

EXHIBIT A

to Petitioner's Motion to File Supplement

**IN THE INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA**

No. 24-ICA-39

DEBORAH BEHELER BALDWIN,

Claimant Below, Petitioner,

vs.

(Underlying: WorkForce Board of Review,
Case No. R-2023-1780 (R-2-J))

SCOTT A. ADKINS, in his official capacity as
Acting Commissioner of
WORKFORCE WEST VIRGINIA, and
WORKFORCE WEST VIRGINIA
BOARD OF REVIEW

Respondents.

Supplement to Petitioner's Brief

Comes now the Petitioner, Deborah Beheler Baldwin ("Petitioner"), and pursuant to Rule 10(h) of the West Virginia Rules of Appellate Procedure and the Court's February 16, 2024 order to address the matter of this Court's jurisdiction in the context of *W. Va. Code* § 21A-7-17 and Petitioner's January 26, 2024 appeal, Petitioner asserts as follows:

***W. Va. Code* § 21A-7-17 cannot create a jurisdictional bar to Petitioner's appeal because the Board of Review failed to comply with *W. Va. Code* § 21A-7-17 and provide proper notice to Petitioner.**

There is no jurisdictional bar under *W. Va. Code* § 21A-7-17 because Petitioner's January 26, 2024 appeal was timely filed, in light of the Board of Review's failure to properly serve its December 26, 2023 order. Instead of serving its order properly to counsel for Petitioner, the Board of Review of WorkForce West Virginia ("Board of Review" or "Board") sent its order directly to Petitioner, delaying service and failing to comply with *W. Va. Code* § 21A-7-17. (D.R. p. 56-59).

The thirty (30)-day appeal period articulated in *W. Va. Code* § 21A-7-17 depends directly on this act – the date of mailing by the Board of Review:

The decision of the board shall be final and benefits shall be paid or denied in accordance therewith, unless a claimant, last employer, or other interested party appeals to the Intermediate Court of Appeals within 30 days after mailing of notification of the board's decision.

W. Va. Code § 21A-7-17 (emphasis added). However, the Board of Review failed to properly mail notification of the Board's decision by sidestepping Petitioner's counsel. (D.R. p. 56-59).

At the direction of the Board in its Notice of Appeal Review (D.R. p. 55), Petitioner's counsel tendered her arguments to the Board of Review in writing on December 5, 2023 since the Board had not accorded her an in-person or telephonic hearing. (D.R. p. 78-80). Petitioner's letter had very clearly changed the destination address for any mail to be sent by the Board:

If you require any additional information relating to this claim, please do not hesitate to contact us. **Since we represent Mrs. Baldwin in this matter, please direct all future contacts regarding this claim to our attention.**

(D.R. p. 79-80) (emphasis added). Only inches away from this notification was the contact information necessary to send correspondence to counsel in lieu of the claimant (*id*), but the Board or Review ignored it. Despite Petitioner's request, the Board simply continued sending correspondence to an address where it was unexpected, delaying proper notice. (D.R. p. 56-59).

Certainly, counsel for Respondent WorkForce had begun sending correspondence to the correct address as early as December 8, 2023 (D.R. p. 81-83), the day after the December 7, 2023 hearing. However, the Board of Review was unfazed by requirements under *W.Va. Code* § 21A-7-15 that it "shall, within fifteen days after the conclusion of the hearing, notify the claimant, last employer, and the commissioner of its findings and decision on an appeal", or under *W. Va. CSR* 84-1-6.14, requiring that "the Board shall issue a decision within ten (10) days of the conclusion of the hearing and mail a copy to all parties." (emphasis added).

Obviously, the expectation by Petitioner and her counsel that notice would be properly mailed was based on what the law requires – that lawyers and judges not communicate with represented parties directly. *W. Va. Prof. Cond.*, Rule 4.2; *W. Va. Code of Judicial Conduct* Rule 2.9. *See also*, Comment 2 to *Judicial Cond.* Rule 2.9 (“Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.”) (emphasis added).

Therefore, even if *W. Va. Code* § 21A-7-17 offered a jurisdictional bar under other circumstances, it cannot serve as a jurisdictional bar in the instant matter wherein the Board of Review failed *ab initio* to generate the factual or legal premise on which a jurisdictional bar could be based – the proper mailing of its order to initiate a 30-day clock under *W. Va. Code* § 21A-7-17.

Respondents, having delayed official service by mail in this manner, cannot thwart access to the courts by claiming a jurisdictional bar which relies on their own errors. The failure to provide Petitioner with proper notice of the order against her, and attempting to prevent access to the courts based on their own errors, is yet another violation of procedural due process. As the West Virginia Supreme Court held,

It is a fundamental principle of law that notice to a party and an opportunity for him to be heard are essential to the jurisdiction of the court in which a proceeding is pending, and such notice must be given by the issuance and the service of process in the manner prescribed by law unless this requirement is waived.

State ex rel. Staley v. Hereford, 131 W. Va. 84, 87-88, 45 S.E.2d 738, 740 (1947). As the Supreme Court later voiced,

An administrative board must abide by its own rules and the legislative mandates. *Trimboli v. Board of Education of Wayne County*, 163 W.Va. 1, 254 S.E.2d 561 (1979), Syl. pt. 1; *Powell v. Brown*, 160 W.Va. 723, 238 S.E.2d 220 (1977). Of course, this is basic to due process notice. The notice element of due process requires that those affected by rules of an administrative board be entitled to depend upon use by and adherence to those rules by the board; otherwise, any person

relying on rules which are not followed is misled and surprised, making this facet of notice a sham.

Tasker v. Mohn, 165 W. Va. 55, 65, 267 S.E.2d 183, 189 (1980). The Court observed:

A party desiring to appeal cannot be deprived of this right by the failure of the trial court, for whatever reason, to enter a timely order or some memorandum of the action taken from which a party may have a right to appeal.

Mooney v. Barton, 155 W. Va. 329, 334, 184 S.E.2d 322, 325 (1971).

Further, whether a jurisdictional bar exists depends on the facts and law of each appeal. West Virginia cases declaring appeal deadlines as a jurisdictional bar are distinct because they do not rely on the same legal or factual premise as Respondents here. Instead of relying on the date of mailing, the cases are based on statutory deadlines with provable dates of receipt, by certified mail, with appeal filings which are clearly very late.¹ The appeal dates in these cases were not decided based on the date of mailing as in *W. Va. Code* § 21A-7-17, but instead on the date of proven receipt of notice as set forth in *W. Va. Code* § 29A-5-4(b). Petitioner highlights that her alleged one-day delay would not have occasioned a jurisdictional bar even under these existing cases cited, since receiving and signing for certified mail would have delayed delivery at least that long.

Moreover, *W. Va. Code* § 21A-7-17, with its appeal period relying on a date which is not even printed on the order itself, begs the question whether WorkForce even expects unrecorded dates to trigger specific appeal deadlines. This contrasts sharply with other statutory schemes, which declare specifically on their face that a jurisdictional bar is the aim. *See, eg. W. Va. Code* § 23-5-3 (Time limit of 60 days of actual receipt in Workers Compensation claims “is a

¹ *See generally, Jenkins v. W. Va. Bd. of Soc. Work*, 2023 W. Va. App. LEXIS 265, 2023 WL 7202960 (Appeal filed more than 60 days after Board of Social Work sent a copy of decision to correct address by certified mail informing petitioner of 30 day appeal period from actual receipt); *State ex rel. Comm'r v. Swope*, 230 W. Va. 750 (2013) (Appeal of DMV order clearly more than 40 days after claimant received decision by certified mail informing petitioner appeal time governed by *W. Va. Code* § 29A-5-4 with 30 day appeal period from actual receipt).

condition of the right to objection and hence jurisdictional.”); *W. Va. Code* § 11-10A-18 (Specifically prohibiting “administrative or judicial review” in absence of appeal within 60 days of actual service). The statutes declaring this intent also rely on a date of delivery. *See, eg. id.* Certainly, no such jurisdictional bar is articulated in *W. Va. Code* § 21A-7-17. In any event, Respondents may not rely on a jurisdictional bar in this case since they failed to properly mail the Board of Review’s December 26 determination, causing delay.

Because *W. Va. Code* § 21A-7-17 is not a jurisdictional bar to Petitioner’s appeal, the *West Virginia Rules of Appellate Procedure* and equity govern acceptance of Petitioner’s appeal, under the authority of the West Virginia Intermediate Court of Appeals. Because Respondent Board delayed its *W. Va. Code* § 21A-7-17 entry date by mailing its December 26, 2023 decision improperly, Petitioner’s January 26, 2024 Notice of Appeal was filed timely and well within the thirty-day period articulated in Rule 5 of the West Virginia Rules of Appellate Procedure. However, should the court conclude the filing was untimely, *W. Va. R.A.P.* 5(i)(1) and *W. Va. R.A.P.* 39(b) authorize the Intermediate Court of Appeals to extend time for good cause shown recognizing equitable relief from harsh sanctions, as available in *W. Va. R.A.P.* 38(f) and 38B(d) authorizing the Court to grant motions for filings out of time for good cause shown.

Petitioner has established such good cause for a one-day delay in filing. Although Petitioner’s counsel had clearly requested that the Board’s decision be sent to her counsel’s address, the Board caused significant delay in legal notice by ignoring that instruction and sending its decision to the prior address where it was not expected. Petitioner eventually prepared the necessary documents for her Notice of Appeal in spite of this delay, but the delay also resulted in a calendaring error, and Petitioner filed her Motion for Leave to File Out of Time the very next business day upon notification by the Court. Moreover, Respondents simply cannot claim that one day caused them prejudice.

Respectfully submitted,
Petitioner, Deborah L Beheler Baldwin,
By counsel,

/s/ Christopher Hedges

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