

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: September 23, 2004  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0973-WC

DATE 10-14-04 EJA Groun+HDC

ST. JOSEPH HOSPITAL

APPELLANT

V.

APPEAL FROM COURT OF APPEALS  
2002-CA-1522-WC  
WORKERS' COMPENSATION BOARD NO. 99-0933

NANCY BRATTON; HON. BRUCE COWDEN,  
ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION  
BOARD; AND KENTUCKY COURT OF APPEALS

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

An Administrative Law Judge (ALJ) determined that the terms of an agreement to settle the initial workers' compensation claim did not bar compensation for future knee replacement surgery; that the claimant's present condition warranted such surgery; that she was entitled to temporary total disability (TTD) benefits from the date of surgery until she reached maximum medical improvement (MMI); and that her request for increased permanent income benefits must be held in abeyance pending the attainment of MMI. Although the employer appealed, the Workers' Compensation Board (Board) dismissed the matter on the ground that the ALJ's decision was interlocutory.

Concluding, however, that the award of medical and TTD benefits was final and appealable and that the ALJ had committed no legal error, the Court of Appeals vacated the Board's decision and remanded with directions to enter an order affirming the ALJ.

We affirm.

The claimant worked for approximately 22 years in St. Joseph Hospital's central supply department. Equipment was sent to the department for sterilization, and her work as a technician required a great deal of bending, stooping, and lifting. On February 5, 1998, she fell in the hospital cafeteria, severely injuring her left knee.

Dr. D'Angelo performed arthroscopic surgery on March 11, 1998. He later testified that the claimant had grade 4 chondromalacia, which is the worst level of damage to the cartilage and medial femoral condyle. In a letter dated July 31, 1998, Dr. D'Angelo indicated that the claimant would be a candidate for a mosaic plasty or further surgery due to her injury.

Dr. Berghausen evaluated the claimant on October 6, 1998, on behalf of the employer. He thought that her primary problem was acute chondromalacia of the patella for which he recommended physical therapy and bracing. Dr. Berghausen assigned a 3% impairment rating. In his opinion, a total knee replacement was unnecessary, and a mosaic plasty would not be effective for patellofemoral chondromalacia.

Although the claimant returned to work after the injury, her activities were restricted. She continued to experience knee pain and other symptoms. In October, 1999, Dr. D'Angelo thought that she probably needed a total knee replacement to alleviate her pain and other symptoms but also discussed alternatives to surgery.

Dr. Roberts performed a university evaluation on November 16, 1999, and determined that the claimant had a 12% AMA impairment. He attributed 25% of the impairment to the natural aging process but also indicated that the claimant's work aggravated or accelerated the effects of the natural aging process. He placed numerous restrictions on the claimant's activities and indicated that she did not retain

the physical capacity to return to the type of work she performed at the time of the injury. Although he did not think that the claimant was a candidate for total knee replacement at the present time, he thought it probable that she would require the procedure in the next 5-10 years.

The parties agreed to settle the claim and executed a Form 110-I agreement that was approved by an ALJ on March 29, 2000. The agreement indicated that approximately \$7,000.00 in medical expenses had been paid and that none remained contested. It noted the 12% and 3% impairment ratings as well the claimant's restrictions. It also noted that the claimant had returned to restricted duty on April 17, 1998; that she had subsequently been terminated for other causes; and that she was not presently working. The agreement indicated that no temporary total disability (TTD) benefits were paid and that the permanent disability claim was settled for a lump sum that equated to an 18.75% disability, the calculation of which was based upon a 10% impairment that was multiplied by factors of 1.25 and 1.5.<sup>1</sup> The parties checked "No" in response to a question concerning whether the settlement amount included a waiver or buyout of past or future medical expenses and responded "N/A" when asked the settlement amount for waiver or buyout. In a section entitled "Other Information," the agreement indicated:

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.

On September 12, 2001, the claimant moved to reopen, alleging a medical fee dispute. She also asserted that her condition had worsened since the settlement, that

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<sup>1</sup> At the time of the claimant's injury, KRS 342.730(1)(b) provided a 1.00 multiplier for a 10% impairment and a 1.25 multiplier for a 12% impairment. Although KRS 342.730(1)(c)1 did not affect the disability rating, it authorized multiplying the income benefit by 1.5 if, due to the effects of the injury, the worker did not retain the physical capacity to perform the type of work performed at the time of injury.

she required knee replacement surgery, and that the employer was liable for her medical expenses. Attached to the motion was a June 6, 2001, letter from the employer's claims administrator, denying approval for knee replacement surgery based upon the settlement agreement, and a July 6, 2001, letter from Dr. D'Angelo. The employer objected to reopening on the grounds that the claimant's condition was no worse than at settlement, that she had waived any claim for a knee replacement, and that there was no medical fee dispute. The motion was granted, however, and additional proof was taken.

At reopening, the claimant testified that she did not think a knee replacement was appropriate when she agreed to settle her claim, but her condition had subsequently worsened. Her present complaints included a great deal of arthritis, fluid, inflammation, and pain. She asserted that she had paid certain medical bills that were presently contested. The claimant acknowledged that Dr. D'Angelo had recommended a knee replacement before she settled her claim and that Dr. Berghausen had indicated she did not need the procedure.

Nancy Mitchell, the employer's risk manager, testified concerning the impact of the evidence at the time of settlement on its terms. She noted the conflicting evidence concerning the extent of the claimant's permanent impairment. Although the claimant would not have been able to return to the same work after her injury, Ms. Mitchell thought that she would be able to perform some work. She stated that although the employer normally pays settlement proceeds over an eight-year period, it made a concession by agreeing to pay the claimant in a lump sum. Her understanding of the agreement was that the employer would pay future medical expenses for the injury except for knee replacement surgery.

In a letter dated July 6, 2001, Dr. D'Angelo stated that June 1, 2001, radiographs documented a narrowing of the medial joint compartment and showed a progressive deterioration of the claimant's knee. When deposed in December, 2001, Dr. D'Angelo testified that the claimant's condition had worsened since March 29, 2000, inasmuch as she had increased symptoms of pain, stiffness, and swelling. He discussed several available treatments and explained why he recommended a total knee replacement as being the best overall. He stated that the claimant was 60 years old and acknowledged that her relative youth made her a less than ideal candidate for knee replacement because the procedure had a 10 to 15-year life span. He noted, however, that there was no other reliable technique for relieving her pain and that the procedure was not unreasonable at her age. He also stated that the procedure was likely to alleviate problems with the patella because it addressed all compartments of the knee. Dr. D'Angelo acknowledged that he had first recommended the procedure in October, 1999, but that "the insurance company wouldn't let it go ahead." He stated that the claimant's condition had deteriorated since then and explained that it would be unusual for a knee that had the kind of damage the claimant's did not to progress after three to four years. He further stated that her increased symptoms made it highly probable that the underlying cartilage damage also had worsened. He testified that medical bills from February 9 and June 1, 2001, were for the effects of the claimant's injury.

In its brief to the ALJ, the employer indicated that it would no longer contest the outstanding medical bills, but it continued to maintain that the claimant compromised any right to knee replacement surgery in the settlement agreement. The employer asserted that no more than a 9% impairment was compensable when the claim was settled; that arguably neither the 1.25 nor the 1.5 multiplier applied; and that it paid the

claimant a lump sum despite its usual policy to the contrary. It argued, therefore, that the claimant received more money than she would have received otherwise and received it eight years sooner in return for waiving the knee replacement surgery.

The ALJ concluded from the evidence that the claimant did not waive her right to reopen at some point in the future and obtain approval for knee replacement surgery. In reaching this conclusion, the ALJ noted that Dr. Roberts' opinions as a university evaluator were entitled to presumptive weight and that he assigned a 12% impairment rating. Although he attributed 25% of the impairment to the natural aging process, he also indicated that the claimant's work aggravated or accelerated the process, making the entire impairment the liability of the employer. Haycraft v. Corhart Refractories, Ky., 544 S.W.2d 222 (1976). Furthermore, all of the evidence indicated that the claimant did not retain the physical capacity to return to the same type of work. The ALJ noted that there was no agreement to waive future medical expenses and, relying upon Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704 (2000), determined that the payment of a lump sum rather than periodic payments was inadequate consideration for such a waiver. Furthermore, the ALJ explained, even where consideration for a waiver of future medical expenses is adequate, it must be direct on the face of the settlement rather than implied. Id. Concluding that the claimant's medical condition had worsened since the settlement, and that knee replacement surgery was presently necessary, the ALJ ordered the employer to pay for the procedure and also to pay TTD benefits from the date of surgery until the claimant reached MMI thereafter. To the extent that the motion requested an increase in permanent occupational disability, it was held in abeyance pending the attainment of MMI and a party's motion to consider the merits of the request.

The employer no longer asserts that the ALJ's decision was interlocutory. It argues, however, that the agreement to waive knee replacement surgery was binding at reopening and forever barred knee replacement surgery. The employer also argues that enforcement of the agreement is consistent with the policy of Chapter 342, and that there was no change of condition to warrant reopening. We disagree.

In Whittaker v. Pollard, Ky., 25 S.W.3d 466, 469 (2000), we explained that there is a strong public policy favoring the settlement of workers' compensation claims and that an agreement to settle a claim is a contract between the parties. Once approved, such an agreement is enforceable as an award. Questions concerning the construction and interpretation of contractual terms are legal in nature and, therefore, are subject to de novo review on appeal. Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1998).

Where contractual terms are ambiguous or inconsistent, the primary rule of construction is to effectuate the parties' intent as demonstrated by the contract as a whole. Bullock v. Young, 252 Ky. 640, 67 S.W.2d 941 (1933). When doing so, the court must take into account the circumstances under which the agreement was executed, attempt to discern the effect that the parties intended, and reconcile inconsistent terms where possible. Black Star Coal Corp. v. Napier, 303 Ky. 778, 199 S.W.2d 449 (1947); Lockwood's Trustee v. Lockwood, 250 Ky. 262, 62 S.W.2d 1053 (1933).

When the claimant and her employer entered into the agreement, there was a dispute regarding the reasonableness and necessity of knee replacement surgery at that time. Dr. D'Angelo thought that it was necessary as early as October, 1999, but testified that when he attempted to "book" the procedure, the employer's carrier had refused to approve it. Dr. Roberts, the university evaluator, did not think the claimant was a candidate for the procedure at the time but that she would be in 5 to 10 years.



Dr. Berghausen stated that the claimant was not a candidate for the procedure. The claimant testified that she had decided she did not wish to undergo the procedure at that time.

KRS 342.020 entitles a worker to compensation for reasonable and necessary medical expenses both at the time of the injury and in the future. It is undisputed that in the agreement presently at issue the claimant waived compensation for total knee replacement and/or mosaic plasty surgery as part of the consideration for settlement. The agreement also indicated, however, that there was no waiver of future medical expenses and specified no consideration for such a waiver. Therefore, although the provisions were harmonious with respect to the compensability of knee replacement surgery at the time the agreement was executed, they were inconsistent with respect to its compensability should the claimant's condition worsen in the future. Reading the provisions of the contract in harmony and mindful of the circumstances that existed at the time of its execution, the Court of Appeals correctly interpreted its legal effect. The agreement barred knee replacement surgery at the time it was executed, but it did not bar any type of reasonable and necessary medical treatment should the claimant's condition worsen in the future.

KRS 342.125(3) permits reopening at any time to resolve the compensability of post-award medical expenses. Contrary to the employer's assertion, KRS 342.125(1)(d) governs the prima facie showing on a motion for a modification of income benefits. See Dingo Coal Co. v. Tolliver, Ky., 129 S.W.3d 367 (2004). It is inapplicable to a medical expense reopening. Nonetheless, having waived any present right to knee replacement surgery in the settlement, the claimant was required to prove a worsening of her medical condition since the settlement. KRS 342.020 places on an employer the

burden of proving that a post-award medical bill is unreasonable or unnecessary. Mitee Enterprises v. Yates, Ky., 865 S.W.2d 654 (1993).

We are not persuaded by the employer's assertion that there was no evidence of a post-award worsening in the claimant's condition. Dr. D'Angelo noted in his letter of July 6, 2001, that a worsening in the claimant's knee was documented by radiographs from June 1, 2001, that showed a narrowing of the medial joint compartment. He later testified that two compartments of the knee were affected when he recommended surgery before the settlement but that three compartments were affected presently. He also stated that the claimant's knee condition was progressive, that it had deteriorated, and that it would continue to deteriorate. The claimant testified that her symptoms were more severe at reopening than they had been at settlement and that presently she had difficulty sleeping through the night. Under the circumstances, it was reasonable for the ALJ to conclude that the claimant's condition had worsened since the settlement and, therefore, to consider the reasonableness and necessity of the proposed surgery at the present time. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Absent any current evidence to rebut Dr. D'Angelo and the claimant, their testimonies supported the conclusion that the employer failed to meet its burden of proving that the procedure was presently unreasonable or unnecessary.

The decision of the Court of Appeals is affirmed.

All concur.

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