Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 2, 2015

CLAIM NO. 201300153

LANDY MILLS PETITIONER

VS. **APPEAL FROM HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE**

NALLY & HAMILTON ENTERPRISES
J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Landy Mills ("Mills") appeals from the February 20, 2015 Order on Petitioner's Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ"). The ALJ determined a settlement agreement with Nally & Hamilton Enterprises ("Nally") approved on August 27, 2013 is enforceable; Mills

failed to prove fraud, mistake or newly discovered evidence as a basis for reopening pursuant to KRS 342.125; and a reopening for a worsening of condition is barred by the terms of the settlement agreement. Mills argues the ALJ is barred by *res judicata* from determining the settlement agreement was enforceable. Finding no error, we affirm.

In a November 26, 2013 Opinion and Order Dismissing, the Board provided the following procedural summary and ruling:

> Mills initiated this claim following an October 27, 2012 injury to his back, right leg and right foot, and the claim was assigned to Hon. Allison Emerson Jones, Administrative Law Judge. During the pendency of the claim, Mills underwent a discectomy. The matter was set for formal hearing on June 26, 2013. At the formal hearing, the parties negotiated a settlement for a complete and total dismissal with prejudice. A hearing order was issued and approved by the ALJ. On August 27, 2013, the CALJ approved the settlement agreement.
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> However, on September 6, 2013, Mills filed a motion styled "Motion to Set Aside Proposed Settlement" and stated "it appears that [he] will have to have surgery again." On September 23, 2013, Nally responded. It not only objected to any reopening, but also challenged Mills' characterization of the agreement as a "proposed" settlement. Nally pointed out the settlement agreement had been reduced to writing in a Form 110, which had been approved by the [Chief Administrative Law Judge ("CALJ")] and filed with the

Commissioner. By Order dated September 26, 2013, the CALJ granted Mills' motion, stating "the above-styled Workers' Compensation claim is hereby reopened for further proceedings."

It is unclear if the CALJ considered Nally's objection to the motion. In the September 26, 2013 Order, the CALJ noted "there have been no objections or other responses to the motion to set aside the settlement agreement." However, despite this inconsistency, Nally did not petition the CALJ for reconsideration of the Order. Instead, it filed a notice of appeal to this Board.

Though styled as a motion to set aside a "proposed settlement", Mills essentially moved the CALJ to reopen his claim. By the language used in the Order, it appears the CALJ also considered the pleading as a motion to reopen. An order granting reopening pursuant to KRS 342.125 is not final and appealable. For purposes of Chapter 342, a final award, order or decision is determined according to CR 54.02 (1) and (2). 803 KAR 25:010. Pursuant to CR 54.02, an order is appealable only if it terminates the action itself, acts to decide all matters litigated by the parties, and operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984).

The CALJ's Order is not final and appealable because it determined only that Mills had made a *prima facie* showing he *may* prevail under the evidence put forth upon reopening. It does not determine whether Mills has actually suffered a change of disability or worsening of condition caused by the

> injury. Accordingly, there has been no final award, order, or decision as defined by 803 KAR 25:010 Section 21(2)(b) resolving Mills' claim.
>
> Therefore, the appeal is hereby **DISMISSED.**

After dismissal of the appeal, the matter was assigned to ALJ Allen. In his Opinion and Order on Reopening, the ALJ found the settlement agreement satisfied the requirements of KRS 342.265 and was therefore valid and enforceable. The ALJ noted the CALJ's order setting aside the agreement was appealed and the Board's opinion dismissed the appeal, not on the merits of the CALJ's actions but on the grounds the appeal was taken from an interlocutory order. The ALJ stated he believed the Board "did not entertain the issue of whether the setting aside of the previous settlement agreement was appropriate or allowed under KRS 342.265 or that dismissing the defendant's appeal acted to provide authorization for that determination." The ALJ's understanding was that the matter was remanded for a full determination of the merits of the claim under the exclusive remedy of reopening under KRS 342.265(4).

The ALJ next noted Mills' motion to set aside the agreement failed to comply with the requirements of 803 KAR 25:010(4)(6)(a). He explained:

The ALJ finds the plaintiff failed to comply with the requirements necessary to reopen this claim pursuant to KRS 342.125. Plaintiff did not support the motion with the required documentation set forth above. However, the ALJ believes that the Chief ALJ and Workers' Compensation Board's findings that the case was reopened on a *prima facie* showing by the plaintiff before the ALJ overcomes any shortcomings in attachments to the motion to reopen.

However, being that as it may, the ALJ finds that, on the merits of the case, the plaintiff still has not carried his burden pursuant to KRS 342.125. Plaintiff has filed no evidence showing that the settlement agreement was procured by fraud, mistake or newly-discovered evidence which could not have been discovered with the exercise of due diligence. While plaintiff may have filed medical evidence of a second surgery and testified at the final hearing that such was carried out, he has not shown a change in disability as demonstrated by objective medical evidence of worsening of impairment since the date of the award or order.

The ALJ notes that the MRI of plaintiff's lumbar spine which prompted the referral to Dr. Bean was performed on July 25, 2013. The actual referral was made on August 26, 2013. Both actions occurred before the motion to set aside the proposed settlement agreement. That motion referred to the fact the plaintiff would have to have additional surgery by Dr. Bean as the reason to set aside the agreement; referencing the MRI and referral in support. As both were in existence and available prior to approval of the settlement agreement, it cannot be said

> the subsequent surgery would have been a change in disability "since the date of the award or order."
>
> However, regardless of the ALJ's findings on the merits of the reopening as set forth above, having found the settlement agreement was a valid and enforceable document as per KRS 342.265 and the opinion of the Workers' Compensation Board, the ALJ believes the plaintiff's rights to reopen to allege worsening of condition, past, present and future medical expenses and rights to any indemnity benefits were fully compensated and waived by virtue of the plain language of the settlement agreement entered into and approved herein.

Additionally, the ALJ noted Mills was questioned at the hearing and acknowledged that he signed the agreement after it was explained to him by his attorney, the agreement acted to waive reopening, he agreed to the terms, and he knew the agreement was approved by the ALJ. Accordingly, the ALJ held the terms of the agreement were enforceable and the reopening was prohibited and barred by the terms of the agreement.

Mills filed a petition for reconsideration, requesting that the ALJ identify what evidence was submitted subsequent to the CALJ's order, and what evidence he relied upon in determining what law of the case was related to the enforceability of the settlement agreement. Mills acknowledged he did not file a motion to reopen on grounds

of fraud, newly-discovered evidence, mistake or change of disability as provided by KRS 342.125(1). Rather, he noted he filed a motion to set aside the settlement agreement, which was granted. Thus, Mills contended he was not required to submit any of the documentation required by 803 KAR 25:010(4)(6)(a).

In his February 20, 2013 order ruling on the petition, the ALJ provided a list of all filings subsequent to the CALJ's order. The ALJ noted the Board had indicated that, although Mills had styled his motion as a motion to set aside a proposed settlement, he had essentially moved the CALJ to reopen his claim. The ALJ further noted the language used by the CALJ also considered the pleading as a motion to reopen. The ALJ noted any deficiency in filing required documentation was resolved and remedied by the order of the CALJ allowing the claim to be reopened and the Board's order acknowledging this decision.

On appeal, Mills argues the ALJ's determination that the agreement is enforceable is contrary to the plain language of the CALJ's order indicating the agreement was set aside. Mills contends the Board's statement that "There has been no final award, order, or decision" resolving the claim refers to the settlement agreement, and is tantamount to an express determination that there was no settlement

agreement. Mills contends the ALJ identified no new evidence or case law that would indicate the CALJ's order setting aside the settlement agreement is invalid. He further maintains the CALJ's order was binding upon the parties and the ALJ was precluded from making a second determination on the issue. Mills notes Nally did not appeal the Board's determination.

We begin by noting KRS Chapter 342 does not provide for a mechanism to set aside an agreement approved by an ALJ except through the reopening statute set forth in KRS 342.125. KRS 342.265(4) provides:

> If the parties have previously filed an agreement which has been approved by the administrative law judge, and compensation has been paid or is due in accordance therewith and the parties thereafter disagree, either party may invoke the provisions of KRS 342.125, <u>which remedy shall be exclusive</u>. (emphasis added).

Inherent in every settlement is the risk of entering into a bad bargain. A party to an approved agreement cannot simply decide it no longer wishes to be bound by the agreement and seek to set aside the agreement. Rather, the party must seek to reopen and satisfy one of the grounds specified in KRS 342.125(1).

The procedure for reopening a prior workers' compensation claim pursuant to KRS 342.125 is a two-step

process. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006). The first step is the *prima facie* motion, which requires the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). Only after the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening will the adversary party be put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001). At this point, step two of the reopening process commences, with additional proof time being set so the merits of the reopening can be fully and finally adjudicated. Campbell v. Universal Mines, 963 S.W.2d 623 (Ky. 1998). In Crawford & Co. v. Wright, 284 S.W.3d 186 (Ky. 2009), the Supreme Court instructed that once the motion to reopen is made with the required *prima facie* showing, the matter is to be assigned to an ALJ for further proof time and an adjudication of the merits.

Here, the CALJ apparently did not have access to the objection and response to Mills' motion filed by Nally on September 23, 2013. A review of the electronic record in this claim reveals the response and objection was not

entered until September 27, 2013, the same day the CALJ entered his order. It also appears the CALJ may not have reviewed the actual agreement which contained a buyout/waiver of future medical benefits and the right to reopen. Again, it is apparent the CALJ treated the matter as a motion to reopen.

Mills' motion stated an MRI revealed the same problem that existed post-injury is still there, he has been referred for neurosurgical evaluation, and it appears surgery will be required. This potentially would be grounds to reopen for a worsening of disability. However, the agreement contained a buyout/waiver of the right to reopen, foreclosing this option. Assuming this evidence establishes a *prima facie* case for reopening for a change of disability since the date of the settlement, it was clear error for the CALJ to set aside the agreement. In a reopening due to change in disability, the award is only modified from the date of the motion to reopen. The terms of the agreement remain unaltered for the period prior to filing of the motion to reopen.

Setting aside the agreement prior to the taking of proof on the questions of fraud, mistake or newly discovered evidence would also be erroneous as a matter of law. In his motion to set aside, Mills made no allegation

of fraud, mistake or newly discovered evidence. To the contrary, in his petition for reconsideration of ALJ Allen's decision, Mills unequivocally states he did not file a motion to reopen on the grounds of fraud, mistake or newly-discovered evidence. Mills was also candid in his testimony at the hearing held November 25, 2014. He acknowledged his signature on the agreement, confirmed the conditions in the agreement were explained to him by his attorney, and he agreed to "waive medical expenses, waive reopening, and basically, waive every right you had under workers' comp." His testimony establishes he knowingly and willingly entered into the settlement.

Contrary to Mills' assertion, the Board's prior decision did not determine whether the settlement agreement was enforceable. The only decision before the Board in the initial appeal was the *right* to appeal from the CALJ's September 26, 2013 order. The Board held that order was not final and appealable. In the initial appeal, the Board did not, and could not reach the question of whether the CALJ erred in ordering the agreement to be set aside. Now, the Board can reach that question.

To the extent the CALJ attempted to set aside the settlement agreement, we hold the CALJ erred because there was no allegation of fraud, mistake, or newly discovered

evidence which could not have been discovered with the exercise of due diligence. The CALJ apparently determined a *prima facie* case for reopening based upon change of condition, reopened the claim, and set a proof schedule. The agreement was set aside without affording Nally the opportunity for its response to be heard. Until presentation of proof of fraud, mistake, or newly discovered evidence and a decision on the merits, the agreement could not be set aside and it should have remained in effect.

Any error contained in the decision, however, was not appealable based on the interlocutory nature of the CALJ's order. Transit Authority of River City vs. Saling, 774 S.W.2d 468 (Ky. App. 1989). An order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984). Because the CALJ's order was interlocutory, the ALJ had authority to correct the error.

The ALJ's determination that Mills failed to prove the agreement was procured through fraud, mistake or newly discovered evidence is supported by the record.

Likewise, substantial evidence supports a conclusion Mills understood the terms of the agreement and willingly compromised his right to reopen for a worsening of his disability. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the January 23, 2015 Opinion and Order on Reopening and the February 20, 2015 Order on Plaintiff's Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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