

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

**Supreme Court of Kentucky** **FINAL**

2007-SC-000420-WC

DATE 5-15-08 EJA Grant P.C.

SARTIN ENTERPRISES, LLC.

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
2007-CA-000623-WC  
WORKERS' COMPENSATION BOARD NO. 03-01706

WENDELL MAYNARD;  
UNINSURED EMPLOYERS' FUND;  
WORKERS' COMPENSATION BOARD;  
AND HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

KRS 342.290 provides that a decision of the Workers' Compensation Board (Board) is subject to review by the Court of Appeals under rules adopted by the Supreme Court. CR 76.25(2) permits a party to file a petition for review by the Court of Appeals and pay the required filing fee within 30 days of the date on which the Board enters its final decision. It states that "[f]ailure to file the petition within the time allowed shall require dismissal of the petition."

This appeal is taken from an order of the Court of Appeals that denied the appellant's motion for an enlargement of the time in which to file a petition for review. We affirm because the court did not abuse its discretion under the circumstances.

The Board's decision in the above-styled matter indicates on its face that it was

entered on December 22, 2006. On March 22, 2007, Sartin Enterprises, LLC, (Sartin) filed a motion for leave to file a late petition for review in the Court of Appeals on the basis of an alleged clerical error by the Board in failing to apprise the parties of its decision. The motion requested 30 days in which to file a petition. Attached to the motion were affidavits from counsel for the parties. An affidavit from Robert Greene, counsel for Wendell Maynard, indicates that he first learned of the Board's decision on or about February 28, 2007, after contacting the Office of Workers' Claims to inquire concerning the status of the matter. It indicates that Greene did not receive the decision until sometime on or after February 28, 2007. Affidavits from Greene and from the appellant's attorney, Stephen S. Burchett, indicate that Burchett was notified of the Board's decision upon being contacted by Greene on February 28, 2007. Burchett's affidavit also indicates that he did not receive the decision until March 1, 2007. An affidavit from Robert Hensley, the attorney for the Uninsured Employers' Fund, indicates that he first learned of the decision when Burchett notified him on March 1, 2007, and did not receive the decision until March 1, 2007, or later.

Maynard objected. He asserted that CR 76.25(2) requires a tardy petition for review to be dismissed. He also relied on Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713 (Ky. 2001), for the principle that a tardy notice of appeal is subject to automatic dismissal and cannot be saved through application of the doctrine of substantial compliance.

The Court of Appeals found Maynard's argument to be persuasive in light of the decision in AK Steel Corp. v. Carico, Ky., 122 S.W.3d 585 (2003). Thus, it denied the motion. Sartin appeals.

Sartin relies on Lockard v. Workmen's Compensation Board, 554 S.W.2d 396 (Ky. 1977), and Jones v. Davis, 246 Ky. 293, 54 S.W.2d 681 (1932), for the principles that "entry" of a decision includes notice to the parties and that due process requires a decision to be sent to the parties when an adequate amount of time in which to appeal remains. Asserting that the Board failed to properly enter its award, Sartin argues that the time for appeal did not begin to run and that the Court of Appeals erred in denying its motion.

Maynard asserts that Sartin failed to establish the premise for its argument under Lockard, supra, because it failed to show that the Board did not enter or mail the decision in time to allow a party to file a timely petition for review. It showed only that the parties did not receive a copy of the Board's decision within 30 days after it was entered. Maynard argues that the Court of Appeals could not presume that the Board failed to mail the decision because a number of reasons could have caused the parties not to receive it in a timely manner, including the annual glut of mail that precedes the Christmas holiday. He concludes that counsel for all three parties were remiss in failing to check on the status of the case periodically.

KRS 342.230(2) designates the executive director of the Office of Workers' Claims as the keeper and custodian of the records of the Board. KRS 342.245 charges the executive director with recording all proceedings of the Board in books that contain an entry of each case and the Board's decision. KRS 342.285 requires the Board to enter the decision in an appeal of an Administrative Law Judge's decision within 60 days after the last appellate brief is filed.

In Staton v. Poly Weave Bag Co., Inc./Poly Weave Packaging, Inc., 930 S.W.2d

397, 399 (Ky. 1996), the court noted the principles found in CR 58(1) and CR 77.04(2) concerning the date of entry for the purpose of taking an appeal under CR 73.02(1) and applied them to CR 76.25(2), which concerns the time for filing a petition for review by the Court of Appeals. The court determined that the Board's decision is entered for the purpose of CR 76.25(2) when it is noted in the docket and the parties are served with notice that the decision was entered.

In AK Steel Corporation v. Carico, *supra*, the court pointed out that a petition for review of the Board's decision serves as both a notice of appeal and a brief. It explained that, like a notice of appeal or a motion for discretionary review, a petition for review is the document by which a party invokes the Court of Appeals' jurisdiction to consider the matter. Like CR 73.02(2) and CR 76.20(2)(c), CR 76.25(2) indicates that a failure to file a timely document invoking the court's jurisdiction requires dismissal. The court noted that CR 76.20(2)(c) and CR 73.02(2) prohibit an enlargement of the time for filing a motion for discretionary review after it expires and that CR 6.02 limits an enlargement of time for filing a notice of appeal to what is specified in CR 73.02. The court determined, therefore, that CR 73.02(1)(d) provides the only basis for enlarging the time for taking an appeal after it has expired. CR 73.02(1)(d) states as follows:

Upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order that affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time.

In the present case, the Board's opinion is the only evidence of record concerning the date on which the executive director or one of the executive director's clerical employees entered the decision and mailed a copy to the parties. The opinion

indicates that the decision was entered on December 22, 2006. More than 30 days had passed when Sartin moved for leave to enlarge the time for filing a petition for review and to receive an additional 30 days to file the petition. We conclude, therefore, that the Court of Appeals did not abuse its discretion by denying the motion.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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