

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 15, 2014

CLAIM NO. 201270373

CROSS MAINTENANCE, LLC

PETITIONER

VS.

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

MARK R. RIDDLE  
and HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Cross Maintenance, LLC ("Cross") appeals from the March 20, 2014, opinion and order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding the parties had reached a full and complete settlement agreement regarding Mark Riddle's ("Riddle") claim and sustaining his motion to enforce a settlement. Cross also

appeals from the April 10, 2014, opinion and order overruling its petition for reconsideration.

Riddle was employed by Cross as a carpenter. While adjusting a Skil saw, his right finger hit the trigger of the saw causing the blade to almost completely sever the middle and ring finger of the left hand. He underwent surgery that night, and because infection later developed in the fingers he underwent other operative procedures. Riddle returned to work for another company earning less wages than he earned while employed by Cross. He testified the range of motion in his fingers is not very good and he lost a substantial amount of grip strength in his left hand. Riddle relied upon Dr. Warren Bilkey's 22% impairment rating assessed pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Cross relied upon Dr. Richard DuBou's opinions that Riddle had a 5% impairment rating and retained the capacity to return to the work performed at the time of injury.

The benefit review conference order and memorandum ("BRC") reflects Riddle received temporary total disability ("TTD") benefits from September 5, 2012, through April 5, 2013, and medical expenses were paid in the amount of \$16,976.90. The only contested issues were benefits per

KRS 342.730 and vocational rehabilitation. A hearing was to be held on October 23, 2013, and both parties submitted position statements to the ALJ. The ALJ rendered a decision on November 21, 2013, finding, based on the opinion of Dr. DuBou, the injury caused a 5% permanent impairment, the provisions of KRS 342.730 (1)(c)1 did not apply, and Riddle was not entitled to vocational rehabilitation.

On December 5, 2013, Riddle filed a verified motion to enforce the settlement or in the alternative schedule a hearing. Attached to the motion is the affidavit of Hon. Chris Evensen ("Evensen"), Riddle's attorney, and copies of the e-mails exchanged between the attorneys regarding settlement negotiations. He also filed a petition for reconsideration. In the preamble to his petition for reconsideration, Riddle stated he was concurrently filing a motion to enforce the settlement agreement. On the assumption the ALJ enforces the settlement, Riddle requested the November 21, 2010, opinion and order be vacated and set aside and the remainder of his petition for reconsideration be disregarded as moot. If, however, the ALJ did not enforce the settlement agreement and set aside and vacate his opinion, Riddle was submitting the petition for reconsideration. Cross filed a response

to the petition for reconsideration and an objection to the motion to enforce settlement or in the alternative schedule a hearing.

On December 19, 2013, the ALJ entered an opinion and order stating, in relevant part, as follows:

An Opinion and Order was rendered in this case back on November 21, 2013. Pending now is the plaintiff's Verified Motion to Enforce a Settlement or, Alternatively, to Schedule a Hearing, the defendant's Objection to the Motion to Enforce a Settlement or to Schedule a Hearing, and also plaintiff's Petition for Reconsideration and defendant's Response thereto.

The dispositive matter which must be ruled on is the plaintiff's Motion to enforce a settlement or in the alternative, to schedule a hearing, and defendant's Response thereto.

The ruling case law is contained in the Opinion of the Workers' Compensation Board in Claim No. 07-78069, Anthony Smith v. Swartz Moving, entered on August 6, 2010 and the subsequent Opinion of the Court of Appeals of Kentucky in 2010-CA-001646-WC in Swartz Moving v. Anthony Smith, et al, rendered on April 29, 2011.

Pursuant to the Opinion of the Workers' Compensation Board and the Opinion of the Court of Appeals, I am by this Order reopening the proof time to conduct additional proceedings, including a second hearing, with any additional evidence presented by the parties to be limited solely to the question of whether a meeting of the minds in regard to all terms of the

alleged settlement agreement arose, thus rendering the alleged settlement agreement enforceable, with the understanding that if no enforceable settlement agreement is found, the original Opinion and Order dated November 21, 2013 shall remain in effect.

The ALJ scheduled a hearing for February 25, 2014, at 10:30 a.m. E.T.

As evidenced by the documents attached to Riddle's motion to enforce the settlement agreement, settlement discussions were conducted prior to and after the October 23, 2013, hearing. The following are a portion of the documents attached to Riddle's motion:

- In a May 6, 2013, letter, Riddle conveyed an offer to settle for the lump sum of \$175,000.00 with open medical coverage, a waiver of vocational rehabilitation, and a right to reopen for additional indemnity benefits. It appears this letter was not acted upon until October 4, 2013, when Evensen sent an e-mail at 12:04 p.m. requesting Hon. Douglas U'Sellis ("U'Sellis"), counsel for Cross, to respond to his settlement demand. In the e-mail, Evensen attached a copy of the demand letter.<sup>1</sup>
- An October 8, 2013, e-mail U'Sellis sent to Evensen stating since the demand was based on the possibility of a permanent total

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<sup>1</sup> This e-mail is attached to Riddle's motion to enforce the settlement agreement.

disability award and Riddle was now working as a painter the demand was rejected. U'Sellis stated he just recently received Dr. DuBou's report reflecting Riddle had a 5% impairment and retained the capacity to return to the same type of work. U'Sellis indicated he would attempt to obtain some settlement authority that afternoon.

- An October 22, 2013, e-mail Evensen sent to U'Sellis asking if his client had a counter-demand. U'Sellis sent Evensen a reply e-mail that same day indicating his adjuster was checking with her supervisor and if he heard anything that day he would let Evensen know, otherwise they would go ahead with the hearing. U'Sellis would be in touch with Evensen as soon as he heard from the adjuster.

On October 24, 2013, at approximately 4:45 p.m., Jason Swinney ("Swinney") with U'Sellis' office sent an e-mail to Evensen stating as follows:

Chris,

I received authority from my client to offer Mr. Riddle a lump sum of \$25,000 plus weekly benefits of \$150 to be paid for 425 weeks. I know Rudloff is deciding the claim, but I think we can make a strong argument that Bilkey's rating is not accurate. Specifically, Dr. Bilkey rated Mr. Riddle for an impairment for the fifth digit despite Mr. Riddle's testimony that he does not even experience symptoms in the fifth digit. His overall rating is also higher than the rating that would be appropriate if your client actually had

amputations at the PIP joint for the third and fourth digits.

This settlement offer gives your guy a lump sum with the security of additional income to compensate him for any lost earning capacity. This also does not appear to be the type of injury that would require any type of ongoing medical treatment, so it seems mutually beneficial to buy the claim out in its entirety. If Rudloff awards benefits based on Dr. DuBou's 5% impairment, then your guy is going to be receiving \$10 to \$40 per week after deducting for fees and costs, so there is certainly plenty for him to lose.

Let me know what your guy thinks.

At approximately 4:48 p.m., on the same day, Evensen sent an e-mail to Swinney stating as follows:

Just so I understand the terms, is this with all rights open? Or is this for a complete dismissal? Or, something else?

Six minutes later, at 4:54 p.m., Swinney sent an e-mail to Evensen stating "This would be for a complete dismissal."

At 5:09 p.m., that same day, Evensen sent an e-mail providing the following:

Counter-demand:

- (1) \$50,000.00 up front
- (2) \$200.00 per week for 425 weeks
- (3) Complete dismissal of all future rights (assuming all medical expenses to date have been paid - I think they have, but don't want some bill popping up).

Total Pay-out over time is \$135,000.00.

If we proceed to the Judge, Mr. Riddle is going to get an award as follows:

22% IMPAIRMENT WITH THE (3.4) FACTOR  
 $\$406.56 \times 22\% \times (1.15) \times 3.4 = \$349.72$   
per week for 425 weeks, which would be  
a total pay-out of \$148,631.00

Thus, my demand provides your client a reduction in the amount of indemnity benefits it will have to pay and it lets them off the hook for medical coverage.

I expect a quick opinion, so please provide a response as soon as possible.

Not having received a response to the above, on Monday, October 28, 2013, Evensen sent an e-mail to Swinney stating: "[a]ny response to my counter-demand below?"

On November 22, 2013, at 1:49 p.m., U'Sellis sent an e-mail to Evensen stating as follows:

Hi Chris

We haven't yet received an e-mail today, but I am assuming that the judge has not yet issued a decision on this claim. My last offer had been for a lump sum of \$25,000, plus \$150 per week for 425 weeks. Your last demand had been for a lump sum of \$50,000, plus \$200 per week for 425 weeks. I have spoken further with my client. They have authorized me to offer \$40,000, plus \$175 per week as a compromise. Please discuss that with your client as soon as possible, and let me know if she [sic] is agreeable. Thank you.

Doug<sup>2</sup>

On that same date at 2:33 p.m., U'Sellis sent an e-mail to the ALJ with copies to the ALJ's staff and Evensen which reads as follows:

Hi Judge

Chris Evensen and I have been continuing settlement negotiations in this claim. I made a counter offer to Chris just this afternoon. He is traveling, but is attempting to reach his client by phone - so far without success. Chris and I think there is a good chance the case might resolve, if he can speak with his client. We realize that a decision from you could be expected at any time. Chris suggested, and I agreed, to contact you to request that, if you have not already issued your decision, you wait until at least Tuesday of next week, to give us the weekend and Monday to see if we can get this resolved.

Any assistance you can provide in that regard would be greatly appreciated. Thank you and have a good weekend.

Doug

Later that evening, at 5:16 p.m., Evensen sent an e-mail to U'Sellis with copies to the ALJ and his staff stating as follows:

Dear Judge Rudloff and Doug,

I am writing to advise plaintiff has accepted the defendant's offer and this claim is settled. Therefore, there will

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<sup>2</sup> Unbeknownst to the attorneys for both parties, the ALJ rendered a decision the day before this e-mail was sent.

not be a need for Judge Rudloff to issue an opinion. Form 110 to follow.

Chris Evensen<sup>3</sup>

Five minutes later, at 5:21 p.m., Evensen sent the following e-mail to U'Sellis:

Dear Doug,

I am writing to advise we accept your offer and this claim is settled. I attempted to "reply to all" from your e-mail to the judge advising we are settled. However, I am working off of a cell phone and am not positive it went through. Accordingly, I request you e-mail the judge's office advising we are settled.

On November 25, 2013, Evensen sent U'Sellis an e-mail which reads as follows:<sup>4</sup>

Dear Doug,

I trust you received the two e-mails I sent out on Friday 11/22/13 in which I (a) advised you we accepted your offer and the claim was settled and (b) "Replied to all" in response to your e-mail to Judge Rudloff and his staff (cc'd to me) wherein you advised Judge Rudloff and his staff we were

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<sup>3</sup> Evensen's affidavit reflects that after receiving the offer on November 22, 2013, he called Riddle and left a message on his voicemail. Evensen also represented he called U'Sellis and advised him he was traveling, had left messages for Riddle, was going to recommend acceptance of the offer and suggested he and U'Sellis may want to advise the ALJ "we're working towards a settlement." U'Sellis advised he would e-mail the ALJ's office and advise they were working on a settlement and request an opinion not be entered. Evensen's affidavit states he later phoned U'Sellis and left a voicemail message advising acceptance of the offer of a \$40,000.00 lump sum payment and \$175.00 per week for 425 weeks in exchange for a complete dismissal.

<sup>4</sup> In his affidavit, Evensen states he received a copy of the ALJ's opinion on November 25, 2013.

negotiating. In my responsive e-mail, I advised the Judge and you we had accepted your offer and the claim was settled. I informed a Form 110 settlement agreement would follow.

Today's mail contained the Opinion. Obviously, it is my position we had all the material terms in writing (string of e-mails), a valid offer, and a valid acceptance before either of us were aware of the Judge's ruling. Therefore, I believe under controlling contract law and applicable precedent, *Coalfield Tel. Co. v. Thompson*, 113 S.W.3d 178 (Ky. 2003), we have an enforceable agreement. I am attaching a draft of a Form 110 settlement agreement. I request you review the Form 110 and advise if any changes need to be made. If it meets with your approval, please advise and I suggest we file the Form 110 along with a Joint Motion to Vacate/Set aside the Opinion.

Please let me know.

On that same date at 5:04 p.m., U'Sellis sent an e-mail to Evensen responding as follows:

Chris,

I haven't seen the decision. I agree that we had a valid settlement. What did he rule?

Doug<sup>5</sup>

Thereafter, Evensen tendered a completed Form 110 Agreement as to Compensation and Order Approving Settlement. The "Benefit and Settlement Information"

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<sup>5</sup> Copies of the e-mails alluded to herein were attached to Evensen's affidavit.

section of the Form 110 reflects temporary total disability benefits had been paid totaling \$12,375.00, \$40,000.00 would be paid in a lump sum, and \$175.00 would be paid weekly for 425 weeks. It stated this was a compromise settlement of a disputed claim and referenced other information stating "see below." Monetary amounts were provided as consideration for the following waivers:

Waiver or buyout of past medical benefits - \$5,000.00

Waiver or buyout of future medical benefits - \$25,000.00

Waiver of vocational rehabilitation - \$5,000.00

Waiver of the right to reopen - \$5,000.00

After setting out the respective position of the parties, the Form 110 contains the following:

In an effort to resolve the claim, the Plaintiff and Defendant/Employer have each compromised their respective positions and have agreed to enter into this Settlement Agreement. The Plaintiff is agreeing to accept \$40,000.00 payable in a lump sum and \$175.00 per week for 425 weeks, beginning the date this Form 110 is approved, in exchange for a complete dismissal of his claim for indemnity benefits (TTD, PPD, PTD and/or death benefits), medical expenses/benefits, right to reopen and vocational rehabilitation, with prejudice.

The Employer will pay Riddle and his attorney \$40,000.00 in a lump sum and \$175.00 per week for 425 weeks in exchange for a complete dismissal of this claim and all rights under the Workers' Compensation Act.

Consistent with Evensen's affidavit, there appears to be no dispute that on December 4, 2013, U'Sellis e-mailed Evensen indicating he was not authorized to sign the settlement agreement.

The February 25, 2014, hearing order reflects the witnesses would be Evensen and U'Sellis and the evidence introduced by the parties were Evensen's affidavit, the correspondence between Evensen, the adjuster, and U'Sellis, as well as the attachments to the position statements. Notably, Cross' documentary evidence consisted of a copy of the e-mail from U'Sellis to Evensen dated November 27, 2013, sent at 1:49 p.m. containing a handwritten notation on the printout of the e-mail of: "past meds open through 11/22/13 - all other rights waived." That document also contains a copy of the e-mail from Evensen to U'Sellis dated November 22, 2013, sent at 5:21 p.m., in which Evensen advised U'Sellis of acceptance of the offer and he had attempted to "reply to all from U'Sellis' e-mail to the Judge advising we are settled." Evensen stated he was working off his cell phone and was not positive the e-mail

went through; therefore, he requested U'Sellis e-mail the judge's office and advise "we are settled."

At the February 25, 2014, hearing, Evensen recounted what took place on November 22, 2013, after he received the e-mail containing the counter-offer. Evensen explained the settlement called for a \$40,000.00 lump sum payment and a weekly benefit of \$175.00 per week for 425 weeks. In return, there would be a complete dismissal of Riddle's claim. Evensen stated that after he spoke with Riddle on the evening of November 22, 2013, and conveyed his acceptance of U'Sellis' offer, he believed a settlement agreement had been reached and there was nothing left to negotiate. Evensen introduced his affidavit which mirrors his testimony and sets out the discussions which took place via e-mail on November 22 and 25, 2013.

Evensen testified that upon receiving the ALJ's decision on Monday, November 25, 2013, he e-mailed U'Sellis advising he had received the opinion but believed they had a valid settlement agreement. He cited to U'Sellis' e-mail agreeing they had a valid settlement. Evensen testified that later U'Sellis advised him he did not believe there was a valid agreement. Evensen stated he was never aware the ALJ had issued an opinion prior to the time a

settlement was effectuated. He indicated the fact the ALJ had issued an opinion had no effect on the settlement.

Evensen testified he prepared the Form 110. He agreed there had been no discussion as to the sums he allocated as consideration for each of the waivers. He stated the figures were arbitrary because there was to be a complete dismissal of Riddle's claim. Evensen denied discussing with U'Sellis whether Cross would pay Riddle's medical bills through November 22, 2013, since the agreement called for a complete dismissal. Evensen pointed out the BRC order reflects unpaid medical bills were not a contested issue. He testified there was no discussion regarding a Medicare Set Aside since Riddle was not receiving Social Security and was not eligible for Medicare. Because there was no discussion as to when the periodic payments would begin, he inserted in the agreement the provision that periodic payments would begin when the Form 110 was approved.

U'Sellis testified he did not see the e-mail Evensen sent on Friday, November 22, 2013, accepting the offer until Monday. He admitted his voice mail contained a message from Evensen to that effect. He acknowledged sending an e-mail on November 25, 2013, stating they had a valid settlement. He noted the parties had not assigned

consideration for the various waivers nor had they thought about the agreement in relation to Social Security and Medicare. U'Sellis testified Evensen asked him about medical benefits remaining open through Friday, November 22, 2013. However, U'Sellis noted there was nothing in the agreement stating Cross was liable for outstanding medical bills through the date of the agreement. He acknowledged there was an agreement regarding the dollar amount and the waiver of future medical benefits.

U'Sellis testified that when he sent the November 25, 2013, e-mail stating he believed there was a valid agreement, he was aware a decision had been rendered but did not know the date it was rendered. He indicated when the e-mails were sent on Friday regarding the proposed agreement, he was assuming the ALJ had not issued a decision. U'Sellis acknowledged that at Evensen's suggestion, he e-mailed the ALJ to advise they were negotiating. U'Sellis testified when he first saw the opinion on Tuesday of the next week, he realized it had been rendered the day before negotiations resumed. He then told Evensen he needed to talk to his client concerning the legal effect of the decision with respect to the timing of the settlement. U'Sellis testified that upon researching the issue and speaking with his client, he told Evensen

there was no valid settlement. U'Sellis stated there was not a valid settlement because a decision had been rendered before the negotiations began. Further, he also questioned whether enough detail was provided to constitute a valid settlement. He testified he was unsure he would have had the same authority, had his client known a decision had been rendered.

U'Sellis testified that he wrote the notation on the printout of his November 22, 2013, e-mail sent at 1:49 p.m.. He explained that on that date, he had written on a sticky note they had discussed responsibility for medical bills through November 22, 2013. He then transferred that notation to the copy of his November 22, 2013, e-mail which he printed out on the following Monday. U'Sellis testified that had he known the ALJ had issued a decision at the time he made the counter-proposal, he would have talked to his client to see if there was a change in position.

U'Sellis testified he had prepared all of the agreements in the cases in which he and Evensen had previously been involved. He acknowledged he was not aware of any unpaid medical bills and the BRC order indicates there were no outstanding medical bills. He agreed that assigning dollar amounts to the waivers when there is a

dismissal of all the plaintiff's rights does not change the amount of the settlement.

On March 20, 2014, the ALJ rendered, in relevant part, the following opinion and order:

The matter which must be first ruled on is the plaintiff's Motion to enforce a settlement and the defendant's Response thereto. The ruling case law is contained in the Opinion of the Workers' Compensation Board in Claim No. 2007-78069, Anthony Smith v. Swartz Mowing, entered on August 6, 2010, and the subsequent Opinion of the Court of Appeals of Kentucky in 2010-CA-001646-WC, in Swartz Mowing v. Anthony Smith, et al, rendered on April 29, 2011.

Pursuant to the above-cited Opinions by the Workers' Compensation Board and the Kentucky Court of Appeals, on December 19, 2013 I rendered an Order reopening the proof time to conduct additional proceedings, including a second Hearing, with any additional evidence presented by the parties to be limited solely to the question of whether a meeting of the minds in regard to all terms of the alleged settlement agreement arose, thus rendering the alleged settlement agreement enforceable, with the understanding that if no enforceable settlement agreement was found, the original Opinion and Order dated November 21, 2013 shall remain in effect.

. . .

Based upon the sworn testimony of Mr. Evensen and Mr. U'Sellis and the exhibits filed at the Hearing, I make

the factual determination that the attorneys for the parties conducted extensive settlement negotiations. I make the factual determination that on November 22, 2013 Mr. U'Sellis forwarded an e-mail to Mr. Evensen, by the terms of which Mr. U'Sellis informed Mr. Evensen that he was authorized to offer the plaintiff a lump sum of \$40,000.00, plus \$175.00 per week for 425 weeks, as a compromise. I make the factual determination that thereafter on November 22, 2013 Mr. Evensen sent an e-mail to Mr. U'Sellis confirming acceptance of the defendant's offer and writing to Mr. U'Sellis to advise that the plaintiff accepted his offer and that this claim was settled.

I make the determination that under the above factual scenario, the decision of the Kentucky Supreme Court in *Coalfield Telephone Company v. Thompson*, 113 S.W.3d 178 (Ky.2003) is controlling. In that case, the defendant's attorney wrote to the plaintiff's attorney offering a lump sum to settle the case. The plaintiff's attorney responded in writing, stating that he had talked to the plaintiff and that the plaintiff had advised him to accept the defendant's offer to settle for the specified lump sum. Judge Smith concluded that KRS 342.265 required an agreement to be signed by the parties or their representatives and approved by the Judge in order to be enforceable. However, the Workers' Compensation Board, the Court of Appeals and the Supreme Court ruled that the letters from representatives of both parties clearly indicated the terms to which they agreed, that there was no assertion that the terms were incomplete, and further that under

those circumstances there was a full and complete settlement agreement.

Based upon the above-cited evidence and the ruling case law, I make the factual determination that there was a meeting of the minds on November 22, 2013, before the attorneys received a copy of my Opinion and Order on November 25, 2013. I, therefore, make the determination that there was a full and complete settlement agreement between the parties on November 22, 2013, by the terms of which defendant agreed to pay plaintiff a lump sum of \$40,000.00, plus \$175.00 per week for 425 weeks.

Accordingly, the ALJ sustained Riddle's motion to enforce the settlement agreement and overruled Cross' objection. Riddle's petition for reconsideration and Cross' response thereto were held in abeyance for further proceedings.

Cross filed a petition for reconsideration pointing out KRS 342.285(1) specifies "[a]n award or order of the Administrative Law Judge... shall be conclusive and binding as to all questions of fact." It noted the ALJ had not addressed this argument contained in its position statement. Although it acknowledged the general terms of the agreement had been reached, it posited there was an issue as to whether there was a complete agreement on all material aspects. Cross asserted there was a disagreement as to whether it would remain liable for the medical

expenses and there was no beginning date for payment of the weekly benefits. It argued there is no documentation of any agreement regarding these material issues. Lastly, Cross asserted the ALJ had not addressed its argument that a meeting of the minds could not have occurred since the negotiations were based on the erroneous assumption the claim had not been decided. It pointed out that "assumption was specifically included in the original offer" it made on November 22, 2013.

On April 10, 2014, the ALJ overruled Riddle's petition for reconsideration stating, in relevant part, as follows:

The Opinion and Order, which I rendered back on December 19, 2013, stated that the dispositive matter which must be ruled on is the plaintiff's Motion to enforce a settlement, or in the alternative, to schedule a hearing, and the defendant's Response thereto. Said Opinion and Order further stated that I was therein reopening the proof time to conduct additional proceedings, including a second Hearing, with any additional evidence presented by the parties to be limited solely to the question of whether a meeting of the minds in regard to all terms of the alleged settlement agreement arose, thus rendering the alleged settlement agreement enforceable, with the understanding that if no enforceable settlement agreement is found, the original Opinion and Order dated

November 21, 2013 shall remain in effect.

In the Opinion and Order dated March 20, 2014, I reviewed the pertinent sworn testimony at the Hearing and the law of the case, and made the factual determination that there was a meeting of the minds on November 22, 2013, before the attorneys received a copy of my Opinion and Order on November 25, 2013, and I further made the factual determination that there was a full and complete settlement agreement between the parties on November 22, 2013, by the terms of which defendant agreed to pay the plaintiff a lump sum of \$40,000.00, plus \$175.00 per week for 425 weeks.

On appeal, Cross contends the ALJ erred in sustaining the motion to enforce the purported settlement agreement. Therefore, the decision should be set aside and the original opinion and order of November 21, 2013, reinstated.

Cross argues there are two reasons there was no meeting of the minds. First, although the parties agreed to the broad financial terms of the settlement, certain details had not yet been resolved. Specifically, there was no discussion regarding Riddle's Social Security/Medicare status and whether consideration should be given to protecting Medicare's interest. Further, there was no discussion or agreement as to how the settlement funds were to be apportioned to the various waivers. It contends that

counsel for both parties also had a question as to whether medical benefits would remain open through November 22, 2013. Further, there was no agreement regarding the start date of the proposed periodic payments.

Next, it argues the correspondence between the parties is abundantly clear that the parties negotiated on the assumption no decision had been rendered. Cross maintains that had the parties been aware a decision had been rendered prior to November 22, 2013, one or both of them might have withdrawn from the negotiations. It asserts at the very least, both counsel would have been obligated to advise their clients a decision had been rendered in order to determine how they wished to proceed.

Cross' counsel suggests that had he known a decision had been rendered, there is the distinct possibility the claims supervisor might have chosen not to extend further authority and wait to review the decision. Cross asserts this misconception of the parties is a mutual mistake and prevented a meeting of the minds.

In addition, Cross argues KRS 342.285(1) states as follows: "An award or order of the Administrative Law Judge ... shall be conclusive and binding as to all questions of fact." Although the parties were unaware a decision had been rendered, that decision was conclusive and binding as

to all issues of fact. Consequently, it contends the negotiations occurring the day after the opinion was rendered were "under false pretenses." Since an award had been entered, the purported settlement agreement was a legal nullity and the November 21, 2013, decision is conclusive and binding.

With respect to settlement agreements, KRS 342.265(1) reads, in relevant part, as follows:

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.

In Coalfield Telephone Co. v. Thompson, 113 S.W.3d 178 (Ky. 2003), the Supreme Court held that the correspondence between the attorneys for the respective parties can constitute a sufficient memorandum of an agreement for purposes of KRS 342.265(1). There, the employer through its counsel had mailed a letter to claimant's attorney offering a lump sum in order to settle the matter. The letter provided the calculations utilized in arriving at the lump sum. The next day, the claimant's attorney responded he had talked with his client who

advised him to accept the offer to settle the case for a lump sum. He indicated this would be settlement of income benefits only and would not be a complete buyout. The employer's attorney indicated he would prepare the settlement agreement and get it to him and he would secure the ALJ's signature. Three days later the claimant died.

Subsequently, the claimant's mother, as administratrix of the estate, sought to enforce the agreement as set forth in the letters between counsel because it constituted a signed memorandum of their agreement. The ALJ declined to enforce the agreement. The claimant's mother appealed arguing the ALJ erred in failing to approve the terms of the agreement documented in the exchange of letters between counsel. She prevailed before the Board and the Court of Appeals. On appeal, the Supreme Court identified the issues as follows:

Although the correspondence that is at issue may reflect an agreement of the parties, it is not the sort of agreement that may be enforced in circuit court under KRS 342.305 because the ALJ refused to consider its terms and, therefore, failed to approve it. There is no argument that the intervening death of the claimant affected the viability of any agreement the parties may have reached. What is at issue is whether the correspondence of counsel constituted a sufficient memorandum of an agreement of the parties or whether, as the employer

maintains, KRS 342.265(1) requires a formal document that contains the terms of an agreement and that is signed by the parties or their representatives.

Id. at 180.

Citing to Skaggs v. Wood Mosaic Corp., 428 S.W.2d

617 (Ky. 1968), the Supreme Court observed:

Although *Skaggs v. Wood Mosaic Corp.*, Ky., 428 S.W.2d 617 (1968), turned on the requirements of KRS 342.265, it concerned whether a claim that was filed approximately five years after the date of accident was barred by limitations. The worker asserted that after paying voluntary medical and TTD benefits, the employer offered to settle the potential claim and accompanied its offer with a check, which he cashed. He argued that their actions constituted an offer and acceptance but that the agreement was neither filed with nor approved by the "old" Board. He maintained, therefore, that under the applicable version of KRS 342.265, the period of limitations was suspended, and his claim was timely. [footnote omitted] Recognizing that the purpose of the statute was to coerce employers to file and obtain approval of settlement agreements to ensure that they were fair, that ordinarily the word "agreement" referred to a mutual understanding, and that to interpret it narrowly would frustrate the purpose of the statute, the Court determined that the parties had reached an agreement within the meaning of the statute. *Id.* at 619. Furthermore, the Court emphasized that an agreement, itself, did not have to be in writing if there was "written evidence (such as the letter and canceled checks in this case) for the

'memorandum' which the statute says shall be filed." *Id.*

Id. at 180-181.

The Supreme Court held:

In determining whether the correspondence of counsel constituted a memorandum of an agreement by the claimant and his employer, the ALJ was not faced with a situation such as in *Carter v. Taylor*, Ky. App., 790 S.W.2d 448 (1990), where the only written evidence of an alleged agreement consisted of one attorney's notes. Here, letters from representatives of both parties clearly indicated the terms to which they agreed, and there is no assertion that the terms were incomplete. Under those circumstances, the Board and the Court of Appeals correctly determined that the ALJ should have addressed the substance of the agreement rather than its form.

Id. at 181.

Because the settlement agreement as found by the ALJ is not supported by the record and does not comport with the agreement Riddle contends the parties reached, we vacate and remand.

The ALJ determined the full and complete settlement agreement reached between the parties on November 22, 2013, called for Cross to pay Riddle a lump sum of \$40,000.00 plus \$175.00 per week for 425 weeks. The ALJ made no finding the parties agreed there would be a "complete dismissal" of Riddle's claim. It is clear if an

agreement was reached, Cross was to make a lump sum payment of \$40,000.00 and institute payment of \$175.00 per week for 425 weeks in exchange for a dismissal of Riddle's claim. There is a vast difference between the agreement Riddle alleged was reached and that found by the ALJ. In Hudson v. Cave Hill Cemetery, 331 S.W.3d 267, 271 (Ky. 2011), the Supreme Court noted Coalfield Telephone Company v. Thompson, stands for the principle "an ALJ may approve a settlement based upon correspondence between the parties if the correspondence memorializes all of the terms to which they agreed and neither party asserts the terms are incomplete." Here, part of the alleged agreement was that there would be a "complete dismissal" of Riddle's claim. Yet, the ALJ made no finding regarding this aspect of the alleged agreement. Thus, the ALJ's finding does not comport with the agreement Riddle sought to enforce.

Further, assuming the agreement did not call for a complete dismissal of Riddle's claim, the amounts listed in the agreement as consideration for the waiver of past medical benefits, future medical benefits, vocational rehabilitation, and right to reopen are essential elements of the agreement. Thus, there would be an incomplete agreement because the parties would have to agree to the specific consideration for each waiver. Therefore, the

claim must be remanded for specific findings of fact as to whether an agreement as alleged by Riddle was reached.

That said, should the ALJ find the parties reached the agreement urged by Riddle, the amount attributable to each of the waivers becomes insignificant since a complete dismissal results in Riddle waiving all such rights. U'Sellis acknowledged as much at the February 25, 2014, hearing testifying as follows:

Q: As well - in terms of assigning dollar amounts to the waivers in a settlement agreement that is for a total buyout of all rights, does that change the dollar amount that the entire settlement is being paid for?

A: It does not - despite your grammar.

In addition, the decision must be vacated because the ALJ failed to determine whether there was a dispute as to whether the medical benefits were to remain open through November 22, 2013, the date the agreement was allegedly reached. If the ALJ determines the date through which Cross would remain liable for Riddle's medical benefits was an unresolved essential term of the agreement, there was not a full and complete agreement and the ALJ must find the parties did not reach a complete settlement agreement. We are buttressed in this conclusion by the holding of the Supreme Court in Hudson v. Cave Hill Cemetery, supra:

KRS 342.265(1) promotes the prompt disposition of workers' compensation claims with a minimum of expense by permitting parties to agree to settle their dispute. [footnote omitted] The statute requires an ALJ to approve the parties' agreement, after which KRS 342.305 permits it to be enforced in circuit court as a judgment. *Thompson* stands for the principle that an ALJ may approve a settlement based on correspondence between the parties if the correspondence memorializes all of the terms to which they agreed and neither party asserts that the terms are incomplete. Neither KRS 342.265 nor *Thompson* should be construed as encouraging hastily-drafted and incomplete settlement agreements.

The correspondence in the present case failed to show the existence of a complete settlement agreement such as was present in *Thompson*. The amount of lump sum proceeds to be allocated to a Medicare Set-Aside Account may have legal and financial consequences for the parties. The allocation is an essential element of a settlement that includes such an account. Although the dispute before ALJ Smith concerned only medical expenses, Walnista's offer and letter of October 19, 2007 refer to a full and final resolution of the claim for \$500,000.00 "to include set aside."

Id. at 271.

Thus, the ALJ must determine whether one of the essential terms of the agreement was the date through which Cross would be responsible for Riddle's medical benefits. If such a date was an essential term of the agreement, then

as in Hudson v. Cave Hill Cemetery, supra, the parties did not reach a complete settlement agreement.

We find no merit in Cross' assertion the negotiations were contingent upon the lack of a decision by the ALJ. By finding an agreement was reached, we believe the ALJ implicitly, if not expressly, concluded the negotiations were not contingent upon the lack of a decision by the ALJ. The evidence amply supports such a conclusion. The fact U'Sellis stated in his November 22, 2013, e-mail at 1:49 p.m., that he was assuming the judge had not issued a decision on this claim is not indicative these were conditional negotiations and there was no agreement in the event a decision was rendered at any point during negotiations. Significantly, there is no statement by either party reflecting there is no agreement if a decision is rendered prior to the parties reaching an agreement. Rather, it appears the parties were desirous of settling the claim and the fact the ALJ may decide the claim during the negotiations would not affect their negotiations and vitiate an agreement. This is firmly established by U'Sellis' e-mail of November 25, 2013, at 5:04 p.m., wherein he stated "I haven't seen the decision. I agree that we had a valid settlement. What did he rule?" That statement clearly indicates the existence of an

enforceable settlement agreement was not contingent upon the ALJ not rendering a decision. U'Sellis confirmed a valid settlement was reached in spite of the fact the ALJ had rendered a decision.

In addition, the parties' failure to agree to the date payment of weekly benefits were to commence is of no significance and does not cause the terms of the settlement agreement to be incomplete. The ALJ could determine the commencement date without altering the agreement terms and adversely affecting the rights of the parties.

Cross' assertion a resolution of all Social Security and Medicare considerations was necessary is without merit. As noted by Evensen in his testimony, Riddle was working, was not drawing Social Security, and was not on Medicare. Riddle's October 23, 2013, hearing testimony reveals that in July 2013, he began working for another employer making \$12.00 an hour working forty hours a week. We note nothing in the record indicates a need to deal with Social Security and/or Medicare issues as the record reflects Riddle's date of birth was 1957 and at the time of the August 28, 2012, injury his age was fifty-five. More to the point, neither party argued there was a need to allocate a lump sum to a Medicare Set-Aside Account.

Finally, we find no merit in Cross' assertion the declaration of KRS 342.285(1) that the ALJ's decision is conclusive and binding as to all questions of fact, nullifies the agreement. Even after rendition of an opinion, the parties may agree to settle the claim in order to avoid an appeal. That agreement may contain provisions which are contrary to the findings contained in the ALJ's decision. KRS 342.285 does not prohibit the parties from reaching an agreement after the decision is rendered which contains terms contrary to provisions of the ALJ's decision.

Accordingly, the March 20, 2014, Opinion and Order finding the parties reached a settlement agreement, sustaining Riddle's motion to enforce the settlement agreement, and overruling Cross' objection and response and the April 10, 2014, Opinion and Order on Reconsideration affirming the decision are **VACATED**. This matter is **REMANDED** to the ALJ for a determination of whether the parties' correspondence memorializes all the terms of the settlement agreement. If the ALJ determines the correspondence establishes the parties reached a full and complete agreement, he shall enter specific findings of fact setting forth the essential terms of the agreement. However, if the ALJ determines the parties did not reach a

full and final resolution of all disputed issues, he shall provide the findings of fact in support of his decision. Further, he shall then deny Riddle's motion and reinstate the provisions of his November 21, 2013, Opinion and Order and rule upon Riddle's petition for reconsideration which he ordered held in abeyance.

ALL CONCUR.

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