Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 22, 2015

CLAIM NO. 201100465

A & C COMMUNICATIONS PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, ADMINISTRATIVE LAW JUDGE**

HENRY J. DECKER
OWEN CARROLL LANEY D/B/A LANEY UTILITIES
EMPLOYEE STAFF, LLC
SUNZ INSURANCE COMPANY
UNISURED EMPLOYERS' FUND
HON. OTTO D. WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART
AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. A&C Communications ("A&C") appeals from the November 12, 2014 Opinion, Order and Award, the December 18, 2014 Order denying its petition for reconsideration, and

"any prior adverse orders below" rendered by Hon. Otto D. Wolff, Administrative Law Judge ("ALJ"). The ALJ found A&C liable as an up-the-ladder employer pursuant to KRS 342.610(2) for benefits awarded to Henry J. Decker ("Decker"). A&C argues the ALJ erred in overruling its motion to strike the untimely Forms 111 submitted by Employee Staff, LLC ("ES") and Sunz Insurance ("Sunz"), and in dismissing them as parties. A&C further claims the ALJ erred in determining Owen Carroll Laney d/b/a Laney Utilities ("Laney") was insured through ES and Sunz. Finally, A&C claims KRS 342.610 is inapplicable to this case and the ALJ had no jurisdiction to order reimbursement and interest. For the reasons set forth below, we vacate in part and remand for additional findings of fact.

Factual Overview

Laney is a business that erects utility poles and towers to carry telephone lines. It specialized in placing poles in areas that are difficult to access. Owen Carroll Laney, the owner of Laney Utilities, hired Decker as a pole setter. On January 4, 2011, his first day of work, Decker was severely injured in a motor vehicle accident as he left the work site in a Laney truck.

At the time of the accident, Laney operated under a service agreement with ES. ES is an employer's

administrative service company. Pursuant to the service agreement, ES would accept Laney's workers as "assigned employees". In order to become an "assigned employee", Laney was required to submit certain documentation, including federal taxation forms and a signed ES employment application. Once accepted as an "assigned employee", ES would provide payroll services as well as workers' compensation insurance. ES employees, including "assigned employees", were provided workers' compensation coverage through Sunz.

It is uncontradicted that Owen Laney failed to designate Decker as an "assigned employee" pursuant to the service agreement with ES. As of Decker's first day of work on January 4, 2011, the required documentation had not been submitted. However, Mr. Laney testified ES frequently by-passed the requirements of the service agreement and accepted his employees as "assigned" nonetheless.

At the worksite where Decker was injured, Laney was performing work for A&C. On November 5, 2010, A&C entered into a contract with Mountain Rural Telephone to perform work on a communication line in Frenchburg, Kentucky. On November 30, 2010, A&C entered into a subcontract agreement with Laney to perform work which A&C was obligated to perform pursuant to its contract with

Mountain Rural Telephone. Decker was working at the Frenchburg site when he was injured.

The primary issue before the ALJ was Decker's employer. It was the position of ES and Sunz that Decker was never made an "assigned employee" pursuant to the service agreement. Instead, ES and Sunz argued Laney was a subcontractor to A&C. Because Laney did not carry workers' compensation coverage outside of its agreement with ES, Decker was an uninsured employee and, therefore, A&C bore up-the-ladder liability.

On appeal, the issues do not concern the ALJ's determination Decker is permanently totally disabled. Therefore, we will not discuss the medical proof. However, a detailed recitation of the procedural history is necessary.

Procedural Background

On March 28, 2011, Decker filed a Form 101 against Laney, the Uninsured Employers' Fund ("UEF"), and A&C. Kentucky Employer's Mutual Insurance ("KEMI"), as the workers' compensation carrier for A&C, was also listed as a party. Decker alleged he was injured on January 4, 2011, in a motor vehicle accident in the course of his employment with Laney.

On March 28, 2011, the Commissioner of the Department of Workers' Claims certified Laney had workers' compensation insurance on the alleged date of injury and was "insured under Employee Staff, LLC." The certification stated Sunz Insurance was the insurance carrier for ES. The Commissioner also certified A&C had workers' compensation insurance on the alleged date of injury through KEMI. The UEF and A&C filed Forms 111 denying liability and the claim. A&C also asserted it was not Decker's employer and denied up-the-ladder liability pursuant to KRS 342.610.

On June 2, 2011, A&C filed a motion to join ES and Sunz based on the Commissioner's certification. By order dated June 27, 2011, the ALJ sustained A&C's motion and directed ES and Sunz to enter an appearance and file a Form 111 within forty-five days of the date of the order. The order also provided ES and Sunz notice that, pursuant to statute and regulations, they must file a denial or acceptance of the claim and failure to file the Form 111 may result in sanctions as provided in 803 KAR 25:010 §5.

On August 15, 2011, Decker filed a motion to amend his Form 101 to assert, in the alternative, ES was his employer. On that same date, Decker also filed a motion to have the allegations contained in his Form 101

admitted. Citing KRS 342.270(2) and 803 KAR 25:010 § 5, Decker asserted ES and Sunz failed to timely file a Form 111 and requested all allegations be deemed admitted as to ES and Sunz. Further, relying on the Commissioner's certification, Decker requested Laney and ES be deemed his employers as insured by Sunz.

On August 19, 2011, ES filed a motion to continue the hearing set for August 24, 2011. Counsel for ES stated he was newly hired and had been contacted by ES on August 17, 2011, and had no opportunity to review the file but had made telephone contact with counsel for the UEF, Decker, and A&C in order to receive the pleadings. He stated it was his understanding ES had moved its office and therefore did not receive the majority of the pleadings. On that same date, counsel entered his appearance for ES, and filed a Form 111 asserting Decker was not its employee on the date of the alleged injury.

On August 24, 2011, the ALJ entered an order containing the following:

> Matter continued based upon parties agreement over A&C obj. to commence TTD and Med Ben, claim in abeyance as to TTD and med. ben; bifurcate claim on all other issues. [Defendant] Sunz's to prep agreed formal order setting forth above.

The order was signed by counsel for all the parties.

On August 29, 2011, Sunz filed a special answer stating Decker did not have an employment relationship with ES. Sunz also filed a Form 111 asserting Decker was not employed by ES on the date of the alleged injury.

On August 29, 2011, A&C filed an objection and motion to strike the pleadings of ES and Sunz, asserting the pleadings were untimely. It noted KRS 342.270(2) and 803 KAR 25:010 § 5(2) permit an employer to file a Form 111 within forty-five days. It asserted the failure of ES and Sunz to timely respond requires their admission of all allegations in Decker's Form 101 and issues of insurance coverage, notice, and employment relationship are deemed to be admitted by Laney, ES, and Sunz. A&C also requested it be dismissed as a party.

On September 1, 2011, the ALJ entered an order sustaining Decker's motion to include ES "as a Defendant Employer in the alternative." Thereafter, both ES and Sunz filed objections to A&C's motion to strike their pleadings.

On September 15, 2011, the ALJ entered an order noting ES and Sunz failed to comply with KRS 342.270(2) and 803 KAR 25:010 §5 by not filing a Form 111 or notice of claim denial or acceptance within forty-five days of the scheduling order or the order entered June 27, 2011. The ALJ noted the defendants were provided notice their failure

to enter an appearance and file a Form 111 within forty-five days may result in sanctions pursuant to 803 KAR 25:010 §5. Citing to the Commissioner's certification, the ALJ ordered the allegations contained in the Form 101 be deemed admitted as to ES and Sunz. The ALJ further ordered Laney "was insured under Employee Staff" and its insurance carrier is Sunz. The order stated a hearing would be held to determine the extent of the damages to be awarded to Decker. A&C and the UEF were to remain parties to the action until further orders.

On September 26, 2011, Sunz filed a petition for reconsideration and motion to vacate the September 15, 2011, order. On September 28, 2011, ES similarly filed a petition for reconsideration of the order.

The record contains an October 27, 2011 document styled "Agreed Order" bearing the notation on the ALJ's signature line "not signed due to lack of agreement by A&C Communications." The document stated Decker's motion to have the allegations of the Form 101 admitted as to ES and Sunz was rendered moot and withdrawn. The proposed agreed order also stated the claim was placed in abeyance as to extent and duration and medical benefits. The remaining issues were bifurcated. Sunz agreed to pay past and future temporary total disability ("TTD") benefits and medical

expenses subject to reimbursement upon determination of the proper payment obligor. The proposed agreed order acknowledged A&C objected to the commencement of TTD benefit payments and moved to have the ALJ deem all matters admitted pertaining to the allegations made against ES and Sunz. A&C was directed "to file a written objection and motion for same." A decision on the issue would be made upon receipt of A&C's written submissions and any responses.

On October 28, 2011, A&C filed a motion to quash depositions of Lisa Plank and Owen Carroll Laney. It argued the September 15, 2011, order precluded Sunz from continuing to take depositions on issues other than extent and duration of disability.

On November 30, 2011, A&C filed a supplemental response and objection to the petitions for reconsideration, again noting the failure of ES and Sunz to file timely Forms 111. A&C asserted there was a complete lack of evidence of good cause for the failure to comply with the deadline. On December 14, 2011, ES filed a response to A&C's supplemental response and objection to its petition for reconsideration. On December 27, 2011, Sunz filed a reply and response to A&C's objection.

Some nine months later, on September 12, 2012, the ALJ entered his Opinion and Interlocutory Order. Concerning the September 15, 2011, order, the ALJ determined as follows:

> Petitioner's ES and Sunz correctly identified an error patently appearing on the face of the September 15, 2011 Order. In fact, the entire Order is a patent error. The Order of September 15, 2011 is set aside in its entirety.
>
> The patent error starts with the introductory sentence of the Order, the first sentence read, "This matter is before the ALJ upon Motion of the Plaintiff, Henry Decker, to have the allegations of the Form 101 admitted as to Defendants, Employee Staff, LLC and Sunz Insurance Company." This is a patent error on the face of the Order; Plaintiff did not have any motion pending before the undersigned on September 15, 2011.
>
> Plaintiff's Motion To Have Allegations of Form 101 Admitted was withdrawn by Plaintiff at the August 24, 2011 conference in London, Kentucky. Plaintiff withdrew his Motion at that time because Sunz agreed to promptly pay Plaintiff all of his past due indemnity and medical benefits. Sunz even agreed to continue paying such weekly benefits until the correct payment obligor was identified in this litigation or until Plaintiff attained MMI status. This quid pro quo agreement allowed Plaintiff to receive benefits and eliminated ES and Sunz' exposure of having the allegations of Plaintiff's Form 101 admitted against them.

> There being a patent error on the face of the Order, Petitioners ES and Sunz's Petitions are Sustained. The Order of September 15, 2011 is set aside in its entirety.

The ALJ found Decker was an employee of Laney on the date of injury and was not an assigned employee of ES. Therefore, ES and Sunz, its workers' compensation carrier, were not obligated to pay workers' compensation benefits, were no longer necessary parties to the litigation and were dismissed. The ALJ made the following determination:

> It having been determined that on 1/4/11 Plaintiff was an employee of [Laney], and that Plaintiff was not an Assigned Employee of ES, and that [Laney] was uninsured on 1/4/11, and that Plaintiff and [Laney] were working under the SUBCONTRACT between [Laney] and AC, and, with the application of KRS 342.610(2), it is determined that AC, and/or its carrier (KEMI), are liable for the payment of compensation to Plaintiff.

The ALJ determined A&C's objection and motion to strike their pleadings were moot because ES and Sunz were dismissed from the litigation. The ALJ also noted other issues remain to be resolved, stating as follows:

> There remain issues to be addressed and decided in this matter. Undoubtedly there will be another wave of motions and petitions for reconsideration filed as a result of this Order, and such filings and/or Petitions shall be promptly addressed.

> The determinations herein set forth, render any other issues, presently pending, but unaddressed, moot.
>
> This is an interlocutory order and not subject to appeal.

The ALJ's findings of fact, conclusions of law, and order are as follows:

> 1. Facts as stipulated and above discussed.
>
> 2. On January 4, 2011 Plaintiff was an employee of [Laney]. This finding is based upon Plaintiff's testimony, Carroll Laney's testimony in two depositions and the proof indicating [Laney] exercised complete control over Plaintiff's work on January 4, 2011.
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> 3. On January 4, 2011 Plaintiff sustained a work-related injury in the course of his employment with [Laney].
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> 4. On January 4, 2011 [Laney], as pertains to Plaintiff, did not have workers' compensation insurance in place. This finding is based upon Owen Laney's testimony, indicating that the only workers' compensation insurance coverage [Laney] had was through ES.
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> 5. On 1/4/11 Plaintiff was not an "Assigned Employee" of ES. This finding is based upon the wording of the Service Agreement and the testimony of Owen Laney that he took no steps to have Plaintiff designated an "Assigned Employee" of ES.
>
> 6. On January 4, 2011 there was in effect a SUBCONTRACT between [Laney] and AC. This finding is based upon a review of the SUNCONTRACT [sic] and Owen

Laney's acknowledgement the SUBCONTRACT was in effect on 1/4/11.

7. On 1/4/11 Defendant [Laney] was working under the SUBCONTRACT between [Laney] and AC. This finding is based upon the testimony of Owen Laney, Plaintiff and Scott Terpening.

8. On January 4, 2011 AC had in place a policy of Kentucky workers' compensation insurance through Kentucky Employer Mutual Insurance (KEMI). This finding is based upon AC's repeated representations throughout this litigation that its workers compensation insurance carrier on January 4, 2011 was KEMI. These representations include, but are not limited to, the content of Defendant AC's Form 111 and its Notice of Claim Denial or Acceptance.

9. On 1/4/11 Plaintiff was an employee of [Laney], an uninsured subcontractor of AC, thus, pursuant to KRS 342.610(2), Plaintiff is entitled to receive workers' compensation benefits from AC and/or its insurer KEMI. This finding is based upon the testimony of Plaintiff, Owen Carroll and Scott Terpening.

ORDER

1. Defendants' Employee Staff LLS [sic] and Sunz Insurance Company Petitions for Reconsiderations are SUSTAINED.

2. The Order of September 15, 2011 is SET ASIDE in its entirety.

3. Defendant A&C Communication Company's Objection and Motion to Strike Pleadings of Employee Staff and Sunz Insurance Company is OVERRULED.

4. Defendants A&C Communication Company and its Kentucky Workers' Compensation insurance carrier (KEMI) shall, within thirty (30) days of this Order, provide Plaintiff, with all past, present and future indemnity benefits due him since January 5, 2011. Defendant's obligation to provide Plaintiff with such benefits shall continue until Plaintiff attains MMI from the effects of his work-related injury.

5. Defendant A&C Communications and/or KEMI shall provide Plaintiff with all future medical benefits as may reasonably be required for the care and relief from the effects of his work-related injury.

6. Defendants A&C Communications Company and/or KEMI shall, within thirty (30) days from the date of this Order, pay Employee Staff LLC and/or its insurer Sunz Insurance Company any and all benefits paid to or on behalf of Plaintiff to date. Within ten (10) days of this Order, Defendants Employee Staff, LLC and/or its insurer Sunz, shall provide to Defendant's A&C Communications Company or its insurer KEMI an account of all benefits paid to and/or on behalf of Plaintiff.

7. Defendant A&C Communications Company and/or its insurer KEMI are entitled to a credit against the amounts owed Plaintiff, equal to the amounts they are required to refund to Employee Staff, LLC and/or Sunz.

8. Defendants Employee Staff, LLC, Sunz and the UEF are DISMISSED from further litigation of this claim.

> 9. Any other pending Petitions for Reconsideration and/or Motions, not addressed herein, are moot.
>
> 10. This is an Interlocutory Order, and, at this time, not subject to appeal.
>
> 11. As to the remaining parties, a Benefit Review Conference is scheduled for Wednesday, November 28, 2012 at 1:30 p.m. eastern time at the Lexington hearing site.

On September 28, 2012, A&C filed a petition for reconsideration which the ALJ overruled on April 9, 2013, concluding there was no patent error in the opinion and interlocutory order. The ALJ explained the September 15, 2011 order deeming the allegations admitted was set aside because it addressed and ruled upon an issue which was not before the ALJ. The ALJ reasoned the issue of the untimely Forms 111 was moot because Decker had withdrawn his motion in return for Sunz agreeing to immediately pay past and future indemnity and medical benefits.

A&C appealed, arguing the ALJ erred in overruling its motion to strike the untimely filed Forms 111 of ES and Sunz, dismissing them as parties, and assigning liability to A&C's carrier with an order of reimbursement. The Board dismissed the appeal concluding, as a matter of law, the ALJ's September 12, 2012 order was interlocutory and did not represent a final and appealable order.

Thereafter, the ALJ determined Decker is permanently totally disabled. The ALJ found A&C responsible for the award and ordered it to reimburse Sunz, including interest at 12%, for all benefits Sunz paid to Decker. A&C filed a petition for reconsideration arguing the assessment of liability was in error because ES and Sunz had not filed timely Forms 111, good cause had not been shown for the delay, and there was no statutory or regulatory authority for imposition of interest on reimbursement between carriers.

On October 11, 2012, Sunz filed its response to the petition for reconsideration contending that, due to an apparent delay in securing service information on ES, it did not receive notice of the order of joinder until July 27, 2011 when it received a July 25, 2011 letter from the Attorney General informing it of the joinder of ES and Sunz. The letter, attached as an exhibit to the motion, directed Sunz to file the requisite paperwork no later than August 11, 2011. Despite the clear language of that letter, Sunz argued in its response to the petition for reconsideration that it should have 45 days from the date it received notice of joinder in which to file its Form 111. Therefore its Form 111 should be deemed timely.

By order dated December 18, 2014, the ALJ denied A&C's petition for reconsideration, stating "pre-judgment interest on liquidated damages is permitted per KRS 360.040. Post judgment interest at the legal rate of 12% interest on post-judgment." Additionally, the ALJ indicated the petition raised issues previously decided in the Order of April 9, 2013, which the ALJ adopted in response to the petition for reconsideration.

Analysis

Effect of Untimely Forms 111

On appeal, A&C argues the ALJ erred in overruling its motion to strike the untimely Forms 111 of ES and Sunz, and in dismissing them as parties. A&C also claims the ALJ erred in concluding Decker was not an employee of ES, and that it bears up-the-ladder liability. For the reasons set forth below, we conclude the question of whether the Forms 111 were properly admitted is determinative of all three issues.

A&C notes the language of KRS 342.670(2) and 803 KAR 25:010 is mandatory, and the ALJ is required to impose liability once ES and Sunz missed the deadline to file their Forms 111. A&C asserts the agreement by Sunz to pay TTD and medical benefits after its default is irrelevant and does not constitute good cause for the delay. Thus, according to

A&C, the ALJ had no legal basis to set aside the September 15, 2011 order of default. A&C contends the Forms 111 of ES and Sunz have never been admitted into the record and the ALJ failed to conduct the proceedings necessary to determine whether the admission of the forms was appropriate. Without the proper determination of admission of the forms, ES and Sunz should not have been permitted to take any proof.

KRS 342.270(2) states, in pertinent part as follows:

> 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).

803 KAR 25:010 § 5 states, in pertinent part, as follows:

> (2)(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.

(Emphasis added).

Because of the mandatory language of KRS 342.270(2) and 803 KAR 25:010 §5(2), a motion by the claimant to deem the allegations admitted is not necessary to trigger its application. Here, Decker and Sunz agreed to withdraw the motion to deem the allegations contained in the Form 101 admitted. The ALJ erroneously concluded this agreement extinguished the issue of whether the untimely filing of the Forms 111 was excused. Once the ALJ is aware of a late filing of a Form 111, it is incumbent upon the ALJ to determine if good cause exists for the late filing. Additionally, it is readily apparent and the ALJ was clearly aware A&C was asserting the allegations of the Form 101 must be deemed admitted against ES and Sunz. Decker's motion to amend the Form 101 to include ES as an alternate employer had been granted prior to entry of the September 15, 2011 order deeming the allegations of the Form 101 admitted. A&C's liability is impacted if the allegations are admitted, because Decker would then be an employee of ES which had insurance coverage at the time of the accident, thereby extinguishing A&C's liability.

In Neace v. Asplundh Tree Expert Co., Inc., Claim No. 05-00381, the Board determined KRS 342.270(2) and 803 KAR 25:010 § 5(2), governing the procedure for adjustment of

workers' compensation claims, permits an employer to file a Form 111, Notice of Claim Denial, outside the forty-five day period mandated by the statute, and thus avoid admission of all allegations of the application, if the ALJ finds the employer has shown good cause for any such delay. On review, the Supreme Court affirmed the Board's opinion. *See* Neace v. Asplundh Tree Expert Co., Inc., Nos. 2007-SC-000236-WC, 2007-SC-000268-WC, 2008 WL 1850622 (Ky. 2008). In so ruling, the Court instructed:

> In the present case, the employer tendered a tardy Form 111 and asserted that good cause existed for the delay. The Board determined that KRS 342.270(2) and 803 KAR 25:010 § 5 did not require strict compliance with the 45-day period despite their mandatory language. It concluded that a party may obtain relief from the 45-day requirement upon a showing of good cause in the same manner that a party may obtain relief from a default judgment in a civil action.
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> KRS 342.270(2) requires an employer to respond within 45 days of the scheduling order and admit or deny the allegations contained in the worker's application for benefits. It does not address the effect of a delay in doing so or a failure to do so. 803 KAR 25:010 § 5 operates as the equivalent of a default judgment provision. Its purpose is to facilitate the prompt and orderly resolution of claims.
>
> In a civil action, CR 8.02, CR 8.04, and CR 12.01 operate to admit an

averment in a pleading if the opposing party fails to answer and deny it within 20 days of service of the summons and complaint. CR 55.01 provides for the entry of a default judgment if a party fails to defend a cause of action and lists but a few exceptions. Ryan v. Collins, 481 S.W.2d 85 (Ky. 1972), notes, however, that the courts disfavor such judgments and that CR 55.02 permits the trial court to set aside a default judgment upon a showing of good cause in accordance with CR 60.02. Liberty National Bank & Trust Co. v. Kummert, 305 Ky. 769, 205 S.W.2d 342 (Ky.1947, and Howard v. Fountain, 749 S.W.2d 690, 692 (Ky. App. 1988), direct the trial court to apply a liberal standard when judging whether good cause exists and state that the exercise of discretion will not be disturbed absent abuse. Likewise, Moffitt v. Asher, 302 S.W.2d 102 (Ky. 1975), applies an abuse of discretion standard to a decision granting or denying a request under CR 6.02 to plead after the time allowed in CR 12.01 has expired.

As explained in J.B. Blanton Co. v. Lowe, 415 S.W.2d 376 (Ky. 1967), the courts afford an administrative agency's construction of its own regulation great weight when determining the regulation's meaning. Although 803 KAR 25:010 § 5 does not indicate that the time for filing a Form 111 may be enlarged after it expires, the claimant points to no statute or regulation that prohibits it from being enlarged despite a showing of good cause. The Board's construction of 803 KAR 25:010 § 5 is reasonable. It considers a worker's interest in the prompt resolution of a claim but also ensures that an employer who shows good cause for tendering a tardy Form 111

> will receive a day in court. We conclude, therefore, that 803 KAR 25:010 § 5 permits an employer to file a Form 111 outside the 45-day period if the ALJ finds that it has shown good cause for the delay.
>
> . . . . KRS 342.285 designates the ALJ as the finder of fact; therefore, the claim must be remanded for the ALJ to make findings of fact that will permit a meaningful appellate review. If the ALJ determines that the employer has not shown good cause, then the allegations contained in the application for benefits are admitted. If the ALJ determines that the employer has shown good cause, the ALJ must then consider the merits of the contested issues.

Slip op at pp. 2-3.

To set aside a default judgment, as a threshold matter, "good cause" must be shown. Jacobs v. Bell, 441 S.W.2d 448 (Ky. 1969). To establish "good cause," the party seeking relief from a default judgment must demonstrate that it is not guilty of unreasonable delay or neglect. Terrafirma, Inc. v. Krogdahl, 380 S.W.2d 86 (Ky. 1964).

Here, the ALJ never made a determination of whether good cause was shown. Even though Sunz argues its provision of TTD benefits and medical benefits constitutes good cause, an action occurring after the untimely filing cannot constitute good cause. On remand, the ALJ must

determine whether ES/Sunz established good cause for the delay and specifically state the basis for that finding. If ES failed to establish good cause, it must be deemed Decker's employer and, because ES was insured by Sunz at the time of Decker's injury, A&C would not have liability for the award. If ES is deemed the employer, KRS 342.610 is inapplicable.

Conversely, if the ALJ determines there was good cause for the delay in filing the Form 111, we find the record contains substantial evidence to support his findings that Decker was an employee of Laney and not an assigned employee of ES at the time of the injury. It is uncontradicted that the requirements in the Service Agreement and the necessary paperwork had not been completed and ES had not accepted Decker as its employee at the time of the injury. Further, it is uncontradicted that Decker was performing work under the subcontract of Laney with A&C at the time of the injury. If ES is not deemed the employer, the evidence supports a finding A&C is liable as an up-the-ladder contractor.

Reimbursement and Interest

A&C contends the ALJ had no jurisdiction to order reimbursement and interest. It contends the dispute is

between two carriers and is beyond the purview of and authority vested in an ALJ.

If the ALJ determines ES did not show good cause and it is deemed Decker's employer, Sunz is not entitled to reimbursement. If good cause was shown, we believe the ALJ could properly order reimbursement but not interest on the sums paid by Sunz. In Custard Insurance Adjuster v. Aldridge, 57 S.W.3d 284 (Ky. 2001), the Supreme Court, citing Wolfe v. Fidelity & Casualty Insurance Co., of New York, 979 S.W.2d 118 (Ky. App. 1998) and Larson's Worker's Compensation Law § 150.04 (1)-(2) (2001) held, where the dispute is between two insurance carriers and does not affect the rights of an employee in a pending claim, jurisdiction does not lie with the ALJ. In such cases, because the question of reimbursement was purely a dispute between two insurance carriers over benefits that had already been paid and resolution of the matter did not involve a provision of KRS Chapter 342, neither the ALJ nor this Board has jurisdiction to resolve the question. Id. at p. 288-289. Additionally, § 150.04[2] of Larson's, cited by the Supreme Court in Custard, reads as follows:

> On the other hand, when the rights of the employee in a pending claim are not a stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur

> when the question is merely one between two insurers, one of whom alleges that it has been made to pay an undue share of an award to a claimant, and the award itself is not being under attack. Or it may occur when the insured and insurer have some dispute entirely between themselves about the validity or coverage of the policy and the sharing of admitted liability.
>
> . . .

This Board has affirmed, on more than one occasion, an ALJ's determinations as to the right of reimbursement between carriers based upon the location of the claim and the issue of which injury resulted in the disability. *See e.g.* National Steel v. Loving, Claim No. 93-48272, rendered November 9, 1996; Accuride, Inc., v. Berry, Claim Nos. 91-49641 & 84-26509, rendered March 31, 1995. In our opinion, the ALJ had the authority to order reimbursement for the amounts paid by Sunz. However, establishing interest by utilizing KRS 360.040, was an action without or in excess of the ALJ's powers. The Workers' Compensation Act permits interest to be awarded to the claimant pursuant to KRS 342.040, but does not provide for interest on reimbursement between carriers. The award of interest pursuant to KRS 360.040 was in the realm of enforcement and the legislature has established the procedure for enforcing agreements, orders, decisions or

awards by ALJs or the Workers' Compensation Board in the circuit courts of the county in which the injury occurred. KRS 342.305.

Sanctions

Finally, in its reply brief, A&C notes ES failed to file a brief on appeal. Kentucky Rules of Civil Procedure 76.12(8)(c) provides a court may accept the appellant's statements of facts and issues as correct; reverse the judgment if appellant's brief reasonably appears to sustain such action; or regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case. A&C further notes 803 KAR 25:10 § 21(12) provides the sanction for failure to file a responsive brief may result in reversal. Accordingly, A&C requests such sanctions as the Board deems appropriate including confession of error and reversal of the judgment below without considering the merits of the case. Because Sunz, the carrier for ES, did file a brief and their interests are largely aligned, we decline to impose sanctions on ES for its failure to file a brief on appeal.

Conclusion

Accordingly, the November 12, 2014 Opinion, Order and Award, the December 18, 2014 order denying its petition for reconsideration rendered by Hon. Otto D. Wolff,

Administrative Law Judge are hereby **VACATED IN PART** and this matter is remanded for a determination of whether good cause excused untimely filing of the Forms 111 of ES and Sunz and the entry of an amended Opinion and Award in conformity with the views expressed herein.

ALL CONCUR.

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