

OPINION ENTERED: April 24, 2012

CLAIM NO. 201078829

MARTY MITCHELL

PETITIONER

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

SUN PRODUCTS
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION VACATING
AND REMANDING**

* * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Marty Mitchell ("Mitchell") appeals from the opinion and order rendered January 17, 2012 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") dismissing the claim he filed against Sun Products. No petition for reconsideration was filed.

On appeal, Mitchell argues the ALJ improperly dismissed his claim for failing to provide due and timely notice. Mitchell also argues Sun Products failed to timely file a Form 111 claim denial, and did not provide an adequate explanation for doing so. Specifically, Mitchell argues, "the ALJ failed to require the Defendant to show good cause for failure to timely file [sic] 111." We vacate and remand.

A brief recitation of the history of the claim is necessary. On July 11, 2011, Mitchell filed a Form 101 alleging injuries occurring on October 1, 2009, and April 26, 2010. In the Form 101, Mitchell stated he had provided immediate verbal notice of the accidents. The Form 101 listed Zurich Insurance, P.O. Box 968077, "Shambaumburg"[sic], IL, as the insurer. The Kentucky Department of Worker's Claims ("DWC") issued a notice of filing of the claim on July 13, 2011, and mailed a copy to American Zurich Ins. Co., POB 968051, Schaumburg, IL 60196 as the insurer. It is assumed the address for Sun Products was properly listed, and it was properly served since the record is silent in that regard.

On July 18, 2011, the DWC issued a scheduling order assigning the claim to the ALJ for resolution. The order states as follows:

Within forty-five (45) days of this notice, Defendants shall file a notice of claim denial or acceptance (Form 111). If not filed, all allegations of the application shall be deemed admitted. At least ten (10) days prior to the benefit review conference; the parties shall file a witness list and copies of all known exhibits, proposed stipulations and notice of contested issues. Proof-taking for all parties shall commence as of the date of this notice and extend for sixty (60) days, followed by thirty (30) days for Defendants only and fifteen (15) days thereafter for rebuttal by the Plaintiff. If necessary, a hearing will be scheduled by the Administrative Law Judge following the benefit review conference.

Mitchell filed records from Dr. Dimick, his treating surgeon. On October 13, 2011, well after Mitchell's time for the introduction of evidence had expired, Sun Products filed a Form 111 claim denial. Per the scheduling order, the Form 111 was due to be filed no later than September 1, 2011. Sun Products provided no explanation for the late filing, nor did it file a motion for leave to file the claim denial. On October 25, 2011, Mitchell filed a witness list, and a list of contested issues. The late filing of the Form 111 was not listed as an issue. On October 28, 2011, after the expiration of it's time for introduction of evidence, Sun Products filed a motion for extension of time through November 18, 2011 to

introduce evidence. In that motion, Sun Products stated an incorrect address for Zurich had been listed in the Form 101. No mention was made as to whether Sun Products had received the filing information, or whether the correct address was listed for it. Likewise, the motion made no mention of the Form 111.

On November 2, 2011, a benefit review conference ("BRC") was held. In the BRC order and memorandum completed at that time, the ALJ noted the following:

Plaintiff moves to limit to ex. & dur.
because Form 111 not timely filed, Δ
explains delay, Π motion to strike
overruled over Π's objection

Other issues preserved in that memorandum include, "benefits per KRS 342.730, notice, unpaid or contested medical expenses, injury as defined by the ACT, TTD, exclusion for pre-existing disability/impairment". No formal motion, response, or order was entered concerning the Form 111.

A hearing was held on November 15, 2011. The hearing transcript does not contain a recitation of the evidence filed of record, nor does it contain a list of the contested issues preserved for determination. Specifically, the Form 111 was not mentioned. Mitchell filed a brief on December 12, 2011, but did not address the

Form 111. Sun Products filed a brief on December 12, 2011, and mentioned the ALJ's determination at the BRC overruling Mitchell's motion to strike the Form 111. Sun Products argued the following:

The Workers' Compensation Board has held that relief from the requirement for filing a Form 111 within 45 days may be had upon good cause shown, in the same manner as relief from a default judgment in civil actions. Asplundh Tree Expert Company v. Neace, Claim No. 05-00381 (October 17, 2005). In this same Opinion, the Board also noted that the decision to permit a Form 111 to be filed belatedly is one within the ALJ's discretion (Id.) It explained that whether an employer has a good cause for its failure to file a timely 111 is an essential finding of fact to be made by the ALJ. (Id.)

Of note, the Rules of Civil Procedure allow the setting aside of a judgment entered by default if good cause can be shown. CR 55.02. Kentucky Civil Rule 60.02 permits a court to relieve a party from a default judgment on a variety of grounds, including excusable neglect. It is also accepted that as a general rule, default judgments are not looked upon with favor. Bargo v. Lewis, 305 S.W.2d 757 (Ky. 1957). Trial courts have been directed to apply a liberal standard in determining whether good cause has been shown in order to ensure that defendants are not deprived of their day in court. Liberty National Bank & Trust Co. v. Kummert, 205 S.W.2d 342 (Ky., 1947).

The Workers' Compensation Board has also previously explained that in considering whether there has been

substantial compliance with a procedural rule, considerations include the essential purpose of the rule and whether the opposing party's need are adequately protected. Asplundh Tree Expert Company v. Neace, Claim No. 05-00381 (October 17, 2005).

Sun Products argued it had shown good cause for the delay in filing the Form 111, and Mitchell's motion had been properly overruled. Sun Products also specifically noted it had filed a motion for extension of time wherein it had outlined delay was occasioned by an incorrect listing of Zurich's address on the application and scheduling order. Sun Products further argued:

An incorrect address for service of process is certainly "good cause" excusing the delay in filing Defendant's answer, and the ALJ was within his discretion to overrule Plaintiff's motion to strike.

The ALJ rendered an opinion and order on January 17, 2012 dismissing Mitchell's claim because he had failed to provide due and timely notice of his injury to Sun Products. The ALJ did not mention the filing of the Form 111.

The law is well settled. It is imperative the ALJ provide a sufficient basis to support his determination. See Cornett v. Corbin Materials, Inc., 807

S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). In that case, the Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review." *Id.* at 358.

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine

all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In the case *sub judice*, the ALJ provided no analysis supporting his decision regarding the motion to strike the Form 111 other than a brief hand-written

sentence in the BRC order and memorandum. He merely provided a determination without explanation. We do not believe in dismissing this claim the ALJ provided an adequate analysis in the BRC order and memorandum which supports his decision to overrule Mitchell's verbal motion to strike the Form 111.

KRS 342.285(2)(c) provides generally the Board may determine on appeal whether an order, decision or award is in conformity to the provisions of Chapter 342. KRS 342.285(3) provides the Board may "in its discretion" remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These statutes, when read in conjunction, provide this Board with authority to return a claim for findings in conformity with the Kentucky Workers' Compensation Act.

It is undisputed Sun Products did not timely file a Form 111 claim denial. The scheduling order was issued on July 18, 2011. The time for filing a Form 111 expired on September 1, 2011. Sun Products did not file the Form 111 until October 13, 2011, well beyond the mandatory filing date. Although Sun Products provided an explanation in its' motion for extension of time for the introduction of evidence, it did not file a motion for leave to file a late Form 111. The burden was on it to do so. The

scheduling order specifically provided 45 days to file a claim denial. KRS 342.670(2) states in relevant part:

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.

803 KAR 25:011 §5(2)(a) states as follows:

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.

As noted by Sun Products, this Board previously stated in Asplundh Tree Expert Company v. Neace, Claim No. 2005-00381 (October 17, 2005), it is within the ALJ's discretion as to whether to allow the filing of a late Form 111. After the expiration of the 45 day period, the burden was on Sun Products to request and demonstrate good cause for the delay in filing. This it did not do.

Sun Products has cited numerous cases setting forth the ALJ's discretion in allowing the late filing of the Form 111. In each of these cases, the relief was sought and granted, it was not presumed. In this instance,

Sun Products merely filed a late Form 111, without a request to do so, and without an explanation. Sun Products bore the burden of requesting permission from the ALJ to allow the late filing. Merely tendering the Form 111 without request did not satisfy that burden. The relief sought required activity on the part of Sun Products. Mere silence and inactivity did not suffice. It is noted Sun Products subsequently filed a late motion for extension of time to introduce evidence, but failed to request leave to file the Form 111.

Although Mitchell verbally moved to strike the Form 111 at the BRC, it had only been tendered, and never properly admitted. The details of the motion, response and order are not in the record. We are therefore at a loss to determine whether the ALJ properly allowed the Form 111 to be filed, and whether the notice issue was properly preserved.

On remand, the ALJ shall conduct any proceedings necessary to determine whether the filing of the Form 111 was appropriate. If the ALJ determines Sun Products provided an adequate reason for delay, he may issue an order allowing the filing of the Form 111, and a determination regarding the notice issue would be proper. If, however, the ALJ determines Sun Products did not have

an adequate justification for delay, a dismissal of the claim based upon improper notice would not be appropriate. If the Form 111 is deemed not to have been timely filed, the ALJ can only determine the extent and duration of disability, if any.

We are not attempting to substitute our judgment for that of the ALJ. However, the hand-written notation on the BRC order and memorandum falls well short of adequate findings of fact. After reviewing the evidence and providing an adequate analysis, the ALJ very well may determine Sun Products may be permitted to file a late claim denial. However, the parties are entitled to findings so that both sides may be dealt with fairly and be properly apprised of the basis for the decision.

Accordingly, the opinion and order dismissing Mitchell's claim, entered by Hon. Otto Daniel Wolff, IV, on January 17, 2012, is hereby **VACATED** and this claim is **REMANDED** for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MICHAEL D LINDSEY
1830 DESTINY LANE, STE 111
BOWLING GREEN, KY 42104

COUNSEL FOR RESPONDENT:

HON WALTER A WARD
333 WEST VINE ST, STE 1100
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

HON OTTO DANIEL WOLFF, IV
8120 DREAM STREET
FLORENCE KY 41042