Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 27, 2013

CLAIM NO. 201197859

DOTSON TRUCKING PETITIONER

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

WILLIAM STACY HUNT
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * * *

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

ALVEY, Chairman. Dotson Trucking Company ("Dotson") appeals from the January 14, 2012, Interlocutory Opinion, Order and Award, and the July 12, 2013 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding William Stacy Hunt ("Hunt") temporary total disability ("TTD") benefits, permanent partial

disability ("PPD") benefits, and medical benefits. Dotson also appeals from the August 13, 2013 Order on Reconsideration.

On appeal, Dotson argues the ALJ erred in disregarding Dr. Joseph Zerga's findings regarding Hunt's ability to return to work. Dotson next argues the ALJ's assessment of the three multiplier pursuant to KRS 342.730(1)(c)1 is not supported by substantial evidence. Dotson also argues the ALJ failed to make specific findings supporting his determination of the extent of pain management. Finally, Dotson argues the ALJ erred in failing to grant a credit against future PPD benefits for TTD benefits involuntarily paid pursuant to an interlocutory award. Because the ALJ's award of PPD benefits, and application of the three multiplier pursuant to KRS 342.730(1)(c)1 is supported by substantial evidence, we affirm in part. Regarding the issue of credit, we determine Dotson is entitled to a credit against future PPD benefits for overpayment of TTD benefits involuntarily paid pursuant to an interlocutory order, and therefore vacate and remand for the ALJ to make a proper determination of appropriate credit.

Hunt filed a Form 101 on August 29, 2011 alleging on January 18, 2011, he injured his right arm as he was

tossed about the cab of the truck he was driving when a trailer jack failed as he was dumping a load of coal. An order was issued on December 12, 2011 amending the Form 101 to list Dotson rather than Skyhawk Construction as the correct employer.

Hunt testified by deposition on October 13, 2011. He also testified at hearings held on January 25, 2013 and May 21, 2013. Hunt is a high school graduate, and has a commercial driver's license. Hunt has been primarily employed as a truck driver for various employers throughout his working life. His job for Dotson consisted of delivering eight to nine loads of coal per day from a mine to a prep plant located over twenty miles away. In addition to driving the truck, he was required to check fluid levels, change oil and change tires.

On January 18, 2011, Hunt extended the bed of the trailer to dump a load of coal. The jack used in extending the trailer failed, causing the load to fall. This caused the entire truck to bounce, and threw Hunt around inside the cab. Hunt testified he sustained superficial injuries to his nose and mouth. He stated he also injured his right elbow, but could not identify what it struck. He stated the incident was observed by numerous co-workers, and he

reported it to the truck boss, and later discussed the incident with Dotson's owner.

He subsequently sought medical treatment with Dr. William Fannin, his family physician. Dr. Fannin took him off work and referred him to Dr. Keith Hall, who administered injections to the right elbow. Hunt had previously sustained cervical and lumbar injuries due to an unrelated motor vehicle accident ("MVA") which occurred in 2009. He was actively treating with Dr. Fannin for injuries sustained in the 2009 MVA, for which he was taking medications at the time of the work incident, including Lortab, Zanaflex, Tramadol and Motrin for treatment of the cervical lumbar conditions.

Hunt was released by Dr. Keith Hall to return to work without restrictions in April 2011. On April 24, 2011, he began working for Skyhawk Construction where his job duties were essentially the same as those performed for Dotson. After he returned to work, he experienced swelling in his right elbow due to shifting, and pain in his right hand.

Hunt was evaluated by Dr. Gregory Snider at Dotson's request in November 2011. He was subsequently taken off work by Dr. Fannin on November 4, 2011, and has not worked since. He continued to complain of right elbow

swelling and loss of grip strength. He also complained of tingling and numbness in his right arm and fingers. He had two rounds of physical therapy which he stated provided no relief. He stated his right elbow has continued to worsen since he was taken off work in November 2011.

Tommy Bevins ("Bevins") testified by deposition on December 13, 2011. He is the president of both Dotson and Skyhawk Construction. Hunt began working for Skyhawk Construction in April 2011 because no positions were available at Dotson. Hunt's job duties at Skyhawk Construction were similar to those required at Dotson, but he drove a newer truck. He stated Hunt ceased working for Skyhawk Construction in November 2011. He noted Hunt had worked for several Bevins-owned companies in the past.

Hunt filed Dr. Hall's office note dated April 11, 2011 with the Form 101. Dr. Hall noted Hunt's complaints of pain along the medial aspect of his right elbow, which increased with activity. He noted a March 13, 2011 MRI revealed mild degenerative changes, and he diagnosed right elbow epicondylitis. He administered injections, and prescribed oral anti-inflammatory medication. Hunt also filed the January 17, 2012 note from Dr. Kevin Pugh, who practices with Dr. Hall, taking him off work from January 17, 2012 through February 10, 2012.

Hunt subsequently filed a motion to reinstate TTD benefits, and filed Dr. Fannin's November 4, 2011 note which stated, "it is undetermined at this time when the patient will be able to return to work." Dotson filed the note from Dr. Hall, faxed to the workers' compensation insurer on June 1, 2011, indicating Hunt had reached maximum medical improvement ("MMI"). Dotson then filed Dr. Snider's November 3, 2011 report. Dr. Snider diagnosed a right medial epicondyle contusion, right epicondylitis and mild right ulnar neuritis. He opined Hunt had not yet reached MMI, but could continue to work without specific restrictions, and further stated Hunt's conditions, "is amenable to resolution: thus, no permanent impairment is anticipated."

The ALJ entered an interlocutory opinion, order and award on January 14, 2012, awarding TTD benefits and medical benefits. The ALJ specifically found as follows:

> I am persuaded, at this time, that despite the lack of specific restrictions from Dr. Snider and the return to work period that the Plaintiff's condition as of November 4, 2011, was sufficient so as to preclude a return to work.
>
> I so find because although Dr. Snider did not issue formal restrictions he obviously does not think the plaintiff is at MMI due to the Plaintiff's credible complaints. I myself find the

> Plaintiff's complaints credible. Both treating physicians, Dr. Pugh and Dr. Fannin, find the Plaintiff's complaints credible and believe he should be taken off work.
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> Therefore, temporary total disability benefits shall be awarded at a rate of $504.10 per week from November 4, 2011 through the date at which the Plaintiff reaches maximum medical improvement or his condition improves sufficiently to allow a return to work. This claim is placed in abeyance. Both parties shall file status updates every sixty days. Either party may move to remove this claim from abeyance.
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> Nothing herein should be construed as guaranteeing a certain period of TTD, any future, currently speculative type of medical treatment or any expedited process on any future aspect of the claim.

Dotson filed a petition for reconsideration, and a motion to terminate benefits on February 24, 2012. Dotson cited to records from Dr. Fannin from March 2011 indicating epicondylitis, mild osteoarthritis, and no evidence of complete tendon ligamentous disruption. It compared those statements to records from the Pikeville Medical Center dated February 14, 2012 indicating Hunt had reported a fractured elbow, and treatment was not to be administered until authorized by Dr. Pugh. In response, Hunt filed records from Dr. Fannin from January 2011 indicating he had sustained a right elbow injury for which he had been taken

off work. In an order issued March 19, 2012, the ALJ indicated the issues had been resolved, and Hunt was receiving benefits.

Hunt filed no status reports as ordered by the ALJ in the interlocutory order. Dotson filed status reports on April 20, 2012; June 21, 2012, August 17, 2012, and October 18, 2012. On October 9, 2012, Dotson filed a motion to discontinue the payment of TTD benefits, noting Hunt was discharged from physical therapy on April 20, 2012, and no medical records had been provided regarding subsequent treatment. On October 29, 2012, the ALJ issued an order terminating TTD benefits, and setting a proof schedule.

Hunt filed the Form 107-I report prepared by Dr. James Owen who performed an evaluation at his request on January 16, 2013. Dr. Owen noted Hunt's right arm, low back and cervical pain. He stated Hunt's condition began from a nonwork-related MVA. Dr. Owen incorrectly noted the date of injury as January 18, 2010, which he stated exacerbated the low back and neck pain. He diagnosed persistent ulnar neuritis (for which he recommended an EMG), and exacerbations of cervical and lumbar conditions. He assessed a 28% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") of which he found 15%

due to the work injury. Dr. Owen recommended restrictions of lifting, handling or carrying objects less than twenty pounds, and to avoid activity requiring recurrent bending, squatting or stooping. He also indicated Hunt should avoid activities requiring maneuvering with the right hand. Dr. Owen did not advise which restrictions were due to which complaint. He further opined Hunt did not retain the physical capacity performed at the time of the injury.

Dotson filed numerous medical records and reports. In a report dated October 16, 2012, Dr. Snider diagnosed Hunt with right medial epicondylitis and mild right ulnar neuritis. He assessed a 2% impairment rating pursuant to the AMA Guides, and stated he could treat with over-the-counter anti-inflammatory medication. Dr. Snider indicated Hunt could return to work with no specific restrictions, and could perform his previous duties as a “dump truck operator or truck driver”.

Dotson filed records from Drs. Hall and Pugh. Dr. Hall’s May 31, 2011 note stated Hunt had reached MMI from the January 18, 2011 injury. Dr. Pugh’s note from January 17, 2012 reflects Hunt declined a right elbow injection, and he ordered an EMG and additional physical therapy.

Dotson filed numerous records from Dr. Fannin for treatment provided from August 2009 through September 16,

2011, reflecting treatment rendered for cervical and lumbar conditions. Treatment for the right elbow or forearm is not mentioned except for the March 8, 2011 office note reflecting an MRI of the right elbow revealed mild medial epicondylitis, small joint effusions with mild osteoarthritis, and no evidence of complete tendon or ligamentous tear.

Dotson filed numerous records for treatment Hunt received prior to the work accident. The November 29, 2010 record from Hunt's chiropractor, Dr. Gregory Hackney D.C., reflects treatment for multiple diagnoses including cervicalgia, thoracic pain, lumbalgia, radiculitis, muscle spasm and headaches. On March 11, 2010, Dr. Duane Densler, a neurosurgeon, noted neck, thoracic and low back pain radiating into Hunt's lower legs into the top of his foot, left greater than right. Records from Bluegrass Orthopaedics for office visits on August 11, 2010 and November 17, 2010 reflect treatment for cervical and lumbar injuries sustained in the 2009 MVA. Pikeville Medical Center records from July 29, 2009 reflect complaints of pain to the neck, shoulder, shoulder joints, and low back.

Dr. Zerga evaluated Hunt on March 11, 2013, at Dotson's request. He noted Hunt's complaints were not over the elbow, but were over the proximal right forearm. He

opined Hunt's complaints were related to the work injury, and assessed a 5% impairment rating pursuant to the AMA Guides. Regarding Hunt's return to work, Dr. Zerga specifically stated:

> In my opinion, the patient could return to work. He has symptoms, but they would not keep him from working. He would be restricted from any highly repetitive use with his right arm. Driving a truck, or occasionally shifting gears, would not be highly repetitive.

Dotson filed two medical disputes concerning Dr. Fannin's treatment. In support of the first dispute, it filed the July 26, 2011 utilization review report of Dr. Peter Kirsch who opined office visits of April 12, 2011 and May 12, 2011 were not medically reasonable or necessary for Hunt's work injury. Dr. Kirsch stated the diagnoses of cervicalgia, lumbar radiculopathy and ruptured L5-S1 disk were unrelated to the January 2011 work injury. He stated only the right elbow epicondylitis is work-related. He opined Dr. Fannin's office treatment, including the contested office visits, were for conditions unrelated to the work injury.

In a supplemental medical dispute, Dotson filed the utilization review report of Dr. John Rademaker dated April 22, 2013. Dr. Rademaker stated Hunt had reached MMI,

and the referral to pain management was not medically necessary or reasonable for treatment of the January 18, 2011 work injury.

A benefit review conference ("BRC") was held on May 21, 2013. The issues preserved were benefits per KRS 342.730; work-relatedness/causation; unpaid or contested medical expenses; injury as defined; TTD; reasonableness and necessity of pain management referral; and issues decided by interlocutory order. The hearing was held on May 21, 2013 following the BRC. A subsequent order dated June 2, 2013 clarified the TTD issue included underpayment, overpayment, and applicable credit. Subsequent to the hearing, Dotson filed a medical dispute challenging bills from Family Drug in Pikeville, Kentucky for various medications including those for conditions which may be unrelated to the work injury.

The ALJ issued an opinion, award and order on July 12, 2013, finding as follows:

> The pleadings as a whole make it clear that the Plaintiff is only claiming an injury to his right arm. Regardless, the weight of the evidence as a whole, including Dr. Fannin, Dr. Snider and Dr. Zerga, demonstrate the sole work-related injury is the right arm and that would be the finding.
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> The undersigned has considered all of the Plaintiff's complaints and

statements as well as the medical records and reports. The Administrative Law Judge determines that the findings and conclusions of Dr. Zerga most accurately reflect the Plaintiff's current condition. As such the Plaintiff has a 5% impairment rating.

When considering the restrictions assigned by Dr. Zerga the undersigned finds, in conjunction with the Plaintiff's testimony and simple reality that the Plaintiff cannot return to the type of work done on the date of injury. While Dr. Zerga stated the Plaintiff could return to the type of work done on the date of injury he qualified it with an "if" that essentially means the Plaintiff cannot return to same work. Specifically, the Plaintiff is limited from work requiring rapid shifting or other movements with the right arm. It would be unsafe for the Plaintiff to professionally drive any vehicle with these restrictions.

As for the referral to pain management the Administrative Law Judge can see no reason to not find it compensable. It is simply a referral to pain management, for a Plaintiff who, as a matter of law, is entitled to future medical expenses. Any recommendations or findings of that specialist are not before the undersigned and not ripe for adjudication. While the Defendant has certainly fulfilled the procedural requirements to contest such a referral a finding of non-compensability, at this stage, would lack rationality.

The Plaintiff was paid TTD from January 19, 2011 through April 24, 2011 and from November 4, 2011 through October 23, 2012. The Plaintiff's argument for additional TTD hinges on a finding that

the Plaintiff did not reach maximum medical improvement until Dr. Owen placed him at MMI, in January, 2013.

However, by a previous Order herein the Administrative Law Judge found the Plaintiff to be at MMI as of April 20, 2012 by virtue of the fact that the Plaintiff had ceased to attempt all medical treatment other than palliative treatment. The undersigned notes that this is true despite the compensability of the pain management referral as the Plaintiff continued to receive medications and regardless, pain management is by its very nature palliative, not curative. A Plaintiff, who by their own admission and the unrebutted record is not even attempting curative medical treatment, is at MMI. Therefore the Plaintiff was at MMI as of April 20, 2012.

The final question remains, as raised by the Defendant, of their ability to recoup an involuntary overpayment of TTD. The general rule is that overpaid TTD benefits can only be recouped against past due PPD benefits, and inasmuch as PPD benefits shall be instituted from the date of injury, and excluding date of TTD owed, that rule shall be followed.

The Defendant argues that because the overpayment of TTD was involuntary, i.e. as a result of this judge's Order, they are entitled to recoup the overpayment against future benefits. The undersigned has reviewed the applicable statutes and case law, including *River City Transit Authority v. Saling*, 774 S.W.2d 468 (Ky. App. 1989). Neither that case, nor none of the rest of the law, ever states or addresses that overpaid TTD can be recovered against future PPD. It merely

states that the courts refuse to accept as a matter of law that there exists no means to recover overpaid TTD, beyond the limits of past due PPD. Neither the courts, nor the statutes, provide any other method to recover them, but that is not a binding rule upon the undersigned. As such no rule of law allows the undersigned to provide any credit beyond past due PPD.

The undersigned will note, in reaching this decision, that the medical evidence supports the award of PPD made herein and strongly supported, almost compelled, the prior Interlocutory award of TTD and medical benefits. The undersigned is not effectively endowed with the power to reject all of the medical evidence. That the Plaintiff turned out to be manipulative and less than sincere is an unfortunate truth, but no legal means exists to recoup those TTD benefits that were being paid to him while he consciously and actively, or inactively as it where[sic], chose to cease to attempt all medical treatment and did not notify anyone.

Hunt's permanent partial disability award shall be 716.15 (AWW) x 2/3 (workers' compensation rate) x .05 (impairment rating) x .65 (grid factor) x 3 (KRS 342.730(1)(c)1.) = $46.65 a week, for 425 weeks, from January 18, 2011, and excluding all periods of temporary total disability benefits actually owed. The Defendant is entitled to a credit, for the overpayment of temporary total disability benefits, against all past due PPD benefits. He is also entitled to all reasonable and necessary, work-related medical expenses for the right elbow, including a referral to pain management.

Dotson filed a petition for reconsideration on July 22, 2013, arguing the ALJ inaccurately quoted Dr. Zerga's report by inserting the word "if", as a qualifier regarding Hunt's ability to work, and by using the term "rapid shifting". Dotson also argued the ALJ's award of the three multiplier pursuant to KRS 342.730(1)(c)1 is not supported by the record. Dotson next argued the ALJ erred in calculating the PPD benefit rate, which should have been based upon $46.55 per week rather than $46.65. Dotson next argued the ALJ erred in finding Hunt entitled to pain management services. Finally, Dotson argued the ALJ erred finding it not entitled to credit against future PPD benefits to recoup an overpayment of TTD benefits involuntarily paid.

In an order issued on August 13, 2013, the ALJ noted the parties are entitled to an accurate reflection of the evidence, and he acknowledged Dr. Zerga did not use the word "if" in reference to restrictions. The ALJ denied the petition relating to pain management treatment. Finally the ALJ stated the following regarding credit against future PPD benefits for involuntary overpayment of TTD benefits:

> The undersigned has already stated that he believes the Plaintiff manipulated the system to receive an additional period of TTD. However, the law does not

> allow a credit against future benefits to recoup involuntarily overpaid TTD. That portion of the Petition is OVERRULED.

On appeal, Dotson argues the ALJ inappropriately disregarded Dr. Zerga's finding regarding Hunt's ability to return to work, and applied the wrong standard. Dotson next argues the application of the three multiplier pursuant to KRS 342.730(1)(c)1 is not supported by the record. Dotson also argues the ALJ failed to make specific findings regarding the extent of pain management. Finally, Dotson argues the ALJ erred in finding it was not permitted to a credit against future PPD benefits for an involuntary overpayment of TTD benefits.

Hunt, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hunt was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable

persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Regarding the first three issues raised by Dotson, substantial evidence exists to support the ALJ's determination. Dr. Zerga, whose report was relied upon by the ALJ, clearly stated Hunt's injury was work-related and detailed activities which he should avoid. Based upon the evidence, both medical and lay, it was reasonable for the ALJ to infer Hunt could not return to his pre-injury job due to residuals from his work injury, and additional treatment is required. Therefore, his determinations regarding these issues will not be disturbed. Likewise, we find the ALJ did not err in his determination regarding the referral to pain management.

Regarding the final issue, credit for overpayment of TTD benefits against future PPD benefits, it is noted Dotson involuntarily paid such benefits pursuant to an interlocutory order issued by the ALJ on January 14, 2012, until relieved of such obligation by subsequent order issued October 29, 2012. In the October order, the ALJ determined Hunt was only entitled to TTD benefits until April 20, 2012, thereby creating a substantial overpayment of TTD benefits. This was reiterated in the ALJ's decision rendered July 12, 2013. Dotson argues the past due and owing PPD benefits are

insufficient to allow it to recoup the overpayment, and it should be permitted a credit against future PPD benefits for such involuntary payments. Because the overpayment of TTD benefits was involuntary, we agree.

Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990), establishes an employer can only receive a credit against past due and owing benefits for a voluntary overpayment of benefits. However, it does not address a situation where such overpayment was involuntarily paid pursuant to an interlocutory order. This issue has previously been addressed by this Board on numerous occasions, specifically in Christina Rose Persinger v. Schnucks Super Saver, Claim No. 1985-02399, rendered May 1, 1992; Ronnie Baker v. Roberts Trucking Co., et al, Claim No. 1989-13990, rendered November 12, 1993; and, Colley Block Company v. Charles Salisbury, Claim No. 1998-97993, rendered December 18, 2002. As we noted in those appeals, while we do not cite our opinions as authority, we do strive for consistency.

In each of those appeals, the equitable solution for involuntary overpayment of TTD benefits was to reduce the amount of future weekly benefit payments. Specifically in Colley, we stated as follows:

> We also note that the Court of Appeals in Transit Authority of River City v. Saling stated "we are unwilling to assume that under the new statute any amount paid under an interlocutory order would perforce be uncollectable from the claimant if the final decision found such an award was erroneous." We have previously held the involuntary nature of excess temporary total disability benefits constitutes a material factual distinction from those in Triangle Insulation. Thus, in ruling on the petition for reconsideration, the ALJ erroneously reversed the credit and improperly limited Colley to taking credit against past-due permanent partial disability benefits.

It is clear Dotson complied with the interlocutory order by both paying the TTD benefits, and by filing the status reports requested by the ALJ. Hunt underwent no treatment after April 12, 2012, and filed no status report. Dotson argues it was provided with no medical records regarding Hunt's treatment until October 2012 when it filed the motion to terminate TTD benefits. The fact Dotson did not file the motion to terminate TTD benefits for over six months after Hunt's last treatment created the excessive involuntary payments, attributable in large part to Hunt's failure to provide a status of his condition and treatment. But for Dotson filing the motion when it did, the amount to be credited would be much greater.

In this instance, the ALJ determined he was without authority to allow Dotson credit for the involuntary overpayment of TTD benefits created by the orders of February and October 2012. Because these payments were involuntary, and consistent with our previous holdings, we determine the ALJ could reduce the payment of future PPD benefits. As we previously stated, the reduction should be taken equally as a reduction of all weekly unpaid installments. Therefore, we vacate the ALJ's determination regarding credit for the involuntary overpayment. On remand, the ALJ shall determine the appropriate credit due, and calculate the remaining weekly benefits to be paid once the credit has been applied.

Finally, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). It is noted Dotson filed numerous medical disputes concerning treatment administered by Dr. Fannin, and bills for prescription medication for which no determination was ever issued. We therefore *sua sponte* remand this matter for a determination of outstanding medical disputes, and to determine whether additional parties should be joined. Although neither party raised this issue, KRS 342.285 clearly grants the Board the

authority to decide questions of law regardless of whether they are raised on appeal. It is within the Board's province on appeal to assure orders and awards of an ALJ are in conformity with Chapter 342.

Accordingly, the January 14, 2012, Interlocutory Opinion, Order and Award, and the July 12, 2013 Opinion, Award and Order rendered by Hon. Chris Davis, Administrative Law Judge, and the August 13, 2013 Order on Reconsideration are **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for the ALJ to address the determination of appropriate credit to be afforded for the involuntary overpayment of TTD benefits, and to resolve any outstanding medical disputes.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

MEMBER, STIVERS. I agree with the majority's decision on all issues raised on appeal except for its determination Dotson Trucking is permitted a credit for overpayment of temporary total disability ("TTD") benefits against its obligation to pay future permanent partial disability ("PPD") benefits.

In the past, this Board has held that where there is an involuntary overpayment of TTD benefits pursuant to

an interlocutory order, the employer is entitled to a credit against its obligation to pay future PPD benefits. However, I disagree with my predecessors on this issue as I believe the holding in Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990) is applicable across the board. In other words, where there is an overpayment of TTD benefits, either voluntary or involuntary, the overpayment can only be credited against past due benefits and cannot affect the claimant's future benefits.

In Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, supra, the Supreme Court dealt with a claim involving voluntary overpayment of TTD benefits. After noting "there is a considerable social and economic benefit to an employee who obtains voluntary income benefits in the initial stages of the injury," the Supreme Court stated as follows:

> An employee who has received an overpayment of income benefits should not be deprived of future income as a result of any such overpayment. However, an overpayment which can be credited fully against a past due amount without affecting future benefits is within the purview of the statutes.
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> It is the holding of the Court that when a claimant's future benefits are not affected, the employer shall be

> allowed a full dollar for dollar credit on past benefits.

Id. at 630.

The Supreme Court's holding makes no distinction as to whether the overpayment of TTD benefits involved voluntary or involuntary payments. Thus, I respectfully submit that in the last sentence of the above quote, the Supreme Court handed down an all-encompassing rule pertaining to the credit to which the employer is entitled when there has been an overpayment of TTD benefits, regardless of whether payments are voluntary or involuntary.

In Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1989) the Court of Appeals did not determine the extent to which an employer could obtain credit for TTD benefits overpaid due to an interlocutory order. The Court of Appeals merely stated they were unwilling to assume that under the new statute any amount paid under an interlocutory order would be uncollectable if the final decision found such a decision was erroneous. Id. at 469. Less than a year later, the Supreme Court determined the manner by which an employer could obtain a credit for any overpayment of TTD benefits.

This position is reinforced by the Supreme Court's recent holding in UPS Airlines v. West, 366 S.W.3d 472 (Ky. 2012). In that case UPS and West had entered into a collective bargaining agreement requiring UPS to pay Loss of License benefits during the period West was unable to perform his duties as an airline pilot. The Supreme Court identified the issue as the extent to which KRS 342.730(6) entitles UPS to receive a credit against its liability under KRS 342.730(1) for payments of Loss of License benefits that are the product of a collective bargaining agreement between UPS and the Independent Pilot Association of which West was a member. Id. at 473.

The ALJ determined UPS was entitled to a dollar-for-dollar credit against West's past due and future income benefits for all benefits paid under the Loss of License insurance plan. Id. The Board reversed and the Court of Appeals affirmed the Board. However, the Supreme Court affirmed in part and reversed in part, stating:

> We affirm to the extent that UPS was not entitled to a dollar-for-dollar credit, but we reverse with respect to the legal conclusion that Loss of License benefits were not funded exclusively by the employer for the purposes of KRS 342.730(6) because they were bargained-for benefits. Enacted in an apparent response to *GAF v. Barnes*, KRS 342.730(6) entitles UPS to credit its liability for past due or future

income benefits based on the payment of Loss of License benefits, but it does so only to the extent that Loss of License benefits duplicate, *i.e.,* "overlap" workers' compensation benefits. KRS 342.730(6) does not entitle UPS to credit the overpayment of voluntary benefits against future income benefits.

The Supreme Court instructed:

> Stated plainly, KRS 342.730(6) entitles an employer to credit disability or sickness and accident benefits that it funds exclusively against its liability under KRS 342.730(1) for overlapping past-due or future income benefits that are based on the same disability. It does not entitle an employer to credit the overpayment of voluntary income benefits against future income benefits.
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> . . .
>
> The Loss of License benefit to which the parties agreed exceeded the claimant's benefit under KRS 342.730(1) during the weeks that they overlapped. KRS 342.730(6) entitled UPS to credit overlapping Loss of License benefits against the TTD benefits that were otherwise payable, but it did not entitle UPS to take credit for the contractual excess. Having failed to credit the private benefits when making TTD payments, UPS was entitled to credit the overpayment of TTD against past-due benefits, if any, but was not entitled to take credit against its liability for future partial disability benefits.

With respect to this analysis, there are two significant facts in UPS Airlines v. West, supra. First, UPS did not voluntarily overpay TTD benefits and it was not seeking a credit against its obligation to pay future PPD benefits for a voluntary overpayment of TTD benefits. What UPS sought was a dollar-for-dollar credit against its obligation to pay past due and future income benefits as a result of its payment of a Loss of License benefits. Second, UPS was contractually obligated to pay the Loss of License benefits as a result of a collective bargaining agreement. Thus, there was no overpayment of TTD benefits. Significantly, the Supreme Court only permitted UPS to obtain a credit for its payment of Loss of License benefits against its obligation to pay past due PPD benefits. It did not allow UPS to take a credit against its liability for future PPD benefits.

I submit the logical conclusion to be drawn from the holding in UPS Airlines v. West, supra, is that in any scenario involving the overpayment of TTD benefits, whether voluntary or involuntary, the employer is only allowed a dollar-for-dollar credit on its obligation to pay past due benefits. Therefore, I disagree with the majority and would not permit Dotson Trucking to take a credit for its involuntary payment of TTD benefits against its obligation

to pay future PPD benefits, based solely on the fact the overpayment of TTD benefits was involuntary. Allowing such a credit would violate the holdings in Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, supra, and UPS Airlines v. West, supra.

That said, given the ALJ's statements in his opinion that he believed Hunt was manipulative and less than sincere, I would remand for further findings with directions to the ALJ that he may grant Dotson Trucking a credit against its obligation to pay future TTD benefits only if he determines the overpayment of TTD benefits resulted from the bad faith actions of Hunt. Upon a finding that Hunt's bad faith actions resulted in Hunt receiving an overpayment of TTD benefits, the ALJ should be permitted to grant Dotson Trucking a credit for overpayment of TTD benefits from Hunt's future PPD benefits. This would prevent Hunt from profiting from his own misdeeds.

Accordingly, I would remand to the ALJ with instructions that he is to determine whether the overpayment of TTD benefits resulted from Hunt's bad faith actions. If the ALJ makes such a finding Dotson Trucking shall be entitled to a dollar-for-dollar credit on its obligation to pay future PPD benefits. However, if the ALJ does not find that Hunt's misdeed or bad faith actions

resulted in the overpayment of TTD benefits, then he cannot grant Dotson Trucking a dollar-for-dollar credit as permitted by the majority. If the ALJ makes no such finding then Dotson Trucking can only receive a dollar-for-dollar credit on past due PPD benefits.

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