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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 37444-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Matter of

JERRY L. DARRAH

Appellant

Vs.

Washington State Employment Security Department

Respondent

BRIEF OF APPELLANT

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pm 7-23-08

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I. INTRODUCTION

This is an appeal of a Commissioner of the Employment Security Department's denying the Petitioner's Petition for Review of Rights and Petition for Reconsideration. Petitioner requested a *de novo* review of the above rulings.

Further, the Petitioner appeals the Thursday County Superior Court's entry of Finding of Fact, Conclusion of Law, and Order Affirming the Commissioner's Decision entered on February 15, 2008.

Petitioner specifically requests review of the Court's Findings of Fact in Paragraph 1.5 and 1.6.

Further, Petitioner requests a *de novo* review of the Conclusion of Law in Paragraph 2.2 and 2.4, that the Commissioner's conclusions did not constitute error of law in accordance with Washington Administrative Procedure Act.

III. STATEMENT OF THE CASE

The Petitioner, Jerry Darrah, was discharged from his employment with employer, Zetec, Inc. on January 24, 2007, after over twenty years of employment. He was denied benefits from the Employment Security Department (Dept.) in a notice dated March 20, 2007. Commissioner's Report (CR) page 5.

A unemployment claim hearing was scheduled for May 4, 2007.

CR 1 Petitioner stated in his review of rights that he did not receive the Notice of Hearing by Telephone until May 7, 2007. The reason being that his mail was being withheld by a former landlord.

On May 4, 2007, a default order was entered by the Department stating the Petitioner had failed to appear for the hearing and failed to make a timely request for postponement CR 19. The order was signed by Judith L. McCarthy who listed her address as the Office of Administrative Hearings, Old City Hall Bldg., 5th Floor, 221 N. Wall Street, Ste. 540, Spokane, WA 99201-0826.

The Default Order also included information regarding the Petition for Review Rights. The order stated that the order is final unless a written

petition for review is addressed and mailed to the Agency Records Center, Employment Security Department, PO Box 9046, Olympia, WA 98507-9046. The order further stated that the Petition for Review must be postmarked on or before June 4, 2007. CR 20

Petitioner sent a Petition for Review of Rights, dated June 1, 2007, inadvertently to the Administrative Law Judge McCarthy at the Office of Administrative Hearings in Spokane. It was received by the Office of Administrative Hearings on June 5, 2007, presumably being postmarked prior to the deadline of June 4, 2007.

No indication in the file as to when Mr. Darrah was notified he had mailed his request for review to the wrong address, although it is Petitioner's contention that it was not returned until after June 20 as it is designated on the copy of his Petition at CR 25. Petitioner then mailed to the correct address on or about June 27, 2007, as it is noted in the copy of the certified mail found at CR 26.

On July 20, 2007, an Order of Dismissal was entered stating that Petitioner had missed the deadline date of June 4th and did not file his Petition for Review until June 27th, which was 23 days late. CR 28 The Order stated there was no reason for the delay alleged in the Petition and

the delay in filing the Petition was not based on an excusable reason. The Order went on to inform the Petitioner that he had 10 days from the date of the ruling to file a Petition for Reconsideration. The ten days commenced on July 20, 2007.

The Petitioner then retained counsel to file the Petition for Reconsideration. Petitioner's attorney prepared, signed, and mailed the Petition for Reconsideration on July 25, 2007. CR 33. On August 7, 2007, the Petitioner's Petition for Reconsideration was returned to his attorney's office by the US mail. In a letter dated August 7, 2007, Petitioner's attorney states he had inadvertently left off the bottom line on the envelope to the Department. CR 30. It is the Petitioner's attorney's contention in his letter that he had typed in five lines of the address into his computer, unaware that his computer program would only print out four lines on the envelope. CR 31. This was not noticed prior to mailing. The attorney immediately contacted the Commissioner's Review Office, faxed a copy of the Petition and sent it overnight mail (CR 41) to the Commissioner's Review Office. In his letter the attorney explained the computer glitch to the review judge.

On August 17, 2007, an Order Dismissing the Petition for Reconsideration was entered. The order states the Petition was not timely filed. CR 44. The Commissioner had received the letter explaining the circumstance of the delay on August 9th.

The Petitioner then filed a Petition for Judicial Appeal. The hearing was held on February 15, 2008, in which the Thurston County Superior Court found that there was no basis in the records finding a 23 day delay was based on an excusable reason (Finding of Fact Paragraph 1.5). The Court further found that the Commissioner below found that Claimant's Petition for Reconsideration was not timely filed and there was no basis for any delay stating in the record before him, as was postmarked on August 8, 2007, (Finding of Fact Paragraph 1.6).

The trial court, in its Conclusions of Law found that Commissioner's Conclusion of Law in the decision did not constitute error of law and was otherwise in accordance with the Washington Administrative Procedure Act (Conclusions of Law 2.2) and found that the Petitioner had failed to establish any basis for judicial relief under RCW 34.05.570. (Conclusions of Law 2.4)

IV. STANDARD OF REVIEW

The Employment Security Department has the discretion to accept an untimely appeal if “good cause” for the late filing is shown. *RCW 50.32.075*.

Whether the Claimant acts on “good cause” has been the subject of a three part test. *Rasmussen vs. Employment Security 30 Wn. App. 671, 672 (1981)*. The factors considered are (1) the shortness of the delay; (2) the absence of prejudice to the parties; (3) the excusability of the error.

The validity of the excuse presented in factor three presents a mixed question of law and fact which must be reviewed *de novo* under the “error of laws” standard. *ID at 673*.

In determining the affect of the length of delay the Court should use a sliding scale in which a short delay requires a less compelling reason for the failure to timely file than of a longer delay. *Wells v. Employment Security 61 Wn. App. 306, 314 (1991)*.

V. ARGUMENT

In reviewing whether there is good cause for a late filing of an Employment Security Department appeal the Court must consider the three factors set forth in *Rasmussen*. Those factors are (1) the shortness of

the delay; (2) the absence of prejudice to the parties; (3) the excusability of the error.

First, addressing the delay in filing the Petition for Review of Rights, the Administrative Law Judge (ALJ) had ruled the Petition was filed 23 days late. CR 28 Based on the sliding scale set forth in *Wells*, the significance of the length of the delay is considered based on the reason for the failure to timely file the appeal.

Here, the Petitioner perfected his request for review but mailed it to the wrong address. He mailed it to the ALJ rather than the Agency Record Center as was set forth in the notice of his right to appeal. It can be presumed that the request for review was timely mailed by the June 4th deadline in that it was received by the Office of Administrative Hearings on June 5, 2007. CR 25 The Petition for Review was then held for some time at the Office of Administrative Hearings without notice to the Petitioner that he had filed the Petition with the wrong office. Upon notice he had filed with the wrong office, Petitioner immediately filed with the correct office on June 27th. The Court should measure the length of the delay from the date the claimant became aware of the need to appeal. *Hanratty vs. Employment Security* 85 Wn. App. 503, 506, 507 (1997).

Here the Petitioner was not aware that his appeal was untimely until notified by the Department that he had mailed it to the wrong address. Therefore, any of the time Petitioner was unaware that he had not properly filed his request should not be counted in determining the length of the delay.

Even if the entire 23 days is calculated that time is not so lengthy to deny good cause when considered on the sliding scale as forth in *Wells*.

With regard to the untimely filing for the Petition for Reconsideration, Petitioner sets forth the same argument as set above. Petitioner's attorney was unaware the envelope had been wrongly addressed. Upon notice that the Petition had been returned, the attorney immediately took steps to correct the error. The those steps included contacting the Commissioner's Review Office by phone, sending a copy of the Petition via facsimile, and sending a copy of the Petition via overnight mail. In that the attorney was not aware that the Petition had not been timely filed and only became aware of that on August 7th, which is the date of the postmark of the mailing to the proper address. CR 41 Any such time should not be counted in determining the length of the delay of the

appeal based on *Hanratty*. Using this rationale, there was no delay in filing the Petition for Reconsideration.

It is the Petitioner's position based on *Hanratty* that any delay in filing the appeal was very brief and this is especially true in consideration for the reason for the delay.

A second factor to consider is the absence of prejudice to the parties. Here, the record reflects no prejudice on the part of the Department. On the other hand, prejudice to the Petitioner is great. In *Scully vs. Employment Security*, 42 Wn. App. 596, 602 (1986), the Court quotes the preamble of the Employment Security Act found at RCW 50.01.010 that, "this Title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum". The Court goes on to state that the Legislature takes for granted that those entitled to unemployment are suffering. If Petitioner is entitled to unemployment compensation, denial of these benefits is undoubtedly prejudicial to him.

The third factor in considering good cause is the excusability of the error. As set forth above, the Petitioner timely filed, by way of postmark, his Petition for Review but inadvertently sent it to the wrong address. In

Wells at 315 the Court set forth factors in favor of allowing an appeal to proceed on the merits. The Court noted that nothing in the record indicated that the employee in that case had any experience with unemployment procedures on appeals. Here the Petitioner had worked for this employer for over 20 years and there is no indication that he had ever made use of the Employment Security's procedures.

In *Wells*, the Court also stated that employee in that case was required to determine the method of filing an appeal without assistance of counsel. The same is true in this case.

The *Wells* Court further noted the paramount concern as stated above in the Legislature's intent that Title 50 shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum. The *Wells* Court ruled that with no prejudice a short delay depriving an unsophisticated applicant amounts to a good cause for the delay. It went on to quote the United States Supreme Court, stating, "technicalities are particularly inappropriate in a statutory scheme in which layman, unassisted by trained lawyers, initiate the process". *Love v. Pullman Co.*, 404 US 522, 527 (1972).

With regard to the delay in filing the Petition for Reconsideration it was out of the Petitioner's hands that his attorney failed to properly address the envelope which contained the Petition for Reconsideration. The Petitioner presents this as a technological glitch as much as any inadvertence or neglect. Petitioner's attorney was unaware his computer program used to address letters would not print a fifth line on the envelope. The address set forth to mail the Petition for Reconsideration appears to require five lines of text. CR 40 Although a defendant is bound by the acts of his attorney, the Courts are able to correct an injustice when the defendant or his attorney is unable to comply with the rules through no intent or act of his own volition. *Goldendale vs. Graves*, 88 *Wn. 2d* 417, 423, (1977). Here, it was a simple mistake with a computer and should be found excusable.

Further, the Commissioner received a letter from Petitioner's attorney explaining the reason for the delay at least one week prior to his order denying the Petition for Reconsideration.

VI. ATTORNEY'S FEES

It is the Petitioner's position that he was unlawfully denied a hearing on the merits regarding his claims of benefits under the

Unemployment Compensation Act. He was therefore required to hire legal representation and Petitioner therefore requests an award of attorney's fees as set forth by the Superior Court pursuant to *RCW 50.32.160*.

VII. CONCLUSION

The Courts have continually held that substantial compliance with procedural rules is sufficient. *In re Saltis, 94 Wn. 2d 889, 896, (1980)*.

The first factor in determining whether there is good cause for the delay in filing an appeal is the length of the delay. Here, the length of the delay were not excessive. This is especially true in that when considering that the Petitioner was not aware that his appeal had not been timely filed and acted upon them immediately upon learning this.

The second factor is prejudice of the parties. Here, the State has not shown how they would be prejudiced. The prejudice to the Petitioner would be great in that he would be denied benefits that he is entitled to by law.

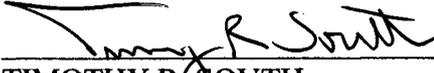
Finally, the third factor is the excusability of the delay. Here, the Petitioner timely filed his appeal but did so with the wrong office. Upon notice of his error he immediately filed with the correct office. He had

substantially complied by timely filing a request for appeal with the Department albeit to the wrong office. This should be excusable and should be found to be good cause for the delay.

With regard to the delay in filing the Petition for Reconsideration, the delay was caused by Petitioner's attorney not being aware that his computer would only print off four lines on an envelope when the proper address to file the Petition was five lines. Upon notice of the error, the Petitioner's attorney immediately filed the Petition by way of postmark that same day.

Based on the above, the Petitioner respectfully requests the Court to reverse the Administrative Judges rulings and remand this matter to be heard on the merits.

Dated this 23rd day of July, 2008.



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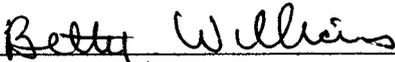
CERTIFICATE OF SERVICE

I, certify I served a copy of this document, **BRIEF OF APPELLANT**, on all parties or their counsel of record on the date below as follows:

■ United States Mail, postage pre-paid

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Dated this 23rd day of July, 2008.



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