

BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE

IN THE MATTER OF:

HILLSBORO PAINTING &
DECORATING, LLC vs. TRAVELERS
PROPERTY CASUALTY COMPANY OF
AMERICA

DOCKET NO. 12.28-100886A

ORDER

THIS ORDER IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN January 14, 2009.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 EIGHTH AVENUE NORTH, 8th FLOOR
NASHVILLE, TENNESSEE 37243-0307

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, 615/741-7008 OR 741-5042, FAX 615/741-4472. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE**

IN THE MATTER OF:

**Hillsboro Painting & Decorating, LLC vs.
Travelers Property Casualty Company of
America**

DOCKET NO: 12.28-100886A

ORDER DISMISSING APPEAL

Pending before the undersigned is a Motion for Summary Judgment filed by Respondent Travelers Property Casualty Company of America ("Travelers"). The basis of the motion is the claim that Petitioner, Hillsboro Painting & Decorating ("Hillsboro"), failed to file a petition for appeal in a timely manner and therefore is not entitled to an appeal before the commissioner. If successful in its motion, Respondent Travelers asks for a judgment against Hillsboro in the disputed amount of \$43,566.00, plus pre and post-judgment interest. In addition, Travelers asks that the costs of this appeal be assessed against Hillsboro. The parties argued the motion orally in a telephone conference on December 16, 2008 and again on December 29, 2008. Petitioner Hillsboro did not file a written response in opposition to the Motion for Summary Judgment.

History of the Case

Petitioner Hillsboro disputes the amount of a premium sought by Travelers because Hillsboro avers it ceased doing business as that business entity during the course of the period for which the amount of premium is disputed. After communications

between the principals of Hillsboro and Kim Zersen, Assistant Vice President, Aon Risk Services, were unsuccessful in resolving the matter, on July 14, 2008, Ms. Zersen wrote a letter serving notice of her decision that the audit, which found that Hillsboro owed an unpaid premium of \$43,566.00, should remain unchanged. In her letter, she notified Hillsboro that "If you would like to continue to dispute this matter, you will need to file a formal appeal to the Commissioner, through Mike Shinnick, according to the procedures outlined in the bulletin attached. See the paragraph titled 'Procedure for appealing to the Commissioner or (sic) review' on the second page."

On page 2 of the attached bulletin, the last paragraph reads as follows:

Procedure for appealing to the Commissioner for review

After the insurer, rate service organization, or Plan administrator has ruled on a request for review, Tenn. Code Ann. §56-5-309(b) gives the aggrieved party the right to appeal the ruling to the Commissioner. **The appeal must be made in writing within thirty (30) days after the decision is made** by the insurer, rate service organization or Plan administrator and must contain a short and plain statement as to what portion of the insurer's rate service organization's or Plan administrator's decision is being appealed and the grounds for such appeal. . . . (Emphasis supplied.)

The paragraph goes on to provide the address to which the appeal must be sent, who must receive simultaneous copies, and the legal provisions under which a hearing in the matter will be held.

The information contained in the bulletin regarding the right to appeal and the requirements for invoking this right are derived from the above referenced statute and the associated rule, the texts of which follow:

Every insurer and rate service organization shall provide within this state reasonable means whereby any person aggrieved by the application of

its rating system may be heard on written request to review the manner in which the rating system has been applied in connection with the insurance afforded. If the insurer fails to grant or reject the request within thirty (30) days, the applicant may proceed in the same manner as if the application had been rejected. **Any party affected by the action of the insurer on the request may, within thirty (30) days after written notice of the action, appeal to the commissioner who, after a hearing held upon not less than ten (10) days written notice to the appellant and the insurer, may affirm, modify, or reverse such action.**

Tenn. Code Ann. §56-5-309(b). (Emphasis supplied.)

In order to be considered, any appeal filed with the commissioner must meet the following requirements: The appeal **must be filed with the commissioner within thirty (30) days of . . . the receipt of the decision.**

Rule 0789-1-82-.06(2)(a)(1). (Emphasis supplied.)

Petitioner's Appeal was filed with the Secretary of State, Administrative Procedures Division ("APD"), on November 3, 2008. The copy of the Petition for Appeal that was transmitted to APD from the Department of Commerce and Insurance ("Department") to open a contested case hearing file was dated September 3, 2008 by Petitioner's attorney and stamped received by the Department on September 9, 2008. On December 3, 2008, APD received notice of appearance of counsel for Travelers, and on December 8, 2008, Travelers filed a Motion for Summary Judgment.

By agreement, the Motion was argued orally by counsel for both parties on December 16, 2008. Travelers argued that Ms. Zerven's letter clearly notified Hillsboro of the right to appeal, how to file an appeal and the necessity of filing within the 30 day deadline. Travelers asserted that Hillsboro failed to file the appeal within the requisite 30 days, filing instead some fifty-seven (57) days "after the Insured received the Plan Administrator's ruling."

Hillsboro's counsel acknowledged that the appeal was not filed within thirty (30) days of the adverse ruling by the Plan Administrator. He asserted that it was not clear to Laura Betty, owner of Hillsboro Painting and Decorating, LLP, that Ms. Zerven was the "Plan Administrator" whose decision would start the appeal period. He alleged that Ms. Betty had additional telephone conversations with Ms. Zerven after the July 14, 2008 letter, and argued that these conversations might have misled an unrepresented party to fail to realize that the thirty (30) day period was elapsing as she spoke. He argued that Travelers should be equitably estopped from relying upon the failure to file an appeal timely because of Ms. Betty's per se status and the misleading impression she may have obtained from further discussions about the dispute her attorney alleges she had with Ms. Zerven.

Summary Judgment

Respondent Travelers seeks a summary judgment order in this matter asking, as a matter of law, to have Petitioner's appeal recognized as untimely and therefore to have judgment rendered in the amount of \$43,566.00 together with pre- and post-judgment interest. Travelers also asks that the costs of the appeal be assessed against the Insured, Hillsboro Painting, for which execution might issue if necessary.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04; Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn.1993). The party seeking summary judgment has the burden of persuading the

court that its motion satisfies these requirements. See Byrd v. Hall, 847 S.W.2d at 211; Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn.1991). Further, when considering a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d at 534; Byrd v. Hall, 847 S.W.2d at 215. Summary judgment should therefore be granted only when the facts and conclusions to be drawn from the facts permit a reasonable person to reach but one conclusion. Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d 528, 534 (Tenn.2002).

If, on the other hand, the evidence and the inferences reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual disputes, and the question can be disposed of as a matter of law. Godfrey v. Ruiz, 90 S.W.3d 692, 695 (Tenn.2002; Seavers v. Methodist Med. Ctr. of Oak Ridge, 9 S.W.3d 86, 91 (Tenn.1999); Beaudreau v. Gen. Motors Acceptance Corp., 118 S.W.3d 700 Tenn.Ct.App.2003.)

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Kim Zersen issued her decision letter on July 14, 2008.
2. Laura Betty received Ms. Zersen's letter by fax on July 14, 2008.
3. Counsel for Hillsboro filed an appeal with the Commissioner that was dated September 3, 2008 and stamped received by the Department on September 9, 2008.
4. The thirtieth (30th) day after the date of Ms. Zersen's decision letter was dated and faxed to Hillsboro is August 13, 2008.

5. The appeal to the Commissioner was stamped received by the Department fifty-seven (57) days after Ms. Zersen's letter was dated and faxed. The appeal period is thirty (30) days.

DISCUSSION AND CONCLUSIONS OF LAW

1. The parties do not dispute that Ms. Zersen's letter was received by Hillsboro on July 14, 2008, that thirty days from that date would be August 13, 2008, or that Respondent's appeal was dated September 3, 2008 and documented as filed on September 9, 2008. Thus the parties do not disagree that the appeal was untimely. They do disagree whether the untimeliness should be held against the Petitioner, about the underlying facts and merits of the matter, and whether a judgment on the merits should issue from Respondent's motion.

2. Respondent's Motion for Summary Judgment is construed as a Motion to Dismiss because the only subject about which there is no genuine issue as to any material fact and on which the moving party is entitled to judgment as a matter of law is the question of timeliness of filing the appeal by Petitioner. The parties agree and the facts establish that the Petitioner's appeal was filed untimely. It would have been filed untimely had it been filed on the date Petitioners first consulted counsel. The relevant statute, rule and Memorandum from the Commissioner are quite clear that an appeal must be filed within thirty (30) days from the date of receipt of the adverse determination letter from the plan administrator. The appeal was not filed within the requisite thirty (30) days, and therefore by law, it is untimely filed and subject to being dismissed. It is

hereby Ordered that this matter be DISMISSED. Costs of this appeal are charged to the
Petitioner.

This order entered and effective this 30TH day of December, 2008.

Margaret R. Robertson

Margaret R. Robertson
Administrative Judge

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Eighth Avenue N., Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.