

# Commonwealth Of Kentucky

## Court Of Appeals

NO.1999-CA-000437-WC

DONNIE R. OSBORNE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. 96-97945 AND 97-02358

MOUNTAIN CONSTRUCTION COMPANY;  
ROBERT WHITAKER, Acting Director  
of SPECIAL FUND;  
RONALD W. MAY, Administrative Law Judge;  
and WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION

### AFFIRMING

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BEFORE: DYCHE, GARDNER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Donnie R. Osborne brings this appeal after the Workers' Compensation Board affirmed an Administrative Law Judge's decision to dismiss Osborne's request for a hearing.

On April 9, 1998, an arbitrator determined that Osborne had sustained a work-related injury and awarded him benefits based on a 20 percent permanent partial disability. The arbitrator dismissed his claim arising from an occupational disease, coal workers' pneumoconiosis. On April 28, 1998, Osborne's counsel allegedly sent a request for a hearing before an ALJ seeking to

have the arbitrator's decision reviewed, but the Board did not receive the request. Approximately two and one-half months after sending the request, Osborne's attorney contacted the Board and learned that it had not been received. Osborne's attorney claims that he spoke with an employee at the Board's office who told him to file another copy of the appeal request. Osborne finally filed his appeal request on August 10, 1998. The ALJ granted Mountain's motion to dismiss Osborne's appeal because Osborne's appeal was not timely, and the Workers' Compensation Board affirmed the ALJ's decision. This appeal followed.

Kentucky Revised Statutes (KRS) 342.270 and 342.275 delineate the time frame for an appeal of an arbitrator's decision. KRS 342.270(5) provides that: "[u]nless timely appeal is filed as set forth in KRS 342.275, the written determination of the arbitrator shall be a final order enforceable under the provisions of KRS 342.305." KRS 342.275(1) provides that "[w]ithin thirty (30) days after the filing of the benefit review determination with the commissioner, any party may appeal that determination by filing a request for hearing before an administrative law judge."

Even if Osborne's attorney mailed an appeal to the Board within the prescribed statutory period, it was not received and filed. This Court addressed this issue in Revenue Cabinet v. JRS Data Systems, Inc.<sup>1</sup> In that case, we interpreted former KRS 131.340(2), which dealt with the appeal of tax assessments, to determine what the word "filing" meant as used in the statute. KRS 131.340(2) then provided that any party could appeal an adverse

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<sup>1</sup> Ky. App., 738 S.W.2d 828 (1987).

decision "by filing a complaint or petition of appeal before the board within thirty (30) days from the receipt by such aggrieved party of the agency's ruling, order, or determination."<sup>2</sup> In interpreting the language of the statute, we noted that

[I]t is clear that the mere act of depositing a legal document in the mail, although a proper method for transmitting to a public office a document which is required to be filed, does not as such amount to a "filing" of the document. On the contrary, until such time as the document actually arrives at the appropriate office, it has not been "filed" for purposes of a statute mandating its filing.<sup>3</sup>

As defined in JRS Data Systems, the filing of an appeal did not occur until the documents were received by the Board. If the documents were time stamped and placed in the case file, there would also be evidence that a filing had occurred. Similarly, if the appeal had been sent to the Board by certified mail with return receipt requested and Osborne could provide evidence that the appeal had been received, the return receipt would have been sufficient evidence that the appeal had been received. A party who sends a document to be filed through the mail does so at his own peril if he does not provide a way of proving receipt.

In this case, Osborne offers no evidence that the appeal was actually received by the Board. The affidavit signed by his

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<sup>2</sup> Id. at 829 (citing KRS 131.340(2) (modified 1986)) (emphasis omitted).

<sup>3</sup> Id. at 830.

attorney only indicates service of the appeal by mail on the Board and opposing counsel. Osborne's appeal was not filed with the Board until August 10, 1998.

Kentucky's highest court noted in Kendrick v. Fields when discussing the appeal process of the workers' compensation claims under the statutes in existence at the time, "[t]he language of the statute is plain as to the time to which to appeal. The time within which a petition for review must be filed is mandatory, and if it is not complied with the . . . [reviewing body] acquires no jurisdiction."<sup>4</sup> Failing to meet the statutorily prescribed period for an appeal is fatal and bars further relief. Because Osborne did not file his appeal within the time prescribed by KRS 342.275, the ALJ lacked jurisdiction to it.

The Workers' Compensation Board's decision affirming the dismissal of Osborne's request for a hearing is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark D. Goss  
Harlan, Kentucky

BRIEF FOR APPELLEE

MOUNTAIN CONSTRUCTION COMPANY:

David Schwetschenau  
STOLL, KEENON & PARK, LLP  
Lexington, Kentucky

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<sup>4</sup> Kendrick v. Fields, Ky., 384 S.W.2d 64, 64 (1964) (citing Carnahan Oil & Ref. Co. v. Miller, Ky., 232 Ky. 78, 22 S.W.2d 430 (1929). See also Department of Highways v. Matney, Ky., 290 Ky. 440, 161 S.W.2d 617 (1942)); Forest Hills Developer v. Public Serv. Comm'n, Ky. App., 936 S.W.2d 94, 96 (1996) (when a "statute prescribes the method for taking an appeal from an administrative action and the time in which the appeal must be taken, these requirements are mandatory and must be met in order for the . . . [reviewing body] to obtain jurisdiction to hear the case") (quoting Frisby v. Board of Educ. of Boyle County, Ky. App., 707 S.W.2d 359, 361 (1986)).