

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000965-WC

CLARK REGIONAL MEDICAL
CENTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-97-59112 AND WC-98-94943

LENORA LOVINGS; HON. ANDREW MANNO,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.¹

VANMETER, JUDGE: Clark Regional Medical Center (CRMC) petitions for review from an opinion of the Workers' Compensation Board (Board) affirming the Administrative Law Judge's (ALJ) determination that CRMC had failed to provide good cause to show why CRMC did not timely file a Form 111 in response to Lenora H. Lovings' motion to reopen her claim for an occupational injury due to a worsening of her condition. Because the Board, in

¹ Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

review of the ALJ's decision, did not overlook or misconstrue controlling statutes or precedent, or commit error in assessing the evidence so flagrant as to cause gross injustice, we affirm.

Lovings suffered work-related injuries while working as a registered nurse for CRMC on August 1, 1997, and again on September 22, 1997. Lovings subsequently filed a motion for workers' compensation benefits. On September 13, 1999, the ALJ/Arbitrator awarded Lovings permanent partial disability benefits commensurate with a permanent impairment rating of 15% to the body as a whole.

On July 10, 2003, Lovings filed a motion to reopen her case, alleging a worsening of condition and increase in both impairment and disability as a result of her 1997 work-related injuries. In the affidavit attached to her motion, Lovings stated that the pain in her shoulders, ankles, hips, and knees had become so severe that she was no longer able to work at even a sedentary job. In both the motion to reopen and her affidavit, Lovings alleged "total disability" as a consequence of her work-related injuries. She stated also that she is in need of a total knee replacement on her right knee.

An order sustaining Lovings' motion to reopen was entered by Chief ALJ Sheila C. Lowther on August 26, 2003. When that order was returned as undeliverable, a corrected order was sent out by Chief ALJ Lowther on September 18, 2003, and was

served upon both the employer, CRMC, and CRMC's self-insurance administrator, AIK. The scheduling order was sent out by the Office of Workers' Claims on September 25, 2003. Copies were sent to both AIK/Attention Cheryl Guidice and the employer, CRMC. The scheduling order stated that within 45 days of the notice CRMC was required to file a Notice of Claim Denial or Acceptance (Form 111). The scheduling order further stated that if CRMC failed to file the Form 111 within 45 days (i.e., by November 9, 2003), then all allegations contained in Lovings' motion to reopen would be deemed admitted by the company.

On November 21, 2003, Lovings filed a motion requesting that the ALJ take judicial notice that CRMC had not filed its Form 111 within 45 days of the scheduling order and to accordingly deem as admitted all allegations contained in her motion to reopen. Not until December 5, 2003, did CRMC take action in the matter, at which time W. Kenneth Nevitt, attorney for CRMC, filed his entry of appearance. On December 10, 2003, CRMC filed a "Motion for Extension of Time to File Response to Plaintiff's Motion to Reopen and Notice of Claim Denial or Acceptance." In the motion CRMC argued that it should be granted an extension of time in which to file its Form 111 because counsel for the company had not received a copy of the September 25, 2003, scheduling order until December 3, 2003. Lovings filed a response to the motion objecting to the

requested extension of time. Ultimately, the ALJ overruled Lovings' motion to take judicial notice of CRMC's failure to timely file its Form 111, and granted CRMC's motion for additional time to file its Form 111.

Thereafter, Lovings' claim proceeded on the merits. On March 1, 2004, the ALJ entered an Opinion and Award dismissing Lovings' claim for additional income benefits upon reopening. The ALJ concluded that Lovings had failed to show an increase in impairment for any of her work-related injuries. Lovings appealed that decision to the Board. Among the issues raised in the appeal was that CRMC had failed to timely file a Form 111 in response to Lovings' motion to reopen.

On July 23, 2004, the Board entered an opinion vacating and remanding the ALJ's March 1, 2004, Opinion and Award for a determination by the ALJ as to whether there was good cause for the late filing of the Form 111 by CRMC. In the event the ALJ determined that there was good cause for the late filing, then the prior determination denying Lovings benefits was to stand; if, on the other hand, the ALJ determined that there was not good cause for the late filing, then all allegations contained in Lovings' motion to reopen and attached affidavit were to be deemed admitted by the company.

Upon remand, by Opinion and Order dated October 29, 2004, the ALJ determined that there was not good cause for

CRMC's late filing. As the allegations contained in Lovings' motion to reopen and affidavit attached thereto contained allegations that Lovings was totally disabled due to her work-related injury, and those allegations were deemed admitted, the ALJ awarded her total permanent disability benefits. On April 8, 2005, the Board issued an opinion upholding the ALJ's determination. This petition for review followed.

The ALJ determined that CRMC did not show good cause for failing to timely file its Form 111 in response to Lovings' motion to reopen. The ALJ addressed the good cause issue as follows:

The first issue before the undersigned Administrative Law Judge is whether or not the Defendant-Employer had good cause for its late filing of a Form 111. The best source for information concerning the late filing of the Form 111 is found in Defendant's Motion for Extension of Time to File a Form 111. The only reasoning contained in that motion was that the counsel for the Defendant-Employer did not receive a copy of the scheduling order of September 25, 2003 until December 3, 2003. Counsel also stated he did not receive until December 5, 2003, a copy of the Motion to Reopen that was filed on July 10, 2003. The Workers' Compensation Board, in its opinion, held 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.

Generally, when a party is seeking relief from a default judgment in a civil action,

it must show good cause. Good cause generally means a reasonable excuse for the delay in answering while establishing that the party is not guilty of unreasonable delay or neglect. *Terrafirma, Inc. v. Krogdahl*, 380 S.W.2d 86 (Ky. 1964). If a party has a valid excuse for the default, a meritorious defense to the claim, and there is no prejudice to the non-defaulting party, relief may be granted. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166 (Ky.App. 1991). In the case at bar, the Defendant-Employer was required to file a form 111 on or before November 9, 2004. A motion for extension of time to file the Form 111 was filed on December 10, 2004. The Form 111 itself was filed on December 18, 2003. In *Howard v. Fountain*, 749 S.W.2d 690 (Ky.App. 1988), a motion to set aside a default judgment was denied where the "good cause" shown was mere inattention on the part of the Defendant or his attorney. In the *Howard* case, the basis for the late filing of a responsive pleading was that the attorney was not contacted regarding the summons and complaint until December 5, 1985. The complaint had been filed on November 13, 1985.

In the case at bar, this ALJ finds that the Defendant-Employer has not provided any good cause to show why the Form 111 was not filed in a timely manner. The only reason given was that the attorney for the Defendant-Employer was not notified of the scheduling order by the Defendant-Employer until December 3, 2003. Therefore, according to the opinion of the Workers' Compensation Board, all allegations contained in the Plaintiff's Motion to Reopen and her affidavit incorporated therein by reference, are deemed admitted. This includes the allegation that Plaintiff's pain in both shoulders, both ankles, both hips and both knees is the result of her work injury.

Before us, CRMC does not take issue with the ALJ's findings concerning the late filing or, for that matter, his conclusion that the company did not show good cause for failing to timely file its Form 111. Rather, CRMC argues (1) that the matter should be remanded back to the ALJ to determine "what prejudice, if any, the employee suffered as a result, and whether less extreme sanctions are warranted," and (2) that even if it is determined that the matters in Lovings' motion to reopen are deemed admitted, then such does not result in the conclusion that the employee's medical problems are due to the work injury. The Board addressed these two issues as follows:

CRMC also argues that the ALJ should have considered whether or not Lovings suffered any prejudice when ALJ King granted CRMC's motion for extension of time to file its notice of claim denial or acceptance. It submits that since proof was allowed to be taken, Lovings did not suffer any prejudice.

803 KAR 25:010 Section 5(2), the administrative regulation in question, provides in pertinent part:

(a) Defendant shall file a notice of claim denial or acceptance on a Form 111 - Injury and Hearing Loss claim within forty-five (45) days after the notice of the scheduling order or within forty-five (45) days following an order sustaining a motion to reopen a claim.

(b) If a Form 111 is not filed, all allegations of the application shall be deemed admitted.

We agree with CRMC that Lovings did not suffer any actual prejudice because she was allowed to fully prosecute her motion to reopen before the original ALJ and was not denied the opportunity to introduce any evidence in support of her motion to reopen. However, that is not the issue. The sanction authorized by the above cited regulation relieves the employee from the burden of proving her claim to the extent the allegations contained in the motion to reopen or the Form are deemed admitted. In other words, the sanction for the failure to file a Form 111 precludes the opportunity of the employer to produce proof in support of its defenses. As a practical matter, application of the "deemed admitted" language contained in the regulation inures to the benefit of a claimant. On the other hand, if the ALJ allows the employer the opportunity to file a late Form 111, the injured claimant would still be granted the opportunity to present and maintain the claim. In other words, in the arena of workers' compensation it is highly unlikely, absent extraordinary circumstances, that a claimant could ever make a showing of actual prejudice.

. . . .

CRMC also argues that even if the matters in Lovings' motion to reopen are deemed admitted such admission does not result in the conclusion that her medical problems are due to a work injury. It contends Lovings did not attach any medical opinion to her motion to reopen that her work injury caused any increased disability, nor was it the cause of any needed medical treatment. CRMC submits the question of causation is one for medical experts and Lovings' testimony alone does not support a finding of causation.

As explained, the failure to file a timely Form 111 rendered the matters alleged in

Lovings' motion to reopen deemed admitted. Among these allegations were work-relatedness and extent and duration - no further proof was necessary.

The function of this Court when reviewing opinions of the Workers' Compensation Board is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.² In the present case, this did not occur upon the Board's review of the ALJ's decision.

We agree with the Board's determination that if the employer fails to establish good cause for failing to timely file a Form 111, the claimant need not establish actual prejudice in order to avail herself of the sanction prescribed in 803 KAR 25:010 Section 5(2). As determined by the Board, by analogy, the procedures contained in CR³ 55 for the granting and setting aside of a default judgment provide appropriate guidelines for an employer's failure to timely file a Form 111.⁴ To set aside a default judgment, as a threshold matter, "good cause" must be shown.⁵ As CRMC failed to establish good cause as

² *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

³ *Kentucky Rules of Civil Procedure*.

⁴ If anything, the Board's construction of 803 KAR 25:010 Section 5(2) is lenient toward the employer. The regulation is phrased in the mandatory "shall"; however, the Board construed the regulation to provide an exception if the failure to file was for good cause by analogy to CR 55.02. The issue of whether there is such an exception is not before us.

⁵ *CR 55.02; Howard v. Fountain*, 749 S.W.2d 690, 692 (Ky.App. 1988).

a threshold matter, it follows that Lovings need not demonstrate actual prejudice to avail herself of the sanction prescribed in 803 KAR 25:010 Section 5(2).

Further, as Lovings' allegations of a total disability in connection with a work-related injury as stated in her motion to reopen are deemed as admitted by CRMC, all elements necessary for an award of total permanent disability benefits are satisfied,⁶ and there is no need for additional medical proof.

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

TAYLOR, JUDGE, CONCURS.

POTTER, SENIOR JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

POTTER, SENIOR JUDGE, CONCURRING IN RESULT: I agree with the result. However, I reach that result primarily by giving deference to the Workers' Compensation Board's interpretation of its own regulation rather than by relying on an analogy to Civil Rule 55.

BRIEF FOR APPELLANT:

W. Kenneth Nevitt
Louisville, Kentucky

BRIEF FOR APPELLEE:

James D. Howes
Louisville, Kentucky

⁶ See *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503, 508 (Ky. 2001).