

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002572-WC

FLUOR CONSTRUCTION INTERNATIONAL,
INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-30526

LARRY KIRTLEY; GARDNERS SERVICE
COMPANY; SPECIAL FUND; HONORABLE
DONALD G. SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD

APELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, HUDDLESTON, AND McANULTY, JUDGES.

DYCHE, JUDGE: Fluor Construction International, Inc., petitions this court for review of an opinion of the Workers' Compensation Board ("Board") dismissing its appeal from an order of the Administrative Law Judge ("ALJ"). We reluctantly affirm.

Fluor had petitioned the ALJ for reconsideration of an award adverse to it. On March 30, 2000, the ALJ signed an order denying the petition. Pursuant to 803 KAR 25:010E §1(5), that order was deemed "filed" three days later. Unfortunately, the

order was not mailed to counsel of record for Fluor, who did not find out about the existence of the order until May 5, 2000, when he called to inquire about it. On May 8, he filed a motion for the order to be set aside and reissue the order so that his appeal would not be untimely. The ALJ granted that motion on May 30, and Fluor filed a Notice of Appeal to the Board on June 9, 2000.

The Board raised the issue of its jurisdiction to hear the appeal *sua sponte*, remarking that, "Failure to file a timely notice of appeal is a jurisdictional defect that is fatal to the appeal." (Citations omitted.) It further stated that the "fact that Fluor's counsel was not served with a copy of the order on petition for reconsideration excuses it from filing a timely notice of appeal." The Board applied CR 77.04(4) to this situation:

Failure of the trial court to require service of notice of entry of any judgment or order under this rule or the failure of the clerk to serve such notice, or the failure of a party to receive notice, shall not affect the validity of the judgment or order, and does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73.02(1).

CR 73.02(1) allows the trial court, upon a showing of "excusable neglect," to extend the time for taking an appeal for not more than 10 days from the expiration of the original time.

While we sympathize with the plight of counsel for Fluor, we can find no authorization in the Kentucky Administrative Regulations for the action of the ALJ, who was, we are sure, only trying to be fair. And, assuming that the

adoption by the Board of the provisions of CR 77.04(4) is proper, not even the exception provided for in CR 73.02(1) saves the appeal. If the Kentucky Supreme Court, the General Assembly, or the writers of the Administrative Regulations deem this problem to be antithetical to the administration of justice, perhaps one of those bodies will remedy this situation. Until then, we find no relief for Fluor.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James G. Fogle
Louisville, Kentucky

BRIEF FOR APPELLEE
SPECIAL FUND:

Joel D. Zakem
Frankfort, Kentucky