

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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

2011-SC-000532-WC

KEVIN REECE

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001445-WC
WORKERS' COMPENSATION NO. 06-72669

INTEGRAL STRUCTURES, INC.;
HONORABLE CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant appeals a Court of Appeals order that denied his motion for additional time in which to file a petition for review and dismissed his appeal as being untimely. At issue is whether the court erred by failing to determine whether the Department of Workers' Claims (Department) complied with the procedures required by KRS 342.230(2), KRS 342.245, and CR 76.25(2) for entering its decisions and providing notice of entry to the parties.

We affirm. Nothing required the Court of Appeals to address the issues the claimant raises. He does not dispute that the Board served him with its opinion, which stated that its decision was entered on June 28, 2010; that his petition for review identified the date of entry of the Board's decision as being

June 28, 2010; and that he sent the petition to the Clerk of the Court of Appeals by priority registered mail on July 29, 2010.

The claimant was born in 1968; completed high school; and worked for the defendant-employer as a laborer. His duties included setting steel beams, installing roofs, sheeting walls, installing HVAC adaptors, and installing gutters. He sustained injuries to his nose, skull, and left eyelid and retina on October 19, 2006 when a bracket on the garage door that he was removing from a storage unit pulled loose and struck him in the face. He underwent surgery; missed approximately 30 days' work; returned to work without restrictions; and then underwent a second surgical procedure in March 2007. He was released to return to full-duty work in mid-April 2007. His employer paid his usual wages during the periods that he missed work.

The claimant provided his employer with another return-to-work slip that listed no restrictions on November 19, 2008. On November 25, 2008, however, he provided his employer with a letter from Dr. Cantor, his treating surgeon, who stated that he anticipated the claimant would have difficulty performing tasks that required binocular vision and depth perception and stated that the left eye would experience increased sensitivity to environmental irritants such as wind, cold, chemicals, dirt, and smoke. A follow-up letter stated in June 2009 that the claimant would have difficulty operating certain machinery and walking at heights or along ledges.

Dr. Brockman evaluated the claimant in February 2009 and restricted him from operating heavy equipment due to his impaired depth perception. He assigned a 15% impairment rating.

Dr. Eiferman evaluated the claimant in April 2008. He assigned a 14% impairment rating but no work restrictions.

The claimant testified that he continued to experience problems with depth perception, light sensitivity, and blurred vision when his claim was heard and that his employer provided work within those restrictions. He stated that he was unable to work on roofs or at heights and viewed the fact that he was not assigned to certain jobs as being the product of hostility by his employer. He attributed several mishaps that occurred after his return to work to the effects of the injury. His employer submitted testimony that he never requested any accommodations or refused to perform any task.

The parties submitted briefs and the claim was taken under submission, after which the claimant filed a motion to reopen proof time or to reopen under KRS 342.125. He based the motion on allegations that actions his employer took after the hearing were inconsistent with its evidence that he received no accommodations for his restrictions. The motion was denied.

The ALJ awarded income benefits based on a 14% permanent impairment rating without a benefit multiplier, noting that the claimant returned to work without restrictions and at full pay. Overruling his petition for reconsideration, which asserted among other things that he was entitled to a triple benefit under KRS 342.730(1)(c)1, the ALJ stated that he would not

have been found to be able to work without restrictions had the ALJ thought he was unable to perform the duties his job required safely. The ALJ failed to make the requested findings under KRS 342.730(1)(c)2 concerning whether the claimant earned the same or a greater wage than at the time of his injury and the likelihood that he would be able to continue to do so indefinitely.

The Board reversed to the extent that the ALJ's failed to make findings under KRS 342.730(1)(c)2 and remanded the claim for that purpose. Affirming otherwise, the Board determined that the evidence did not compel the application of KRS 342.730(1)(c)1 and that the ALJ did not err by refusing to reopen the proof after the claim was submitted for a decision. The Board's decision bore the notation "OPINION ENTERED: June 28, 2010."

The claimant's petition for review identified the date upon which the Board entered its decision as being June 28, 2010. He sent it to the Clerk of the Court of Appeals by priority registered mail on July 29, 2010. The Clerk returned the petition as being untimely on the ground that it was due by July 28, 2010.

On August 25, 2010 the claimant filed a motion for additional time in which to file the petition under CR 76.40(1). He relied on *Coker v. Ash Trucking Co., Inc.*¹ to argue that, despite the notation contained on the Board's opinion, the Board did not "enter" its decision within the meaning of CR 76.25(2) until

¹ 917 S.W.2d 183 (Ky. App. 1996) (appellant ordered to obtain certificate concerning date of entry because Board's opinion stated only rendition date; entry as contemplated by CR 76.25(2) occurs when the Department makes the entry required by KRS 342.245 into the record book kept for that purpose).

June 29, 2010.² He based the allegation on discussions between his attorney and the Department's Appeals Section Supervisor. The employer objected based on the entry date stated on the Board's opinion and in the claimant's petition for review.

On November 17, 2010, while the motion for an extension of time remained pending, the claimant filed a motion requesting the Court of Appeals to obtain a certificate from the Department stating the date on which the Commissioner or a member of the Department's staff entered the Board's decision pursuant to KRS 342.285(3) and KRS 342.245. An affidavit from the claimant's attorney stated that the Department had not adopted a procedure for certifying when the Board's decisions are entered. Counsel acknowledged in the affidavit a belief when tendering the claimant's petition for review that "entry" of the Board's decision occurred on the date that appeared on the face of its opinion. Counsel claimed to have learned subsequently from Department personnel that the date appearing on the face of the Board's decision might or might not be the date that the decision was entered in the electronic recording system by which the Department complies with KRS 342.245.

² KRS 342.285(3) requires the Board to "enter" its decision within 60 days following the date that the last appellate brief was filed. KRS 342.230(2) designates the Department of Workers' Claims (Department) as the custodian of the Department's records, including those of the Board. KRS 342.245 states, "All proceedings of the board and the administrative law judges shall be recorded in books kept for that purpose by the commissioner, which shall constitute a public record and shall contain an entry of each case, claim, or proceeding considered, heard or passed upon by each administrative law judge and the board, with the award, finding or decisions made thereon."

The employer objected to the motion and moved to dismiss the appeal. On January 20, 2011 the Court of Appeals passed the pending motions and ordered the claimant to file with the Clerk within 20 days a verified statement from the Department's commissioner that "confirm[ed] the date the Board's opinion was noted in the docket and the parties were served with notice of entry of the opinion."

A statement from the commissioner confirmed that the Board's opinion "was entered on June 28, 2010" and that the commissioner had no knowledge of any event that would have caused it to be entered at a time other than the date reflected on the opinion. The statement also indicated that the commissioner had directed the Board to reflect the date of entry on the front of its opinion; directed the Board to mail the opinion to the parties before the entry date; and had no knowledge of any deviation from those directions. The claimant filed the statement and requested an extension of time to obtain another statement from the commissioner that addressed the date of the docket notation and of service of the Board's opinion on the parties.

The Court of Appeals denied the claimant's motion for additional time to file a petition for review and dismissed the appeal on March 24, 2011. The court denied as being moot the motion for additional time to file a certification. A divided court denied subsequent motions by the claimant to reconsider the previous order and to order the Board or the Department to clarify the method by which the Board's opinions are entered. This appeal followed.

The claimant asserts that the Court of Appeals erred by failing to determine whether the Department complied with the mandatory procedures for entering decisions of the Board and providing notice to the parties. He argues that his petition for review was timely because he sent it to the Clerk by priority registered mail on July 29, 2010, which was within 30 days after the Board's decision was entered on June 29, 2010. We disagree.

KRS 342.290 and CR 76.25(2) permit a party aggrieved by the Board's decision to file a petition for review in the Court of Appeals within 30 days of the date that the Board "enters its final decision pursuant to KRS 342.285(3)." CR 76.25(4)(b) requires a petition for review to state the date of entry of the final decision by the Board. Failure to file the petition within the time allowed requires dismissal.³

*Coker v. Ash*⁴ does not control the outcome of this appeal because, unlike the Board's opinion in the present case, its opinion in *Coker v. Ash* stated only the date that the decision was rendered. Thus, the court required the appellant to obtain certification from the Department concerning the date that it was entered. The claimant does not dispute that the Board served him with its opinion, which stated that the decision was entered on June 28, 2010. He admits that his petition for review identified the date of entry of the Board's

³ CR 76.25(2). *Belsito v. U-Haul Company of Kentucky*, 313 S.W.3d 549 (Ky. 2010); *Hutchins v. General Electric Company*, 190 S.W.3d 333 (Ky. 2006); *AK Steel Corporation v. Carico*, 122 S.W.3d 585, 586 (Ky. 2003) (a misunderstanding over the filing date is not the type of excusable neglect for which CR 73.03(1)(d) permits an enlargement of the time to file the jurisdictional document after that time has expired).

⁴ 917 S.W.2d 183.

decision as being June 28, 2010 and that he sent the petition to the Clerk of the Court of Appeals by priority registered mail on July 29, 2010. Moreover, he alleges nothing that would have required the court to consider the method by which the Board's opinions are entered or to determine whether the Board's opinion in this case was actually entered on June 28, 2010.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,
KEVIN REECE:

Udell Barry Levy
1450 Starks Building
455 South Fourth Street
Louisville, KY 40202

COUNSEL FOR APPELLEE,
INTEGRAL STRUCTURES, INC.:

Rodney Joseph Mayer
U'Sellis & Kitchen, PSC
600 East Main Street
Suite 100
Louisville, KY 40202