

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 9, 2021

CLAIM NO. 201602174

DOUGLAS KLARE

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

WILD FLAVORS
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AND ORDER
DISMISSING APPEAL**

* * * * *

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

STIVERS, Member. Douglas Klare (“Klare”) appeals from the December 11, 2020, “Medical Dispute Opinion and Order” of Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). Klare also appeals from the January 6, 2021, Order overruling his Petition for Reconsideration. In a response to the Board’s show cause order, Klare has requested that he be allowed to file a Notice of Appeal out of time and that he be granted an extra day. For the reasons set out herein, we dismiss Klare’s appeal.

BACKGROUND

On December 11, 2020, the ALJ entered a “Medical Dispute Opinion and Order” in which she sustained Wild Flavors’ Motion to Reopen and found the medical services in question non-compensable. As the ALJ’s ruling has no bearing on our decision, we will not discuss the nature of the medical fee dispute, the evidence, or the ALJ’s ruling. On December 17, 2020, Klare filed a Petition for Reconsideration which the ALJ overruled by Order entered January 6, 2021. On February 8, 2021, Klare filed a Notice of Appeal appealing from the ALJ’s December 11, 2020, decision and the January 6, 2021, Order overruling his Petition for Reconsideration.

On February 17, 2021, the Board *sua sponte* issued an Order granting Klare fifteen (15) days from the date of the Order to show cause why the appeal should not be dismissed for failure to file a timely appeal. Wild Flavors was granted fifteen (15) days thereafter in which to file a response and Klare was granted five (5) days to file a reply to any response filed by Wild Flavors. On February 25, 2021, Klare filed a response acknowledging the ALJ’s December 11, 2020, decision, and noting he filed a Petition for Reconsideration which was overruled by Order dated January 6, 2021. Klare then set forth the following:

A Notice of Appeal was immediately prepared, but not immediately filed to allow counsel time to discuss the appellate process with his client, Douglas Klare. During that period of time between preparation of the Notice of Appeal and the office appointment with Mr. Klare, the Notice of Appeal was accidentally internally docketed as being due on Saturday, February 6, 2021 instead of Friday, February 5, 2021. The administrative error rests with me. I believe that my client has a meritorious position which should be heard.

Counsel respectfully requests that he be allowed to file the Notice of Appeal out of time and that he be granted the extra day.

ANALYSIS

Because Klare's Notice of Appeal was not timely filed, we deny Klare's request to file a Notice of Appeal out of time and be granted an extra day and dismiss his appeal.

803 KAR 25:010 Section 22(2)(a)(b) and (c) reads as follows:

(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).

(c) The notice of appeal shall:

1. Denote the appealing party as the petitioner;
2. Denote all parties against whom the appeal is taken as respondents;
3. Name the administrative law judge who rendered the award, order, or decision appealed from as a respondent;
4. If appropriate pursuant to KRS 342.120 or 342.1242, name the director of the Division of Workers' Compensation Funds as a respondent;
5. Include the claim number; and
6. State the date of the final award, order, or decision appealed.

Pursuant to the above regulation, Klare had thirty (30) days from January 6, 2021, to file a Notice of Appeal. In the case *sub judice*, the thirtieth and last day Klare could timely file a Notice of Appeal was Friday, February 5, 2021. Klare's Notice of Appeal was filed on Monday, February 8, 2021. Consequently, Klare's Notice of Appeal was filed on the thirty-third day following entry of the ALJ's January 6, 2021, Order. In his response, Klare concedes his Notice of Appeal was not filed within the prescribed statutory period. Since Klare's Notice of Appeal was not filed within thirty (30) days from the date of the ALJ's January 6, 2021, Order, this Board does not have jurisdiction to consider the appeal. In Rice v. McCoy, 590 S.W.2d 340, 341, 342 (Ky. App. 1979), the Kentucky 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 jurisdictional. "The language of the statute is plain as to the time in 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 holding in Rice was reaffirmed in Rainwater v. Jasper & Jasper Mobile Homes, Inc., 810 S.W.2d 63, 64 (Ky. App. 1991). There, the Court of

Appeals explained: “Failure to timely file a notice of appeal, however, is fatal to the action. CR 73.02(2). *Id.* Filing of the notice of appeal within the time prescribed by CR 73.01 is mandatory and jurisdictional. *Burchell v. Burchell*, Ky. App., 684 S.W.2d 296 (1984).”

Workers’ Compensation Board v. Siler, 840 S.W.2d 812, 813 (Ky. 1992) mirrors the factual situation in the case *sub judice*. In Siler, *supra*, an opinion was entered by the Workers’ Compensation Board on October 16, 1990. The claimant certified he mailed the Notice of Appeal on November 14, 1990. The notice was received by the Board on November 16, 1990, thirty-one (31) days after the ALJ’s decision was filed. The Board dismissed the claimant’s appeal. However, in a split decision, the majority of the Court of Appeals reversed the Board and remanded. The Kentucky Supreme Court reversed the Court of Appeals and reinstated the Board’s Order dismissing the appeal holding as follows:

Our adoption of the substantial compliance rule provides that the failure of a party to timely complete some procedural steps may not affect the validity of the appeal. CR 73.03(2); *Ready*, 705 S.W.2d at 479; *Smith v. Goodyear Tire and Rubber Co.*, Ky. App., 772 S.W.2d 640 (1989). However, filing of the Notice of Appeal within the prescribed time frame is still considered mandatory, and failure to do so is fatal to the action. CR 73.03(2); *City of Devondale v. Stallings*, Ky., 795 S.W.2d 954 (1990); *Rainwater v. Jasper & Jasper Mobile Homes*, Ky. App., 810 S.W.2d 63 (1991).

In Stewart v. Kentucky Lottery Corporation, 986 S.W.2d 918, 921 (Ky. App. 1999), the Court of Appeals reaffirmed the principle that a Notice of Appeal must be timely filed in order for the Board to have jurisdiction holding as follows:

The timely filing of a notice of appeal is not jurisdictional, but rather is a matter of procedure. *Johnson v. Smith*, Ky., 885 S.W.2d 944 (1994). Nevertheless, the supreme court squarely held in *Johnson* that the timely filing of a notice of appeal in compliance with CR 73.02 is the method by which the jurisdiction of the appellate court is invoked and that automatic dismissal of an appeal is the penalty for late filing of such a notice. 885 S.W.2d at 950. The substantial compliance doctrine simply does not apply to notices of appeal. Therefore, we are powerless to somehow excuse appellant's failure to comply with the rule regardless of whether he received notice of entry of the order denying his motion for reconsideration. It follows that the circuit court did not err by denying appellant's CR 60.01 and CR 60.02 motion seeking to correct the record by changing the controlling dates noted in the clerk's docket. *See United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth*, Ky., 461 S.W.2d 535 (1970).

Based on the foregoing, Klare's appeal was untimely as the Notice of Appeal was not filed within thirty (30) days from January 6, 2021, the date the Order overruling his Petition for Reconsideration was entered. Klare's Notice of Appeal was not filed until February 8, 2021; therefore, the appeal is not properly before the Board. Since the Board does not have jurisdiction to consider the appeal, it must be dismissed.

Accordingly, it is ordered that Klare's request to file a Notice of Appeal out of time is **DENIED**. Further, it is ordered that the appeal from the December 11, 2020, "Medical Dispute Opinion and Order" and the January 6, 2021, Order overruling Klare's Petition for Reconsideration is **DISMISSED**.

ALL CONCUR.

/s/ FRANKLIN A. STIVERS
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