Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 16, 2016

CLAIM NO. 201367697

WILLIAM E STILWELL PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

KENTUCKY STATE UNIVERSITY
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART
AND REMANDING
* * * * * *

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

RECHTER, Member. William E. Stilwell ("Stilwell") appeals from the February 19, 2016 Opinion, Award and Order and the March 18, 2016 Order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability, permanent partial disability and medical benefits for lower extremity and low back

injuries, but declined to award enhancement for an alleged safety violation.

On appeal, Stilwell argues the impairment rating assessed by Dr. Burke for the lower extremity and the alleged safety violation should have been deemed admitted due to the employer's untimely filing of a Form 111; that even if the safety violation is not deemed admitted, it was error not to award the 30% penalty; that it was error to give Kentucky State University ("KSU") credit or offset for wages paid while he was temporarily totally disabled; that he should have been awarded temporary total disability ("TTD") benefits until the date Dr. Burke placed him at maximum medical improvement ("MMI"); and that he should have been awarded the three multiplier or, in the alternative, the two multiplier. For the reasons set forth herein, we affirm in part, vacate in part and remand.

Stilwell filed his claim on May 22, 2015, alleging injuries to his left leg, lower extremity and back as a result of a September 16, 2013 accident. He was cutting down a tree with a chainsaw when he cut his leg. Stilwell also alleged a safety violation pursuant to KRS 342.165, noting the protective equipment KSU provided was not OSHA approved.

Stilwell testified by deposition on September 8, 2015 and at the hearing held December 22, 2016. He has a master's degree in aquatic sciences and an undergraduate degree in forestry. Stilwell was employed as a Coordinator II and manager of the Environmental Education and Research Center, a forest service trail used for research and educational purposes. His duties included clearing the trail and giving tours, writing grants, and maintaining the web site.

On September 16, 2013, Stilwell was using a chainsaw to cut down a 12 foot cedar tree that was leaning over a trail. As the tree fell, it clipped the edge of the chain, causing it to pop off the bar of his saw and whip his leg, lacerating his left shin. Stilwell acknowledged he did not properly notch the tree prior to cutting and he had not planned an escape route because the tree was small. He was aware chain saw chaps were available.

Stilwell was placed on paid administrative leave for disciplinary reasons in September, 2013 following a complaint involving text messages to an individual he met at a conference where he was representing KSU. He was terminated in January 2015 and received unemployment benefits.

Eddie Reed, the current manager of the Research and Demonstration Farm, testified at the hearing. When he used a chain saw, he was provided with logging pants and chain saw chaps. He acknowledged the canvas pants provided were not the proper pants for chain saw operation.

Stilwell submitted reports of Dr. Frank Burke who performed an independent medical evaluation ("IME") on April 30, 2015. Dr. Burke opined Stilwell sustained a complex laceration involving skin, subcutaneous tissue, fascia muscle, and bone. He also had multiple "near-falls" secondary to his leg giving way, and a limp with development of back pain which evolved into right-sided sciatica. Dr. Burke assigned a 9% impairment rating for the lower extremity pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Although he did not believe Stilwell was at MMI for the back condition, Dr. Burke assigned a provisional 12% impairment rating. Additionally, he assigned a 2% impairment rating for a superficial peroneal nerve injury. When combined, the ratings produced a 21% whole person impairment rating.

On October 22, 2015 Dr. Burke reevaluated Stilwell. He opined Stilwell had reached MMI for his back

condition and had a 12% impairment rating for that condition. Dr. Burke attributed the back condition to incapacitation of normal function of the lower extremity. Dr. Burke reaffirmed the 9% rating for a skin disorder of the lower extremity. That rating, and the 12% rating for the back condition, produced a combined 20% impairment rating. Dr. Burke did not address the 2% impairment rating he had previously assigned for the peroneal nerve injury. In the future, he recommended restrictions against activities which can overly strain his back, excessive repetitive bending, squatting, and heavy lifting.

Dr. Burke testified by deposition on November 19, 2015. He opined Stilwell's back condition was the result of his left leg giving way and movement in his back. He confirmed Stilwell had a 9% impairment rating for the lower extremity and 12% rating for the back condition, producing a 21% combined rating. He reaffirmed restrictions against repetitive bending and squatting and heavy lifting. Dr. Burke did not believe Stilwell could return to his former work.

Stilwell filed medical records from Dr. Phillip Tibbs, who diagnosed low back pain with sciatica. He performed a microdiscectomy for a herniated L5-S1 disc on

November 3, 2014. At a November 18, 2014 office visit, Dr. Tibbs stated Stilwell was “safe to return to work at this time.”

Stilwell filed medical records from Dr. Matthew Tutt, who performed decompression surgery at L5-S1 on March 3, 2015. On April 6, 2015, Dr. Tutt noted Stilwell was recovering well, and encouraged him to slowly increase activity. Stilwell was directed to return on an as-needed basis.

Dr. Philip Corbett performed an IME on October 5, 2015. He diagnosed a full-thickness skin defect of the left leg, well healed, with evidence of sensory injury to the superficial peroneal nerve. He placed Stilwell at MMI as of March 15, 2014, and felt he would require no permanent work restrictions. Dr. Corbett assessed a 2% impairment rating for the skin defect pursuant to the AMA Guides. In a December 21, 2015 supplemental report, Dr. Corbett indicated he disagreed with Dr. Burke’s assessment concerning the lower extremity. Dr. Corbett rated Stilwell at the lower end of the allowable impairment rating due to his ability to perform activities of daily living. Dr. Corbett noted there was no atrophy in the lower extremity, which strongly contradicted Stilwell’s allegation that his

leg gives out. Furthermore, he found no medically probable indication of a causal relationship between the work injury and the back condition that ultimately resulted in a microdiscectomy. Rather, he opined the back condition was more likely the result of other unrelated traumatic events, including being run over by a car and lifting a 100 pound log. Also, Stilwell's herniated disc appeared to be related to degenerative disc disease. Dr. Corbett opined Stilwell requires no permanent restrictions as a result of the work injury, and retains the capacity to return to his prior employment capacity.

After reviewing the evidence, the ALJ first considered whether good cause existed for KSU's late filing of its Form 111, which was submitted about three weeks tardy. As explanation, KSU offered only the inadvertence of a former employee, which the ALJ deemed insufficient to establish good cause for the delay. Therefore, the ALJ held "it is incumbent upon the ALJ to find the allegations of injury set forth in the plaintiff's Form 101 are deemed admitted."

Turning to the extent and duration of Stilwell's injuries, the ALJ accepted the 12% impairment rating assessed by Dr. Burke for the low back condition. He found

Dr. Corbett more persuasive regarding the impairment rating for the lower extremity, and awarded benefits based upon his 2% rating. The ALJ concluded Stilwell retained the physical capacity to return to his position, and therefore was not entitled to an enhancement of benefits by the three multiplier. The ALJ determined the two multiplier could apply, as Stilwell continued to earn the same or greater wage through the payment of salary continuation following the injury. However, Stilwell's termination was the result of sexual harassment "which is an intentional deliberate action with reckless disregard of the consequences" that precludes award of the two multiplier pursuant to Livingood v. Transfreight, LLC., 467 S.W.3d 249 (Ky. 2015). The ALJ noted TTD benefits were not paid, but Stilwell received salary continuation through January 7, 2015 and suffered no wage loss during that time. Based upon the release by Dr. Tutt, the ALJ concluded Stilwell would qualify for TTD benefits for 12.57 weeks from January 8, 2015 through April 6, 2015. Thus, KSU was credited for unemployment benefits paid during this period.

In his Form 101, Stilwell stated the personal protective equipment was not OSHA approved. The ALJ determined this allegation was insufficient to sustain

Stilwell's burden of proving entitlement to increased benefits. Rather, the ALJ opined the accident occurred as a result of Stilwell using improper technique, and the injury occurred as a result of his failure to obtain and utilize the provided safety equipment. Therefore, he declined to increase benefits pursuant to KRS 342.165.

Stilwell filed a petition for reconsideration making the same arguments he raises on appeal. The ALJ issued an order on March 18, 2016 denying the petition as a re-argument of the merits of the claim.

On appeal, Stilwell first challenges the ALJ's reliance on Dr. Corbett's impairment rating of his lower extremity. He argues the ALJ was obliged to accept Dr. Burke's report because it was attached to his Form 101. According to Stilwell, it is not just the allegations contained in the Form 101 that are deemed admitted if no timely Form 111 is filed, but also any impairment rating contained in an attached medical report. He argues Gray v. Trimmaster, 173 S.W.3d 236 (Ky. 2005), supports his reasoning.

803 KAR 25:010 Section 5(1)(d) requires the claimant to file one medical report along with the Form 101. For any non-psychological injury claim, the medical

report must contain the description of the injury which is the basis of the claim, and a medical opinion establishing a causal relationship between the alleged injury and the work activities. KRS 342.270(2) requires a defendant to file a notice of claim denial or acceptance within 45 days of being notified a claim has been filed against it. 803 KAR 25:010 Section 5 (2)(a) directs the defendant to file this notice on a Form 111. The regulation further provides that "[i]f a Form 111 is not filed, all allegations of the application shall be deemed admitted." The purpose of these mandatory provisions is to encourage compliance by employers.

The question before us is whether the employer has admitted the extent of impairment by filing a tardy Form 111 without good cause. Stated otherwise, if the medical report attached to the Form 101 contains an impairment rating, does that impairment rating constitute an "allegation" which is deemed admitted. Neither the statutes nor the regulations squarely answer this specific question. 803 KAR 25:010 Section 5(2)(a) states that the allegations contained in "the application" are deemed admitted when the Form 111 is untimely filed. Though "application" is not expressly defined in the regulations,

803 KAR 25:010 Section 5 (1) sets forth the required contents of an application. While a medical opinion establishing causation is mandatory, there is no requirement that the opinion must contain an impairment rating.

This omission in the regulations would tend to indicate the impairment rating is not a part of the "application" itself, but rather an element to be proven as the claim proceeds. We have also reviewed applicable case law for more specific guidance. Stilwell is correct that Gray v. Trimmaster is on point, though it leaves our exact question unanswered.

In Gray, the claimant filed a Form 101 alleging bilateral arm injuries, and attached a medical report of Dr. Brooks stating her work caused an inflammatory process in her arms. The employer failed to file a timely Form 111 or appear at the benefit review conference ("BRC"). The day after the BRC, the employer filed a Form 111, but thereafter filed no evidence. Gray later filed the medical report of Dr. Owen, who diagnosed rheumatoid arthritis and assigned a 2% whole person impairment rating based on pain. The ALJ noted the employer admitted Gray suffered a work-related injury through its failure to timely file a Form

111. However, the ALJ dismissed the claim, determining Gray had failed to establish "through objective medical findings" that she suffered a compensable injury.

The ALJ determined Dr. Owen's report did not establish an injury through "objective medical findings" because his impairment rating was based solely on subjective complaints of pain. The Supreme Court agreed with this assessment of Dr. Owen's report, but determined the ALJ failed to give proper effect to the untimely filing of the Form 111: "In failing to deny the allegations of the claimant's application, the employer admitted that she sustained repetitive motion injuries to both upper extremities, that the injuries caused an inflammatory process, and that they occurred within the course and scope of her employment." In other words, the employer admitted an injury occurred which was causally related to her work. Therefore, Gray could not prove an injury through Dr. Owen's impairment rating alone, as it was not based on objective medical findings. However, because her injury had been admitted through the employer's failure to file a timely Form 111, she could establish the *extent* of her injury through the use of Dr. Owen's impairment rating. "[T]he ALJ could have determined from the evidence that the

"injury" to which the employer admitted resulted in the impairment that Dr. Owen measured." Id. at 243. The claim was remanded for the ALJ to consider the possibility Gray had established a permanent impairment.

More specifically relating to our issue, the Court observed:

> By failing to file a timely Form 111, the employer admitted that the claimant sustained work-related repetitive motion injuries, producing a harmful change that Dr. Brooks described as an inflammatory process. Although Dr. Brooks stated that the condition was both caused and aggravated by her work, he did not indicate that the condition caused a permanent impairment, required medical treatment, or caused any particular symptoms. Therefore, although the allegations of the claimant's application proved an "injury," they were insufficient, by themselves, to support an award of income or medical benefits.

Sitwell argues this quote evidences the Court's holding that, had Dr. Brooks' report included an impairment rating, it would have been deemed admitted due to the failure to file a timely Form 111. This is a logical leap we are unwilling to make, as the Court could have simply been acknowledging the fact Dr. Brooks' opinion was insufficient to establish extent and duration, regardless of the tardy Form 111. The Court was not specifically asked whether the

impairment rating would have been admitted, had it been included in the Form 101, nor did the Court expressly answer this question.

In Piedmont Airlines v. Brown, 2010-CA-001300-WC, rendered February 14, 2011, Designated Not to be Published, the Court of Appeals more squarely addressed our question. In Brown, the claimant filed a Form 101 and attached a medical report containing an impairment rating. The employer failed to timely file a Form 111 or to appear at the BRC. Thereafter, the employer entered an appearance and was permitted to schedule an independent medical evaluation ("IME"). Brown failed to appear three times at scheduled IMEs, and at a hearing. The ALJ dismissed the claim. The Court of Appeals determined the ALJ should have placed the claim in abeyance following Brown's failure to appear at the IME; she lacked statutory authority to dismiss the claim for his failure to appear.

Regarding the import of the employer's tardy Form 111, the Court of Appeals stated the employer "does not have the right to use an IME report in an attempt to rebut allegations which were deemed admitted upon its failure to timely file a Form 111". Slip Op. at 5. Moreover, the employer was not entitled to obtain an IME for purposes of

obtaining a rating or restrictions. Without citation to any case, the Court concluded, "[b]y not filing a Form 111 in response to Brown's claim, Piedmont accepted the allegations contained therein. Thus, Piedmont is not entitled to obtain an IME for purposes of obtaining a rating or restrictions to dispute those [attached to the Form 101]." Slip Op. at 4.

Recently, in American Woodmark Corp. v. Mullins, 484 S.W.3d 307 (Ky. App. 2016), the Court of Appeals again considered the effect of a late Form 111. In Mullins, the ALJ determined the employer filed its Form 111 late without good cause and explained the effect of this delinquency:

> The failure to timely file a Form 111 does not, by itself, entitle the claimant to benefits. In Gray, the Court stressed that while the employer was deemed to have admitted that the claimant sustained an injury within the scope of the employment, the burden remained on the claimant to prove the extent of the employer's liability. The result is analogous to a default judgment in a civil action which determines liability but damages may be awarded only after a hearing and findings of fact and conclusions of law. (Internal citations omitted).

In this recently published opinion, the Court of Appeals indicates the burden remains on the claimant to prove extent and duration, even when the Form 111 is tardy.

By analogizing a tardy Form 111 to a default judgment, the Court implies an impairment rating is not "admitted" even when attached to the Form 101.

The guidance from Chapter 342 and related regulations and case law is less than clear. Though the Brown case decided a similar issue, the case is unpublished and without an extended analysis of the regulations or the case law. Gray and Mullins, both published, do not specifically answer our question, though tend to indicate that an impairment rating is not "admitted" even when attached to the Form 101. Again, we note there is no requirement the Form 101 include a medical opinion containing an impairment rating.

Finally, and importantly, we emphasize the purpose of the mandatory regulations – to effectuate the timely and efficient handling of cases. That purpose is not frustrated here. KSU filed its Form 111 late. However, the delay was relatively short at three weeks, and KSU entered an appearance well before the BRC. It was penalized for its tardiness by the inability to contest work-relatedness.

In 803 KAR Section 5(1), the legislature set forth the requirement that a Form 101 must be accompanied

by a medical report describing the injury and establishing a causal relationship between the work and the injury. The legislature also penalized employers who file untimely Form 111 by deeming all allegations admitted. Without more express statutory language or guidance from case law, we cannot conclude that the legislature intended a more harsh penalty. For these reasons, we interpret 803 KAR 25:010 Section 5(2)(b) to mean that an employer has admitted only a work-related injury when the employer fails to timely file a Form 111. Therefore, the ALJ did not err in choosing to rely upon Dr. Corbett's impairment rating, as he was not obliged to adopt Dr. Burke's rating.

Stilwell next argues KSU admitted a safety violation by failing to file a timely Form 111, and therefore expert testimony was not required to establish the violation.

KRS 342.165(1), provides:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty

> percent (30%) in the amount of each payment.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

The effect of KSU's failure to file a timely Form 111 is that it is deemed to have admitted the protective equipment did not meet OSHA standards, as Stilwell alleged. *See* Mullins, 484 S.W.3d at 315. However, this allegation does not set forth all of the necessary elements to prove entitlement to enhanced benefits. To his detriment, Stilwell's Form 101 contained his admission that he failed to use the proper technique in felling the tree, which the ALJ could reasonably conclude was the cause of the accident. Further, while Stilwell alleged OSHA approved protective equipment was not available, he failed to use the equipment which was provided. He made no allegation that he would have used protection if it were OSHA approved, or that the lack of approved protective equipment

was the reason he declined to use the available equipment. Because Stilwell used an improper technique and did not use the protective equipment that was available, we cannot say the ALJ's conclusion that the allegations in the Form 101 were insufficient to prove entitlement to enhancement is clearly erroneous.

Stilwell argues that if the safety violation is not deemed admitted, the overwhelming evidence indicates a violation occurred. He emphasizes his testimony is unrebutted that he was not provided proper leg protection, or that KSU failed to report the incident to OSHA. He asserts it would have been cited for providing inadequate leg protection.

KRS 342.165(1) requires that accident occurred as a result of the employer's failure. Clearly, the accident itself was not caused by the failure to have OSHA approved protective equipment available. Additionally, the evidence does not compel a finding that Stilwell's injury would have been less severe with OSHA approved protective equipment, than it would have been had he used the chaps that were available. The evidence falls far short of compelling a finding in Stilwell's favor regarding entitlement to enhanced benefits for an intentional safety violation.

Stilwell argues the ALJ erred in awarding KSU a credit or offset for wages paid while he was temporarily totally disabled. He acknowledges he was paid full salary while off work on administrative leave. However, he contends the salary was not in lieu of TTD benefits. The employer must meet satisfy the requirements of KRS 342.730(6) to receive any credit or offset.

An employer may choose to continue to pay an employee's regular wages or salary during a period of TTD when the employee is not reporting to work. Such salary or wage "continuation" can be construed as a voluntary payment of past income benefits if it is determined the payments were made in lieu of income benefits and the payments satisfy the requirements of KRS 342.730(6). *See e.g*. Nesco Resources v. Arnold, 2015 WL 1284630 (Ky. App. 2015).

We find it necessary to vacate the ALJ's findings regarding entitlement to TTD benefits and the credit for salary paid while Stilwell was placed on administrative leave. First, we note the ALJ made insufficient findings regarding the specific period or periods when Stilwell was temporarily totally disabled. Without such a determination, the amount of past due permanent partial disability benefits cannot be determined. Second, the

ALJ's findings regarding the credit for salary paid following the injury are insufficient. The ALJ made no finding as to whether the salary paid while Stilwell was on administrative leave was intended to be in lieu of TTD benefits, or if the payments satisfy the requirements of KRS 342.730(6). It would appear they were not intended as such, but were made while the investigation was being conducted concerning the allegation of inappropriate texting. However, we are without fact finding authority and direct no particular finding on remand.

Stilwell argues he should have been paid TTD benefits to the date Dr. Burke placed him at MMI. He contends the ALJ erred in using the date of Stilwell's last visit with Dr. Tutt because he did not place Stilwell at MMI at the last visit. Instead, he recommended physical therapy to improve the condition. Stilwell further notes Dr. Burke expressly stated Stilwell was not at MMI for the back condition on April 30, 2015, and was the first physician to place Stilwell at MMI for his back on October 22, 2015. Dr. Burke is the only physician to address MMI for the back surgery.

KRS 342.0011(11)(a) defines temporary total disability as the "condition of an employee who has not

reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. To be entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury.

The ALJ noted that while Stilwell continued with physical therapy, his condition had stabilized and he was capable of returning to employment at the time of the visit with Dr. Tutt on April 6, 2015. Dr. Tutt noted Stilwell was ambulating well and assigned no restrictions in the April 6, 2015 record. The evidence does not compel a

finding Stilwell satisfied both prongs of KRS 342.0011(11)(a) after the last visit with Dr. Tutt. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Finally, Stilwell argues his permanent partial disability award should have been enhanced by the three multiplier or, in the alternative, the two multiplier pursuant to KRS 342.730(1)(c). Dr. Burke testified Stilwell is unable to go back to the type of work he performed at the time of injury because he should avoid activities with prolonged squatting, repetitive or excessive bending, and heavy lifting which are required for outdoor forestry service activities.

Alternatively, Stilwell argues the two multiplier is applicable. He asserts the ALJ erroneously determined "sexual harassment" was the reason for his termination, and that the alleged misconduct had nothing to do with another employee. Stilwell contends the standard of "conduct shown to have been an intentional, deliberate action with reckless disregard of the consequences either to herself or another" enunciated in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015) is in conflict with the plain meaning of KRS 342.730(1)(c)2, which states an injured worker's permanent partial disability benefits

shall be multiplied by two if the employment at the same or greater wage ceases "for any reason, with or without cause…."

The record contained conflicting evidence regarding Stilwell's capacity to return to his previous employment. Thus, the evidence cannot be said to compel a finding in Stilwell's favor regarding the three multiplier. The ALJ cited Dr. Corbett's opinion that Stilwell retains the physical capacity to return to his position. Dr. Burke's only restrictions were to avoid activities that would overly strain the back and to avoid excessive repetitive bending, squatting, and heavy lifting. The ALJ further noted Stilwell only occasionally performed lifting activities and this could not be characterized as excessive. The opinions of Drs. Corbett and Burke constitute substantial evidence supporting the ALJ's decision that Stilwell is not entitled to enhancement by the three multiplier. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We are bound by the precedent set forth in Livingood. The ALJ determined the allegation of misconduct made concerning Stilwell's texting of the student was the reason for his termination. The ALJ concluded this

misconduct met the standard of "intentional, deliberate action with a reckless disregard of the consequences either to himself or to another" set forth in Livingood. Stilwell essentially asks the Board re-weigh the evidence on this question and reach a different conclusion than the ALJ. We may not do so.

Accordingly, the February 19, 2016 Opinion, Award and Order and the March 18, 2016 order rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART and REMANDED** to the Administrative Law Judge for additional findings of fact and entry of an amended opinion in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN PART, DISSENTS IN PART, AND FURNISHES A SEPARATE OPINION.

ALVEY, CHAIRMAN. While I concur with most of the decision rendered by the majority in this case, I disagree the medical evidence containing an impairment rating filed with the Form 101 does not constitute part of the claim which can be deemed admitted by the late filing of a Form 111.

803 KAR 25:010 Section 5 is titled, "Application for resolution of an injury claim and response." This

regulation outlines the documentation submitted with the Form 101 which constitutes the claim application. Included in that section is Section (1)(d) which states: "1(I) medical report, which may consist of legible hand-written notes of the treating physician, and which include the following:

> 1. A description of the injury which is the basis of the claim;
>
> 2. A medical opinion establishing a causal relationship between the work-related events or the medical condition which is the subject of the claim;
>
> 3. A psychological condition and additional medical report establishing the presence of a mental impairment or disorder.

While this provision does not specifically outline the need for an impairment rating, if one is provided, it is part of the application process and failure to timely file a claim denial results in all allegations being admitted which can include an impairment rating if so provided.

Therefore, to the extent the impairment rating deemed admitted by the Administrative Law Judge which was part of the application process is considered, I respectfully dissent from the majority.

In all other aspects, I believe the Administrative Law Judge’s decision should be affirmed.

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