IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LAMOTTE WALLACE,	)
	)
Employee-Appellant,	)
	)
v.	) C.A. No. N11A-08-007 WCC
	)
P & C ROOFING, INC.,	)
	)
Employer-Appellee.	)

Submitted: September 12, 2011
Decided: November 15, 2011

On Employer-Appellee's Motion to Dismiss – **GRANTED**

ORDER

Lawrence A. Ramunno, Esquire, 903 North French Street, Wilmington, DE 19801. Attorney for Employee-Appellant.

John W. Morgan, Esquire, Heckler & Frabizzio, 800 Delaware Avenue, Suite 200, Wilmington, DE 19801. Attorney for Employer-Appellee.

CARPENTER, J.

On this 15th day of November, 2011, upon consideration of P&C Roofing, Inc.'s Motion to Dismiss it appears to the Court that:

1. In January of 2011, Lamotte Wallace ("Appellant") petitioned the Industrial Accident Board ("the Board") to determine compensation due to him for neck injuries he allegedly sustained while working for P&C Roofing, Inc. ("Appellee"). The Board heard Appellant's claims in May of 2011. On July 8, 2011, the Board mailed to Appellant its decision to deny compensation. Appellant filed a notice of appeal of the Board's decision on August 12, 2011, thirty-five days after the Board mailed its decision.

2. On August 17, 2011, Appellee filed a Motion to Dismiss the appeal for untimeliness. Appellee claims the thirty-day statute of limitations imposed by 19 Delaware Code § 2349 bars Appellant's appeal.[1]

3. Appellant filed a response to the Motion to Dismiss on August 24, 2011. In his response, Appellant contends that the date he received the Board's decision would reflect that it was mailed later than the July 8, 2011 date noted in the decision. Appellant also argues that the appeal was timely filed under Superior Court Civil Rules 6(a) and 6(e). Rule 6(a) states that the day after which the designated period of time begins to run should not be included in any period of

[1] *See* 19 *Del. C.* § 2349 ("An award of the Board . . . shall be final and conclusive between the parties . . . unless within 30 days of the day the notice of the award was mailed to the parties either party appeals to the Superior Court for the county in which the injury occurred . . . ").

time computed by the Rules and if the last day of a period falls on a date on which the office of the Prothonotary is closed, the period "shall run until the end of the next day on which the office of the Prothonotary is open."[2] Rule 6(e) states, "Whenever a party has the right to or is required to do some act or take some proceeding within a prescribed period after being served and service is by mail, 3 days shall be added to the prescribed period."[3]

4. There are two questions before the Court: First, is the recitation of the mailing date on the face of the Board's decision conclusive? Second, do the time allowances provided by Rules 6(a) and 6(e) apply to appeals from decisions mailed by the Industrial Accident Board?

5. In this case, Appellant admits that the Board's decision recites, on its face, that it was mailed on July 8, 2011.[4] Appellant argues that he has reason to believe that no mailing occurred on July 8, 2011 "due to the receipt date," but he has not alleged an alternative mailing date or indicated that he has any evidence to support one.[5] A party who does not timely file an appeal of an Industrial Accident Board decision must articulate his reasons for believing that the noted mailing date was not the actual mailing date. As an example, this Court in *Alston v. Diamond*

[2] Super. Ct. Civ. R. 6(a).
[3] Super. Ct. Civ. R. 6(e).
[4] On the last page of the Board's decision, which Appellant attached to his Notice of Appeal, the Board typed "Mailed Date:" next to which was handwritten "7-8-11."
[5] Appellant Resp. ¶ 2.

State Machining rejected the mailing date noted at the bottom of an agency decision as the actual mailing date because Appellee asserted that he checked his mail regularly and did not receive the decision until twenty days later.[6] In contrast here, Appellant does not know when he received the Board's decision or have any evidence to suggest that the mailing did not occur as noted on the decision. His bald assertion that the Board mailed the decision later than July 8, 2011 "due to the receipt date" does not persuade the Court that the noted mailing date was not the actual mailing date. The Court will consider the mailing date written on the decision to be conclusive in the absence of any evidence to the contrary.[7] The Court will therefore calculate the timeliness of Appellant's appeal using the July 8, 2011 date on the face of the Board's decision.

6. The second question before the Court is whether the time allowances provided by Rules 6(a) and 6(e) apply to appeals from decisions mailed by the Board. This is a moot question. Even under the most generous computation allowed by the Rules, Appellant's appeal is untimely.[8] Furthermore, this Court has held that the language of Section 2349 does not indicate a legislative intent to

[6] *Alston v. Diamond State Machining*, 1997 WL 914854 (Oct. 16, 1997 Del. Super.).
[7] *See Scott v. State*, 2003 WL 164288 (Jan. 21, 2003 Del. Super.) (finding that an Industrial Accident Board decision was mailed on the date noted, in handwriting, on the decision).
[8] The Board mailed its decision on July 8, 2011. The appeal deadline, not including the mailing date, was Sunday, August 7. If the Court applied Rule 6(a), the Court would not include the appeal deadline in the calculation because it fell on a Sunday. However, the appeal deadline then would have been Monday, August 8. The appeal, filed by Appellant on August 12, would still have been untimely. Applying Rule 6(e) lengthens the appeal period to thirty-three days. Under that scenario, the appeal deadline would have been Wednesday, August 10, 2011. Because the office of the Prothonotary was open on that date, the Court would not apply Rule 6(a), and Appellant's appeal would still be untimely filed.

extend the thirty-day time period for any reason[9] and that Rule 6(e) does not apply to notices of appeal from Industrial Accident Board decisions that were received by mail.[10]

7. As a result, the Court finds that Appellant's appeal was untimely filed and will grant the Motion to Dismiss under Superior Court Rule 72(i).

8. For the foregoing reasons, Appellee's Motion to Dismiss is hereby GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[9] *Irvin-Wright v. State*, 2003 WL 21481004, *2 (June 16, 2003 Del. Super.) (explaining that the General Assembly would have written accommodations for delay into Section 2349 if it had intended to).
[10] *See Genesis Health Ventures v. Horne,* 2008 WL 2331983, *2 (May 30, 2008 Del. Super.) (finding that the time allowances of Rule 6(e) do not apply to notices of appeal from decisions mailed by the Industrial Accident Board).