

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001661-WC

ZACK HOSKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-90626

ASSOCIATED CONTRACTING,  
HON. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE,  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,<sup>1</sup> SPECIAL JUDGE.

DIXON, JUDGE: Zack Hoskins seeks review of an order of the Workers' Compensation Board dismissing his appeal for failure to timely file a brief. We affirm.

Hoskins is thirty-two years old and has a twelfth grade education. He has primarily worked in the coal mining industry. Hoskins was employed by Associated Contracting as a heavy equipment operator at a surface coal mine. He suffered neck and

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<sup>1</sup> Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

back pain on March 11, 2004, when his end loader struck hard coal, and he was jostled around inside the cab. Hoskins reported the incident and finished his shift. He has not worked since the accident.

On July 4, 2002, Hoskins developed a muscular disorder in which his legs jerked uncontrollably, and he was unsteady on his feet. After visiting numerous physicians, he was diagnosed with myoclonus of the lumbar spine. Hoskins attributed this condition to the March 11, 2004, work injury and sought workers' compensation benefits.

Following a benefit review conference and formal hearing, the Administrative Law Judge (ALJ) allowed Hoskins to file his brief beyond the deadline. The ALJ issued a lengthy opinion finding that Hoskins's condition was not related to the work accident and denied workers' compensation benefits. Hoskins filed a petition for reconsideration with the ALJ which was denied on November 22, 2005. Hoskins then filed a notice of appeal to the Workers' Compensation Board on December 20, 2005.

Hoskins's attorney, Monica Rice-Smith, filed the claimant's brief along with a motion for an extension of time on February 9, 2006. However, neither the Board nor counsel for Associated Contracting received a copy of the brief. It was not until June 12, 2006, that Rice-Smith investigated the status of the appeal and learned of the error. She submitted another brief to the Board along with a motion to file a late brief. In the unverified motion, Rice-Smith opined that her office had problems in the preceding months with the United States Post Office mishandling mail.

The Board denied the motion and dismissed Hoskins's appeal pursuant to 803 Kentucky Administrative Regulations (KAR) 25:010 § 21 (11) (e). Hoskins now asks this Court to reverse the order of the Board and reinstate his appeal.

Hoskins argues the Board erred in dismissing his appeal because a good faith effort was made to perfect the appeal, and counsel believed the brief was properly submitted. Hoskins also points out that Kentucky Rules of Civil Procedure (CR) 6.02, allows a court to extend filing deadlines for “excusable neglect.”

Conversely, Associated Contracting contends the Board acted within its regulatory authority by dismissing the appeal for failure to file a brief. Associated Contracting alternatively argues Hoskins would have been unsuccessful had the Board considered the merits of the appeal and that Hoskins failed to name the Board as a party pursuant to Kentucky Rules of Civil Procedure (CR) 76.25.

In a workers' compensation case, if the ALJ finds against the claimant, the claimant then faces a stringent burden of proof on appeal to the Board. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). As such, the Board will uphold the ALJ's decision unless it is clearly erroneous. *Id.* Consequently, this Court gives great deference to the Board's decision and only intervenes where the Board's action constitutes a flagrant error resulting in gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In the case *sub judice*, the Board dismissed Hoskins's appeal due to a procedural defect and did not reach the merits of the case. However, we must keep in mind that Kentucky Revised Statutes (KRS) 342.260 grants the Board authority to promulgate administrative regulations necessary to carry out its

purpose. *Workers' Compensation Board v. Siler*, 840 S.W.2d 812, 812-13 (Ky. 1992).

Under the Board's regulations, a claimant appealing an ALJ's decision to the Board must submit a brief within thirty days of filing the notice of appeal. 803 KAR 25:010 § 21 (3)

(a). Furthermore, the regulation states:

Sanctions. Failure of a party to file a brief conforming to the requirements of this administrative regulation or failure of a party to timely file a response may be grounds for the imposition of one (1) or more of the following sanctions:

- (a) Affirmation or reversal of the final order;
- (b) Rejection of a brief that does not conform as to organization or content, with leave to refile in proper form within ten (10) days of the date returned. If timely refiling occurs, the filing shall date back to the date of the original filing;
- (c) Striking of an untimely response;
- (d) A fine of not more than \$500; or
- (e) Dismissal.

803 KAR 25:010 § 21 (11).

In this case, a pattern of dilatory conduct emerged. First, Rice-Smith filed a tardy brief with the ALJ and blamed the post office. Next, Rice-Smith attempted to tender Hoskins's appellate brief to the Board twenty days late because the deadline was not on counsel's calendar. Finally, Rice-Smith submitted a brief to the Board nearly five months beyond the filing deadline, again blaming the post office. The only explanation for the delay is found in the unverified motion to file a late brief. We cannot help but wonder why Rice-Smith never followed up on the appeal after (supposedly) filing the brief in February, considering it was already twenty days late, and she was aware of alleged problems with the post office.

Furthermore, we recognize that the Board's dismissal foreclosed Hoskins's opportunity to appeal his case on the merits. We note that, upon our review of the record, the ALJ entered a comprehensive and well-reasoned opinion supported by substantial evidence. As such, we agree with the Board that a delay of nearly five months cannot be overlooked in this case. Although the Board imposed a serious sanction, we are reminded that the Board is vested with the authority to carry out its regulations. KRS 342.260.

Finally, we address Associated Contracting's argument that the Board was not named as a party in the appeal to this Court. While CR 76.25 (4) (a) requires an appellant to designate the Board as an appellee, the Supreme Court has held that some circumstances exist where dismissal for non-compliance with the rule is improper. *Hutchins v. General Electric Co.*, 190 S.W.3d 333, 337 (Ky. 2006). In *Hutchins*, the Court specifically considered that the appellant served the Board with a copy of the petition for review, *Id.*, as did Hoskins in this case. However, as we have decided this case on other grounds, we decline to address this issue further.

For the reasons stated herein, the order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

**BRIEF FOR APPELLANT:**

Monica Rice-Smith  
EDMOND COLLETT, P.S.C.  
Hyden, Kentucky

**BRIEF FOR APPELLEE:**

W. Barry Lewis  
LEWIS AND LEWIS LAW OFFICES  
Hazard, Kentucky