

***Workers' Compensation Board Appeals Handbook***

*Michael W. Alvey, Chairman, Kentucky Workers' Compensation Board*

This Handbook is designed to explain and summarize basic procedures, rules, and regulations for the lay, or self-represented litigant, as well as serve as a summary reminder of workers' compensation appellate practice for attorneys. We hope this handbook will assist litigants in facilitating their access to and understanding of appeals before the Workers' Compensation Board.

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## **Table of Contents**

Introduction & Cautionary Notes	Page 3
The Workers' Compensation Board	Page 5
Definitions	Page 6
Motion Practice & Formatting Documents	Page 7
Timely Filing Documents	Page 9
What May Be Appealed	Page 9
Notice of Appeal	Page 9
Record on Appeal	Page 11
The Brief: Written Argument	Page 11
Sanctions for Failure to File a Brief	Page 14
Decisions of the Workers' Compensation Board	Page 14
Further Review	Page 15
Effective Date of Opinions and Final Dispositions	Page 16
Settlement While Claim is on Appeal	Page 16
Glossary	Page 16

## Introduction & Cautionary Notes

This Handbook is intended to assist individuals with navigating the appellate practice pertaining to appeals before the Workers' Compensation Board, the first level of appeal of workers' compensation claims. The Handbook is not intended to be a complete practice manual and is not a substitute for carefully reviewing the current Kentucky Rules of Appellate Procedure, the Kentucky Civil Rules, the applicable regulations set forth in 803 KAR 25:010, case law, or the Kentucky Revised Statutes.

**NOTE: It is the responsibility of a person engaged in an appeal to follow the current practice regulations, statutes, civil rules, or rules of appellate procedure which control over any apparent conflict with statements or guidance contained in this handbook.**

Copies of the current version of the Kentucky Civil Rules are available in most county law libraries and in some larger public libraries. To access West's Compilation of Court Rules & Procedures online, visit the Kentucky Court of Justice website at [www.kycourts.gov](http://www.kycourts.gov) and click on the "About the Courts" tab, then click on the "Supreme Court" tab. Next, click on "Rules & Procedures" in the "Resources" section of the Supreme Court or Court of Appeals page.

This Handbook deals only with the procedures for practicing an appeal before the Workers' Compensation Board from a final decision issued by a Kentucky Workers' Compensation Administrative Law Judge.

**While the staff of the Department of Workers' Claims Appeals Section, the Ombudsman of the Department of Workers' Claims, and the claims specialists always attempt to be helpful and assist all parties, they are not allowed to give legal advice or to make decisions for a party concerning how an appeal should be practiced.** Parties practicing an appeal should research questions in the statutes, regulations, and the court rules.

This Handbook is available on the Kentucky Department of Workers' Claims website at: <https://elc.ky.gov/Workers-Compensation/Pages/Publications.aspx>

Any comments concerning the contents, clarity, or usefulness of this Handbook should be addressed to:

Appeals Supervisor  
Kentucky Department of Workers' Claims  
500 Mero St.  
Frankfort, Kentucky 40601  
(502)564-5550

## **The Workers' Compensation Board**

Since 1987 and pursuant to KRS 342.285, the Kentucky Workers' Compensation Board has been the first step in the appellate process in workers' compensation litigated claims. The appeal procedure is set forth in 803 KAR 25:010 Section 22. The three members of the board are appointed to four-year terms by the Governor, subject to confirmation by the Senate. Board members possess qualifications of Court of Appeals judges. One board member is designated as the Chairman.

Since 1994, the board is statutorily required to render an opinion within 60 days of the filing of the last brief. Cases are randomly assigned to each board member to primarily author opinions. In each opinion, unless it is necessary for a board member to recuse from the case, all three board members participate in rendering the decision.

From 1991 to present, over 65 percent of the decisions rendered by the Workers' Compensation Board were appealed no further. A higher percentage of appeals occur following law changes or new interpretations of existing statutory law by either the Kentucky Court of Appeals or the Kentucky Supreme Court.

The Workers' Compensation Board is statutorily limited pursuant to KRS 342.285 to determining:

- Whether the administrative law judge acted without or in excess of his or her powers
- Whether the order, decision or award was procured by fraud
- Whether the order, decision or award was in conformity with the provisions of the Kentucky Workers' Compensation Act
- Whether the order, decision or award is clearly erroneous based on the reliable, probative and material evidence contained in the record

-Whether the order, decision or award is arbitrary or capricious or characterized by abuse or a clearly unwarranted exercise of discretion

## **Definitions**

(1) “**Department of Workers’ Claims**” or “**DWC**” is the agency responsible for administering workers’ compensation claims.

(2) "**Administrative Law Judge**" or "**ALJ**" means an individual appointed pursuant to KRS 342.230(3).

(3) "**Workers’ Compensation Board**" or “**WCB**” is defined by KRS 342.0011(10), and is the first level of appeal of decisions rendered by ALJs.

(4) "**Civil Rule**" or "**CR**" means the Kentucky Rules of Civil Procedure.

(5) "**Date of filing**" means the date that:

(a) A pleading, motion, or other document is electronically filed with the Commissioner at the DWC in Frankfort, Kentucky.

(b) A pleading, motion, order, opinion, or other document is received by the Commissioner at the DWC, 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.

(6) "**Jurisdictional deadline**" means a deadline set by statute or administrative regulation that cannot be extended or changed.

(7) "**Litigation Management System**" or "**LMS**" means the electronic filing and document management system utilized in the filing and processing of workers' compensation claims in the Commonwealth of Kentucky.

(8) "**Signature**" means actual personal handwritten signatures, and includes electronic signatures, which shall be treated as a personal signature for all documents filed in LMS.

(9) "**Rules of Appellate Procedure**" or "**RAP**" are rules of appellate practice established by the Kentucky Supreme Court.

(10) "**Kentucky Revised Statutes**" or "**KRS**" are statutes or laws enacted by the Kentucky Legislature.

(11) "**Kentucky Administrative Regulations**" or "**KAR**" are regulations that implement the statutory provisions.

(12) "**Petitioner**" is a party who files a notice of appeal.

(13) "**Respondent**" is a party against whom an appeal is taken.

### **Motion Practice & Formatting Documents**

Parties present their arguments on the merits of an appeal through formal briefs. However, during an appeal, it may be necessary to request rulings from the WCB regarding procedural or substantive issues. This may include requests for additional time to file a document, requests for a stay of enforcement of the judgment, remand for consideration of approval of a settlement agreement by an ALJ, or even dismissal of the appeal. These requests are handled through the WCB's motion practice.

Motion practice before the WCB differs from practice before a district or circuit court in that the parties do not appear at a set motion hour. Parties, instead, submit written motions for review, consideration, and action by the WCB. It is, therefore, extremely important that written motions and objections be carefully prepared to present the parties' positions.

Any party is permitted to file a response no later than 10 days after the date a motion was filed. RAP 7(C) and 803 KAR 25:010 Section 6(4). After the time to respond has passed, the motion is assigned to a board member for disposition

on a weekly motion docket. Orders ruling on motions are filed in LMS. Copies of orders are mailed to individuals who are unrepresented and have opted not to be served through LMS.

All documents filed with the WCB must be properly captioned including the claim number and the parties involved in the appeal. The document's title should reflect what is being asked in the motion. For example: "Notice of Appeal"; "Motion to Dismiss"; "Motion for Additional Time to File a Brief"; etc.

Documents should be typed. If typing is not possible and handwritten documents must be submitted, the documents must be legible and conform to the formatting requirements in RAP 5(B)(4). Documents must be on 8.5 x 11-inch paper. The type must be at least 12-point and the document must be double-spaced. A margin of 1.5 inches must appear on the left side of the page. The text of the document should clearly state the relief requested and the reasons justifying the relief.

The document must be signed by the attorney or party submitting it and state the signing attorney or party's address. RAP 11, CR 5 & 11; and 803 KAR 25:010 Section 3(3).

Because the WCB prepares its own orders, draft orders should not be submitted with a motion.

Any document submitted to the WCB must be served on all other parties to the appeal. RAP 5; 803 KAR 25:010 Section 5; and CR 5. If a party is represented by counsel, service is completed by delivery to the party's counsel. Any document or pleading before the WCB submitted through the U.S. Mail shall insert "Appeals Branch" or "Workers' Compensation Board" on the envelope.

A Notice of Appeal is filed via LMS, or by mail (if unrepresented), at the following address:

Appeals Supervisor  
Kentucky Department of Workers' Claims  
500 Mero St.  
Frankfort, Kentucky 40601

## **Timely Filing Documents**

Documents that are subject to a deadline must be filed in LMS or received at the Department of Workers' Claims on or before the due date.

RAP 5(E) provides that if a party utilizes registered mail, the document is timely filed on the date it is submitted. Under RAP 5(E), the document may be sent by U.S. Registered Mail, U.S. Express Mail, or by a recognized carrier – such as UPS or FedEx - where the carrier marks the outside of the envelope or box with the date the carrier received the mailing from the customer. **Certified Mail does not qualify under the rule and will be considered filed upon receipt by the DWC.**

Documents filed through first class U.S. Mail will not be considered filed until received by the DWC. A party attempting to use this method of transmittal must carefully comply with the rule and make sure that the date the mail carrier received the document is prominent on the outside of the envelope or box. Documents properly mailed under the rule are deemed timely based on the date that the mail carrier received the document.

## **What May Be Appealed**

A party may only appeal from a judgment that is **FINAL**. A judgment is considered final and appealable only if it disposes of all the claims presented before an ALJ. A judgment or an order that does not dispose of all issues is considered interlocutory and cannot not be immediately appealed. CR 54.01. Any claims disposed of in an interlocutory order may be raised before the WCB when a final judgment has been entered.

The WCB reviews appeals to determine whether the judgment is final and properly appealable. The WCB will dismiss an interlocutory appeal even if neither party raises the issue. Attorneys and parties should also be aware that where an order is by its very nature interlocutory, even the inclusion of the recitals set forth in CR 54.02 will not necessarily make it appealable. *Hook v. Hook*, 563 S.W.2d 716 (Ky. 1978).

## **Notice of Appeal**

The notice of appeal is the document used to begin an appeal. The requirements for filing the notice of an appeal to the WCB are contained in 803 KAR 25:010

Section 22. The notice of appeal notifies all parties and the WCB that the petitioner wishes the review of an ALJ's decision.

The notice of appeal must be filed within thirty (30) days after the ALJ's decision or from an order issued on a Petition for Reconsideration. 803 KAR 25:010 Section 22(2)(a) and KRS 342.275(2). Failure to timely file a Notice of Appeal will result in dismissal of the appeal. 803 KAR 25:010 Section 22(2)(e).

A party who files a notice of appeal before disposition of a Petition for Reconsideration shall promptly move the WCB to hold the appeal in abeyance pending a decision by the ALJ. The Notice of Appeal should be amended, if necessary, after the ALJ issues a ruling on the Petition for Reconsideration.

The notice of appeal must be timely filed in LMS, or if the party is self-represented and has not opted to receive documents through that system, by mail to the Department of Workers' Claims in accordance with the procedure explained above. There is no filing fee for appeals to the WCB.

All parties to the appeal must be identified by name both in the style of the case and in the body of the notice of appeal. If a person or entity is involved in the litigation in a limited capacity (as executor or guardian, for example), that capacity should be included with the name.

The petitioner's notice of appeal must list all other parties to the appeal as respondents. It must contain a certificate of service demonstrating service of the notice upon counsel for all parties to the proceedings from which the appeal is taken, or, if a party is unrepresented, upon the party at the last known address. RAP 2(B)(1).

Failure to name an indispensable party, or one who is necessary to provide complete relief, as a respondent may result in dismissal of the appeal.

The notice of appeal must identify all opinions or orders petitioner seeks to have reviewed. RAP 2(B)(1). This normally includes the ALJ's decision and any adverse ruling or order on a petition for reconsideration.

Any cross-appeal must be filed within ten (10) days after the filing of the notice of appeal. 803 KAR 25:010 Section 22 (2)(d)1. Failure to file within the ten days constitutes a waiver of the cross-appeal.

## **Record on Appeal**

LMS is the official record of all workers' compensation procedures. No documents from the record of the proceedings before the ALJ are required to be filed with any pleadings or briefs on appeal. This includes briefs, pleadings, opinions, and orders. Any such filing will be stricken from the record as unnecessary. Likewise, no new or additional evidence may be filed before the WCB, except when the appeal involves allegations of fraud or misconduct of some person engaged in the administration of KRS 342.010 *et seq.* KRS 342.285(2).

## **The Brief: Written Argument**

A brief is a party's written argument on the merits of the appeal. It is the principal way to present the party's position on appeal. Because the WCB rarely hears oral arguments, the brief may be a party's only opportunity to establish the basis for the appeal.

The technical requirements for preparing the brief are designed to expedite the handling and consideration of the appeal by the WCB. Beyond the technical requirements, careful presentation of the arguments and thoughtful assembly of an appendix will assist WCB in evaluating the merits of the issues presented in the appeal.

The **petitioner's brief** must be filed within thirty (30) days after the filing of the notice of appeal and shall conform to the requirements of Civil Rule 7.02(4). Per 803 KAR 25:010 Section 22, the petitioner's brief shall designate the parties as petitioner (or petitioners) and respondent (or respondents) and shall include:

- The name of each petitioner.
- Specific designation of all adverse parties as respondents.
- The ALJ who rendered the award, order, or decision appealed from named as a respondent.
- The workers' compensation claim number or numbers.
- The date of entry of the final award, order, or decision issued by the ALJ.

-Whether any matters remain in litigation between the parties in any forum or court other than those for which an appeal is being sought.

-A statement of the "Need for Oral Argument," designating whether the party requests an argument to be heard orally before the board and, if so, a brief statement setting out the reason or reasons for the request.

-A "Statement of Benefits Pending Review," advising whether the benefits designated to be paid by the award, order, or decision have been paid or started pursuant to KRS 342.300.

-The petitioner's brief shall provide:

- A brief "Introduction" outlining the nature of the case.
- A "Statement of Points and Authorities" listing reference, including cases and statutes relied upon, in the order they are discussed in the body of the argument and the respective pages of the brief on which the citation appears. This requirement may be eliminated for briefs of five (5) pages or less.
- A "Statement of the Case" consisting of a chronological summary of the facts and procedural events necessary to provide an understanding of the issues presented by the appeal.
- An "Arguments" section that conforms to the statement of points and authorities pertinent to each issue of law. The arguments section should also contain a statement of whether the issue(s) was properly preserved for review and, if so, in what manner.
- A "Conclusion" setting forth the specific relief sought from the board.
- An "Appendix" (if applicable) containing copies of cases cited from federal courts and foreign jurisdictions, if any, upon which reliance is made; and copies of any prior WCB decisions referenced in the brief. (RAP 41 governs the use of unpublished opinions of the Court of Appeals or Supreme Court.)

A **respondent** shall file a brief, or combined brief if cross-petition or cross-petitioner's brief, within thirty (30) days of the date on which the petitioner's brief was filed with the DWC.

A respondent's brief must include a statement of the "Need for Oral Argument" like the statement required of the petitioner. It shall also include a "Statement of Benefits Pending Review" like the statement required of the petitioner.

Respondent's counter-argument shall follow the organization and content of the petitioner's brief.

A petitioner may file a **reply brief** within ten (10) days after the date on which the respondent's brief was served or due, whichever is earlier. An index or contents page is not required.

If a **cross-appeal** has been filed, the cross-petitioner's reply brief shall be served within ten (10) days after the date on which the last cross-respondent's brief was served or due, whichever is earlier. A respondent who is also a cross-petitioner may file a combined brief or a separate cross-petitioner's brief addressing issues raised by the cross-appeal. If a separate cross-petitioner's brief is filed, the format shall be the same as a respondent's brief.

**Certification.** The petitioner's brief, the respondent's brief, and the reply brief(s) shall be signed by each party or his or her counsel. That signature constitutes a certification that the statements contained in the document are true and made in good faith.

**Service.** Serving the notice of appeal, cross-appeal, petitioner's brief, respondent's brief, and reply briefs on adverse parties is handled as follows:

- A party shall serve the brief on each adverse party.
- Every brief filed in an appeal to the Workers' Compensation Board shall bear on the front cover a signed statement, in accordance with Civil Rule 5.03, by the attorney or party that service has been made in conformity with this rule. The statement shall identify by name each person served and the manner of service.
- The name of each attorney, or an unrepresented party, submitting a document to the Workers' Compensation Board along with a

current address, email address, and telephone number shall appear following the "conclusion" of the brief.

**Number of Copies.** The parties shall not file any additional copies of their briefs submitted either via LMS or by mail.

### **Sanctions for Failure to File a Brief**

Failure of a party to file a brief conforming to the rules may be grounds for the imposition of one or more of the following sanctions pursuant to 803 KAR 25:010 Section 22(12):

- (a) Affirmation or reversal of the final order;
- (b) Rejection of a brief with leave to refile in proper form within ten (10) days of the date returned. If timely refile 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.

### **Decisions of the Workers' Compensation Board**

Procedural matters may be handled by a single member whose signature appears on an order disposing of the issue.

All opinions on the substantive merits of an appeal and all dispositional orders must be approved by a majority of the WCB. The end of the Order contains a statement concerning whether all the board members concurred. If any member dissents from the majority decision, that fact is stated at the end of the majority opinion. A concurring or dissenting member may write a separate opinion stating the reasons for the disagreement. A decision by a majority of the panel is the decision of the WCB. 803 KAR 25:010 Section 22(16).

The WCB may dispose of a case by **affirming** or **reversing** the entirety of the ALJ's decision or it may **affirm in part** as to some issues and **reverse in part** as to others. The WCB may **vacate** the ALJ's decision if he or she omitted an

essential step in reaching the decision, lacked jurisdiction to reach the conclusion, or exceeded his or her jurisdiction. The WCB also may **remand** the case to the ALJ for further proceedings or determinations, if necessary. If a case is remanded to the ALJ, a party adversely affected by the remand decision is entitled to make a new appeal. However, the “law of the case” doctrine, or failure to appeal from the previous WCB opinion may prevent a review on issues conclusively decided in the first appeal.

WCB decisions are announced in one of three types of documents: an opinion, an order, or an opinion and order.

An opinion is titled as such in the caption of the document – for example, “Opinion Affirming.” An opinion lists the board members, as well as the authoring member, but does not have an actual signature.

Opinions are rendered each Friday in LMS. Opinions are mailed to counsel or unrepresented litigants on Friday. The opinion shows on its face the date entered.

**Petitions for reconsideration or rehearing before the WCB are not permitted.**

The WCB uses orders to announce procedural rulings. Orders show the date of entry near the signature of the judge and are effective immediately upon entry. RAP 40(F). WCB orders are entered into LMS on Wednesdays.

### **Further Review**

WCB opinions may be appealed to the Kentucky Court of Appeals within thirty (30) days after they are issued. Court of Appeals decisions may be reviewed by the Kentucky Supreme Court as a matter of right.

The notice of appeal must be filed in the office of the Clerk of the Court of Appeals within 30 days of the date of the rendition of the Court of Appeals opinion or of the entry of the order disposing of the petition for rehearing, or of the entry of any other order making final disposition of the action. The notice must be served on all opposing counsel and a \$150 filing fee required by RAP 13 must be paid.

## **Effective Date of Opinions and Final Disposition**

An opinion issued by the WCB is not final until the 31<sup>st</sup> day after it is issued. A decision of the Court of Appeals becomes final on the 31<sup>st</sup> day after the rendition of the opinion unless a petition for rehearing or motion for discretionary review has been timely filed. RAP 40(G). If a petition for rehearing has been filed, the opinion becomes final on the 31<sup>st</sup> day after the entry of an order disposing of the petition for rehearing unless the claim is appealed to the Kentucky Supreme Court.

## **Settlement While Claim is on Appeal**

If the parties agree to settle a claim while it is on appeal, the original settlement agreement signed by all parties, along with a motion to place the appeal in abeyance and to remand to the ALJ must be filed. An ALJ is not permitted to review a settlement agreement of a claim on appeal until the WCB issues an order holding the appeal in abeyance and remanding the claim to the ALJ for consideration of approval of the settlement agreement. Once the ALJ has either approved or rejected the settlement agreement, the appeal shall be removed from abeyance and dismissed if all issues on appeal have been resolved. If issues remain for decision after the ALJ's determination regarding the settlement agreement, the WCB shall remove the appeal from abeyance and establish a briefing schedule.

## **Glossary**

**Affirm.** To confirm a judgment on appeal; declaration used when the WCB finds no reversible error.

**Appeal.** A legal procedure by which a party who is dissatisfied with a decision of an ALJ may seek review by the WCB.

**Petitioner.** A party to a legal proceeding who seeks relief from the WCB from an ALJ's decision.

**Respondent.** A party who opposes an appeal and who usually seeks to have the ALJ's judgment affirmed.

**Concur.** To agree with a decision.

**Dissent.** To disagree with a decision.

**Litigant.** Any party to a lawsuit.

**Motion.** A document filed with the WCB seeking some relief short of a decision on the merits of an appeal, such as an extension of time or dismissal of an appeal.

**Opinion.** A document rendered by the WCB announcing a decision on the merits of an appeal and setting out the reasons for that decision.

**Order.** A document from the WCB granting or denying a motion or directing that some action be taken.

**Pro se.** A person who is representing himself or herself in litigation and who is proceeding without an attorney.

**Remand.** To send a case back to the ALJ with directions to take some further action.

**Response.** A document filed with the WCB by a party opposing a motion; a response may, in some instances, express a lack of opposition to the relief sought or even join in the request for relief.

**Reverse.** To declare an ALJ's determination is wrong due to some significant error and that the judgment may not be enforced.

**Vacate.** To set aside an ALJ's decision due to failure to complete a required step in deciding a claim.