that there would be no more continuances, he was going to dismiss the case with prejudice.

HN1 In proceedings before the Industrial Commission to vacate dismissals for want of prosecution and to reinstate claims, the burden is on the petitioner to allege and prove facts in order to justify reinstatement. It is within the sound discretion of the Commission to grant or deny reinstatement. *Cranfield v. Industrial Com.* (1980), 78 Ill. 2d 251, 255; *Shiffer v. Industrial Com.* (1973), 53 Ill. 2d 519, 521.

Mr. Roberts asserts that the Commission abused its discretion in dismissing the petition because petitioner alleges that notices were not sent to the parties advising them of the hearing date and that counsel was unaware that a hearing was scheduled on December 18, 1979.

The order of the Industrial Commission dismissing the section 19(h) petition was **[**858]** entered on December 24, 1979. The order recites on its face that "due notice given this cause came on for hearing before the Commission on December 18, 1979."

The petitioner asserts that he has met his **[***3]** burden of proof to justify vacating the Industrial Commission order that dismissed the action for want of prosecution, by demonstrating that no one appeared on behalf of either side on December 18, 1979. The evidence presented, that neither party appeared, does not prove that proper notice was not given.

According to the Industrial Commission order of December 24, 1979, proper notice was given. We therefore find that the dismissal of the claim represented a proper and sound exercise of discretion by the Industrial Commission.

[*478] The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

DISSENT BY: SIMON

DISSENT

JUSTICE SIMON, dissenting:

The record in this case reveals that shortly after the original petition was dismissed for want of prosecution the claimant filed a **petition to reinstate** which the Industrial Commission denied. This denial was improper for the reason set forth below, and I would remand the cause to the Commission for reinstatement pursuant to this court's supervisory authority.

This court has held that section 24 of the Limitations Act (Ill. Rev. Stat. 1979, ch. 83, par. 24a) gives plaintiffs an absolute right to refile actions which **[***4]** have been dismissed for want of prosecution by circuit courts. (*Franzese v. Trinko* (1977), 66 Ill. 2d 136; see also *Wold v. Bull Valley Management Co.* (1983), 96 Ill. 2d 110 (order dismissing cause for want of prosecution held not appealable because of right to refile); *Flores v. Dugan* (1982), 91 Ill. 2d 108 (same).) Section 24 is not limited to common law actions filed in circuit courts, however, but applies "[i]n the actions specified in this Act or any other act or contract where the time for commencing an action is limited." (Ill. Rev. Stat. 1979, ch. 83, par. 24a.) Proceedings before the Industrial Commission are specified in an act (Ill. Rev. Stat. 1979, ch. 48, par. 138.1 *et seq.*), and the time for commencing them is limited (see Ill. Rev. Stat. 1979, ch. 48, par. 138.19(b)). There is no reason I can see why these proceedings should not be covered by and subject to the provisions of that Limitations Act. The claimant's **petition to reinstate** his action previously dismissed for want of prosecution was filed within one year of the dismissal and should have been granted, as the Act directs.

I do not agree that whether reinstatement should have been permitted **[***5]** is within the sound discretion of the Industrial **[*479]** Commission, nor do I believe that there is any burden on the petitioner to justify reinstatement. The Industrial Commission is controlled by section 24 of the Limitations Act in the same way a circuit court would be. To the extent that the two opinions cited by the majority hold to the contrary, I respectfully suggest that either they were incorrectly decided or the court was not called upon to consider the relevancy of section 24, as it was not in this case.

*97 Ill. 2d 395, *; 454 N.E.2d 661, **;*
*1983 Ill. LEXIS 436, ***; 73 Ill. Dec. 564*

BENJAMIN BROMBERG, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Jewish Family and Community Service, Appellee)

No. 57633

Supreme Court of Illinois

97 Ill. 2d 395; 454 N.E.2d 661; 1983 Ill. LEXIS 436; 73 Ill. Dec. 564

September 23, 1983, Filed

PRIOR HISTORY: [***1] Appeal from the Circuit Court of Cook County, the Hon. Arthur L. Dunne, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant filed a claim for **workers' compensation** benefits after he suffered a heart attack while at work as an attorney. The Circuit Court of Cook County (Illinois) affirmed a decision of respondent Industrial Commission (Commission) and dismissed the case. The claimant appealed.

OVERVIEW: The claimant, an attorney, worked as a director in a legal aid department. He alleged that he was a permanently disabled as a result of a heart attack that he suffered while employed by respondent employer. After five days of hearings, an arbitrator found that the claimant failed to prove that his ill-being resulted from an accident arising out of and in the course of his employment. The claimant filed a petition for review. The claimant's case was scheduled for hearing before the Commission on at least eight different dates over a 14-month period before it was dismissed. The claimant filed a petition to vacate the dismissal and to reinstate the case, and a hearing was held. The Commission denied reinstatement. The circuit court then affirmed the Commission. The court affirmed the circuit court and held that the responsibility of the claimant to know about the court dates was his, and he was obligated to inquire of the dates. The court held that claimant was not entitled to assume that, in the face of his apparent lack of interest, a benevolent commissioner would have automatically continued the case, have fixed a new hearing date and have notified him thereof.

OUTCOME: The court affirmed the lower court's judgment that dismissed the **workers' compensation** claim.

CORE TERMS: claimant's, hearing date, notice, scheduled, authenticated, arbitrator, reinstatement, continuance, workmen's, reinstate, respondent's attorney, Rules Governing, failure to present, abuse of discretion, timely petition, arbitration, ascertain, excusable, coupled, medical evidence, deposition, arrived, endless, times

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HN1 In a petition for reinstatement before the Industrial Commission, the burden is on the petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Claim Periods

HN2 Just as a petitioner may lose his right to proceed before the Industrial Commission by failing to file a timely petition, resulting in a binding decision by the arbitrator, under Ill. Rev. Stat. ch. 48, par. 138.19(b) (1977), so, too, may he lose his right to be heard by the Commission after a timely petition has been filed, by failing to proceed in accordance with the statutory requirements and the governing rules. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Sheldon A. Harris, of Chicago, for appellant.

Kane, Doy & Harrington, of Chicago (Steven H. Shanok, of counsel), for appellee.

JUDGES: JUSTICE UNDERWOOD delivered the opinion of the court.

OPINION BY: UNDERWOOD

OPINION

[*397] **[**661]** Claimant Benjamin Bromberg, an attorney, appeals from an order of the circuit court of Cook County confirming the Industrial Commission's decision denying his **petition to reinstate** his **workmen's compensation** case which had been dismissed by the Commission on July 21, 1981, for want of prosecution and for failure to perfect review.

Claimant, who had practiced law privately since his admission to the bar in 1938, began his employment with respondent, Jewish Family and Community Service of Chicago, as director of its legal aid department in June 1972. In 1978, he filed an application for adjustment of claim with the Industrial Commission alleging that he was permanently disabled as a result of a heart attack suffered on August 15, 1977, while employed by respondent.

[662]** Following five days of hearings **[***2]** between April 1979 and January 1980, an arbitrator found that claimant failed to prove that his ill-being resulted from an accident arising out of and in the course of his employment. Notice of that decision was filed with the Commission on April 3, and claimant filed a petition for review before the Commission on April 15, with a request for a 30-day extension in which to file a transcript of the evidence or an agreed statement of facts. He also indicated that he intended to present additional medical evidence at the hearing on review. The record indicates that the transcript of evidence was filed on April 29, 1980, but it was never authenticated as required by statute (Ill. Rev. Stat. 1977, ch. 48, par. 138.19(b)) and Commission rules (Rules Governing Practice Before the Industrial Commission Under the **Workmen's Compensation** and Occupational Diseases Act, sec. 4, Rule 4 -- (2)(D) (1977)).

Claimant's case was scheduled for hearing before the **[*398]** Commission on at least eight different dates over a 14-month period before it was dismissed. The first three dates were in 1980, on May 20, September 16 and December 2. (The record indicates that it may also have been scheduled **[***3]** for September 30.) It was continued each time. While there is no record of the reasons for the continuances in 1980 or at whose request they were made, on February 17, 1981, the next scheduled hearing date, respondent's attorney appeared before the Commission and moved that the proofs be closed. He noted how long the case had been pending on review and that it had been set for hearing on three previous occasions. He further advised the Commissioner that the previously assigned Commissioner had ordered that claimant submit any additional medical evidence by deposition on or before February 17. Claimant's attorney was not present at this time; however, he had apparently appeared earlier that day and secured a continuance until April 10 from the Commissioner before whom respondent's attorney was arguing. The Commissioner noted respondent's motion, indicated that he had no record of the prior proceedings, and stated that an order would be entered that additional evidence by deposition was to be submitted no later than April 10 at 2 p.m.

Claimant's attorney neither appeared nor submitted additional evidence on April 10. The case was continued until June 9, at which time claimant's **[***4]** counsel again failed to appear, and respondent's attorney again objected to any further continuances. Although observing that the case had been on the review call for over a year and scheduled for hearing several times, the Commissioner also noted that claimant's attorney had not been present at the last hearing, and stated that, to avoid any lack of communication with respect to the hearing date, the case would be continued until June 30, with notice to be sent. Although the case was noted for that date on **[*399]** the file and on the call sheet, apparently notice was inadvertently not sent, and no one appeared on claimant's behalf. The Commissioner again continued the case until July 21, at 9:30 a.m., over respondent's objection that it was claimant's responsibility, as the petitioning party, to pursue his claim on review and ascertain the scheduled hearing dates, and that the Commission did not have a continuing obligation to send out notices after claimant's repeated nonappearances.

Notice of the July 21 hearing date was given, claimant's counsel failed to appear, and at approximately 10:30 a.m. on that date the case was dismissed. Claimant's attorney arrived sometime between **[***5]** 11 and 11:30 a.m. and was informed of the dismissal.

The following day, claimant filed a petition to vacate the dismissal and to reinstate the case, and a hearing was held the following September. Counsel for claimant advised the Commission that the reason for his failure to appear on July 21 was that he was involved in a contested case in the circuit court of Cook County from 9:15 until 10:45 a.m. He had anticipated that the hearing in the circuit court would be completed in a shorter time. Further, he stated that there was a demonstration in the lobby of the State of Illinois Building when he arrived which prevented his access to the **[**663]** elevators for a short time, and that this also contributed to his delay. Following argument by both parties, the Commission noted the number of times the case had been scheduled, and that there had been no effort by claimant to communicate potential problems in proceeding. It also noted that, in any event, there was no indication that claimant had been prepared to proceed on July 21, and denied reinstatement.

In affirming the Commission, the circuit court made the following findings and apt observations:

> "I have listened **[***6]** with care to the arguments of counsel. I have reviewed the very extensive briefs that were **[*400]** filed. I find no abuse of discretion by the Industrial Commission. I cannot say that this decision is contrary to the manifest weight of the evidence or contrary to law. * * * In the Court's opinion this is symptomatic of a malaise that grips the entire metropolitan system of justice.
>
> The endless delays, the endless failures of attorneys to appear without excuse, either real or apparent, to inform a hearing officer as to the reasons for delay has reflected for years adversely upon the effective administration of justice and continues to do so and will continue to do so until the Appellate Courts start acting to see to it that lawyers fulfill their responsibilities to their clients and appear on the days and dates set for hearing that move hearings to a proper conclusion."

Claimant argues here that the Commission's decision to deny reinstatement, if upheld, results in a denial of substantial justice because of the conclusive effect of the arbitrator's ruling against him. He accordingly urges that we apply a different standard from that previously announced in assessing the **[***7]** propriety of the Commission's action. Alternatively, he asserts that the Commission abused its discretion because his failure to appear on July 21 was excusable, and the failure to present an authenticated transcript of evidence on arbitration is not fatal since it may be authenticated prior to or at the time set for hearing before the Commission (see Rules Governing Practice Before the Industrial Commission Under the **Workmen's Compensation** and Occupational Diseases Act, sec. 4, Rule 4 -- (2)(D) (1977); *Heckard v. Industrial Com.* (1933), 353 Ill. 197, 199).

As this court has consistently held, HN1 "In a petition for reinstatement before the Industrial Commission, the burden is on the petitioner to allege and prove facts justifying the relief prayed. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission." (*Cranfield v. Industrial Com.* (1980), 78 Ill. 2d 251, 255; *Shiffer v. Industrial Com.* (1973), 53 Ill. 2d 519, 521; *Zimmerman v. Industrial Com.* (1972), 50 Ill. 2d 346, 349.) **[*401]** While it is true that the Commission dismissed claimant's petition following a hearing by an arbitrator, in contrast to the cited cases **[***8]** in which the case had been dismissed at the arbitration stage, we consider that the same standard is applicable in reviewing the Commission's decision which denied reinstatement. HN2 Just as a petitioner may lose his right to proceed before the Commission by failing to file a timely petition, resulting in a binding decision by the arbitrator (Ill. Rev. Stat. 1977, ch. 48, par. 138.19(b); *City of Chicago v. Industrial Com.* (1976), 63 Ill. 2d 99, 103), so, too, may he lose his right to be heard by the Commission after a timely petition has been filed, by failing to proceed in accordance with the statutory requirements and the governing rules. Had petitioner failed to appear on only one occasion under excusable circumstances, we might well agree that a dismissal by the Commission which precludes a review on the merits would be unwarranted. Here, however, we have a 14-month period involving claimant's failure to proceed or appear despite numerous continuances to enable him to do so, coupled with a failure to present to the Commission an authenticated transcript of the hearings before the arbitrator.

It is entirely clear from this record that claimant failed to appear on April 10, June **[***9]** 9, June 30 and July 21 despite the fact that on April 10 the case had been pending before **[**664]** the Commission for nearly a year. The case had been continued from February 17 at claimant's request, and it is conceded that all parties had notice of the April 10 hearing date. The only effort by claimant's attorney to justify his failure to appear on that date was by evidence *dehors* the record which was not properly before the circuit court. (*Zimmerman v. Industrial Com.* (1972), 50 Ill. 2d 346, 350.) While counsel complains that the record shows he had no notice of the June 9 or June 30 hearing dates, the responsibility was his to ascertain the status of his case after he failed to appear on the April 10 date to which the **[*402]** hearing had been continued at his request. (See *Diacou v. Palos State Bank* (1976), 65 Ill. 2d 304, 311; *Esczuk v. Chicago Transit Authority* (1968), 39 Ill. 2d 464; Rules Governing Practice Before the Industrial Commission Under the **Workmen's Compensation** and Occupational Diseases Act, sec. 4, Rule 4 -- (2)(D) (1977).) So far as counsel knew, his case might have been dismissed or the proofs closed on that date; he is not **[***10]** entitled to assume that, in the face of his apparent lack of interest, a benevolent commissioner will automatically continue the case, fix a new hearing date and notify him thereof. Given the procedural history of this case prior to July 21, together with counsel's failure to advise the Commission of the scheduling conflicts or the delay on the morning of the 21st, coupled with the unexplained failure to secure an authenticated transcript, we cannot say the Commission's dismissal of the case was an abuse of discretion.

The judgment of the circuit court of Cook County is accordingly affirmed.

Judgment affirmed.

*219 Ill. App. 3d 203, *; 579 N.E.2d 370, **;*
*1991 Ill. App. LEXIS 1239, ***; 161 Ill. Dec. 822*

TONJA NOTMAN, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Thrif-T-Mart, Appellee)

No. 3-90-0853WC

Appellate Court of Illinois, Third District, Industrial Commission Division

219 Ill. App. 3d 203; 579 N.E.2d 370; 1991 Ill. App. LEXIS 1239; 161 Ill. Dec. 822

July 19, 1991, Filed

NOTICE: [***1] Released for Publication October 22, 1991.

SUBSEQUENT HISTORY: Rehearing Denied October 22, 1991.

PRIOR HISTORY: Appeal from the Circuit Court of La Salle County; the Hon. Robert L. Carter, Judge, presiding.

DISPOSITION: Order Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant challenged an order of the Circuit Court of La Salle County (Illinois), which confirmed appellee Industrial Commission's decision that it lacked jurisdiction to review an arbitrator's dismissal of the claimant's death benefits case brought under § 7(d) of the **Workers' Compensation** Act (Act), Ill. Rev. Stat. ch. 48, para. 138.7(d).

OVERVIEW: The claimant sought death benefits under § 7(d) of the Act as the dependent collateral heir of her deceased brother. After several continuances and production requests, the claimant still had not provided the proof necessary to meet § 7(d)'s requirement that she show more than 50 percent dependency, so the arbitrator dismissed the case. The arbitrator's order, which the claimant said she never received, provided notice that she had 15 days to file a petition for review. The arbitrator later denied the claimant's motion to reinstate, finding that the commission had lost jurisdiction by the claimant's failure to timely petition for review. The commission affirmed, as did the circuit court. On appeal, the court further affirmed, concluding that although the Act did not explicitly so provide, the arbitrator's inherent authority to conduct hearings and make decisions under § 19(b) of the Act, Ill. Rev. Stat. ch. 48, para. 138.19(b), permitted him to enter the dismissal order, so the commission's order was not void. The court further found that the commission properly dismissed the reinstatement petition because it was not equivalent to a petition for review. It was not timely filed.

OUTCOME: The court affirmed the judgment of the circuit court confirming the Industrial Commission's dismissal of the claimant's petition for lack of jurisdiction.

CORE TERMS: claimant's, arbitrator, tax returns, want of prosecution, reinstatement, failure to produce, subpoena, reinstate, void, decedent, arbitrator's decision, subject matter, Compensation Act, hearing date, personal jurisdiction, ordering, failed to file, inherent power, subpoenaed, dependency, confirmed, authorize, Act Ill, dismissal order, collateral heir, production of documents, rescheduled, confirming, requesting, chronology

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Judgments > Relief From Judgment > Void Judgments
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 A "void judgment" is one entered by a court or quasi-judicial tribunal that lacks jurisdiction over the parties or subject matter or that lacks the inherent power to make or enter the decision and may be attacked at any time, either directly or collaterally. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Local Governments > Administrative Boards
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN2 As a statutory creature, the Industrial Commission's (Illinois) powers derive from the statutes which authorize and create it. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Communications Law > U.S. Federal Communications Commission > Jurisdiction

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction

HN3 The Industrial Commission (Illinois) has original subject matter jurisdiction over actions brought under the **Workers' Compensation** Act. More Like This Headnote

Civil Procedure > Discovery > Methods > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN4 Section 19(b) of the **Workers' Compensation** Act provides that the arbitrator shall make such inquiries and investigations as he or they shall deem necessary and may examine and inspect all books, papers, records, places, or premises relating to the questions in dispute and hear such proper evidence as the parties may submit. Ill. Rev. Stat. ch. 48, para. 138.19(b) (1985). More Like This Headnote

Governments > Legislation > Statutes of Limitations > Time Limitations

Workers' Compensation & SSDI > Administrative Proceedings > Fraud

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN5 An arbitrator's decision becomes the Industrial Commission's (Illinois) decision and is conclusive, absent fraud, unless a petition for review is filed by either party within 15 days after the party receives the decision and notification of when it was filed. Ill. Rev. Stat. ch. 48, para. 138.19(b) (1985). More Like This Headnote

COUNSEL: Emmanuel F. Guyon, of Streator, for appellant.

John A. Nudo, of Joliet, for appellee.

JUDGES: Justice McNamara delivered the opinion of the court. McCullough, P.J., and Woodward, Stouder and Lewis, JJ., concur.

OPINION BY: McNAMARA

OPINION

[*203] **[**370]** JUSTICE McNAMARA delivered the opinion of the court:

Claimant, Tonja Notman, appeals from an order of the circuit court of La Salle County confirming the Industrial Commission's **[*204]** (Commission's) decision that it lacked jurisdiction to review the arbitrator's dismissal of the case.

In February 1984, claimant filed an application for adjustment of claim with the Commission, which alleged that claimant **[**371]** was entitled to benefits as a collateral heir seeking death penalty benefits under section 7(d) of the **Workers' Compensation** Act (Act) (Ill. Rev. Stat. 1985, ch. 48, par. 138.7(d)). William Notman, claimant's brother, was employed by respondent, Thrif-T-Mart, at the time of his **[***2]** death. Claimant alleged that she was dependent upon decedent. Section 7(d) of the Act requires a claimant seeking death benefits as a collateral heir to prove that she was more than 50% dependent upon the decedent. (Ill. Rev. Stat. 1985, ch. 48, par. 138.7(d).) On November 15, 1985, claimant was served with subpoenas requesting production of her income tax returns for the years 1980 to 1983 and of decedent's tax returns for the same years. On November 25, 1985, after argument, the arbitrator denied claimant's motion to quash the subpoenas and ordered her to produce the tax returns before January 6, 1986, the rescheduled hearing date. On January 6, 1986, the arbitrator continued the case to March 5, 1986, again ordering production of the documents prior to the rescheduled hearing date. On February 14, 1986, claimant forwarded documents to respondent purporting to comply with the order: the documents included various W-2 forms for claimant and decedent and claimant's 1982 State and Federal returns. On March 5, the arbitrator again continued the case for hearing until June 4, 1986, this time ordering certified copies of all documents subpoenaed to be produced. On May 7, 1986, **[***3]** respondent filed a motion asking that claimant's attorney be held in contempt for his repeated disregard of the Commission's orders and that the matter be dismissed with prejudice. On the final hearing date, June 4, 1986, neither claimant nor her counsel appeared. The arbitrator dismissed the case with prejudice by written order dated June 11, 1986. Such order reserved ruling on the contempt issue, but stated:

> "You are further notified that unless a Petition for Review is filed with the Industrial Commission within fifteen (15) days after receipt of this order and a review perfected in accordance with the provisions of the Illinois **Workers Compensation** Act and the Rules of the Industrial Commission then the order of the arbitrator shall be entered as the decision of the Industrial Commission."

Claimant maintains that she never received a copy of this dismissal order. Claimant also contends that her attorney appeared before the arbitrator on June 2, 1986, and showed him a letter from the **[*205]** Internal Revenue Service (IRS) indicating that the returns were forthcoming. The IRS letter states that copies of claimant's 1981 to 1984 returns were attached, but that the **[***4]** IRS still had not located the 1980 return.

On July 17, 1986, and August 11, 1986, claimant filed motions requesting reinstatement of the case. Claimant failed to appear at the hearing on her motion. Claimant's attorney asserts that he was informed by telephone on the day before the scheduled hearing that the Commission would be closed on that day due to a judge's funeral. (The Commission was not closed.) In an order dated August 25, 1986, the arbitrator denied claimant's motion to reinstate, specifically finding that because claimant failed to file a petition for review within the time required by statute, the Commission lost jurisdiction of the matter. On September 12, 1986, claimant filed a petition for review of the arbitrator's decision. Upon review, the Commission affirmed the arbitrator's decision, finding lack of jurisdiction. The circuit court of La Salle County confirmed.

On appeal, claimant makes several arguments. First, she contends that the Commission had no authority to enter a dismissal order for failure to produce discovery materials and therefore such order was void. Alternatively, claimant maintains that the Commission's order could only have been a dismissal **[***5]** for want of prosecution, for which the Act allows claimant 60 days to petition for

reinstatement. Finally, claimant maintains that her petition for reinstatement, filed within 15 days after receipt of the order, was sufficient as a petition for review.

Initially, claimant contends that the arbitrator lacked authority to dismiss the cause for failure to produce the tax returns **[**372]** as ordered by subpoena, and that the order is, therefore, void. Respondent maintains that the order is not void because the Commission had both subject matter and personal jurisdiction and the order was within its inherent authority. We agree with respondent.

HN1 A "void judgment" is one entered by a court or quasi-judicial tribunal that lacks jurisdiction over the parties or subject matter or that lacks the inherent power to make or enter the decision and may be attacked at any time, either directly or collaterally. (*City of Chicago v. Fair Employment Practices Comm'n* (1976), 65 Ill. 2d 108, 357 N.E.2d 1154.) Further, HN2 as a statutory creature, the Commission's powers derive from the statutes which authorize and create it. *City of Chicago v. Fair Employment Practices Comm'n*, 65 **[***6]** Ill. 2d 108, 357 N.E.2d 1154.

HN3 The Industrial Commission has original subject matter jurisdiction over actions, such as this one, brought under the **Workers' [*206] Compensation** Act. Moreover, claimant, by filing this claim, and respondent, by responding, conferred personal jurisdiction upon the Commission. The Commission, therefore, did not lack either subject matter or personal jurisdiction. Nor do we believe that the arbitrator here lacked the inherent power to dismiss claimant's cause for her failure to produce the ordered documents.

HN4 Section 19(b) of the Act provides:

> "The Arbitrator shall make such inquiries and investigations as he or they shall deem necessary and may examine and inspect all books, papers, records, places, or premises relating to the questions in dispute and hear such proper evidence as the parties may submit." Ill. Rev. Stat. 1985, ch. 48, par. 138.19(b).

The Act unequivocally authorizes the arbitrator to order production of documents related to disputed issues. Whether claimant was "dependent" on the decedent to the extent of 50% or more of total dependency (Ill. Rev. Stat. 1985, ch. 48, par. 138.7(d)) was a critical issue in this case, and **[***7]** the tax records ordered by the subpoena would likely have provided necessary information regarding that status and claimant's entitlement to relief. Claimant's repeated failure to produce these documents precluded the Commission from adequately resolving this threshold issue. Claimant suggests that the arbitrator's authority permitted him to take only two actions: hear the case and issue a written decision, as authorized by section 19(b) of the Act, or dismiss the case for want of prosecution, as authorized by Rule 7020.90 of the Industrial Commission. We disagree. Although the Act does not explicitly so provide, we believe that the arbitrator's inherent authority permitted him under the circumstances here to enter the present order. Any other result would fail to recognize the arbitrator's authority to conduct hearings and make decisions on issues raised through the filing of a claim and to reasonably dispose of cases. We find no authority to support claimant's position and, therefore, conclude that the Commission's order was not void.

We also decline to accept claimant's characterization of the order as a dismissal for want of prosecution, which would entitle claimant to file **[***8]** a **petition to reinstate** within 60 days. A review of the arbitrator's order reveals that the cause was not dismissed for want of prosecution, as claimant suggests, but rather for her failure to produce the tax returns. Paragraphs 3 through 8 of the four-page order refer primarily to the tax returns, tracing the chronology of the subpoena for the returns, the subsequent orders and claimant's failure to produce them. Indeed, the order details the following: the service of subpoenas in November 1985; the subsequent denial of claimant's motion **[*207]** to quash; claimant's purported production of documents in February 1986; orders dated November 26, 1985, January 6 and March 5, 1986, ordering production of the tax returns and continuing hearing; and the March 1986 order requiring claimant to certify the tax returns as true, complete and without alteration and to provide a letter from the IRS if the returns were lost. After setting forth the above chronology regarding the tax returns, the arbitrator dismissed the case with prejudice. Based upon the detailed **[**373]** reference to the tax returns and the tenor of the order, we cannot conclude that the case was dismissed **[***9]** for want of prosecution. Rather, the arbitrator dismissed the case because claimant failed, despite three hearing continuances over a period of several months, to supply documents which she needed to establish her claim against respondent. As such, claimant's attempt to reinstate the case was inappropriate, especially in light of the order's specific direction that unless claimant filed a petition for review within 15 days, the order would be entered by the Commission. Such procedure is also mandated by the plain language of the Act. Ill. Rev. Stat. 1985, ch. 48, par. 138.19(b).

Finally, we reject claimant's argument that its petition for reinstatement was sufficient as a timely petition for review. Claimant suggests that if the Commission received the order on June 26, 1986, then processed it in due course, her petition, filed on July 15, 1986, must have been timely filed. HN5 An arbitrator's decision becomes the Commission's decision and is conclusive, absent fraud, unless a petition for review is filed by either party within 15 days after the party receives the decision and notification of when it was filed. (Ill. Rev. Stat. 1985, ch. 48, par. 138.19(b); *Wiscons v. Industrial* **[***10]** *Comm'n* (1988), 176 Ill. App. 3d 898, 531 N.E.2d 956.) By filing a motion to reinstate on July 15, 1986, claimant demonstrated that she knew at least as of that date about the arbitrator's decision. Claimant failed to file a petition for review until September 12, almost 60 days later. Such delayed action simply failed to meet the statutory filing deadline, as delineated in the arbitrator's order.

Moreover, we refuse to equate claimant's motion to reinstate with a petition for review. Claimant urges, relying on *Cranfield v. Industrial Comm'n* (1980), 78 Ill. 2d 251, 399 N.E.2d 1316, that this court should consider her petition for reinstatement as a petition for review. In *Cranfield*, the trial court confirmed the Commission's decision denying reinstatement of the case, which had been dismissed for want of prosecution. On appeal, our supreme court found that the Commission properly treated claimant's petition for reinstatement as a timely filed petition for review. The court focused on the arbitrator's **[*208]** dismissal for want of prosecution, finding that "in these circumstances" claimant had 60 days to seek reinstatement. Importantly, the court noted: "Had claimant **[***11]** in fact sought review of an arbitrator's award or other disposition of the case on the merits, we would [find jurisdiction lacking.]" (*Cranfield*, 78 Ill. 2d at 255, 399 N.E.2d at 1318.) Unlike *Cranfield*, however, the arbitrator here did not dismiss the case for want of prosecution. Rather, the arbitrator dismissed the case after claimant failed, despite adequate time and various orders, to produce the required documents, which were relevant to the key issue in the case. Moreover, the respondent in *Cranfield* moved to dismiss for want of prosecution; conversely, the transcript of the June 4, 1986, hearing here reveals that the basis of respondent's motion to dismiss was the failure to produce the subpoenaed tax returns. Because claimant's eligibility for benefits turned on her ability to prove dependency, her failure or inability to produce such evidence adversely affected the merits of her claim. We, therefore, believe such dismissal is more akin to a disposition on the merits than a dismissal for want of prosecution and, as

such, find *Cranfield* distinguishable from the present case.

We find that the Commission properly dismissed the 1986 petition on the ground **[***12]** that it lacked jurisdiction based upon claimant's failure to file a petition for review within 15 days after the arbitrator entered his decision.

For the foregoing reasons, the judgment of the circuit court of La Salle County, confirming the Industrial Commission's dismissal of the petition for lack of jurisdiction, is affirmed.

Judgment affirmed.

McCULLOUGH, P.J., and WOODWARD, STOUDER and LEWIS, JJ., concur.

*229 Ill. App. 3d 925, *; 594 N.E.2d 730, **;*
*1992 Ill. App. LEXIS 844, ***; 171 Ill. Dec. 586*

CURTIS CONLEY, Appellant, v. THE INDUSTRIAL COMMISSION, et al. (Nussbaum Trucking, Appellee).

NO. 4-91-0510WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, INDUSTRIAL COMMISSION DIVISION

229 Ill. App. 3d 925; 594 N.E.2d 730; 1992 Ill. App. LEXIS 844; 171 Ill. Dec. 586

May 28, 1992, Filed

SUBSEQUENT HISTORY: [***1] Petition for Rehearing Denied July 14, 1992. Released for Publication July 14, 1992. As Corrected September 4, 1992.

PRIOR HISTORY: Appeal from Circuit Court of Macon County. No. 90MR118. Honorable John K. Greanias, Judge Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Claimant employee appealed the order of the Circuit Court of Macon County (Illinois), which dismissed the employee's application for adjustment of **workers' compensation** claim denied by respondent Illinois Industrial Commission.

OVERVIEW: The employee filed an application for adjustment of claim for a heart attack. After three years, the case was dismissed by an arbitrator for want of prosecution. The employee filed a petition for reinstatement, which the Commission denied. Upon review, the circuit court confirmed the Commission's denial of the petition for reinstatement. On appeal, the employee argued that there was no record of the Commission having sent the employee's attorney notice of the dismissal of case. However, the employee did not make the relevant Commission a part of the record at any point in the litigation. Because the record was insufficient to resolve the employee's speculative arguments, the court held that the employee waived them for purposes of review. In addition, the employee failed to establish any facts suggesting that his attorney did not receive notice of the dismissal of the application for adjustment of claim. Thus, the Commission's decision denying the employee's **petition to reinstate** was not an abuse of discretion.

OUTCOME: The court affirmed the circuit court's dismissal of the employee's application.

CORE TERMS: claimant's, notice, arbitrator's, reinstate, reinstatement, received notice, want of prosecution, personally, certified mail, rebuttal, mail service, registered, heart attack, b-1, registered mail, arbitration, speculative, reinstated, justifying, waived, law firm, attorneys of record, counsel of record, return receipt, oral representation, substitution, contending, appearance, confirmed, untimely

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 On a petition for reinstatement before the Illinois Industrial Commission, the burden is on the claimant to allege and prove facts justifying the relief sought. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN2 It is clearly the duty of the party desiring to have the case reviewed to see that a complete record relating to any issues raised is filed by the Illinois Industrial Commission. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 The burden of proof is on claimant to allege and prove facts justifying reinstatement. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN4 Section 19(b) of the **Workers' Compensation** Act states in part: The decision of the arbitrator shall be filed with the Illinois Industrial Commission which the Commission shall immediately send to each party or his attorney a copy of such decision, together with a notification of the time when it was filed. Ill. Rev. Stat. ch. 48, para. 138.19(b) (1989). More Like This Headnote

COUNSEL: FOR APPELLANT, Warren E. Danz, P.C., Attorney at Law, 1100 River City Savings Plaza, 331 Fulton Street, Peoria, IL 61602.

FOR APPELLEE, Michael J. Kehart, Kehart, Shafter, Hughes & Webber, P.C., Attorneys at Law, 500 First of America Center, P.O. Box 871, Decatur, IL 62525.

JUDGES: HONORABLE JOHN T. McCULLOUGH, P.J., HONORABLE THOMAS R. RAKOWSKI, J., HONORABLE ALFRED E. WOODWARD, J., HONORABLE ALAN L. STOUDER, J., HONORABLE HENRY LEWIS, J.

OPINION BY: JOHN T. McCULLOUGH

OPINION

[*926] **[**730]** PRESIDING JUSTICE McCULLOUGH delivered the opinion of the court:

Claimant's application for adjustment of claim was dismissed for want of prosecution. More than 60 days later, claimant filed a motion to reinstate the case, which the arbitrator and Industrial Commission (Commission) denied. The circuit court confirmed the Commission and claimant appeals, contending he is entitled to reinstatement because there is no evidence he received notice that his case had been dismissed. We affirm.

Claimant, **[***2]** represented by attorney Warren Danz, filed an application for adjustment of claim, No. WC40371, on November 18, 1983, for a heart attack occurring October 5, 1983. When the case lay dormant in excess of three years, it was dismissed by an arbitrator for want of prosecution on December 31, 1986.

[731]** A petition for reinstatement bearing a proof of service of June 16, 1987, was filed by attorney James W. Johnson. The unverified petition recited that "neither Petitioner or his attorney had notice of the hearing on December 31, 1986," and claimant did not learn of the dismissal until June 10, 1987.

An objection was filed by respondent, contending the **petition to reinstate** was untimely because "the record further shows that notice of the dismissal was dated February 20, 1987, and mailed to counsel on February 24, 1987." Attached as an exhibit was the form notice of dismissal from the Commission received by counsel for the respondent. The objection also indicated that "the record further shows that a similar notice was sent to Warren Danz, Attorney at Law, on the same date" since Danz was counsel of record at that time and attorney Johnson had never entered an appearance on behalf **[***3]** of claimant.

Claimant filed a "rebuttal" in which he again alleged that neither he nor his attorney had notice of any December 31, 1986, hearing which resulted in the order dismissing the case for want of prosecution. **[*927]** Concerning respondent's allegation that attorney Danz received notice of the dismissal, the "rebuttal" stated:

"To date Petitioner had no information that such notice was received by anyone representing him. On the contrary, although the record of the commission shows that notice of dismissal was sent to Mr. Warren Danz, who formerly represented petitioner, according to Mr. Dobbs of the Industrial Commission, there is no return receipt or copy of a notice addressed to Petitioner in the file that might suggest that Mr. Danz or anyone representing Petitioner received notice."

Claimant concluded that the Commission was required to serve notice by certified mail under its rules and, therefore, he should be absolved from filing an untimely **petition to reinstate**.

On September 15, 1987, attorney Johnson filed a formal appearance on behalf of claimant. Attorney Danz was allowed to withdraw at that time. A hearing on claimant's **petition to reinstate** was held before **[***4]** the arbitrator that same day.

Claimant testified that he filed several applications for adjustment of claim for three heart attacks. The first attack was on September 28, 1983, and the second was approximately six days later. The third heart attack, the date of which claimant was unsure, occurred sometime in 1984. Claimant stated he learned of the dismissal of this particular application in June 1987 when he was advised of this fact by someone from his union. Claimant stated he never personally received any notice of dismissal from the Commission.

On cross-examination, claimant admitted that attorney Danz initially represented him when the applications for adjustment of claim were filed. He stated that although he later changed lawyers and retained attorney Johnson, he was unaware of whether the appropriate substitution of counsel forms were ever filed with the Commission. Claimant also conceded he had no knowledge of whether attorney Danz had received notice that the case had been dismissed. Claimant was the only witness.

Attorney Johnson then asked the arbitrator to take judicial notice of the Commission's records for two reasons. Johnson represented that from discussions with Commission **[***5]** personnel it was his belief there was no record that the Commission served notice of the dismissal on anyone other than counsel for the respondent. Attorney Johnson also attempted to argue that the Commission rules required actual notice to claimant irrespective of whether counsel received notice.

[*928] The arbitrator noted that attorney Johnson's oral representation that the Commission file did not indicate notice had been sent to attorney Danz was in direct contradiction to claimant's written "rebuttal" which recited that the Commission record did show that notice was sent to attorney Danz despite the fact that there was no return receipt.

The arbitrator also observed that the Commission rules did not require that parties **[**732]** be personally served in addition to counsel and attorney Johnson conceded that current Commission rules do not require use of certified mail by the Commission. He also

agreed that although he had taken over claimant's file 18 months earlier, he had failed to file the appropriate substitution of attorney form with the Commission and attorney Danz was counsel of record for claimant at all times prior to the filing of the **petition to reinstate**.

In **[***6]** his final argument, attorney Johnson contended there was no indication in the file that attorney Danz or claimant had ever received notice that the case was set for hearing before it was dismissed on December 31, 1986. The arbitrator rejected this contention on the basis that under Commission procedures, cases which had been inactive for three years were simply dismissed and no formal hearing had been held on December 31, 1986.

Based on the contrary position claimant took in his written "rebuttal" and the oral representations made during the hearing, the arbitrator indicated she was going to consult the Commission files to determine if there was evidence that notice of the dismissal was sent to attorney Danz. In concluding the hearing, the arbitrator stated:

"I'm going to have to find out if notice was sent. If they returned it and it came back in the file, obviously he doesn't have it. But if there's no reason to think -- if they mailed it and they haven't gotten it back, he has got it, and that's all there is to it.

This is not a question of whether or not I think your client's *[sic]* a nice person and should have his case reinstated. This is jurisdictional.

* * *

* * * And **[***7]** if you can't show -- if you cannot show that you really didn't get notice or that Mr. Danz didn't get notice under the circumstances that would justify filing [the **petition to reinstate**] close to four months after the notices went out, I don't have jurisdiction to do anything about it. It's just not there.

[ATTORNEY] JOHNSON: I agree. I agree.

[*929] ARBITRATOR WHITE: It's going to hang on what that Commission file says."

An order was subsequently entered by the arbitrator denying the petition for reinstatement. The order recites that notice of dismissal was sent in accordance with Commission rules to the attorneys of record and, since the petition for reinstatement was filed more than 60 days after notice of dismissal was received by the attorneys for the parties, the Commission did not have jurisdiction to reinstate the case.

A third attorney, Stephen M. Cornelius, filed a petition for review of the order denying reinstatement on behalf of claimant. In his statement of exceptions and supporting brief, attorney Cornelius offered the following summary of the events:

"When the case was three years old it was dismissed by Arbitrator White on 12-31-86, apparently after a failure **[***8]** of the Petitioner to appear at the Decatur Arbitration docket in December of 1986. According to Commission records, the notice was sent to Mr. Danz. No proof of his receipt exists. No **Petition to Reinstate** was filed until after the 60 day time period."

Attorney Cornelius raised three issues before the Commission: (1) whether the Commission was required to give personal notice to claimant; (2) whether the arbitrator had continuing jurisdiction because an order of dismissal is not conclusive within the meaning of the statute when it was not timely appealed because it is not an order directed to the merits of the case; and (3) whether the Commission should adopt the dissenting opinion in *Roberts v. Industrial Comm'n* (1983), 96 Ill. 2d 475, 478, 451 N.E.2d 857, 858 (Simon, J., dissenting), in which Justice Simon indicated his belief that a claimant should have absolute right to refile a petition within one year after its dismissal for want of prosecution. No additional evidence was presented by attorney Cornelius at a hearing set before the commissioner on review.

[733]** Respondent, however, offered two exhibits, which were admitted **[***9]** without objection by claimant. The first exhibit was a preprinted Commission notice of dismissal issued to attorney Danz in Commission case No. WC40372 (which was apparently a companion case to the one at issue here, No. WC40371). The second exhibit was an affidavit by a partner in respondent's counsel's law firm who averred that in June 1987 he examined the Commission file and found in it a notice to respondent's law firm showing a dismissal date of February 20, 1987. Attached to this affidavit was a copy of the form notice respondent received from the Commission showing dismissal of case No. **[*930]** WC40371. This was the same notice originally attached to respondent's objections to the **petition to reinstate**.

On October 10, 1990, the Commission issued an order affirming the arbitrator. Attorney Warren Danz then filed review proceedings in the circuit court. Following the failure of either claimant or his attorney to appear at the hearing set in the circuit court, the court confirmed the Commission. A timely notice of appeal was filed by attorney Danz on behalf of claimant.

The principles of law in this area are well settled. *HN1*On a petition for reinstatement before the Commission, **[***10]** the burden is on the claimant to allege and prove facts justifying the relief sought. The granting or denying of the **petition to reinstate** rests in the sound discretion of the Commission. *Cranfield v. Industrial Comm'n* (1980), 78 Ill. 2d 251, 255, 399 N.E.2d 1316, 1318; *Zimmerman v. Industrial Comm'n* (1972), 50 Ill. 2d 346, 349, 278 N.E.2d 784, 786.

On appeal, claimant initially contends that there is no record anywhere of the Commission having sent attorney Danz notice of dismissal of case No. WC40371, much less evidence of a date on which the notice was received, so as to trigger the 60-day window for filing the **petition to reinstate**.

The problem with this contention is twofold. Throughout the Commission proceedings and on appeal claimant speculates as to what the Commission file may or may not contain and what the arbitrator may or may not have reviewed. The actual Commission files which the arbitrator was asked to consider and which she indicated she would review have not, however, been made a part of the record at any point in the litigation. *HN2*It is clearly the duty of the party desiring **[***11]** to have the case reviewed to see that a complete record relating to any issues raised is filed by the Commission. *(Berry v. Industrial Comm'n* (1978), 72 Ill. 2d 120, 124, 378 N.E.2d 507, 509.) Since the record is insufficient to resolve claimant's speculative arguments, claimant has waived them for purposes of review.

In addition, claimant's argument suffers from another fundamental defect. HN3 The burden of proof is on claimant to allege and prove facts justifying reinstatement. No such facts were produced before the arbitrator. Claimant initially conceded that attorney Danz was sent notice of the dismissal. While this concession was orally retracted during the hearing before the arbitrator, no evidence was ever presented by attorney Danz, either by way of testimony or affidavit, that he had not received the Commission order. Allegations of lack of notice by someone other than the individual who would have been the recipient of the notice is not proof of that fact.

[*931] Finally, at oral argument, claimant for the first time raised the contention that section 19(i) of the **Workers' Compensation** Act (Act) (Ill. Rev. Stat. 1989, ch. 48, **[***12]** par. 138.19(i)) requires that the Commission serve all notices required under the Act either personally or by registered mail and, for that reason, claimant's case should be reinstated. Initially, we observe this issue is waived because this particular theory and argument was not made until oral argument in the appellate court, long after it should have appropriately been raised before the arbitrator or Commission. *Forrest v. Industrial Comm'n* (1979), 77 Ill. 2d 86, 92, 395 N.E.2d 576, 579.

[734]** Even were we to consider claimant's argument on the merits, we would find it wanting. As pointed out by respondent, various provisions of the Act do require personal, certified mail, or registered mail service. (Ill. Rev. Stat. 1989, ch. 48, pars. 138.2 (c), 138.4(c), 138.5(b), 138.19(b-1).) HN4 Section 19(b) states in part:

"The decision of the Arbitrator shall be filed with the Commission which Commission shall immediately send to each party or his attorney a copy of such decision, together with a notification of the time when it was filed." (Ill. Rev. Stat. 1989, ch. 48, par. 138.19 (b).)

Section 19(i) does not require all notices to be served **[***13]** personally or by registered mail. The section does state that when personal or registered mail service is required, the service shall be made "at the last address so filed with the Commission." (Ill. Rev. Stat. 1989, ch. 48, par. 138.19(i).) When no address is filed with the Commission, the party may file the notice with the Commission. The Commission is not a "party" to its own proceedings and does not "serve" documents upon anyone.

An interpretation as argued by claimant would render meaningless those sections of the Act which require a specific type of service. For example, 19(b-1) requires all service with respect to that paragraph to be "by personal service or by certified mail and with evidence of receipt." (Ill. Rev. Stat. 1989, ch. 48, par. 138.19(b-1).) Section 19(f) is specific as to procedures in seeking review in the circuit court and service of notice upon the Commission and parties in interest. Ill. Rev. Stat. 1989, ch. 48, par. 138.19(f).

The claimant cites *Cooke v. Industrial Comm'n* (1930), 340 Ill. 309, 172 N.E.2d 761. *Cooke* does not say personal or registered mail service is required in giving notice of an arbitrator's **[***14]** award. The issue in *Cooke,* as here, was whether notice was received.

[*932] Since claimant failed to establish at arbitration or before the Commission any facts suggesting his attorney of record, Warren Danz, did not receive notice of the dismissal of claimant's application for adjustment of claim, and because the record on appeal is insufficient to resolve claimant's speculative arguments on what the Commission file contains, it cannot be said that the Commission's decision denying claimant's **petition to reinstate** was an abuse of discretion.

Accordingly, the judgment of the Macon County circuit court is affirmed.

Affirmed.

RAKOWSKI, WOODWARD, STOUDER, and LEWIS, H., JJ., concur.

*345 Ill. App. 3d 1138, *; 804 N.E.2d 629, **;*
*2004 Ill. App. LEXIS 67, ***; 281 Ill. Dec. 664*

JOHNNIE D. BANKS, JR., Appellant, v. THE INDUSTRIAL COMMISSION et al. (Mariah Boats, Appellee).

No. 5-03-0343WC

APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

345 Ill. App. 3d 1138; 804 N.E.2d 629; 2004 Ill. App. LEXIS 67; 281 Ill. Dec. 664

January 28, 2004, Decided

PRIOR HISTORY: [***1] Appeal from the Circuit Court of Franklin County. No. 02--MR--19. Honorable Loren P. Lewis, Judge, Presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant **workers' compensation** claimant sought review of a decision of the Circuit Court of Franklin County (Illinois), which affirmed a decision by appellee, the Illinois Industrial Commission. The Commission refused to reinstate the claimant's application for adjustment of a **workers' compensation** claim. An arbitrator had dismissed the application for want of prosecution.

OVERVIEW: The claimant filed his application for adjustment of his claim in 1995 but took no further action. The arbitrator dismissed the claim in 1999 when both the claimant and his attorney failed to appear at an arbitrator's status call. The claimant's attorney filed a petition to vacate the dismissal and to reinstate the claim, but he failed to notice a hearing date for the petition. The claimant obtained new counsel in 2001, who filed a second **petition to reinstate** and set it for hearing. The second petition asserted that the first petition had never been ruled on. The arbitrator denied the **petition to reinstate,** which was affirmed by both the Commission and the trial court. The court affirmed. The arbitrator properly dismissed the application for adjustment pursuant to Ill. Admin. Code tit. 50, § 7020.60(b)(2)(C)(ii). The failure to set the first petition for reinstatement was fatal to the petition. While the Commission's rules did not require a hearing take place within a certain time, setting the petition for hearing was required by Ill. Admin. Code tit. 50, § 7020.90(b) (2002). The Commission's application of § 7020.90(b) was not arbitrary or unreasonable.

OUTCOME: The trial court's judgment, which confirmed the Commission's decision, was affirmed.

CORE TERMS: claimant, reinstate, arbitrator, want of prosecution, notice, reinstatement, failed to comply, abused, arbitration, new counsel, judicial review, timely petition, certain time, substantially complied, substantial compliance, continuance, predecision, petitioned, confirmed, premature, diligence, pleader, times, arguments ignore, scheduled, coworker, lengthy, stresses

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN1 On a **petition to reinstate** before the Illinois Industrial Commission, the burden is on the claimant to allege and prove facts justifying the relief sought. Whether to grant or deny a **petition to reinstate** rests within the sound discretion of the Commission. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN2 The Illinois Industrial Commission's rules provide that written notices will be sent to the parties only for the initial status call setting on arbitration. Ill. Admin. Code tit 50, § 7020.60(a) (2002). Thereafter, the cases are continued at three-month intervals until the case has been on file with the Commission for three years, set for trial, or otherwise disposed of. Ill. Admin. Code tit. 50, § 7020.60(a) (2002). More Like This Headnote

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Claim Periods

HN3 When a case has been on file with the Illinois Industrial Commission for three years or more, the parties or their attorneys must be present at each status call on which the case appears. Ill. Admin. Code tit. 50, § 7020.60(b)(2)(C)(i) (2002). If the claimant or the claimant's attorney fails to appear at a status call upon which the case appears, then the case shall be dismissed for want of prosecution except upon a showing of good cause. Ill. Admin. Code tit. 50, § 7020.60(b)(2)(C)(ii) (2002). More Like This Headnote

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
HN4 Where a cause has been dismissed from the Illinois Industrial Commission arbitration call for want of prosecution, a party may **petition to reinstate** it within 60 days of receiving the dismissal order. Ill. Admin. Code tit. 50, § 7020.90(a) (2002). More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
HN5 See Ill. Admin. Code tit. 50, § 7020.90(b) (2002).

Administrative Law > Agency Adjudication > Decisions > Stare Decisis
Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
HN6 See Ill. Admin. Code tit. 50, § 7020.90(c) (2002).

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation
Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
HN7 Although not binding on the courts, the Illinois Industrial Commission's interpretation of its rules is entitled to deference and will be set aside only if it is clearly erroneous, arbitrary, or unreasonable. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
HN8 Ill. Admin. Code tit. 50, § 7020.70(a) (2002), which governs general motion practice, states that all motions must be accompanied by a "notice of motion" form and set forth the date on which the movant will appear before the arbitrator or a commissioner to present the motion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
HN9 A party must exercise due diligence in pursuing his or her claim before the Illinois Industrial Commission. More Like This Headnote

COUNSEL: Attorney for Appellant: Ron D. Coffel, Ron D. Coffel & Associates, Benton, IL.

Attorney for Appellee: Kenton J. Owens, Brandon, Schmidt, Goffinet & Solverson, Carbondale, IL.

JUDGES: JUSTICE CALLUM delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

OPINION BY: CALLUM

OPINION

[630]** **[*1139]** JUSTICE CALLUM delivered the opinion of the court:

I. INTRODUCTION

On November 2, 1995, claimant, Johnnie D. Banks, Jr., filed an application for adjustment of his claim under the **Workers' Compensation** Act (Act) (820 ILCS 305/1 *et seq.* (West 1994)). On April 21, 1999, an arbitrator dismissed his claim for want of prosecution. On June 28, 1999, claimant's counsel petitioned to reinstate the claim but did not set a hearing on the petition. Claimant obtained new counsel who, on February 28, 2001, filed a second **petition to reinstate**. An arbitrator denied reinstatement. Claimant sought review before the Industrial Commission **[***3]** (Commission), which upheld the denial. Claimant sought judicial review, and the trial court confirmed the Commission's decision. On appeal, claimant argues that the Commission abused its discretion in denying claimant's **petition to reinstate** his claim after the dismissal for want of prosecution. We affirm.

II. BACKGROUND

Claimant filed his application for adjustment of claim on November 2, 1995. The application alleged that, while working for **[**631]** employer, Marlah Boats, on June 29, 1995, claimant was injured when a coworker struck him with a pipe. No action was taken on the claim until April 21, 1999, when the claim came up on the arbitrator's monthly status call. The arbitrator entered an order stating that "this cause being called for arbitration, *** and all parties hereto having received due notice, *** and [claimant] having failed to appear, it is ordered that such cause *** is hereby dismissed for want of prosecution."

On June 28, 1999, claimant petitioned to vacate the dismissal and reinstate the claim. The petition alleged that claimant's attorney received notice of the dismissal on May 12, 1999. Claimant's attorney was unaware that the matter had been set on the regular **[***3]** docket call and on April 21, 1999, was in court on several criminal matters. The petition did not notice a hearing date, and no action was taken on it.

Claimant obtained new counsel who, on February 28, 2001, filed a second **petition to reinstate** alleging that the first petition was never ruled on and, because claimant had a meritorious claim, the standards of equity and fairness mandated reinstatement. The arbitrator denied the motion, and claimant timely sought review before the Commission.

[*1140] The Commission upheld the arbitrator's decision and reasoned as follows:

"The Commission finds that [claimant's] case was dismissed for want of prosecution three years and four months after the Application for Adjustment of Claim had been filed, that [claimant's] attorney of record had an obligation to keep track of this claim and that [claimant's] attorney *** filed a timely motion to reinstate this matter but failed to comply with Commission rule 7020.90(b). The Commission finds no evidence the Arbitrator abused his discretion in dismissing this claim. The Commission has done its own review of the record and finds no reason to reinstate the claim."

Claimant sought judicial review, and **[***4]** the trial court confirmed the Commission's decision. Claimant timely appealed.

III. DISCUSSION

On appeal, claimant argues that the Commission erred in refusing to reinstate his claim. HN1 On a **petition to reinstate** before the Commission, the burden is on the claimant to allege and prove facts justifying the relief sought. *Bromberg v. Industrial Comm'n*, 97 Ill. 2d 395, 401, 454 N.E.2d 661, 73 Ill. Dec. 564 (1983). Whether to grant or deny a **petition to reinstate** rests within the sound discretion of the Commission. *Conley v. Industrial Comm'n*, 229 Ill. App. 3d 925, 930, 594 N.E.2d 730, 171 Ill. Dec. 586 (1992).

HN2 The Commission's rules provide that written notices will be sent to the parties only for the initial status call setting on arbitration. 50 Ill. Adm. Code § 7020.60(a) (2002). Thereafter, the cases are continued at three-month intervals until the case has been on file with the Commission for three years, set for trial, or otherwise disposed of. 50 Ill. Adm. Code § 7020.60(a) (2002). HN3 When a case has been on file with the Commission for three years or more, the parties or their attorneys must be present at each **[***5]** status call on which the case appears. 50 Ill. Adm. Code § 7020.60(b)(2)(C)(i) (2002). If the claimant or the claimant's attorney fails to appear at a status call upon which the case appears, then the case shall be dismissed for want of prosecution except upon a showing of good cause. 50 Ill. Adm. Code § 7020.60(b)(2)(C)(ii) (2002).

HN4 Where a cause has been dismissed from the arbitration call for want of prosecution, a party may **petition to reinstate** it within 60 days of receiving the dismissal order. **[**632]** 50 Ill. Adm. Code § 7020.90(a) (2002). HN5 The petition must "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." 50 Ill. Adm. Code § 7020.90(b) (2002). HN6 "The Arbitrator shall apply standards of fairness and equity in ruling on the **Petition to Reinstate** and shall consider the grounds **[*1141]** relied on by Petitioner, the objections of Respondent and the precedents set forth in Commission decisions." 50 Ill. Adm. Code § 7020.90(c) **[***6]** (2002).

Claimant stresses that his **petition to reinstate** was timely and argues that the Commission erred in imposing requirements not contained in the rules. According to claimant, the rules do not state that a **petition to reinstate** must be heard within a certain time, and the Commission essentially imposed such a requirement. Also, claimant argues that he substantially complied with rule 7020.90 and, as a result, the Commission abused its discretion in refusing to reinstate the claim.

HN7 Although not binding on the courts, the Commission's interpretation of its rules is entitled to deference and will be set aside only if it is clearly erroneous, arbitrary, or unreasonable. *Shannon v. Industrial Comm'n*, 160 Ill. App. 3d 520, 522, 513 N.E.2d 525, 112 Ill. Dec. 111 (1987). Here, the Commission found that claimant filed a timely petition but failed to comply with rule 7020.90(b). That rule plainly requires that a petition must set forth the date on which the claimant will appear before the arbitrator to present his petition. Rule 7020.70, HN8 which governs general motion practice, states that, with exceptions that do not apply here, all motions must be accompanied by a "notice of motion" **[***7]** form and set forth the date on which the movant will appear before the arbitrator or a commissioner to present the motion. 50 Ill. Adm. Code § 7020.70(a) (2002). Although the rules do not specifically require that a hearing on the petition take place within a certain time, they do require that the claimant notice the petition for a hearing. There is no dispute that claimant's petition failed to comply with these requirements.

This claim presents a useful example of the reason for the rule. Claimant's attorney filed a timely petition, but no hearing on the petition was scheduled until almost two years later. By the time the arbitrator heard the petition, almost five-and-a-half years had passed since the filing of the application for adjustment of claim. In a claim involving an altercation with a coworker and most likely the issue of who was the initial aggressor, the potential prejudice resulting from the delays in prosecuting this claim is apparent. After a lengthy delay like the one here, witnesses may be unavailable or their ability to recall the incident may be diminished. Neither rule 7020.90 nor the Commission's interpretation of the rule is arbitrary **[***8]** or unreasonable.

Claimant argues that *Cranfield v. Industrial Comm'n*, 78 Ill. 2d 251, 399 N.E.2d 1316, 35 Ill. Dec. 788 (1980), stands for the proposition that substantial compliance with rule 7020.90 is sufficient. *Cranfield* does not support claimant's position, however. There, the hearing on the claim had been continued several times. On the final date, the claimant failed to appear, and **[*1142]** claimant's counsel stated that he was unable to proceed. The arbitrator refused to grant another continuance and granted the employer's motion to dismiss for want of prosecution. The claimant filed a document entitled "petition for review." The Commission found that the petition was in substance a **petition to reinstate**. Because the petition complied with the predecessor **[**633]** to rule 7020.90, the Commission treated it as such. The court found that the Commission properly treated the "petition for review" as a **petition to reinstate**. *Cranfield*, 78 Ill. 2d at 255.

Claimant argues that "the pleader in the Cranfield Case did not plead a date by which the Petitioner would present the reinstatement for hearing, because the pleader never intended the document to be considered as such." There **[***9]** is no indication in *Cranfield* that the claimant's petition failed to include the date on which the claimant would appear before the Commission to present the petition. In fact, the court's opinion states that the petition was set for a hearing five times. *Cranfield*, 78 Ill. 2d at 253.

Claimant also relies on *Sprinkman & Sons Corp. v. Industrial Comm'n*, 160 Ill. App. 3d 599, 513 N.E.2d 1188, 112 Ill. Dec. 579 (1987). There, the claimant filed her writ of *certiorari* for circuit court review 12 days after the Commission issued a predecision memorandum but before it issued its official decision. The employer argued that the writ was premature and therefore that the court lacked jurisdiction to review the Commission's ruling. The claimant argued that, because the predecision memorandum was identical to the final decision, she substantially complied with section 19(f)(1) of the Act (Ill. Rev. Stat. 1983, ch. 48, par. 138.19(f)(1) (now 820 ILCS 305/19(f)(1) (West 2002))). The court agreed and held that substantial compliance was sufficient to vest the trial court with jurisdiction. *Sprinkman & Sons*, 160 Ill. App. 3d at 602. **[***10]**

The rationale of *Sprinkman & Sons* does not apply here. That decision was based on the concern over simplifying procedure, honoring substance over form, and preventing technicalities from depriving a party of the right to be heard. *Sprinkman & Sons*, 160 Ill. App. 3d

at 601; see also *Forest Preserve District of Cook County v. Industrial Comm'n*, 305 Ill. App. 3d 657, 660, 712 N.E.2d 856, 238 Ill. Dec. 752 (1999). Here, the Commission did not rely on a mere technical defect to deny the petition. The petition's failure to comply with rule 7020.90(b) resulted in the petition not being called for a hearing until almost two years after it was filed. Moreover, one rationale for the holding in *Sprinkman & Sons* was that the employer failed to show that it was prejudiced by the premature writ. *Sprinkman & Sons*, 160 Ill. App. 3d at 602. Here, as the delays mounted, the potential for prejudice to employer increased. There is nothing in *Cranfield*, *Sprinkman & Sons*, or any other decision **[*1143]** supporting claimant's contention that "the Supreme Court employs a highly relaxed construction of **Petitions to Reinstate** in favor of employees bringing claims for **[***11]** work related injuries." HN9 A party must exercise due diligence in pursuing his or her claim before the Commission. *Contreras v. Industrial Comm'n*, 306 Ill. App. 3d 1071, 1076, 715 N.E.2d 701, 240 Ill. Dec. 14 (1999). The Commission reviewed the record, appropriately applied "standards of fairness and equity," and saw no reason to reinstate the claim.

Finally, claimant argues that standards of fairness and equity supported reinstatement. Claimant stresses that the claim was dismissed at a status call hearing, there is no indication that claimant or his counsel repeatedly requested continuances or failed to appear at prior hearings, and there were no prior dismissals for want of prosecution. These arguments ignore that the claim languished for over three years before the arbitrator dismissed **[**634]** it for want of prosecution. There was a lengthy delay between the filing of the initial **petition to reinstate** in June 1999 and February 2001, when a hearing on the petition was finally scheduled. Also, claimant asserts that, because status call hearings are held only one morning per month, between July 1999 and February 2001, claimant's counsel had only 18 half days, *i.e.*, 9 full days, during **[***12]** which to present the **petition to reinstate**. Thus, according to claimant, under these circumstances, the delay was not the result of a lack of diligence in presenting the motion. This creative but unconvincing argument ignores that the petition failed to comply with rule 7020.90(b) and that counsel missed numerous opportunities to notice a hearing on the petition. Under these circumstances, we cannot say that the Commission abused its discretion in denying the petition.

IV. CONCLUSION

The judgment of the circuit court of Franklin County confirming the Commission's decision is affirmed.

Affirmed.

McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and GOLDENHERSH, JJ., concur.

*365 Ill. App. 3d 727, *; 852 N.E.2d 282, **;*
*2006 Ill. App. LEXIS 602, ***; 304 Ill. Dec. 32*

NESTLE USA, INC., Plaintiff-Appellant, v. DONALD DUNLAP and THE INDUSTRIAL COMMISSION OF ILLINOIS, Defendants-Appellees, and FREDERIC NESSLER and MICHAEL McDONALD, Defendants.

No. 4-05-0900

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

365 Ill. App. 3d 727; 852 N.E.2d 282; 2006 Ill. App. LEXIS 602; 304 Ill. Dec. 32

May 23, 2006, Submitted
June 1, 2006, Filed

SUBSEQUENT HISTORY: Released for Publication July 17, 2006.

PRIOR HISTORY: **[***1]** Appeal from Circuit Court of Morgan County. No. 04CH72. Honorable Richard T. Mitchell, Judge Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employer appealed the judgment of the Circuit Court of Morgan County (Illinois) granting the motion to dismiss of defendant Industrial Commission of Illinois in the employer's action seeking declaratory relief from the reinstatement of defendant employee's **workers' compensation** claim and seeking to enjoin the Commission from further hearing the employee's claim.

OVERVIEW: The employee's **workers' compensation** claim was dismissed by an arbitrator due to want of prosecution. The second attorney sought reinstatement, asserting that he had been substituted as the employee's counsel. The second attorney was not the attorney of record to whom the notice of dismissal was sent. The arbitrator reinstated the case after believing the second attorney's assurances that he had filed a substitution-of-counsel form in the past. As a result of this determination, the employer filed the complaint for declaratory judgment and injunctive relief in the trial court. The trial court properly found that it lacked jurisdiction over the case. When a factual question existed, as in the instant case, the Commission, under 820 Ill. Comp. Stat. Ann. 305/19(a), (b) (2004), was to designate an arbitrator to investigate and hear evidence. The arbitrator's decision was subject to review by the Commission under 820 Ill. Comp. Stat. Ann. 305/19(b) (2004) before its final decision could be reviewed by the trial court under 820 Ill. Comp. Stat. Ann. 305/19(f)(1) (2004). Therefore, the Commission was entitled to review an arbitrator's decision before the instant action was filed.

OUTCOME: The judgment was affirmed.

CORE TERMS: arbitrator, notice, administrative remedies, reinstate, arbitrator's decision, undisputed facts, counsel of record, judicial review, substitution-of-attorney, exclusive jurisdiction, factual dispute, reinstatement, hear, substitution, faxed, exhaustion doctrine, administrative agency, final decisions, concurrent jurisdiction, statutory authority, irreparable, concurrent, disputed, exhaust, compensation claim, attorney of record, statutory power, declaratory, meritorious, reinstated

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
Civil Procedure > Appeals > Standards of Review > De Novo Review
HN1 An appellate court reviews a circuit court's decision to grant motions to dismiss under 735 Ill. Comp. Stat. Ann. 52-615, -619 under the de novo standard. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
HN2 The Supreme Court of Illinois has determined that the courts have no original jurisdiction in cases involving determination of **workers' compensation** benefits. In such compensation proceedings, the court's role is appellate only. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
HN3 The Illinois Supreme Court has held that the Illinois Industrial Commission's jurisdiction is concurrent with the circuit court in some instances. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution

HN4 According to the Illinois **Workers' Compensation** Act, whenever a disputed question of law or fact exists, the Illinois Industrial Commission shall first designate an arbitrator who shall investigate claims and hear evidence. 820 Ill. Comp. Stat. Ann. 305/19(a), (b) (2004). The arbitrator's decision may then be reviewed by the Commission. 820 Ill. Comp. Stat. Ann. 305/19(b) (2004). More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN5 The Illinois **Workers' Compensation** Act provides for review of final Illinois Industrial Commission decisions in the trial court. 820 Ill. Comp. Stat. Ann. 305/19(f)(1) (2004). Under § 19(f)(1), a proceeding for review in a trial court shall be commenced within 20 days of the receipt of notice of the decision of the Commission. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN6 In the context of an administrative appeal, jurisdiction should not be determined by a ruling on the merits. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN7 In the context of an administrative appeal, jurisdiction is authority to hear and decide a cause. It does not depend upon the correctness of the decision made and is not lost because of an erroneous decision. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

HN8 In the context of exhaustion of remedies, the exhaustion doctrine applies when an administrative agency has exclusive jurisdiction to hear an action. Courts have recognized several exceptions to the exhaustion doctrine. More Like This Headnote

COUNSEL: For Nestle USA, Inc., Appellant: Eugene F. Keefe, Keefe & Associated, L.L.C.. Chicago, IL.

For Industrial Commission of Illinois, Appellee: Honorable Lisa Madigan, Attorney General State of Illinois, Chicago, IL, Gary S. Feinerman, Solicitor General, Chicago, IL, Jan E. Hughes, Assistant Attorney General, Chicago, IL.

ARGUER: For Appellant: Eugene F. Keefe.

ARGUER: For Appellee: Jan E. Hughes.

JUDGES: Honorable Robert W. Cook, J., Honorable Robert J. Steigman, J. - CONCUR, Honorable John T. McCullough, J. - CONCUR. JUSTICE COOK delivered the opinion of the court. STEIGMANN and MCCULLOUGH, JJ., concur.

OPINION BY: Robert W. Cook

OPINION

[*728] **[**283]** JUSTICE COOK delivered the opinion of the court:

Plaintiff, Nestle USA, Inc. (Nestle), brought an action seeking declaratory relief from a ruling by arbitrator Ruth White of the Illinois **Workers' Compensation** Commission (Commission) (formerly the Illinois Industrial Commission) regarding reinstatement of Donald Dunlap's **workers' compensation** **[***2]** claim. Plaintiff also sought to enjoin the Commission from further hearing Dunlap's claim. Plaintiff presented a motion for summary judgment on the undisputed facts. The Attorney General of the State of Illinois, acting as counsel for the Commission, presented a motion to dismiss the case. The trial court **[*729]** granted the Commission's motion to dismiss. Nestle appeals. We affirm.

I. BACKGROUND

On January 13, 2000, Donald Dunlap filed a **workers' compensation** claim with the Commission claiming he had a heart attack on September 4, 1999, while employed by Nestle. **[**284]** When he filed the claim, Dunlap's attorney was Frederic Nessler. According to the Commission's records, Nessler has been noted to be Dunlap's counsel of record through 2004.

On November 15, 2000, attorney Michael McDonald wrote to Nessler that Dunlap's wife asked him to pursue her husband's claim and that McDonald would protect Nessler's fee on any ultimate settlement or verdict.

On July 23, 2001, McDonald sent Nessler a "Stipulation to Substitute Attorneys" form for Nessler to sign and return to McDonald. Three days later, Nessler returned the signed substitution-of-attorney form.

On October 1, 2002, Nessler wrote to Eugene Keefe, **[***3]** Nestle's attorney, saying that he received a notice of a motion and order concerning Dunlap's case. Nessler stated he no longer represented Dunlap as of July 26, 2001, when a signed substitution-of-attorney form was sent to McDonald. Also, on October 1, 2002, Nessler sent the notice to McDonald and requested a file-stamped copy of the approved substitution-of-attorney form.

On May 20, 2003, a paralegal with Nessler's firm, Lorrie Foor, sent McDonald a letter stating that in "December of 2001, we had a hearing regarding the unsigned Substitution of Attorney" and requesting the signed and filed form. The letter concluded that if the Nessler firm did not hear from McDonald within 10 days, they would be setting the Dunlap case for hearing again on July 19, 2003. Also on May 20, 2003, Foor sent a letter to arbitrator Ruth White stating that Dunlap has retained McDonald as counsel and a hearing was conducted in December 2002, to have the substitution entered. Foor asked that the matter be continued because Nessler is still the attorney of record on the docket but Nessler's firm is unaware of the status of the Dunlap case.

On October 16, 2003, White issued an order dismissing Dunlap's case **[***4]** for want of prosecution because the petitioner failed to appear at a status call or trial date. Notices of dismissal dated November 7, 2003, which were addressed to Nessler and Keefe, stated

that unless a **petition to reinstate** was filed with the Commission within 60 days of receipt of the dismissal, the case could not be reopened.

[*730] On February 3, 2004, Keefe faxed Nessler a copy of his notice of dismissal dated November 7, 2003, and stated that Nestle has closed the file on the Dunlap case as the Commission's records indicate that the case was dismissed without reinstatement.

On February 26, 2004, Nessler faxed the notice of dismissal to McDonald.

On April 26, 2004, McDonald filed a **petition to reinstate** Dunlap's case. In the motion to reinstate, McDonald stated that he did not receive the October dismissal order until it was faxed to him on February 26, 2004, by Nessler after Nessler received the notice from Keefe on February 3, 2004. The motion stated that Nessler withdrew as counsel on March 13, 2001, and McDonald entered his appearance on that date. McDonald claims that he had appeared before White in the matter. In Nestle's complaint for injunctive relief, Nestle acknowledged **[***5]** that "McDonald has occasionally attended Industrial Commission status hearings and otherwise claimed to represent *** Dunlap as counsel," but that Nestle had always objected and pointed out that McDonald failed to file an appearance of counsel or a substitution of counsel on Dunlap's behalf.

On September 8, 2004, White allowed McDonald to appear as counsel for Dunlap and argue his motion to reinstate. White reinstated the case after accepting McDonald's assurances, as an officer of the court, that he, at some point in the past, **[**285]** filed a substitution-of-counsel form despite the fact that the Commission never showed him to be counsel of record.

On December 8, 2004, Nestle filed a complaint for injunctive relief in the circuit court of Morgan County. In the complaint, Nestle alleged that Nessler is Dunlap's counsel of record, and he never filed a motion to reinstate within 60 working days from the date Nestle's attorney faxed a copy of the dismissal to Nessler. In its first-amended complaint for declaratory judgment and permanent injunction, Nestle sought a declaratory judgment because the arbitrator and Commission "have innocently refused to follow Illinois law in the claim below and **[***6]** are now acting outside the powers granted to the **Workers' Compensation** Commission by our legislature to the irreparable detriment of Plaintiff Nestle." Nestle claimed that if it is forced to continue to defend a claim that was finally dismissed by rule of law, Nestle's due-process and equal-protection rights under Illinois law would be violated. Nestle asked that the circuit court permanently enjoin the Commission and White from further adjudicating Dunlap's claim.

The Commission filed a motion to dismiss under sections 2-615 and 2-619(a)(1) and (a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(a)(1), (a)(9) (West 2004)). The Commission alleged **[*731]** that the circuit court lacked jurisdiction because Nestle had not exhausted its administrative remedies and was improperly seeking judicial review of the arbitrator's nonfinal decision through its declaratory-relief action. Dunlap, through attorney Norbert Goetten, filed a motion to dismiss, arguing that the complaint was premature because the Commission had not entered a final order in the case. Nessler and McDonald were dismissed as defendants and are no longer parties to this matter. Nestle responded and filed a motion **[***7]** for summary judgment.

On September 30, 2005, the circuit court granted the Commission's motions to dismiss, finding that the court's jurisdiction under section 19(f) of the **Workers' Compensation** Act (Act) (820 ILCS 305/19(f) (West 2004)) is limited to review of final decisions.

This appeal followed.

II. ANALYSIS

First, Nestle filed a motion with this court to "Append Abstract of Record," seeking leave to supplement the record with the transcript of the September 8, 2004, hearing before White; White's decision granting Dunlap's motion to reinstate the case; and a Commission "Stipulation to Substitute Attorney" form dated March 13, 2001, and signed by Dunlap, Nessler, and McDonald. The Commission responded that this court should not allow the motion because the documents were not certified by the Commission in accordance with section 14 of the Act (820 ILCS 305/14 (West 2004)) and because the documents were not part of the record in the circuit court. Because the three documents' inclusion in the record will not affect the outcome of this case, we see no harm in granting the motion.

As to the merits of the appeal, the circuit court dismissed Nestle's complaint after determining **[***8]** the court lacked jurisdiction. The court never addressed the merits of the case. Thus, the only issue before this court is whether the circuit court correctly determined that it lacked jurisdiction. See *Kemp-Golden v. Department of Children & Family Services*, 281 Ill. App. 3d 869, 879, 667 N.E.2d 688, 695, 217 Ill. Dec. 599 (1996) (when the circuit court dismissed the complaint based on lack of standing, this court only reviewed the judgment granting the motion to dismiss **[**286]** and refused to review the merits of the plaintiff's claim). HN1 We review a circuit court's decision to grant motions to dismiss under sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2004)) under the de *novo* standard. *Morris v. Williams*, 359 Ill. App. 3d 383, 386, 834 N.E.2d 622, 626, 296 Ill. Dec. 65 (2005).

Nestle argues that the trial court had either original or concurrent jurisdiction to state the rights of the parties as the issue involved **[*732]** undisputed facts and questions of law regarding the arbitrator's power to reinstate the claim. Nestle claims it should not be required to follow the normal procedures for appealing an arbitrator's decision in a **workers' [***9] compensation** claim to the five-member appellate panel of the Commission. According to Nestle, the arbitrator acted outside of her statutory authority and, therefore, without jurisdiction when she reinstated Dunlap's claim after more than 60 days had passed from the date Dunlap's attorney of record received notice of the dismissal.

The Commission urges that the Commission has exclusive jurisdiction in this matter. According to the Commission, Dunlap's claim against Nestle involves a determination of benefits and "circuit courts have no original jurisdiction over **workers' compensation** proceedings, wherein benefits are determined, under the Act" *(Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 158, 601 N.E.2d 720, 727, 176 Ill. Dec. 22 (1992)). Because the Commission has exclusive jurisdiction, the court must apply the "exhaustion of administrative remedies doctrine." Under the exhaustion doctrine, a party claiming to be wronged by an administrative action must first pursue all available administrative remedies before seeking review in the courts. *Illinois Health Maintenance Organization Guaranty Ass'n v. Shapo*, 357 Ill. App. 3d 122, 130, 826 N.E.2d 1135, 1142-43, 292 Ill. Dec. 699 (2005). **[***10]** Alternatively, the Commission claims that even if the trial court had original or concurrent jurisdiction, the court correctly deferred jurisdiction under the doctrine of primary jurisdiction as the Commission is better suited to resolve the dispute than the court.

HN2 The Supreme Court of Illinois has determined that the courts have no original jurisdiction in cases involving determination of

workers' compensation benefits. Hartlein, 151 Ill. 2d at 158, 601 N.E.2d at 727. In such compensation proceedings, the court's role is appellate only. Gunnels v. Industrial Comm'n, 30 Ill. 2d 181, 185, 195 N.E.2d 609, 611 (1964). HN3 The supreme court has also held, though, that the Commission's jurisdiction is concurrent with the circuit court in some instances. See Segers v. Industrial Comm'n, 191 Ill. 2d 421, 426-27, 732 N.E.2d 488, 492, 247 Ill. Dec. 433 (2000) (jurisdiction is concurrent when the issue involves a widow's application for death benefits after her husband had previously settled for a lump sum); Employers Mutual Cos. v. Skilling, 163 Ill. 2d 284, 286-87, 644 N.E.2d 1163, 1165, 206 Ill. Dec. 110 (1994) (jurisdiction **[***11]** is concurrent when the issue involves an insurance-coverage issue connected to a **workers' compensation** claim).

We conclude that under these facts, the Commission had exclusive jurisdiction and Nestle was required to exhaust all administrative remedies before seeking judicial review.

The only arbitrator's decision on appeal is White's decision to **[*733]** reinstate Dunlap's claim. As a result of White's reinstating his claim, Dunlap may be entitled to benefits. While the issue does not involve an arbitrator's traditional determination of benefits, exclusive jurisdiction should apply for two main reasons. First, the arbitrator's decision resolved a factual dispute. **[**287]** Second, a jurisdictional determination should not be dependent upon the merits of a claim.

First, Nestle urges that the Commission, as an administrative agency, only has the powers granted by the Illinois legislature and white's reinstatement of Dunlap's claim was not authorized by the legislature because the petition for reinstatement came after 60 days from notice to Dunlap's counsel of record. Nestle cites Business & Professional People for the Public Interest v. Illinois Commerce Comm'n, 136 Ill. 2d 192, 555 N.E.2d 693, 144 Ill. Dec. 334 (1989), **[***12]** Segers, 191 Ill. 2d 421, 732 N.E.2d 488, 247 Ill. Dec. 433, and Daniels v. Industrial Comm'n, 201 Ill. 2d 160, 775 N.E.2d 936, 266 Ill. Dec. 864 (2002), to support its contention that courts can render declarations on interpretations of Illinois's administrative agencies' procedures, powers, and rules based upon undisputed facts without first exhausting administrative remedies. Nestle's argument and the application of the three cases rest on the premise that the trial court was presented with only undisputed facts. Despite Nestle's assertion to the contrary, the arbitrator's decision resolved a factual dispute.

Nestle claims that the facts are undisputed because Nessler, not McDonald, was Dunlap's attorney at all relevant times as he was listed as Dunlap's counsel of record at all relevant times. White concluded, though, that McDonald had been Dunlap's attorney since 2001 when he sent a substitution-of-attorney form to the Commission office in Chicago. Based on her belief that McDonald would not lie to her, White concluded that the Commission must have made an error that kept McDonald from appearing as the attorney of record. While McDonald could **[***13]** not produce any documentation proving that he ever filed the form, Nestle produced documents that showed Nessler and others continually requested that McDonald file the appropriate forms. Nestle claims that White's conclusion did not rest on a determination of "disputed facts," but was a "hopeful and generous conclusion by a forgiving hearing officer without a shred of evidence to support it."

However Nestle chooses to characterize White's determination, this matter clearly arose over a factual dispute. Nestle claims that McDonald never filed the substitution-of-attorney form and that McDonald lied to White. McDonald claims he filed the form and the Commission made an error. White chose to believe McDonald despite the documents Nestle produced. White made her decision based upon her familiarity with the specific facts of the case and her observation of **[*734]** the parties. The parties disagreed as to when the 60 days began to run based upon a dispute over who should have received the notice of dismissal. White resolved the factual dispute and applied the time limit according to her determination.

HN4 According to the Act, whenever a disputed question of law or fact exists, the Commission shall **[***14]** first designate an arbitrator who shall investigate claims and hear evidence. 820 ILCS 305/19(a), (b) (West 2004). The arbitrator's decision may then be reviewed by the Commission. 820 ILCS 305/19(b) (West 2004). HN5 The Act provides for review of *final* Commission decisions in the trial court. See 820 ILCS 305/19(f)(1) (2004) (proceeding for review in trial court shall be commenced within 20 days of the receipt of notice of the decision of the Commission); see also Pace Bus Co. v. Industrial Comm'n, 337 Ill. App. 3d 1066, 1069, 787 N.E.2d 234, 237, 272 Ill. Dec. 419 (2003) (jurisdiction to review final decision of the Commission is vested in the trial court). Nestle should follow the procedures outlined in the Act before the courts interfere.

[288]** Further, in concluding that the trial court had original or concurrent jurisdiction, Nestle assumed its claim was meritorious. In the trial court, Nestle essentially sought a determination that the arbitrator acted outside of her statutory power. Nestle then claimed that the court had jurisdiction because the arbitrator acted outside her statutory power. Under Nestle's theory, in order for the court to have jurisdiction, **[***15]** the court first had to determine Nestle would succeed on the merits. If Nestle's claim is meritorious, the trial court has jurisdiction. Nestle agrees, though, that if its claim is not meritorious and White acted within her statutory powers, the court does not have jurisdiction. Further, had White ruled Dunlap's petition could not be reinstated, Dunlap's only recourse would have been an appeal to the Commission. In that situation, Dunlap could not have appealed to the courts because White's decision was authorized by statute. Nestle, though, could appeal to the court because White acted without statutory authority.

HN6 Jurisdiction should not be determined by a ruling on the merits. See Nelson v. Miller, 11 Ill. 2d 378, 391, 143 N.E.2d 673, 680 (1957) (rejecting the assumption that the trial court lacks jurisdiction over a nonresident defendant who allegedly committed a tortious act within the state unless all of the elements that combine to spell ultimate liability in tort are present); C&K Distributors, Inc. v. Hynes, 122 Ill. App. 3d 525, 529, 461 N.E.2d 560, 563, 77 Ill. Dec. 937 (1984) HN7 ("Jurisdiction is authority to hear and decide a cause. [Citation. **[***16]**] It does not depend upon the correctness of the decision made and is not lost because of an erroneous decision"). Based on Nestle's theory, any litigant could skip Commission review and seek judicial review by alleging that the arbitrator's **[*735]** decision was not authorized by statute. Trial courts would be forced to first determine if arbitrators' decisions were wrong in order to determine if they had jurisdiction.

Nestle should be required to exhaust all administrative remedies before pursuing judicial review. HN8 The exhaustion doctrine applies when an administrative agency has exclusive jurisdiction to hear an action. Board of Education of Warren Township High School District 121 v. Warren Township High School Federation of Teachers, Local 504, 128 Ill. 2d 155, 163, 538 N.E.2d 524, 528, 131 Ill. Dec. 149 (1989). Courts have recognized several exceptions to the exhaustion doctrine, and Nestle invokes three exceptions. First, Nestle claims that the case involves undisputed facts. See Castaneda v. Illinois Human Rights Comm'n, 132 Ill. 2d 304, 309, 547 N.E.2d 437, 439, 138 Ill. Dec. 270 (1989). Second, the issue involves statutory interpretation that falls **[***17]** within the expertise of the court because the arbitrator acted outside her statutory authority in seeking to continue to adjudicate a case that was finally dismissed. See Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board, 166 Ill. 2d 296, 306, 652 N.E.2d 301, 306, 209 Ill. Dec. 761 (1995). Third, Nestle will suffer irreparable harm from further administrative remedies.

See *Illinois Bell Telephone Co. v. Allphin*, 60 Ill. 2d 350, 358, 326 N.E.2d 737, 742 (1975).

As stated above, the case involves disputed facts. Further, the issue does not involve statutory interpretation. The issue revolves around the arbitrator's factual determination. Finally, Nestle claims it would suffer irreparable harm because it would be forced to maintain reserves, retain evidence, relocate witnesses, and defend a claim that was finally dismissed. Once again, this argument assumes the merits of Nestle's claim by assuming the **[**289]** case was finally dismissed. None of the exceptions excuse Nestle from exhausting administrative remedies.

Nestle must first exhaust its administrative remedies by appealing to the Commission before seeking judicial review. **[***18]** This will give the Commission the chance to consider the arguments of the parties and make its own factual determinations and conclusions regarding the filing of the substitution of attorney form. The Commission may not agree with the arbitrator. If the Commission does agree with White, Nestle will have the opportunity to present its appeal of the Commission's final decision to the trial court.

III. CONCLUSION

For the reasons stated, we affirm the trial court's dismissal.

Affirmed.

STEIGMANN and McCULLOUGH, JJ., concur.