



of Labor Law Compliance (Bureau) also filed a Motion to Quash Petitioners' Appeal (Motion to Quash).

The relevant facts in this case are as follows. Ted Babich owns and operates Babich Plumbing Company, which was awarded four public works projects: (1) the Avalon Municipal Building for Avalon Borough; (2) the Friendship Ridge Phase 5D for the Beaver County Commissioners; (3) the New 911 Emergency Dispatch Center for Butler County; and (4) the Athletic Facility for McGuffey School District (collectively, Projects). The specifications for the Projects included predetermined minimum wage rates established by the Bureau.

In or around 2005, David Lipchak, an investigator for the Bureau, conducted an investigation regarding the wages that Petitioners paid to various workers for work they had performed on the Projects. Following the investigation, the Bureau issued an order to show cause charging Petitioners with intentionally failing to pay prevailing wages to nine workers,<sup>2</sup> which resulted in an underpayment of, at least, \$139,469.97. Petitioners filed an answer in which they denied the charges contained in the order to show cause and asserted that all nine workers alleged to have been underpaid were subcontractors, and not employees.

A hearing on the matter was held on March 30, 2007. During the hearing, Mr. Lipchak appeared on behalf of the Bureau and testified as to the nature and extent of his investigation. Four of the workers alleged to have been underpaid, William Newman, David Brown, William Hines, III, and Floyd Rose, also appeared on behalf

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<sup>2</sup> The nine workers included: John Ansell, John Bauer, David Brown, Mike English, William Hines, III, Clay Klien, William Newman, Floyd Rose, and Merle Slippey.

of the Bureau and testified as to the nature of their work relationship with Petitioners. Further, the Bureau submitted contracts and prevailing wage predeterminations for the Projects, payroll records for the Projects, and written statements from William Newman, David Brown, and Floyd Rose. Ted Babich appeared on behalf of Petitioners and testified that the workers alleged to have been underpaid were subcontractors, and not employees. Petitioners also submitted two invoices from John Bauer, attempting to establish his status as a subcontractor.

Following the hearing, the Secretary issued an adjudication and order rejecting Petitioners' assertion that the workers alleged to have been underpaid were subcontractors, and not employees. (Secretary's Adjudication and Order, Conclusions of Law (COL) ¶ 4.) The Secretary concluded that Petitioners improperly paid wages that were less than the prevailing wages that had been predetermined for the Projects to, at least, nine workers. (COL ¶ 3.) The Secretary also concluded that Petitioners had failed to maintain accurate records documenting the wages paid to such employees. (COL ¶ 6.) The Secretary further concluded that Petitioners' "actions were willful and/or with a knowing disregard of the rights of their workers." (COL ¶ 7.) Accordingly, the Secretary debarred Petitioners from receiving public work contracts for three years.

Petitioners appealed the Secretary's adjudication and order to the Board,<sup>3</sup> and the Board conducted oral argument on the matter. On October 19, 2007, the Board issued an opinion and order affirming the Secretary's determination.

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<sup>3</sup> Petitioners also filed a Petition for Stay with the Allegheny County Court of Common Pleas (trial court), seeking a stay of the three-year debarment. In response, the Bureau filed Preliminary Objections asserting, among other things, that the trial court lacked subject matter jurisdiction over the Petition for Stay and that Petitioners had failed to exhaust their statutory

On January 8, 2008, Petitioners filed with the Court of Common Pleas of Allegheny County (trial court) a Petition to File Appeal *Nunc Pro Tunc*, which was granted by order dated January 9, 2008. Petitioners filed with the trial court a *nunc pro tunc* appeal of the Board's order on February 11, 2008, alleging that they had not violated the Act because the nine individuals whom they were found to have underpaid were subcontractors, and not employees. Thereafter, the Bureau filed an answer averring that: (1) Petitioners' appeal was untimely; (2) Petitioners did not meet the requirements for an appeal *nunc pro tunc*; and (3) the trial court lacked jurisdiction to grant Petitioners permission to proceed *nunc pro tunc*. By order dated February 25, 2008, the trial court transferred the matter to this Court and granted the Bureau leave to file, with our Court, an appeal of the order granting Petitioners permission to proceed *nunc pro tunc*.

The Bureau subsequently filed, with this Court, an appeal of the trial court's order granting Petitioners permission to proceed *nunc pro tunc*. In addition, the Bureau filed its Motion to Quash, through which it seeks to have Petitioners' appeal quashed as untimely for failure to establish grounds for an appeal *nunc pro tunc*. By order dated April 10, 2008, this Court denied the Bureau's appeal of the trial court's order granting Petitioners permission to proceed *nunc pro tunc* as interlocutory and not immediately appealable. This Court also indicated that the Bureau's Motion to Quash would be treated as a motion for reconsideration of the trial court's order granting Petitioners permission to proceed *nunc pro tunc* and listed it for disposition

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remedies. By order dated August 27, 2007, the trial court granted the Bureau's Preliminary Objections and dismissed the Petition for Stay.

with the merits.<sup>4</sup> Further, the parties were directed to, in their principal briefs, address the merits of this action as well as the issue of whether permission to proceed *nunc pro tunc* was properly granted.<sup>5</sup>

We will first consider whether Petitioners were properly granted permission to proceed *nunc pro tunc*. In their Petition to File Appeal *Nunc Pro Tunc*, Petitioners allege that they did not file a timely appeal because they did not initially receive a copy of the Board’s opinion and order. (Petition to File Appeal *Nunc Pro Tunc*.) Petitioners further allege that, on December 13, 2007, counsel for the Bureau sent them a new copy of the Board’s opinion and order, which was received on December 14, 2007.<sup>6</sup> (Petition to File Appeal *Nunc Pro Tunc*; Petitioners’ Appeal ¶¶ 11-12.) The Bureau contends that Petitioners’ allegations are insufficient to satisfy the requirements for allowing a *nunc pro tunc* appeal. We agree.

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<sup>4</sup> We note that this case raises an interesting procedural question as to whether or not the trial court had the authority to grant the Petition to File Appeal *Nunc Pro Tunc* that was filed by Petitioners where it lacked subject matter jurisdiction over the *nunc pro tunc* appeal that followed. However, because of our disposition in this case, we need not address this issue.

<sup>5</sup> Petitioners, in their brief, do not address the issue of whether *nunc pro tunc* relief was properly granted.

<sup>6</sup> There is no question that Petitioners filed an untimely appeal in this case. Section 5571(a) of the Judicial Code provides that “[t]he time for filing . . . a petition for review of a quasi-judicial order in the . . . Commonwealth Court shall be governed by general rules.” 42 Pa. C.S. § 5571(a). According to Pennsylvania Rule of Appellate Procedure 1512(a)(1), “[a] petition for review of a quasijudicial order . . . shall be filed with the prothonotary of the appellate court within 30 days after the entry of the order.” Pa. R.A.P. 1512(a)(1). The date of the entry of an order of a government unit is “the day . . . the office of the government unit mails or delivers copies of the order to the parties.” Pa. R.A.P. 108(a)(1). Here, the Board mailed a copy of the Board’s opinion and order to Petitioners on October 19, 2007. (Verification of Gina Meckley ¶¶ 3-4.) However, Petitioners did not file their appeal until February 11, 2008, which was well outside of the 30-day period for taking an appeal. Thus, Petitioners’ appeal was clearly untimely.

When a party fails to file a timely appeal, the “appellate courts may grant a party equitable relief in the form of an appeal *nunc pro tunc* in certain extraordinary circumstances.” Criss v. Wise, 566 Pa. 437, 442, 781 A.2d 1156, 1159 (2001). A *nunc pro tunc* appeal may be granted where a party proves that the failure to file a timely appeal was caused by fraud or an administrative breakdown. Id. (citing West Penn Power Co. v. Goddard, 460 Pa. 551, 556, 333 A.2d 909, 912 (1975)). A *nunc pro tunc* appeal may also be granted where the appellant proves that: “(1) the appellant’s notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant’s counsel; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay.” Id. (citing Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 384-86, 671 A.2d 1130, 1131-32 (1996) and Bass v. Commonwealth Bureau of Corrections, et al., 485 Pa. 256, 259-60, 401 A.2d 1133, 1135-36 (1979)).

This Court has made it clear that “[b]are allegations that one has failed to receive a mailing are insufficient cause for allowing a *nunc pro tunc* appeal.” J.A. v. Department of Public Welfare, 873 A.2d 782, 786 (Pa. Cmwlth. 2005) (citing Bradley v. Pennsylvania Board of Probation and Parole, 529 A.2d 66, 67 (1987)). “The so-called ‘mailbox rule’ creates a rebuttable presumption that the item mailed was received and mere denial of receipt is not sufficient to defeat this presumption.” Id.

Here, Petitioners assert that they did not receive a copy of the Board’s opinion and order until December 14, 2007, after they had contacted counsel for the Bureau and requested a copy. (See Petitioners’ Appeal ¶¶ 11-12; Petition to File Appeal

*Nunc Pro Tunc.*) However, the Bureau submitted a verification statement from Gina Meckley, an administrative assistant with the Department of Labor and Industry who is assigned to help the Board in conducting its administrative functions. In her verification statement, Ms. Meckley indicates:

3. On October 19, 2007, in the regular course of business, [she] arranged for the mailing of a copy of the Board's [o]pinion and [o]rder in [this] matter . . . to Ted Babich at his address located at 625 Narrows Run Road, Coraopolis, PA 15108, by placing the [o]pinion and [o]rder in an envelope, along with a cover letter . . . and attach[ing] a billing code slip to the envelope so that the Department's mailroom would charge postage to the fund used for the Board.

4. The envelope containing the cover letter and Board's [o]pinion and [o]rder was placed in the regular place of mailing for all mailings issued by my office for pick-up by the Department's messenger service for delivery to the Department's mailroom, where postage is affixed, and the mail is then deposited in the U.S. mail.

5. The Board's [o]pinion and [o]rder was not returned to [her] office as undeliverable by the postal authorities or the Department's mailroom.

(Verification of Gina Meckley ¶¶ 3-5.) This was sufficient to create a rebuttable presumption that a copy of the Board's opinion and order was mailed to Petitioners on October 19, 2007, and that Petitioners received said copy. See Department of Transportation v. Brayman Construction Corp.-Bracken Construction Co., 513 A.2d 562, 566 (Pa. Cmwlth. 1986) (explaining that "evidence of actual mailing is not required" but, rather, that evidence that a document was prepared "in the usual course of business and placed in the regular place of mailing" is sufficient). Moreover, Petitioners did not make any specific allegations or submit evidence proving that fraud, an administrative breakdown, or non-negligent circumstances prevented them from receiving the original copy of the Board's opinion and order that was mailed on

October 19, 2007.<sup>7</sup> The only explanation that Petitioners provide is that “they have a rural mailbox at the highway.” (Petition to File Appeal *Nunc Pro Tunc*.) However, this vague allegation, without more, does not explain why Petitioners would not have received the copy of the Board’s opinion and order that was originally mailed on October 19, 2007.

Additionally, even assuming that Petitioners did not receive a copy of the Board’s opinion and order until December 14, 2007, Petitioners still failed to meet the requirements for a *nunc pro tunc* appeal. “[A] petitioner in an appeal *nunc pro tunc* must proceed with reasonable diligence once he knows of the necessity to take action.” Stanton v. Department of Transportation, Bureau of Driver Licensing, 623 A.2d 925, 927 (Pa. Cmwlth. 1993). In Stanton, a licensee failed to timely appeal the suspension of his driving privileges because his counsel’s office manager, who was responsible for filing appeals, was ill and missed the deadline. Id. at 925. However, even after the office manager returned to work, a petition for leave to appeal *nunc pro tunc* was not filed for another 11 days, and we held that this did not constitute reasonable diligence. Id. at 927-28. Here, Petitioners waited 25 days after the date upon which they admit that they received a copy of the Board’s opinion and order to file their Petition to Appeal *Nunc Pro Tunc*, and they did not provide any explanation for this additional delay. Thus, Petitioners failed to exercise reasonable diligence.

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<sup>7</sup> The Bureau acknowledges, in its brief, that it was informed by a letter dated February 29, 2008, that Petitioners’ address was changed to 4995 University Boulevard, Coraopolis, PA 15108. (Bureau’s Br. at 13.) However, there is no assertion that the address provided in the February 29, 2008 letter was the correct address for Petitioners in October of 2007, when the Board originally mailed a copy of its opinion and order. In fact, we note that the address to which the Board mailed a copy of its opinion and order is the same address that appears on the Petition to File Appeal *Nunc Pro Tunc* that was filed by Petitioners on January 8, 2008.



Therefore, we are constrained to conclude that Petitioners' allegations are insufficient to allow them to proceed *nunc pro tunc*.<sup>8</sup> Accordingly, the Bureau's Motion to Quash is granted, and Petitioners' appeal is quashed.<sup>9</sup>

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**RENÉE COHN JUBELIRER, Judge**

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<sup>8</sup> Even if we had permitted Petitioners to proceed with their appeal *nunc pro tunc*, we note that we would need to quash Petitioners' appeal because their brief is substantially defective so as to preclude meaningful appellate review. See Grosskopf v. Workmen's Compensation Appeal Board (Kuhns Mkt.), 657 A.2d 124, 125 (Pa. Cmwlth. 1995). Petitioners' brief merely consists of 159 numbered paragraphs that are divided among the following headings: "History—Hearing Before the Secretary"; "Counterstatement of the Case"; and "Conclusion." (Petitioners' Br. at 2, 8, and 14.) Petitioners' brief does not contain: a Statement of Questions Involved, as required by Pa. R.A.P. 2111(a)(4) and 2116(a); a Summary of Argument, as required by Pa. R.A.P. 2111(a)(6) and 2118; or an Argument, as required by Pa. R.A.P. 2111(a)(8) and 2119. Additionally, Petitioners' brief contains no citations to case law or the record, as required by Pa. R.A.P. 2119(b). The rule requiring a Statement of Questions Involved "is to be considered in the highest degree mandatory, admitting of no exception." Pa. R.A.P. 2116(a); see also Grosskopf, 657 A.2d at 125-26. Without a petitioner setting out the questions raised in the appeal, explaining the legal arguments, with references to authority, that support the petitioner's position, or citing to the places in the record where there is testimony which supports the petitioner's argument, the Court cannot engage in effective appellate review. We understand that Petitioners, here, are pro se. However, the Rules of Appellate Procedure "appl[y] to all briefs, regardless of whether they are written by an attorney or by a party in his or her own behalf." Daly v. Unemployment Compensation Board of Review, 631 A.2d 720, 722 (Pa. Cmwlth. 1993). "[A] layperson who represents himself in legal matters must to an extent assume the risk that his lack of expertise in legal training will prove his undoing." Huffman v. Unemployment Compensation Board of Review, 555 A.2d 287, 288 (Pa. Cmwlth. 1989). Furthermore, "when a party has failed to comply with the rules regarding contents of briefs, this Court cannot on review speculate or for that matter formulate as to what we believe [the party's] argument on appeal is or ought to be." Id.

<sup>9</sup> Because of our disposition, we do not reach the propriety of the Board's order affirming the Secretary's decision.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Babich Plumbing Company	:	
and Ted Babich, individually,	:	
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Petitioners	:	
	:	
v.	:	No. 476 C.D. 2008
	:	
Commonwealth of Pennsylvania,	:	
Department of Labor and Industry,	:	
Bureau of Labor Law Compliance,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, November 26, 2008, the Motion to Quash Babich Plumbing Company and Ted Babich’s (Petitioners) Appeal, which was filed by the Department of Labor and Industry, Bureau of Labor Law Compliance, is hereby granted, and Petitioners’ appeal is quashed.

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**RENÉE COHN JUBELIRER, Judge**