

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002186-WC

CONNIE McKNIGHT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-02067

SHAMROCK COAL/JAMES RIVER COAL CO.;
HON. JOHN THACKER, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

WINE, JUDGE: Connie McKnight petitions for review of an order of the Workers' Compensation Board (Board) dismissing his appeal for failure to timely file a notice of appeal and brief. We affirm.

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

McKnight was employed at Shamrock Coal/James River Coal Co. (“Shamrock Coal”) from August 8, 1987, until October 12, 2002.

On December 1, 2004, he filed a claim for workers’ compensation benefits alleging bilateral hearing loss due to exposure to loud noises during his employment at Shamrock Coal. On October 12, 2005, the Administrative Law Judge (ALJ) dismissed McKnight’s claim in an Opinion and Order which stated that the claim was not filed timely pursuant to the two-year statute of limitations set out in KRS 342.185. McKnight filed a petition for reconsideration with the ALJ, which was denied on November 28, 2005.

McKnight claims he then mailed a notice of appeal to the Board and parties on December 12, 2005. While Shamrock Coal received the notice of appeal on December 16, 2005, the Board received no notification that the appeal had been filed.

On February 7, 2006, Shamrock Coal filed a motion requesting that McKnight show cause why his appeal should not be dismissed for want of prosecution as there had been no action taken on the appeal. In response, McKnight’s counsel tendered a brief to the Board on March 8, 2006, along with a motion for leave to file a late brief. The Board denied the motion and gave McKnight fifteen days to show cause why the appeal should not be dismissed. Ultimately, the Board dismissed McKnight’s appeal pursuant to 803 KAR 25:010 § 21(2)(a). McKnight now asks this Court to reverse the order of the Board and reinstate his appeal.

McKnight asserts the Board erred in dismissing his appeal because he made a good faith attempt to perfect the appeal, and counsel believed the appeal was properly submitted to the Board. McKnight also argues that, pursuant to *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986), substantial compliance with the appellate process was enough for the Board to consider his appeal. On the other hand, Shamrock Coal contends the Board acted within its regulatory authority by dismissing the appeal for failure to file a timely notice of appeal and brief. Shamrock Coal also argues that the filing of an appeal requires strict compliance with 803 KAR 25:010 § 21(2)(a) and CR 73.02(1)(a).

In this case, the Board did not get to the merits of McKnight's case, but dismissed due to a procedural defect. Specifically, 803 KAR 25:010 § 21(2)(a) requires a party aggrieved by an ALJ's order to file a notice of appeal to the Board within thirty days from the entry of the ALJ's final order. There is no question that McKnight's counsel failed to comply with this rule. McKnight's counsel also failed to comply with other deadlines imposed by the Board. On April 13, 2006, the Board gave counsel fifteen days to show cause why the matter should not be dismissed for failure to give the Board notice of appeal. However, more than fifteen days after the Board's show cause order, counsel filed a tardy, unverified response stating the notice of appeal was mailed December 12, 2005, and blaming the post office for the displaced notice. Then on May 26, 2006, the Board issued another order directing counsel to file a supplemental brief within ten days from the date of the order, regarding whether the appeal was perfected in the absence of a timely filed notice of appeal. Nearly a month later and no response, the

Board issued another show cause order on June 22, 2006, allowing counsel another fifteen days to show cause why the matter should not be dismissed for failure to respond to the Board's May 26, 2006 order. Counsel finally responded to this order on June 29, 2006, explaining that the failure to respond to the Board's orders was due to various employees in her office being on vacations and others having to double up on their workload.

Despite this lack of diligence, McKnight argues he believed, in good faith, that he had filed his appeal in a timely manner. Further, McKnight contends Shamrock Coal received notice of the appeal within thirty days pursuant to 803 KAR 25:010 § 21(2)(a). Thus, McKnight asserts, no substantial harm or prejudice has resulted as both parties have submitted briefs to the Board.

McKnight also argues that the Board should have deemed his appeal to be timely under the substantial compliance principle enunciated in *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986) and CR 73.02(2). But, while *Ready v. Jamison* and CR 73.02(2) adopt a substantial compliance rule, CR 73.02(2) specifies that “[t]he failure of a party to file a timely notice of appeal . . . shall result in a dismissal or denial.”

In *Workers' Compensation Board v. Siler*, 840 S.W.2d 812 (Ky. 1992), the Kentucky Supreme Court held that this rule applies equally to workers' compensation actions. Consequently, a claimant's failure to file a timely appeal, even in good faith, warranted automatic dismissal. *Id.* at 813. We also note that the lack of prejudice to any party is not a factor in this determination. In *Siler*, the Court dismissed the appellant's

untimely appeal because it was filed one day late. Here, more than three months after the ALJ's final order was entered, the Board received McKnight's notice in an attachment on his motion for leave to file a late brief.

We recognize that the Board's dismissal takes away McKnight's opportunity to appeal his case on the merits. But, while the Board's decision to dismiss is a drastic sanction, KRS 342.260 vests the Board with the authority to carry out its regulations. We agree with the Board that McKnight failed to set forth good cause as to why his appeal should not have been dismissed. Because McKnight did not file a timely notice of appeal and brief, the Board properly dismissed his appeal.

Therefore, for the reasons stated herein, the order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edmond Collett
Monica Rice Smith
Hyden, Kentucky

BRIEF FOR APPELLEE, SHAMROCK
COAL/JAMES RIVER COAL CO.:

Ronald J. Pohl
Lexington, Kentucky