

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001912-WC

MICHAEL ALAN BORGMEIER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-91750

AUTOGUARD SERVICE CORPORATION;
HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE;
KENTUCKY EMPLOYERS' SAFETY
ASSOCIATION; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

TAYLOR, JUDGE: Michael Alan Borgmeier, *pro se*, petitions this Court to review a July 27, 2006, order of the Workers' Compensation Board dismissing his appeal. We affirm.

Appellant sustained a work-related injury on January 8, 1996, and was awarded temporary total disability benefits by opinion rendered on March 22, 2001. Thereafter, appellant, through counsel, filed a motion to reopen and claimed to be permanently and totally disabled. On December 19, 2005, the Administrative Law Judge (ALJ) entered an opinion and order denying the motion to reopen and dismissing the claim.

Thereafter, appellant, *pro se*, filed a notice of appeal in the Workers' Compensation Board (Board) on March 3, 2006.² Appellant's brief was due within thirty days, which was on or before April 3, 2006. 803 Ky. Admin. Regs. (KAR) 25:010 § 21(3)(a) (2006). On April 5, 2006, appellant filed a motion for extension of time to file a brief. Therein, he cited poor health and medical issues as the reason for seeking an "extension" of time. By order entered April 19, 2006, the Board granted appellant's motion and gave him sixty days from the date of the order to file the brief.³ Thereupon, appellant's brief was due on or before June 19, 2006.

On June 8, 2006, appellant filed a second motion for extension of time to file a brief. Therein, appellant again cited poor health as the reason for seeking an

² Appellant proceeded *pro se* before the Workers' Compensation Board (Board) and proceeds *pro se* before this Court.

³ Appellant actually mailed his motion on April 2, 2006, although it was not received and filed by the Board until April 5, 2006, after the April 3, 2006, deadline. Nonetheless, the Board accepted the late filing and extended the brief filing deadline.

extension and requested an unspecified amount of time in which to file a brief. By order entered June 22, 2006, the Board set forth the procedural history of the case and ordered:

[T]he Petitioner's motion is **DENIED**. The Petitioner shall have 15 days from the date of this order in which to file a brief in support of his notice of appeal and to serve said brief on all parties. The Respondent shall have 30 days thereafter in which to file its brief. The Petitioner's reply brief, if any, shall be filed within 10 days from the date on which the last Respondent's brief is due or filed, whichever is earlier. In the event the Petitioner should fail to file his brief within the specified time period, the herein appeal shall be dismissed as of the 16th day from the date of this order.

By the clear language of the June 22, 2006, order, appellant had fifteen days from the date of the order to file a brief. If appellant failed to file a brief within that time period, the Board clearly stated that the appeal would be dismissed. Appellant failed to file a brief. Instead, on July 10, 2006, appellant filed a third motion for extension of time to file a brief. Again, he cited poor health as a reason for seeking the extension. By order entered July 27, 2006, the Board dismissed appellant's appeal. Appellant now brings this appeal to this Court, thus precipitating our review.

Appellant contends the Board erroneously dismissed his appeal. Appellant specifically states:

The Board has overstepped it's[sic] intended authority in expecting appealant[sic] to properly file petitioner's brief, while claimant is so seriously ill and facing three (3) corrective major operations. The Board's dismissal of appellant's valid case must be reversed, allowing plaintiff reasonable time and express opportunity to file petitioner's brief.

Appellant's Brief at 3. We disagree.

Under 803 KAR 25:010 § 21(3)(a) (2006), a petitioner's brief must be filed within thirty days of the filing of a notice of appeal. Additionally, 803 KAR 25:010 § 21(11) (2006) outlines the possible sanctions available to the Board for a party's failure to file a conforming brief:

Failure of a party to file a brief conforming to the requirements of this administrative regulation or failure of a party to timely file a response may be grounds for the imposition of one (1) or more of the following sanctions:

- (a) Affirmation or reversal of the final order;
- (b) Rejection of a brief that does not conform as to organization or content, with leave to refile in proper form within ten (10) days of the date returned. If timely refiling occurs, the filing shall date back to the date of the original filing;
- (c) Striking of an untimely response;
- (d) A fine of not more than \$500; or
- (e) Dismissal.

803 KAR 25:010 § 21(11)(e) clearly grants the Board the power of dismissal as a sanction for a party's failure to file a conforming brief. In the case at hand, we believe the Board neither abused its discretion nor acted erroneously in dismissing appellant's appeal. The Board graciously gave appellant two extensions of time and adequately warned appellant concerning the sanction of dismissal. Accordingly, we are of the opinion the Board did not err by dismissing appellant's appeal for failure to timely file a brief.

For the foregoing reasons, the order of the Workers' Compensation Board
is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Alan Borgmeier, *Pro Se*
Louisville, Kentucky

BRIEF FOR APPELLEES:

James G. Fogle
Janet K. Martin
Louisville, Kentucky