

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 98-CC-00090-COA**

JAMES D. RUSSELL

APPELLANT

v.

**MITCHELL-PUTNAM SIGNS AND INSURANCE COMPANY OF NORTH
AMERICA**

APPELLEES

DATE OF JUDGMENT: 01/06/1998
TRIAL JUDGE: HON. ROBERT WALTER BAILEY
COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: THOMAS L. BOOKER JR.
LAUREL G. WEIR
ATTORNEY FOR APPELLEES: DANIEL M. BAKER
JAY R. MCLEMORE
NATURE OF THE CASE: CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION: DISMISSED APPEAL BECAUSE APPELLANT'S BRIEF
WAS FILED TWO WEEKS LATE
DISPOSITION: AFFIRMED - 06/22/99
MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED: 7/13/99

BEFORE McMILLIN, C.J., DIAZ, AND LEE, JJ.

DIAZ, J., FOR THE COURT:

¶1. James D. Russell, the claimant, appeals the decision of the Lauderdale County Circuit Court which dismissed his appeal of an order of the Workers' Compensation Commission because his brief was untimely filed. Russell raises the following issues in his appeal: (1) whether the circuit court abused its discretion in dismissing his appeal when his brief was filed two weeks late and (2) whether the Commission's finding is supported by substantial credible evidence. We find that the first issue is dispositive; therefore, we do not address the merits of the second assignment of error.

FACTS

¶2. The case *sub judice* originated from a hearing on Russell's claim for benefits under the Mississippi Workers' Compensation Act for injuries sustained on January 17, 1989, while in the course and scope of his employment with the Mitchell-Putnam Sign Company. The employer admitted the compensability of the injury and paid Russell's medical benefits. The issues to be resolved were the extent of permanent disability, if any, and the employer and carrier's liability for medical services and supplies rendered by an out-of-state treating physician. After a hearing on the merits, the administrative judge found that Russell had not sustained a temporary or permanent disability as a result of his on the job injury.

¶3. Russell appealed the administrative judge's decision to the Full Commission. However, he never filed a brief. On August 20, 1997, the Full Commission affirmed the administrative judge's order and found no temporary or permanent disability.

¶4. On September 11, 1997, Russell appealed the decision of the Full Commission to the Lauderdale County Circuit Court. On October 2, 1997, the record was filed in the circuit court. He filed his brief on November 25, 1997--fourteen days after the forty day deadline set forth by Mississippi Rule of Appellate Procedure 31(b). On December 11, 1997, the employer and carrier filed a motion to dismiss or, in the alternative, to strike. No response to this motion was filed by Russell. Thereafter, on January 6, 1998, the circuit court entered an order dismissing Russell's appeal for failure to comply with Mississippi Rule of Appellate Procedure 31(b) as incorporated into the Uniform Circuit and County Court Rule 5.06. Feeling aggrieved, Russell appeals both the circuit court's dismissal of his appeal and the substantive merits of the Full Commission's decision.

DISCUSSION

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DISMISSING RUSSELL'S APPEAL WHEN HIS BRIEF WAS FILED TWO WEEKS LATE

¶5. Pursuant to Uniform Circuit and County Court Rule 5.06, appeals to circuit courts are to be filed in the same manner as those to the Mississippi Supreme Court which are governed by Mississippi Rules of Appellate Procedure.

¶6. Mississippi Rule of Appellate Procedure 31(b) states in pertinent part:

The appellant shall serve and file the appellant's brief within 40 days after the date on which the record is filed.

Recently, in *American Investors, Inc. v. King*, 97-CA-01255-SCT, *2, (¶ 3) (Miss. 1999), the Mississippi Supreme Court held that the circuit court should not dismiss an appeal for failure to prosecute where the appellant is denied "prior notice and an opportunity to cure the default."

¶7. Here, Russell filed his brief on November 25, 1997, fifty-four days after filing the record with the circuit court. The employer and carrier's motion to dismiss for failure to prosecute notified Russell that his appeal was defective and gave him an opportunity to cure the default. Nonetheless, he did not offer any reasons

why his brief should be considered after the deadline for filing nor did he respond to the employer and carrier's motion to dismiss for exceeding the filing deadline. Since Russell failed to provide good cause as to why his brief was untimely filed and since his brief was filed two weeks late, the circuit court judge properly dismissed the appeal as untimely. Therefore, this assignment of error is without merit.

¶8. THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT DISMISSING THE APPELLANT'S APPEAL IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, COLEMAN, LEE, PAYNE, AND THOMAS, JJ., CONCUR.

IRVING, J., NOT PARTICIPATING.