RENDERED: MARCH 2, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2006-CA-001328-WC
AND
CROSS-APPEAL NO. 2006-CA-001459-WC

BROWN LOE NEACE — APPELLANT/CROSS-APPELLEE

v.

PETITIONS FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-00381

ASPLUNDH TREE EXPERT COMPANY, INC.;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND TAYLOR, JUDGES; EMBERTON,[1] SENIOR JUDGE.

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

TAYLOR, JUDGE: Brown Loe Neace petitions and Asplundh Tree Expert Company, Inc. (Asplundh) cross-petitions this Court to review a June 2, 2006, opinion of the Workers' Compensation Board (Board) vacating and remanding an opinion of the Administrative Law Judge (ALJ). We affirm.

Neace filed a claim for workers' compensation benefits alleging a work-related cumulative injury to his spine manifesting itself on January 13, 2005. Asplundh failed to file a Form 111 (Notice of Claim Denial) within the forty-five day time limit as provided in Kentucky Revised Statutes (KRS) 342.270(2) and 803 Ky. Admin. Regs. (KAR) 25:010 Section 5(2). Asplundh's Form 111 was due to be filed on May 5, 2005; however, Asplundh tendered it on May 18, 2005. Neace objected to the late filing of the Form 111. The ALJ ultimately concluded that the forty-five day time limit of KRS 342.270(2) and 803 KAR 25:010, Section 5(2) is mandatory and that the form cannot be filed outside that mandatory time limit for any reason. The ALJ concluded that Asplundh's failure to timely file the Form 111 resulted in admission of all allegations contained in the application except extent and duration of disability.

The ALJ also concluded that Neace was permanently and totally occupationally disabled and awarded benefits accordingly. Asplundh sought review with the Board. The Board vacated and remanded. The Board concluded that Asplundh should be allowed to file the Form 111 untimely if the ALJ believed that "good cause" existed for its failure to timely file the form. The Board also concluded that the ALJ did not err in awarding permanent total disability benefits. Neace petitioned this Court for review of the Board's opinion regarding the late filing of Form 111, Asplundh filed a

protective cross-petition arguing that good cause had been shown as a matter of law to support the late filing of Form 111. Asplundh further argues on cross-appeal that the ALJ erred by applying the whole man test to Fugate's claim. This review and cross-review follow.

**Appeal No. 2006-CA-001328-WC**

Neace argues that the Board erred as a matter of law by concluding that an employer may file a Form 111 untimely if good cause is shown. Neace cites to the language of KRS 342.270(2) and 803 KAR 25:010, Section 5(2) to support its claim that the forty-five day time limit is mandatory. Neace also cites this Court to Gray v. Trimmaster, 173 S.W.3d 236 (Ky. 2005) in support of its position.

We view Gray as distinguishable. In Gray, the employer failed to file a Form 111, and the Court concluded that all allegations in the application were admitted leaving only extent and duration to be adjudicated. By contrast, Asplundh tendered a Form 111, although untimely. Thus, Gray is not dispositive. Rather, we view the opinion of the Board upon this issue as persuasive and adopt it herein.

> [W]e do not believe the standard for determining compliance in this situation is a strict one, notwithstanding use of the compulsory "shall" in the relevant provisions. In a previous decision addressing the effect of an untimely Form 111, this Board observed that 803 KAR 25:010 §5(2) essentially operates as a default judgment provision in the context of a claim for workers' compensation benefits. Super Service, Inc. v. Ming Xiao Zou, Claim No. 00-01352 (October 10, 2001). A brief examination of the law relevant to default judgments and relief there from will be helpful to our analysis.

Similar to the procedures established for the adjudication of workers' compensation claims, the Rules of Civil Procedure require a party to set forth his defenses to each claim asserted against him. CR 8.02. A party's failure to respond to an averment in a pleading to which a response is required results in the admission of said averment, with certain enumerated exceptions. CR 8.04. When a party fails to plead or otherwise defend against a claim, the Rules of Civil Procedure provide for entry of a judgment by default. CR 55.01. However, [a]s a general rule default judgments are not looked upon with favor by our courts of justice. Ryan v. Collins, Ky., 481 S.W.2d 85 (1972). The Rules of Civil Procedure allow the setting aside of a judgment entered by default if "good cause" may be shown. CR 55.02. This is true notwithstanding the compulsory language found in CR 8.02 and 8.03 with respect to the duty to file a responsive pleading and assert affirmative defenses.

Trial judges are directed to apply a liberal standard in the determination of "good cause" in order to ensure that the defendant is not deprived of his day in court. Liberty National Bank & Trust Co. v. Kummert, Ky., 205 S.W.2d 342 (1947). The court has broad power to set aside a default judgment. That power must not be exercised capriciously, but as a matter of judicial discretion in the service of justice. S.R. Blanton Development, Inc. v. Investors Realty & Management Co., Inc., Ky.App., 819 S.W.2d 727 (1991). "Although default judgments are not favored, trial courts possess broad discretion in considering motions to set them aside and we will not disturb the exercise of that discretion absent abuse." Howard v. Fountain, Ky.App., 749 S.W.2d 690, 692 (1988). In a similar vein, permission to plead after the allotted time lies within the discretion of the trial court, subject to review for abuse of discretion. Moffitt v. Asher, Ky., 302 S.W.2d 102 (1975).

We believe that relief from the requirement for filing a Form 111 within 45 days following an order sustaining a motion to reopen an injury claim may be had upon good cause shown, in the same manner as relief from a default judgment in a civil action.

Hence, we conclude that a Form 111 may be filed untimely if the ALJ determines that good cause has been shown. We, as did the Board, believe that a determination of good cause is properly within the province of the ALJ. We, thus, reject Neace's argument.

**Cross-Appeal No. 2006-CA-001459-WC**

Asplundh argues that the Board erred by failing to conclude as a matter of law that good cause was established justifying the untimely filing of the Form 111. As previously concluded, we believe that the determination of good cause is properly left within the province of the ALJ. This is not a question that should be initially decided by a reviewing body, such as the Board. Consequently, the Board properly remanded this question to the ALJ for determination.

Asplundh also contends that the ALJ erred by applying the whole man test to find Nance permanently and totally occupationally disabled.

In Garrett Mining Co. v. Nye, 122 S.W.3d 513, 520 (Ky. 2003), the Supreme Court explained that the whole man theory applies:

> "[w]here [an employee] has had a compensable disability, received his compensation and returned to work and then receives a subsequent *independent* injury which incapacitates him, the prior injury should not be deducted."

(quoting Cabe v. Skeens, 422 S.W.2d 884, 885 (Ky. 1967)). The Supreme Court noted that "[t]he rule is applied when the disability caused by the second injury is unrelated to and unaffected by the disability caused by the previous injury." Id. at 520.

Asplundh maintains that application of this test was in error:

> Since he had a prior active impairment and disability in the same area of his present disability as held by the ALJ, the subsequent injury was not "independent" of the previous injury and the "whole man" theory does not apply.

Asplundh's Brief at 21-22. In essence, Asplundh is arguing that Neace had a prior active impairment of the spine; therefore, the previous injury and current work injury are not independent of each other. However, the ALJ specifically found:

> [P]ursuant to the testimony of Dr. Hoskins, the Administrative Law Judge is not persuaded the Plaintiff suffered from any preexisting, active disability at the time of his January 13, 2005 injury. There is no indication in the record that the Plaintiff possessed any permanent disability that affected his work activities prior to September 10, 2001. While the Plaintiff was in fact treating with Dr. Chaney, and on mediations up until the time of January 2005 there is no evidence to dispute the Plaintiff's claim that he was fully capable of performing his job duties prior to January 13, 2005.

Contrary to Asplundh's assertions, the ALJ specifically found that Neace did not suffer from a pre-existing active disability at the time of his work-related injury. In effect, the ALJ found that Neace's prior injury was no longer active and disabling. As such, we reject Asplundh's contention upon this issue.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ACREE, JUDGE, CONCURS.

EMBERTON, SENIOR JUDGE, DISSENTS.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

McKinnley Morgan
MORGAN, MADDEN, BRASHEAR & COLLINS
London, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT, ASPLUNDH TREE EXPERT COMPANY, INC.:

W. Barry Lewis
Lewis and Lewis Law Offices
Hazard, Kentucky