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NO. 101790-1

SUPREME COURT OF THE STATE OF WASHINGTON

CATHY MONTGOMERY,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In this fact-specific case, Cathy Montgomery’s attorney filed a petition for review in her workers’ compensation appeal two days late because he committed the wrong due date to memory, told his assistant the wrong due date, and did not verify the due date stated in the Board of Industrial Insurance Appeals’ letter. So the Board declined to consider the late petition.

The attorney’s failure to keep track of a due date in a single workers’ compensation case presents no issue for this Court’s review under RAP 13.4, a rule that the petition neither cites nor applies. As the Court of Appeals affirmed, these facts showed that relief from the Board’s order was not warranted under CR 60(b)(11). *Montgomery v. Dep’t of Lab. & Indus.*, No. 56838-1-II, slip. op. at 15–16 (Wash. Ct. App. Feb. 14, 2023) (unpublished).

Though Montgomery claims that her attorney’s legal assistant would have checked the claim file to verify the filing

date if the COVID-19 pandemic had not been ongoing (Pet. 9), the Court of Appeals correctly explained that the late filing occurred because “the attorney ultimately gave the legal assistant the wrong deadline, and he was responsible for ensuring timely filing.” *Montgomery*, slip. op. at 16 (citing RPC 5.3(b)). No evidence supports that the pandemic made Montgomery’s attorney give his assistant the wrong filing date.

The Court should deny review.

II. ISSUE

Montgomery filed her petition for review two days late because her attorney did not keep track of the correct due date. Should this lack of diligence be excused under CR 60(b)(11)?¹

¹ As explained *infra* Section IV.B, Montgomery also argued at the Court of Appeals that she was entitled to relief under CR 60(b)(1), which applies to mistakes, inadvertence, surprise, excusable neglect, or irregularity. *Montgomery*, slip op. at 12–14. But she appears to have abandoned that argument by failing to argue it in her Petition. *See* Pet. 8.

III. STATEMENT OF THE CASE

A. Industrial Insurance Background

A party that disagrees with an L&I order in a workers' compensation case may appeal to the Board. RCW 51.52.060. An industrial appeals judge issues a proposed decision and order after hearing evidence. RCW 51.52.104. A party that disagrees with the proposed decision and order can file a petition for review to the three-member Board. *Id.* The party must file the petition within 20 days of the Board's communication of the proposed decision and order, "or such further time as the board may allow on written application of a party." *Id.*

The Board's filing rules allow parties to file petitions for review personally, by mail, by fax, or by electronic filing. WAC 263-12-01501(2). Electronic filing—the method that Montgomery chose in this case—"is accomplished by using the electronic filing link on the board's website." WAC 263-12-01501(2)(d); Pet. 3.

If no party files a petition for review as provided by the statute, the proposed decision and order “shall be adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.” RCW 51.52.104. The proposed decision and order is “deemed adopted” by the Board on the day after the filing due date:

If an order adopting the proposed decision and order is not formally signed by the board on the day following the date the petition for review of the proposed decision and order is due, said proposed decision and order shall be deemed adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.

Id.

B. Montgomery Filed Her Petition for Review Two Days After the Board’s Deadline

Montgomery appealed three L&I orders to the Board.²

AR 42. In January 2020, an industrial appeals judge issued a proposed decision and order adverse to her on some issues.

AR 42–52.

² The certified appeal board record is cited as “AR.”

The Board granted two 20-day extensions of the time for filing a petition, at Montgomery’s request. AR 29–35. In a letter dated March 2, 2020, the Board granted the second extension “for filing a Petition for Review to March 24, 2020.” AR 30.

As Montgomery concedes, she electronically filed her petition for review two days late, on the morning of March 26, 2020. Pet. 3; AR 5. Later that afternoon, Montgomery’s attorney realized he had missed the March 24, 2020 deadline. AR 6. So, on March 27, 2020, he filed a “Request for Relief from Filing Date,” with a declaration from his legal assistant. AR 5–9.

In her declaration, the legal assistant stated that, on March 18, 2020, the attorney gave her a draft of the petition and “advised me that *he thought the Petition was due to be filed with the Board on March 26, 2020.*” AR 5 (emphasis added). She did not check the due date in the client file. AR 6.

The legal assistant stated that she put off drafting the petition until the weekend (which would have been March 21

and 22, 2020) due to the demands of her “job duties and dealing with the effects on our office of the Coronavirus (COVID-19), and personal concerns of my respiratory disease, periodically resulting in recurrent pneumonia.” AR 5.

Despite this, she completed typing and proofing the draft on March 23, 2020—which was still the day before it was due—for the attorney to edit that evening. AR 6. The attorney proofread that draft and, on March 24, 2020, the legal assistant retyped it. AR 6. The legal assistant stated that had she checked the client file, she would have realized the petition for review was due that day since the Board’s March 2, 2020 letter was in the file. AR 5–6. She further explained that the office’s receptionist had only been able to work one day that week due to concerns about her young daughter contracting the virus, resulting in the legal assistant answering all the office’s phone calls. AR 7. The legal assistant stated that in her “normal state of mind unaffected by the stress of COVID-19,” she would have checked the petition’s due date. AR 6. Instead, she and the

attorney continued working on the draft and filed it on March 26, 2020. AR 6.

On April 13, 2020, the Board wrote a letter to the parties, noting that it had received Montgomery’s “request for relief from filing date” and it had determined that her petition was untimely. AR 1. So, on that same date, the Board issued an order that adopted the industrial appeals judge’s proposed decision and order, ruling that no petition for review that complied with the deadline in RCW 51.52.104 had been filed. AR 1–2.³

³ That the Board did not expressly reference the “Request for Relief from Filing Date” in its order adopting the proposed decision and order is immaterial. *Contra* Pet. 5. In its April 13, 2020 letter, the Board acknowledged it had received the request but had determined the petition for review was filed late. AR 1.

Montgomery also appears to fault the Board for not considering the “Request for Relief from Filing Date” as a “[m]otion” under WAC 263-12-118, but she fails to explain why this matters. *See* Pet. 5. In any case, the Board’s rules state that it considers motions to vacate its final orders under the standards in CR 59 and 60, and relief under CR 60 was the relief Montgomery sought here. WAC 263-12-118(2)(b); WAC 263-12-156.

C. Montgomery Asked the Board to Vacate its Final Order Under CR 60(b)(1) and CR 60(b)(11)

Montgomery then filed a CR 60(b) motion to vacate the Board's final order adopting the proposed decision and order. AR 307. She asked for relief under CR 60(b)(1) due to her attorney's "mistake or inadvertence" and under CR 60(b)(11) "on the basis that under the circumstances of the COVID-19 Virus Emergency Orders issued by the governor of Washington 20-05 and 20-25 justice so requires." AR 307.

Montgomery's attorney filed a declaration to support the CR 60(b) motion. AR 308–11. He stated that he completed his draft on March 18, 2020, and put it on his legal assistant's desk. AR 310. He reviewed the Board's March 2, 2020 letter that extended his due date to March 24, 2020, but he "somehow had it in [his] mind that the filing dated [sic] was on Thursday, March 26, 2020, rather than Tuesday, March 24, 2020." AR 310. He attributed the error to his busy law practice:

I equate this situation to a juggler having several balls in the air at the same time, and when he adds another and then another, can you say that he is

negligent in dropping one of the balls? I think not. Certainly he made a mistake in adding another ball, but that is not necessarily negligence. Here, what we have is a third person throwing the additional balls to the juggler, and he is supposed to handle them all. One would expect a ball to be dropped, which is not negligence.

AR 310.

He also noted that during this time, the COVID-19 pandemic was occurring. AR 310. He attached several proclamations from the Governor concerning the pandemic. AR 310, 312–31. These included the Governor’s March 23, 2020 Proclamation 20-25, Stay Home – Stay Healthy. AR 324–28. That proclamation became effective midnight on March 25, 2020—the day after Montgomery’s petition was due. AR 327. The proclamation allowed people employed in “essential business services”—which was defined to include legal services—to leave their homes to work. AR 326–28; Proclamation 20-25 Appendix 11 (Mar. 23, 2020), <https://www.governor.wa.gov/sites/default/files/WA%20Essent>

ial%20Critical%20Infrastructure%20Workers%20%28Final%209.pdf.

The attorney further explained, “I cannot say what [e]ffect the COVID-19 virus pandemic has had upon me, but I do have risk factors if I acquire the virus.” AR 311.

Before the Board ruled on the CR 60(b) motion, Montgomery prematurely appealed the Board’s final order to superior court. CP 1. The superior court entered a judgment requiring the Board to consider Montgomery’s CR 60(b) motion and decide whether her petition for review should be considered timely filed under CR 60(b)(1) or CR 60(b)(11). CP 3–4.

D. The Board Denied Montgomery’s CR 60(b) Motion, and the Superior Court and Court of Appeals Affirmed

On remand, the Board denied the CR 60 motion. AR 301–03. Addressing CR 60(b)(1), the Board concluded that “an error of office procedure such as calendaring an incorrect due date is not excusable error and cannot be the basis for extending

a statutorily created deadline.” AR 302. Addressing CR 60(b)(11), the Board concluded that Montgomery did not show any connection between the pandemic and filing her petition for review late:

Although the COVID-19 pandemic and resulting proclamations are truly extraordinary circumstances, there must still be a nexus between the extraordinary circumstances and the inability to file a timely petition for review. The Governor’s stay at home proclamation dated March 23, 2020, encouraged non-essential businesses to immediately cease operations, but did not mandate they do so until after midnight on March 25, 2020—the day after the petition was due. It did not prohibit businesses conducting operations at home without in-person contact with clients. If this proclamation impacted [the attorney’s] ability to file on March 24, 2020, he should have explained how. The prohibition did not go into effect until after the petition for review was due, and there is no explanation, even if it had prevented conducting business at home with clients, how the proclamation prevented him from filing a petition for review on March 24, 2020.

AR 302–03.

Montgomery appealed to superior court. CP 6–7. Her trial brief asserted several new facts that did not appear in the

attorney's or the legal assistant's declarations at the Board, including that the Board's usual practice is to wait three days after the petition for review deadline to adopt a proposed decision and order. *Compare* CP 8–15 with AR 5–7, 308–11.

L&I moved in limine to exclude these newly asserted facts under RCW 51.52.115, which generally limits the superior court's review to the Board record. CP 31–32.

The trial court granted the motion in limine and affirmed the Board's denial of the CR 60(b) motion.⁴ CP 39–40, 42; RP 7–10. In an oral ruling, the court found that “the failure to calendar by an attorney simply doesn't constitute a mistake or inadvertence” under CR 60(b)(1), and it found that the Board did not abuse its discretion when the Board found there was no

⁴ Though the superior court appeared to exclude the evidence about the Board's usual practice, and though the Court of Appeals affirmed the motion to exclude, finding no abuse of discretion (CP 31–32, 39–40; *Montgomery*, slip op. at 7–10), *Montgomery* does not argue anywhere in her Petition that the Court of Appeals erred in affirming the motion to exclude. *See* Pet. 3. The Court should not consider evidence that is not in the record.

nexus between COVID-19 and the missing of the deadline, precluding relief under CR 60(b)(11). RP 30.

The Court of Appeals affirmed in an unpublished opinion. *Montgomery*, slip op. at 16. It held that Montgomery’s petition for review was untimely under RCW 51.52.104’s plain language. *Id.* at 10–11. It rejected her CR 60(b)(1) claim, agreeing that mistakes from a lack of diligence, such as calendaring errors leading to missed deadlines, are not the type of mistakes that CR 60(b)(1) contemplates. *Montgomery*, slip op. at 12. It also rejected her CR 60(b)(11) claim that “there is a substantial connection or nexus between the extraordinary circumstances caused by COVID-19, and the filing of the [petition for review].” *Montgomery*, slip op. at 15 (alteration in original) (quoting Br. of Appellant at 10). The Court rejected this argument, explaining that “the attorney ultimately gave the legal assistant the wrong deadline,” that “he was responsible for ensuring timely filing,” and that he “conceded that COVID-19 did not interfere with his ability to carry out his duties, stating

that he could not say what effect the pandemic had on him.”

Montgomery, slip op. at 16.

Montgomery now seeks review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Montgomery does not cite and cannot establish any of the RAP 13.4 criteria for review of the Court of Appeals’ rejection of her CR 60(b)(11) claim. The Court of Appeals’ fact-specific decision under CR 60(b)(11) conflicts with no court decision, involves no significant constitutional issue, and is not a matter of substantial public interest. RAP 13.4(b). An attorney’s lack of diligence in failing to keep track of the correct due date for a filing in a specific case does not warrant this Court’s review.

A. A Routine Application of CR 60(b)(11) Does Not Warrant Review

The Court of Appeals’ routine application of CR 60(b)(11) presents no basis for review. Nothing about the facts of this case will impact any other case, as it is limited to a single instance of an attorney missing a deadline.

Under CR 60(b)(11), a court may relieve a party from a final order or judgment for “[a]ny other reason justifying relief from the operation of the judgment.” Under this ground, the party must show “extraordinary circumstances,” which are “unusual circumstances that are not within the control of the party.” *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010). The Court of Appeals was correct to conclude that CR 60(b)(11) did not excuse Montgomery’s late filing.

By Montgomery’s own admission, the reason she filed the petition two days late was because her counsel “had it in [his] mind” that the due date was March 26, 2020 and told his legal assistant the wrong due date. AR 310; *see also* AR 5. These were circumstances entirely within Montgomery’s control, so CR 60(b)(11) relief is not appropriate. Her counsel could have calendared the date, used an organized calendar system shared among staff, or taken other measures to ensure that he and his staff met the deadline, rather than relying on

memory. A failure to track a deadline is within a party's control and is not an extraordinary circumstance.

Montgomery cites the COVID-19 pandemic to excuse her late filing. Pet. 8–9. She claims that “if it were not for the extreme, unexpected, and extraordinary circumstances of the COVID-19 Pandemic and the Governors Proclamations, the Petition for Review would have been timely filed.” Pet. 8–9. And so she argues that substantial evidence does not support finding “a lack of connection between COVID-19 and the filing of the Petition for Review.” Pet. 9. She argues that “the COVID-19 Pandemic . . . had everything to do with the filing of the Petition for Review on March 26, 2020, rather than March 24, 2020.” Pet. 9.

The Court of Appeals correctly rejected these arguments, applying the substantial evidence standard of review.⁵

⁵ The Court of Appeals analyzed the denial of the CR 60(b) motion under the substantial evidence standard of review. *Montgomery*, slip op. 12 n.1. This standard is more generous to Montgomery than abuse of discretion review, which generally

Numerous facts in the record support the Court of Appeals' conclusion that Montgomery "has not shown a sufficient connection between COVID-19 and the late filing."

Montgomery, slip op. at 16.

First, it is undisputed that Montgomery's attorney gave his legal assistant the wrong filing date. AR 5. Montgomery offered no evidence that this had anything to do with the pandemic or the Governor's Proclamations. Instead, Montgomery's attorney attributed the error to a busy law practice requiring him to juggle "several balls in the air." AR 310.

Second, as the Court of Appeals noted, Montgomery's attorney stated he could not say what effect the pandemic had on him. *Montgomery*, slip op. at 16; AR 311. This does not

applies to a denial of a CR 60(b) motion, and which L&I believes is the correct standard of review for this case. *See, e.g., Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 820, 490 P.3d 200 (2021).

support that the pandemic prevented him from timely filing the petition.

Third, though the legal assistant stated that she put off drafting the petition until the weekend of March 21–22 due to her job duties and her personal concerns about her respiratory disease, it is undisputed that she had a draft ready on time on March 23 for the attorney’s review. AR 5–6. So the pandemic had no effect on her ability to timely prepare the petition.

Fourth, the record has no evidence that the pandemic kept Montgomery’s attorney from using a calendaring system, or that it caused him to have the wrong deadline in his head or to tell his staff the wrong due date. Montgomery provides no evidence that her attorney’s office has a central system for calendaring critical deadlines or for catching administrative errors. Failing that, Montgomery’s counsel was not reasonably diligent on behalf of his client, well before COVID-19 escalated to the point where certain businesses had to close on March 25, 2020, under the Governor’s proclamation.

All of these facts support that Montgomery’s attorney’s lack of diligence is why Montgomery filed the petition late, not the COVID-19 pandemic. *Contra* Pet. 1–11.

Montgomery faults the Court of Appeals for concluding that her attorney “ultimately” gave his legal assistant the wrong file date for two reasons. Pet. 9 (citing *Montgomery*, slip op. at 16). First, she says that characterization is wrong because her attorney “gave the legal assistant what he thought was the correct file date.” Pet. 9. But thinking a filing due date is correct does not mean that it is, so the Court of Appeals’ statement that the attorney gave his legal assistant the wrong file date is correct.

Second, Montgomery argues that “the legal assistant was prevented by the threat of contracting COVID-19 with her underlying history of pneumonia from checking the client file to determine the correct date for filing.” Pet. 9. But the legal assistant’s failure to check the due date is not why the petition was late—it was the attorney’s incorrect recall of the date,

which he attributed to a busy law practice. The Court of Appeals was correct to reject this argument, and the fact-specific nature of the case does not support review.

B. There is No Other Basis for Review Under RAP 13.4

Below, Montgomery also argued that she was entitled to relief under CR 60(b)(1), which may relieve a party from a final order for “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” CR 60(b)(1); *see Montgomery*, slip op. at 12–14. But, in her Petition, she provides no argument explaining how she is entitled to relief under CR 60(b)(1). *See* Pet. 7–10. Instead, she mentions that rule only in passing and says “[i]t could be argued” that CR 60(b)(1) applies, without actually arguing that it applies. Pet. 8. Because any argument under CR 60(b)(1) is wholly unsupported, the Court should decline to consider it as a basis for review. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (unsupported arguments are not considered). In any case, the Court of Appeals correctly

rejected Montgomery’s CR 60(b)(1) argument, explaining that “CR 60(b)(1) does not provide relief where attorneys faced with clear deadlines do not take the necessary steps to abide by them.” *Montgomery*, slip op. at 14.

Finally, though it is unclear, Montgomery also appears to suggest that she filed her petition for review on time. She explains that she electronically filed it on March 26, 2020, before the Board issued its final order adopting the proposed decision and order and that March 26, 2020 would have been the date the Board received her Petition, had she mailed it.⁶ Pet. 7–8.

But, as the Court of Appeals recognized, such arguments ignore the unambiguous plain language of RCW 51.52.104. That statute requires a party to file a petition within 20 days of communication of the Board’s order or within “*such further*

⁶ In her argument, she refers to the “Proposed Decision and Order” being timely, but this appears to be a reference to the petition for review. Pet. 8.

time as the board may allow on written application of a party.”

RCW 51.52.104 (emphasis added). That date here was March

24, 2020, but she did not electronically file her appeal until

March 26, 2020, so it does not matter when the Board adopted

the proposed decision, as the Court of Appeals explained:

RCW 51.52.104 unequivocally states that within 20 days or an amount of time the Board specifically allows, any party may file a petition for review. The timing of the Board’s adoption of the proposed decision and order does not affect when the petition for review must be filed.

Because Montgomery did not file her petition within the time the statute and the Board allowed, her petition was untimely, and the proposed decision became the decision and order of the Board.

Montgomery, slip op. at 11. She filed her petition late under the

statute’s plain language, and this presents no basis for review.

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V. CONCLUSION

The Court should deny review.

This document contains 3,857 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of May,
2023.

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