

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-002811-WC

HERBERT DIALS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. 94-40166 and 94-38333

WOLF CREEK COLLIERIES;
HONORABLE ROBERT L. WHITTAKER,
Director of the Special Fund;
HONORABLE DONNA H. TERRY,
Chief Administrative Law
Judge; and HONORABLE WALTER
TURNER, Commissioner of the
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, COMBS, and KNOX, Judges.

ABRAMSON, JUDGE: This is an appeal from an order of the Workers' Compensation Board ("Board") dismissing the appeal of claimant Herbert Dials ("Dials") for failure to file a timely notice of appeal. Dials insists that because he did not receive prompt notice of the order overruling his petition for reconsideration of an order of the Chief Administrative Law Judge ("CALJ"), he

should be allowed to file the notice of appeal within 30 days of his receipt of that order. We disagree and affirm.

The facts are not in dispute. On January 29, 1997, Dials filed a petition for reconsideration of a final award by the CALJ. Although the CALJ entered an order overruling Dials's petition on February 19, 1997, Dials's counsel states that he did not receive the order until August 21, 1997. Dials filed a notice of appeal with the Board on September 9, 1997, within 30 days of his receipt of the February 19 order. The Special Fund's motion to dismiss the appeal as untimely was granted on October 3, 1997, precipitating this appeal.

Although Dials argues that a claimant cannot appeal from that of which he has no knowledge, the administrative regulations set out time limitations on rulings which should have placed him on notice of the need to inquire about the status of his petition. Pursuant to 803 KAR 25:010, Section 21(3), the CALJ was required to issue a ruling within ten days of the date on which the response to Dials's petition was due. Because in this case the respondents had until February 10, 1997 to file their respective responses, the CALJ was required by law to rule on Dials's petition by February 20, 1997. The record shows that the order denying Dials's petition was entered on February 19, 1997, and that it was served upon counsel for Dials.

We are convinced that this case falls squarely within the rationale of Rainwater v. Jasper & Jasper Mobile Homes, Ky.

App., 810 S.W.2d 63, 64 (1991), in which this Court rejected a similar attempt to be excused from a prescribed time limit:

Appellant submits that he did not receive a copy of the Board's opinion until after the appeal time had run. He admits, however, receiving a copy of the Order of Submission from the Board. Both KRS 342.185(3) and 803 KAR 25:011 section 12(13) require the Board to enter its decision within thirty days of the issuance of that submission. The order of submission was dated June 1, 1990. Accordingly, appellant should have been, at least, on notice that an opinion had been rendered prior to his telephone call to the Board of July 31, 1990. Neither appellant's good faith admission to inexperience with the newer procedures in workers' compensation cases, not his claim of a "good and compelling issue" upon the merits can give this Court the jurisdiction or authority to extend the time for filing a notice of appeal or petition for review.

(Emphasis added.) As in Rainwater, the administrative regulations provide a date certain by which the CALJ had to act and this clear directive should have put Dials's counsel on notice to inquire about the status of his petition for reconsideration. Accordingly, the failure to receive a copy of that order does not constitute excusable neglect or authorize the Board or this Court to extend the time for prosecuting an appeal to the Board.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Miller Kent Carter
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Bennett Clark
Lexington, Kentucky

David W. Barr
Louisville, Kentucky