

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2006-SC-0027-WC

DATE Feb 22 07 EWA Grant H.P.C.

CLARK REGIONAL MEDICAL CENTER

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0965-WC
WORKERS' COMPENSATION NOS. 97-59112 & 98-94943

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

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

803 KAR 25:010, § 5(2) provides that all allegations contained in a worker's application shall be deemed admitted if the employer fails to file a Form 111 (notice of claim denial or acceptance) within 45 days after notice of the scheduling order or within 45 days of an order sustaining a motion to reopen a claim.

On remand by the Workers' Compensation Board (Board), an Administrative Law Judge (ALJ) found that the defendant-employer failed to show good cause for its failure to file a timely Form 111 in response to the claimant's motion to reopen her workers' compensation claim. Based on the finding, the ALJ deemed the allegations contained in the motion to be admitted and entered an award in the claimant's favor. The Board and the Court of Appeals affirmed.

The employer raises three arguments on appeal: 1.) that it showed good cause for failing to file a timely Form 111; 2.) that the ALJ erred by failing to consider whether the delay in filing prejudiced the claimant; and 3.) that the ALJ erred by concluding that the matters deemed to be admitted were sufficient to prove that the claimant's present medical problems are due to her work-related injury. Having concluded that it was not an abuse of discretion to conclude that the employer failed to show good cause, that 803 KAR 25:010, § 5(2) is mandatory absent a showing of good cause, and that the allegations contained in the claimant's motion were sufficient to support the increased award, we affirm.

The claimant sustained work-related injuries in August and September, 1997, while working for the defendant-employer. In September, 1999, she received a permanent partial disability award that was based on a finding of 15% impairment and 18.75% disability rating. At the time, she continued to work and to earn the same or a greater wage.

On July 10, 2003, the claimant moved to reopen under KRS 342.125(1)(d), alleging an increase in impairment and disability due to the injuries. The motion summarized changes in her medical condition, indicated that she needed a total knee replacement, and alleged that the injuries had become totally disabling. Attached to the motion was her affidavit, stating that pain in her shoulders, ankles, hips, and knees had become so severe that she was no longer able to perform even sedentary work. Also attached to the motion were reports from Dr. Ryan that chronicled a worsening of her medical condition and an increase in impairment.

On August 26, 2003, the Chief ALJ entered an order sustaining the motion. On September 18, 2003, the Chief ALJ entered a corrected order because the copy of the

initial order that was addressed to the employer's insurance carrier had been returned as being undeliverable. The corrected order was served upon the employer and its self-insurance administrator. On September 25, 2003, the Department of Workers' Claims sent the scheduling order to the employer and to its administrator's office. The order stated the name of the ALJ to whom the matter was assigned, set forth the schedule for taking proof, and stated that the benefit review conference would be held on January 14, 2003. It gave the employer 45 days from "this notice" (i.e., until November 9, 2003) to file a Form 111 Notice of Claim Denial or Acceptance and clearly stated, "If none is filed all allegations of the application shall be deemed admitted." The employer did not file a Form 111 within 45 days of the corrected order granting the motion to reopen or within 45 days of the scheduling order.

On November 21, 2003, the claimant filed a motion requesting the ALJ to take judicial notice of the employer's failure to file a Form 111 and to deem admitted all allegations contained in her motion to reopen. On December 5, 2003, counsel for the employer entered an appearance in the matter. On December 10, 2003, the employer requested an extension of time in which to file a Form 111, alleging that counsel did not receive a copy of the scheduling order until December 3, 2003. The claimant objected on the grounds that the defendant-employer did not allege that it failed to receive notice of its obligation to file a Form 111 when a reasonable time remained to respond and that nothing required service on a defendant's attorney. Nonetheless, the ALJ granted the motion. The reopening then proceeded on the merits and ended with an order dismissing the claim for additional benefits.

Among the issues raised in the claimant's appeal to the Board was the effect of the employer's failure to file a timely Form 111. The Board determined that relief from

the requirement to file a timely Form 111 would be proper "upon good cause shown, in the same manner as relief from a default judgment in a civil action." On that basis, the Board vacated the ALJ's decision and remanded with directions to determine if the employer showed good cause for its failure to file a timely Form 111. The Board explained that if there was good cause, the decision on the merits would stand. If there was not good cause, all allegations contained in the motion to reopen and attached documents were to be deemed admitted. Under those circumstances, the ALJ must reconsider the merits.

On remand, the ALJ found the employer's motion for an extension of time to be the best source of information regarding the cause of its failure to file a Form 111 on or before November 9, 2003, when the 45-day period following the scheduling order expired. Summarizing the explanation offered in the motion, the ALJ stated as follows:

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 ALJ noted subsequently that Terrafirma, Inc. v. Krogdahl, 380 S.W.2d 86 (Ky. 1964), equated "good cause" for relief from a default judgment in a civil action with a reasonable excuse for the delay. However, Howard v. Fountain, 749 S.W.2d 690 (Ky. App. 1988), indicated that mere inattention on the part of the defendant or the defendant's attorney did not constitute good cause for setting aside a default judgment.

Concluding that the employer failed to provide good cause, the ALJ deemed all allegations contained in the claimant's motion to reopen and accompanying affidavit to be admitted. Based on allegations that the claimant's present bilateral shoulder, ankle,

hip, and knee pain resulted from her work-related injury and that she had become permanently and totally disabled, the ALJ concluded that she was permanently and totally disabled. Having failed to convince the Board or the Court of Appeals, the employer continues to assert that the decision was erroneous and should be reversed.

First, the employer asserts that it did show good cause. The employer raised the question of good cause indirectly at the Court of Appeals when arguing that the ALJ applied an incorrect standard for decision. Its petition for review asserted that it had shown good cause, but the ALJ failed to consider that the scheduling order listed the wrong insurance adjuster or to consider if the delay prejudiced the claimant.

A review of the employer's motion for an extension of time to file a Form 111 indicates that the ALJ accurately summarized its contents. Nowhere did the motion indicate that the employer or its claims administrator failed to receive service of the scheduling order when a reasonable amount of time to respond to it remained. The ALJ concluded that the employer's failure to notify its attorney of the scheduling order until December 3, 2003, was not a reasonable excuse for its failure to file a timely Form 111. The decision clearly was not an abuse of the ALJ's discretion.

In making its second argument, that prejudice must be considered, the employer relies on New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004), which is distinguishable and concerned different regulations. Ms. Walker alleged exceptional circumstances when explaining the cause of her failure to submit proof within the designated time. It appeared from the ALJ's failure to analyze the circumstances or prejudice to the employer that the ALJ might have thought erroneously that Cornett v. Corbin Materials, 807 S.W.2d 56 (Ky. 1991), precluded any exception to the regulations concerning the time for taking proof, regardless of the

circumstances. On that basis, the court remanded the claim for further consideration, an exercise of discretion, and an explanation that would permit a meaningful review.

In the present case, the employer failed to file a Form 111 within the designated time. KRS 342.270(2) states:

Except with respect to claims for benefits by reason of coal workers' pneumoconiosis, the executive director shall issue notice of the filing to all parties and shall promptly assign the claim to an administrative law judge. The administrative law judge shall facilitate the exchange of information pertinent to the claim pursuant to administrative regulations promulgated by the executive director. Within forty-five (45) days of the date of issuance of the notice required by this section, the employer or carrier shall file notice of claim denial or acceptance, setting forth specifically those material matters which are admitted, those which are denied, and the basis of any denial of the claim. (emphasis added).

Although KRS 342.270(2) requires the employer or carrier to file a notice of denial or acceptance of a claim within 45 days of the issuance of the notice of the filing, the employer failed to do so. 803 KAR 25:010, §5(2) provides, in pertinent part, as follows:

(a) The defendant shall file a Notice of Claim Denial or Acceptance on a Form 111 - Injury and Hearing Loss 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.

In Gray v. Trimmer, 173 S.W.3d 236, 240 (Ky. 2005), this court explained the purpose and effect of the statute and regulation, stating as follows:

KRS 342.270(2) provides that within 45 days of the issuance of the notice of the filing of a claim, the employer or carrier "shall" file a notice of denial or acceptance. 803 KAR 25:010, § 5(2)(a) requires a Form 111 to be filed within 45 days after notice of the scheduling order. Subsection (b) provides that if a Form 111 is not filed, all allegations of the

application shall be deemed admitted. These provisions are mandatory. Their purpose is to facilitate the prompt and orderly resolution of workers' compensation claims.

Consistent with the purpose of KRS 342.270(2)'s mandate, the Form 111 establishes early in the process what issues are contested and focuses litigation on those issues.

The courts give great deference to an administrative agency's Interpretation of its own regulations. The Board has determined that a motion to reopen for additional benefits is an "application" for such benefits, that prejudice to the worker is not a factor under 803 KAR 25:010, § 5(2), and that an employer's failure to file a timely Form 111 without good cause precludes it from submitting proof in its defense. As noted by the Court of Appeals, the Board's construction of 803 KAR 25:010, § 5(2) is, if anything, lenient to the employer because it permits an exception upon a showing of good cause although the regulation is mandatory. Mindful that KRS 342.270(2) is also mandatory and that a motion to reopen for additional benefits is a claim of entitlement to such benefits, we agree.

The employer's third and final argument is that the admissions contained in the claimant's motion to reopen would not permit a conclusion that her present medical problems and disability were due to her work-related injury. We disagree.

All allegations contained in the claimant's motion to reopen and accompanying documents were deemed admitted. Quoting accurately from the decision in her initial claim, her motion stated that she received "trauma to her back and right hip, right knee and ankle, shoulders, arms, and hands." The motion alleged that she had "developed severe pain . . . as a result of such injury" and stated that she was "totally disabled from employment." Because the allegations contained all elements necessary for an award of permanent total disability, there was no need for further proof.

The decision of the Court of Appeals is affirmed.

All concur.

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