

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 27, 2014

CLAIM NO. 2012673151

CENTRAL BAPTIST HOSPITAL

PETITIONER

VS.

**APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE**

MARTY MAY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Central Baptist Hospital ("Central Baptist") appeals from the September 11, 2013 Opinion and Order, the January 30, 2014 Opinion and Order, the February 6, 2014 Opinion and Order on Reconsideration and the March 7, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ").

In the September decision, the ALJ awarded permanent partial disability benefits enhanced pursuant to KRS 342.730(1)(c)1. In the January 2014 decision, the ALJ declined to enforce a settlement agreement and reaffirmed the September 2013 decision. On appeal, Central Baptist argues the ALJ erred in failing to enforce the settlement agreement. Alternatively, Central Baptist argues benefits should have been awarded pursuant to KRS 342.730(1)(c)2 or proof time should have been extended to permit cross examination of Drs. James C. Owen and Frank Burke. For the reasons set forth herein, we affirm.

Marty May ("May"), a registered nurse working in a neurosurgical intensive care unit, sustained a back injury on June 30, 2012 while assisting a patient getting out of bed. The parties introduced medical proof at and following the Benefit Review Conference hearing on June 12, 2013. A week before the final hearing on June 26, 2013, May submitted the reports of two physicians. Central Baptist was unable to depose these physicians prior to the final hearing. Accordingly, at the conclusion of the hearing, the ALJ granted both parties thirty days to complete any additional proof. He further ordered both parties to submit briefs by July 25, 2013, on which day the case would stand submitted for decision. Though they also

informed the ALJ that a settlement agreement was being discussed, both parties agreed to this solution.

Evidently, Central Baptist did not submit additional proof prior to July 25, 2013 because the parties were actively negotiating a settlement. In fact, a proposed agreement was forwarded to May's counsel on July 24, 2013. The proposed agreement provided temporary total disability ("TTD") benefits would be paid from September 25, 2012 to October 22, 2012 and indicated "Non-MCO treatment denied." May did not accept the terms of the proposed agreement, and sought a longer period of TTD benefits. May's counsel sent an email to Central Baptist's counsel on August 13, 2013. It explained May disagreed with the period of TTD in the proposed settlement agreement, and insisted she be paid TTD until December 20, 2012. After May provided documentation, a revised agreement was sent to May's counsel on September 4, 2013. The revised agreement indicated Central Baptist agreed to pay all reasonable, necessary and related medical expenses and provided TTD benefits would be paid from September 25, 2012 to October 22, 2012 and from November 16, 2012 to December 23, 2012.

Though he had indicated the case would stand submitted on July 25, 2013, it is unclear from the record

whether either party informed the ALJ a settlement was being actively negotiated. We do know that, as of July 25, 2013, neither party had submitted additional proof or a brief. The ALJ rendered an Opinion and Order on September 11, 2013, finding May sustained an injury to her thoracic spine entitling her to permanent partial disability benefits based upon an 8% functional impairment rating. After performing an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ determined May is unlikely to continue to earn the same or greater wage for the indefinite future and is entitled to the three multiplier. He also awarded TTD benefits from October 8, 2012 through October 22, 2012.

On September 12, 2013, without knowledge of the ALJ's decision, May signed the revised agreement. However, she signed the agreement on the wrong line. On September 13, still without knowledge of the ALJ's decision, May returned to her attorney's office and signed on the correct line. On neither of these occasions did she discuss the terms of the revised settlement agreement with her attorney, who was unexpectedly hospitalized at the time due to a health emergency. The agreement was forwarded to the ALJ along with a motion for attorney's fees, and was approved on September 16, 2013.

On September 23, 2013, Central Baptist filed a motion and affidavit to set aside the September 11, 2013 Opinion and enforce the settlement agreement. The motion stated the ALJ's office was informed of the initial agreement. After May insisted on additional TTD, her counsel provided documentation concerning the time she was off work. A revised agreement was sent to May's counsel on September 4, 2013, and he was informed the agreement needed to be in the ALJ's office by September 6 pursuant to the ALJ's instructions. Central Baptist noted there was no indication May disagreed with the terms of the revised agreement until the ALJ rendered his Opinion.

On September 25, 2013, Central Baptist filed a petition for reconsideration of the September 11, 2013 Opinion, arguing the ALJ did not make sufficient findings of fact regarding the enhancement of benefits. Central Baptist also argued that, if the settlement agreement is not enforced, it should be granted additional proof time to depose Drs. Burke and Owen.

A hearing was held on December 18, 2013 at which time May and her counsel testified. Because he was hospitalized at the time, May's counsel was uncertain of the exact dates upon which the revised Form 110 arrived in his office and May signed the agreement. On September 16th,

2013, he had been released from the hospital and informed May of the ALJ's opinion. May indicated she wanted to "accept" the ALJ's opinion. He informed opposing counsel of her position on the 17th. May's counsel acknowledged the revised Form 110 contained all of the revisions May had requested. At the time May signed the agreement, neither she nor her counsel were aware the ALJ had issued an opinion.

May testified she signed the revised agreement on the wrong line on September 12th and returned on the 13th to sign on the correct line. On neither of these days did she discuss the revised agreement with her attorney, nor did she read the agreement before signing it. According to May, she became aware of the ALJ's opinion on September 15th. On cross-examination, May was asked why she signed the revised agreement if she did not agree with its terms, as she had previously testified. After obliquely implying she wanted the matter finalized, May then offered: "I rejected the agreement because - how do I put this, because I agreed with the Judge's award...which was more money."

The ALJ issued an Opinion and Order on January 30, 2014, holding there was no meeting of the minds as to the terms of the revised Form 110 and therefore no settlement agreement. Accordingly, the ALJ denied the

motion to set aside the September 11, 2013 Opinion and Order and enforce the settlement agreement. Additionally, he reaffirmed the September 11, 2013 Opinion.

Central Baptist filed two petitions for reconsideration, challenging both the September 11, 2013 Opinion and Order and the January 30, 2014 decision. Both were denied. On appeal, Central Baptist first argues the ALJ erred in failing to enforce the revised settlement agreement. Alternatively, it challenges the award of benefits pursuant to KRS 342.730(1)(c)2 as unsupported by the evidence. Finally, it requests additional proof time to permit cross-examination of two physicians.

We first address the ALJ's refusal to enforce the terms of the settlement agreement. KRS 342.265, 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). 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." Accordingly, the ALJ enjoyed the authority to set aside the settlement agreement, even after it was evidently mistakenly approved.

Furthermore, the ALJ properly focused his analysis on whether the revised settlement agreement represented a meeting of the minds. See Skaggs, 428 S.W.2d at 619 (defining "agreement" as a "mutual understanding"). The determination as to whether a meeting of the minds occurred is a question of fact. As such, this Board may only disturb the ALJ's findings if they are unsupported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Here, the ALJ stated he based his decision on the testimony of May and her counsel.

Looking at the totality of evidence presented, many would fairly conclude that May agreed with the terms of the revised settlement at the time she signed it, and only changed her mind after learning the ALJ had awarded her more money. She essentially admitted this during her testimony at the hearing. Nonetheless, the circumstances concerning the execution of the settlement agreement can reasonably support a different conclusion. For this reason, we cannot conclude the ALJ's factual findings are devoid of evidentiary basis or entirely unreasonable.

It is undisputed the ALJ issued the September 11, 2013 Opinion before the settlement agreement was submitted for approval. Also, it is uncontroverted May was unable to discuss the revised agreement with her attorney before she signed it, due to his hospitalization. Finally, May changed her mind about the settlement agreement after she was afforded the opportunity to discuss the matter with her attorney. From these facts, the ALJ concluded May never truly assented to the agreement. The fact her attorney believed an agreement had been reached is immaterial, as attorneys are without power to bind their clients. Daugherty v. Runner, 581 S.W.2d 12 (Ky. App. 1978). Under the circumstances of the case, we conclude the ALJ acted within his authority in declining to enforce the revised

agreement. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993)(KRS 342.285 grants the ALJ, as fact-finder, the sole discretion to determine the quality of the evidence and draw reasonable conclusions therefrom).

In the alternative, Central Baptist argues benefits should have been awarded pursuant to KRS 342.730(1)(c)2 or proof time reopened to permit cross-examination of Drs. Owen and Burke. Central Baptist notes May testified at the hearing that her condition was improving. Further, Central Baptist contends the records of Drs. Brooks, Owen and Burke fail to establish May is unlikely to continue to earn an average weekly wage equal to or exceeding her pre-injury wage, and their reports do not indicate her condition is likely to worsen. Finally, Central Baptist asserts it cancelled the depositions of Drs. Owen and Burke as a result of the settlement and it would be prejudiced by not having the cross-examinations as part of the record. Accordingly, it requests that if the agreement is not enforced, the matter should be vacated and remanded with additional proof time.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson

Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Where KRS 342.730(1)(c)1 and (1)(c)2 are both applicable, the ALJ must determine which provision is more appropriate. As part of that analysis, the ALJ must determine whether the injured employee is likely to continue earning a wage which equals or exceeds his or her wages at the time of the injury for the indefinite future. In Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004), the Court of Appeals indicated an ALJ must consider a broad range of factors, only one of which is the ability to perform the current job. The Supreme Court in Adams v. NHC Healthcare, 199 S.W.3d 163, 168, 169 (Ky. 2006) further elaborated "The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income."

Here, the ALJ determined both the two and three multipliers are applicable, a conclusion which Central Baptist does not challenge. He then conducted a Fawbush

analysis and provided an explanation for his determination that the three multiplier was more appropriate. The ALJ specifically noted the determination is not based on a claimant's ability to continue her current employment. Ultimately, he determined May was unlikely to continue to earn a wage equal to or greater than the wage earned at the time of the injury, and that the injuries have permanently altered her ability to earn an income.

In reaching this conclusion, the ALJ stated he relied on May's testimony, and the medical reports of Drs. Brooks, Owen and Burke. The February 6, 2014 Order on Reconsideration contains a more detailed explanation of the ALJ's decision, and we consider it together with the September 11, 2013 Opinion.

May testified she cannot perform necessary duties of her job involving heavy lifting, such as assisting patients getting out of bed. She requires assistance with heavier tasks that are common in nursing positions. She indicated she continues to have significant pain which requires medication, a TENS unit and physical therapy. She further testified Dr. Brooks lifted her restrictions at her request so she could return to work. Dr. Owen agreed with restrictions of no lifting greater than 25 pounds, no repetitive bending, stooping, or prolonged sitting, and no

prolonged standing or walking. Based on the totality of the evidence, we cannot say the ALJ's determination that the three multiplier is more appropriate is clearly erroneous.

We also do not believe Central Baptist is entitled to additional time to develop proof. The ALJ, as fact-finder, has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. See Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). While 803 KAR 25:010, § 13(15) permits an ALJ to order additional discovery or proof between the benefit review conference and the hearing upon motion with good cause shown, no regulation anticipates that additional proof will be taken after a claim has been taken under submission. T.J. Maxx v. Blagg, 274 S.W.3d 436, 438-439 (Ky. 2008). Moreover, failure to timely assert a right to rebuttal at any time during a proceeding may result in the loss of that right. Maxey v. R.R. Donnelley and Sons Co., 859 S.W.2d 130 (Ky. App. 1993).

In this instance, upon agreement of the parties, the ALJ ordered all proof to be completed by July 25, 2013. Central Baptist, having undertaken settlement negotiations, voluntarily elected to forego taking the depositions of Drs. Owen and Burke. It forwarded the first settlement agreement to May's counsel only one day prior to the date the claim was to be taken under submission, leaving no time to revise the agreement if its terms were not acceptable to May. Central Baptist did not request an additional extension of time to cross examine the doctors until the filing of its petition for reconsideration. A petition for reconsideration is not a proper vehicle to obtain an extension of proof time. Central Baptist's attempt to extend proof after the ALJ rendered a decision is an attempt at a second bite of the apple and is simply too late. The ALJ properly limited proof taking concerning the motion to set aside the September opinion to evidence concerning the validity of the revised agreement. Pursuant to T.J. Maxx v. Blagg, we believe it would be improper to order the ALJ to reopen proof time to permit the taking of the depositions of Drs. Owen and Burke.

Accordingly, the September 11, 2013 Opinion and Order, the January 30, 2014 Opinion and Order, the February 6, 2014 Opinion and Order on Reconsideration and the March

7, 2014 Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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