

RENDERED: MAY 12, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001959-WC

MITCHELL CHILDERS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-90263

ADELPHIA COMMUNICATIONS;
HON. SHEILA C. LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Mitchell Childers petitions this Court to review
an opinion of the Workers' Compensation Board (the Board)
entered August 19, 2005, affirming the Chief Administrative Law

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Judge's (CALJ's) decision to deny Childers' motion to reopen his claim. We vacate and remand.

On February 2, 2000, Childers sustained a work-related injury while employed with Adelphia Communications. Childers underwent an anterior cervical discectomy with fusion and eventually returned to his previous position earning the same wage. The parties subsequently executed a settlement agreement which was approved by order of the CALJ entered March 20, 2001. As consideration for this settlement Childers received a lump sum payment in the amount of \$37,527.07.

On February 17, 2005, Childers filed a motion to reopen his claim. Therein, Childers contended the claim should be reopened based upon a change in his disability or worsening of impairment. Childers also argued that the settlement agreement should be set aside based upon mutual mistake or constructive fraud. Childers further argued he did not specifically waive his right to reopen the claim in the settlement agreement. By a two-page order entered March 18, 2005, the CALJ determined that Childers had waived his right to reopen and denied the motion. The CALJ did not address Childers' arguments that the settlement agreement should be set aside based upon mutual mistake or constructive fraud. Unsatisfied with the CALJ's decision, Childers sought review

with the Board. The Board affirmed the decision of the CALJ, thus precipitating our review.

Childers raises the following contentions of error:

1) the CALJ erred by determining the settlement agreement constituted a valid waiver of his right to reopen, 2) the CALJ erred by denying his motion to reopen based upon a change in disability or worsening of condition, and 3) the settlement agreement should be set aside because of mutual mistake or constructive fraud. We will address Childers' claims *seritum*.

Upon his first claim, Childers relies upon Huff Contracting v. Sark, 12 S.W.3d 704 (Ky.App. 2000) for his assertion that "the lack of specific monetary consideration" rendered the waiver of his right to reopen void. The parties' settlement agreement provides, in relevant part, as follows:

Claimant herein agrees to accept an additional lump sum of \$37,527.07 in consideration for a full and final waiver of any and all rights to compensation for future medical expenses that may result from the work-related injuries that are the subject of this claim. All parties to this agreement understand that a dismissal with prejudice means a full and final waiver of: past and future income benefits; future medical expenses; any past medical expenses that are outstanding; past and future vocational benefits; past and future rehabilitation benefits; all other compensation benefits; and, **including but to limited to, a full and final waiver of any right to reopen this claim for any reason whatsoever.** (Emphasis added).

Childers asserts that the \$37,527.07 he received under the settlement agreement was consideration solely for the waiver of future medical benefits. Thus, he claims that no consideration was given for his waiver of past and future vocational benefits, past and future rehabilitation benefits or the right to reopen his claim. The CALJ concluded that the \$37,527.07 represented consideration for the waiver of all rights in conjunction with this claim.

Under Huff, this Court held that consideration must be present for a valid waiver of a claimant's right(s). Id. Here, the settlement agreement specifically provided that Childers "agrees to accept an additional lump sum of \$37,527.07 in consideration for a full and final waiver of any and all rights . . . to reopen this claim for any reason whatsoever." Accordingly, we believe the language of the parties' agreement clearly provides that a portion of the money paid thereunder was in consideration for the waiver of Childers' right to reopen his claim. Thus, the settlement agreement validly waived Childers' right to reopen his claim.

We shall now address Childers' second and third claims collectively. Childers asserts the settlement agreement was based upon a five (5%) percent impairment rating when the record reveals the actual impairment rating was ten (10%) percent. As the agreement erroneously reflects an impairment rating of five

(5%) percent, Childers contends the settlement agreement should be set aside based upon mutual mistake or constructive fraud.

From a review of the record, it is clear that Childers raised the issues of mutual mistake and constructive fraud before the CALJ. It is equally clear that the CALJ did not address these issues in its order. We believe the CALJ is required to make findings of fact and conclusions of law upon all contested issues. See Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). We further believe it is reversible error for the CALJ not to make the required findings of fact and conclusions of law upon such contested issues. See id. We do not express an opinion regarding the validity of Childers' claims of mutual mistake or constructive fraud. We merely conclude these issues should have been addressed and ruled upon by the CALJ.

We, thus, vacate and remand this cause to the CALJ for the limited purpose of making findings of fact and conclusions of law upon whether the settlement agreement should be set aside based upon mutual mistake and/or constructive fraud. If the CALJ determines the settlement agreement should be set aside upon one or both grounds, the CALJ should then reach Childers' remaining issues of whether he established a *prima facie* case to warrant reopening and an increase in benefits. As such, we do not reach appellant's remaining contentions upon these issues.

For the foregoing reasons, the opinion of the Workers' Compensation Board is vacated and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas G. Polites
WILSON, POLITES & MCQUEEN
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jo Alice Van Nagell
Lori V. Daniel
CLARK & WARD, PLLC
Lexington, Kentucky