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Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001796-WC

JOHN A. RICHEY; HARNED,
BACHERT & DENTON, LLP;
NORMAN E. HARNED
AND WILLIAM F. CODELL

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-80743

PERRY ARNOLD, INC.;
HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS'
COMPENSATION BOARD

APPELLEES

NO. 2009-CA-001954-WC

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CROSS-APPELLANT

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ADMINISTRATIVE LAW JUDGE;
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BOARD

CROSS-APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** * * * * *

BEFORE: ACREE AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

ACREE, JUDGE: John A. Richey and Perry Arnold, Inc. have filed cross-appeals from an August 28, 2009 opinion of the Workers' Compensation Board. Richey appeals from that portion of the opinion in which the Board declined to assess sanctions against the employer, and Perry Arnold appeals the portion which awarded temporary total disability benefits (TTD) to Richey. After careful review of the record and the law, we affirm as to the appeal and reverse as to the cross-appeal.

Facts and Procedure

Richey sustained a shoulder injury while working for Perry Arnold as a carpenter on July 13, 2004. He underwent surgery to repair the injury on October 18, 2004, but continued experiencing pain afterward. In 2005, Richey sought preauthorization of an additional surgical procedure through the employer's

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Workers' Compensation insurance provider. Richey believed the procedure would resolve his continued pain. Treating physicians and independent medical examiners² agreed additional surgery was unnecessary; Richey's requests were denied following two Utilization Reviews. Each denial was communicated to Richey via a document entitled Utilization Review Notice of Denial. The parties entered into a settlement agreement on November 9, 2005. The agreement provided, "This is a lump sum settlement of \$15,500.00 for complete resolution of indemnity benefits. Medical benefits remain open per the act."

Subsequent to entry of the settlement agreement, Richey found a specialist, Dr. Anderson, who believed surgery would be beneficial. On February 27, 2007, Richey faxed a request for preauthorization, written by him, and attached a letter from Dr. Anderson. Perry Arnold responded by sending Richey a copy of one of the Utilization Review Notices of Denial originally sent in 2005 denying preauthorization for a referral to a specialist. It is undisputed that the employer did not approve the request, initiate a Utilization Review, or take action to reopen the claim. Richey underwent surgery on April 3, 2007, and paid expenses out of pocket. The following day his attorney filed both a motion to reopen the claim and Medical Dispute Form 112. Perry Arnold filed a response and defended the claim. The issues before the ALJ were whether Richey could collect additional TTD payments and whether the 2007 surgery was necessary and reasonable, making the

² These medical professionals included Drs. Goldman, Kirsch, Dunn, Gladstein, and Olash, each of whom had testified to that effect at the hearing.

employer liable for Richey's expenditures related to surgery and recovery. Richey also requested assessment of sanctions against Perry Arnold.

Following a hearing conducted on February 20, 2009, the Administrative Law Judge (ALJ) issued an order finding the surgery was necessary and reasonable, and awarding Richey payment for the 2007 operation and related medical expenses, and reimbursement for expenses Richey incurred in traveling to attend appointments with his physician and physical therapists. The ALJ also dismissed Richey's request for TTD benefits and sanctions. A subsequent order partially granted Richey's motion to reconsider the denial of sanctions, awarding him attorney fees and costs associated with litigation of the claim. Yet another order granted Perry Arnold's motion to reconsider the reconsidered order, and the ALJ reversed his position on sanctions once again.

On appeal, the Board affirmed the ALJ's refusal to impose sanctions upon the employer, but reversed the denial of TTD benefits.³ The reversal was based upon an interpretation of the settlement agreement; the Board concluded Richey had not waived his right to claim income benefits subsequent to the settlement. This appeal followed.

Standard of Review

This Court is permitted to alter a decision of the Workers' Compensation 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." *Pike*

³ The Board affirmed the ALJ's opinion in all other respects.

County Board of Education v. Mills, 260 S.W.3d 366, 368 (Ky. App. 2008) (quotation omitted). Further, the Board’s review of an ALJ’s factual conclusion may only result in reversal when “[t]he order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record[.]” KRS 342.285(2)(d).

Denial of Sanctions

KRS 342.310 states that, under certain circumstances, an ALJ “may assess the whole cost of the proceedings[.]” KRS 342.310(1). We note, as did the Board, that the language is permissive. KRS 446.010(20). However, by regulation, “a sanction [s]hall be assessed, as appropriate, if [a]n employer or a medical payment obligor challenges a bill *without reasonable medical or factual foundation*[.]” 803 KAR 25:012 Section 2(1)(a)(emphasis supplied).

In this case, the Board determined that,

[g]iven the conflicting medical evidence of record, . . . the ALJ could reasonably conclude that Perry Arnold did not challenge nor defend against the treatment proposed and implemented by Dr. Anderson without reasonable grounds. The expert testimony from Dr. Goldman, Kirsch, Dunn, Gladstein, and Olash bears out that fact.

(Board Opinion, August 28, 2009, p. 14). We agree with this assessment and with the Board’s determination that whether an employer has defended a medical dispute without reasonable grounds “is a determination to be made solely within the discretion of the ALJ as fact finder.” (*Id.* at p. 13). Given our standard of review, we must affirm.

Affirming the Board on this issue and on this ground makes unnecessary our consideration of the parties' arguments regarding the distinction between a medical "bill" and a medical preauthorization and the distinction between the submission of same by the employee rather than a physician.

We conclude that the Board's decision regarding the issue raised in Richey's appeal was not clearly erroneous.

TTD Benefits

On cross-appeal, Perry Arnold contends it was error for the Board to reverse the ALJ's determination that Richey was not entitled to seek TTD benefits pursuant to the settlement agreement entered November 9, 2005. Specifically, the employer believes the Board exceeded its authority – its review of the ALJ's decision regarding the settlement, according to this argument, should have been for clear error only. Perry Arnold contends the Board improperly substituted its judgment for that of the ALJ.

In response, Richey argues the proper standard of review was *de novo* because contract construction is a matter of law, and that it was therefore permissible for the Board to give no deference at all to the ALJ's decision.

The dispute turned upon the portion of the settlement agreement which states, "This is a lump sum settlement of \$15,500.00 for complete resolution of indemnity benefits." Richey argued this did not constitute waiver of future TTD benefits. The ALJ disagreed, saying the only reasonable construction was that the parties intended to foreclose any future claims to TTD benefits; otherwise, the

settlement would have virtually no effect. The Board reversed, ruling Richey did not waive his right to future TTD benefits for the following reasons: (1) the agreement lacked consideration for the waiver, as required by *Huff Contracting v. Sark*, 12 S.W.3d 704 (Ky. App. 2000); (2) the use of the present tense indicated the parties intended only to resolve TTD benefits due as of the moment of signing; and (3) the settlement agreement contained no explicit reference to a waiver of future TTD benefits.

“An agreement to settle a workers’ compensation claim constitutes a contract between the parties.” *Whittaker v. Pollard*, 25 S.W.3d 466, 469 (Ky. 2000). Such an agreement is therefore subject to contract law and the accompanying standards of review. “The construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court.” *Morganfield Nat’l Bank v. Damien Elder and Sons*, 836 S.W.2d 893, 895 (Ky. 1992). This Court may reverse a decision of the Board if it erred as a matter of law. *Pike County Board of Education*, 260 S.W.3d at 368.

The Board ruled in this case that, “[a]s a matter of law, . . . the consideration given for a waiver of the right to reopen [for consideration of additional TTD payments] must be contained on the face of the agreement and ‘may not simply be implied’ from some other language.” (Board Opinion at p. 12, quoting *Huff Contracting* at 706). Because there was no amount designated in the agreement as specific consideration for Richey’s waiver, the Board reversed the ALJ. We believe the Board misreads *Huff Contracting*.

In *Huff Contracting*, this Court quoted at length the underlying decision by the Board. The purpose was not to adopt the legal reasoning, but to state the underlying facts and procedure. The Board's decision stated, without reference to any authority that

[i]n order for a waiver of medicals to be effective, consideration for that waiver must be direct on the fact [sic] of the settlement and may not simply be implied from some other activity.

Huff Contracting, 12 S.W.3d at 706. The Board has read the case as though this were the holding of *Huff Contracting*. It was not.

Huff Contracting concerned an agreement, drafted by the employer's counsel, in which the worker received "[a] lump sum settlement of 3%, discounted at 6%, Total to be paid by the employer is \$2,685.20." The agreement noted the amounts of TTD and medical benefits that the employer had paid and indicated that the settlement was "inclusive of all attorney fees and also includes all future medical expenses beyond that already paid." Sometime thereafter, the worker moved to set aside the agreement or, in the alternative, to reopen based on mistake or constructive fraud, stating that it had not been his intent to waive his right to future medical expenses. This Court determined that the purported waiver was invalid because no substantial evidence in the record indicated that it was supported by consideration. The decision *did not* address whether specific consideration must be allocated to each type benefit that is waived because only a waiver of future medical expenses was at issue. *See Childers v. Adelphia Communications*, No. 2006-SC-0433-WC, 2007 WL 858836 *3 (Ky., Mar. 22,

2007)(cited in accordance with CR 76.28(4)(c)). *Huff Contracting* simply stands for the principle that a waiver of future rights must be supported by consideration in addition to that provided for income benefits.

The agreement at issue allocated no consideration specifically to the waiver of the right to reopen. But, unlike the situation in *Huff Contracting*, the claimant received substantial consideration in addition to the amount for income benefits. The settlement awarded Richey \$15,500, well over the \$6,040.04 already paid in TTD benefits, and future medical expenses were left open. Unlike *Huff Contracting* in which nothing more was paid to the worker than that amount to which he was already entitled, the benefit to Richey was clear. That constituted substantial evidence upon which the ALJ could conclude there was adequate consideration. Therefore, the Board should not have reversed the ALJ on either of its first two grounds – i.e., that the agreement lacked consideration and that the agreement failed to explicitly identify what portion of the consideration was attributable to the waiver of the right to reopen for TTD claims.

Furthermore, we cannot agree with the Board’s third ground for reversing the ALJ – that the contract language stating Richey was paid “for complete resolution of indemnity benefits” only settled past claims for TTD. The agreement cannot be fairly read that way.

One of the most “fundamental rules of construction of contracts [is] that words shall be accorded their ordinarily used meaning unless the context requires otherwise.” *Bays v. Mahan*, 362 S.W.2d 732, 733 (Ky. 1962). This agreement

contemplates “complete resolution” of Richey’s claim to indemnity benefits.

“Complete” is defined as “1. having all parts or elements; lacking nothing; whole; entire; full[;] 2. finished; ended; concluded[.]” Dictionary.com Unabridged.

Random House, Inc. <http://dictionary.reference.com/browse/complete> (accessed:

October 25, 2010); *see also* BLACK’S LAW DICTIONARY 258 (5th ed. 1979)(meaning

“Full; entire; including every item or element of the thing spoke of, without

omissions or deficiencies . . . Perfect; consummate; not lacking in any element or

particular[.]”). It is clear to this Court that the parties intended the settlement

agreement to wholly, entirely, and fully resolve Richey’s claim to TTD benefits,

then and forever. This is the only interpretation that is consistent with the

document, taken as a whole. As the ALJ put it, if this were not the interpretation,

“the settlement would have had very little effect” since Richey’s right to claim

future medical benefits was explicitly reserved.

The Board’s decision to uphold the ALJ’s refusal to award sanctions to Richey was based upon substantial evidence and a proper application of the law and is affirmed. Interpreting the settlement agreement to permit Richey to receive TTD benefits in excess of those in the agreement was contrary to a proper application of law to the agreement, and is therefore reversed.

ALL CONCUR.

BRIEFS FOR
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