

FILED
COURT OF APPEALS
DIVISION II
2016 NOV -2 AM 10:54
STATE OF WASHINGTON
BY  DEPUTY

No. 48306-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MONTE D. MOORE, Appellant,

v.

GORDON TRUCKING, INC., Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

Robert M. Arim
Attorney for Respondent

The Law Office of Robert M. Arim, PLLC
777 108th Ave. N.E., Suite 2250
Bellevue, WA 98004
425.440.7400

WSBA #27868

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT.....5

 1. The December 18, 2014, Appeal 7

 2. The January 22, 2015, Motion for Reconsideration 8

 3. The March 27, 2015, Motion to Amend Appeal 9

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Department of Labor & Industries v. Tyson Foods, Inc,</i> 143 Wn.App. 576 (2008)	5
<i>Farm Supply Distribs., Inc. v. Wash. Utils. & Transp. Comm'n</i> 83 Wn.2d 446 (1974)	5
<i>Robinson Constr. v. Department of Labor & Industries</i> 136 Wn.App. 369 (2006)	5
<i>Department of Labor & Industries v. Denny</i> 93 Wn.App. 547 (1999).....	5

STATUTES

RCW 51.52.060	5, 6
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OTHER AUTHORITIES

<i>In re Santos Alonzo</i> , BIIA Dec., 56,833 (1981).....	7
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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court err under Clark County Cause No. 16-2-00070-7 when it did not rule on the December 18, 2014, appeal from the October 23, 2014, closing order, as alleged in Appellant's Supplemental Assignment of Error?
2. Did the Superior Court err under Clark County Cause No. 16-2-00070-7 when it determined the appeal filed on January 22, 2015, was not filed timely from the November 19, 2014, receipt date of the November 17, 2014, Department order, pursuant to RCW 51.52.060(1)(a)?

II. STATEMENT OF THE CASE

The Department of Labor and Industries (Department) issued an order on October 23, 2014, that closed Claim No. SD68472 with time loss compensation ended as paid through April 24, 2014. CABR¹ at 39-40. The order stated that the claim was allowed as a temporary aggravation of the claimant's pre-existing right shoulder arthritis condition, and that the medical record showed treatment was no longer necessary. *Id.*

¹ CABR refers to the Certified Appeal Board Record, sent under separate cover from Clark County Superior Court. This is the new CABR, dated 02/10/16.

Mr. Douglas Palmer, attorney for the claimant, Plaintiff and Appellant in this case, Mr. Monte D. Moore, filed a protest from the October 23, 2014, order with the Department on November 11, 2014, and the Department issued an order affirming the October 23, 2014, order on November 17, 2014. CABR at 41-42. The November 17, 2014, order and notice indicated any appeal from this order must be made in writing to the Board of Industrial Insurance Appeals (Board) within 60 days after receipt of the notice, or the same shall become final. *Id.*

Mr. Palmer admitted in an answer to an interrogatory that he received that November 17, 2014, order, on November 19, 2014. CABR at 78. A copy of that order, with a date stamp from his office, bearing the date of November 19, 2014, was attached as a response to a request for production. CABR at 79-81.

On January 22, 2015, Mr. Palmer filed an appeal to the Board from the November 17, 2014, Department affirm order. CABR at 38-42.

The respondent, Gordon Trucking, Inc., (Gordon) filed a Motion for Summary Judgment with the Board on June 15, 2015. CABR at 60-90. On June 24, 2015, Mr. Moore filed a response. CABR at 91-97. Gordon filed a reply on June 26, 2015. CABR at 99-106. On August 5, 2015, Industrial Appeals Judge (IAJ) Steven Yeager issued a decision denying Gordon's Motion for Summary Judgment. CABR at 107-112. Following

Gordon's Request for Interlocutory Review, CABR at 114-121, the Board reversed on August 26, 2015. CABR at 130-131.

In writing the review, IAJ Ellsworth stated the issue of whether the December 18, 2014, notice of appeal should have been treated as though it were an appeal to the November 17, 2014, Department order was an entirely different matter that needed to be resolved under Docket No. 14 25374. CABR at 131. That docket was appealed under Clark County Cause No 15-2-01387-8, which was brought to this court under 48306-8-II. IAJ Ellsworth stated, as to this appeal under Docket No. 15 10871, the January 22, 2015, notice of appeal was not timely filed from the November 17, 2014, affirming order and this appeal should be dismissed. *Id.* IAJ Ellsworth sent the case back to IAJ Yeager to write a proposed decision and order dismissing this appeal. *Id.*

Pursuant to those directions, IAJ Yeager issued a Proposed Decision and Order on November 12, 2015, that concluded the January 22, 2015, appeal of the Department's November 17, 2014, order was not timely, pursuant to RCW 51.52.060(1)(a). CABR at 29-30. Accordingly, IAJ Yeager dismissed the appeal. Following a Petition for Review from Mr. Moore on December 1, 2015, (CABR at 20-25) and a response from Gordon on December 9, 2015, (CABR at 5-16) the Board issued an Order Denying Petition for Review on December 16, 2015. CABR at 3. That

order stated the Proposed Decision and Order becomes the Decision and Order of the Board. *Id.*

On January 13, 2016, Mr. Moore filed a Notice of Appeal in Clark County Superior Court from the December 16, 2015, Board Order Denying Petition for Review. The court assigned cause number 16-2-00070-7. Following briefing, the court heard arguments in a bench trial on June 30, 2016, and issued a judgment on July 18, 2016. CP² 22. The Honorable Scott Collier concluded that Mr. Palmer's January 22, 2015, Notice of Appeal from the Department's November 17, 2014, order was not timely, per RCW 51.52.060(1)(a), and the dismissal of the appeal was correct. *Id.*

On July 29, 2016, Mr. Moore filed a Notice of Appeal to the Court of Appeals, Division II, from the Superior Court's July 18, 2016, Judgment. CP 24. This court originally assigned No. 49260-1-II to this appeal, but following an unopposed motion to consolidate, joined it with No. 48306-8-II, and No. 48306-8-II has been designated for all future filings on both appeals.

On October 5, 2016, Mr. Moore filed a Supplemental Brief, and accordingly, this brief is offered a supplement to Gordon's April 6, 2016, brief, filed under No. 48306-8-II.

² CP refers to Clerk's Papers, filed with the Court of Appeals.

III. ARGUMENT

The sole issue on this new appeal from Clark County Superior Court, under Cause No. 16-2-00070-7, involves whether the January 22, 2015, appeal from the November 17, 2014, Department order was timely pursuant to RCW 51.52.060(1)(a). It was not.

In reviewing administrative Board rulings, the Court of Appeals stands in the same position as the Superior Court. *Department of Labor & Industries v. Tyson Foods, Inc.*, 143 Wn.App. 576, 581-82, (2008) (citing *Farm Supply Distribs., Inc. v. Wash. Utils. & Transp. Comm'n*, 83 Wn.2d 446 (1974)). Where the underlying challenge is to the Department's order, the Court of Appeals reviews the Board's decision, not the Superior Court's ruling. *Robinson Constr. v. Department of Labor & Industries*, 136 Wn.App. 369, 373 (2006) (citing *Department of Labor & Industries v. Denny*, 93 Wn.App. 547, 550 (1999)). An agency's legal determinations are reviewed under an error of law standard, "which permits us to substitute our judgment for that of the agency." *Id.* (citing *Denny*, 93 Wn.App. at 550).

In this case, the Board's November 12, 2015, Proposed Decision and Order, adopted by their December 16, 2015, Order Denying Petition for Review, was extremely concise. There was no genuine issue as to any material fact, and Gordon was entitled to a decision as a matter of law.

Further, Mr. Palmer's January 22, 2015, Notice of Appeal from the Department's November 17, 2014, order was not timely, pursuant to RCW 51.52.060(1)(a). Mr. Moore wishes that were not so, and assigns error in his supplemental brief hoping it is not so. However, there is no fact and no argument to get around the cold reality that the appeal now before this court was not timely.

There is no dispute that the November 17, 2014, affirm order was received by Mr. Palmer on November 19, 2014. RCW 51.52.060(1)(a) is the controlling law. This is a very simple calculation of time. 60 days from communication of the order would be January 18, 2015. Mr. Palmer filed his appeal on January 22, 2015, which is 64 days past the date of communication of the order. Saying it is timely does not change time. It remains a late appeal. There is no issue of statutory construction, or for that matter any alleged failure to understand the communication. This order was received by an attorney practicing in a workers' compensation firm. The appeal was not timely, and the Board was correct to rule on that sole issue by granting summary judgment and dismissing the appeal. All the use of magic word analysis will not change this cold reality.

Mr. Moore goes to great lengths to obfuscate the issues by inserting other arguments, but for this appeal from Cause No. 16-2-00070-7, there is no other issue than a failure to timely file an appeal.

1. The December 18, 2014 Appeal.

Mr. Moore's Supplemental Brief spends much time on the issues not pertinent to the new appeal from Clark County Cause No. 16-2-000707. Those other issues have been addressed previously in the briefing before this court, and in an effort to avoid repetitiveness, Gordon defers the bulk of the argument to the prior April 6, 2016, Brief of Respondent. However, there are a few points worth focusing on here, in an effort to bring some clarity to what has cascaded into an avalanche of complications.

Mr. Moore refers to the December 18, 2014, appeal as a "document" in his Supplemental Brief in the Assignment of Error. Perhaps that goes to the support he seeks in construing it for what it is not. It is very clear on the face of the December 18, 2014, appeal, that Mr. Palmer referenced the October 23, 2014, Department order, several times in fact. 06/16/15 CABR³ at 6-8. Further, he attached a copy of the October 23, 2014, order to that appeal. *Id.* at 9-10.

When the Board properly denied the December 18, 2014, appeal pursuant to their analysis per *In re Santos Alonzo*, BIIA Dec., 56,833 (1981), in their January 12, 2015, Order Denying Appeal, it was clearly

³ The June 16, 2015 CABR was the record sent from Cause No. 15-2-01387-8, now part of this consolidated appeal.

stated that “The parties still retain the right to appeal from any further determination or order of the Department.” 06/16/15 CABR at 19. That was true, as the 60-day time limit had not yet tolled. Mr. Moore clearly had until January 18, 2015, to file a proper appeal. He did not.

2. The January 22, 2015, Motion for Reconsideration.

Had a timely appeal been filed, two years worth of appeals would not have ended up before this court. Instead, Mr. Moore filed a Motion for Reconsideration on January 22, 2015, from the Board’s January 12, 2015, Order Denying Appeal. 06/16/15 CABR at 21. As the unanimous three member Board ruled on March 19, 2015, in their Order Denying Motion for Reconsideration of Order Denying Appeal, “Mr. Moore’s argument that his appeal should be granted because his appeal expressed a clear disagreement with the Department’s decision is irrelevant.” 06/16/15 CABR at 33-34.

Further, the Board stated “The assertion by Mr. Moore’s attorney that he referenced the October 23, 2014, order in the Notice of Appeal as a result of a scrivener’s error is not credible.” *Id.* at 34. Mr. Moore could have taken that Board order on appeal to Superior Court. He did not.

3. The March 27, 2015 Motion to Amend Appeal.

Instead, Mr. Moore filed a Motion to Amend Notice of Appeal on March 27, 2015. One major problem was that the appeal was already denied. A second major problem was that the March 19, 2015, Board Order was their final order. The Board made this abundantly clear in their May 13, 2015, letter stating, "Please be advised that the March 19, 2015 order is final and the Board will not accept a motion to amend the appeal."

06/16/15 CABR at 60.

IV. CONCLUSION

As to the new issue raised from Clark County Superior Court on Cause No. 16-2-00070-7, the facts in this case are clear. The January 22, 2015, appeal from the November 17, 2014, Department order was not timely.

With regard to all of the time and argument spent on the other issues, it is clear that Mr. Moore seeks absolution for a series of failures. There was a failure to properly appeal the October 23, 2014, Department order. There was a failure to timely appeal the November 17, 2014, Department affirming order. There was a failure to appeal the Board's final order of March 19, 2015.

There is a reason why Gordon filed and won on summary judgment on Cause No. 15-2-01387-8. There was no material dispute, and no abuse by the Board to deny the Motion to Amend when the appeal was already denied, and the Board had issued their final order. There is a reason why Gordon filed and won on summary judgment at the Board on the January 22, 2015, appeal. It was not timely filed. For this, there is no material dispute.

Thus, while also incorporating the April 6, 2016, Respondent's Brief, Gordon respectfully requests this Court affirm both the October 30, 2015, and July 18, 2016, decisions from Clark County Superior Court.

DATED this 2nd day of November, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert M. Arim', written over a horizontal line.

Robert M. Arim
Attorney for Respondent
WSBA #27868

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MONTE D. MOORE,) No. 48306-8-II
)
Appellant,)
v.)
) CERTIFICATE OF SERVICE
GORDON TRUCKING, INC.)
)
Respondent.)

I certify that I caused a true and accurate copy of the foregoing BRIEF OF
RESPONDENT to be served on the following parties, in the manner indicated below, on
November 2, 2016:

ORIGINAL AND COPY TO: **VIA HAND DELIVERY**
The Clerk of the Court
Washington State Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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COPIES TO:

Mr. Douglas M. Palmer
Busick Hamrick Palmer, PLLC
P.O. Box 1385
Vancouver, WA 98666

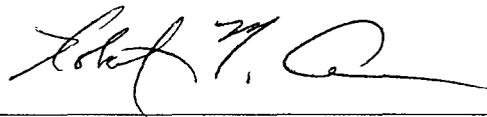
Mr. James S. Johnson, AAG
Office of the Attorney General
P.O. Box 40121
Olympia, WA 98504-0121

Sedgwick (via facsimile)

Gordon Trucking, Inc. (via e-mail)

DATED this 2nd day of November, 2016.

THE LAW OFFICE OF ROBERT M. ARIM, PLLC



Robert M. Arim, WSBA No. 27868
Attorney for Respondent, Gordon Trucking, Inc.