

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 1, 2019

CLAIM NO. 201601673

JAMES GILBERT and
JOHNNIE TURNER

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

BLUEGRASS MATERIALS CO., LLC and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
DISMISSING

* * * * *

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

ALVEY, Chairman. James Gilbert (“Gilbert”) seeks review of the Opinion and Order rendered September 27, 2018 by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ dismissed Gilbert’s claim against Bluegrass Materials Co., LLC (“Bluegrass”). Gilbert filed a petition for reconsideration, which the ALJ denied in an order issued October 15, 2018.

Gilbert filed a Notice of Appeal on February 1, 2019. Bluegrass filed a motion to dismiss the appeal as untimely. In his response, Gilbert acknowledges he only had thirty days to file an appeal from the ALJ's October 15, 2018 order denying his petition for reconsideration. Gilbert's response specifically states as follows:

Comes now the Petitioners, JAMES GILBERT and JOHNNIE L. TURNER, by and through Counsel, and herein states that the Respondent/Employer is correct that the Petitioner only had 30 days from the date of the Judge's order on Petition for Reconsideration to file an appeal.

However, the undersigned does not recall ever receiving a hard copy of this order in the mail, and his office inadvertently did not check LMS until very recently to see that an order had been filed. It was not until the undersigned's office was reviewing LMS last week that the Order was seen.

We initially note KRS 342.285(1) states as follows:

An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for review of the order or award.

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).

Gilbert did not file a Notice of Appeal within thirty days as required. Because Gilbert did not timely file a Notice of Appeal within thirty days from the date of the order denying his petition for reconsideration, 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 Gilbert’s claim on September 27, 2018, and denied the petition for reconsideration in his October 15, 2018 order. 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).

We acknowledge Gilbert's assertion that a hard copy of the ALJ's order on reconsideration was not sent to him. This is addressed in 803 KAR 25:011 (3) (effective October 7, 2016). That section specifically provides that the filing of all pleadings, motions or orders through LMS became mandatory on July 1, 2017, with the exception of those documents submitted by, or to be served upon self-represented litigants. Therefore, there was no requirement for the mailing of a hard copy of the order denying the petition for reconsideration. Failure to timely monitor filings in LMS does not expand jurisdictional filing deadlines. With the Board being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED Respondent's motion to dismiss this appeal is **GRANTED**.

Accordingly, the appeal filed by Petitioner, Gilbert on February 1, 2019 is hereby **DISMISSED**.

ALL CONCUR.

MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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