

RENDERED: MARCH 26, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001845-WC

MATTHEW HUDSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-99674

CAVE HILL CEMETERY; HON.  
JOHN B. COLEMAN, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Matthew Hudson appeals the September 4, 2009,  
opinion of the Commonwealth of Kentucky Workers' Compensation Board. That

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

opinion reversed the earlier opinion of an administrative law judge (ALJ) which ruled that a valid settlement agreement existed between Hudson and Cave Hill Cemetery with respect to Hudson's workers' compensation rights. Because we hold that the Board did not err in its decision, we affirm.

The procedural facts of this case are convoluted at best. Hudson's medical history is irrelevant to this appeal and therefore will not be discussed. Hudson's original claim for workers' compensation benefits was settled on January 31, 2003; the settlement did not include a waiver of future medical benefits. On October 6, 2006, Hudson filed a motion for payment of medical bills. In response, Cave Hill filed a motion to reopen and a medical fee dispute challenging inpatient treatment for depression and suicidal tendencies. A final hearing was held on September 19, 2007, before ALJ Marcel Smith, who ordered that both parties file concurrent briefs within thirty days. The issue in dispute is the existence of a settlement agreement between the parties, allegedly reached after the September 19, 2007, hearing but prior to the ALJ's November 15, 2007, order.

Hudson's attorney, Edward A. Mayer, testified that on October 16, 2007, he received a telephone call from claims adjuster Tracy Walnista, offering \$500,000.00 for dismissal of the action in full. According to Mayer, the offer included a Medicare set-aside; was only good until October 19, 2007; and would not be extended. On October 19, 2007, Mayer faxed Walnista an acceptance of the offer and informed her that Hudson had not yet been approved for Social Security disability benefits (SSD). In response, Walnista wrote a letter to Mayer indicating

that the fax accepting the offer had been received and that a copy of the claim file had been forwarded to Cave Hill's defense attorney, Ronald Pohl. Walnista also indicated that, because Hudson had not yet been approved for SSD, she was uncertain about how to proceed with the Medicare set-aside, and had therefore contacted NuQuest for guidance.

Mayer next contacted Pohl and advised that there was no need for the parties to file briefs with the ALJ, as a settlement had been reached between the parties. Pohl indicated that he was not aware of the offer, that he thought the amount was too much, and that he would have to confirm the settlement with Cave Hill. Neither party filed a brief with the ALJ. Mayer would later indicate that he had contacted Pohl on multiple occasions inquiring as to the receipt of the Form 110 Settlement Agreement, but that the form was never sent.

On November 15, 2007, ALJ Smith ordered that Cave Hill was no longer responsible for Hudson's psychiatric and psychological treatment or medications but was responsible for a rehabilitation and detoxification program. According to Mayer, on November 20, 2007, Pohl sent a letter to Mayer indicating that there was no agreement. The record fails to produce a copy of this letter. On November 26, 2007, Mayer sent a letter to Pohl which referenced the November 20, 2007, letter; included a copy of the October 19, 2007, fax accepting the offer; and indicated that Mayer expected the offer to stand despite Pohl's delays in preparing the Form 110.

Hudson filed a motion for reconsideration on November 26, 2007, and cited a pending settlement between the parties. Cave Hill filed a response maintaining that no agreement existed. On November 29, 2007, Pohl drafted a letter to Mayer in which he cited the fact that he was not a party to the settlement discussions as the cause for complications. Pohl also indicated that he hoped to resolve the matter. On December 19, 2007, an order was entered denying the motion for reconsideration and stating “there is no enforceable [a]greement pursuant to [Kentucky Revised Statutes] KRS 342.265.” Hudson then appealed to the Board.

On March 21, 2008, the Board dismissed the appeal and held that the alleged settlement agreement was neither properly presented to the ALJ for a determination nor preserved for appeal before the Board. The Board also vacated the portion of the ALJ’s order denying reconsideration which stated that there was no settlement agreement. In so doing, the Board stated that in order for the issue to be ripe for appeal, a verified motion to approve the settlement must be filed before the ALJ; the parties should be allowed to present evidence as to the existence of the agreement; and the ALJ should then issue a decision as to whether or not an enforceable agreement existed.

A hearing was held before ALJ John Coleman on January 7, 2009. On January 26, 2009, Hudson filed a verified motion to enforce the alleged settlement agreement, to which Cave Hill filed a response. On March 6, 2009, ALJ Coleman found that a valid settlement agreement existed between Hudson and

Cave Hill and compared the case to that of *Coalfield Telephone Co. v. Thompson*, 113 S.W.3d 178 (Ky. 2003), wherein it was held that correspondence between the attorneys constituted a sufficient memorandum of an agreement. Cave Hill filed a motion for reconsideration on March 24, 2009, which was denied on April 15, 2009. Cave Hill then appealed ALJ Coleman's decision to the Board.

On appeal to the Board, Cave Hill argued that there was no enforceable settlement agreement, pursuant to KRS 342.265, because there is no memorandum of agreement that was signed by the parties, filed with the commissioner, and approved by an ALJ. The Board agreed with Cave Hill, found that a settlement agreement did not exist, and reversed the decision of the ALJ. This appeal followed.

Our review of a decision of the Workers' Compensation Board is limited to observing whether "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The burden of persuasion is on the claimant to prove each of the essential elements of his or her cause of action. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). "In reviewing the evidence, the court may not substitute its judgment for that of the board as to the weight of evidence upon questions of fact." *Stovall v. Collett*, 671 S.W.2d 256, 257 (Ky. App. 1984).

On appeal, Hudson argues that the Board erred as a matter of law when it reversed the ALJ with directions to enter an order that no settlement

agreement existed between the parties. The law regarding contracts, including settlement agreements, is firmly established in the state of Kentucky. However, the nexus of this case falls outside the realm of general contract law and is instead governed by specific workers' compensation laws. The use of settlement agreements in workers' compensation claims is governed by KRS 342.265(1), which states, in relevant part:

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 executive director, and, if approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305.

Hudson argues that the correspondence between the parties constitutes a memorandum as envisioned by KRS 342.265(1) and, therefore, an agreement exists. In support of this argument, Hudson cites to the *Coalfield* case relied on by ALJ Coleman. The facts of *Coalfield* involve a claimant who had accepted a settlement offer but died before the agreement could be filed with, and approved by, the ALJ. The Kentucky Supreme Court held that the correspondence of the attorneys constituted a memorandum sufficient to constitute an agreement.

*Coalfield*, 113 S.W.3d at 179. In so holding, the Court noted that the correspondence indicated the complete terms of the agreement, and there was no assertion that the terms were incomplete. *Id.* at 181. Thus, the Court concluded that the ALJ should have focused on the substance of the agreement, rather than its form. *Id.*

Unlike the correspondence in *Coalfield*, the correspondence in the case before us did not indicate the terms of the agreement, and Cave Hill asserts that the terms were incomplete. More specifically, Cave Hill argues that the amount that was to be appropriated between Hudson and Medicaid had not yet been determined. In its opinion, the Board noted the same distinguishing facts between the *Coalfield* case and the case *sub judice* to signify that the parties had not yet reached a mutual understanding. The Board thus held that the terms of the agreement remained undefined and incomplete because the correspondence between the parties failed to state, in specific terms, precisely how the settlement was being allocated. The Board concluded that ALJ Coleman had inserted nonexistent terms into the agreement and his finding should, therefore, be reversed. We agree.

The correspondence between then counsel for Hudson and Cave Hill failed to set out the specific terms of the agreement and, therefore, failed to provide the substance which the Court in *Coalfield* so heavily relied upon. As the Board noted, there was no mutual understanding between the parties. The ambiguous details of the proposed settlement are reflected by the ALJ's addition of requisite terms in an effort to make it whole. Such an act is outside the scope of the ALJ's authority; creating the settlement is the task of the parties. Accordingly, Hudson has failed to show that the Board overlooked or misconstrued the application of KRS 342.265(1) and has further failed to show that the Board erred in its refusal to apply the holding of *Coalfield* to the facts at hand.

For the foregoing reasons, the Board's opinion of September 4, 2009, is affirmed.

LAMBERT, JUDGE, CONCURS IN RESULT ONLY.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion. I do not believe that Cave Hill should be permitted to avoid its obligation established through the formation of a valid settlement agreement with its employee, Hudson. I will begin with an analysis of the applicable statute and then turn to the law of civil settlements.

*Coalfield Telephone Co. v. Thompson*, 113 S.W.3d 178, 180-81 (Ky. 2003), permits a claimant to bind his employer to the terms of a workers' compensation settlement even though the formation of the settlement agreement did not strictly comply with KRS 342.265(1). In *Coalfield*, the court stated that the legislature's intent in enacting KRS 342.265 was to protect employees against unfair settlements from their employers and that the statute should not be narrowly interpreted to permit the frustration of its purpose. *Id.*

On October 16, 2007, Tracy Walnista, Senior Claims Representative for One Beacon Insurance, contacted Hudson's counsel, Edward A. Mayer, and offered \$500,000 for a complete and total dismissal of the action; stipulated in the offer was that any Medicare set-aside allocation be made from the \$500,000. On

October 19, 2007, Hudson's counsel completed a fax to Walnista indicating his acceptance of the offer of \$500,000.

Walnista responded to the fax by letter addressed to Hudson's counsel that same day indicating that she had received the fax agreeing to accept the offer in the amount of \$500,000 as a full and final resolution of the workers' compensation claim. Her letter indicated that a copy of the claim file was forwarded to the employer's attorney, Ronald Pohl, to draft the settlement papers. The letter also advised that the claims adjuster had contacted Nu Quest to obtain information on handling the Medicare set-aside issue in light of the fact that Hudson was appealing the denial of his application for SSD benefits. The letter concluded by thanking Hudson's counsel for his timely response to the offer.

At page 804 of the record, the Administrative Law Judge stated:

Hon. Edward Mayer was able to testify in front of the Administrative Law Judge at the hearing held herein. Mr. Mayer was very credible in his assertions that a settlement agreement had been reached based upon the terms of a complete buyout of the entirety of the plaintiff's claim for the sum of \$500,000. He credibly testified that it was his understanding, pursuant to the correspondence of the parties, that defense counsel would be responsible for drafting the final agreement.

The ALJ further found that:

...based upon the correspondence between plaintiff's counsel and the insurance adjuster, it seems pretty clear that an offer was made for a complete buyout of the plaintiff's rights under KRS Chapter 342 in the amount of \$500,000. It also seems clear that the offer was accepted with the understanding that the amounts would

be clarified once the Medicare set aside information was obtained.

Neither party notified the ALJ after their settlement nor did Hudson file a brief. The ALJ then proceeded to render a ruling on pending motions and, thereafter, issued an order which reduced the employer's liability for some of Hudson's medical expenses. With the favorable ruling, employer's counsel contacted Hudson and informed him that there was no workers' compensation settlement.

Here, the evidence clearly established that both parties entered into a valid workers' compensation agreement within the meaning of KRS 342.265. Similar to *Coalfield*, Hudson and his employer agreed on all of the material elements of their settlement agreement. In exchange for \$500,000, Hudson agreed to a complete release of all obligations of the carrier and employer. Although the majority disagrees, these written correspondences constituted a memorandum of an agreement between the employee and his employer. The terms of their agreement are clearly spelled out and the employer's subsequent allegation that the agreement is missing essential terms is without merit.

I further note that a settlement agreement is valid "if it satisfies the requirements associated with contracts generally, *i.e.*, offer and acceptance, full and complete terms, and consideration." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky.App. 2002). Because a settlement agreement is a contract, its unambiguous terms must be given effect to effectuate the parties'

intent at the time the contract was formed. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005). Accordingly, Cave Hill cannot escape its obligations from the settlement agreement entered into by the parties. While its situation changed, maybe even substantially, it is required to fulfill its obligation at the time the contract was formed and forward Hudson \$500,000. Pursuant to the settlement agreement, Hudson would be responsible for all claims by health providers, Medicare, or any other claim against the proceeds of the settlement.

Therefore, in view of our legislature's intent to prohibit employers from entering unfair settlements with distressed employees and the law of civil settlements, Hudson should not be denied the benefit of a bargain that he obtained by agreeing to the complete dismissal of all claims. To hold otherwise would be to permit Cave Hill to unjustly gain at the expense of its employee.

This is basic contract law. An offer was made and acceptance of that offer was tendered. The offer was clear and unequivocal as found by the ALJ. The consequences of the majority opinion will be that no two lawyers can settle a case prior to the date of approval of the settlement by the ALJ. Every offer can be withdrawn. Every acceptance can be withdrawn up until the date of the approval by the ALJ. The consequences of such a decision will cause chaos in the everyday dealings between attorneys in workers' compensation cases.

The legislative intent to require approval of the settlement agreement by an ALJ was to protect unrepresented workers from unconscionable settlements.

Therefore, as stated by our Supreme Court in *Coalfield*, I believe that the majority ruling places form over substance.

I would reverse.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, CAVE  
HILL CEMETARY:

Melanie B. Gabbard  
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