RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2002-CA-001522-WC

ST. JOSEPH HOSPITAL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-00933

NANCY BRATTON; HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: St. Joseph Hospital has petitioned for review of an order of the Workers' Compensation Board entered on July 12, 2002. The Board dismissed St. Joseph's appeal from the Administrative Law Judge's order entered on May 31, 2002, on grounds that the order was interlocutory and not appealable. Having concluded that the Board erred in dismissing St. Joseph's appeal, but that the ALJ was correct in granting Nancy Bratton's motion to reopen and by ordering St. Joseph to pay for Bratton's

knee replacement surgery, we vacate the Board's order dismissing St. Joseph's appeal, and remand with instructions to enter an order affirming the ALJ's order and award.

Bratton was employed by St. Joseph as a central supply technician from approximately October 1977, through June 1999.[1] On February 5, 1998, Bratton was carrying her lunch tray to a table in St. Joseph's cafeteria when a small "dip" in the floor caused a "slip and fall" type accident in which Bratton severely injured her left knee. Approximately one month later, on March 11, 1998, Dr. Gregory D'Angelo performed an arthroscopy on Bratton's knee. Dr. D'Angelo reported that Bratton had "grade 4 chondromalacia," which he described as being the worst level of damage to the knee's cartilage and other tissues. Bratton eventually returned to work at St. Joseph, but she was restricted in the types of activities she could perform.

Despite having undergone the arthroscopy, Bratton continued to experience pain in her left knee. Dr. D'Angelo testified that around October 1999, he formed the opinion that total knee replacement surgery would be required to completely alleviate Bratton's pain and other complications. Dr. Edward Berghausen evaluated Bratton on October 6, 1998, and opined that

[1] According to Bratton's testimony, "central supply" is the area of the hospital where various pieces of equipment from throughout the hospital are sent to be sterilized in preparation for use on the next patient. Bratton testified that her job required a great deal of stooping, bending, and lifting.

she was not a candidate for total knee replacement.[2] Dr. Berghausen further assigned Bratton a functional impairment rating of 3%.

Approximately one year later, on November 16, 1999, Dr. Craig Roberts examined Bratton pursuant to a KRS[3] 342.315 evaluation.[4] Dr. Roberts opined at that time that Bratton was not a candidate for knee replacement surgery, but that she would likely require such surgery in the next five to ten years. Dr. Roberts assigned Bratton a functional impairment rating of 12%, but attributed 25% of her impairment to the natural aging process.

On March 29, 2000, a settlement agreement between Bratton and St. Joseph was approved by the ALJ. St. Joseph agreed to pay Bratton a lump sum of $23,485.38, even though it was typically St. Joseph's policy to pay settlements in periodic amounts as provided for in the workers' compensation statutes. The settlement amount was reached by assigning Bratton an initial impairment rating of 10%. Pursuant to KRS 342.730, this figure was then multiplied by factors of 1.25 and 1.50, which

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[2] Dr. Berghausen testified that he was a part of a referral service called "Case Consultants." He further testified that St. Joseph would often refer injured workers to him for medical evaluations.

[3] Kentucky Revised Statutes.

[4] Among other things, KRS 342.215 authorizes an ALJ to direct the appointment of a medical evaluator to examine an injured employee.

led to a total impairment rating of 18.75%.[5] According to St. Joseph, at the time the parties reached the settlement agreement, KRS 342.730 provided that the multiplying factor for a 10% impairment rating was 1.00, and the 1.50 factor applied only to those cases where it was determined that the employee was unable to return to work. St. Joseph contends that it agreed to pay Bratton a settlement based on a higher impairment rating than required and in a lump sum amount, in exchange for Bratton agreeing to waive her claim against St. Joseph for the costs of knee replacement surgery.

On September 12, 2001, Bratton filed a motion to reopen based on a "medical fee dispute." Bratton claimed that her knee condition had worsened and that the parties' settlement agreement did not preclude her from seeking to hold St. Joseph liable for the costs of knee replacement surgery. St. Joseph objected to the reopening, arguing that Bratton had not established a worsening of her condition, and that because Bratton had waived any claims against St. Joseph for a knee replacement, there was no "medical fee dispute." On October 22, 2001, the ALJ found that Bratton had set forth a prima facie case for reopening and granted Bratton's motion.

[5] KRS 342.730(b) provides guidelines for determining an injured worker's benefits when there has been a permanent partial disability. The employee's wages are first multiplied by an impairment rating. This figure is then multiplied again by a corresponding factor provided in the statutory guidelines.

Following a benefit review conference held on February 6, 2001, and a formal hearing held on February 21, 2001, the ALJ entered an opinion, order, and award regarding Bratton's motion to reopen. The ALJ found that "there was not in fact adequate consideration given [by St. Joseph] for the waiver for total knee replacement [ ] surgery[.]" Thus, the ALJ ruled that the settlement agreement in which Bratton allegedly waived any claim against St. Joseph for a total knee replacement failed for lack of consideration and the settlement agreement did not preclude her from reopening her claim on this issue. The ALJ further found that even if St. Joseph had provided sufficient consideration to render Bratton's waiver binding, her conditioned had "worsened." Therefore, pursuant to KRS 342.125, the ALJ ruled that the knee replacement issue was subject to reopening.

Based upon the ALJ's further findings that Bratton's knee condition had in fact worsened, the ALJ ordered that St. Joseph and/or its insurer would be liable for the costs of Bratton's knee replacement surgery if she elected to undergo that procedure. The ALJ further ordered St. Joseph and/or its insurer to pay Bratton temporary total disability (TTD) benefits pursuant to KRS 342.730(1)(a), until she achieved maximum medical improvement. Bratton's claim was ordered to be held in abeyance until maximum medical improvement was achieved. St.

Joseph appealed the ALJ's order to the Board. However, on July 12, 2002, the Board held that St. Joseph was appealing from an interlocutory order and therefore dismissed St. Joseph's appeal. This petition for review followed.

St. Joseph first argues that the Board erred by dismissing its appeal as interlocutory. In its response to Bratton's motion to dismiss before the Board, St. Joseph argued:

> This matter [ ] was before ALJ Cowden on a medical fee dispute, wherein the primary issue was whether waiver language in a settlement agreement was enforceable to bar [Bratton] from claiming medical expenses for knee replacement surgery. Thus, the ALJ's decision, made by entry of an Opinion and Award [in which it ordered that St. Joseph be held liable for Bratton's knee replacement surgery], was, in fact, dispositive of the issues presented in the medical fee dispute. By definition, therefore, this appeal is not interlocutory, and may proceed.

We agree with St. Joseph's argument on this issue and hold that the Board erred by dismissing St. Joseph's appeal as interlocutory.

In its order dismissing St. Joseph's appeal, the Board relied on the cases of Transit Authority of River City v. Saling,[6] and KI USA Corp. v. Hall.[7] However, those cases are distinguishable from the case sub judice. In Saling and Hall,

[6] Ky.App., 774 S.W.2d 468 (1989).

[7] Ky., 3 S.W.3d 355 (1999).

the injured worker in both cases applied for and received an award for interlocutory TTD benefits from the ALJ pursuant to 803 KAR[8] 25:010, Section 12. As our Supreme Court explained in Hall, "[i]nterlocutory awards are appropriate only in instances where the affected individual 'will suffer irreparable injury, loss or damage pending a final decision on the application.'"[9] In the case at bar, Bratton was not seeking interlocutory relief; rather, she filed a motion to reopen her case on the basis of a medical fee dispute.

A review of the record shows that in the parties' motions and briefs filed with the ALJ, the issue of whether Bratton had shown the requisite "irreparable injury, loss or damage" to entitle her to interlocutory relief was never raised. Further, as the ALJ noted in his order and memorandum following a benefit review conference held on February 6, 2002, the primary issue before the ALJ was the legal effect of the waiver language contained in the parties' settlement agreement. In short, there is nothing in the record indicating that either the parties or the ALJ contemplated that Bratton was seeking interlocutory relief.[10] Unlike the facts of Saling and Hall, the

[8] Kentucky Administrative Regulations.

[9] Hall, 3 S.W.3d at 358 (citing 803 KAR 25:010, § 11(3) which has been renumbered as § 12(4)(a)(2)).

[10] The ALJ's order holding St. Joseph liable for Bratton's knee replacement and TTD benefits is titled "Opinion, Order and Award Upon Reopening Opinion

ALJ in the instant case ordered St. Joseph to pay for Bratton's knee replacement and to pay her TTD benefits pursuant to KRS 342.020 and KRS 342.730 respectively; it did not order those payments under the interlocutory scheme found under 803 KAR 25:010, Section 12. Hence, Saling and Hall are inapplicable to the facts of the case sub judice.

A final and appealable order is one which either "'terminates the action itself or operates to divest some right in such manner as to put it out of the power of the court making the order after the expiration of the term to place the parties in their original condition.'"[11] As St. Joseph correctly points out, the ALJ's determination that the language in the parties' settlement agreement was not an effective waiver of future medical benefits and that St. Joseph would therefore be liable for Bratton's knee replacement surgery, was a final order that divested St. Joseph of the right to refuse payment under the settlement agreement. Hence, the ALJ's order was therefore final and appealable. Accordingly, we hold that the Board erred by dismissing St. Joseph's appeal as interlocutory.

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and Order On Interlocutory Relief." Since this order makes no further reference to the requirements for interlocutory relief, we must conclude that the inclusion of the words "Interlocutory Relief" was merely a clerical error.

[11] Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228, 231 (1939)(quoting Green River Fuel Co. v. Sutton, 260 Ky. 288, 84 S.W.2d 79, 81 (1935)). See also Davis v. Island Creek Coal Co., Ky., 969 S.W.2d 712 (1998).

The only remaining issue is whether the ALJ was correct in granting Bratton's motion to reopen. Since this is a question of law, we have determined in the interest of judicial economy that it would be proper for this Court to address this issue on the current appeal, rather than remand the case to the Board.

St. Joseph argues that the waiver language in the parties' settlement agreement precludes Bratton from seeking to hold St. Joseph liable for the costs of her knee replacement surgery. We disagree with St. Joseph, but for different reasons than those stated by the ALJ.

The ALJ found that "there was not in fact adequate consideration given for the waiver for total knee replacement or mosaic-plasty surgery on [Bratton's] left knee." We believe the ALJ erred in measuring the adequacy of consideration, rather than limiting his determination to whether there was in fact consideration given by both parties. In order for an agreement to be binding, there must be consideration, "but the adequacy of the consideration cannot be inquired into if there is something of detriment to one party or benefit to the other, however slight."[12]

In the case at bar, there was a bona fide dispute with respect to Bratton's impairment rating. Dr. Berghausen assigned

[12] Posey v. Lambert-Grisham Hardware Co., 197 Ky. 373, 247 S.W. 30, 33 (1923).

her a rating of 3%, while Dr. Roberts assigned a rating of 12%. Both parties have admitted that the final 18.75% impairment rating, which included the factors of 1.25 and 1.5, was a compromise between the parties that had been reached during negotiations. Further, St. Joseph agreed to pay a lump sum amount to Bratton, as opposed to its normal practice of paying in periodic installments. Thus, St. Joseph agreed to the higher impairment rating and the lump sum payment in exchange for Bratton agreeing to the waiver language. Accordingly, we hold that the agreement was supported by consideration; both parties incurred a detriment and/or received a benefit as a part of the negotiations.

We now turn to the language of the settlement agreement itself. "An agreement to settle a workers' compensation claim constitutes a contract between the parties."[13] The construction and interpretation of contracts are questions of law for the court.[14] Questions of law are subject to de novo review on appeal.[15] The intention of the contracting parties should be ascertained by construing the contract as a whole.[16]

[13] Whittaker v. Pollard, Ky., 25 S.W.3d 466, 469 (2000).

[14] Cinelli v. Ward, Ky.App., 997 S.W.2d 474, 476 (1998).

[15] Id.

[16] Bullock v. Young, 252 Ky. 640, 651, 67 S.W.2d 941, 946 (1933).

If the contract contains inconsistent clauses, those clauses should be reconciled if possible.[17]

In support of its argument that Bratton has waived her right to seek payment for her knee replacement surgery, St. Joseph relies on the following language from the settlement agreement:

> Plaintiff, Nancy Bratton, waives and dismisses her claim for a total knee replacement, and/or mosaic-plasty surgery, of her left knee, as part of the consideration for settlement.

However, above this quoted language is a sentence which states: "Does settlement amount include waiver or buyout of ____ past or _____ future medical expenses?" In response, the parties checked the blank space marked "No." Directly underneath this sentence, is the following: "If yes, settlement amount for waiver or buyout: $_____". The parties inserted "N/A."[18]

Hence, the settlement agreement contains some seemingly inconsistent provisions. However, we conclude that these provisions can be reasonably reconciled so as to give effect to the agreement as a whole. The quoted language that St. Joseph relies upon makes no mention of future medical expenses. On the other hand, the other provision makes specific mention of future medical expenses. Therefore, we conclude that

[17] Black Star Coal Corp. v. Napier, 303 Ky. 778, 781, 199 S.W.2d 449, 451 (1947).

[18] We assume this is an abbreviation for "not applicable."

this settlement agreement must be interpreted to provide that Bratton agreed to waive her claim for knee replacement surgery at the time the agreement was reached, but that she did not waive a future claim that might arise if her condition worsened. Accordingly, we hold that it was proper for the ALJ to grant Bratton's motion to reopen.

Following the ALJ's order granting Bratton's motion to reopen, there was substantial evidence presented to the ALJ supporting his decision to order St. Joseph to pay for Bratton's knee replacement surgery and to pay her TTD benefits. Dr. D'Angelo testified that since March 29, 2000, the day the settlement agreement was approved by the ALJ, Bratton's condition had worsened and that in his opinion, knee replacement surgery was necessary to alleviate both her pain and complications. Dr. D'Angelo specifically stated that a "total knee replacement would be a reasonable and necessary procedure for the cure and/or relief of [Bratton's] left knee condition." Further, Bratton also testified that her condition had worsened. Specifically, Bratton stated that her ability to sleep through the night had been hampered and that it "has changed my whole life." Considering the fact that St. Joseph presented no evidence to the contrary, we hold that there was substantial evidence before the ALJ supporting his decision, and that St. Joseph failed to meet its burden of showing that the knee

replacement surgery was unnecessary.[19] Accordingly, we affirm the order of the ALJ holding St. Joseph liable for the costs of Bratton's knee replacement surgery and for the payment of TTD benefits.

Based on the foregoing, the order of the Board dismissing St. Joseph's appeal is vacated, and this matter is remanded to the Board with instructions to enter an order affirming the ALJ's award.

ALL CONCUR.

BRIEF FOR APPELLANT:

David C. Trimble
Lexington, Kentucky

BRIEF FOR APPELLEE:

David R. Marshall
Lexington, Kentucky

[19] National Pizza Co. v. Curry, Ky.App., 802 S.W.2d 949, 951 (1991).