

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503749

EVLYNENE KIRKENDOLPH, EMPLOYEE	CLAIMANT
DF&A REVENUE SERVICES DIVISION/OCSE, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 24, 2008

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE SHEILA F. CAMPBELL,
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE RICHARD S.
SMITH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY W. RUDD,
Attorney at Law, Little Rock, Arkansas.

ORDER

This matter comes on for review by Respondent's Motion to Dismiss Claimant's Notice of Appeal to the Full Commission. Claimant has also filed a Motion to Reopen the Claim for Additional Evidence. We grant the Respondent's motion to dismiss the untimely notice of appeal and deny the claimant's motion to submit additional evidence.

The administrative Law Judge issued her Opinion on December 21, 2007. The certified return receipt requested card showed that someone at claimant's attorney's office signed for the order on January 2, 2008. Thus claimant had until February 1, 2008 to file her notice of appeal. She did not file her pro se notice until February 12, 2008.

Pursuant to Ark. Code Ann. §11-9-711(a)(1) (Repl. 2002), the opinion of the Administrative Law Judge becomes final unless the claimant files an appeal in writing within 30 days from the receipt of the opinion. The procedural requirements set forth in the statute are mandatory or jurisdictional and require strict compliance. Lloyd v. Potlatch Corporation, 19 Ark. App. 335, 721 S.W.2d 670 (1986); Cooper Industrial Products v. Meadows, 5 Ark. App. 205, 634 S.W.2d 400 (1982). Therefore, the opinion of the Administrative Law Judge becomes final and the Full Commission cannot review it if the notice of appeal is not received within 30 days, as set forth in the statute. Smith v. Servomation, 8 Ark. App. 274, 651 S.W.2d 118 (1983). Moreover, the rule of unavoidable casualty does not apply to the failure to file a notice of appeal in a timely manner. Williams v. Luft Construction Co., 31 Ark. App. 198, 790

S.W.2d 921 (1990). Burris v. Burris, 278 Ark. 106, 643

S.W.2d 570 (1982).

Since the claimant's notice of appeal was not filed within thirty days of receipt, it was untimely filed. Accordingly, the claimant's appeal must be, and hereby is, dismissed. Claimant alleges her attorney was admitted to a mental health facility. Under the law this does not excuse the untimely notice. The record reflects that the claimant's attorney received the Order on January 2, 2008. While there is no record of the claimant having received the Order, the claimant was bound by the actions of her then attorney. Since the claimant's notice of appeal was not filed within 30 days of receipt, it was untimely filed. Accordingly, the claimant's appeal must be, and hereby is, dismissed.

Claimant requests that an impairment rating issued by Dr. Collins after the hearing in this case should be admitted. The issue at the hearing was based on a claim of permanent and total disability. The administrative law judge noted opinions from other doctors that report to show claimant permanent and total but these were rejected for the reasons cited in the opinion. This impairment rating by Dr.

Collins is 46%, less than permanent and total and secured after the hearing but before the final opinion was issued.

The Commission will treat the claimant's motion as a motion to submit additional evidence. The Workers' Compensation Commission has broad discretion with reference to the admission of evidence, and its decision will not be reversed absent a showing of abuse of discretion. W.W.C. Bingo v. Zwierzynski, 53 Ark. App. 288, 921 S.W.2d 954 (1996); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987); Southwest Pine & Supply v. Hoover, 13 Ark. App. 144, 680 S.W.2d 723 (1984); Clark v. Peabody Testing Service, 265 Ark. 489, 579 S.W.2d 360 (1979). Moreover, the Commission is given a great deal of latitude in evidentiary matters; specifically, Ark. Code Ann. §11-9-705(a) (Repl. 2002) states that the Commission "shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure... ." Additionally, the Commission is directed to "conduct the hearing, in a manner as will best ascertain the rights of the parties." Ark. Code Ann. §11-9-705(a); Bryant v. Staffmark, Inc., 76 Ark. App. 64, 61 S.W.3d 856 (2001); Clark, supra.

With regard to additional evidence, Ark. Code Ann. §11-9-705(c) (1) (A) (Repl. 2002) provides that all evidence must be submitted at the initial hearing on the claim. In order to submit new evidence, the claimant must show that the new evidence is relevant; that is it not cumulative; that it would change the result of the case; and that the claimant was diligent in presenting the evidence to the Commission. Hargis Transport v. Chesser, 87 Ark. App. 301, 19 S.W.3d 309 (2004); Haygood v. Belcher, 5 Ark. App. 127, 633 S.W.2d 391 (1982); Mason v. Lauck, 232 Ark. 891, 340 S.W.2d 575 (1960).

We find that the motion should be denied. The claimant's new impairment rating by Dr. Collins would not change the result in the hearing below.

Therefore, after considering the claimant's motion, and all other matters properly before the Commission, we deny the claimant's motion to submit additional evidence.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I respectfully dissent from the majority's Order finding that the claimant's February 12, 2008 notice of appeal was not timely filed. Although the record indicates that the claimant's attorney's office received notice of the Administrative Law Judge's December 21, 2007 Order on January 2, 2008, the record also indicates that the claimant's attorney was not actively practicing law during this time period, and was, in fact, suspended from the practice of law on January 28, 2008.

Ark. Code Ann. §11-9-711(a)(1) states:

A compensation order or award of an administrative law judge or a single commissioner shall become final unless a party to the dispute shall, within thirty (30) days from the receipt by him or her of the order or award, petition in writing for a review by the full commission of the order or award.

The procedural requirements set forth in the statute are mandatory or jurisdictional and require strict compliance, Lloyd v. Potlatch Corporation, 19

Ark. App. 335, 721 S.W. 2d 670 (1986); Cooper Industrial Products v. Meadows, 5 Ark. App. 205, 634 S.W. 2d 400 (1982). Therefore, the opinion of the Administrative Law Judge becomes final and the Full Commission cannot review it if the notice of appeal is not received within 30 days as set forth in the statute. Smith v. Servomation, 8 Ark. App. 274, 651 S.W. 2d 118 (1983). Moreover, the rule of unavoidable casualty does not apply to the failure to file notice of appeal in a timely manner. Williams v. Luft Construction Co., 31 Ark. App. 198, 790 S.W. 2d 921 (1990). Burris v. Burris, 278 Ark. 106, 643 S.W. 2d 570 (1982).

Here, the majority has determined that based on the fact that a certified return receipt requested card shows that someone at the claimant's attorney's office signed for the Order on January 2, 2008, the claimant had notice of the Order as of January 2, 2008, and thus the claimant had until February 1, 2008 to file a notice of appeal. I disagree.

As stated above, Ark. Code Ann. §11-9-711(a)(1) requires strict compliance. Accordingly, the relevant inquiry is not, as the majority has found, when

the claimant had notice of the Administrative Law Judge's December 21, 2007 Order, but when the claimant, as the only party to the dispute capable of appealing on her behalf after her attorney's January 28, 2008 suspension from the practice of law, actually received the Administrative Law Judge's December 21, 2007 Order.

Here, the record is devoid of any evidence indicating when the claimant received the Administrative Law Judge's December 21, 2007 Order. Therefore, I find that in order to strictly comply with Ark. Code Ann. §11-9-711(a)(1), this claim should be remanded to the Administrative Law Judge for the parties to develop a record and present evidence on the claimant's receipt, if at all, of the Administrative Law Judge's December 21, 2007 Order.

Furthermore, I must also respectfully dissent from the majority's denial of the claimant's motion to submit additional evidence. The Commission has broad discretion with reference to admission of evidence, and the Supreme Court will not reverse that decision absent a showing of abuse of that discretion. Clark v. Peabody Testing Service, 265 Ark. 489, 579 S.W.2d 360 (1979);

W.W.C. Bingo v. Zwierzynski, 53 Ark. App. 288, 921 S.W.2d 954 (1996); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987); Southwest Pipe and Supply v. Hoover, 13 Ark. App. 144, 680 S.W.2d 723 (1984).

Ark. Code Ann. §11-9-705(c)(1) (Repl. 2002) provides that all evidence must be submitted at the initial hearing on the claim. In Haygood v. Belcher, 5 Ark. App. 127, 633 S.W.2d 391 (1982) the Arkansas Court of Appeals set forth the prerequisites for remand by the Full Commission on proffer to present newly discovered evidence: (1) The newly discovered evidence must be relevant; (2) it must not be cumulative; (3) it must change the result; and (4) the party seeking to introduce the evidence must be diligent.

Here, the evidence the claimant seeks to introduce is relevant, not cumulative and the claimant has been diligent in seeking to introduce the evidence. As I find that the evidence, specifically the new impairment rating by Dr. Collins, would change the result in the hearing below, as it directly impacts on the claimant's burden of proof by preponderance of the

evidence her entitlement to permanent and total disability benefits, I find that this matter should be remanded to the Administrative Law Judge for consideration of the claimant's proffered evidence.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner