

KATHLEEN TABB  
(Appellee)

v.

CORNING, INC.  
(Appellant)

and

CHARTER OAK FIRE INSURANCE CO.  
(Insurer)

Decided: October 24, 2022  
Corrected: November 1, 2022

PANEL MEMBERS: Administrative Law Judges Sands, Knopf, and Rooks  
BY: Administrative Law Judge Sands

### **ORDER DISMISSING APPEAL**

[¶1] At issue is whether the Appellate Division of the Workers' Compensation Board may accept an appeal filed beyond the twenty-day deadline set forth in 39-A M.R.S.A. §321-B(1)(A). For following reasons, we dismiss the appeal.

[¶2] An administrative law judge (*Stovall, ALJ*) issued an amended decree in this case on September 8, 2022, denying Corning, Inc.'s Petition for Review. Corning received a copy of the decision on September 12, 2022. Corning sent a Notice of Intent to Appeal to the Appellate Division by U.S. mail on the day it was due—October 3, 2022. It was not received by the Appellate Division until October 11, 2022.

[¶3] A Notice of Intent to Appeal must be filed in the Appellate Division “within 20 days after receipt of notice of the filing of the decision by the administrative law judge.” 39-A M.R.S.A. § 321-B(1)(A). The Notice of Appeal is considered filed on the date it is received by the Appellate Division or any of the board’s regional offices. Me. W.C.B. Rule, ch. 13, ¶ 3(2). Receipt may include receipt by e-mail. *Id.* Because the appeal period ended on a Sunday (October 2, 2022), it was extended to Monday October 3, 2022. Corning’s Notice of Intent to Appeal was received by the Appellate Division eight days later. Corning did not timely send an electronic copy of the Notice of Intent to Appeal to the Appellate Division.

[¶4] Corning has now filed a Motion requesting that the Appellate Division accept the late-filed Notice. Corning asserts that the Notice was not sent to the Appellate Division by e-mail on October 3rd due to a clerical error. It states that the late filing was an inadvertent deviation from its standard practice, which is to email the Notice on the date of mailing. Corning represents that counsel for Ms. Tabb does not object to the late filing.

[¶5] A timely notice of intent to appeal, however, is a mandatory precondition to an appellate court’s exercise of jurisdiction. *See Landmark Realty v. Leasure*, 2004 ME 85, ¶ 7 n.1, 853 A.2d 749. This rule applies to appeals from administrative agency decisions. *See Waning v. Dep’t of Transportaion*, 2008 ME 95, ¶ 9, 953 A.2d

365 (failure to file appeal from a decision of the State Claims Commission within 30-day period established in 23 M.R.S.A. § 156 deprives the Superior Court of jurisdiction over appeal); *Davric Me. Corp. v. Bangor Historic Track, Inc.*, 2000 ME 102, ¶¶ 11-12, 751 A.2d 1024 (affirming dismissal of appeal from agency decision when filed beyond the thirty-day appeal period prescribed in the Administrative Procedure Act, 5 M.R.S.A. § 11002(3)).

[¶6] Corning contends that this rule does not apply here because the cases cited involved appeals to courts from final administrative decisions that are subject to the Rules of Civil Procedure, and not appeals to an administrative appellate body. However, like this case, the cited cases involve appeals from administrative agency decisions that are governed by specific statutory deadlines.<sup>1</sup>

[¶7] Corning further asserts that in this case, it is not necessarily the statutory deadline that has been exceeded, but the board rule that defines “filing” as the date of receipt by the Appellate Division. Corning suggests, therefore, that the Appellate Division has discretion to waive the board’s filing rule under the circumstances of this case.

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<sup>1</sup> The Appellate Division has applied Law Court authority and has dismissed late-filed appeals by unpublished order on at least two prior occasions. *Zimba v. Maine General Medical Center*, App. Div. No. 14-44 (Order dated October 22, 2014; Notice of Appeal received by two months and ten days late); *Thurston v. C.W. Hayden Co.* (Order dated June 27, 2016; Notice received five days late).

[¶8] In support, Corning cites an Appellate Division order in *Hewes v. Hannaford Brothers*, App. Div. No. 18-34. In that case, the division granted an enlargement of time to file a cross appeal (denying the appellant’s motion to dismiss) when the employer had mailed its Notice of Intent to (Cross) Appeal on the due date, but the Notice was not received by the Appellate Division until two days later. However, the factors relied on by the Appellate division when exercising its discretion to allow the cross appeal in *Hewes* distinguish it from this case: there is no statute governing the appeal period for filing a cross appeal—it is set by board rule only; and an appeal had already been filed in *Hewes*, thus the formal level decision had not become final.

[¶9] Even in light of extenuating circumstances that might otherwise excuse a late filing, the Appellate Division is powerless to enlarge the statutory 20-day period for filing an appeal. *See City of Lewiston v. Me. State Employees Ass’n*, 638 A.2d 739, 741 (Me. 1994) (recognizing that statutory periods of appeal are not subject to administrative enlargement of time; reversing Superior Court decision that allowed appeal filed one-day beyond the fifteen-day period prescribed by 26 M.R.S.A. § 968(5)(F)). To extend the appeal would be outside the scope of the board’s discretion.

The entry is:

The appeal is DISMISSED.

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Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322.

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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