

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 8, 2022

CLAIM NO. 200900264

BURNA SWINEY (PRO SE)

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

BIZZACK, INC. and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AND ORDER
DISMISSING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and MILLER, Members.

ALVEY, Chairman. Burna Swiney (“Swiney”) seeks review of the Opinion and Order issued December 20, 2021 by Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). No Petition for Reconsideration was filed. The Opinion resolved a medical dispute in Bizzack, Inc.’s (“Bizzack”) favor. The ALJ determined contested opioid treatment is not reasonable or necessary after an appropriate period of

weaning. The ALJ also determined the previous decision by Hon. Greg Harvey, Administrative Law Judge, finding a proposed spinal cord stimulator is not reasonable or necessary is *res judicata*.

Swiney filed a Notice of Appeal on January 20, 2022, which is 31 days after the date of the Opinion and Order. Although the Notice of Appeal bears the date of January 15, 2022, it was not received by the Kentucky Department of Workers' Claims until January 20, 2022. The envelope containing the Notice of Appeal indicates it was mailed through first class U.S. Mail on January 18, 2022.

803 KAR 25:010 section 1 (7)(b)2 provides:

(7) "Date of filing" means the date that:

(b) A pleading, motion, order, opinion or other document is received by the commissioner at the Department of Workers' Claims in Frankfort, Kentucky, except:

2. Documents transmitted by United States registered (not certified) or express mail, or by other recognized mail carries shall be deemed filed on the date the transmitting agency receives the document from the sender as noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

803 KAR 25:010 section 22 (2) provides:

(2) Time and format of notice of appeal.

(a) Within thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.

(b) As used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2).

Swiney did not file a Notice of Appeal within 30 days as required. The Kentucky Department of Workers' Claims did not receive the Notice of Appeal until January 20, 2022, which is 31 days after the Opinion was entered. Because Swiney did not timely file a Notice of Appeal within 30 days from the date of the Opinion and Order, this Board does not have jurisdiction to consider the appeal as it relates to the merits of the claim. In Rice v. McCoy, 590 S.W.2d 340, 341, 342 (Ky. App. 1979), the Court of Appeals held as follows:

KRS 342.281 is mandatory; a showing of good cause offers no relief from its provisions. In Johnson v. Eastern Coal corporation, Ky., 401 S.W.2d 230, 231 (1966), the court held that "strict compliance with this section is mandatory to obtain a full Board review."

Appellee's petition for reconsideration was untimely filed and the Board properly overruled it. We note that a dismissal would have been the more appropriate ruling by the Board; however, overruling the petition accomplished the same result.

Since the petition for reconsideration was untimely taken, any right of appeal to the circuit court was lost. KRS 342.285 is jurisdiction. "The language of the statute is plain as to the time within which to appeal. The time within which a petition for review must be filed is mandatory, and if it is not complied with the circuit court acquires no jurisdiction." [citation omitted]

The ALJ rendered the decision on the merits of Swiney's claim on December 20, 2021. Since this Board does not have jurisdiction to consider this appeal, it must be dismissed. *See also* Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky. App. 1998).

Accordingly, **IT IS HEREBY ORDERED AND ADJUDGED** the appeal filed by Petitioner, Burna Swiney, on January 20, 2022, is hereby **DISMISSED**.

ALL CONCUR.

/s/ Michael W. Alvey
MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

DISTRIBUTION:

PETITIONER, PRO SE: **LMS**

BURNA SWINEY
PO BOX 1352
ELKHORN CITY, KY 41522

COUNSEL FOR RESPONDENT: **LMS**

HON MARCEL SMITH
300 EAST MAIN ST, SUITE #400
LEXINGTON, KY 40507

OTHER PARTIES:

DR MICHAEL M WILKINSON **USPS**
350 BLOUNTVILLE HWY, SUITE #105
BRISTOL, TN 37620

SHAWNA SMITH, NP **USPS**
350 BLOUNTVILLE HWY, SUITE #105
BRISTOL, TN 37620

ADMINISTRATIVE LAW JUDGE: **LMS**

HON GRANT S ROARK
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601