RENDERED: MAY 18, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000200-WC

PAMELA ALVEY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-00947

FORD MOTOR COMPANY; HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, MOORE, AND NICKELL, JUDGES.

ACREE, JUDGE: Pamela Alvey (Alvey) appeals from the December 29, 2010, opinion of the Workers' Compensation Board (Board). That judgment affirmed the July 19, 2010, opinion and order of Hon. Grant Roark, Administrative Law Judge (ALJ), dismissing Alvey's claim for workers' compensation benefits and holding that a settlement agreement between Alvey and her employer, Ford Motor

Company (Ford), was unenforceable. Because we hold that the ALJ and the Board erred by applying the wrong legal analysis, we reverse and remand for further proceedings.

Because Alvey does not challenge those portions of the ALJ's order which pertain to her claim for workers' compensation benefits, the facts surrounding her injuries will not be addressed. Instead, this opinion concerns the ALJ's failure to enforce an alleged settlement agreement reached between the parties. The facts surrounding the formation of the agreement were conceded among the parties during the final hearing for Alvey's claim, held on May 19, 2010. The testimonies of Alvey's attorney, Wesley Gatlin, and Ford's attorney, Phillipe Rich, were reduced to writing by the Board. That transcript reads as follows:

> Judge Roark: All right; if there's no other witnesses, then with respect to the issue – and this is a bit unusual for this, but with respect to the issue about whether there's an enforceable settlement agreement, obviously the only real parties with any great knowledge of – of what was represented are counsel for the Plaintiff and counsel for the Defendant. And, we discussed before we went on the record that the only way I know of to address that is take any – come to any agreement on what was relayed and what was represented is just to have each of you explain your understanding of – of what was represented. And, you know, it may be that there's no disagreement as to the material representation. It just may be –
>
> Mr. Gatlin: – Let Phil go ahead and – I'm sure I will agree with him.
>
> Judge Roark: Go ahead, Mr. Rich.

Ms. Alvey: Is the recorder off?

Mr. Rich: No – well, we had – after the last BRC, we had some discussions about settlement. Wes eventually sent me – I think we – I made a demand at one point. There was a little bit of confusion about the demand – what it was and what it involved. I did get a letter from Wes, which I attached to my motion to enforce, which was for $35,000.00 for dismissal. I talked with Ms. Alvey about that, and we responded with a counter-offer of $50,000.00, I believe it was, which I communicated to you, Wes, and we were doing this over the telephone. I don't think I sent you any emails or faxes.

Mr. Gatlin: Not that I know of.

Mr. Rich: I'm pretty sure I didn't. And, I'm pretty sure when I made the offer for $50,000.00 we talked – we spoke at that time. We didn't just leave voice mails. And, then you responded to me through – I think it was a voice message – that you had $45,000.00. I am not a hundred percent certain whether we spoke or whether – whether it was just a voice mail. I – based on that information, I contacted Ms. Alvey. She accepted. I telephoned you, and said we accept the $45,000.00. Please draw up the papers and let Judge Roark know that the – that we're settled. And, I didn't hear anything again until I got a message from you stating that there was a problem. And, that's when we spoke, after that.

Mr. Gatlin: That's correct. Oh, I'm sorry.

Judge Roark: How many – how long was that between the time that you left the message for Gatlin saying you would accept that and the time that he got back with you saying that?

Mr. Rich: I would say, you know – to me, sometimes it – you know, it seemed like about a week, but it may have been longer than that.

Mr. Gatlin: I don't know exactly, Judge, either. I mean, around that.

Judge Roark: Anything you want to add, Mr. Gatlin?

Mr. Gatlin: No, I said, I agree with the statement Mr. Rich made.

Judge Roark: And, because I don't know that we have any of this on the record, in terms of, I guess, the background behind the representation that you made to Mr. Rich, and why the –

Mr. Gatlin: You want me to state that?

Judge Roark: Yes.

Mr. Gatlin: Okay; I thought that I had authority to make the offer that I did. After I had made it, and after he had accepted it, I found out that it had not been authorized. There's more than one person that has to authorize a settlement in that amount. And, one of the people had not approved it and did not approve it. And, so, really I didn't have the authority to offer what I did.

Judge Roark: And you didn't find that out until after the message that you received from Mr. Rich where he said he was accepting that – the amount?

Mr. Gatlin: Right.

Judge Roark: Okay; anything else we need to add?

Mr. Rich: What's the name of the fellow what we're talking about who – who put the kibosh on the whole thing?

Mr. Gatlin: That's the plant manager. I don't even know his name.

Mr. Rich: Okay.

> Mr. Gatlin: That's the thing. I'm not in contact with each one of these people, so I don't really poll them and say, now, did you agree and you agree? I just, as I say, mistakenly thought that everybody had signed off on it and had not.

On July 19, 2010, the ALJ's order was entered, which held that the no enforceable agreement existed between the parties because it had been invalidated before it was reduced to writing, and was incomplete. In support of his decision the ALJ cited to the unpublished opinion of *Hudson v. Cave Hill Cemetery*, 2010 WL 1132558 (Ky. App. 2010). Alvey filed a petition for reconsideration, which was denied, and subsequently appealed to the Board. In an opinion dated December 29, 2010, the Board affirmed the ALJ's opinion and also cited to the *Hudson* case as controlling. This appeal followed.

An ALJ's decision is "conclusive and binding as to all questions of fact" and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.285. This Court's review is limited to that of the Board but also to errors of law which may arise before the Board. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999); KRS 342.290. Therefore, our task "is to correct the Board only where the . . . Court perceives 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).

Approximately one month after the Board's December 29, 2010, opinion affirming the ALJ, the Kentucky Supreme Court affirmed this Court's holding in

Hudson. *Hudson v. Cave Hill Cemetery*, 331 S.W.3d 267, 271 (Ky. 2011). The employee in *Hudson* alleged that an agreement had been evidenced by the existence of numerous items of correspondence between his attorney and the employer's attorney as well as his attorney and the claims adjuster for the employer's insurance company. *Id.* In response, the employer argued that the agreement was not enforceable because it had not been reduced to writing and the absence of certain terms regarding an agreed-to Medicare Set-Aside made it incomplete. *Id.* This Court held that an enforceable agreement did not exist and the Supreme Court agreed. *Id.* In so holding, the Supreme Court relied on the case of *Coalfield Telephone Company v. Thompson*, 113 S.W.3d 178 (Ky. 2003), which it summarized as holding 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."

We are of the opinion that the facts in the case *sub judice* are factually distinguishable from both *Hudson* and *Thompson*. Whereas the parties in both *Hudson* and *Thompson* disagreed as to the existence of an agreement, the parties herein conceded that an agreement had been reached. Indeed, as evinced by the hearing transcript, counsel for Ford specifically indicated that an offer had been made and accepted. Further, neither party alleged to the ALJ that the agreement was incomplete.[1] The question then becomes: when both parties concede the

[1] Although Ford maintains in its brief that the agreement was missing essential terms, such an argument was never presented to the ALJ. We do not read *Thompson* or *Hudson* as holding that a party may assert incomplete terms at any stage of the proceeding. Once a party has failed to assert the factual defense to the finder of fact, it cannot be presented for the first time to this

existence of an agreement and neither asserts that the agreement is incomplete, then does the rationale of *Hudson* and *Thompson*, by negative implication, compel the conclusion that an agreement does exist? We believe so.

Whereas the Court in *Hudson* and *Thompson* focused on the incomplete formation of an agreement, the relevant legal theory in the case now before this Court pertains to principal-agent relationship and whether Alvey's attorney was aware that Ford's attorney did not have the authority to enter into an agreement. It would be inequitable to punish Alvey for a misunderstanding, to which her attorney was not privy, between Ford and its agent, Mr. Rich. "It has been held that a principal is bound by the acts of the agent within the apparent scope of authority although the authority may be in fact limited, if one dealing with the agent is ignorant of limitations upon his authority." *May v. Ken-Rad Corp.*, 131 S.W.2d 490, 492 (Ky. 1939). Thus, it is possible that the agreement between the parties may be unenforceable based on a different legal analysis pertaining to principal-agent theory. Such a determination, however, is necessarily left to the finder of fact, and not this Court.

Because we hold that the Board and the ALJ improperly applied the holdings of *Hudson* and *Thompson* to an agreement which the parties concede existed, we reverse and remand with instructions to determine whether Ford,

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Court. *See Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (Ky. App. 1940) ("It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.").

and/or its attorney, should be compelled to honor the agreement that was made under the law as it pertains to principals and agents.

ALL CONCUR.

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