

OPINION ENTERED: FEBRUARY 22, 2013

CLAIM NO. 201082823

CPC COMMODITIES, LLC

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE**

CHARLES W. POLAND
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING IN PART AND REMANDING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. CPC Commodities, LLC ("CPC") appeals the August 22, 2012 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), and the September 14, 2012 order denying its petition for reconsideration. The sole question on appeal is whether the ALJ erred in denying CPC a credit for salary continuation payments.

Charles W. Poland ("Poland") testified by deposition on April 11, 2012 and at the formal hearing held June 25, 2012. Poland stated he received payments from CPC based upon his hourly rate of pay for a forty hour week. He stated "After taxes, they give me - it was \$360." He did not return to work following the June 18, 2010 injury. At the hearing, Poland acknowledged receiving checks from CPC following the injury, but he could not recall the total amount. He testified his wife handled them and she indicated taxes were withheld.

Steve Jones ("Jones"), Chief Financial Officer and Human Resources Director of CPC, testified at the hearing. He stated CPC paid Poland following the work injury based upon his normal hourly rate multiplied by forty hours per week. He identified an exhibit listing the payments made to Poland and explained them as follows:

Well, they were payments in lieu of the TTD payment. It was just our company policy. We - we paid employees who were off work, we continued to pay them 40 hours a week. And our normal - the normal expectation was they would be coming back to work within a work [sic] or two and it just kept things simpler just to pay him 40 hours. And then we would get reimbursed from the workers' comp company for the TTD pay, we would submit requests for reimbursement and they reimbursed the company directly.

Jones stated this was the same practice CPC had applied to other employees who sustained work-related injuries. He stated payments were made to Poland until January 20, 2012, after CPC obtained a permanent impairment rating. At that point, CPC offered Poland a different position as a dispatcher, which he declined. Jones did not know the amount of the checks sent to Poland. Jones stated the gross weekly amount was \$500.00, from which taxes and Poland's portion of health insurance were deducted.

In the Opinion, Order and Award rendered August 22, 2012, the ALJ's findings relevant to this appeal are as follows:

The only remaining issue is that of wage continuation and how it applies to, if at all, a credit for past due total disability benefits. I find no fault with how the employer had handled this claim, including their calculation of how to pay the Plaintiff his continuing wages while he was off work.

However, while I have reviewed the Defendant's brief and I do recall the generally accepted practice of how to handle wage continuation prior to *Millersburg Military Institute v. Puckett* 260 S.W.3d 339 (Ky. 2008) that authority does not state what the Defendant believes it does. Rather it stands for the proposition that since workers' compensation is a statutory creation, not based in the common law that the benefits and credits it provides are strictly set forth in the statute. Since the credit for wage

continuation is not set forth in the statute there is no such credit. Accordingly this issue is resolved in entirety in the Plaintiff's favor and no credit is awarded for salary continuation.

CPC filed a petition for reconsideration on September 4, 2012, raising the same arguments it now raises on appeal. By order dated September 14, 2012, the ALJ denied CPC's petition.

On appeal, CPC argues the ALJ's ruling is in contravention of the law articulated in Triangle Insulation & Sheet Metal Co., Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W. 2d 628 (Ky. 1990). CPC argues the credit issue is governed by KRS 342.730(6). CPC argues it paid \$500.00 per week to Poland from the date of his injury until he was released by his treating doctor and it is entitled to take a credit for those payments against any past due benefits. CPC notes testimony from Jones establishes the payments were intended to be in lieu of workers' compensation benefits. Jones testified it was CPC's policy to pay injured workers at their regular hourly rate for forty hours per week, for which CPC would be reimbursed by the compensation insurer. CPC contends these payments are more generous than Poland's temporary total disability ("TTD") benefit rate. CPC argues it is entitled

to a dollar for dollar credit in the amount of \$40,440.00 against past due benefits through the date of the award.

The ALJ erred in failing to analyze whether CPC's salary continuation payments constitute voluntary payment of TTD benefits qualifying CPC for a credit. Rather, the ALJ merely disallowed the credit since there was no specific reference to a credit for "salary continuation" in the statute.

As the party seeking a credit, CPC had the burden to establish its entitlement. Dravo Lime Co. Inc., v. Eakins, 166 S.W. 3d 283 (Ky. 2005). CPC presented testimony from Mr. Jones indicating the payment of salary continuation was intended to be in lieu of TTD benefits. The ALJ failed to address the essential question of whether CPC's salary continuation constituted a voluntary payment of income benefits. CPC is entitled to receive a dollar for dollar credit for the net amount of the payment received if the payments were made in lieu of workers' compensation benefits as long as the credit does not affect future benefits. See Stratemeyer, supra. The Board has no fact-finding authority, so it is necessary to remand this matter for additional findings. Although we are vacating and remanding this matter for the proper analysis and additional findings, we are not compelling any particular

result. After performing this analysis, the ALJ may conclude a credit for voluntary payment of benefits is or is not applicable to this claim.

Accordingly, the August 22, 2012 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge, and the September 14, 2012 order denying CPC's petition for reconsideration is **VACATED IN PART and REMANDED** for additional findings in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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