Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 16, 2016

CLAIM NO. 201100465

SUNZ INSURANCE CO. 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;
A & C COMMUNICATIONS;
UNINSURED EMPLOYERS' FUND; and
HON. OTTO D. WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Sunz Insurance Company ("Sunz") appeals from the decision on remand rendered January 29, 2016 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") finding it responsible for payment of income and

medical benefits to Henry J. Decker ("Decker") for injuries he sustained on January 4, 2011 while working for Owen Carroll Laney d/b/a Laney Utilities ("Laney"). Sunz also appeals from the March 31, 2016 order denying its petition for reconsideration.

On appeal, Sunz argues Employee Staff, LLC ("ES") was not properly joined to Decker's claim in accordance with 803 KAR 25:010 §5(2)(c). It additionally argues the issues of employer-employee relationship and coverage are non-waivable defenses. Sunz also argues Decker's application for resolution of claim did not contain allegations which can be deemed admitted against it. Finally, it argues its procedural due process rights were violated when the ALJ denied it the opportunity to submit additional proof. Because we determine the ALJ performed the analysis previously directed by this Board, he did not err in refusing to allow the introduction of additional proof, and he did not abuse his discretion, we affirm.

This is the third time this claim has been appealed to this Board. A&C Communications ("A&C") initially appealed from an interlocutory decision rendered by the ALJ on September 12, 2012, and his order denying its petition for reconsideration finding it liable for benefits to Decker pursuant to KRS 342.610. This Board dismissed

the appeal as interlocutory in a decision entered October 11, 2013.

The parties subsequently introduced evidence and the ALJ rendered a decision on November 12, 2014, finding Decker permanently totally disabled. The ALJ found A&C responsible for payment of permanent total disability benefits and medical benefits pursuant to KRS 342.610. In its petition for reconsideration, A&C argued the ALJ erred in ordering it to pay interest on the amounts to be reimbursed to Sunz; in finding it liable despite Sunz not having timely filed a Form 111 Claim Denial; and ES did not timely file a Form 111 after it was joined as a party by order on June 27, 2011. On December 18, 2014, the ALJ entered an order denying the petition for reconsideration.

On appeal, A&C argued the ALJ erred in overruling the motion to strike the untimely Form 111 claim denials filed by ES and Sunz, then dismissing them as parties. Citing to Gray v. Trimmaster, 173 S.W.3d 236 (Ky. 2005), A&C argued the forty-five day time period for filing a claim denial is mandatory, not discretionary. A&C additionally argued Laney was insured through ES and Sunz. A&C argued that because Laney was insured through ES and Sunz, KRS 342.610 is inapplicable to this case. Finally, A&C argued the ALJ had no jurisdiction to order it to

reimburse Sunz with interest for payments it had made to Decker.

In a decision entered May 22, 2015, after outlining the procedural history of the claim, which we do not feel necessary to repeat, this Board provided the following analysis:

> 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.
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> 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.
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> (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.

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).
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> 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.

This Board provided specific instruction for the determinations the ALJ was required to make on remand, directing as follows:

> . . . 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.
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> 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.

This Board additionally stated as follows:

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.

In his decision on remand rendered January 29, 2016, the ALJ found Sunz did not timely file a Form 111. He noted Sunz was named on the scheduling order issued by the Commissioner of the Kentucky Department of Workers' Claims on April 20, 2011, and it did not file its Form 111 Notice of Claim Denial until August 29, 2011, well after the forty-five day time for filing had passed. The ALJ also noted ES was joined as a party by order on June 27, 2011, and it did not file a claim denial until August 19, 2011, again after the forty-five day time for filing had passed. The ALJ noted neither Sunz nor ES moved for leave to file a Form 111, nor did either establish good cause for their respective late filings.

The ALJ specifically stated as follows:

> Sunz has not presented a "good cause" explanation why it did not make a timely filing to the Commissioner's April 20, 2011 assignment order; in fact it has not given any explanation.
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> Based upon the above it is determined Sunz never provided a "good cause" explanation for its delay in filing a Form 111.
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> Furthermore, ES failed to comply with the June 27, 2011 Order dictating it enter an appearance and file a Form 111 within 45 days of the date of the order, and has not presented a "good cause" explanation why it failed to do so.

> As directed in the Board's Opinion, and the determination having been made Sunz and ES did not provide "good cause" explanations for their untimely filings, it is determined ES was Plaintiff's employer on January 4, 2011, and therefore ES, and its insurer, Sunz, are liable to pay Plaintiff's November 12, 2014 Award.
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> Pursuant to the Board's instructions, and the findings made herein, it is determined A&C is not Plaintiff's up-the-ladder statutory employer, and thus does not have liability to Plaintiff for the November 12, 2014 Award. Also, pursuant to this determination A&C's insurer, KEMI, had no liability.
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> Furthermore, pursuant to the Board's Opinion, and the determination A&C is not Plaintiff's employer, Sunz is not entitled to reimbursement as set forth in the November 12, 2014 Award.

Sunz filed a petition for reconsideration arguing A&C failed to meet the regulatory requirements intended to protect the due process rights of newly joined parties. It also argued it was patent error for the ALJ to state there was no "good cause explanation" for "the failure by ES and Sunz to file their Forms 111 within 45 days of the 6/27/11 Order." The Petition for Reconsideration was denied in an order issued by the ALJ on March 31, 2016.

We will first address Sunz's argument the ALJ erred in not allowing it to submit additional proof. The ALJ did not err in refusing to provide additional time for

Sunz to introduce evidence on remand. The ALJ was not directed, or permitted, to conduct further proceedings, or to allow the introduction of additional evidence. This is consistent with the decisions of the Kentucky Supreme Court in T. J. Maxx v. Blagg, 274 S.W.3d 436 (Ky. 2008); Nesco v. Haddix, 339 S.W.3d 465 (Ky. 2011); and UEF v. Pellant, 396 S.W.3d 292 (Ky. 2012) which prohibit "a second bite of the apple" or the introduction of additional evidence on remand. We therefore determine the ALJ did not err in refusing to allow Sunz additional time to introduce evidence, especially in a case in which it has been named since it was served notifications by the Commissioner of the Kentucky Department of Workers' Claims in March and April 2011.

We next note the ALJ determined the Form 111 was not timely filed. Clearly, Sunz did not file a claim denial within forty-five days after it was first notified of the claim by the Commissioner of the Kentucky Department of Workers' Claims, nor after it was served with a copy of the scheduling order. Likewise, it did not file a claim denial within forty-five days after the June 2011 order joining ES. In late August 2011, Sunz filed an untimely claim denial without asking for leave to do so, or in any other fashion or attempting to establish "good cause".

While we do not cite previous decisions of this Board as authoritative, we do so in this instance for guidance and consistency. In Marty Mitchell v. Sun Products, Claim No. 2010-78829 (April 24, 2012), this Board noted the employer did not timely file a Form 111 claim denial. It did not do so until well beyond the mandatory filing deadline. As in the case *sub judice*, 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 forty-five 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.
>
> This Board specifically stated as follows:
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> 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.
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> 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.

As in Mitchell, the ALJ determined Sunz did not timely file a Form 111, and did not file a motion for leave to do so. Regarding the ALJ's determinations neither Sunz nor ES timely filed their respective Form 111 claim denials, nor did they request leave to file them past the mandatory forty-five day limit, again we find no error. The ALJ made his determinations in accordance with the directives of this Board. We likewise note ES did not appeal from the ALJ's determination.

In this instance, the ALJ was granted the limited authority to determine whether Sunz and ES had shown good

cause in not timely filing Forms 111. He determined they did not. "Good cause" is most commonly defined as a timely showing of the circumstances under which a default judgment was procured. Green Seed Co., Inc. v. Harrison Tobacco Storage, 633 S.W.2d 755 (Ky. 1984). 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).

Correspondingly, relief from the requirement for filing a Form 111 within forty-five days of the issuance of the scheduling order may only be had upon good cause shown. Neace, 2008 WL 1850622. *See also* Clark Regional Medical Center v. Lovings, No. 2006-SC-0027-WC, 2006 WL 2987038 (Ky. 2006). Absent a showing of good cause by an employer for the untimely filing of a Form 111, the requirement under 803 KAR 25:010 § 5(2)(b) that all allegations in a claimant's application for benefits shall be deemed admitted is mandatory. Gray v. Trimmaster, supra. Actual prejudice to the injured employee is not a factor under KRS 342.270(2) or 803 KAR 25:010 § 5(2). Lovings, 2006 WL 2987038.

Whether good cause is adequately proven in such instances is a question of fact for determination within the discretion of the ALJ on a case by case basis, depending on the evidence presented. Neace, 2008 WL 1850622. Regardless of the result reached, the exercise of such discretion by an ALJ cannot be disturbed on appeal absent a clear showing of abuse. The test for abuse of discretion is whether the fact-finder's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Officeware v. Jackson, 247 S.W.3d 887, 892 (Ky. 2008).

In accordance with the directive of this Board, the ALJ determined ES, and its insurer Sunz, at no time moved for leave to file untimely claim denials, and neither demonstrated good cause for failing to do so. He therefore determined they are responsible for payment of Decker's award. Because the ALJ made the determinations required by this Board, his decision will not be disturbed.

Accordingly, the decision on remand rendered January 29, 2016 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, and the March 31, 2016 order denying its petition for reconsideration are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MARK R BUSH
250 GRANDVIEW DR, STE 550
FORT MITCHELL, KY 41017

COUNSEL FOR RESPONDENT HENRY DECKER:

HON MARK D KNIGHT
PO BOX 49
SOMERSET, KY 42502

COUNSEL FOR RESPONDENT EMPLOYEE STAFF LLC:

HON DONALD C WALTON, III
333 WEST VINE ST, STE 1100
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT A & C COMMUNICATIONS:

HON W BARRY LEWIS
PO BOX 800
HAZARD, KY 41702

UNINSURED EMPLOYERS' FUND:

HON JAMES CARPENTER
1024 CAPITOL CENTER DR, STE 200
FRANKFORT, KY 40601

RESPONDENT:

OWEN CARROLL LANEY
D/B/A LANEY UTILITIES
37 STEPHENS ROAD
WELLINGTON, KY 40387

CHIEF ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601