OPINION ENTERED: July 3, 2013

CLAIM NO. 201292514

EDITH LEWIS PETITIONER

VS. **APPEAL FROM HON.THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

FLEMING COUNTY BOARD OF EDUCATION
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Edith Lewis ("Lewis") appeals from the December 6, 2012, opinion, award, and order of Hon. Thomas G. Polites, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits

for a right shoulder injury occurring on October 14, 2011.[1] Lewis also appeals from the January 31, 2013, order sustaining in part and overruling in part her petition for reconsideration.

On October 14, 2011, Lewis was employed as a cook with Fleming County and was injured when she lifted a five gallon kettle of chili and carried it to the serving line. As a result, she began experiencing pain in her right shoulder. She was subsequently treated by Dr. Wallace L. Huff, Jr., an orthopedic surgeon, who performed surgery on December 9, 2011, consisting of the following procedure:

> Right shoulder arthroscopy with:
>
> 1. Limited debridement of undersurface rotator cuff tear and repair of partial thickness rotator cuff tear with a single Healix anchor.
>
> 2. Subacromial decompression.
>
> 3. Distal clavicle excision.

The benefit review conference ("BRC") order reflects the parties stipulated Lewis sustained a work-related injury on October 14, 2011, but is silent as to whether TTD benefits were paid.

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[1] Pursuant to Fleming County Board of Education's ("Fleming County") motion to re-certify service of the opinion, award, and order, in a January 31, 2013, order the ALJ sustained the motion and ordered the opinion and award re-certified to December 6, 2012.

Relying upon Dr. John Corbett's opinions, the ALJ determined Lewis had a 6% impairment as a result of the right shoulder injury. He determined KRS 342.730(1)(c)2 was applicable and enhanced Lewis' benefits by the two multiplier.

With respect to Lewis' entitlement to TTD benefits, the ALJ determined as follows:

> The parties have also listed temporary total disability as a contested issue in this claim. Having reviewed the entirety of the evidence, the ALJ concludes the plaintiff is entitled to total disability benefits from November 28, 2011 through July 30, 2012 based upon the plaintiffs [sic] testimony, the wage records and the medical records of Dr. Wallace Huff. Given the stipulation that plaintiffs [sic] average weekly wage is $326.45, the TTD rate shall be $217.63 per week. The wage records reflect the plaintiff was paid through November 18, 2011 and that she did not work after that date. Dr. Huff's records reflect that he placed plaintiff on light-duty restrictions at the time of his office visit on November 28, 2011, and he maintained plaintiff on restricted duty until July 30, 2012 at which time she was released to full duty. The employer is hereby allowed a credit for interest on past due TTD benefits for the period they proffered payment of TTD benefits to the plaintiff which was from November 22, 2011 through March 31, 2012.

The ALJ entered the following award:

> 1. Plaintiff shall recover from the defendant and/or its insurance carrier temporary total disability benefits in the amount of $217.63 per week from November 28, 2011 through July 30, 2012. Interest at the rate of 12% per annum shall be paid on these benefits save for the period from November 28, 2011 through March 31, 2012 as the employer has been granted a credit against interest for this period for proffering payment of benefits to the plaintiff that were refused.
>
> 2. Plaintiff shall recover from the defendant and/or its insurance carrier permanent partial disability benefits for the work-related injury in the amount of $22.09 per week for 425 weeks beginning October 14, 2011 together with interest at the rate of 12% per annum on any past due benefits provided however that the payment of permanent partial disability benefits shall be suspended during any intervening period of temporary total disability.

The ALJ also awarded medical benefits.

Both parties filed petitions for reconsideration. Lewis' petition for reconsideration asserted a typographical error in the amount of the award of PPD benefits. She also requested the ALJ reconsider his finding she is "not entitled to interest on the TTD benefit check proffered to her by the carrier since she 'refused' it." Lewis made the same argument she now makes on appeal.

As Fleming County's petition for reconsideration and the ALJ's order ruling on Fleming County's petition for

reconsideration are not at issue, we will not address either.

In the January 31, 2013, order ruling on Lewis' petition for reconsideration, corrected the typographical error regarding the award of PPD benefits. The ALJ denied that portion of Lewis petition for reconsideration seeking interest on the portion of the TTD benefits awarded which were previously tendered by Fleming County and returned by Lewis.

On appeal, Lewis asserts there is no provision for "penalty interest" against an injured worker. Lewis further asserts as follows:

> It is Lewis' position that if an injured worker who is incarcerated for two (2) years for a parole violation is entitled to the 12% per annum interest provided by KRS 342.040(1), there is no reason why the ALJ has determined that she is not because the [sic] "refused" it, particularly in light of the fact that (a) she returned the TTD check that had been [sic] to her by the workers' compensation carrier because her "bosses at the District" advised her that if she kept it, she would lose her health insurance, which was a necessity; (b) the parties stipulated that no TTD had been paid; and (c) her entitlement to interest was not listed as a contested issue. Lewis' reliance on her supervisors was reasonable and she should not be penalized for misinformation given to her by her superiors or any misunderstanding between the carrier and the Employer.

Lewis argues the ALJ's decision must be reversed and remanded with instructions to award 12% interest on all of the TTD benefits awarded.

The only evidence relative to this issue consists of Lewis' October 12, 2012, hearing testimony on cross-examination, which is as follows:

> Q: I wanted to ask you a couple questions about the TTD checks. I know there was [sic] some issues with how those were presented to you originally, information that may have been told to you one way or the other. I'm not interested in that. I just want to know how this was handled. My understanding is, and correct me if I'm wrong – and by the look you're giving me I guess I need some further clarification. Do you know what TTD is?
>
> A: No.
>
> Q: Okay. These are the checks from Workers' Compensation that were sent to you while you were off work?
>
> A: Okay.
>
> Q: Are you familiar with what I'm speaking about now?
>
> A: Uh-huh.
>
> Q: Is that a yes?
>
> A: Yes.
>
> Q: Okay. I'm sorry. You have to say it, that's all. My understanding is that you voided these and did not cash them when they were sent to you? Is that

also correct, the checks? You're not in trouble, I'm just trying to figure out if that's what you did?

A: I accepted the travel checks for mileage, and any reimbursement for medication or anything like that. What I returned was the check for pay.

Q: Okay. Why did you return that?

A: Because the people, my bosses at the District told me that if I kept that check –

Q: We can't get – I know I asked the question, but I asked it in a bad way so let me put it this way. I'm not interested, necessarily, in what they said specifically to you. What was your understanding?

A: My understanding was if I kept that check, then, I would not have health insurance.

Q: Okay. And did you consult an attorney about – you weren't represented at that time, correct?

A: No.

Q: So understanding, and I would be with you, too, if I heard that, so you did not cash the checks, correct?

A: Uh-huh.

Q: Is that a yes?

A: I'm sorry. Yes.

Q: Okay. What I want to verify is that they were at least sent to you at one point in time, whether you cashed them or not, correct?

> A: Correct.
>
> Q: Okay. That's all. Do you remember how much the checks were when they were sent to you?
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> A: I only received the one check that I returned.
>
> Q: Just one, okay. Do you remember how much that was for?
>
> A: Not the exact amount. It was four thousand plus some odd dollars.
>
> Q: So it –
>
> A: That was for 15 weeks' work.
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> Q: It covered a very good period of time?
>
> A: Fifteen weeks.

Significantly, Lewis did not testify she returned the check because her bosses at the District advised her if she kept the check she would lose her health insurance. Rather, Lewis did not finish her sentence regarding what her bosses told her about keeping the check. She testified it was her understanding if she kept the check she would not have health insurance. Lewis did not explain the basis for her understanding and there was no re-direct testimony. What is not revealed by the evidence is whether the check Lewis admittedly received for fifteen weeks of TTD benefits included interest which was due pursuant to KRS 342.040(1). Lewis only testified the check covered fifteen weeks, and

Fleming County did not introduce any evidence regarding the amount of the check and whether a portion of the amount represented interest which was due on the fifteen weeks of TTD benefits paid in a lump sum.

KRS 342.040(1) reads, in relevant part, as follows:

> Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, except that if the administrative law judge determines that a denial, delay, or termination in the payment of income benefits was without reasonable foundation, the rate of interest shall be eighteen percent (18%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. . . .

Clearly, the above statute mandates interest shall be paid on each installment of income benefits from the time it is due until paid. Although the ALJ did not

make a specific finding Lewis actually received the check, Lewis' testimony establishes she received the check. Further, in summarizing Lewis' testimony, the ALJ stated as follows: "[Lewis] was sent a TTD check by the employer but due to a misunderstanding she returned the check. She thought it was for a period of 15 weeks." In addition, in the findings of fact regarding entitlement to TTD benefits, the ALJ stated Fleming County had proffered a payment to Lewis covering the period from November 22, 2011, through March 31, 2012. Therefore, we believe this statement by the ALJ is tantamount to a finding that Lewis received a check for fifteen weeks of TTD benefits covering the period from November 22, 2011, through March 31, 2012.

Although Lewis may have misunderstood the ramifications of accepting the check in question, there is nothing establishing Fleming County caused her to return the check. In fact, Lewis' testimony is unequivocal that she knew the check was for fifteen weeks "of pay" and chose to return it. The extent of the conversation she had with any individual employed by Fleming County is unknown.

Given Lewis' testimony, we believe the ALJ did not err in refusing to order Fleming County to pay interest on past due TTD benefits due for the period from November 22, 2011, through March 31, 2012, from and after the date

the check for the TTD benefits was sent to Lewis. Lewis had the check in hand and returned it; therefore, she is not entitled to interest from and after the date the check for the fifteen weeks of TTD benefits was sent to her. The record supports the ALJ's determination Lewis received payment of the TTD benefits for the initial fifteen week period.

With respect to the assertion by both parties that entitlement to interest was not preserved at the BRC as a contested issue, we note the BRC reflects "TTD rate and duration" and "benefits per KRS 342.730" were among the contested issues. The Board believes interest due on TTD benefits is encompassed by these more general categories of contested issues; thus, entitlement to TTD benefits and any interest due thereon was an issue properly preserved.

In summary, although Lewis may not have been represented by counsel at the time she received the check, there is nothing which establishes she could not have retained the check, determined how her rights may be affected by retaining the check, and then properly negotiated the check for TTD benefits due from November 22, 2011, through March 31, 2012. To hold otherwise would allow Lewis to receive interest on a lump sum, a check for which she previously received and chose to return. KRS

342.040(1) does not mandate that Fleming County owes interest on the fifteen weeks of TTD benefits beyond the date the check was tendered by Fleming County. We decline to remand this matter to the ALJ for additional proof on this matter. We affirm the ALJ's decision not to award interest on the TTD benefits due from November 22, 2011, through March 31, 2012, from and after the date the check was sent to Lewis.

That said, we vacate, in part, the award of TTD benefits for the period from November 22, 2011, through March 31, 2012, since we find there was no award of interest on these benefits in accordance with KRS 342.730(1). In other words, Lewis is due interest for the period these TTD benefits remained unpaid. Fleming County can determine the date the check was issued and can issue a replacement check for those TTD benefits containing interest on the TTD benefits due for the fifteen week period.

Accordingly, the decision of the ALJ granting Fleming County a credit for the interest to be paid on the TTD benefits from and after the date a check was sent to Lewis for the TTD benefits covering the period from November 22, 2011, through March 31, 2012, is **AFFIRMED**. However, the award of TTD benefits is **VACATED** to the extent

the ALJ did not award interest on the TTD benefits due from November 22, 2011, through March 31, 2012, until Fleming County tendered a check for the TTD benefits. On remand, the ALJ shall enter an amended opinion and award awarding Lewis interest on the TTD benefits due from November 22, 2011, through March 31, 2012, until those benefits were tendered by Fleming County.

ALVEY, CHAIRMAN, CONCURS.

COUNSEL FOR PETITIONER:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

COUNSEL FOR RESPONDENT:

HON STEPHANIE D ROSS
1655 BURLINGTON PIKE STE 50
FLORENCE KY 41042

ADMINISTRATIVE LAW JUDGE:

HON THOMAS G POLITES
SPINDLETOP OFFICE COMPLEX
2780 RESEARCK PARK DR
LEXINGTON KY 40511