Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 3, 2014

CLAIM NO. 201191576

AMERICAN WOODMARK CORP PETITIONER/CROSS-RESPONDENT

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

DANNY MULLINS RESPONDENT/CROSS-PETITIONER
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

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

RECHTER, Member. American Woodmark, Corp. appeals from the November 18, 2013 Opinion, Award and Order and the December 24, 2013 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). Danny Mullins ("Mullins") cross-appeals. For the reasons set forth herein, this matter must be remanded to the ALJ for further

findings of fact regarding whether American Woodmark established good cause for the delay in filing its Form 111.

Mullins was injured on April 5, 2011 when a piece of lumbar fell from above the forklift he was operating, striking him in the face, and causing serious injuries. He filed a Form 101 on January 22, 2013. On February 26, 2013, he amended the claim to allege a safety violation. A scheduling order was issued on February 20, 2013, setting the Benefit Review Conference ("BRC") for June 14, 2013. Pursuant to the scheduling order, the American Woodmark's notice of claim denial or acceptance was due April 6, 2013.

According to representations made in pleadings before the ALJ and this Board, counsel for American Woodmark did not timely receive the scheduling order due to a clerical error on the part of its adjusting firm. As a result, its Form 111 was not filed until May 8, 2013. The Form 111 was not accompanied by a motion for leave to file as untimely, however it was accepted and filed nonetheless.

There is no indication in the record that the timeliness of the Form 111 was raised or discussed at the time of filing. Thereafter, a significant amount of proof was submitted, concerning both the extent and nature of Mullins' injuries, as well as the alleged safety violation.

The BRC Order dated September 24, 2013 does identify the timeliness of the filing of the Form 111 as a contested issue. In its brief to the ALJ, American Woodmark argued it had good cause for the untimely filing of its Form 111.

The ALJ issued an Opinion, Award and Order on November 18, 2013, awarding Mullins temporary total and permanent partial disability benefits for injuries to his "cervical and lumbar spine and to his face." The ALJ found Mullins did not suffer any psychological impairment as a result of the accident, but made no specific finding with respect to the alleged safety violation.

Mullins petitioned for reconsideration. He requested the ALJ make additional findings concerning the timeliness of the Form 111, arguing American Woodmark had failed to establish good cause for the tardy pleading. Therefore, Mullins reasoned, American Woodmark admitted the safety violation and psychological condition.

In the Order on Reconsideration, the ALJ acknowledged the BRC Order list the timeliness of the Form 111 as an issue, but was not discussed in the Opinion. Citing Gray v. Trimmaster, 173 S.W.3d 236 (Ky. 2005), the ALJ stated he felt "compelled to find [Mullins] does have a psychological condition." Regarding the alleged safety violation, the ALJ explained:

> The undersigned notes, *sua sponte* that I did fail to address KRS 342.165. The undersigned acknowledges that the Plaintiff pled this under the general duty clause and Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The Plaintiff testified that the lumber was stacked too high and that he complained of it and that is what caused the accident. Since the Form 111 was untimely and KRS 342.165 is separate, though directly tied to, KRS 342.730, I believe I am bound to enhance his TTD and PPD benefits by 30%.

803 KAR 25:010 Section 5 (2)(b) provides when "a Form 111 is not filed, all allegations of the application shall be deemed admitted." By the plain language of the regulation, it does not apply when a Form 111 is in fact filed, though belatedly. However, in Gray, the penalty was imposed, and all allegations of the application were deemed admitted, though the employer filed a Form 111, albeit untimely. However, subsequent appellate decisions have made clear that the harsh penalty of 803 KAR 25:010 Section 5 (2)(b) will not be imposed when the employer can establish good cause for the delay in filing its Form 111. *See, e.g.* Clark Regional Medical Center v. Lovings, 2006 WL 2987038 (Ky. 2006); Neace v. Asplundh Tree Expert, Co., Inc., 2008 WL 1850622 (Ky. 2008).[1] As American Woodmark

[1] These unpublished opinions of the Kentucky Supreme Court are cited pursuant to CR 76.28(c).

emphasizes in its brief to this Board, the ALJ made no finding as to whether it had established good cause for the delayed filing of its Form 111. Rather, it appears the ALJ deemed the allegations regarding a safety violation and the alleged psychological injury admitted, based solely on the fact the Form 111 was untimely.

Whether good cause for delay in filing the Form 111 exists is a question of fact properly left to the ALJ. For this reason, the matter must be remanded. On remand, the ALJ is requested to make a specific finding as to whether American Woodmark established good cause for the delay in filing its Form 111. If good cause has not been established, then American Woodmark will be deemed to have admitted all of the allegations contained in Mullins' application. If good cause has been established, then the ALJ must enter a decision regarding the alleged safety violation and the alleged psychological injury based on the merits of each claim.

American Woodmark also argues the evidence does not support a finding that the psychological claim was work-related or a KRS 342.165 violation. Due to our holding herein, it would be premature for this Board to address these issues. On cross-appeal, Mullins argues the ALJ failed to award income benefits for his right eye

injury and erred in limiting the award of medical benefits to his cervical and lumbar spine and face. Both of these arguments are predicated on the assumption that the penalty contained in 803 KAR 25:010 Section 5 (2)(b) was properly imposed. Again, it would be premature for this Board to address these arguments, prior to a finding regarding whether good cause for the delay in filing the Form 111 was established.

For the reasons set forth herein, the November 18, 2013 Opinion, Award and Order and the December 24, 2013 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge, are hereby **VACATED** and the claim is **REMANDED** for further proceedings as set forth in this opinion.

ALL CONCUR.

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