OPINION ENTERED: June 6, 2013

CLAIM NO. 201198399

WILLIE SLONE, JR. PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

ICG KNOTT COUNTY, LLC
and HON. STEVEN G. BOLTON
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Willie Slone, Jr., ("Slone") seeks review of the Order rendered December 10, 2012 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), sustaining a motion to file an untimely Form 111 by ICG Knott County, LLC ("ICG"). Slone also appeals from the January 11, 2013 order denying his petition for reconsideration.

On appeal, Slone argues the order sustaining ICG's motion to file a late Form 111 is clearly erroneous as a matter of law. We dismiss Slone's appeal because the December 10, 2012 order is interlocutory and does not represent a final and appealable order.

This appeal solely focuses on whether the ALJ erred in allowing ICG to file an untimely Form 111. Therefore, we will not discuss the medical evidence in the record because it is not relevant to this appeal. However, a brief review of the procedural history is necessary.

On July 27, 2012, Slone filed a Form 101, Application for Resolution of Injury Claim, alleging he sustained a work-related left arm and shoulder injury on July 30, 2010. Slone identified ICG as the Defendant/ Employer. Chartis Casualty Company ("Chartis") was identified as the workers' compensation insurer. Thereafter, on August 3, 2012, the Commissioner of the Kentucky Department of Workers' Claims ("Commissioner") mailed the notice of the filing of the claim to Slone, Slone's counsel, Arch of KY/Apogee Coal, and Chartis.

In the scheduling order dated August 14, 2012, the Commissioner notified all listed parties the claim had been assigned to the ALJ, scheduled a benefit review conference, and ordered a proof-taking. The order also stated within

forty-five days of the notice, Defendants shall file a Form 111, Notice of Claim Denial or Acceptance. It also stated all allegations contained in the application shall be deemed admitted if no Form 111 is filed. The August 14, 2012 order was also mailed to Slone, Slone's counsel, Arch of KY/Apogee Coal, and Chartis.

On November 13, 2012, ICG filed a "Motion to File Late Form 111," as well as its Form 111, Notice of Claim Denial. ICG requested leave to file a late Form 111, stating as follows:

> [ICG] was purchased by Arch Coal on July 15, 2011. At that time ICG was insured and was covered by a third party administrator, Wells Fargo. After the Arch purchase ICG became Arch's liability for injuries that occurred after July 31, 2011. Arch Coal's third party administrator is Underwriters Safety & Claims, Inc. Notice of Claim was issued on August 14, 2011, a copy of the claim was sent to Arch of Kentucky/Apogee Coal and [Chartis]. [Chartis] was the insurer of ICG not Arch and Chartis's (sic) third party administrator was Wells Fargo. The claim did not go to either Wells Fargo, [Chartis'] third party administrator and/or Arch Coal's third party administrator, Underwriters Safety & Claims. According to Mr. Slone's Application his date of injury was July 30, 2010 at which he was an employee of [ICG] and this claim is not the responsibility of Arch Coal/Apogee.
>
> [ICG] respectfully submits that the cause of the confusion set forth on the

> Notice of Claim notifying Arch Coal and [Chartis], the claim went unanswered. [Chartis] did not insure Arch Coal and Arch Coal had and has no relationship with [Chartis].

Despite Slone's objection to the motion, the ALJ stated as follows in the December 10, 2012 order:

> This cause having been heard upon the defendant-employer's Motion to File a late Form 111. The ALJ noting the bout and confusion as to the properly named employer and insurer at the time of plaintiff's alleged injury hereby SUSTAINS the defendant-employer's Motion to File a late Form 111. IT IS FURTHER ORDERED that the Form 111 attached hereto is deemed timely filed.

Slone filed a petition for reconsideration on December 26, 2012 making the same arguments he now raises on appeal. The ALJ denied Slone's petition on January 11, 2013 stating as follows:

> It seems to the ALJ that circumstances justified allowing the Defendant additional time to file its Form 111. As the Order addresses all issues raised, it does not appear that revision is necessary or that said Petition raises errors patently appearing on the face of the award, order, or decision.

On appeal, Slone argues the order sustaining ICG's motion to file a late Form 111 is clearly erroneous as a matter of law. Slone states he filed the Form 101 on July 27, 2012 and subsequently filed a Form 102, Application for

Resolution of Occupational Disease Claim, on August 1, 2012.[1] Subsequently, Slone alleges notices of the injury and occupational disease claims were sent to ICG and identified identical addresses for ICG and its insurer, Chartis. Slone states the scheduling order for the injury claim was sent to ICG on August 14, 2012, but counsel for ICG did not enter an appearance until November 9, 2012. However, counsel for ICG entered an appearance in the occupational disease claim on August 16, 2012. Slone further states he testified by deposition on October 16, 2012 in the occupational disease claim, and testified in detail regarding the July 30, 2010 work injury.[2] On November 9, 2012, ICG filed its motion to file an untimely Form 111 in the case *sub judice*, twenty-four days after the deposition and forty-two days after the September 28, 2012 deadline to file the Form 111.

Slone notes 803 KAR 25:010 §5(2)(a) and (b) requires an employer to file a Form 111 within forty-five days of the schedule. Slone also notes an employer's failure to timely file a Form 111 without good cause precludes it from submitting proof in its defense, and mere

[1] Slone attached to its brief to the Board the Form 102, Application for Resolution Occupational Disease Claim, Claim Number 2012-00998, filed August 1, 2012.

[2] Likewise, Slone attached to its brief to the Board a copy the deposition transcription dated October 16, 2012, taken in Claim Number 2012-00998.

inattention does not constitute good cause. Slone argues as follows:

> Here, [ICG] received notice of Mr. Slone's injury claim on at least (3) occasions prior to filing its Motion to File Late Form 111, including: (i) notice of filing on August 3, 2012; (ii) the scheduling order of August 14, 2012; and (iii) Mr. Slone's deposition on October 16, 2012. Nevertheless, [ICG's] Motion to File Late Form 111 was not filed until twenty-four (24) days after its last notice of Mr. Slone's injury claim and forty-two (42) days beyond the 45-day period provided by **803 KAR 25:010, § 5(2)(a)**) and enumerated in the scheduling order. Considering the fact that Mr. Slone's Form 102 Application for Resolution of Occupational Disease Claim made no mention of Mr. Slone's July 30, 2010 work injury, along with the fact that, prior to Mr. Slone's deposition on October 16, 2012, neither Mr. Slone nor Counsel for Mr. Slone made reference to any specific dates and/or injuries directly to Counsel for [ICG], the fact that Counsel for [ICG] specifically initiated questioning regarding Mr. Slone's July 30, 3010 work injury during the deposition on October 16, 2012, alone indicates that [ICG] had notice of Mr. Slone's injury claim at least twenty-four (24) days prior to filing the Motion to File Late Form 111.

Therefore, Slone requests the Board overturn the December 10, 2012 order, and direct all allegations contained in his Form 101 be deemed admitted.

Because we conclude the ALJ's December 10, 2012 order is interlocutory and does not represent a final and

appealable order, we dismiss Slone's appeal. 803 KAR 25:010 Sec. 21 (2)(a) provides as follows:

> [w]ithin thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.

803 KAR 25:010 Sec. 21 (2)(b) defines a final award, order or decision as follows: "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) states as follows:

> (1) When more than one claim for relief is presented in an action . . . the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984); *cf.* Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939); *and* Transit Authority of River City vs. Sailing, 774 S.W.2d 468 (Ky. App. 1980); *See also* Ramada Inn vs. Thomas, 892 S.W.2d 593 (Ky. 1995).

In this instance, the ALJ's order dated December 10, 2012 merely allowed ICG to file an untimely Form 111, without making a determination on the merits. It is obvious further action is to be taken in the claim, and the order is not final and appealable. The ALJ's order does not operate to terminate the action or to finally decide all outstanding issues. Likewise, it does not operate to determine all the rights of the parties so as to divest the

ALJ once and for all of the authority to decide the merits of the claim.

Regardless, had this issue appeared in a final appealable order, we would have affirmed. It is undisputed ICG did not timely file a Form 111 claim denial. The scheduling order was issued on August 14, 2012. The time for filing a Form 111 expired on September 28, 2012. ICG did not file the Form 111 until November 13, 2012, well beyond the mandatory filing date. On the same date, ICG filed a motion requesting leave to file a late Form 111, asserting an explanation for its tardiness.

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 25:010 §5(2)(a) and (b) 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.

> If a Form 111 is not filed, all allegations of the application shall be deemed admitted.

The purpose of the above-referenced provisions is to facilitate the prompt and orderly resolutions of claims, and is mandatory. Gray v. Trimmaster, 173 S.W.3d 236, 240 (Ky. 2005). The Kentucky Supreme Court held 803 KAR 25:010 §5 permits an employer to file a Form 111 outside the forty-five day period if the ALJ finds that it has shown good cause for the delay. Neace v. Asplundh Tree Expert Co., Inc., Nos. 2007-SC-000236-WC and 2007-SC-000268-WC, (Rendered April 24, 2008) (unpublished opinion). *See also* Clark Regional Medical Center v. Lovings, No. 2006-SC-0027-WC, (Rendered October 19, 2006) (unpublished opinion); Whittaker v. Morgan, 52 S.W.3d 567 (Ky. 2001).

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 v. Asplundh Tree Expert Co., Inc. at p. 3; Clark Regional Medical Center v. Lovings at p. 3. Regardless of the result reached, the exercise of such discretion by an ALJ cannot be disturbed on appeal absent a clear showing of abuse of discretion on the part of the fact-finder. Neace v. Asplundh Tree Expert Co., Inc. at p. 2. 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 the case *sub judice*, ICG affirmatively filed a motion requesting leave to file an untimely Form 111, and provided an explanation for its delay. In the December 10, 2012 order, the ALJ sustained ICG's motion, noting the "confusion as to the properly named employer and insurer at the time of Plaintiff's alleged injury." The ALJ ordered ICG's Form 111 to be deemed timely filed. The ALJ essentially determined ICG established good cause for its delay. The ALJ was well within his discretion in so finding, and therefore the Board would not have disturbed the December 10, 2012 order, had it been properly before this Board on appeal.

Accordingly, the appeal seeking review of the order entered December 10, 2012 and the January 11, 2013 order denying the petition for reconsideration entered by Hon. Steven G. Bolton, Administrative Law Judge, is hereby **DISMISSED**.

STIVERS, MEMBER, CONCURS.

MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON GLENN M HAMMOND
P O BOX 1109
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON DENISE M DAVIDSON
P O DRAWER 986
HAZARD, KY 41702

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G BOLTON
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601