Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 18, 2014

CLAIM NO. 201200926

BOBBY E. BERTRAM D/B/A B & F LUMBER PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

KENNETH T. BRIDGEMAN,
UNINSURED EMPLOYERS' FUND
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Bobby Bertram ("Bertram") and the Uninsured Employers Fund ("UEF") appeal from the August 9, 2013 Opinion and Order; the August 28, 2013 Order on Reconsideration; the February 7, 2014 Opinion, Award and Order; and the February 26, 2014 Order on Reconsideration

rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). Bertram and the UEF argue the ALJ erred in determining Kenneth Bridgeman's ("Bridgeman") claim is not barred by his settlement of a civil action arising from the same work-related injury. Additionally, Bertram challenges the ALJ's award of permanent total disability benefits. For the reasons set forth herein, we affirm.

Bridgeman worked as a general laborer on Bertram's farm from 2008 until his work accident on August 3, 2010. He was seriously injured when a large bale of hay fell from a trailer, crushing him. The bale weighed approximately 600 pounds, and knocked Bridgeman unconscious. He was hospitalized for sixty-two days as a result of the accident, and underwent four surgeries. His injuries included mild traumatic brain injury, pelvic fractures, a pelvic abscess, vertebral fractures, lacerations to his liver, and an enlargement of the spleen.

On August 2, 2011, Bridgeman filed a civil tort suit for bodily injuries against Bertram, individually. Bridgeman was represented by Hon. John Rodgers, and Bertram by Hon. Darrell Saunders. In his initial complaint, Bridgeman alleged medical expenses in excess of $400,000.00. The parties proceeded with discovery for the

next year. On July 6, 2012, Bertram moved for summary judgment.

Meanwhile, Bridgeman pursued this workers' compensation action. He filed a Form 101 on July 17, 2012. It is worth noting that attorneys Rodgers and Saunders represented Bridgeman and Bertram, respectively, in the civil action only. Both Bridgeman and Bertram were represented by different counsel in the workers' compensation action.

Shortly after the workers' compensation action was initiated, summary judgment in the civil action was denied, and the parties agreed to mediation. The mediation occurred on October 4, 2012 and resulted in a settlement in the amount of $23,000.00. Bridgeman signed a Release and Indemnification Agreement the same day. By agreed order, the civil suit was subsequently dismissed. Though Rodgers was aware a workers' compensation claim was pending at the time of the settlement agreement, no attempt was made to consult with the attorneys handling that case. In fact, the attorneys representing Bridgeman and Bertram in the workers' compensation action were not made aware of the mediation or the settlement agreement until after it had been signed.

Having finalized the civil action, Bertram then moved the ALJ to dismiss the workers' compensation action, arguing the Release and Indemnification Agreement bars the claim. The ALJ bifurcated the claim, and first considered its viability in light of the settlement of the civil action and the Release and Indemnification Agreement. In an Opinion and Order dated August 9, 2013, the ALJ ultimately concluded the agreement does not bar the workers' compensation action, primarily because it was never approved pursuant to KRS 342.265. In a subsequent Opinion, Award and Order dated February 7, 2014, the ALJ awarded Bridgeman permanent total disability benefits. Bertram's petitions for reconsideration of both Orders were denied.

Bertram appeals, arguing Bridgeman waived his claim through the settlement agreement. Alternatively, Bertram challenges the award of permanent total disability benefits. The UEF similarly argues the settlement agreement document effectively bars Bridgeman's workers' compensation claim.

We turn first to the language of the Release and Indemnification Agreement. The language of the form is broad, and provides, in pertinent part:

FOR AND IN CONSIDERATION of the payment to the undersigned, Kenneth Bridgeman, at this time the sum of Twenty Three Thousand Dollars ($23,000.00), the receipt of which is hereby acknowledged, I/we, being of lawful age do hereby release, acquit and forever discharge Bobby Bertram, and KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY or THE FB INSURANCE COMPANY, their heirs, executors, administrators, agents and assigns, of and from any and all actions, causes of action, claims, demands, costs, loss of services, expenses and compensation, and/or at law or in equity, of whatsoever kind or nature, arising out of any and all known and unknown injuries and damages resulting from, or which may result from, an accident that occurred on or about the 3rd day of August, 2010, on or near Bobby Bertram Farm, in or near, Wayne County, Kentucky.

…

In further consideration of all aforesaid payments by the Company on behalf of its insured, the undersigned hereby agree that in the event any further claim is made or suit is filed against the parties hereby releases, including any claim for subrogation (excluding PIP subrogation), indemnity or contribution, and including, but not limited to, claims by or on behalf of private health insurers, managed care organizations, and/or governmental entities, arising out of or related to the injuries sustained by the Claimant in the aforementioned accident, that the undersigned shall repay to the parties hereby released any amounts as may be collected from said parties, related to the injuries and damages sustained by the Claimant, and to otherwise defend, indemnify and hold harmless the parties herein released

> from and against any and all claims, loss or expense, including attorney fees and costs, associated with, arising out of, or relating to any such claim or suit.

We agree with the ALJ that the Release and Indemnification Agreement cannot be considered a final settlement of the workers' compensation claim. KRS 342.265 requires any settlement agreement to be approved by the ALJ, otherwise it is not enforceable. *See also* Greene v. Paschall Truck Lines, 239 S.W.3d 94 (Ky. App. 2007). It is undisputed the Release and Indemnification Agreement was never presented to, nor approved by, the ALJ prior to its execution.

The UEF acknowledges the Release and Indemnification Agreement cannot be considered a settlement of the workers' compensation claim because it was not approved by the ALJ. Rather, it argues Bridgeman effectively *waived* the right to pursue his workers' compensation action. As indication Chapter 342 recognizes the concept of 'waiver', the UEF directs our attention to KRS 342.610(4).

Generally speaking, there is a difference between 'waiving' a claim and 'settling' a claim. Waiver is the intentional relinquishment of a known right, based on either the actions or the conduct of the waiving party.

U.S. Fidelity & Guar. Co. v. Miller, 34 S.W.2d 938, 940 (Ky. App. 1931). *See also* Greathouse v. Shreve, 891 S.W.2d 387 (Ky. 1995). A settlement agreement is simply a contract, governed by contract law. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 105 (Ky. 2003).

However, under the circumstances of this case, it is a distinction without a real difference. Bridgeman signed a settlement agreement – a contract – terminating the civil action. Bertram is attempting to rely on the language contained in that agreement to terminate the pending workers' compensation action as well. Stated otherwise, he argues the settlement agreement, and the consideration paid, effectively satisfies the workers' compensation action. Even if we read the Release and Indemnity Agreement as a valid waiver or release of Bridgeman's workers' compensation claim, such would constitute "an agreement … in regard to compensation." KRS 342.265 applies, and mandates the ALJ approve any such agreement before it is enforceable. To hold otherwise would render KRS 342.265 meaningless, and defeat its purpose of protecting the interest of the employee. *See* Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (Ky. 1968).

The UEF and Bertram rely heavily on the case of Humana, Inc. v. Blose, 247 S.W.3d 892 (Ky. 2008). We agree

Blose stands for the general proposition that a statutory right may be waived, and that a valid release is effective to waive a person's right to bring even a statutory claim. However, a key distinction exists in this case. Bridgeman had already filed his workers' compensation claim. If the parties intended the Release and Indemnity Agreement to act as a settlement of that pending claim, it was incumbent upon them to seek the approval of the ALJ pursuant to KRS 342.265.

Because the Release and Indemnity Agreement was never presented to the ALJ for approval, it cannot be relied upon to dismiss Bridgeman's claim. For the same reasons, the indemnification language contained in the document cannot be relied upon as grounds to dismiss the claim. The ALJ properly denied the motion to dismiss.

Bertram next challenges the ALJ's finding Bridgeman is permanently totally disabled. He argues the evidence compels a finding Bridgeman is permanently partially disabled. We disagree.

The ALJ stated her reliance on Bridgeman's testimony, as well as the medical reports of Drs. Warren Bilkey and Dennis Sprague. Bridgeman is a 48 year old man who has earned his GED, but has a learning disorder and borderline intellectual functioning. His entire work

history consists of manual labor. The ALJ observed Bridgeman seemed depressed and in pain at the final hearing, describing his mannerisms as "hopeless". Bridgeman testified that he attempted to return to work at Bertram's farm in late 2011, but had to leave after about two hours due to pain.

Dr. Bilkey diagnosed multiple thoracic spine fractures, lumbar strain and compression fracture, multiple pelvic fractures, and depression related to chronic pain. He assigned a 48% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He opined Bridgeman should be confined to sedentary level of activity, although he acknowledged his condition may improve with reconditioning.

Dr. Sprague evaluated Bridgeman's psychological condition and diagnosed depressive disorder, generalized anxiety disorder, pain disorder, and borderline intellectual functioning. Referencing the AMA Guides, he assessed a 10% permanent functional impairment rating, 2% of which was pre-existing due to borderline intellectual functioning. If he returned to work, Dr. Sprague opined Bridgeman would suffer moderate impairments in his ability to deal with stress, get along with co-workers, maintain

regular attendance, and maintain concentration throughout a work day.

Permanent total disability is the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of the injury. KRS 342.0011(11)(c). In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers' age, educational level, vocational skills, medical restrictions, and the likelihood he can resume some type of work under normal employment conditions. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ considered this standard and articulated the factors supporting her conclusions. The above-referenced proof constitutes the requisite substantial evidence to support the award. Square D. Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). As such, the award will not be disturbed. Furthermore, because the award of permanent total disability benefits has been upheld, Bertram's argument with respect to temporary total disability benefits is rendered moot.

For the foregoing reasons, the August 9, 2013 Opinion and Order; the August 28, 2013 Order on Reconsideration; the February 7, 2014 Opinion, Award and

Order; and the February 26, 2014 Order on Reconsideration rendered by Hon. Jeanie Owen Miller are hereby **AFFIRMED**.

ALL CONCUR.

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