

IN THE COURT OF APPEALS 10/15/96
OF THE
STATE OF MISSISSIPPI
NO. 93-CC-01041 COA

TERRI LEE BATTISE

APPELLANT

v.

**HOSPITAL HOUSEKEEPERS OF AMERICA, INC. AND CONTINENTAL CASUALTY
COMPANY**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JERRY OWEN TERRY

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

FLOYD J. LOGAN

SCOTT W. WEATHERLY, JR.

ATTORNEY FOR APPELLEES:

WILLIAM D. BLAKESLEE

NATURE OF THE CASE: WORKERS COMPENSATION

TRIAL COURT DISPOSITION: NOTICE OF APPEAL NOT TIMELY FILED AND APPEAL
DISMISSED

BEFORE FRAISER, C.J., KING, AND PAYNE, JJ.

FRAISER, C.J., FOR THE COURT:

Terri Lee Battise (Battise) failed to appeal the decision of her claim by the Workers' Compensation Commission (commission) within the statutory thirty day time limit. Battise filed her notice of appeal three days late and motioned to appeal out of time. The Harrison County Circuit Court sent the case back to the commission, which dismissed the appeal. The circuit court affirmed the commission's order. Battise appeals to this Court presenting the following issues:

I. WHETHER THE EMPLOYER-CARRIER FAILED TO PROVIDE THAT THE NOTICE OF APPEAL WAS NOT TIMELY FILED IN SUPPORT OF ITS MOTION TO DOCKET AND DISMISS.

II. IF THE APPEAL PERIOD RUNS FROM THE DATE OF SIGNING THE COMMISSION ORDER, WHETHER RULE 4(g) OF THIS COURT APPLIES TO THIS APPEAL, AND IF SO, WHETHER CLAIMANT'S FAILURE TO TIMELY FILE A NOTICE OF APPEAL WAS DUE TO "EXCUSABLE NEGLIGENCE."

Finding no error, we affirm.

FACTS

Battise was employed by Hospital Housekeepers of America (employer) when she fell on the job and injured herself. Continental Casualty Company (carrier) denied benefits and she filed her petition to controvert. The Administrative Law Judge (ALJ) found that Battise sustained a compensable work injury and incurred temporary total and permanent partial disabilities. The employer-carrier filed a Petition for Review before the Workers' Compensation Commission. The commission affirmed the ALJ's finding of temporary total disability, but reversed the finding of permanent partial disability. The commission order was dated December 2, 1992.

Scott W. Weatherly, Jr. (Weatherly) was Battise's counsel of record at the time of the hearing before the ALJ. Weatherly's law firm was dissolved in December, 1991 and he moved to Birmingham, Alabama. It was during Weatherly's move out of state that the ALJ's decision regarding Battise was under review by the commission. Floyd J. Logan, Weatherly's former law partner received notice of the commission's decision in December 1992, and notified Weatherly by facsimile. Weatherly in turn contacted Logan and concluded that Battise would have to authorize the appeal. However, Battise was without a phone and it was not until January 6, 1993, that Battise apprised Logan of her desire to appeal the commission's decision.

Weatherly attached an affidavit to Battise's notice of appeal and motion to appeal out of time. In his affidavit, Weatherly admits that the decision of the commission was "forwarded to the law offices of Logan & Keith and a copy of same was transmitted to [him] by way of facsimile transmittal" on or about December 2, 1992. He further states that "it was decided that Ms. Battise would have to be contacted and advised of the fact that she had the right to appeal the aforementioned decision within

thirty (30) days and/or January 2, 1993, and this was in fact communicated to her by Floyd J. Logan." Battise filed her notice of appeal to the circuit court with the commission on January 7, 1993, along with a motion to appeal out of time.

The commission secretary forwarded Battise's appeal, and motion to appeal out of time along with the commission record to the Harrison County Circuit Court. The employer-carrier filed a motion to docket and dismiss appeal with the Harrison County Circuit Court. On May 7, 1993, the circuit court remanded the cause to the commission for determination of whether an out of time appeal should be granted. The commission denied Battise's motion to appeal out of time and granted the employer-carrier's motion to dismiss the appeal.

Battise appealed the commission's decision to the Harrison County Circuit Court. Again the employer-carrier filed a motion to docket and dismiss. The circuit court dismissed the appeal on August 16, 1993. Battise appeals contending the commission and circuit court erred in dismissing her appeal.

I. WHETHER THE EMPLOYER-CARRIER FAILED TO PROVIDE THAT THE NOTICE OF APPEAL WAS NOT TIMELY FILED IN SUPPORT OF ITS MOTION TO DOCKET AND DISMISS.

Section 71-3-51 of the Mississippi Code provides the requirements for appealing a commission decision:

The final award of the commission shall be conclusive and binding unless either party to the controversy shall, within thirty (30) days from the date of its filing in the office of the commission and notification to the parties, appeal therefrom to the circuit court of the county in which the injury occurred.

Miss. Code Ann. § 71-3-51 (Rev. 1995). In addition to the statute, our state's leading textual authority on workers' compensation law, *Mississippi Workmen's Compensation* by Vardaman S. Dunn states the following:

An appeal to the Circuit Court from the final decision of the commission must be perfected within thirty (30) days of the date of the award by filing a notice of appeal with the secretary of the commission.

Vardaman S. Dunn, *Mississippi Workmen's Compensation* § 386 at 482 (3d ed. 1990). Dunn bases this conclusion on the Mississippi Workers' Compensation Commission (MWCC) Procedural Rule 11, which states:

Should either party desire to appeal from an award of the commission, the party desiring to appeal shall within thirty days of the date of the award file a notice of appeal with the

secretary of the commission.

Vardaman S. Dunn, *Mississippi Workmen's Compensation* at 596 (3d ed. 1990).

The commission order in Battise's case was rendered on December 2, 1992. Thirty days from December 2, 1992, was January 1, 1993. The first of January being a legal holiday in Mississippi, the expiration date fell on the following day. However, in 1993, the two days following January 1, were Saturday and Sunday. Therefore, the expiration date for Battise's filing of her notice of appeal was Monday, January 4, 1993. Battise did not file her notice of appeal until January 7, 1993, three days after the thirty day limit expired. Under the applicable law and MWCC Procedural Rule 11, it is clear that Battise did not timely file her notice of appeal.

Battise claims on appeal that the employer-carrier failed to meet its burden of proving an untimely filing because there was no proof of receipt of notification by Battise. Battise raises this issue for the first time on appeal. In her notice of appeal and motion to appeal out of time, she did not raise the issue of notification or challenge the December 2, 1992 date of the Order. She only asked permission to appeal despite her delinquent filing. The law is clear that unless an issue was raised in the trial court for consideration by the trial judge, it cannot be considered on appeal. *Shaw v. Shaw*, 603 So. 2d 287, 292 (Miss. 1992) ("One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level.").

Moreover, Weatherly, Battise's counsel, in his sworn affidavit stated that Logan, his former partner, received notification of the commission order on December 2, 1992, and notified Weatherly by facsimile that day. He further stated that he and Logan discussed the necessity of notifying Battise of her right of appeal. Battise acknowledged and admitted that the time for her appeal had expired in her motion to appeal out of time and in her response to the employer-carrier's motion to dismiss. Additionally, Weatherly admitted the appeal was untimely in his affidavit. Battise is bound by the admission of facts made by her attorney. *Lane v. Woodland Hills Baptist Church*, 285 So. 2d 901, 905 (Miss. 1973) (" . . . an attorney may bind his client by stipulation or admission of facts. . . ."). This issue is procedurally barred and without merit.

II. IF THE APPEAL PERIOD RUNS FROM THE DATE OF SIGNING THE COMMISSION ORDER, WHETHER RULE 4(g) OF THIS COURT APPLIES TO THIS APPEAL, AND IF SO, WHETHER CLAIMANT'S FAILURE TO TIMELY FILE A NOTICE OF APPEAL WAS DUE TO "EXCUSABLE NEGLIGENCE."

Battise argues that her untimely notice of appeal should be excused under Rule 4(g) of the Mississippi Rules of Appellate Procedure (MRAP). Rule 4(g) states:

The trial court may extend the time for filing a notice of appeal upon motion filed not later than thirty days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good

cause. . . .

M.R.A.P. 4(g). However, there is nothing in our law applying MRAP 4(g) to decisions of the Mississippi Workers' Compensation Commission. Battise has not shown that 4(g) is applicable to her appeal. *Wilson v. Mississippi Employment Security Com'n* instructs us that "appeals from state administrative agency hearings are controlled by statute. . . ." *Wilson v. Mississippi Employment Security Com'n*, 643 So. 2d 538, 540 (Miss. 1994). Even if we were to hold that Rule 4(g) applied to Battise's appeal, she did not raise it at the appropriate level. She failed to present Rule 4(g) as a premise for relief to the commission which acts as the trial court in worker's compensation cases. According to the rule, relief under 4(g) may be granted at the trial court's discretion upon motion made to the trial court. Battise did not ask the commission for relief under 4(g) and cannot raise it for the first time on appeal. *See Shaw*, 603 So. 2d at 292. Battise did not have "good cause" as required by the rule. The comment to Rule 4(g) states that the burden of proving excusable neglect falls on the appellant. "Mere failure to learn of entry of the judgment is generally not a ground for showing excusable neglect." Comment, M.R.A.P. 4(g). Counsel's busy schedule is also unacceptable as an excuse. "Filing a notice is a simple act, and a party must do all it could reasonably be expected to do to perfect the appeal in a timely fashion." Comment, M.R.A.P. 4(g). The case of *Matter of Estate of Ware*, 573 So. 2d 773, 776 (Miss. 1990), illustrates how difficult it is to prove excusable neglect. Appellant tried repeatedly to contact her attorney by phone at his home to learn the chancery judge's ruling in her case. *Id.* It took appellant almost two months to reach her attorney only to find that the ruling was against her. *Id.* She hired a new attorney and filed a motion for an out of time appeal. *Id.* The supreme court found that there was insufficient evidence to support her contention of excusable neglect. *Id.*

Similarly, in *Dependents of Townsend v. Dyer Woodturnings, Inc.*, 459 So. 2d 300, 300 (Miss. 1984), the appellants were aggrieved by an order of the Workers' Compensation Commission. However, instead of filing a notice of appeal with the commission, the appellants incorrectly filed their petition for review with the circuit court. *Id.* at 301. Their petition for review was dismissed on the grounds that "an appeal was not properly and effectively taken from the Commission order. . . ." *Id.* On appeal to the supreme court, the appellants sought a deviation from MWCC Procedural Rule 11. *Id.* The Mississippi Supreme Court held that appellants failed to properly file their notice of appeal within the statutorily prescribed time limit and therefore their case was properly dismissed. *Id.* at 302.

Some may view the decision of this Court as rigid and heartless. However, we are bound by statutory provisions and procedural rules prescribing the time limitations for appeals from decisions of the Workers' Compensation Commission. In *Tandy Electronics, Inc. v. Fletcher*, the Mississippi Supreme Court addressed the effect and construction of Supreme Court Rule 4(a) [now Mississippi Rule of Appellate Procedure 4(a)], which in relevant part states:

In a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to this Court the notice of appeal required by rule 3 shall be filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order appealed from.

In dismissing an appeal where the appellant was one day late in filing its notice of appeal, the Court stated:

The interests of certainty and avoiding official arbitrariness in decision-making suggest a hard edged inflexible cutoff to end the reasonable time frame [to appeal], as opposed to a loose or flexible standard. There is no particular virtue in a thirty-day rule, as opposed to a thirty-one day rule. There are important policy considerations at work, however, that suggest a precise rule, strictly enforced, rather than a directive to "file a notice of appeal within a reasonable time" or a precise rule that is riddled with exceptions or is not enforced. All are interested in knowing with certainty whether the appeal has been perfected. Satellite litigation regarding the question of whether the appeal has been perfected is wasteful and time consuming, both to the litigants and to the court and promotes no inherent value.

Strict enforcement has the virtue of treating alike all persons similarly situated. We perceive no circumstances involving potential appellants from adverse judgments in civil actions which would compel a unique or flexible treatment. All are entitled to a reasonable time within which to perfect an appeal, and thirty days is certainly a reasonable time within which to do something which could not possibly take longer than fifteen minutes at the maximum.

Tandy Electronics, Inc. v. Fletcher, 554 So. 2d 308, 310 (Miss. 1989). From the foregoing we are mandated to require strict adherence to and unyielding enforcement of appeal time frames.

When examined in light of the statutorily prescribed time limit and MWCC Procedural Rule 11, Battise's admission of failing to timely file her notice of appeal coupled with her failure to show excusable neglect supports the commission's actions. Acting under our scope of review, we affirm the commission's dismissal of her case.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT AFFIRMING THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION'S DISMISSAL OF BATTISE'S APPEAL IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.

BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., NOT PARTICIPATING.