STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORISTS MUTUAL INSURANCE COMPANY,

Petitioner,

vs. Case No. 13-2940

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Respondent.
_____/

FINAL ORDER

On September 3, 2013, a hearing was held pursuant to sections 120.57(1) and 120.574, Florida Statutes (2013), via video teleconference with sites in Orlando and Tallahassee, Florida, before Administrative Law Judge F. Scott Boyd of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Matthew J. Troy, Esquire
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For Respondent: Mari H. McCully, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether the doctrine of equitable tolling should excuse the late filing of a Petition for Administrative Hearing filed with Respondent by Petitioner Florists Mutual Insurance Company.

PRELIMINARY STATEMENT

Petitioner Florists Mutual Insurance Company (Florists) and Kendall Regional Medical Center (Kendall) had a dispute over reimbursement of inpatient hospital services provided by Kendall. Respondent Department of Financial Services (Department) issued a Reimbursement Dispute Determination in the matter, which was received by Florists on April 8, 2013. Petitioner mailed a Petition for Administrative Hearing on April 25, 2013, which was not received by the Department until May 1, 2013.

Respondent issued a Notice of Intent to Dismiss Petition for Administrative Hearing on the basis that the Petition was not received by the Department within the 21-day time period. Petitioner then timely filed for an administrative hearing on the issue of whether the doctrine of equitable tolling should excuse its earlier late filing. On August 6, 2013, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On August 16, 2013, with agreement of the Department, Petitioner filed a Motion for Summary Final Hearing. The Motion

was granted on August 19, 2013, and the case was scheduled for hearing on September 3, 2013. Respondent submitted a written agreement to summary proceeding as required by section 120.574(1)(b) on September 4, 2013.

At hearing, the parties stipulated to the introduction of two composite exhibits: P-1, consisting of the original Reimbursement Dispute Determination, the initial Petition for Hearing in that matter (Initial Petition), the Postal Service receipts for delivery of the Initial Petition, and a related Postal Service tracking document; and P-2, consisting of Petitioner's Response to the Department's Intent to Dismiss Petition for Administrative Hearing (Second Petition), Postal Service receipts for delivery of that Response, and a related Postal Service tracking document. The parties also stipulated at hearing to the facts relating to mailing as they were set forth in the Second Petition.

These stipulations of the parties are reflected in the Findings of Fact set out below. Respondent recorded the proceeding with a recording device, but the recording was not transcribed or filed. Both parties submitted Proposed Final Orders, which have been considered in the preparation of this Order.

FINDINGS OF FACT

1. Respondent, the Department, is the state agency charged with resolving disputes over reimbursement for costs of medical services provided to injured workers under workers' compensation law.

2. Petitioner Florists was in a reimbursement dispute with Kendall. The Department issued a Determination that Florists should reimburse Kendall the sum of $100,894.54.

3. Florists received notice of the Reimbursement Dispute Determination on April 8, 2013, via United States Postal Service certified mail.

4. The Reimbursement Dispute Determination included a Notice of Rights advising Florists that a request for an administrative hearing on the Determination had to be received by the Department within 21 days of Florists' receipt of the Determination. It noted in bold print that failure to file a petition within that time period constituted waiver of the right to a hearing.

5. Florists' Initial Petition was sent via certified mail from the Tallahassee office of Petitioner's counsel located at 1701 Hermitage Boulevard, Suite 103, Tallahassee, Florida, on or about Thursday, April 25, 2013. The filing deadline was the following Monday.

6. The Initial Petition was appropriately addressed to "Julie Jones, CP, FRP, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida."

7. The Initial Petition was received by the Department on Wednesday, May 1, 2013, at 10:11 a.m.

8. The Department determined that the Initial Petition was untimely, as it was received on the twenty-third day after Florists received notice, making it two days late.

9. Petitioner is a workers' compensation insurance carrier whose substantial interests are affected by Respondent's Reimbursement Dispute Determination that it must reimburse health care provider Kendall $100,894.54. That determination will become final if Petitioner is determined to have waived its right to a hearing.

10. The distance between the Tallahassee office of Petitioner's counsel and the office of the Department is approximately four miles.

11. From review of the United States Postal Service tracking information, it appears that after the Initial Petition was mailed, it was processed in Louisville, Kentucky, before it returned to Tallahassee, Florida, for delivery, indicating a journey of some 1,050 miles over the course of six days.

12. Late delivery of the Petition by the United States Postal Service did not prevent Florists from asserting its rights.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569, 120.57, and 120.574, Florida Statutes.[1/]

14. Pursuant to section 440.13(7), Florida Statutes, the Department is granted authority to resolve reimbursement disputes when petitioned to do so by a health care provider which disagrees with a workers' compensation insurance carrier's disallowance or adjustment of reimbursement for medical services rendered to its insured. The Department's determination in such a dispute constitutes intended agency action.

15. Respondent's Reimbursement Dispute Determination requires Petitioner to reimburse health care provider Kendall $100,894.54. Petitioner is entitled to a hearing on whether its untimely filing should be excused. Phillip v. Univ. of Fla., 680 So. 2d 508, 509 (Fla. 1st DCA 1996). Petitioner has standing in this proceeding.

16. The parties have invoked the summary procedure set forth in section 120.574, which provides that if all parties agree in writing, a hearing may be conducted with expedited

timeframes, limitations on available motions, and with final order authority vested in the administrative law judge.

17. Respondent's Reimbursement Dispute Determination clearly advised Petitioner of the Department's determination. In an extensive Notice of Rights, it also advised Petitioner that any request for hearing had to be received by the Department within 21 days of Petitioner's receipt of the determination. This offered a clear point of entry, which has not been disputed by Petitioner.

18. Florida Administrative Code Rule 28-106.111, entitled Point of Entry into Proceedings and Mediation, provides in relevant part:

> (2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision.
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> * * *
>
> (4) Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

19. Pursuant to Florida Administrative Code Rule 28-106.104(1), a petition is filed when it is "received by the office of the Agency Clerk during normal business hours."

Riverwood Nursing Ctr., LLC v. Ag. for Health Care Admin, 58 So. 3d 907, 912 (Fla. 1st DCA 2011). It was stipulated that the Initial Petition was received on May 1, 2013, at 10.11 a.m. This was two days beyond the deadline.

20. At hearing, Petitioner first argued that pursuant to Florida Administrative Code Rule 28-206.103, entitled Computation of Time, five days should be added to the 21-day time limit because notice of the Department's determination was sent by regular U.S. mail. Petitioner did not pursue this in its Proposed Order, and the argument is rejected. Rule 28-206.103 itself specifically provides that these additional days shall not be added when the period of time begins pursuant to a type of notice described in rule 28-106.111, relating to an initial point of entry. See Watson v. Brevard Cnty. Clerk, 937 So. 2d 1264, 1266 (Fla. 5th DCA 2006).

21. Section 120.569(2)(c) provides that a petition for administrative hearing shall be dismissed if the petition has been untimely filed, but expressly notes that this does not eliminate the availability of equitable tolling as a defense. See also Fla. Admin. Code R. 28-106.111(4); Pro Tech Monitoring, Inc. v. Dep't of Corr., 72 So. 3d 277, 281 (Fla. 1st DCA 2011).

22. The doctrine of equitable tolling is applied in the interest of justice to permit an administrative hearing that otherwise would be barred by untimely filing. "The doctrine

serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules." Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988) (quoting Machules v. Dep't of Admin., 502 So. 2d 437, 446 (Zehmer, dissenting)).

23. However, the doctrine is applied sparingly. It is not applicable to excuse the "too ordinary occurrence of a party's attorney failing to meet a filing deadline." Envtl. Resource Assoc. v. Dep't of Gen. Servs., 624 So. 2d 330, 331 (Fla. 1st DCA 1993)(equitable tolling not applied to excuse late filing of petition sent by certified mail one day prior to deadline). As the Florida Supreme Court described in Machules, supra, "[g]enerally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."

24. Here, Petitioner asserts that the action of the United States Postal Service, in routing its Petition to Louisville, Kentucky, and taking six days to deliver a letter that would usually be delivered in only one or two days, was "extraordinary" so as to justify application of the doctrine. In Cann v. Department of Children & Family Services, 813 So. 2d 237, 239 (Fla. 2d DCA 2002), the court held that a letter sent

the day before the filing deadline but delivered a day late did not warrant equitable tolling, stating that, "two days for the postal delivery of a letter is not 'extraordinary.'" The court did go on to note at page 239 in footnote three:

> In Appel v. Dep't of State, 734 So. 2d 1180 (Fla. 2d DCA 1999), this court noted that equitable considerations would apply to extend a similar administrative time limit when Appel mailed his request five days before the time limit expired, but the post office took nine days to deliver the letter 250 miles. Our decision in Appel, however, rested primarily on a determination that Appel's request was, in fact, timely because Appel had the benefit of the five-day mailing rule. In this case, the five-day mailing rule does not apply. *See:* Fla. Admin. Code R. 28- 106.103.

It is not entirely clear whether the purpose of this footnote was to suggest that the Second District is no longer committed to the dicta in the Appel decision that equitable tolling would have applied there, or if its purpose was merely to draw contrast between an "undeserving" two-day delay and a more "deserving" nine-day one.

25. Petitioner's assertion that Appel is "squarely on all fours" with the instant case is not correct, not only because the "equitable considerations" in that case were said not to be controlling, but because of the cryptic footnote in Cann. Respondent's assertion at hearing that Cann overruled Appel is similarly overstated. It is true that the basis for the ruling

there -- that the "five-day mailing rule" applied -- is no longer good law due to changes in the statute and administrative rules, but these changes did not affect the discussion of equitable tolling.

26. Every person familiar with postal delivery knows that delays in mail delivery can, and often do, occur. The "usual" delivery time is not guaranteed. That the Petition was not delivered on Friday or the following Monday is not necessarily "extraordinary," even when new tracking services can reveal the reason for that delay -- information that previously would have remained a mystery. In any event, the application of equitable tolling in this case cannot be reduced to a determination of whether the six-day delivery time here is closer to the two-day delivery time in Cann or the nine-day delivery time in Appel. There is no bright line or mechanical rule to determine when equitable tolling is warranted; the particular circumstances of each case must be considered. Cf. Holland v. Florida, 130 S. Ct. 2549, 2563 (2010).

27. Federal court decisions, from which the Florida Supreme Court in Machules crafted its standard for application of equitable tolling to administrative proceedings in Florida, emphasize that a petitioner must exercise due diligence in preserving his legal rights. Baldwin Cnty. Welcome Ctr. v.

Brown, 466 U.S. 147, 151 (1984)(one who fails to act diligently cannot invoke equitable principles to excuse lack of diligence).

28. Under the facts of this case, the six-day delivery time, even if deemed "extraordinary," in no way prevented Petitioner from asserting his rights. A diligent Petitioner might easily have ascertained that the Petition had not yet been received -- through these same new tracking services or a simple phone call to Respondent -- in time to dispatch a courier from its Tallahassee office across the four miles to meet the pending deadline. Cf. Vantage Healthcare Corp. v. Ag. for Health Care Admin, 687 So. 2d 306, 307 (Fla. 1st DCA 1997)(concluding equitable tolling not available because no quasi-judicial proceeding was involved, but noting that equity would not justify application of the doctrine where a party chose to use overnight courier at the last minute but made no effort to confirm that the letters were actually delivered, and they were delivered one day late). Having chosen to utilize mail service, a Petitioner is not thereafter relieved of the responsibility to act with due diligence to assert his rights. "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999).

29. This is not to conclude that mailing delay could never warrant equitable tolling, but only that it does not do so here, where Petitioner's counsel had an office minutes away from the clerk's office of a State agency, and ready access to information indicating whether the petition had actually been delivered as expected. While this conclusion may seem contrary to the important goal of ameliorating harsh results where there is no prejudice to the other party, there is an equally important competing value: the filing deadlines of procedural rules must be routinely enforced if they are not to become blurred and unreliable.

30. The doctrine of equitable tolling does not apply to excuse the late filing of the Initial Petition for Administrative Hearing filed by Petitioner.

31. In the absence of equitable tolling, Petitioner waived its right to a hearing pursuant to rule 28-106.111(4).

32. Respondent did not issue an order that will itself mature into final agency action, but instead chose to issue a Notice of Intent to Dismiss the Petition at some later date, after chapter 120 proceedings or waiver thereof.[2/]

CONCLUSION

In view of the foregoing findings of fact and conclusions of law, it is hereby

ORDERED that:

The Petition of Florists Mutual Insurance Company challenging Respondent's Notice of Intent to Dismiss Petition for Administrative Hearing is DISMISSED.

DONE AND ORDERED this 30th day of September, 2013, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2013.

ENDNOTES

[1/] All citations are to the Florida Statutes (2013) unless another version is indicated.

[2/] However denominated, an agency's adverse determination of a party's substantial interests is ineffective until after proceedings under section 120.57 have been conducted or waived. Capeletti Bros. v. State, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.