

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 391694-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

PUGET SOUND MEDICAL SUPPLY, Appellant,

and

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

Cases

Aponte v. Dep't of Soc. & Health Servs., 92. Wn. App. 604,
965 P.2d 626 (1998)..... 1

Dalton v. State, 130 Wn App. 653, 124 P.3d 105 (2005)..... 4

In re Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997) 1

Luckett v. Boeing Co., 98 Wn. App. 307, 989 P.2d 1144 (1999) 4

Wells v. Employment Sec. Dep't., 61 Wn. App. 306, 809 P.2d 1386
(1991)..... 2

Statutes and Rules

CR 60(b)..... 4

RCW 50.32.075 2

WAC 388-02-0010..... 3

WAC 388-02-0020(1)..... 3

WAC 388-02-0580(3)..... 2

ARGUMENT

The Board of Appeals decision should be reversed because it failed to consider the shortness of the delay and the lack of prejudice to the other party in considering the reason PSM filed its request for review 22 days after the initial decision was mailed.

The decision of both the Superior Court and BOA are reviewed de novo because they were based on an improper application of the statute and an error of law. *See Aponte v. Dep't of Soc. & Health Servs.*, 92. Wn. App. 604, 617, 965 P.2d 626 (1998). The decision is not reviewed for abuse of discretion, as implied by DSHS in its responsive brief.

Even under an abuse of discretion standard, however, relief should be granted because “a trial court [or agency decision maker] abuses its discretion if its decision is ... based on ... untenable reasons,” and a decision “is based on untenable reasons if it is based on an incorrect standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (citations omitted). The decision below must be reversed because BOA applied the wrong standard to determine whether PSM had good reason for filing its request for review 22 days after the initial decision, rather than 21.

The WAC at issue allows a request for review to be filed between 21 and 30 days after the initial decision as follows:

- (3) A review judge may accept a review request after the twenty-one calendar day deadline only if:
 - (a) The BOA receives the review request on or before the thirtieth calendar day after the deadline; and
 - (b) A party shows good reason for missing the deadline.

WAC 388-02-0580(3).

This WAC provision does not define “good reason.” However, because the provision is remarkably similar to RCW 50.32.075,¹ case law applying that statute should be used to determine when a party has sufficient good reason to justify the delayed filing. As argued in the opening brief, a miscalculated deadline is sufficient good reason to allow a late-filed appeal under RCW 50.32.075 if the delay is short and the other party is not prejudiced by the delay. *Wells v. Employment Sec. Dep’t.*, 61 Wn. App. 306, 314, 809 P.2d 1386 (1991). DSHS does not rebut the conclusion that if the *Wells* test is applied, the decision below must be reversed. Where WAC 388-02-0580 does not define good reason, the test adopted in the analogous context of RCW 50.32.075 should be used. BOA erred in ignoring the factors outlined in *Wells* and in determining that PSM did not establish good reason for the delayed filing.

Originally, BOA rejected PSM’s statement of good reason because RCW 50.32.075 uses the phrase “good cause” instead of “good reason.”

¹ RCW 50.32.075 provides: “For good cause shown the appeal tribunal or the commissioner may waive the time limitations for administrative appeals or petitions set forth in the provisions of this title.”

However, “good reason” and “good cause” are virtually indistinguishable for the reasons argued in PSM’s opening brief, including the fact that many WAC provisions use the terms interchangeably. DSHS admits in its response brief that the terms are synonymous, and thus BOA’s rejection of PSM’s request for review on those grounds was clear error.

On reconsideration, BOA chose to apply the good cause definition set forth in WAC 388-02-0020(1).² Significantly, however, there is no compelling reason to adopt the good cause standard set forth in WAC 388-02-0020 as opposed to the good cause standard found in case law interpreting RCW 50.32.075. The definitions that apply to WAC 388-02 are contained in WAC 388-02-0010, and nothing in those definitions or in WAC 388-02-0580 defines or describes what constitutes sufficient good reason to justify a delayed filing.

Even if the good cause standard of WAC 388-02-0020 is applied, the BOA decision should be reversed. Under the circumstances presented, PSM’s reason for filing its request for review on day 22 was a “substantial reason or legal justification,” and the appeal should have been accepted. DSHS argues that good cause was not established because the reason for the delayed filing would not have been sufficient grounds to set aside a

² WAC 388-02-0020(1) provides: “Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.”

judgment for mistake, inadvertence, or excusable neglect under case law interpreting CR 60(b)(1). However, CR 60 is only to be used “as a guideline” in applying a good cause standard. In evaluating whether the reason presented qualifies as good cause, nothing precludes the application of case law interpreting the good cause standard under RCW 50.32.075.

Furthermore, courts have adopted a test very similar to the one used to apply RCW 50.32.075 in the context of CR 60. Regarding a motion to set aside a judgment, “[t]he motion shall be made within a reasonable time.” CR 60(b). In determining whether this requirement has been met, courts consider the individual facts and circumstances of each case. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999).

Specifically, the court should weigh the following:

The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion. Major considerations in determining a motion’s timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner.

Id. at 312-13 (citations omitted); *see also Dalton v. State*, 130 Wn App. 653, 663, 124 P.3d 105 (2005). Thus, determining the timeliness of a motion under CR 60(b) is focused on exactly the same three factors used in *Wells* and similar cases to determine whether there is sufficient good

cause to justify a late-filed appeal: the reason for the delay, the length of the delay, and the extent of prejudice to the other party.

The suggestion to rely on “the provisions of Superior Court Civil Rule 60 as a guideline” when evaluating good cause under WAC 388-02-0020 does not specify which specific language or consideration under CR 60 is to be used. There is no particular reason why the case law cited by DSHS in interpreting CR 60(b)(1) is any more applicable to this situation than the case law evaluating the timeliness of a motion under CR 60(b).

In evaluating the reason for PSM’s delay of less than a day in filing its request for review, BOA should have weighed the shortness of the delay and the lack of prejudice to DSHS against the reason for the delay, as suggested by *Wells* (analyzing RCW 50.32.075) and *Luckett* (considering the timeliness of a motion under CR 60(b)). BOA’s failure to apply the correct standard by weighing these factors constitutes error justifying reversal of its decision.

Respectfully submitted this ^{6th} day of October, 2009.

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Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Reply Brief of Appellant to be served upon:

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