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2015 MAR -9 AM 10:55

BARBARA A. WHEELER
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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|--|---|---------------------------------|
| DAVID G. BROWN | : | |
| Plaintiff-Appellee | : | CASE NO. 2014 CVD 000374 |
| vs. | : | |
| | : | Judge McBride |
| ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, et al., | : | |
| Defendants | : | DECISION/ENTRY |
| | : | |

Fox & Fox Co., L.P.A., Bernard C. Fox, Jr. and M. Christopher Kneflin, counsel for the plaintiff-appellee David G. Brown, P.O. Box 207, Amelia, Ohio 45102.

Barno Law, LLC, John C. Barno, Melissa A. Black, and Jamison S. Speidel, counsel for the defendant-appellant Core Molding Technologies, Inc., P.O. Box 91155, Columbus, Ohio 43209.

James M. Carroll, Assistant Attorney General, Workers' Compensation Section, James Carroll, counsel for defendant Administrator, Bureau of Workers' Compensation, 1600 Carew Tower, 441 Vine Street, Columbus, Ohio 43215.

This cause is before the court for consideration of a motion to dismiss filed by the plaintiff-appellee David G. Brown and a motion for leave to file an amended notice of appeal filed by defendant-appellant Core Molding Technologies, Inc. (hereinafter referred to as "Core Molding").

The court scheduled and held an evidentiary hearing on the motions on November 21, 2014. When the final post-hearing memorandum was filed on December 11, 2014, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On January 11, 2014, a decision was issued refusing the appeal of Core Molding to the Industrial Commission.¹ The "record of proceedings" states that those findings were mailed on January 11, 2014.²

On March 18, 2014, Core Molding filed its notice of appeal in this court. That notice states in pertinent part as follows: "Core Molding Technologies, Inc. hereby gives notice of its appeal to the Industrial Commission Order of January 9, 2014, mailed on January 11, 2014, and received by the undersigned on January 15, 2014 * * * ."³

The plaintiff-appellee David Brown subsequently filed the present motion to dismiss the appeal pursuant to Civ.R. 12(B)(1), arguing that Core Molding failed to timely file its appeal. Brown argues in his motion that the time for appeal ran on March 17, 2014 since the decision was received by counsel for the employer on January 15, 2014.

¹ Notice of Appeal, Exhibit A.

² Id.

³ Notice of Appeal.

In response, Core Molding filed a memorandum contra to the motion to dismiss and a motion for leave to amend its notice of appeal. Core Molding argues in both written filings that the notice of appeal contained a clerical error and that counsel for Core Molding did not receive the decision at issue until January 18, 2014. In support of this contention, Core Molding submitted the affidavit of Joanie Damron, the legal assistant at Barno Law, LLC.⁴ As a result, the court set the matter for an evidentiary hearing.

At the evidentiary hearing, Joanie Damron testified that one of her daily tasks is to go to Barno Law's post office box, retrieve and open the mail, and import the documents electronically into the computer system because Barno Law is a paperless office. Damron testified that, although Barno Law is a paperless office, the office has chosen not to electronically receive notices and orders from the Industrial Commission.

Damron testified that, although she does not have an independent memory of the specific refusal order at issue in this case, the document list used at Barno Law indicates that the refusal order was entered on the list on January 20, 2014.⁵ As a result, she testified that the order was received on Saturday, March 18, 2014. Damron also sent an email to John C. Barno on January 20th regarding the refusal order.⁶ She further testified that there have been problems with Barno Law's post office box and that it is not uncommon to receive letters late. She testified that it is mandatory in the office that mail is scanned into the system the day it is received.

Joanie Damron testified that she drafted the subject notice of appeal and submitted it to the attorney on the case for his approval. She could not explain why the

⁴ Motion for Leave to Amend Notice of Appeal, Exhibit A.

⁵ Defendant's Exhibit A1.

⁶ Defendant's Exhibit A2.

notice states that the refusal order was received on January 15, 2014 other than to say that it was a clerical error.

The document list indicates that the notice of appeal was mailed on March 13, 2014. Damron testified that it was sent via FedEx 2-day mail but that the court did not receive it until March 18th. She stated that the only reason for using FedEx 2-day mail was so that she could track the package and have confirmation of delivery.

STANDARD OF REVIEW

"The standard for reviewing the dismissal of a complaint for lack of jurisdiction, pursuant to Civ.R. 12(B)(1), is whether the complaint has raised any cause of action which the court has authority to decide."⁷ The court "must determine whether the complaint contains sufficient allegations to demonstrate that the common pleas court has jurisdiction over the asserted claims."⁸ "In determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the complaint."⁹

LEGAL ANALYSIS

R.C. 4123.512 states in relevant part as follows:

⁷ *McCoy Hedges v. Conrad*, 10th Dist. Franklin No. 02AP-362, 2002-Ohio-5792, ¶ 7, citing *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989); and *McHenry v. Indus. Comm.*, 68 Ohio App.3d 56, 62, 587 N.E.2d 414 (4th Dist., 1990).

⁸ *Id.*

⁹ *Id.*

“(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case * * * to the court of common pleas of the county in which the injury was inflicted * * * * * Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

* * *

(B) The notice of appeal shall state the names of the administrator of workers' compensation, the claimant, and the employer; the number of the claim; the date of the order appealed from; and the fact that the appellant appeals therefrom.”

R.C. 4123.511(E) provides in pertinent part as follows:

“Upon the filing of a timely appeal of the order of the staff hearing officer issued under division (D) of this section, the commission or a designated staff hearing officer, on behalf of the commission, shall determine whether the commission will hear the appeal. * * * If the commission or the designated staff hearing officer determines not to hear the appeal * * * the commission or the designated staff hearing officer shall issue an order to that effect and notify the parties and their respective representatives in writing of that order.”

“The requirement that the notice of appeal be timely filed * * * is jurisdictional.”¹⁰

“Accordingly, jurisdiction is vested in the Court of Common Pleas if the notice of appeal is filed within 60 days from receipt of the Commission's refusal order.”¹¹

¹⁰ Id. at ¶ 8, citing e.g., *Fisher v. Mayfield*, 30 Ohio St.3d 8, 9, 505 N.E.2d 975 (1987).

¹¹ *Swartzwelder v. Ryan*, 9th Dist. Medina No. 08CA0050-M, 2009-Ohio-779, ¶ 8.

"The Ohio Supreme Court has held that where a right of appeal is conferred by a statute, the appeal can be perfected only in the mode prescribed by that statute, and that 'the exercise of the right conferred is conditional upon compliance with the accompanying mandatory requirements.'"¹²

"A simple clerical error in the notice of appeal does not divest a reviewing court of jurisdiction to hear an appeal so long as the notice substantially complies with" the mandate of R.C. 4123.512(B).¹³ " '[S]ubstantial compliance for jurisdictional purposes occurs when a timely notice of appeal filed pursuant to R.C. [4123.512] includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities.'"¹⁴ "The issue of substantial compliance of the notice of appeal is a question to be determined on a case-by-case basis."¹⁵

"The Supreme Court stated in *Fisher [v. Mayfield]* that its determination was guided by the fundamental tenet of judicial review in Ohio that courts should decide cases on their merits."¹⁶

The court notes that, in his post-hearing brief, David Brown argues that the appeal was not proper because it indicates that the order being appealed was the refusal order rather than the order of the staff hearing officer. The court finds that, regardless of whether an appeal may or may not identify a refusal order as the order

¹² *Dikong v. Ohio Supports, Inc.*, 985 N.E.2d 949, 2013-Ohio-33, ¶ 10 (1st Dist.), quoting *Zier v. Bur. of Unemp. Comp.*, 151 Ohio St. 123, 84 N.E.2d 746 (1949), paragraph one of the syllabus.

¹³ *Lehman v. Buehrer*, 8th Dist. Cuyahoga No. 97323, 2012-Ohio-931, ¶ 10, citing *Mayfield*, supra, 30 Ohio St.3d 8 at paragraph two of the syllabus.

¹⁴ *Id.*, quoting *Mayfield* at paragraph two of the syllabus.

¹⁵ *Wethington v. University of Cincinnati*, 1st Dist. Hamilton No. C-980656, 1999 WL 193708, *2, citing *Mayfield* at paragraph two of the syllabus.

¹⁶ *Gdovichin v. Geauga Cty. Hwy. Dept.*, 90 Ohio App.3d 805, 807, 630 N.E.2d 778 (11th Dist., 1993), citing *Mayfield* at 11.

being appealed¹⁷, the notice of appeal in the present case substantially complied with R.C. 4123.512. The notice included sufficient information to put the parties on notice that an appeal was being filed regarding David Brown's claim for allowance of the condition of right elbow tendon tear. The date and location of the injury, and the BWC claim number, were included in the notice of appeal. Therefore, the court will address the remaining issue of this motion, which is whether the appeal was timely filed.

In *Cantrell v. Celotex Corp.*, 105 Ohio App.3d 90, 663 N.E.2d 708 (1st Dist., 1995), the court noted that “* * * [N]o right of appeal attaches as the result of mere knowledge of the decision, and that it is not until after receipt of written notice that the right of appeal attaches and the time for appeal begins to run.”¹⁸ The *Cantrell* case involved an attorney who did not receive any notice of the commission's decision and who was therefore required to avail himself of the savings procedure set forth in R.C. 4123.522. However, in the case at bar, there is no dispute that counsel for Core Molding received the refusal order; the only question is when counsel actually received that order.

The court found Joanie Damron's testimony to be credible at the evidentiary hearing. It is mandatory at the Barno Law office that all mail be entered into the computer system the day it is received or, if it is received on a weekend, the Monday immediately following that weekend. The refusal order was entered on the electronic document list on January 20, 2014 and Damron testified that this would mean it was received on the previous Saturday, January 18th. The January 15th date typed in the

¹⁷ See, e.g., *Lehman*, supra, 2012-Ohio-931 (the notice of appeal stated that the order being appealed was the order refusing to permit the appeal to the three member Industrial Commission).

¹⁸ *Cantrell*, supra, 105 Ohio App.3d at 95, citing *Weiss v. Ferro Corp.*, 44 Ohio St.3d 178, 182, 542 N.E.2d 340 (1989).

notice of appeal was a clerical error that was not caught by Damron or the attorney. Based on the evidence received at the evidentiary hearing, the court finds that the office of appellant's counsel did not receive the refusal order at issue until January 18, 2014. As such, the notice of appeal was timely filed on March 18, 2014.

The appellant has filed a motion to amend its notice of appeal. "The Ohio Rules of Civil Procedure apply to all civil proceedings, including special statutory proceedings like those under the workers' compensation statutes, unless they are 'by their nature * * * clearly inapplicable.'"¹⁹ Civ.R. 15, which allows for the amendment of pleadings, has been found to apply to petitions filed in workers' compensation cases because " 'the pleading that R.C. 4123.512 names a petition is complaint.' "²⁰ However, the petition is a separate filing from the notice of appeal.

Nevertheless, in *AutoZone, Inc. v. Mercer*, 12th Dist. Madison No. CA2002-06-011, 2002-Ohio-6521, the employee-appellee moved to dismiss the appeal because the employer's notice of appeal referenced the order being appealed as a decision pertaining to treatment and such decisions are not appealable to a court of common pleas.²¹ The employer "moved to correct typographical/clerical errors in the notice of appeal[,] " arguing that it actually intended to appeal the decision of the industrial commission approving the employee's claim for two conditions.²² That decision was attached to the notice of appeal.²³ The trial court granted the employer's motion to

¹⁹ *Wethington*, supra, *4, quoting Civ.R. 1(C); and *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 364, 691 N.E.2d 667 (1998).

²⁰ *Id.* at *5, quoting *Robinson* at 364.

²¹ *Mercer*, supra, at ¶ 4.

²² *Id.*

²³ *Id.*

correct the error and held that “the corrected notice of appeal was ‘deemed accepted and filed as of the date of the entry[.]’ * * * ”²⁴

The appellate court found that the notice of appeal was sufficient to give the employee notice and the court jurisdiction “since it contained the names of the employee and employer, the number of the claim, the fact that the action is an appeal, and a copy of the decision being appealed was attached to the notice of appeal.”²⁵ The court further held that “[s]ince [the employer’s] appeal substantially complied with the jurisdictional requirements of R.C. 4123.512(B), was ‘deemed accepted and filed as of the date of the entry,’ and appealed an order granting an employee’s right to participate, the trial court had jurisdiction to hear the case.”²⁶ By relying on the amended notice of appeal in making its determination on the issue of jurisdiction, the appellate court effectively sanctioned the court’s decision to allow said amendment.

The date that the employer or his representative received the order at issue is not one of the five items required to be included in a notice of appeal in order to vest this court with jurisdiction. However, the fact that it was included in the present notice of appeal and the date was incorrectly set forth in the notice due to a clerical error raised the issue of whether the notice was timely filed. This court has found, based on the evidence presented, that the date included in the notice was a clerical error and that appellant’s counsel received the order on January 18, 2014. As such, the court will grant the appellant leave to amend its notice of appeal to correct this clerical error.

²⁴ Id.

²⁵ Id. at ¶ 18.

²⁶ Id. at ¶ 20.

CONCLUSION

The plaintiff-appellee David Brown's motion to dismiss pursuant to Civ.R. 12(B)(1) is not well-taken and is hereby denied.

The defendant-appellant Core Molding Technologies, Inc.'s motion for leave to amend its notice of appeal is well-taken and is hereby granted. Said amendment shall be served and filed within fourteen days of the date of this Decision/Entry.

IT IS SO ORDERED.

DATED: 3-9-15



Judge Jerry R. McBride

NOTICE TO CLERK:

The Clerk is hereby directed to serve upon all parties not in default for failure to appear notice of this judgment and the date of its entry upon the journal. Within three days of entering this judgment upon the journal, the Clerk shall serve the parties in a manner prescribed by Civ.R.5(B) and note the service in the appearance docket.



Judge Jerry R. McBride