

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-001112-WC

JOHN BANNON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-14-68234

FORD MOTOR COMPANY;  
HON. STEPHANIE KINNEY,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, KRAMER AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: John Bannon appeals from an order of the Workers' Compensation Board dismissing his cross-appeal as being untimely filed. Having reviewed the record in conjunction with applicable legal authority, we affirm the order of the Board.

## **FACTS AND PROCEDURAL HISTORY**

John Bannon filed a workers' compensation claim as a result of an injury sustained while on the assembly line at Ford Motor Company. On September 29, 2017, an Administrative Law Judge awarded Bannon temporary total disability benefits, as well as 27% permanent partial disability benefits for a period not to exceed 425 weeks or until Bannon qualified for Social Security benefits, whichever occurred first. Since Bannon was 65 and qualified for Social Security at the time of the award, the Board applied the tier down provisions from the 1994 statute to his benefits. Thus, Bannon collected full permanent disability benefits from August 2013 to the date of his 65<sup>th</sup> birthday, at which time his benefits were reduced by 10% each year until he turned 70.

Bannon filed a motion for reconsideration, citing *Parker v. Webster County Coal LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017), which held the provisions of the 1996 version of Kentucky Revised Statute (KRS) 342.730(4) to be unconstitutional. Ford also moved for reconsideration. On February 21, 2018, the ALJ issued a ruling on both motions which is not pertinent to the primary issue in this appeal.

On March 22, 2018, Ford filed a notice of appeal to the Board in accordance with 803 KAR<sup>1</sup> 25:010, Sec. 22(2)(a), which provides for an appeal

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<sup>1</sup> Kentucky Administrative Regulation.

within thirty (30) days of the decision of an ALJ. On April 6, 2018, Bannon attempted to file a cross-appeal per 803 KAR 25:010, Sec. 22(2)(d); however, Bannon's cross-appeal was not filed within the ten days required in the regulation and the Board subsequently dismissed his cross-appeal as untimely.

This appeal followed.

### **ANALYSIS**

We review decisions of the Workers' Compensation Board to determine if the Board "has overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). When reviewing questions of law, an appellate court is not bound by the decisions of an ALJ or the Board regarding proper interpretation of the law or its application to the facts and in such matters the standard of review is *de novo*. *Bowerman v. Black Equipment Company*, 297 S.W.3d 858, 866 (Ky. App. 2009).

Of the several issues advanced in this appeal, our primary focus is whether the Board erred in dismissing Bannon's cross-appeal as being untimely filed. It is well-settled that the filing of a notice of appeal or cross-appeal "within the prescribed time frame is still considered mandatory, and failure to do so is fatal to the action." *Workers' Compensation Bd. v. Siler*, 840 S.W.2d 812, 813 (Ky.

1992) (citing CR<sup>2</sup> 73.03(2)). In *Siler*, the Supreme Court of Kentucky held that “[t]he Board is granted the authority under KRS 342.260 to promulgate regulations necessary to carry on its work, including regulations necessary for reviewing decisions of the ALJ. KRS 342.285.” *Id.* at 812-13. Thus, the regulation which requires the filing of a cross-appeal within ten days of the notice of appeal is within the statutory authority of the Board and is a valid regulation. Strict compliance is required.

As Bannon notes in his brief, all parties before the Workers’ Compensation Board chose to use the LMS<sup>3</sup> and thus no copies of pleadings were mailed or emailed by counsel. Bannon argues that there was a technical issue with the LMS which prevented him from receiving timely notice that an appeal had been filed. While Bannon attempts to argue that he substantially complied with the regulation, the Supreme Court in *Siler* emphasized that the substantial compliance doctrine does not apply to the filing of notices of appeal. Citing *Jenny Wiley Health Care Center v. Commonwealth*, 828 S.W.2d 657 (Ky. 1992), the Supreme Court reiterated that “under CR 73.02(2) and *Ready v. Jamison*, [705 S.W.2d 479 (Ky. 1986)], Jenny Wiley Health Care Center’s good-faith attempt to file notice of appeal would require an automatic dismissal because it did not meet the time

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<sup>2</sup> Kentucky Rule of Civil Procedure.

<sup>3</sup> LMS is the Litigation Management System of electronic filing utilized in the filing and processing of workers’ compensation claims.

specifications of the agency regulation.” *Siler*, 840 S.W.2d at 813. Thus, the Board did not err in dismissing Bannon’s cross-appeal for failure to comply with the time specifications of the regulation regarding notices of cross-appeal.

Further, we note that Bannon does not specify which system was at fault, his or the Board’s. Because he does not address the issue, we will presume that it was Bannon’s system which was down, particularly in light of the fact that Ford had no problem in filing its notice of appeal. As Bannon admits, both parties chose to avail themselves of the LMS system; therefore, we find that Bannon bears responsibility for exercising reasonable due diligence in maintaining his electronic system and keeping track of the progress of his appeal. Even if his system, or for that matter, the LMS system, was down, Bannon is required to keep track of the dates when an appeal can be taken. In sum, there was no error in the Board’s decision to dismiss Bannon’s cross-appeal as not timely filed.

Bannon next argues that if his cross-appeal is held to be untimely, due process considerations bar the Board or this Court from considering Ford’s appeal. We are not persuaded. The fact that Bannon failed to timely file his cross-appeal has absolutely no bearing on the validity of Ford’s appeal, which was filed in compliance with the requirements of the law and regulations. Bannon is not precluded from responding to Ford’s issues raised on appeal and thus will be

afforded all the due process to which he is entitled given his failure to comply with the time requirements for filing his notice of cross-appeal.

Finally, Bannon attempts to raise the issue of the constitutionality of the newly-enacted version of KRS 342.730(4). Because his cross-appeal has been dismissed, this issue is not properly before us.

### **CONCLUSION**

Based upon the foregoing, we affirm the order of the Workers' Compensation Board dismissing Bannon's cross-appeal as untimely.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings  
Louisville, Kentucky

BRIEF FOR APPELLEE FORD  
MOTOR COMPANY:

George T. T. Kitchen, III  
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