

RNDERED: DECEMBER 14, 2023
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE

1/4/2024

Karen Coli

2023-SC-0232-WC

KELLY PORTER

APPELLANT

v.

ON APPEAL FROM COURT OF APPEALS

NO. 2022-CA-1259

WORKERS' COMPENSATION NO. WC-17-85945

RECEIVED
COMMISSIONER
JAN 10 2024

WORKERS' CLAIMS
APPELLEE

AXELON, INC.; HONORABLE
JOHNATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Kelly Porter, pro se, appeals from an opinion of the Court of Appeals which affirmed the decision of the Workers' Compensation Board ("Board") to dismiss his appeal. Having carefully reviewed the record and briefs, we affirm the opinion of the Court of Appeals.

On June 5, 2018, Porter, with the assistance of counsel, filed a workers' compensation claim for injuries sustained during the course of his employment with Axelon, Inc. On January 8, 2020, Porter's original counsel moved to withdraw, which the Administrative Law Judge (ALJ) granted. Porter obtained alternate counsel who entered an appearance on his behalf in April 2020. A formal hearing was conducted on February 23, 2021.

On April 21, 2021, the ALJ awarded Porter temporary total disability (TTD), permanent partial disability (PPD) and medical benefits. Both parties petitioned for reconsideration. On May 13, 2021, the ALJ entered an amended opinion and award. Both parties again petitioned for reconsideration. The ALJ entered a second amended opinion and award on June 2, 2021. While neither party petitioned for reconsideration from the second amended opinion and award, both parties appealed to the Board.

The Board affirmed the ALJ on most of the disputed issues but remanded the matter for consideration of whether Porter was entitled to the application of the two-multiplier, as provided by KRS 342.730(1)(c)2. Neither party appealed from the decision of the Board.

On remand, the ALJ entered an opinion and award on January 6, 2022, concluding that Porter was entitled to application of the two-multiplier. Both parties petitioned for reconsideration. On February 18, 2022, the ALJ issued additional findings of facts to support its conclusion that Porter was entitled to the application of the two-multiplier. Axelon appealed to the Board.

On appeal, the Board vacated the ALJ's determination concerning the application of the two-multiplier and remanded with directions to recalculate Porter's post-injury wages. Neither party sought further review. On remand, the ALJ entered an opinion and award on August 16, 2022, recalculating Porter's post-injury wages under KRS 342.140(d). The ALJ further concluded the two-multiplier did not apply because Porter did not return to work at the

same or greater wages as the pre-injury amount. Neither party filed a petition for reconsideration.

On September 15, 2022, Porter's counsel filed a motion to approve his attorney's fee pursuant to KRS 342.320. The record does not reflect whether the ALJ ruled on the attorney fee issue. Porter's counsel did not file a notice of appeal. On September 16, 2022, Porter, *pro se*, mailed a request via United Parcel Service for an extension of time to file an appeal to the Board. The Board received the request on September 19, 2022. Axelon filed a response in opposition to Porter's motion. The Board entered an opinion and order dismissing Porter's appeal as untimely. The Court of Appeals affirmed. This appeal followed.

Porter argues the Court of Appeals erred by affirming the dismissal of his appeal as untimely. We disagree.

KRS 342.285 governs the procedure for filing an appeal from the decision of an ALJ to the Board and states in pertinent part:

- (1) An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award.

803 KAR¹ 25:010 § 22(2)(a) further provides:

Within thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or

¹ Kentucky Administrative Regulations.

decision may file a notice of appeal to the Workers' Compensation Board.

803 KAR 25:010 § 1(7) defines “[d]ate of filing” as “the date that”:

(a) A pleading, motion, or other document is electronically filed with the commissioner at the Department of Workers' Claims (DWC) in Frankfort, Kentucky;

(b) A pleading, motion, order, opinion, or other document is received by the commissioner at the Department of Workers' Claims in Frankfort, Kentucky, except:

1. Documents delivered to the offices of the Department of Workers' Claims after the office is closed at 4:30 p.m. or on the weekend, which shall be deemed filed the following business day; or
2. Documents transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers shall be deemed filed on the date the transmitting agency receives the document from the sender as noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

Our precedents have steadfastly maintained the timely filing of a notice of appeal is mandatory “and failure to do so is fatal to the action.” *Workers' Compensation Bd. v. Siler*, 840 S.W.2d 812, 813 (Ky. 1992). The doctrine of substantial compliance does not apply to untimely appeals. *Id.* While pro se litigants may generally be entitled to leniency for the failure to comply with procedural requirements, an untimely notice of appeal is “a jurisdictional defect that cannot be remedied.” *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990), superseded on other grounds by rule change as stated in *Mahl v. Mahl*, 671 S.W.3d 140, 151 (Ky. 2023).

Porter's notice of appeal was due on September 15, 2022. As the Court of Appeals and the Board correctly held, Porter's attempt to file a notice of appeal was untimely from the outset because the document was not mailed until September 16, 2022, one day after the time for appeal had expired. Moreover, we cannot consider the affidavit and email attached to Porter's brief in support of his claim that he timely filed his appeal albeit in the wrong forum because these documents were neither included in the record nor otherwise presented to the Court of Appeals or the Board. An appellate court cannot consider matters outside the record even when presented by a pro se litigant. RAP 32(E)(1)(c); *Telek v. Daugherty*, 376 S.W.3d 623, 626 (Ky. App. 2012). Ultimately, it is the responsibility of the “[t]he filing party [to] insure that a document is timely filed to comply with jurisdictional deadlines[.]” 803 KAR 25:010 § 4(1).

Accordingly, the decision of the Court of Appeals is affirmed.

All sitting. VanMeter, C.J.; Bisig, Conley, Lambert, Nickell, and Thompson, JJ., concur. Keller, J., concurs in result only.

COUNSEL FOR APPELLANT:

Kelly A.L. Porter, pro se

COUNSEL FOR APPELLEE:

Cate A. Poole
Goodrum & Downs, PLLC

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RENDERED: FEBRUARY 17, 2023; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

**RECEIVED
COMMISSIONER**

FEB 20 2023

NO. 2022-CA-1259-WC

WORKERS' CLAIMS

KELLY PORTER

APPELLANT

v.
PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD

ACTION NO. WC-17-85945

**AXELON, INC.; HONORABLE JONATHAN
R. WEATHERBY, ADMINISTRATIVE LAW
JUDGE; DR. JOHN JACQUEMIN/ORTHOCLINCY;
AND WORKERS' COMPENSATION BOARD**

APPELLEES

**OPINION
AFFIRMING**

***** * * * ***

BEFORE: ECKERLE, KAREM, AND MCNEILL, JUDGES.

ECKERLE, JUDGE: Kelly Porter (Porter), *pro se*, petitions for review of an order of the Workers' Compensation Board (Board) dismissing his appeal for failure to file a timely notice of appeal. We affirm.

B-1

On June 5, 2018, Porter filed his initial claim for a low back injury sustained during his employment with Axelon in Erlanger, Kentucky. On April 21, 2021, the Administrative Law Judge (ALJ) rendered his initial decision that Porter had sustained a work-related low back injury, awarding temporary total disability (TTD), permanent partial disability (PPD), and medical benefits.

Following a rigorous period of appellate practice, the issue of the application of the multiplier provided in Kentucky Revised Statute (KRS) 342.730(1)(c)(2) remained. In his remand opinion and award of January 6, 2022, the ALJ determined that the 2x multiplier applied to Porter's PPD award. Axelon once again petitioned for reconsideration, arguing that the multiplier did not apply since Porter never returned to work at the same or higher average weekly wage after the injury date. After the ALJ's denial of reconsideration, Axelon appealed to the Board, which vacated his decision and remanded the issue for a recalculation of Porter's post-injury wages. Finally, on August 16, 2022, the ALJ rendered his amended remand opinion and award, finding that the multiplier did not apply since Porter did not return to work at the same or greater average weekly wage. No petition for reconsideration was filed.

In his brief, Porter claims that he was advised by a Board staff member to send his notice of appeal of the August 16, 2022, amended remand opinion and award to the ALJ, not the Board. He indicates that he emailed it to the

ALJ on September 13, 2022. Porter did not make a copy of that email or an affidavit regarding its content or transmission part of the record.

On the instruction of another staffer, Porter sent to the Board a motion for an extension of time to file an appeal by United Parcel Service (UPS) on September 16, 2022. It was received on September 19, 2022. A motion for an extension of time in which to file a brief was received by the Board on October 3, 2022.

Upon receipt of Porter's motion for an extension of time to file an appeal, Axelon filed an objection and motion to strike on the grounds that the Board was without jurisdiction to consider Porter's motion due to his failure to comply with the applicable Kentucky Administrative Regulations (KAR). Axelon asked that the pleading be stricken and that any "appeal" be dismissed. By opinion and order entered October 3, 2022, Porter's attempted appeal was dismissed as untimely.

As noted in *Pike County Board of Education v. Mills*, 260 S.W.3d 366, 368 (Ky. App. 2008), "our standard of review of a decision of the Workers' Compensation Board 'is to correct the Board only where the . . . Court perceives 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, 687-688 (Ky. 1992).'"

Having reviewed the record and the Board's opinion, this Court cannot find that the law was improperly applied or that the evidence was incorrectly considered.

KRS 342.285(1) provides that, if no petition for reconsideration is filed, "either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award." However, those regulations set forth very specific requirements that must be met to perfect the appeal.

803 KAR 25:010 § 22 states in pertinent part:

(1)(b) Parties shall insert the language "Appeals Branch" or "Workers' Compensation Board" on the outside of an envelope containing documents filed in an appeal to the board.

(2) Time and format of notice of appeal.

(a) Within thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.

...

(c) The notice of appeal shall:

1. Denote the appealing party as the petitioner;
2. Denote all parties against whom the appeal is taken as respondents;

3. Name the administrative law judge who rendered the award, order, or decision appealed from as a respondent;

5. Include the claim number; and

6. State the date of the final award, order, or decision appealed.

While Porter's motion for extension of time complies with Section 22 as to these requisites in many respects, it still must have been timely filed.

803 KAR 25:010 § 1(7)(b)2. states that:

(7) "Date of filing" means the date that:

(b) A pleading, motion, order, opinion, or other document is received by the commissioner at the Department of Workers' Claims in Frankfort, Kentucky, except:

2. Documents transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers shall be deemed filed on the date the transmitting agency receives the document from the sender as noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

Porter's motion, having been mailed on September 16, 2022, was untimely from its inception, as evidenced by the envelope¹ in which it arrived. In

¹ Found at Record 716.

Rice v. McCoy, 590 S.W.2d 340, 342 (Ky. App. 1979), the Court recognized that the timely filing of an appeal is both mandatory and jurisdictional. *Jolly v. Lion Apparel, Inc.*, 621 S.W.3d 411 (Ky. 2021). Indeed, the Supreme Court has deemed failure to file a timely notice of appeal “fatal” based upon facts such as those presented herein, where the notice of appeal was sent by mail to the Board, arriving 31 days after the filing of the ALJ’s decision. *Workers’ Compensation Board v. Siler*, 840 S.W.2d 812, 813 (Ky. 1992).

Accordingly, we affirm the Workers’ Compensation Board’s opinion and order dismissing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kelly Porter, *pro se*
Covington, Kentucky

BRIEF FOR APPELLEE:

Cate A. Poole
Lexington, Kentucky