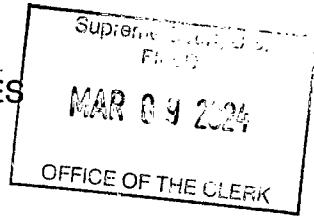


No. 23-3906

IN THE  
SUPREME COURT OF THE UNITED STATES



Kelly A Porter — PETITIONER  
(Your Name)  
VS.  
Axelon, Dr. Jacquemin, ALJ Weatherby  
Ky Workers Comp. Board — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Kentucky Supreme Court  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kelly A. Porter  
(Your Name)

1200 Highway Ave.  
(Address)

Covington, Ky 41011  
(City, State, Zip Code)

859-496-7315  
(Phone Number)

## **QUESTIONS PRESENTED**

- 1. De Novo: Whether the Supreme Court's decision, affirmed the Appellant Court is an abuse of discretion and against the rule of law finding Porter "Notice of Appeal" emailed to the ALJ is contrary to Kentucky Appellant/ Supreme Court rulings:**
- 2. De Novo: Kentucky Workers Compensation statute 803 KAR 25:010 Sect. 22 and KRS 342.285 are unconstitutional, vague, unclear, ambiguous and fails to notify claimants of their right to Appeal the ALJ's decision on award or order.**
- 3. De Novo: 18 U.S. Code § 242 Deprivation of rights under color of law the ALJ, Porter's attorney, Berger and defense attorney conspired to conceal filing of the defendant's medical witness disguised as plaintiff's evidence; lunched a prima facie case of fraud**

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **RELATED CASES**

None.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_ A \_\_\_\_\_.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 12/14/2023.  
A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_ A \_\_\_\_\_.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

111

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

**Title 18 U.S.C, sec.242:** Makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. Including acts done by federal, state, or local official within their lawful authority, but, also acts done beyond the bounds of that officials lawful authority.

**5<sup>th</sup>/14<sup>th</sup> Amendment :Due Process: Procedural;** Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment describe a legal obligation of all states; all levels of American government must operate within the law ("legality") and provide fair procedures. The constitutional requirement that a person must be given notice, the opportunity to be heard, that no citizen of life shall be denied life, liberty or property interest.

**14<sup>th</sup> Amendment “Equal Protection”:** All citizens of the United States are guaranteed equal protection under the laws of the United States. No state shall make or enforce any law which abridge the privileges or immunities of a United States Citizen; nor shall any state deprive any person life, liberty or property interest without due process within its jurisdiction the equal protect of the laws.

**Section 111(2) of the Kentucky Constitution and SCR1.030 (3):** Decisions of the Workers' Compensation Board shall be subject to direct review by the Court of Appeals.

**Section 242 of Title 18 Depravation of Rights Under the Color of Law**

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## TABLE OF CONTENTS

<b>Opinions Below.....</b>	<b>pg1</b>
<b>Statement of the Case.....</b>	<b>pg2-3</b>
<b>Reasons for Granting the Writ.....</b>	<b>pg4-12</b>
<b>Conclusion.....</b>	<b>pg13</b>

## INDEX TO APPENDICES

<b>APPENDIX A.....</b>	<b>Kentucky Supreme Court</b>
<b>APPENDIX B.....</b>	<b>Kentucky Appellant Court</b>
<b>APPENDIX C.....</b>	<b>RECORD EXHIBITS(C1-8)</b>

<b>QUESTIONS PRESENTED.....</b>	<b>i</b>
<b>LIST OF PARTIES/RELATED CASES.....</b>	<b>ii</b>
<b>JURISDICTION.....</b>	<b>iii</b>
<b>CONSTITUTIONAL PROVISIONS .....</b>	<b>iv</b>

## TABLE OF AUTHORITIES CITED

### CASES

1. Ready v. Jamison 705 S.W.2d(1986).....pg5
2. Smith v. Goodyear tire Ky app. 772 S.W.2d(1989).....pg5
3. Workers Comp Bd. v. Siler 840 S.W.2d, Ky Supreme Ct(1992)....pg5
4. Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968).....pg10
5. Wood v. Kirby, Ky. S.W.2d(1978).....pg10
6. Bowerman v. Black Equipment Co., 297 SW 3d Ky: Ct of App 2009...pg11
7. Jones, 127 S.Ct. at 914.....pg6

### STATUTES/RULES

1.803 KAR 25:010 Section 22. Review of Administrative Law Judge Decisions  
(2) Time and format of notice of appeal.....pg4,6,7,8

2. KRS 342.285 - Appeal to Workers' Compensation Board.....pg6,9

4. KRS 342.730(1)(c)(2).....pg2

FRCP RULE 60(b).....pg12

**Constitutional and statutory provisions.....iv**

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Kentucky Appellant court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished. *Feburary 17, 2023*

## STATEMENT OF THE CASE

On March 27,2017 Kelly Porter injured his lower back and lumbar spine while performing his job duties. Porter filed a timely Workers Comp claim. 12/26/2017 Porter's temporary benefits were terminated (Ex 1) citing "injury was age-related." Porter appealed, filing a case with the Kentucky Workers Comp Board, represented by counsel. April 2020 Porter hired attorney Berger as his new counsel. November 2020 the ALJ allowed Porters Attorney, Berger filed into the record the defendants' (Ex 5) medical witness IME Report (Ex 3) which contradicted Porter's medical evidence of Dr. Sower (Ex 2); Berger concealed this material fact from Porter. February 2022 ALJ's Order from (Ex 7) "Petitions for Reconsideration" confirmed, "*The plaintiff is therefore entitled to the 2multiplier per KRS 342.730(1)C (2).*" July 1,2022, the Board vacated and remanded as ordered, "vacates 2xmultiplier, Remand with directions to calculate the post-injury wages utilizing all evidence of record." There would be 4 Reconsiderations filed. On August 16,2022 without a hearing, the ALJ on Remand simply changed his "finding facts" and disqualified Porter from the 2xmultiplier per **KRS 342.730(1)(c)**. Attorney Berger, Porter 's attorney "quit" without motioning the court to withdraw. He failed to assist Porter to find new counsel thereby violating his oath and their contractual agreement. Porter was forced to file his appeal to the Board, Pro Se. Porter's Notice of Appeal was due on September 15,2022. Porter filed a timely **Notice of Appeal** on September 12,2022 Pro se, "via email" (Ex 9a) to the ALJ Weatherby and all parties and a Motion for Extension was also emailed. The Clerk, under the color of law; did not file Porter's **Notice of**

**Appeal** into the record. Porter also mailed a “**Motion for an Extension to file an Appeal**” (Ex8) on September 16, 2022 to the Kentucky Workers Comp Board and all parties; due to the fact that Berger had breached his duty and Porter would need time to find new counsel. On October 3<sup>rd</sup> the Board erroneously deemed Porters “**Motion for an Extension**” to be an untimely **Notice of Appeal**, which was received on September 22, 2022. Porter appealed to the Kentucky Court of Appeals which cited (ExApxB, pg3 para1) “Porter did not make a copy of that email or an affidavit regarding its content or transmission part of the record.” Porter did not know that the emailed Notice had not been filed into the record. Under the color of law; the ALJ actions to discarded the legal document or not to file it into the record was an abuse of power and violated Porters due process rights. The Appellant Court denied review of Porters case on the merits on February 17, 2023, citing, “*Porter did not make a copy of that email or an affidavit regarding its content...*” Porter proceeding pro se had no access to e-filing into workers comp. record (ApxB, pg2 para1). Porter’s email was received by the clerk for the ALJ was confirmed. PorterAppealed to the Kentucky Supreme Court (ApxA) he provided an Affidavit and copy of the emailed notice but, the court affirmed the Court of Appeals; erroneously finding that Porter’s “**Motion for an Extension to file timely Brief**” (Ex8) mailed to worker comp on September 16, 2022 was meant to be Porter’s **Notice for Appeal** and therefore, untimely. But Porter timely emailed his actual **Notice of Appeal** on September 12, 2022 which was completely overlooked because the ALJ

did not file the notice into the record. The Petitioner, Kelly Porter now appeals to the U.S Supreme Court for justice.

## REASONS FOR GRANTING THE PETITION

**1. Whether the Supreme Court's decision, affirmed the Appellant Court is an abuse of discretion and against the rule of law finding Porter "Notice of Appeal" emailed to the ALJ is contrary to Kentucky Appellant/ Supreme Court rulings:**

On September 12, 2022, Porter filed a timely Notice of Appeal, pro se which was sent to the ALJ Weatherby and other parties "via email" (Exa). Under the color of law; the clerk did not file Porter's Notice of Appeal into the record upon verified receipt; (email sent by Porter): Hello, will you please email me to confirm that you received the Notice of Appeal" Thereby denied Porter has procedural due process rights. Because Porter was now acting pro se, unaware of any error; this action or inaction by the clerk denied Porter equal protection. The Clerk nor the ALJ informed Porter that his "Notice of Appeal" must be mailed to the Board. The statute **KAR 25:010 sec22 and KRS 384.285** is **vague and ambiguous** and does not state that the Notice must be mailed. Porter's emailed "Notice of Appeal" if defective was non-jurisdictional therefore, should not have been dismissed. The Supreme court should have found substantial compliance applies ; The failure of any party to comply with other rules relating to appeals ... does not affect the validity of the appeal. The Appellant Courts function, "Achieving an orderly appellate process, deciding cases on the merits, and seeing

*to it that litigants do not needlessly suffer the loss of their constitutional right to appeal; the Court must attempt to balance the harm caused against the objectives sought to be promoted to arrive at an appropriate sanction.* Porter was diligent in his pursuit for justice, appealed the ALJ's August 16, 2022 decision facing extraordinary circumstances; as evidenced by his emailed Notice of Appeal to the parties. But, in Porter's case he has been denied review of this case for non-jurisdictional error because the ALJ /clerk failed to file the Notice, a legal Notice into the record; therefore, been denied his 5<sup>th</sup> and 12<sup>th</sup> amendment rights. An agency's failure to follow its own **regulations** "tends to cause unjust discrimination. **Case law: Ready v. Jamison 705 S.W.2d(1986): Held: Non jurisdictional defects in the notice of appeal should not result in automatic dismissal.** *The notice of appeal was timely filed in Ready, and all parties were named. We concluded that since no substantial harm resulted to the parties, dismissal of the appeal was an inappropriate remedy. "The failure of a party to file notice of appeal within the time specified in this Rule in CR 73.02(1)(a) ... shall result in a dismissal of the appeal. " The failure of any party to comply with other rules relating to appeals ... does not affect the validity of the appeal ... **Smith v. Goodyear Tire and Rubber Co., Ky.App., 772 S.W.2d 640 (1989)**. provides: *The failure of a party to file notice of appeal within the time specified in this rule . . . shall result in a dismissal of the appeal. . . . The failure of any party to comply with other rules . . . does not affect the validity of the appeal . .* **Workers Comp Board. v. Siler, 840 SW 2d,Ky Supreme Ct 1992:***

*The Court of Appeals reversed the dismissal of the Board and remanded the case. Our adoption of the substantial compliance rule provides that the failure of a party to timely complete some procedural steps may not affect the validity of the appeal. No prejudice is shown by the appellees, the Notice of Appeal is ruled timely filed. In Jones, 127 S. Ct. at 914 Held: Ensuring that claims are not thrown out before an adequate opportunity to consider their merit is essential to that guarantee. Other courts have also distinguished a “timely filed defective instrument” from a “failure to timely file an instrument”. Therefore, Porter prays that the decision is reversed.*

**2. Kentucky Workers Compensation statute 803 KAR 25:010 Sect. 22 and KRS 342.285 are unconstitutional, vague, unclear , ambiguous and fails to notify claimants of their right to Appeal the ALJ’s decision on award or order.**

**803 KAR 25:010 Section 22 and KRS 342.285** fails to provide **prior** notice of rights; violates all injured workers right of notification of the right to file an appeal, the applicable 30-day period of limitation, the consequences for a party who files Notice of Appeal within the time specified but who failed to comply with all other rules, will not result in a dismissal of the appeal. The intent here is not “common knowledge” and without written notice contained in **803 KAR 25:010 Section 22 and KRS 342.285 claimants rights are at risk**: The ALJ’s award or order contains the date on which the ALJ’s decision is made but, the ALJ’s decision fails to provide the claimant with notification and explanation of

a “Claimant’s Right to Appeal,” should they disagree with the ALJ’s decision. The Claimant is not given, with the ALJ’s written decision, any prior written notification of their right to appeal. This denies claimants their constitutional right to due process and equal protection. It is the responsibility of the Workers Comp Board and its governing body to fully inform claimants of their “Constitutional Right to Appeal”, rather claimants are pro se or represented by counsel. Pursuant to **803 KAR 25:010 Section 22 (2.a):**The language of the statute is ambiguous as to the time in which to appeal, i.e., “*30 days of an order, award or decision of the ALJ.*” The statute uses, “of” instead of “from.” “Of” shows possession or “part of a whole of something.” “From” is used as starting point of something or origin. The use of the word “of” is ambiguous, it is unclear and confusing. Does the 30 days start, the day of the award; counting that day as day 1 or does the 30 days start, day 1 after the day of the award. Porter was denied his right to receive notice of the ALJ’s decision because at that time Porter was represented by counsel. The ALJ’s decision was not mailed to Porter but, counsel received it electrically. However, Berger, Porter’s attorney “quit” and he did not tell Porter of the ALJ’s decision until 7 days later. This policy too denies claimants their right to due process, that the decision of the ALJ is not mailed out to him. This too, denied Porter his right to appeal and due process based on “extraordinary circumstances”. If the time period to appeal is triggered by the date in which the ALJ signs his decision and not the mailing date of the decision; the statute’s language should reflect such. The right to appeal is

established by statute or constitutional provision. Filing your appeal on time is essential for protecting your appeal rights; however, if the claimant is not notified of their rights, how would they timely take advantage of it? **803 KAR 25:010 Section 22** and **KRS 342.285** does not give people sufficient or fair notice of what the law requires, it does not specify alternative methods of service of an appeal, including, e-filing, email, fax.; this denies claimants procedural due process 5th and 14<sup>th</sup> Amendment equal protection rights and shows a lack of “required notice” of the filing requirements for all claimants. *A statute that is extremely unclear can be, in the Court’s terms, void for vagueness; it fails to notify claimant of right to appeal, language is unclear, no forms are supplied for the Notice of Appeal.* Ohio and Tennessee provide all injured workers with a written notice of a claimants right to Appeal with the award or order of the ALJ’s decision(s); which are mailed out to all the claimant who have a case number. Kentucky gives no such notice to claimants. It is unconstitutional to have an Appeals process which does not include the right of notification of those rights; Interest is compelling when it is essential or necessary rather than a matter of choice, preference, or discretion. Many states provide preprinted form that are accessible online to be filed as a “Notice to Appeal.” Other administrative agencies notify claimants of their right to appeal in their written decisions to approve or reject benefits like Social Security and Snap Benefits and allow a 5-day grace period for mailing of notices to claimants with the decision and a notification of how to appeal a favorable or unfavorable decision.

3. 242 of Title 18 Depravation of Rights Under the Color of Law the ALJ, Porter's attorney, Berger and defense attorney conspired to concealed the harmful filing of the defendant's evidence disguised as plaintiff's evidence; lunched a *prima facie* case of fraud:

*KRS 342.285(2); the "final and appealable" analysis in CR 54 has no application to the board's orders. The workers' compensation board has had only appellate jurisdiction of workers' compensation cases unless there is an allegation of fraud or misconduct on the part of some person engaged in the administration of the Act.* However, the Kentucky Appellant and Supreme Courts both failed to address Porter's allegations of fraud thereby violating Porter's right for due process and equal protection. In 12/26/2018 after receiving temporary benefits Under workers comp. Porter's benefits were abruptly terminated citing "age related injury" and maximum MMI(Ex1). Several Physician's IME submitted into the record were based on racial bias.(IME, pg7, Feb. 27, 2019) "At 59 Mr. Porter decided...he could not and would not continue working ..." ' Poor motivation to be physically active ...manifest...Mr. Porter asked ...for a handicapped parking sticker..." (Supplemental" 2<sup>nd</sup> IME, June 12, 2020) Dr. Kriss opinioned, "*I believe the weight of the evidence is fairly clear that Mr. Porter had already given up on long-term employment prior to March 27, 2017...(5)* "Clearly there is something amiss with Mr. Porter" ... (11) "Porter has no intent of returning to work...he continues to apply to social security...(pg12) Mr. Porter is simply not motivated to be ...productive... The ALJ allowed the defense to admit

into the record, racially bias and age discriminatory medical opinions. **Case law: *Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968)*** : *Remanded. The Court on appeal made it clear that there must be specific findings of fact to enable the Court, upon review, to determine whether the administrative agency had acted within its powers.* The ALJ under the color of law, did conceal from Porter that his attorney, Berger had motioned the court to compel the filing of Nazar, the defendant's medical witness Report(Ex4pg2). No hearing was held. The ALJ allowed Berger to submit into evidence defendant's witness(Ex6, ID#6150731) Dr. Naza's IME. It is common knowledge that the IME's a defendant/employer pays for are skewed in their favor; working to reduce a legitimate claim. Berger's affidavit states, "come now the Plaintiff by and through counsel"(Ex4) but, Berger had not conferred with Porter. This filing directly conflicted with Dr. Sower's IME(Ex2, Porter's own witness) also submitted into the record by Berger but, at Porter's request. The ALJ, Berger and Poole, attorney for Axelon knew that submitting the Defendant's evidence was "improper, controversial, intentionally deceptive, and unethical and did violate Porters equal protection rights. The ALJ had a fiduciary duty to question Berger's motives as such behavior is not client-focused and against public policy.

**Case law: *Wood v. Kirby, Ky.S.W.2d(1978)*** *As noted by the Board, constructive fraud arises from the breach of a legal duty which the law would pronounce fraudulent because of its tendency to deceive others, violate confidence, or injure public interest.* Dr. Nazar suggested post-surgically that, *Porter could return to*

work and assessed a 20% impairment rating which directly contradicted Dr. Sower's (Ex2, ID#6039499) post-surgical 28% impairment rating with abnormal nerve sensations at the right ankle and foot, who opined that *Porter could not return to work*. The ALJ cited Nazar's Report as the "most convincing" medical opinion. **Bowerman v. Black Equipment Co., 297 SW 3d Ky: Court of App (2009)** : *while a capricious fact-finder would be defined as being "characterized by or guided by unpredictable or impulsive behavior."*<sup>51</sup> *These terms are also synonymous with an "unreasonable" decision, one not guided by reason but, irrational or capricious. Held: because the ALJ acted in excess of her statutory authority, reversal is mandated.* It is Porter's belief that Berger did conspire with Poole to submit Nazar's report and that the ALJ would use Nazar's impairment rating over Dr. Sower to reduce the overall workers comp benefit for Porter; *"there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."* **Elements for fraudulent concealment:** "(1) the defendant had a fiduciary duty to disclose a material fact of filing opposing defendant's medical witness Reports. (Ex4, pg2#7,) That this counsel believes the submission of Dr. Nazar's report is necessary to the plaintiff's claim. (Ex4, pg2#6,) ...Defendant has not filed a notice to submit Dr. Nazar's Report. #8 That this request is made out of necessity... (2) Berger failed to disclose the fact; Berger concealed that he did submit Dr. Nazar's Report into evidence. (Ex6) Notice to submit: Comes now the plaintiff, by and through counsel, and hereby tenders the attached Medical Report of Dr. Nazar, Medical Index #3071 (3) failure to disclose the material fact

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kelly A. Porter

Date: March 9, 2024