Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 19, 2014

CLAIM NO. 201375846

CENGAGE LEARNING, INC. PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

REENEACE CLEMONS
HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Cengage Learning, Inc. ("Cengage") appeals from the July 21, 2014 Order overruling its motion to enforce and approve a settlement agreement, and the August 20, 2014 order denying its petition for reconsideration rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"). Cengage argues the CALJ

erred as a matter of law in finding there was no meeting of the minds and therefore no valid settlement agreement. We affirm.

Reeneace Clemons ("Clemons") suffered a low back injury on June 7, 2013. Initially she was represented by counsel, who later withdrew from representation on March 17, 2014. After receiving a report from Dr. Michael M. Best, Cengage extended a settlement offer to Clemons on April 7, 2014 for payments of $33.62 per week with no waivers or a $10,000.00 lump sum for a full and final settlement of the claim. Clemons, *pro se*, responded on April 14, 2014, submitting an "alternative potential settlement" and attaching medical records from Drs. Steven Bailey, James Keller, and John B. Kelly. Clemons stated their opinions were more in line with the issues she was experiencing. The records included a March 31, 2014 treatment note from Dr. Bailey, who indicated surgery may be necessary, but Clemons wanted additional time to consider. Clemons asked Cengage to consider options of benefits at the weekly rate of $72.11 with all future rights to remain open, or a lump sum of $20,000.00 to resolve all issues.

On April 18, 2014, Cengage responded, indicating it would accept Clemons' demand for the $20,000.00 lump sum for a full and final settlement of the claim. Cengage

forwarded a Form 110 that noted all known medical expenses had been paid and it would be relieved from responsibility for any past or future medical expenses. The agreement provided for income benefits of $7,889.20, $10,000.00 for the waiver of past and future medical benefits, $1,000.00 for the waiver of vocational rehabilitation and $1,110.80 for waiver of the right to reopen. In the cover letter to the Form 110, Cengage advised Clemons that she had the right to have the agreement reviewed and explained to her by an attorney of her choosing: "If the Settlement Agreement meets with your approval, please immediately sign the Settlement Agreement … and return same to my office …."

Clemons did not sign the agreement but instead secured representation of Hon. Jillian M. Scheyer. Scheyer advised Cengage of the representation on June 10, 2014. On that same date, Cengage responded that the claim was settled for a $20,000.00 lump sum and requested that Clemons be directed to sign and return the agreement.

Cengage filed its motion to enforce and approve settlement agreement on June 26, 2014. It argued the April 14, 2014 demand letter from Clemons and its April 18, 2014 letter accepting the offer to settle for a $20,000.00 lump sum were sufficient to establish a meeting of the minds and, therefore, a binding and enforceable agreement.

Clemons responded to the motion, indicating she decided to proceed with surgery and, after receiving the April 18, 2014 letter and settlement agreement, she was concerned with the language of the agreement. Clemons sought advice of counsel, who informed Cengage's counsel she was no longer interested in settling the claim under the terms proposed in the settlement agreement. Clemons argued the settlement agreement prepared by Cengage contained additional language and terms not included in the letters exchanged between the parties. Clemons asserted the lack of a meeting of the minds was evidenced by the failure of the agreement to provide for needed surgery which she believed would be covered. The compensability of the proposed surgery is a material fact missing from the purported agreement and therefore it is not an enforceable agreement. Finally, Clemons argued the CALJ is required to consider the substance of an agreement and determine if the agreement is in the best interests of the injured worker. Because the proposed agreement would not provide for the needed surgery, Clemons contended it was not in her best interest.

The CALJ issued an order on July 21, 2014, holding there was no meeting of the minds as to the terms of the Form 110 based upon the attachments to Cengage's motion and Clemons' response and therefore no settlement agreement.

Accordingly, the CALJ denied the motion to enforce the settlement agreement. Cengage filed a petition for reconsideration, making essentially the same arguments it raises on appeal. The CALJ denied the petition for reconsideration, noting Cengage identified no patent error.

As an initial matter, we address an issue raised by Board Member Stivers in his dissenting opinion relating to the CALJ's jurisdiction to hear Cengage's motion. Certainly, the procedural posture of this case is unusual and raises valid concerns, as neither the Form 110 nor the settlement agreement were formally executed by Clemons. However, KRS 342.265 clearly contemplates settlement agreements reached prior to the filing of a Form 101. *See* Palmore v. Helton, 779 S.W.2d 196, 198 (Ky. 1989)("This settlement may be made prior to the hearing and award made by the Board, or even application filed under the provisions of the Act."). Our appellate courts have also recognized KRS 342.265(1) does not necessarily require a formal document signed by the parties and containing the terms of an agreement. *See e.g.* Coalfield Telephone Co. v. Thompson, 113 S.W.3d 178 (Ky. 2003). Rather, an agreement may be memorialized by the correspondence of counsel. Id. Thus, whether substantiated or not, Cengage posited its correspondence with Clemons constitutes a valid memorandum

of agreement. Placed in such a position, its motion to approve settlement agreement was a valid invocation of the CALJ's jurisdiction under Chapter 342.

In any event, the CALJ enjoys subject matter jurisdiction to consider claims brought under Chapter 342. There is no assertion this case concerns matters outside Chapter 342. Even if Cengage did not properly invoke the CALJ's jurisdiction, any objection has been waived by Clemons' failure to object.

Therefore, we turn to the CALJ's order. In arguing the CALJ erred in finding there was no meeting of the minds, Cengage contends Clemons' April 14, 2014 letter was a counter-offer which it accepted as evidenced by its April 18, 2014 letter and attached Form 110 settlement agreement. It asserts the inclusion of the medical note from Dr. Bailey establishes Clemons was aware of and considered the possibility of surgery when she communicated her counter offer. Thus, Cengage contends the need for surgery is not a basis for concluding there was no meeting of the minds. Further, it contends the terms of the agreement are mirrored in the letters, establishing there was a meeting of the minds and, therefore, an enforceable agreement.

Settlement agreements are addressed by the Workers' Compensation Act at KRS 342.265, which states in pertinent part:

> (1) If the employee and employer and special fund or any of them reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement signed by the parties or their representatives shall be filed with the commissioner, and, if approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305.

The purpose of the statute is to give the fact-finder an opportunity to pass upon the terms of compensation agreements and protect the interests of the worker. Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (Ky. 1968). The obvious policy and purpose of KRS 342.265 is to discourage the making of settlements except under the protective supervision of the ALJ. Kendrick v. Bailey Vault Co., Inc., 944 S.W.2d 147 (Ky. App. 1997). Additionally, in Commercial Drywall v. Wells, 680 S.W.2d 299 (Ky. App. 1993) the Court of Appeals stated an ALJ "may look behind the settlement when an agreement appears not to be in the interest of the worker, provided there is cause to do so." More important to the present matter, KRS 342.265(1) provides a clear and

mandatory procedure which must be followed in order to reach a valid and enforceable settlement agreement.

Based upon the record before the CALJ, we do not believe his decision is clearly erroneous. KRS 342.285. The Form 110 was not executed, filed, or approved by an ALJ. This is persuasive evidence no meeting of the minds occurred.

As Cengage points out in its brief, Kentucky courts have nonetheless enforced settlement agreements which did not strictly comply with the provisions of KRS 342.265. *See e.g.* Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (Ky. 1968). However, even under general principles of contract law, there is little evidence from which to conclude a mutual understanding was reached. Under common law, an acceptance would not give rise to a contract unless it mirrors the terms of the offer. Any significant deviation operates as a rejection and a counter-offer. A & A Mechanical, Inc., vs. Thermal Equipment Sales, Inc., 998 S.W.2d 505 (Ky. App. 1999).

Here, the April 14, 2014 letter from Clemons with its attached medical records is ambiguous regarding the surgery. She did not specifically state she had elected to proceed with the surgery. Rather, Clemons indicated the attached medical records were more in line with her

condition than Dr. Best's evaluation. She asked Cengage to consider two options, but her response did not indicate she had decided which option was preferable. It is apparent Clemons had not made an election between receiving periodic benefits with her medical benefits remaining open, or accepting a lump sum to conclude the claim.

Thus, Clemons' letter constituted negotiation rather than a counter-offer. In her letter, she was attempting to have Cengage modify its offer. Cengage elected to respond with one option, the lump sum. Its April 18, 2014 letter is not an acceptance, but rather a new offer. It significantly differs from the April 14, 2014 letter in that Cengage made the election of whether Clemons would receive periodic benefits or a lump sum benefit. Clemons never acted to accept Cengage's final offer. Because Clemons never elected whether she would accept periodic benefits or a lump sum, there was no meeting of the minds. The CALJ's determination that there was no meeting of the minds is supported by substantial evidence in the record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the July 21, 2014 order and the August 20, 2014 order overruling Cengage's petition for reconsideration are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

MEMBER, STIVERS. I agree the CALJ's decision is correct. However, the appeal should be dismissed with direction to the CALJ to vacate his initial decision and subsequent order. In the case *sub judice*, Cengage's attorney and Clemons traded correspondence in an effort to settle the claim. Without either party filing a Form 101, Cengage filed a motion with numerous documents attached in an effort to enforce what it deemed to be a settlement agreement. The question in this case was whether the CALJ had jurisdiction to decide the motion.

In Com. v. Steadman, 411 S.W.3d 717, 721-722 (Ky. 2013), the Supreme Court discussed the concept of subject matter jurisdiction versus jurisdiction over a particular case stating, in relevant part, as follows:

> The Commonwealth argues that the Court of Appeals and Steadman have confused "the concept of general subject matter jurisdiction ... and more particular jurisdiction over a particular case." This Court concludes that the Commonwealth is correct.
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> . . .
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> But these decisions repeatedly refer to jurisdiction of or over "the case." They do not say the court loses jurisdiction over the subject matter of the case, or a category or class of cases.

In fact, that claim does not make sense. Whether a court has subject-matter jurisdiction is determined at the beginning of a case, based on the type of case presented. General subject-matter jurisdiction should be determinable from the face of the charging document (the indictment) or other initial pleading (the complaint). Thus, a court "will retain jurisdiction over such a case so long as jurisdiction was proper in the first place." [citations omitted] ("There is a presumption against divesting a court of its jurisdiction once it has properly attached, and any doubt is resolved in favor of retaining jurisdiction. Indeed, once a court has acquired jurisdiction, no subsequent error or irregularity will remove that jurisdiction, so that a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law, or both." (citations omitted)).

Or, as the Court of Appeals has aptly put it: "Once a court has acquired subject matter and personal jurisdiction, challenges to its subsequent rulings and judgment are questions incident to the exercise of jurisdiction rather than to the *existence* of jurisdiction." *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 429-30 (Ky. App. 2008)(quoting *Buckalew v. Buckalew*, 754 N.E.2d 896, 898 (Ind. 2001)); *see also id. at 430* ("Once a court acquires fundamental jurisdiction of a case, any judgment that it renders in that case 'is not invalidated because of an [alleged] improper exercise of that jurisdiction.' " (quoting *Maryland Bd. of Nursing v. Nechay*, 347 Md. 396, 701 A.2d 405, 410 (1997)(alteration omitted))).

> There is a significant difference between general subject-matter jurisdiction and jurisdiction over a particular case. General subject-matter jurisdiction "refers to a court's authority to determine 'this kind of case' (as opposed to 'this case')."[citation omitted]. This differs from "another type of jurisdiction, jurisdiction over a particular case, ... [which] refers to a court's authority to determine a specific case (as opposed to the class of cases of which the court has subject matter jurisdiction)." *Id*.; *see also* [citation omitted] ("Finally there is jurisdiction over the particular case at issue, which refers to the authority and power of the court to decide a specific case, rather than the class of cases over which the court has subject-matter jurisdiction."). [footnote omitted]

Absent the filing of a Form 110 executed by all the parties, subject matter jurisdiction as well as jurisdiction over a particular case in a workers' compensation claim can only be conferred by the filing of a Form 101. The Supreme Court in Steadman recognized this principle in stating, "general subject matter jurisdiction should be determinable from the face of … the initial pleading (the complaint)."

Further support for this position is contained in KRS 342.270(1) which reads, in part, as follows:

> If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application

for resolution of claim.[1]

Pursuant to this statute, the parties may confer subject matter jurisdiction and jurisdiction over a particular case by the submission of a Form 110 fully executed by all the parties. Absent such a scenario, a Form 101 must be filed in order to confer subject matter jurisdiction and jurisdiction over a particular case.

I submit the first sentence of KRS 342.270(1) contemplates that only a Form 110 signed by all the parties can confer subject matter jurisdiction and jurisdiction over a particular claim upon the CALJ without the filing of a Form 101. Further, the fact Clemons filed a memorandum in opposition to Cengage's "Motion to Enforce and Approve Settlement Agreement" does not constitute a waiver of both subject matter jurisdiction and jurisdiction of a particular case, as subject matter jurisdiction cannot be waived and jurisdiction of a particular case is only present when there is subject matter jurisdiction.

Notably, there is no specific administrative regulation setting out the procedure to be followed when the parties have reached an agreement and tendered a Form 110

[1] The statute continues by setting forth the time limit within which the application must be filed. Clearly, the above-cited section of the statute indicates that if the parties are unable to reach an agreement then either party may file a written application for resolution of the claim.

signed by all the parties. Therefore, it stands to reason there is no statutory or regulatory authority which permits Cengage's motion.[2]

The Kentucky Supreme Court has decreed that an ALJ may determine a settlement agreement was reached absent a formal document signed by all the parties. However, in each such case, the ALJ adjudged a settlement agreement was reached after the filing of a Form 101 conferring subject matter jurisdiction. Further, the determination a settlement agreement had been reached followed an adversarial proceeding before the ALJ. However, there is no statutory or regulatory authority for adversarial proceedings to commence seeking an adjudication a settlement agreement was reached prior to the filing of a Form 101.

We move into unchartered waters when we allow an employer to file a motion to enforce a settlement agreement absent the filing of a Form 110 properly executed by all the parties, or alternatively, a Form 101. There is no administrative regulation which addresses the disposition of Cengage's motion. Thus, I would dismiss the appeal and direct the CALJ to vacate his orders as he did not have

[2] 803 KAR 25:010 Section 4(a) pertains to the filing of a medical fee dispute prior to the filing of a Form 101, but there is no companion regulation dealing with a dispute as to whether a settlement was reached prior to the filing of a Form 101.

subject matter jurisdiction and jurisdiction over this particular case.

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