MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Company,
Appellant,

v.

Review Board,
Appellee-Plaintiff.

September 7, 2021

Court of Appeals Case No. 21A-EX-124

Appeal from the Indiana Department of Workforce Development

The Honorable Lynne D. Hammer, Judge

Trial Court Cause No. 155944

Altice, Judge.

Case Summary

[1] In November 2019, Company protested the results of an unemployment insurance contribution audit and resulting adjustments by the Indiana Department of Workforce Development (the Department). While the matter was before the liability administrative law judge (the ALJ), the Department filed a motion for summary judgment, which the ALJ granted on December 18, 2020. Company filed its notice of appeal of the ALJ's decision on January 21, 2021.

[2] Because Company untimely initiated the appeal under Ind. Appellate Rule (9)(3), its appeal has been forfeited pursuant to subsection (5) of that same rule. Further, Company has not shown, or even alleged, extraordinarily compelling reasons why its forfeited right to appeal should be restored. Accordingly, we do not reach the merits of Company's appeal.

[3] We dismiss.

Facts & Procedural History

[4] Company owns and operates a pizza restaurant in Crown Point, Indiana. Pizza delivery is a part of Company's normal course of business, and it engaged delivery drivers to provide delivery services to its customers. Company required the delivery drivers to execute independent contractor agreements. Having designated them as independent contractors, Company did not remit to the State unemployment insurance taxes for these individuals during the years in question, 2017 and 2018.

[5] On November 12, 2019, following a compliance audit, the Department notified Company that its delivery drivers had been misclassified as independent contractors and that Company was liable for additional unemployment insurance contributions in the amount of $6,267.23. Company timely filed a written protest of the audit results, asserting that the delivery drivers were independent contractors for whom Company did not owe unemployment taxes. The unemployment insurance appeal was referred to the ALJ.

[6] After a prehearing conference and the exchange of discovery, the Department filed a motion for summary judgment in September 2020. The Department's argument in support of summary judgment was rather brief. It set out the elements of Ind. Code § 22-4-8-1(b), which provides:

> Services performed by an individual for remuneration shall be deemed to be employment subject to this article irrespective of whether the common-law relationship of master and servant exists, unless and until all the following conditions are shown to the satisfaction of the department:
>
> > (1) The individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract of service and in fact.
> >
> > (2) The service is performed outside the usual course of the business for which the service is performed.
> >
> > (3) The individual:

> (A) is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or
>
> (B) is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort.

The Department argued that Company could not establish the second element in light of the following admission of fact by Company: "Pizza delivery is part of the normal course of Your business." *Appellant's Appendix Vol. II* at 43. Company responded in opposition and argued that although it regularly offered such services, as was customary in the pizza restaurant industry, Company "left all pizza delivery services to its independent contract drivers exclusively." *Id*. at 56-57. Therefore, Company argued that pizza delivery services were not part of its usual course of business.

[7] On December 18, 2020, the ALJ granted summary judgment in favor of the Department. The ALJ mailed the decision to the parties by certified mail, which Company received on December 21, 2020. Company initiated the instant appeal of the ALJ's decision on January 21, 2021.

Discussion & Decision

[8] The Department argues that Company forfeited its right to appeal when it failed to file a timely notice of appeal from the ALJ's decision. In light of the Martin

Luther King, Jr. Day holiday, the Department notes that Company had until the end of January 19 to file but did not do so until two days later.

[9] App. R. 9 prescribes the procedure for filing a party's notice of appeal and, with respect to administrative appeals, provides:

> A judicial review proceeding taken directly to the Court of Appeals from an order, ruling, or decision of an Administrative Agency is commenced by filing a Notice of Appeal with the Clerk within thirty (30) days after the date of the order, ruling or decision, notwithstanding any statute to the contrary.

App. R. 9(3). "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2." App. R. 9(5).

[10] Company does not dispute that its notice of appeal was filed more than thirty days after the ALJ's decision. But it contends that the notice of appeal was timely filed because the ALJ mailed its decision, thus giving Company an automatic three-day extension in which to file pursuant to Ind. Code § 22-4-32-4(b) and Ind. Appellate Rule 25(C). We cannot agree.

[11] First, Company's argument based on App. R. 25(C) is without merit. That rule provides:

> **Extension of Time When Served by Mail or Carrier.** *When a party serves a document* by mail or third-party commercial carrier, the time period for filing any response or reply to the document shall be extended automatically for an additional three (3) calendar days from the date of deposit in the mail or with the carrier. *This Rule does not extend any time period that is not triggered*

> *by a party's service of a document*, such as the time for filing a Petition for Rehearing or a Petition to Transfer, nor does it extend any time period when service is made by E-Service pursuant to Rule 68(F)(1).

(Emphases supplied.) The rule simply does not apply here, as the ALJ's decision was not a document served by a party and the period in question – thirty days after the date of the decision – was not triggered by a party's service of a document. *Cf. McDillon v. N. Ind. Pub. Serv. Co.*, 841 N.E.2d 1148, 1152 (Ind. 2006) (holding that the application of Ind. Trial Rule 6(E)'s automatic three-day extension "applies only when a party has a right or is required to do some act within a prescribed period after the service of a notice or other paper" and "does not apply to extend periods that are triggered by the mere entry of the order").

[12] Second, it is well established that our appellate rules take precedence over any conflicting statutes. *See Owen Cty. v. Ind. Dep't of Workforce Dev.*, 861 N.E.2d 1282, 1288 (Ind. Ct. App. 2007) ("[O]ur courts have repeatedly held that when there is a conflict between a procedural statute and a procedural rule adopted by our supreme court, the supreme court rule takes precedence and the conflicting statute is nullified."). I.C. § 22-4-32-4(b) provides: "If a notice under this chapter is served through the United States Postal Service, three (3) days must be added to a period that commences upon service of notice." Again, like App. R. 25(C), we fail to see how this provision applies here, as the period set out in App. R. 9(3) commences upon the date of the ALJ's decision, not upon service

of notice. Regardless, even if the statute provided for a three-day extension, it would be in conflict with the appellate rules, which do not.

[13] App. R. 9(3) "specifically provides that the date of the decision is the operative date," *Owen Cty.*, 861 N.E.2d at 1289, and we reject Company's suggestion that when such an order is mailed by the ALJ, "a party shall have an additional three (3) days to file its response from the date of service." *Appellant's Reply Brief* at 8. As Company did not timely file its notice of appeal, Company's right to appeal is forfeited. *See* App. R. 9(5).

[14] Our Supreme Court recently addressed forfeited appeals and observed that, although not a jurisdictional matter, "it is never error for an appellate court to dismiss an untimely appeal". *Cooper's Hawk Indianapolis, LLC v. Ray*, 162 N.E.3d 1097, 1098 (Ind. 2021). In reversing this court's consideration of a forfeited (interlocutory) appeal – filed five days late – the Court explained:

> To reinstate a forfeited appeal, an appellant must show that there are "extraordinarily compelling reasons why this forfeited right should be restored." *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). In *O.R.* – a father's challenge to the adoption of his child – these extraordinarily compelling reasons included "the constitutional dimensions of the parent-child relationship." *Id.* at 972; *see also In re D.J. v. Ind. Dep't of Child Servs.*, 68 N.E.3d 574, 580 (Ind. 2017); *Robertson v. Robertson*, 60 N.E.3d 1085, 1090 (Ind. Ct. App. 2016). The Court of Appeals also has reinstated a forfeited appeal upon finding that the trial court's order was "manifestly unjust." *Cannon v. Caldwell*, 74 N.E.3d 255, 259 (Ind. Ct. App. 2017).

> In its Response to Appellee's Motion to Dismiss Appeal, Cooper's Hawk argued that the Court of Appeals should accept the appeal despite its untimeliness because "the legal issue on appeal involves a substantial question of law, the early determination of which would promote a more orderly disposition of the case." But this merely restates one of the three Appellate Rule 14(B)(1)(c) grounds for granting a discretionary interlocutory appeal; to overcome the forfeiture Rule 9(A)(5) requires, much more is needed.

Id. (cleaned up).

[15] In arguing that we should reinstate the forfeited appeal, Company directs us to *Milbank Ins. Co. v. Ind. Ins. Co.*, 56 N.E.3d 1222 (Ind. Ct. App. 2016), in which a panel of this court expressly found no extraordinarily compelling reasons but, nonetheless, reinstated the untimely appeal "given our long-standing preference for deciding cases on the merits" and given that the parties had fully briefed the case. *Id*. at 1228. Similarly, here, Company does not offer any extraordinarily compelling reasons to consider its untimely appeal and simply contends that the parties would be "better served" to have the fully-briefed issues addressed on the merits, especially where the filing was only a couple days late. *Appellant's Reply Brief* at 12.

[16] We find *Cooper's Hawk* to be a clear directive from the Supreme Court that extraordinarily compelling reasons must be established in order to reinstate a forfeited appeal. Such reasons are completely lacking here. To overcome the

forfeiture required by App. R. 9(A)(5), much more is needed than a general preference for deciding cases on the merits and an almost-timely appeal. [1]

[17] Dismissed.

Bradford, C.J. and Robb, J., concur.

[1] Even if Company had not forfeited its appeal, it is unlikely it would have succeeded on the merits. Under the Unemployment Compensation Act's test for determining whether an individual qualifies as an employee or independent contractor, a worker is presumed to be an employee unless an employer can establish, inter alia, that "[t]he service is performed outside the usual course of the business for which the service is performed." I.C. § 22-4-8-1(b)(2). The Indiana Supreme Court has explained, "if an enterprise undertakes an activity, not as an isolated instance but as a regular or continuous practice, the activity will constitute part of the enterprise's usual course of business irrespective of its substantiality in relation to the other activities engaged in by the enterprise." *Q.D.-A., Inc. v. Ind. Dep't of Workforce Dev.*, 114 N.E.3d 840, 847 (Ind. 2019) (internal quotations omitted). "In other words, if a company regularly or continually performs an activity, no matter the scale, it is part of the company's usual course of business." *Id*. Here, Company made a binding admission that "[p]izza delivery is part of the normal course of [its] business," *Appellant's App. Vol. II* at 43, and also acknowledges on appeal that "[p]izza delivery is an additional service offered to each customer of Company and is a part of the normal course of Company's business." *Appellant's Brief* at 6; *see Cross v. Cross*, 891 N.E.2d 635, 639 (Ind. Ct. App. 2008) (providing that a party's admissions are deemed conclusively established, eliminating the need to prove them at trial). At least at first blush, we are not persuaded by Company's strained application of *Q.D.-A.* in this case.