

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Annunziata and Senior Judge Cole

CHARLES R. WINGATE

v. Record No. 2151-00-4

MEMORANDUM OPINION\*  
PER CURIAM  
DECEMBER 12, 2000

ASSETT PROTECTION TEAM, INC. AND  
INSURANCE CO. OF THE STATE OF PENNSYLVANIA/  
AMERICAN INTERNATIONAL ADJUSTMENT CO., INC.

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

(Charles R. Wingate, pro se, on brief).

(Susan A. Evans; Siciliano, Ellis, Dyer &  
Boccarosse, on brief), for appellees.

The Workers' Compensation Commission dismissed Charles R. Wingate's (claimant) February 2, 2000 claim for benefits, without prejudice, because of his failure to comply with a discovery order requiring that he submit to a discovery deposition within fourteen days. This was the sole issue before the commission when it rendered its decision. Although claimant raises arguments related to the Americans with Disabilities Act and violations of his civil rights, we address, as the issue on appeal, the correctness of the commission's ruling. Upon reviewing the record and the briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the commission's decision. See Rule 5A:27.

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\* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

On appeal, we view the evidence in the light most favorable to the prevailing party below. See R.G. Moore Bldg. Corp. v. Mullins, 10 Va. App. 211, 212, 390 S.E.2d 788, 788 (1990). So viewed, the record established that on October 5, 1999, this Court rendered an opinion affirming the commission's decision dismissing, without prejudice, claimant's previous claim filed on June 1, 1998, due to his failure to submit to a discovery deposition after being ordered to do so by the commission.

On February 2, 2000, claimant re-filed his claim with the commission. On March 21, 2000, employer's counsel sent a letter to claimant, who resides in Texas, requesting that he contact her office to arrange for his discovery deposition to be taken via telephone. On March 23, 2000, claimant contacted employer's counsel and refused to submit to a discovery deposition.

In a letter dated April 17, 2000, employer's counsel informed the commission that claimant had refused to arrange his discovery deposition and requested that the commission compel him to submit to the deposition or dismiss his claim due to his repeated failure to submit to the deposition as required by Rule 1:8, Rules of the Virginia Workers' Compensation Commission, the commission, and this Court.

On April 19, 2000, the deputy commissioner entered an order requiring claimant to submit to a telephonic discovery deposition within fourteen days. The order contained the

following language: "Failure to do so will result in dismissal of the claim with prejudice."

In a letter dated May 5, 2000, employer's counsel informed the commission that claimant had not submitted to a telephonic deposition pursuant to the commission's order. Employer requested that the commission dismiss the claim with prejudice.

On May 15, 2000, the deputy commissioner entered an order dismissing the February 2, 2000 claim with prejudice for failure to submit to a telephonic deposition in a timely manner.

Claimant sent a letter to the commission via certified mail on May 2, 2000 "in response to [employer's counsel's] motion for dismissal due to failure to submit to a telephonic deposition." In the letter, claimant asserted that he was pursuing light-duty work out-of-state and would be "indisposed until May 12, 2000." Thus, he stated that he would be unable to comply with the order for a telephonic deposition. Claimant also asserted that employer's counsel should not be able to ask him any questions about his disability pursuant to the Americans with Disabilities Act and he asserted that employer had violated his civil rights. The commission treated this letter as a request for review of the deputy commissioner's May 15, 2000 order.

On review, the commission ruled that claimant is required to allow employer to depose him and found no basis upon which to place restrictions on relevant questions to be asked during the

discovery deposition. In so ruling, the commission found as follows:

We find that claimant has chronically failed to comply with Orders of the Commission in regard to discovery matters. We further find that dismissal with prejudice is a harsh result even when a claimant has been dilatory in regard to discovery matters. Accordingly, we AMEND the deputy commissioner's May 15, 2000, Order to dismiss the claimant's current claim without prejudice; however, we impose the following condition: The Commission will accept a new claim in this matter only if the claimant submits documentation endorsed by the defendants' counsel that he has complied with the Commission's Order that he submit to a telephonic deposition. The Workers' Compensation Commission cannot process or adjudicate claims brought pursuant to the Americans with Disabilities Act or claims alleging civil rights violations.

We find that this case is controlled by the reasoning set forth in our opinion in claimant's previous appeal to this Court styled, Wingate v. Assett Protection Team, Inc., et al., No. 2569-98-4 (Va. Ct. App. Oct. 5, 1999). The present case deals with the same issue addressed in our previous opinion. Based upon the reasons set forth in that opinion and based upon this record, we find that the commission did not abuse its discretion in dismissing claimant's claim, without prejudice, for his failure to submit to a discovery deposition.

For these reasons, we affirm the commission's decision.

Affirmed.