

RENDERED: DECEMBER 5, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001228-WC

CENTRAL BAPTIST HOSPITAL.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-73151

MARTY MAY;
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KRAMER,¹ AND STUMBO, JUDGES:

CAPERTON, JUDGE: The Appellant, Central Baptist Hospital, appeals the June 13, 2014, opinion of the Kentucky Workers' Compensation Board, as well as the September 11, 2013, and January 30, 2013, opinions and orders of the

¹ Judge Joy A. Kramer, formerly Judge Joy A. Moore.

Administrative Law Judge, and the opinions and orders issued on reconsideration by the Administrative Law Judge on February 6, 2014, and March 7, 2014. On appeal, Central Baptist argues that it was error to fail to enforce the revised settlement agreement between the parties, that proof should have been reopened to permit expert depositions, and that benefits should have been awarded pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)(2). Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

The Appellee, Marty May, sustained a herniated disc at T8-T9 while helping a patient get out of bed on June 30, 2012. At the time of the injury, May was employed by Central Baptist as a registered nurse in the Neo-Intensive Care Unit, a job which required significant lifting, pushing, and carrying, as most patients in that unit were incapacitated. At the time of her injury in this matter, May was a maximum wage earner under the Kentucky Workers' Compensation Act.

The parties introduced medical proof at and following the June 12, 2013, Benefit Review Conference (BRC). A week before the final hearing on June 12, 2013, May submitted the reports of two physicians. Central Baptist was unable to depose those physicians prior to the final hearing. Accordingly, at the conclusion of the hearing, the ALJ granted both parties thirty days to complete any additional proof. The ALJ further ordered that both parties submit briefs by June 25, 2013, on which date the case would stand submitted for decision. Following the hearing in this matter, May was transferred to a lighter duty job with less pay.

Following the hearing, the parties advised the ALJ that a potential settlement was being discussed.

Central Baptist subsequently sent a proposed settlement agreement to May's counsel on July 24, 2013. That agreement provided that temporary total disability (TTD) benefits would be paid from September 25, 2012, to October 22, 2012. It further indicated that "Non-MCO treatment denied." May did not accept the terms of the proposed agreement, and sought a longer period of TTD benefits; according to her counsel's August 13, 2013, letter, she sought payment of TTD through December 20, 2012. After May provided documentation, a revised agreement was sent to her counsel on September 4, 2013. The revised agreement indicated that Central Baptist agreed to pay all reasonable, necessary, and related medical expenses and that TTD benefits would be paid from September 25, 2012, to October 22, 2012, and again from November 16, 2012 through December 23, 2012.

As of July 25, 2013, neither party had submitted additional proof. As noted, the ALJ initially entered an opinion and order in this matter on September 11, 2013. Therein, the ALJ found that May sustained an injury to her thoracic spine, for which she was awarded permanent partial disability (PPD) benefits based upon an 8% impairment rating. Finding that May was unlikely to continue to earn the same or greater wage for the indefinite future, the ALJ enhanced the award by applying the three multiplier pursuant to KRS 342.730(1)(c)(1). The ALJ also awarded TTD benefits from October 8, 2012, through October 22, 2012.

On September 12, 2013, without knowledge of the ALJ's decision, May signed the revised agreement, but on the wrong line. On September 13, still without knowledge of the ALJ's decision, May returned to her attorney's office and signed on the correct line. On neither of those occasions did she discuss the revised settlement agreement with her attorney, who was unexpectedly hospitalized at the time for a health emergency. The agreement was forwarded to the ALJ along with a motion for attorney's fees, and was approved on September 16, 2013.

Thereafter, on September 23, 2013, Central Baptist filed a motion and affidavit to set aside the September 11, 2013, opinion and enforce the settlement agreement. That motion stated that the ALJ's office was informed of the initial agreement. Central Baptist also filed a September 25, 2013, petition for reconsideration, arguing that the ALJ did not make sufficient findings of fact regarding the enhancement of benefits. Central Baptist also argued that if the settlement agreement was not enforced, it should be granted additional proof time to depose Drs. Burke and Owen.

A hearing was held on December 18, 2013, at which time May and her counsel testified. Because he was hospitalized at the time, May's counsel was uncertain of the exact date upon which the revised Form 110 arrived at his office, and on which date May signed it. On September 16, 2013, he had been released from the hospital, at which time he informed May of the ALJ's opinion and order. May indicated that she wanted to "accept" the ALJ's opinion. Her counsel then

informed opposing counsel of her position on September 17th. May's counsel acknowledged that the revised Form 110 contained all of the revisions that May had requested but further stated that at the time May had signed the agreement, neither she nor her counsel were aware that the ALJ had issued an opinion.

Subsequently, on January 30, 2014, the ALJ issued an opinion and order holding that there was no meeting of the minds as to the terms of the revised Form 110 and, therefore, no settlement agreement. Accordingly, the ALJ denied the motion to set aside the September 11, 2013, opinion and order. Central Baptist then filed two petitions for reconsideration, challenging both the September 11, 2013, opinion and order, and the January 30, 2014, decision. Both were denied. Central Baptist then appealed to the Board, arguing that the ALJ erred in failing to enforce the revised settlement agreement and, alternatively, that the award of benefits pursuant to KRS 342.730(1)(c)(1) was unsupported by the evidence. Finally, Central Baptist requested additional proof time to permit cross-examination of Drs. Burke and Owen.

As noted, the Board issued an opinion in this matter on June 27, 2014, affirming the ALJ. In so doing, the Board held that the purpose of KRS 342.265, which addressed Kentucky workers' compensation settlement agreements, is to give the fact-finder an opportunity to pass upon the terms of compensation agreements, and to protect the interest of the worker. *Sub judice*, the Board found that the ALJ properly focused his analysis on whether there was a meeting of the minds and found, within his discretion, that there was not. The Board held that the

ALJ's finding that May never truly assented to the agreement in light of her lack of knowledge of the ALJ's award and the fact that she had not discussed it with her attorney was not devoid of evidentiary basis or entirely unreasonable.

Accordingly, the Board affirmed the ALJ.

Concerning the argument made by Central Baptist that benefits should have been awarded pursuant to KRS 342.730(1)(c)(2) instead of KRS 342.730(1)(c)(1), the Board held that the ALJ was acting within his discretion to rely on May's testimony and the medical reports of Drs. Brooks, Owen, and Burke, and that this evidence was sufficient to support the ALJ's finding on the applicability of the three multiplier.

Finally, concerning Central Baptist's request to reopen proof to take the depositions of Drs. Owen and Burke, the Board held that Central Baptist was not entitled to same. Finding that the ALJ, as fact-finder, had the authority to control the taking and presentation of proof in order to facilitate speedy resolution of the claim, the Board held that the ALJ properly did so in this instance in light of the facts below. It is from that opinion that Central Baptist now appeals to this Court.

On appeal, Central Baptist argues, as it did to the Board, that the ALJ erred in failing to enforce the revised settlement agreement and, alternatively, that benefits should have been awarded pursuant to KRS 342.730(1)(c)(2), and that proof should have been reopened to permit Central Baptist to take the depositions of May's experts. May disagrees, and asserts that there was not an enforceable

agreement, as there was no meeting of the minds between the parties. Further, she asserts that the ALJ properly determined that both the two and three multipliers were applicable, and that the three multiplier was more appropriate to apply *sub judice*.

Prior to reviewing the arguments of the parties, we note that the function of this Court on review is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We review this matter with this standard in mind.

We turn first to the assertion made by Central Baptist that the ALJ erred in refusing to enforce the revised settlement agreement. In reviewing this matter, we note that KRS 342.265 states, in pertinent part, that:

(1) 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 commissioner, and, if approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305.

As our Kentucky Supreme Court has previously held, the purpose of this statute is to provide the ALJ with an opportunity to review the terms of settlement agreements and to protect the interests of the worker. *Skaggs v. Wood Mosaic Corp.*, 428 S.W.2d 617 (Ky. App. 1968). As held by this Court in *Commerical Drywall v. Wells*, 860 S.W.2d 299 (Ky. App. 1993), an ALJ “may

look behind the settlement when an agreement appears not to be in the best interest of the worker, provided there is cause to do so.”

Sub judice, we believe that the ALJ correctly focused his analysis in this matter on whether there was actually a meeting of the minds between the parties. A review of the facts indicates that it is undisputed that the ALJ issued the September 11, 2013, opinion and order before the settlement agreement was submitted for approval. It is further undisputed that May was unable to discuss the revised agreement with her attorney before she signed it, due to his hospitalization. Finally, May changed her mind about the agreement after she had the opportunity to discuss the matter with her attorney.

From those facts, the ALJ concluded that May had never truly assented to the agreement. This was a factual finding made by the ALJ, which the Board correctly found it was without authority to disturb if supported by substantial evidence. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Indeed, it is the ALJ, as fact-finder, who has the sole discretion to determine the quality of the evidence and to draw reasonable conclusions therefrom. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Accordingly, we affirm.

Having so found, we now turn to the argument made by Central Baptist that benefits should have been awarded pursuant to KRS 342.730(1)(c)(2), or that proof time should have been reopened to permit cross-examination of Drs. Owen and Burke. In support of that argument, Central Baptist has directed this

Court's attention to May's testimony that her condition was improving. Further, it has asserted that the records of Drs. Brooks, Owen, and Burke fail to establish that May is unlikely to continue to earn an average weekly wage equal to or exceeding her pre-injury wage, and that their reports do not indicate that her condition is likely to worsen. Finally, Central Baptist has asserted that it cancelled the depositions of Drs. Owen and Burke as a result of the settlement, and that it would be prejudiced by not having that cross-examination as a part of the record.

As our courts have clearly held, when KRS 342.730(1)(c)(1) and KRS 342.730(1)(c)(2) are both clearly applicable, it is for the ALJ to determine which provision is more appropriate. *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). This determination includes consideration of a number of factors, only one of which is the ability to perform the current job. *Adkins v. Pike County Board of Education*, 141 S.W.3d 387, 390 (Ky. App. 2004). As held in *Adams v. NHC Healthcare*, 199 S.W.3d 163, 168 (Ky. 2006), "The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income."

Sub judice, the ALJ provided an explanation for his determination that the three multiplier was more appropriate by specifically stating that the determination was not based upon May's ability to continue her current employment, but was instead based upon the determination that she was unlikely to continue to earn a wage equal to or greater than that earned at the time of the injury, and that the injuries have permanently altered her ability to earn an income. This conclusion was based upon the medical reports of Drs. Brooks, Owen, and

Burke, including the work restrictions assigned by those physicians, as well as May's own testimony. Upon review, we are in agreement with the Board that, based on the totality of the evidence, the ALJ's determination that the three multiplier of KRS 342.730(1)(c)(1) was most applicable was not clearly erroneous. Accordingly, we affirm.

In affirming, we note our agreement with the Board that Central Baptist was not entitled to additional time to develop proof. As we have previously noted herein, the ALJ, as fact-finder, has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. *See Dravo Lime Co., Inc. v. Eakins*, 156 S.W.3d 283 (Ky. 2005).

Sub judice, upon agreement of the parties, the ALJ ordered that all proof be completed by July 25, 2013. Central Baptist, after undertaking settlement negotiations, voluntarily elected to forego taking the depositions of Drs. Owen and Burke. We believe that the ALJ properly limited proof-taking, and find no error in his determination to that end. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the June 13, 2014, opinion of the Kentucky Workers' Compensation Board, as well as the September 11, 2013, and January 30, 2013, opinions and orders of the Administrative Law Judge, and the opinions and orders issued on reconsideration by the Administrative Law Judge on February 6, 2014, and March 7, 2014.

KRAMER, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE

OPINION.

STUMBO, JUDGE, CONCURS.

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