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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001765-WC

MCINTOSH EMPIRE, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-69128

GREGORY BATES;
HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

NICKELL, JUDGE: McIntosh Empire, Inc. ("McIntosh") has petitioned for review of the Workers' Compensation Board's ("Board") opinion entered on August 3, 2007, which affirmed the Administrative Law Judge's ("ALJ") award of benefits to Gregory Bates ("Bates") and the ALJ's denial of its petition for reconsideration. We affirm.

Bates sustained a work-related injury[1] on October 2, 2004. His claim for benefits proceeded to a final hearing before the ALJ on May 25, 2006. Following the hearing, but prior to a decision being rendered, counsel for McIntosh and Bates exchanged correspondence regarding settlement of Bates' claim. On May 31, 2006, McIntosh sent Bates' counsel an offer of $11,500.00 for a total settlement of all claims, including a waiver of payment for past and future medicals and a waiver of the right to reopen the claim. On June 6, 2006, Bates' counsel sent a letter of acceptance of the offer. Thereafter, McIntosh delivered a Form 110 to Bates and tendered a notice of settlement to the Office of Workers' Claims.

On August 28, 2006, McIntosh inquired of Bates as to the status of the settlement agreement. Bates' counsel informed McIntosh that Bates had refused to sign the settlement agreement as drafted because it did not reflect his understanding of the agreement. Bates was under the impression the proposed settlement required him to waive only payment for his past medicals. On September 25, 2006, Bates filed a motion to set the matter for hearing specifically stating that no settlement agreement had been reached. A final hearing was conducted on October 31, 2006. The ALJ received all pertinent evidence regarding Bates' claim[2] and took the matter under submission.

[1] It is undisputed in this appeal that Bates' injury was sustained during the course and scope of his employment with McIntosh.

[2] The medical evidence and the ALJ's factual findings regarding Bates' injury are not directly related to this appeal and are not contested by the parties. Therefore no further discussion is warranted.

On November 6, 2006, McIntosh filed a motion to enforce the settlement agreement pursuant to *Coalfield Telephone Co. v. Thompson*, 113 S.W.3d 178 (Ky. 2003). The ALJ entered its opinion, award and order in favor of Bates on November 13, 2006, and McIntosh filed a petition for reconsideration on November 20, 2006. The ALJ scheduled a hearing for January 24, 2007, for the sole purpose of considering whether to enforce the settlement agreement as drafted by McIntosh. On April 6, 2007, the ALJ entered an order overruling the motion to enforce filed by McIntosh and denying its petition for reconsideration on the grounds that there had been no meeting of the minds on the agreement and thus it was unenforceable under the standard set forth in *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996).

McIntosh timely appealed to the Board.[3] In its August 3, 2007, opinion affirming the ALJ the Board refused to enforce the settlement, finding *Thompson* was not controlling. Further, the Board held that although the attorneys understood the terms of the proposed settlement, Bates did not. Thus, as there was no meeting of the minds, Bates' attorney was without power to bind him to the proposed settlement agreement. This appeal followed.

The sole issue raised in this appeal is whether the settlement agreement was enforceable. McIntosh contends the decision of the Supreme Court of Kentucky in *Thompson* mandates

[3] On appeal to the Board, McIntosh argued (1) the ALJ erred in failing to enforce the settlement agreement; and (2) the evidence in the record compelled a finding that Bates' average weekly wage ("AWW") was $253.23 rather than $352.00 as found by the ALJ. Before this Court, McIntosh argues only the first issue. Therefore the issue regarding Bates' AWW is not properly before us and warrants no further discussion.

enforcement of the agreement by the ALJ. It argues *Thompson* only requires consideration of whether a settlement offer was made and whether that offer was accepted as in *General Motors Corp. v. Herald*, 833 S.W.2d 804 (Ky. 1992). McIntosh argues both of these requirements—offer and acceptance—were met in this case, and therefore the agreement must be enforced by the ALJ. Thus, McIntosh urges us to reverse the Board and remand the matter to the ALJ for further proceedings intended to result in an enforcement of the agreement. After a careful review of the record, we disagree with McIntosh's argument and affirm the Board.

The Board is authorized by KRS 392.285(2)(d) and (e) to overturn the ALJ if the order, decision or award is "clearly erroneous on the basis of the reliable, probative and material evidence contained in the whole record," or if it is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." The function of an appellate court is to correct decisions of the Board when it appears 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).

In its well-reasoned opinion, the Board correctly found under KRS 342.265(1) if an employer, employee and/or the special fund reach a settlement agreement, a written memorandum setting forth the terms of such agreement which has been duly "signed by the parties or their representatives shall be filed

with the executive director, and if approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305." The Board further discussed the importance of the statutory requirement of approval from the ALJ, and correctly rejected McIntosh's argument about the applicability of *Thompson,* to the case at bar, and we hereby adopt their reasoning set forth herein as our own.

> It is well recognized the purpose of this statute is to provide the ALJ the opportunity to pass upon the terms of workers' compensation settlements and thus protect the interests of the injured worker. *Skaggs v. Wood Mosaic Corp.*, 428 S.W.2d 617 (Ky. 1968). The obvious policy and purpose of KRS 342.265 is to discourage the making of settlements except under protective supervision of the ALJ. *Kendrick v. Bailey Vault Co., Inc.*, 944 S.W.2d 147, 149 (Ky.App. 1997). Under the safeguard of the ALJ as a disinterested representative of the public, once a voluntary compromise agreement has been properly reviewed and approved, its legitimacy has the effect of becoming permanent and irrevocable with very few exceptions. *Id.* at 149.
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> The recurring theme throughout the case law addressing KRS 342.265 is that substance prevails over form and '[t]he ALJ may look behind the settlement when an agreement appears not to be in the interest of the worker, provided there is cause to do so.' *Commercial Drywall v. Wells*, 680 S.W.2d 299, 302 (Ky.App. 1993). In this respect, as a fact finder the ALJ possesses broad discretion.
>
> That having been said, we find the holding in *Coalfield Telephone Company v. Thompson, supra*, to be distinguishable from the case *sub judice*. In *Thompson*, the court determined that letters from the attorneys of both the injured worker, who died before a formal settlement could be executed, and the employer clearly contained the terms agreed upon and constituted a sufficient memorandum of agreement for the purpose of

> KRS 342.265(1). The ALJ refused to consider the terms of the agreement because it had not been reduced to a formal document signed by the parties. The court held 'that ALJ should have addressed the substance of the agreement rather than its form.' *Id.* at 181.
>
> Here, the ALJ went to great lengths to investigate, discover and address the substance underlying the negotiations and the purported settlement agreement between Bates and McIntosh. Following a second hearing concerning the matter, the ALJ determined that while there is ample documentation [counsel] understood the terms of the proposed settlement, Bates did not. While attorneys have been held to be superior agents, authority establishes with respect to settlement attorneys are without power to bind their clients. *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky.App. 1978).
>
> The ALJ determined that until Bates actually reviewed the terms of settlement set out in the Form 110, he misunderstood the agreement included waivers of his right to reopen under KRS 342.125 and to receive future medical benefits under KRS 342.020. Upon learning of these terms, Bates refused to sign the agreement. Since there was no meeting of the minds, the ALJ concluded there was no enforceable contract of settlement. Because the ALJ acted within his authority under KRS 342.265(1) by disallowing the purported settlement, and because there is substantial evidence to support that decision, we find no error. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

Under the statutory scheme, approval of a settlement agreement by the ALJ does not occur merely as a matter of course or as a routine exercise. Instead, the ALJ is required to consider the substance of the agreement to determine if the settlement is in the best interests of the injured worker.

As noted above, in the instant case the ALJ more than complied with the mandates of *Thompson*. Unlike the ALJ in

Thompson, who refused to consider the terms of the agreement because it had not been reduced to writing, the ALJ here conducted a hearing specifically to consider the terms of the settlement, not just its form. After taking considerable evidence and arguments from the parties, the ALJ reasoned there had been no meeting of the minds as to the terms of the agreement. Our review of the record indicates the Board was correct in determining substantial evidence supported the ALJ's decision and he did not act arbitrarily. McIntosh has failed to direct us to any credible evidence that the Board has erred to the extent required by *Western Baptist Hospital v. Kelly, supra*.

Therefore, for the foregoing reasons, the Board's August 3, 2007, opinion affirming the ALJ's opinion, award and order dated November 13, 2006, is affirmed.

ALL CONCUR.

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