Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 17, 2015

CLAIM NO. 201389060

LARRY KIDD PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

CROSSROCK DRILLING LLC and
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Larry Kidd ("Kidd") appeals from an opinion, award and order rendered February 20, 2015 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, but dismissing the claim against Crossrock Drilling, Inc. ("Crossrock") for permanent income or additional medical

benefits. Kidd also appeals from the April 3, 2015 order denying his petition for reconsideration.

On appeal, Kidd argues the ALJ erred in failing to set aside the February 20, 2015 decision because the parties had reached a settlement which the ALJ wrongfully failed to consider or approve. In response, Crossrock argues Kidd's appeal must be dismissed because it concerns issues regarding settlement negotiations between the parties never litigated and for which there is no evidence properly of record. Counsel for Crossrock additionally argues the counsel for Kidd violated Supreme Court rule 3.130(42) by communicating with her client directly, and did not advise of the contact, therefore neither the settlement nor negotiations constitute a valid settlement. For the reasons set forth below, we affirm.

Kidd filed a Form 101 on October 24, 2013 alleging back, neck, left hip and left knee injuries from tripping while exiting a bulldozer and falling onto the track. The parties proceeded to introduce evidence. Because the evidence regarding Kidd's injuries and treatment is irrelevant to the issues on appeal, it will not be further discussed. After numerous extensions of time were granted, a benefit review conference ("BRC") was held on December 3, 2014. The issues preserved for

decision were whether Kidd retains the physical capacity to return to the type of work performed at the time of the injury; benefits per KRS 342.730; work-relatedness/ causation; unpaid or contested medical expenses; injury as defined by the Act; TTD (duration); extent and duration and multipliers.

The hearing was held on December 18, 2014. The hearing order notes the contested issues were the same as those listed at the BRC, with the addition of the correct calculation of the average weekly wage. After the hearing, both parties submitted briefs, and the case was taken under submission for decision. On February 20, 2015, the ALJ rendered a decision awarding TTD benefits from March 29, 2013 until September 25, 2013, and dismissing the remainder of the claim. The ALJ specifically determined Kidd is not entitled to additional medical treatment.

Apparently unbeknownst to either the ALJ or counsel for Crossrock, Kidd's attorney engaged in settlement negotiations with the adjustor for Crossrock's insurer. Although not submitted as evidence, attached to Kidd's petition for reconsideration are copies of e-mails between his attorney and the adjustor. Kidd also attached

copies of the e-mails to his brief before this Board. The e-mails state as follows[1]:

Date	Time	Sender	Message
1/28/2015	1:29 PM	Paloma Duncan	Please advise us of your response to our settlement offer of $55,000.00. Please discuss this offer with me at your earliest convenience. My direct phone number is 800-752-5832 ext. 21727 or reply by fax to 6033349007. Thank you and I look forward to hearing from you.
1/28/2015	3:08 PM	Glenn Hammond	Mrs. Duncan I attempted to return your call you [sic] on a couple different occasions to discuss the matter but was not [sic] to speak with you. I had sent a response previously and stated we couldn't waive medical of [sic] reopening. We never heard back. Can you please respond?
2/11/2015	3:24 PM	Paloma Duncan	Ok, so what is the amount your client is agreeable to resolve his case?
2/11/2015	5:46 PM	Glenn Hammond	I am not at the office and have been on the road for the past several days. I'm not sure what his last offer to you was at this time. I will check in the morning and call you back. My cell number is 606-422-0702.
2/13/2015	8:00 AM	Paloma Duncan	Our last offer was 55K. Please let me know if we can get this one wrapped up.
2/13/2015	3:57 PM	Glenn Hammond	My[sic] Kidd said he would accept $80,000 to settle his claim at this time. He would waive vocational rehabilitation yet[sic] his medical and right to reopen.
2/17/2015	8:41 AM	Paloma Duncan	I just want to be sure I understand your counter, 80K for full and final with all waivers or did you mean "not" instead of "yet"?

[1] Paloma Duncan is listed as a Technical Claims Specialist II-WC with Liberty Mutual Insurance/Helmsman Management Services. Glenn Hammond is counsel for Larry Kidd. Aziza refers to Aziza Ashy, attorney for Crossrock who is not listed in the e-mails until 2/24/2015 at 7:39 AM. Melissa Satterly is the paralegal for Hon. Steven G. Bolton, ALJ.

2/18/2015	12:00 AM	Glenn Hammond	He would waive only vocational rehabilitation. All other statutory rights remain open
2/18/2015	8:22 AM	Paloma Duncan	OK since our last offer included all waivers, I would be able to offer 30K with all waivers but he would retain the right to medical care for the low back and knee. Please let me know what your client's response is and or if he has a value for a full and final settlement on everything we would be happy to entertain.
2/18/2015	1:22 PM	Glenn Hammond	I think we will let the ALJ decide then.
2/20/2015	12:25 PM	Paloma Duncan	Obviously a lump sum payment is going to be more enticing for you and your client then [sic] having weekly benefits issued as it would be if an award is issued. So in light of that we can offer $55,000.00, lump sum, waiver of all rights except medicals for the low back and left knee; or in the alternative $70,000 full and final. Please consider these last offers and let me know if this is something we can get done.
2/20/2015	1:08 PM	Glenn Hammond	Not waiving reopening.
2/20/2015	1:41 PM	Paloma Duncan	Ok would your client agree to $54,402.47 for indemnity lump sum settlement with waiver of voc rehab?
2/20/2015	3:19 PM	Glenn Hammond	$55,000 and waive only voc rehab, then we have a deal.
2/24/2015	7:39 AM	Paloma Duncan	Alright, thank you Glenn. Aziza-please prepare the settlement documents and let me know if you need anything else from me. Thank you.
2/26/2015	8:28 AM	Glenn Hammond	(no message. E-mails apparently forwarded to the ALJ's office.)
2/26/2015	8:32 AM	Melissa Satterly	This comes a little too late considering ALJ Bolton rendered his opinion on February 20, 2015. It would have been nice if the parties had thought to notify the ALJ about the settlement. ALJ Bolton spent 3 ½ days working on this opinion. I need all parties to inform me on how they want to proceed with this situation!

We make no determination regarding the completeness of these e-mails, or whether they fully set forth all communication between the parties. No additional e-mails were tendered. The record contains no response to Ms. Satterly's e-mail. Importantly, no motion was filed for the ALJ to consider whether a settlement had been reached.

On March 3, 2015, Kidd filed a petition for reconsideration. The only issue raised involved Kidd's allegations the parties had agreed to settle the claim. Kidd requested, "That as the above case was settled prior to the Opinion, Award and Order, the Petition for Reconsideration should be sustained." Kidd further stated "WHEREUPON, the plaintiff respectfully demands the proper Order sustaining the Petition for Reconsideration and for any and all other relief to which the Plaintiff is entitled either at law and/or in equity."

Crossrock responded to the petition for reconsideration arguing, as it does on appeal, the impropriety of the communications between Kidd's attorney and the insurance adjustor. In the alternative, Crossrock argued if the ALJ should recognize the negotiations, the agreement is incomplete and therefore unenforceable

pursuant to Hudson v. Cave Hill Cemetery, 331 S.W.3d 267, 271 (Ky. 2011).

On April 3, 2015, the ALJ denied Kidd's petition. In so ruling, the ALJ stated as follows:

> This matter comes on before me on Plaintiff's Motion for Reconsideration of my Opinion, Award and Order of February 20, 2014, and Defendant's response thereto.
>
> This case has been processed no differently than any other case. There was a formal hearing on December 18, 2014 at which the sworn testimony of the Plaintiff was heard and the case placed under submission pursuant to 803 KAR 25:010, Section 18 (5), I am required to render a decision within 60 days of the date of the final hearing. The only exception to that mandate is if an "extension is mutually agreed to by all parties" or the case is settled. In this case neither event happened.
>
> Post hearing, both parties filed timely briefs and a decision was timely rendered on February 19, 2015 (mailed on February 20, 2015). (I note that there is an error patently appearing on the fact of the Opinion Award and Order in that there is a typographical error dating it February 20, 2014, which I hereby order corrected *sua sponte*.)
>
> On February 26, 2015, some 6 days after the Opinion Award and Order was mailed and 7 days after it was completed and signed, counsel for the Plaintiff sent an e-mail to my office detailing some settlement negotiations that were taking place in the case. My paralegal e-mailed back asking for instructions

> from both parties. These instructions were never communicated.
>
> Plaintiff now asks that the Opinion Award and Order be set aside, while the Defendant denies an agreement. Following the lead of the statute, I do not believe I have the authority to withdraw the Opinion Award and Order in lieu of a settlement agreement that does not exist. (no one has tendered a Form 110) and without the affirmative motions of both parties.
>
> While I sympathize with the Plaintiff, I find no error patently appearing on the fact of the Opinion Award an Order, and the Petition for Reconsideration must be **DENIED** and **DIMISSED**.
>
> This appeal subsequently ensued.

We will first address Crossrock's allegation Kidd's attorney violated Supreme Court Rule 3.130 (4.2). Because we are limited in reviewing only decisions pertaining to KRS Chapter 342, we are unable to render a decision on such alleged violation. If Crossrock believes such violation occurred, it must be pursued before the appropriate body. We therefore refuse to further address this allegation.

Next, we are in agreement with Crossrock that Kidd's argument pertaining to the alleged settlement between the parties was neither properly presented for determination before the ALJ, nor preserved for appeal before this Board. The purpose of KRS 342.281 is to permit

"the correction of errors patently appearing upon the face of the award, order, or decision." A petition for reconsideration is not a vehicle by which a party may raise an issue previously unidentified for determination by an ALJ, or otherwise submit additional proof for the fact-finder's consideration after the decision on the merits has been rendered. More importantly, an improper petition cannot be utilized as a springboard for review on appeal of matters improperly preserved before the ALJ.

Kidd failed to file a motion requesting approval of a settlement agreement before the ALJ. We note Kidd argues the Kentucky Supreme Court, in Coalfield Telephone Co. v. Thompson, 113 S.W.3d 178, 181 (Ky. 2003), ruled the question of whether a settlement exists between parties to a workers' compensation claim is not controlled by form over substance. The Court further held correspondence between parties may be sufficient to constitute a memorandum of agreement provided there are no assertions that the terms of the agreement are incomplete. Id. Such an agreement does not have to appear in the form of a single document signed by the parties, i.e., the standard Form 110 customarily utilized to memorialize settlements in workers' compensation claims. Id. at 180-181. There must be, however, sufficient documentary evidence of record when

taken together to comprise the "memorandum," which KRS 342.265(1) "says shall be filed." Id. at 181.

However, as stated earlier, in the case *sub judice,* neither a motion nor supporting evidence pertaining to the alleged settlement agreement was properly introduced into the record before the ALJ. Likewise, the ALJ made no fact-finding relative to the issue. Before the ALJ could provide any resolution as to whether a settlement agreement was reached by the parties, a verified motion to approve the settlement was required to be filed, after which a reasonable period of proof time would have been allowed, during which the parties could have submitted evidence concerning the issue. At the conclusion of proof time, the ALJ would then be required to issue a decision addressing whether the alleged terms and substance of the agreement and whether an enforceable settlement exists. Id. Then, and only then, would the matters raised by the parties concerning the ALJ's decision with respect to the settlement issue be ripe for review on appeal. In this instance, however, this procedure was never initiated. Therefore, the ALJ correctly denied the petition for reconsideration as the issue regarding whether a settlement was reached was never properly before him.

This situation differs from the factual scenario set forth in Hudson v. Cave Hill Cemetery, 331 S.W.3d 267 (Ky. 2011). There, the ALJ to whom the claim was initially assigned determined there was no enforceable settlement agreement. Because she made that determination, this Board remanded the claim to her to conduct a proper inquiry as to the existence of the agreement. In this instance, the ALJ made no such finding. He determined the issue regarding whether a settlement had been reached was never properly brought before him.

We additionally note this situation differs from that presented in Cross Maintenance, LLC v. Mark R. Riddle, Claim No. 2012-70373 (August 15, 2014), which is not cited for authority. In that instance, Riddle filed a verified motion to enforce a settlement which was reached after the ALJ rendered his decision. There, the ALJ appropriately set aside the decision, and allowed for the introduction of evidence to determine whether a settlement had been reached, and was enforceable. Here no such motion was filed, and the mechanism for the ALJ to make such determination was never set in motion.

Because this issue was never properly brought before the ALJ for consideration, and never properly preserved, the February 20, 2015 opinion, award and order,

and the April 3, 2015 order on reconsideration, rendered by Hon. Steven G. Bolton are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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