

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Darren S. Blankenship,
Appellant**

**v. No. 35732 (WCBOR No. 2043621)
(Claim No. 2009054055)**

FILED

May 13, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**West Virginia Office of the Insurance Commission,
and CCBCC, Inc., Appellees**

MEMORANDUM DECISION

This workers' compensation claim is before this Court upon the appeal of claimant Darren S. Blankenship from the February 25, 2010, order of the West Virginia Workers' Compensation Board of Review. That order affirmed the denial of Blankenship's motion to accept a late protest from the March 6, 2009, rejection of his request for continued temporary total disability benefits. The employer is CCBCC, Inc. (Coca Cola Bottling Company), and its third party claims adjuster is Avizent / Frank Gates Service Co.

Upon review, this Court concludes that the Board of Review should be affirmed. Accordingly, the order of the Workers' Compensation Board of Review dated February 25, 2010, in claim no. 2009054055, Workers' Compensation Board of Review no. 2043621, is affirmed.

I.

On July 29, 2008, Blankenship injured his lower back at work while raising the bay door of a truck. Thereafter, he filed a claim for workers' compensation benefits.

By decision dated November 24, 2008, the Administrative Law Judge found the injury compensable as a low back sprain / strain and granted Blankenship temporary total disability benefits "for such time periods as substantiated by proper medical evidence." The Board of Review affirmed, and Blankenship was paid temporary total disability benefits until December 17, 2008. A subsequent appeal by CCBCC, Inc., was refused by this Court.

On June 18, 2009, Blankenship, through his attorney, filed a motion to reinstate temporary total disability benefits for the period December 18, 2008, through June 30, 2009.

Filed in support of the motion were records from Dr. Michael Muscari indicating that Blankenship suffered from lumbar sprain / strain, with radiculopathy, and was unable to return to work. On June 24, 2009, however, the Claims Adjuster concluded that Blankenship's motion to reinstate benefits was moot. The Adjuster referred to a previous letter dated March 6, 2009, stating that Blankenship was suffering from conditions unrelated to the compensable injury. The March 6, 2009, letter was addressed to Blankenship and copied to his attorney.

Blankenship's attorney responded by requesting a ruling on the motion to reinstate based on the medical records. According to Blankenship's attorney, the March 6, 2009, letter was premature and had just been received. Subsequently, by letter dated July 29, 2009, Blankenship's attorney repeated his request for a ruling on the motion to reinstate benefits.

On August 5, 2009, the Claims Adjuster once more concluded that Blankenship's motion to reinstate was moot. The Adjuster stated that the March 6, 2009, letter constituted a protestable order denying further temporary total disability benefits and that no protest therefrom had been filed. Moreover, the Adjuster stated that a review of Blankenship's medical records revealed pre-existing degenerative conditions which would not be covered under the claim.

The same day, August 5, 2009, Blankenship's attorney filed a motion to accept a late protest from the March 6, 2009, letter denying benefits. The motion was filed with the Workers' Compensation Office of Judges. In the motion, Blankenship's attorney alleged that he did not receive the March 6, 2009, letter until June 24, 2009 (as an attachment to the Claims Adjuster's June 24, 2009, letter). By decision dated September 9, 2009, however, the Administrative Law Judge denied the motion to accept a late protest from the March 6, 2009, denial of benefits.

On February 25, 2010, the Board of Review affirmed the decision of the Administrative Law Judge. The appeal to this Court followed.

II.

Blankenship contends that his motion to accept a late protest should have been granted so that he can challenge the March 6, 2009, denial of continued temporary total disability benefits. The relevant statute, *W.Va. Code*, 23-5-6 [2003], provides:

Notwithstanding the fact that the time periods set forth for objections, protests and appeals to or from the Workers' Compensation Office of Judges

are jurisdictional, the periods may be extended or excused upon application of either party within a period of time equal to the applicable period by requesting an extension of the time period showing good cause or excusable neglect, accompanied by the objection or appeal petition. In exercising discretion the administrative law judge, appeal board or court, as the case may be, shall consider whether the applicant was represented by counsel and whether timely and proper notice was actually received by the applicant or the applicant's representative.

Here, the Administrative Law Judge indicated that, based upon the initial 60 day appeal period, Blankenship potentially had a 120 day period to file his protest to the March 6, 2009, decision. The Administrative Law Judge, however, concluded:

Although claimant's counsel asserts otherwise, a review of the Order shows that counsel was copied on the March 6, 2009, Order. Further, there has been no showing that the claimant did not receive the Order. Although counsel states that he became aware of the March 6, 2009 Order on June 24, 2009, a protest to the Order was not filed until August 5, 2009. The letter of protest was filed more than one hundred twenty (120) days after the March 6, 2009 Order was entered and, therefore, does not comply with the statutory provisions of W.Va. Code § 23-5-6.

A review of the record in this claim supports the conclusion of the Administrative Law Judge. The March 6, 2009, letter is addressed to the claimant, Darren Blankenship, and his attorney is listed among those to be sent a copy. Moreover, as *W.Va. Code*, 23-5-6 [2003], expressly states, the time periods for protests and appeals to or from the Office of Judges are jurisdictional, and requests for extensions are subject to the exercise of discretion in limited circumstances. As the brief filed in this Court by CCBCC, Inc., states:

W.Va. Code § 23-5-6 contains language that addresses the current situation specifically when it states the Court will consider whether or not the claimant is represented by counsel and whether the order was received by the claimant himself or his counsel. The use of such language suggests that an adjudicator has discretion to assess each situation on a case by case basis to determine if additional time should be granted to allow the protest. Using said discretion, the lower tribunals determined the protest should not be accepted. Therefore, the Board of Review was not plainly wrong to affirm the Office of Judges decision to deny the claimant's motion for late protest.

This Court agrees with CCBCC, Inc., in that regard and concludes that the

Administrative Law Judge had the discretion to deny Blankenship's motion to accept a late protest from the March 6, 2009, order denying further temporary total disability benefits. The circumstances underlying the Administrative Law Judge's decision involved determinations of fact, and none of those determinations violated this Court's "clearly erroneous" standard of review concerning factual matters. As a result, the decision of the Administrative Law Judge was properly affirmed by the Board of Review.

Finally, it would be inappropriate for this Court to address Blankenship's suggestion that, in spite of his failure to timely protest the March 6, 2009, decision, a new or second decision with respect to temporary total disability benefits should have been made by the Claims Adjuster based upon updated medical evidence. As recently confirmed in *Perrine v. E.I. Du Pont De Nemours and Company*, 225 W.Va. 482, 540 n. 63, 694 S.E.2d 815, 873 n. 63 (2010), issues mentioned only in passing or briefed in a cursory manner are insufficiently preserved for purposes of appeal. More importantly, Blankenship's claim for further benefits is before this Court upon the rejection of his motion to accept a late protest from the March 6, 2009, decision. The appeal, thus presented, must be resolved in that context. As CCBCC, Inc., asserts:

The Appellant has submitted evidence to the Court indicating the claimant was disabled during specific periods of time. However, the issue on appeal pertains to whether or not a late protest should be accepted. The medical records submitted by the claimant are irrelevant to the pertinent issue.

III.

For the reasons stated, the order of the Workers' Compensation Board of Review dated February 25, 2010, in claim no. 2009054055, Workers' Compensation Board of Review no. 2043621, is affirmed.

Affirmed

ISSUED: May 13 , 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh