CASE NO. 6371 CRB-3-20-1 CLAIM NOS. 200197164 & 200197165	:	COMPENSATION REVIEW BOARD
JANUSZ SZYSZKA CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	APRIL 28, 2021

ROSE CITY TAXI, LLC
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLEE

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Enrico Vaccaro, Esq., Law Offices of Enrico Vaccaro, Trolley Square, 175 Main Street, Suite 2, P.O. Box 120761, East Haven, CT 06512.

The respondent-appellee, Rose City Taxi, LLC, was represented by Cody N. Guarnieri, Esq., Brown, Paindiris & Scott, LLP, 100 Pearl Street, Second Floor, Hartford, CT 06103.

The respondent-appellee, Second Injury Fund, was represented by Lisa Guttenberg Weiss, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106-1668.

This Petition for Review from the December 19, 2019 Finding and Dismissal by Maureen E. Driscoll, the Commissioner acting for the Third District, was heard September 25, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Randy L. Cohen and William J. Watson III.[1]

[1] We note that a motion for continuance was granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the December 19, 2019 Finding and Dismissal (finding) by Maureen E. Driscoll, the Commissioner acting for the Third District (commissioner), who determined that he was an independent contractor outside the scope of chapter 568. After filing his appeal, the respondent-employer filed a motion to dismiss this appeal, contending that as the appeal was commenced more than twenty days after the issuance of the finding, that this tribunal lacked subject matter jurisdiction to consider the appeal pursuant to General Statutes § 31-301 (a).[2] After reviewing these circumstances, we concur that this appeal was jurisdictionally untimely and therefore this tribunal has no choice but to dismiss this appeal for lack of subject matter jurisdiction.

The following facts are pertinent to our consideration. The commissioner issued her finding in this matter on December 19, 2019. The claimant did not file his petition for review until January 9, 2020. Both the claimant and the respondent-employer agree that the petition for review was filed more than twenty days after the commissioner issued her decision. The respondent-employer filed a motion to dismiss asserting that as the appeal was filed outside the statutory appeal period that this tribunal lacked jurisdiction to hear this appeal. Counsel for the claimant has filed an objection to the motion to dismiss. He has attached an affidavit stating that his law office was closed

[2] General Statutes § 31-301 (a) states: "(a) At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion."

during the Christmas holiday season and he was out of state on a pre-planned family vacation during the statutory appeal period. He argues that pursuant to the precedent in Kudlacz v. Lindberg Heat Treating Co., 250 Conn. 581 (1999), that the delay in filing this appeal should be excused.

The respondents have asserted that pursuant to the precedent in Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010), "that the failure to take an appeal within the twenty day appeal limitation set forth in § 31-301(a) deprives the board of subject matter jurisdiction . . . . " Id., 371. After review of the precedent in Kudlacz, supra, and Stec, supra, we are persuaded that the statute requires us to dismiss this appeal under the facts presented herein.

For the purposes of this appeal, we will assume the validity of all of the facts stated in the affidavit presented by claimant's counsel in support of his objection, and therefore we will address solely issues of law. The claimant's position is that this case is controlled by Kudlacz, supra. In that case, a decision was issued by a trial commissioner on August 8, 1996, and pursuant to the statute in force at that time the claimant had a ten-day statutory appeal period. He filed his appeal to this tribunal on August 21, 1996, and argued that he had not received notice of the decision prior to the expiration of the statutory appeal period. See id., 583-84. We rejected that argument as we found we were bound by the terms of the appeal statute to dismiss any appeal not filed in a timely manner following issuance of a decision by a trial commissioner. See id., 584-85. On appeal, our Supreme Court reversed our decision for the following reason:

> To bar an appeal by a party who, through no fault of his own, has not received notice of the commissioner's adverse decision, would be inconsistent with the right to appellate review expressly granted to an aggrieved party under § 31-301 (a). It is one thing to

> conclude that an aggrieved party has forfeited the right to such review by failing to take appropriate steps to perfect that right; it is another matter entirely, however, to deprive a party of the right to appeal solely because of a failure of notice for which that party bears no responsibility.

Id., 589.

Our Supreme Court remanded this case so that the commission could ascertain if in fact the inability of the claimant to file a timely appeal was due to matters outside their control. In Kudlacz v. Lindberg Heat Treating Co., 3407 CRB-8-96-8 (July 21, 2000), we determined the post office had not delivered the commissioner's decision to the claimant's attorney until after the statutory appeal period had concluded, and that indeed, he had been informed of the decision by opposing counsel and filed his appeal a day prior to actually receiving the notice. After this incident, "Attorney Smigelski discontinued the use of a post office box, as it had become apparent that delays in the delivery of mail could jeopardize the rights of his clients" and we concluded, after hearing testimony from this attorney and his paralegal that, "[t]here is no evidence that the actions or omissions of either caused the tardy delivery of the trial commissioner's decision." Id. In finding the appeal jurisdictionally valid, we determined that, "[w]here the issue is 'the failure of notice beyond [a] party's control;' Kudlacz, supra, 588; said party can only be expected to account for those activities over which it had control—namely, its own course of action during the appeal period." Id.

Our reasoning when considering the Kudlacz remand appears to have relied heavily on footnote 12 of the Supreme Court's Kudlacz decision, wherein it reminded parties of their obligation to make reasonable efforts to comply with the notice statute. "Of course, if an aggrieved party, either by action or inaction, thwarts reasonable efforts

at notification, then that party reasonably cannot claim any unfairness if those efforts prove to be unavailing. Moreover, as this court has noted, a party's 'own inaction in response to actual notice cannot be made the basis of a claim that he was not afforded due process.'" Id., n.12, *quoting* Rogers v. Commission of Human Rights & Opportunities, 195 Conn. 543, 548, 489 A.2d 368 (1985).[3]

We note that the General Assembly took notice of the various difficulties that the ten-day appeal period then in force created for filing appeals to the Compensation Review Board. In Stec, supra, our Supreme Court engaged in a substantial discussion of the legislative history behind Public Act 01-22, which was adopted less than two years after the Kudlacz decision and extended the statutory appeal period from ten days to twenty days. See Stec, 360-63. We have reviewed this legislative history as well and find no discussion about this legislation by any of its proponents that suggests a legislative policy to offer any exemptions or carveouts for special circumstances. Instead, the expectation by the bill's advocates was that by extending the appeal deadline from ten days to twenty days that various problems created by the short appeal period would now be remedied. See in particular the statement of Senator Eric Coleman, 44 S. Proc., Pt. 4, 2001 Sess., pp. 1184-85, id., 361.

[3] In Rogers v. Commission on Human Rights & Opportunities, 195 Conn. 543 (1985), the Supreme Court affirmed the dismissal of a motion to reconsider dismissal of a CHRO complaint due to a late filing. Among their rationale for reaching this decision were "[a]s the United States Supreme Court recently explained, there is no absolute due process right that 'entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, cf. Chase Securities Corp. v. Donaldson, 325 U.S. [304,] 314–316, 65 S.Ct. [1137,] 1142–1143, [89 L.Ed. 1628, reh. denied, 325 U.S. 896, 65 S.Ct. 1561, 89 L.Ed. 2006 (1945)], or, in an appropriate case, filing fees. United States v. Kras, 409 U.S. 434 [93 S.Ct. 631, 34 L.Ed.2d 626] (1973).'" id., 548 and that "[t]he plaintiff was given a meaningful opportunity to be heard when he received notice of the attempted deliveries of the February 25, 1982 letter in his mail box. That the plaintiff did not avail himself of this opportunity until the time for presenting his case had passed is unfortunate, but it does not render the use of the mails in giving notice unconstitutional." Id., 549.

Pursuant to General Statutes § 1-2z, we must apply the plain meaning of the statute, see First Union National Bank v. Hi Ho Mall Shopping Ventures, Inc., 273 Conn. 287, 291 (2005), and pursuant to the precedent in Stec, supra, the failure to commence an appeal within twenty days of the Commission sending notice to the parties renders any late appeal as outside the subject matter jurisdiction of the Commission. See Stec, 364-67. As the Stec court noted, "[t]his determination is in accordance with the principle that, although the act 'should be broadly construed to accomplish its humanitarian purpose . . . its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries.' (Citations omitted; internal quotation marks omitted.) Kinney v. State, 213 Conn. 54, 59, 566 A.2d 670 (1989)." Id., 366.[4]

Our tribunal has consistently applied the jurisdictional bar to bringing a late appeal. See Young v. Tradesource, Inc., 6285 CRB-4-18-8 (September 18, 2019); Swaggerty v. Hartford, 6262 CRB-1-18-4 (March 15, 2019); Tomaszek v. Norton's Auto & Marine Service, Inc., 6249 CRB-1-18-3 (March 1, 2019), *reconsideration denied*, A.C. 42716 (May 7, 2019); Sutherland Hofler v. State/Dept. of Developmental Services, 6173 CRB-5-17-1 (December 12, 2017), A.C. 43383 (September 12, 2019), *appeal dismissed* (November 5, 2019) and A.C. 43444 (September 27, 2019), *appeal dismissed* (October 29, 2019) and A.C. 43474 (October 7, 2019), *appeal dismissed* (November 5, 2019); Charles v. Bimbo Foods, Inc., 5986 CRB-7-15-2 (November 30, 2016), *appeal dismissed*, (March 22, 2017); Bond v. Lee Manufacturing, Inc., 5868 CRB-8-13-8 (April 21, 2016);

[4] For those reasons the argument advanced in the claimant's objection that he has been denied "fundamental fairness" and citing to the concurring opinion of former Chairman Mastropietro in Geraldino v. Oxford Academy of Hair Design, 5968 CRB-5-14-10 (January 20, 2016), *appeal withdrawn*, A.C. 38881 (March 13, 2018), is inapposite. Claimant's Objection, pp. 11-13. In Geraldino, supra, the claimant attempted to argue the respondents had *no* right to an appeal to this tribunal, which the majority opinion rejected as inconsistent with precedent in Wikander v. Asbury Automotive Group/David McDavid Acura, 137 Conn. App. 665 (2012). In this case, no one has denied that had the claimant acted within the jurisdictional time limitations that he had a right of appeal.

Ojeda v. Freshpoint Connecticut, LLC, 6004 CRB-1-15-4 (March 16, 2016) and Brown v. Lawrence & Memorial Hospital, 5853 CRB-2-13-5 (April 21, 2014). As we pointed out in Byczajka v. Stamford, 5023 CRB-7-05-11 (March 26, 2008), only "evidence that the claimant was deprived of a meaningful opportunity to file a timely appeal" can permit the very narrow loophole in Kudlacz, supra, to be used, even if, as in the case of Byczajka, supra, the appeal was only one day late.

In this case, the claimant argues he was deprived of a meaningful opportunity to file a timely appeal because the claimant's counsel closed his law office over the Christmas holidays and left the state to go on vacation. We certainly can envision a fact scenario other than the delayed mail delivery in Kudlacz, supra, where timely notice could not be provided to a litigant or their counsel. There could be some form of natural disaster, law enforcement activity, or regulatory response to a public health crisis wherein a party could not access their post office box or law office for a prolonged period of time. Under those circumstances the entire fault for delay would be in the hands of a third-party absolving the appellant of responsibility for a delayed appeal. However, in the present case, counsel chose volitionally to leave the state and chose to make no arrangements to have anyone receive his mail and advise him as to potentially time sensitive matters.[5] Had claimant's counsel taken different actions, he would have been aware of the finding and could have filed this appeal within the jurisdictionally permissible time frame.

In State v. Kevalis, 313 Conn. 590 (2014), our Supreme Court restated the appropriate standard for interpreting a statute. "In construing a statute, the first objective

[5] We note that the attorney in Kudlacz v. Lindberg Heat Treating Co., 3407 CRB-8-96-8 (July 21, 2000), testified that he changed his mail receipt practices after that incident, presumably to ensure he stayed within future deadlines.

is to ascertain the intent of the legislature. . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 599 *quoting* State v. Ward, 306 Conn. 698, 707-708 (2012). We cannot discern an intent to create a "vacation exemption" to the statutory notice provisions of § 31-301 (a) either from its plain meaning, nor from the legislative history accompanying its last material revision, Public Act 01-22. While our precedent allows for a late appeal to be deemed jurisdictionally valid when the delay is due to no fault of the claimant, we cannot decide due to remedial concerns that attorneys lack agency as to their scheduling of vacations and the manner in which they manage their practices. Since the delay in filing this appeal was due to circumstances within the control of claimant's counsel, we grant the motion to dismiss.

Commissioners Randy L. Cohen and William E. Watson III concur in this Opinion.