

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 3, 2022

CLAIM NO. 201785945

KELLY PORTER (PRO SE)

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

AXELON and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
DISMISSING

* * * * *

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

ALVEY, Chairman. Kelly Porter, *pro se*, (“Porter”) seeks review of the Amended Remand Opinion and Award, rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”) on August 16, 2022. Porter filed a Motion for Extension of Time to File an Appeal to the Kentucky Workers’ Compensation Board. The Motion was posted through United Parcel Service (“UPS”) on September 16, 2022, and received by the Department of Workers’ Claims on

September 19, 2022. The deadline to file an appeal from the ALJ's decision was September 15, 2022. Therefore, even if Porter's Motion is to be considered as a Notice of Appeal, it was not timely filed.

Porter filed a Form 101 on June 5, 2018 alleging he sustained a low back injury on March 27, 2017 while working for Axelon in Erlanger, Kentucky. On June 4, 2019, Porter moved to amend the claim to include a mental/behavioral disorder related to the work injury. The Form 101 was amended by Order entered June 19, 2019. On May 4, 2020, upon joint motion of the parties, the psychological claim was dismissed.

On April 21, 2021, the ALJ rendered a decision finding Porter sustained a work-related low back injury. He awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. The ALJ also awarded 12% interest on past due and owing benefits through June 28, 2017.

Axelon filed a Petition for Reconsideration on April 26, 2021 requesting a reduction in interest on past due and owing amounts to 6% rather than the 12% awarded. Axelon also requested the ALJ to reconsider the award of TTD benefits from March 27, 2017 to July 11, 2017. Porter filed a Petition for Reconsideration on April 26, 2021 arguing the ALJ failed to utilize the five-step analysis contained in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015) in determining he is not permanently totally disabled. In the alternative, he argued he is entitled to the application of the multiplier contained in KRS 342.730(1)(c)1.

The ALJ entered an Order regarding the Petitions for Reconsideration on May 13, 2021, and he attached an amended decision. Axelon filed a second Petition for Reconsideration on May 13, 2021 reiterating its request for additional findings the ALJ failed to make in his Order. On May 19, 2021, Porter filed a second Petition for Reconsideration requesting the ALJ to correct patent errors of law. The ALJ entered an Order on June 2, 2021, attaching a Second Amended Opinion and Award. Axelon filed a Notice of Appeal to this Board on June 11, 2021, and Porter filed a Notice of Cross-Appeal on June 14, 2021.

This Board rendered a decision on October 1, 2021 affirming the ALJ's decision and remanding for a determination of Porter's entitlement to the application of the two-multiplier pursuant to KRS 342.730(1)(c)2. The ALJ issued a Remand Opinion and Award on January 6, 2022 finding the two-multiplier applicable to the award of PPD benefits. Axelon filed a Petition for Reconsideration on January 20, 2022, arguing Porter never returned to work at the same or higher AWW after the injury date, therefore the multiplier contained in KRS 342.730(1)(c)2 is inapplicable. On February 1, 2018, the ALJ issued an Order denying Axelon's Petition for Reconsideration.

On March 14, 2022, Axelon appealed the ALJ's determination to this Board. On July 1, 2022, the Board issued a decision vacating the ALJ's determination, and remanding for the correct calculation of Porter's post-injury wages, then to make a determination regarding whether the multiplier contained in KRS 342.730(1)(c)2 is applicable. On August 16, 2022, the ALJ issued an Amended Remand Opinion and Award finding the two-multiplier contained in KRS

342.730(1)(c)2 is not applicable because Porter never returned to work at the same or greater average weekly wage. No Petition for Reconsideration was filed.

No appeal was filed within thirty (30) days after the ALJ entered his remand decision. The thirtieth day after the ALJ rendered his decision was Thursday, September 15, 2022. On September 16, 2022, thirty-one (31) days after the ALJ rendered his remand decision, Porter submitted a motion to extend the time in which to appeal through UPS. Even if that pleading is considered as a Notice of Appeal, it was untimely.

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).

Since Porter did not file an appeal within thirty (30) days after the ALJ rendered his decision, this Board does not have the jurisdiction to entertain Porter's appeal. 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 remand decision on the merits of Porter's claim on August 16, 2022. The ALJ lost jurisdiction of this claim on September 15, 2022, thirty (30) days after that decision. Even if Porter's Motion was submitted within thirty (30) days after that decision, it would not have served to extend the time for filing a Notice of Appeal. Since this Board does not have jurisdiction to consider any appeal from the ALJ's August 16, 2022 decision, it must be dismissed. *See also* Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky. App. 1998).

Accordingly, since this Board has no jurisdiction to address Petitioner, Kelly Porter's request, **IT IS HEREBY ORDERED AND ADJUDGED** his appeal is **DISMISSED**.

ALL CONCUR.

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

DISTRIBUTION:

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