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Workers' Compensation Report

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Three Recent Appellate Court Jurisdictional Rulings Should Give Practitioners Pause When Filing Reviews

Appellate jurisdictional issues are always of interest to busy trial attorneys. Whether perfecting a petition for review of an arbitrator's decision to the Workers' Compensation Commission or perfecting a judicial review from the Commission to the circuit court, special rules apply that often have serious, if not fatal, consequences for noncompliance.

The September 2017 oral argument call of the Illinois Appellate Court, Workers' Compensation Commission Division, produced three significant rulings on appellate jurisdiction that all practitioners should know about. One decision dealt with petitions for review following the issuance of a corrected arbitration decision; one decision concerned when a petitioner must provide a bond to support judicial review; and one order (albeit an unpublished Rule 23 order) addressed the need to affirmatively establish when an attorney receives a Commission's decision for the commencement of the 20-day time to file a judicial review.

In this issue we provide an overview of these three jurisdictional decisions which, if not heeded, can have a huge and potentially negative impact on any review taken in your case.

Appeals Following a Recalled Decision Must be from the Corrected Decision

As most workers' compensation trial attorneys well know, a petition for review of an arbitrator's decision to the Commission must be filed within 30 days of the arbitrator's decision. 50 Ill. Admin. Code § 9040.10(a). Likewise, a judicial review of a Commission's decision to the circuit court must be filed within 20 days of the party seeking review's receipt of the Commission's decision. 820 ILCS 305/19(f). Determining when that time for filing period begins can be challenging in cases where a recall order and corrected decision are involved.

In *Eddards v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 150757WC, the arbitrator awarded benefits in favor of the claimant. Following the award, the employer filed a timely motion to recall the arbitrator's decision to correct a clerical error. The motion was made pursuant to section 19(f), which states:

> [T]he Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision. When such correction is made the time for review herein specified shall begin to run from the date of the receipt of the corrected award or decision.

820 ILCS 305/19(f).

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The arbitrator granted the motion, recalled the decision, and issued a corrected decision, after which the employer filed a petition for review to the Commission. *Eddards*, 2017 IL App (3d) 150757WC, ¶ 1. The Commission reversed the arbitrator's decision and found the claim non-compensable, and the circuit court confirmed. *Id.* ¶ 2.

Before the appellate court, the claimant filed a motion challenging the court's jurisdiction, alleging that the employer had filed its petition for review from the original arbitrator's decision and not the corrected decision. As a result, the employer did not perfect its review, the claimant contended. *Id.*

The appellate court agreed with the claimant, finding that where an arbitrator corrects a decision upon a motion for recall, "a party must file a petition for review within 30 days after the receipt of the arbitrator's corrected decision." *Eddards*, 2017 IL App (3d) 150757WC, ¶ 11. The court noted that where a corrected decision is made, "the time for review begins to run from the date of the receipt of the corrected award." *Id.* (citing *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 503 (1st Dist. 2007)).

Relying on *Schulz v. Forest Preserve Dist. of Cook County*, 344 Ill. App. 3d 658, 662 (1st Dist. 2003), the court stated that strict compliance with section 19(f) is required. Acknowledging that the employer had filed the petition for review within 30 days of receipt of the arbitrator's corrected decision, the petition for review nevertheless requested review of the arbitrator's original decision. Yet because the Commission issued a corrected decision, "the original decision was not a final, appealable decision." *Eddards*, 2017 IL App (3d) 150757WC, ¶ 16 (citing *Garcia v. Industrial Comm'n*, 95 Ill. 2d 467, 469 (1983)), the court observed that a petition for review filed from an original decision was "without effect" because the issuance of the corrected decision made the original decision a nullity. *Eddards*, 2017 IL App (3d) 150757WC, ¶ 16.

Accordingly, the employer's failure to file a petition for review from the arbitrator's corrected decision divested the Commission of jurisdiction to consider the employer's review. "By requesting review of the arbitrator's original decision rather than the corrected decision, [the employer] has not strictly complied with the Act." *Id.* ¶ 18. The appellate court rejected the employer's argument that the filing constituted a scrivener's error, finding that the petition for review "references a non-final order entered on an entirely different date." *Id.* ¶ 20. As such, the petition for review could not be said to have adequately notified the opposing party or the Commission as to which decision was being appealed. *Id.* ¶ 21.

The appellate court reversed the judgment of the trial court, vacated the decision of the Commission, and reinstated the arbitrator's corrected decision, which had found in favor of the claimant and awarded benefits under the Act. *Id.* ¶ 22.

Eddards demonstrates the importance of attention to detail when preparing a petition for review of an arbitrator's decision to the Commission or a judicial review from a decision of the Commission involving a recalled decision. Section 19(f)'s recall provisions apply to both means of review. Counsel must take great care when motions for recall to correct a clerical error are filed, as these motions must not only be timely-filed (within 15 days of receipt of the target decision) but also must truly request clarification rather than reconsideration, which is not permitted. *McDuffee v. Industrial Comm'n*, 222 Ill. App. 3d 105, 110 (2d Dist. 1991). A motion to recall for clarification that is truly one to reconsider will be deemed an invalid motion and will not toll the time to file the subsequent review. *Wilson-Raymond Constructors Co. v. Industrial Comm'n*, 79 Ill. 2d 45, 56 (1980).

Moreover, as *Eddards* illustrates, appeal must be timely-filed from the corrected decision. This situation can be even more muddied if one of the parties files its own judicial review when the other party has filed or files a section 19(f) motion to recall. In that event, a party may need to consider refiling the judicial review from the corrected decision and asking the circuit court to determine in which action jurisdiction is proper (it should be the review from the corrected decision). Another quandary arises where a party files a motion to recall and it is denied. See *International Harvester v. Industrial Comm'n*, 71 Ill. 2d 180, 186 (1978) and *Zbilski v. Industrial Comm'n*, 48 Ill. 2d 131, 134 (1971) (the Commission's

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decision is not final until the Commission determines whether or not to correct errors). In that event, any petition for review (or judicial review) filed prior to the resolution of a motion to correct error is premature, as it is based on a decision that is not yet final and appealable.

The Party Against Whom an Award was Made can be a Claimant

In *Joiner v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 161866WC, the claimant, Joiner, had filed an application for adjustment of claim under the Act and filed a common law complaint against his employer related to the same accident. The parties entered into a global settlement in the civil action, which purported to settle both the workers' compensation claim and the civil action. When the employer submitted the settlement agreement to the Commission for approval, the arbitrator approved the agreement and ordered the claimant to pay attorneys' fees to the attorneys who had represented him at various times during the Commission proceedings. *Joiner*, 2017 IL App (1st) 161866WC, ¶ 1.

The claimant appealed the award of attorneys' fees to the Commission, which affirmed the arbitrator's findings, and then sought judicial review to the circuit court. *Id*. ¶¶ 2-3. The claimant did not, however, post an appeal bond when filing his written request to commence proceedings in the trial court. The employer moved to dismiss the judicial review, which was allowed by the court. *Id.* ¶ 3.

On appeal, the appellate court noted that section 19(f)(2) requires a party "against whom the Commission [has] rendered an award for the payment of money" to file an appeal bond in order to invoke the court's jurisdiction to review the Commission's decision. *Joiner*, 2017 IL App (1st) 161866WC, ¶ 28. The court observed that in most cases, this party is the employer, who has been found liable for an award. Here, while the claimant received the award, the Commission's decision ordered the claimant to pay attorneys' fees. The court distinguished Joiner's case from the court's prior ruling in *Celeste v. Industrial Comm'n*, 205 Ill. App. 3d 423 (1st Dist. 1990), which seemingly held that a claimant was not required to file an appeal bond because he was an employee, not an employer. In *Celeste*, the claimant had filed a judicial review to contest the Commission's denial of interest and did not file an appeal bond. The *Celeste* court held that the employee did not need to file an appeal bond, as he was "not one against whom an award of money has been rendered," *Joiner*, 2017 IL App (1st) 161866WC, ¶¶ 29-30. The *Joiner* court pointed out, however, that the claimant in *Celeste* had appealed an adverse finding by the Commission, but had not appealed an order requiring him to pay money to his former attorneys.

As a result, the appellate court upheld the circuit court's order dismissing the judicial review with prejudice and held that "[b]y its plain terms, section 19(f)(2) applies to all individuals or entities 'against whom the Commission shall have rendered an award for the payment of money,'' and that section 19(f)(2) "does not exempt employees ordered to pay money by the Commission from having to file an appeal bond." *Id*. ¶ 33.

Joiner is a helpful decision for employers to keep in mind when evaluating a claimant's judicial review filings for section 19(f) compliance. In such cases where a bond is required of an employee, the employer's counsel should pay close attention to the form of the bond, as few claimant's counsel are well-versed in bonding procedures. And as almost any employers' counsel is aware from personal experience, procuring an appeal bond in a workers' compensation case can be a daunting process.

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Timeliness of Judicial Review Filing Must Appear On Face of Pleading

In *Final Call, Inc. v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 162030WC-U, the appellate court vacated the judgment of the circuit court on judicial review and remanded the matter back to the court with instructions that it conduct an evidentiary hearing to determine whether the petition for judicial review was filed within the 20 days prescribed by section 19(f)(1). In that case, Final Call appealed from a circuit court order confirming a Commission decision awarding benefits on behalf of the employee, Kenneth Wright. *Final Call*, 2017 IL App (1st) 162030WC-U, ¶ 2. The Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund (Fund) was added as a party to the litigation because Final Call lacked insurance. *Id.*

On appeal, the Treasurer argued the appeal should be dismissed because Final Call failed to establish that it timely commenced its proceeding for review by filing a request for summons within 20 days of receiving notice of the Commission's decision. *Id.*

The Commission issued its decision on August 27, 2015, and according to Final Call's assertions in its reply brief, it received that decision on September 23, 2015, and filed its request for summons on October 13, 2015, a date within the 20 day period specified in section 19(f)(1). According to the appellate court, compliance with the jurisdictional requirements of section 19(f) "must affirmatively appear in the record." *Id.* ¶ 10. However, "the issue of whether [Final Call] filed its request for summons within 20 days of its receipt of a notice of the Commission's decision, is a question of fact." *Id*. Because the challenge to jurisdiction was not raised before the trial court, but raised on appeal, the court found that "the Treasurer [had] effectively prevented [Final Call] from introducing evidence on the issue." *Id.* While Final Call had attached a copy of an envelope from the Commission addressed to its attorneys with a postage meter date of September 21, 2015, and asserted that the attorneys had received the decision on September 23, "neither the envelope nor any evidence as to the date that the decision was received appear in the record." *Id*. The appellate court concluded that it was constrained by the record, and "we cannot consider exhibits or information supplied by counsel which find no support in the record." *Id*.

The appellate court held that while it was Final Call's burden to establish compliance with section 19(f)(1), "we believe that it should be afforded an opportunity to establish compliance after the issue has been raised." *Id*. ¶ 11. As a result, the court vacated the trial court's order confirming the Commission's decision and remanded the matter back to the court for a hearing on the issue of whether Final Call filed its request for summons within 20 days of its receipt of a notice of the Commission's decision. *Id.*

Final Call stands for the proposition that the timeliness of the judicial review must be affirmatively stated within the written request to commence proceedings filed in the trial court. This can be accomplished in two ways. First, the party filing the written request to commence proceedings can make an affirmative statement in the pleading that the Commission's decision was received on "X" date. Second, the party filing the written request to commence proceedings can provide a copy of the Commission's decision, together with either a copy of the "received" stamp or a copy of the Commission's e-mail wherein the decision is forwarded to counsel. The latter reflects the Commission's recent method of providing parties with decisions by e-mail. Including this documentation ensures that the date of receipt is in the trial court record and places the onus on the non-filing party to present evidence that the statements and attachments are incorrect.

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