

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH E. BORGNE,

Plaintiff-Appellant,

v

ADVANTICA RESTAURANT GROUP,
d/b/a DENNY'S, INC.,

Defendant-Appellee.

UNPUBLISHED
December 20, 2002

No. 235254
WCAC
LC No. 01-000109

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of the Worker's Compensation Appellate Commission (WCAC) denying plaintiff's motion to accept a late filed transcript and dismissing his appeal for failure timely to file the transcript. We affirm.

The facts of this case are rather straightforward. In an opinion and order mailed March 7, 2001, the magistrate found plaintiff entitled to benefits as a result of a work-related injury, but held that he forfeited his right to benefits after May 8, 2000 because of his unreasonable refusal to perform reasonable employment (formerly known as favored work). Plaintiff then filed a timely claim for review with the WCAC on March 16, 2000. Under MCL 418.861a(5), the transcript of the hearing was due within 60 days of that date, i.e., by no later than May 15.

Plaintiff timely requested preparation of the transcripts of the hearings held on July 24 and October 9, 2000. It appears that plaintiff's counsel believed that the court reporter or reporting service would file the transcripts with the WCAC. However, counsel learned that the WCAC had changed its policy so as to require the court reporter to serve the transcripts on the appellant, who is obliged to file them with the WCAC and to serve the other parties.

On May 17, 2001, two days after the transcripts were due, plaintiff filed a motion to accept the transcripts as timely, claiming that they had just recently been received. Plaintiff argued that the transcripts should be accepted as timely because the untimely filing of the transcripts the next day by overnight mail was due to no fault of plaintiff or his counsel, and so under the circumstances it would be an abuse of discretion to dismiss the appeal. To further eliminate any possible prejudice to defendant and to show good faith, plaintiff stated that he would file his

brief by June 14, the date it would have been due had the transcript been timely filed on May 15. Defendant did not answer the motion.

By order dated June 7, 2001, the WCAC denied plaintiff's motion, dismissed his appeal, and summarily affirmed the magistrate's decision. The WCAC noted that the motion was two days late and the transcripts three days late, and held that plaintiff failed to show sufficient cause for the untimely filing.

The Supreme Court's recent decision in *Kurtz v Faygo Beverages, Inc*, 466 Mich 186; 644 NW2d 710 (2002) controls this case. In *Kurtz*, the Court noted:

The WCAC's written policies provide clear notice of the obligation to request extensions of time before the due date. As stated in the form letter sent in this case, as of January 1, 1999, court reporters no longer file transcripts directly with the WCAC, but instead provide them to counsel. Thus, attorneys representing appellants can and should know if a transcript will not be timely filed and are in a position to request an extension within the allotted time.

Of course, unusual situations may arise in which an appellant's failure to timely request an extension might be excused. Where such a claim is made, evaluation of the circumstances is entrusted to the WCAC's discretion. Appellate courts review such decisions regarding failure to comply with procedural deadlines for an abuse of discretion. (Citations omitted). [466 Mich 192-193].

In *Kurtz*, the plaintiff did not file the transcript by the due date, nor did he request an extension. Instead, the plaintiff claimed in his motion for reconsideration of the dismissal order that the reporter's failure to prepare the transcript by the due date excused his failure to file the transcript in a timely fashion. The Court in *Kurtz*, noting that the plaintiff's explanation did not excuse his failure to make a timely request for an extension, found that the WCAC did not abuse its discretion in dismissing the plaintiff's appeal, "[i]n view of the WCAC's efforts to remove the perceived 'chaos' in prior practice and to enforce timely filing deadlines." *Id.*, p 194. Specifically, the Court stated:

Accordingly, we hold that a court reporter's delay in preparing a transcript does not necessarily excuse a late filing where the appellant fails to request an extension of time under procedures established by the WCAC. In the circumstances of this case, the WCAC did not abuse its discretion in dismissing the appeal. (Footnote omitted) [466 Mich 194].

Likewise, in the present case, we cannot find that the WCAC abused its discretion in dismissing the appeal. Although plaintiff cannot be faulted for the court reporter's failure to prepare the transcript by the due date, this does not excuse his failure to make a timely request for an extension. Here, no unusual circumstances were present that excused plaintiff's failure to request an extension. Accordingly, we affirm the dismissal order.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Pat M. Donofrio