

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 2000-CA-001818-MR

APEX MINERALS

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
CIVIL ACTION NO. 00-CI-00584

TERRY PRICE

APPELLEE

AND

2000-CA-002149-WC

APEX MINERALS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. WC-98-01752

TERRY PRICE; DONALD G. SMITH,  
Administrative Law Judge;  
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

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BEFORE: HUDDLESTON, KNOPF and TACKETT, Judges.

HUDDLESTON, Judge: In these consolidated appeals Apex Minerals appeals from a Pike Circuit Court order granting Terry Price's motion for judgment on the pleadings due to Apex's failure to properly file a petition for reconsideration or notice of appeal

within 30 days of an Administrative Law Judge's decision.<sup>1</sup> Apex also appeals a decision of the Workers' Compensation Board which dismissed Apex's appeal of the ALJ's decision to dismiss Apex's renewed motion for reconsideration.

On November 6, 1998, Price filed an application for Resolution of Injury Claim against Apex claiming work-related injuries to his neck, back and leg in August 1997. An ALJ awarded a 15% permanent impairment rating to Price, based on the testimony of two physicians.<sup>2</sup>

Apex attempted to file a petition for reconsideration of the ALJ's award. Apex asserts that the petition was placed in an envelope properly addressed to the Department of Workers' Claims and affixed with proper postage and mailed. The petition never reached the Department of Workers' Claims. On May 1, 2000, Price filed a petition to enforce the award, pursuant to Kentucky Revised Statute (KRS) 342.305, in Pike Circuit Court. On May 10, 2000, Apex filed a renewed petition for reconsideration. In an order dated May 30, 2000, the ALJ overruled the renewed petition.

Price's motion for judgment on the pleadings was granted by Pike Circuit Court on June 27, 2000. A separate order was

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<sup>1</sup> Pike Circuit Court entered two orders. The first order, entered June 27, 2000, granted Price's motion for judgment on the pleadings. The second order, entered July 20, 2000, granted Price's motion for costs and attorneys' fees. Price argues that Apex's notice of appeal to this Court was untimely because the notice was not filed within 30 days from the June 27 order. Even though Apex appeals from the substance of the June 27 order, it had 30 days from the July 20 order to file its appeal, and its notice of appeal, filed July 28, 2000, was timely.

<sup>2</sup> The 15% figure was arrived at by taking the 10% impairment rating assigned to Price multiplied by 1.5, the multiplier under Ky. R. Stat. (KRS) 342.430(1)(c)(1).

entered on July 17, 2000, awarding Price's attorneys a fee and costs.

While Price's motion for judgment on the pleadings was pending, Apex filed a notice of appeal to the Workers' Compensation Board, dated June 28, 2000, from the ALJ's decision to overrule Apex's renewed petition for reconsideration. On August 9, 2000, the Board dismissed Apex's appeal, holding that the ALJ lacked jurisdiction to enter the May 30, 2000, order overruling the renewed petition for reconsideration.

Apex appeals from the order of Pike Circuit Court and from the opinion of the Board dismissing its appeal of the ALJ's decision.

Apex argues that Pike Circuit Court erred in enforcing the ALJ's award because the Department of Workers' Claims never lost jurisdiction of Price's claim. Further, Apex contends, it substantially complied with the filing requirement of KRS 342.281 by properly addressing, affixing postage to and depositing the petition for reconsideration in the mail.

The initial issue to be resolved is whether depositing a petition for reconsideration in the mail is sufficient to constitute a "filing" under KRS 342.281. KRS 342.281 provides that:

Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. . . . The [ALJ] shall be limited in the review to the correction of errors

patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission.<sup>3</sup>

The Supreme Court has held that a party is required to file a petition for reconsideration with the finder of fact before an issue is preserved for appellate review.<sup>4</sup> Therefore, if it is determined that mailing a petition for reconsideration is not sufficient to constitute a filing, then the action of the Board and Pike Circuit Court must be affirmed.

As Price correctly points out, it is undisputed that the Department of Workers' Claims did not receive Apex's petition for reconsideration. For this reason, we must affirm the order granting Price's motion for judgment on the pleadings. As we observed in Rice v. McCoy,<sup>5</sup> "[u]nder Workmen's Compensation Board Regulation 803 KAR 25:010, Section 1, (7), '[t]he date of filing is the date the pleading, motion or other document is received by the board at its office at Frankfort, Kentucky.'"<sup>6</sup> We went on to say

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<sup>3</sup> Emphasis supplied.

<sup>4</sup> See Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334, 338 (1985); see also Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 330 (2000) (explaining that the holding in Eaton Axle, that a petition for reconsideration must be filed in order to preserve an issue for appellate review, was reinstated by the General Assembly in 1996 by the deletion of language that failure to file such a petition did not preclude an appeal).

<sup>5</sup> Ky. App., 590 S.W.2d 340 (1979).

<sup>6</sup> Id. at 341 (emphasis supplied). The current section of the Kentucky Administrative Regulations is 803 KAR 25:010(1)(5), which states "'Date of filing' means the date a pleading, motion, or  
(continued...)"

that "KRS 342.281 is mandatory; a showing of good cause offers no relief from its provisions."<sup>7</sup> Thus, if the petition for reconsideration is not received by the Department of Workers' Claims, the petition has not been timely filed even though it was mailed in time to reach the board.

Apex directs our attention to Smith v. Goodyear Tire and Rubber Co.<sup>8</sup> for the proposition that substantial compliance with KRS 342.281 is sufficient. Smith is distinguishable from this case. In Smith the appellant met the requirement of Kentucky Rule of Civil Procedure (CR) 76.40(2) by properly and timely forwarding a petition for review of a Workers' Compensation Board's opinion by registered mail. However, the filing fee was not "timely" received with the petition. This Court held that the appellant had timely placed the Court on notice of the appellant's desire for review of the Board's opinion, and that the appellant had substantially complied with the filing requirement. In this case, Apex's petition for reconsideration was never received.

"Filing" under KRS 342.281 means that the petition for reconsideration must be received by the Department of Workers' Claims.<sup>9</sup> Simply mailing the petition is inadequate to meet the filing requirement. Under KRS 342.281, Apex had fourteen days to

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<sup>6</sup> (...continued)  
other document is received by the commissioner at the Department of Workers' Claims in Frankfort, Kentucky, . . ."

<sup>7</sup> Rice, supra, n. 5, at 341, citing Johnson v. Eastern Coal Corp., Ky., 401 S.W.2d 230, 231 (1966).

<sup>8</sup> Ky. App., 772 S.W.2d 640 (1989).

<sup>9</sup> 803 KAR 25.010(1)(5).

file a petition for reconsideration of the ALJ's award. Apex failed to do this, and Price properly filed in Pike Circuit Court a motion to have the ALJ's award enforced.<sup>10</sup>

The decision of the Board dismissing Apex's appeal of the decision of the ALJ is affirmed. Likewise, the Pike Circuit Court order granting Price's motion for judgment on the pleadings is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

A. Stuart Bennett  
JACKSON & KELLY, P.L.L.C.  
Lexington, Kentucky

BRIEF FOR APPELLEE:

John T. Chafin  
KAZEE, KINNER, CHAFIN,  
HEABERLIN & PATTON  
Prestonsburg, Kentucky

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<sup>10</sup> See Pierce v. Russell Sportswear Corp., Ky. App., 586 S.W.2d 301, 303 (1979).