

OPINION ENTERED: November 30, 2011

CLAIM NO. 200685808

EVA COMBS

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

HAZARD ARH
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

* * * * *

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

COWDEN, Member. Eva Combs ("Combs") appeals from an opinion, order and award on reopening dated June 27, 2011 rendered by Administrative Law Judge ("ALJ") Grant S. Roark determining Combs sustained her burden in demonstrating her psychological condition had worsened as a result of a work injury sustained on May 22, 2006 while in the employment of Hazard ARH ("Hazard") to the point she was now 100% occupationally disabled. In addition, the ALJ determined as a result of Combs' failure to attend a vocational rehabilitation evaluation, pursuant to KRS 342.710(5),

Combs' award of benefits must be reduced by one-half effective March 10, 2011, the date Hazard moved for a reduction in benefits and continuing until Combs complied with the order for a vocational rehabilitation evaluation. Combs also appeals from an order dated August 2, 2011 which sustained in part and denied in part her petition for reconsideration.

On appeal, Combs contends the ALJ erred in allowing Hazard "credit against its future liability" for amounts paid in excess of \$164.26 since March 10, 2011. It is Combs' position Hazard was only entitled to a total credit of \$110.11 which represented the amount of additional past due income benefits she was owed as of the date the opinion was rendered.

Combs initially filed her Form 101 on July 24, 2008 alleging an injury on May 22, 2006 to her right shoulder, arm, elbow, wrist and hand with psychological overlay when she lifted and pulled heavy charts while in the employment of Hazard. In an opinion, order and award dated February 23, 2009, ALJ Lawrence Smith determined Combs sustained a 32% functional impairment rating according to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") Fifth Edition, as it applies to her physical injuries and a 10% psychological impairment

pursuant to the AMA Guides for a total functional impairment of 42% as a result of the work injury of May 20, 2006. Commensurate with this finding, the ALJ awarded permanent partial disability ("PPD") benefits at the rate of \$325.23 per week beginning June 21, 2008 and continuing for 520 weeks. After reviewing the record, the ALJ was also persuaded Combs should be afforded the opportunity for a vocational rehabilitation evaluation pursuant to KRS 342.710. Hazard appealed from this opinion, order and award on the ground the ALJ erred in awarding PPD benefits based in part on a 32% functional impairment rating as it applies to her physical condition. On June 19, 2009, this Board affirmed the opinion, order and award.

On November 10, 2010, Combs filed a motion to reopen alleging her condition had worsened as a result of her work-related injury to the point she was permanently and totally disabled. In support of her position, Combs attached her own affidavit and the affidavits of Dr. Brett Muha and Julia States MSW/LCSW. In an order dated December 10, 2010, Chief Administrative Law Judge ("CALJ") Landon Overfield determined Combs had set forth a *prima facie* case justifying reopening. To this extent, Combs' motion to reopen was sustained and the matter was assigned to an ALJ for further adjudication.

On March 10, 2011, Hazard filed its motion to reopen, pointing out the Department of Workers' Claims vocational rehabilitation specialist had written Combs and referred her to a facility for a vocational evaluation. Hazard noted on March 24, 2009, the Department informed Combs her vocational evaluation was scheduled for April 16, 2009. However, Hazard stressed Combs did not attend the scheduled vocational evaluation. Hazard noted the Department of Workers' Claims vocational rehabilitation specialist again wrote Combs and referred her for a second vocational evaluation on February 24, 2011. Hazard maintained Combs again missed her scheduled vocational evaluation. Pursuant to KRS 342.710(5), Hazard therefore moved any award of future income benefits awarded to Combs should be reduced by 50% until Combs attended a vocational rehabilitation evaluation and also completed a mutually acceptable vocational rehabilitation program.

At a benefit review conference ("BRC") held on April 13, 2011, the parties listed the contested issues as follows: worsening on reopening; affect of failure to attend vocational rehabilitation; whether plaintiff met a *prima facie* case for reopening; and improvement of condition.

In an opinion, order and award on reopening dated June 27, 2011, the ALJ determined Combs had presented a *prima facie* case for reopening with her own affidavit and the evidence from Dr. Muha and Julia States. In addition, although the ALJ was not entirely persuaded Combs' physical condition had actually worsened, based on Julia States' opinion, he was persuaded Combs' psychological condition had worsened and was work-related. Moreover, the ALJ determined from Combs' testimony and her presentation to her providers, Combs was presently psychologically precluded from returning to gainful employment on a regular and sustained basis. Accordingly, the ALJ determined Combs was permanently and totally disabled. As it applies to the issue raised on appeal, the ALJ found as follows:

The employer also filed a motion on March 10, 2011 to reduce plaintiff's award by 50% due to her refusal to attend a vocational retraining evaluation as previously directed by ALJ Smith in his February, 2009 award. Plaintiff counters it would be pointless for her to attend a vocational evaluation because she is physically unable to do any work.

However, the point of vocational retraining is to help injured workers to be retrained to return to employment within whatever physical limitations she may have. It may ultimately turn out that plaintiff is not a suitable candidate for vocational retraining, but her age and education and work

history to date do not compel a finding that she is necessarily not a suitable candidate for retraining. In short, plaintiff cannot unilaterally decide not to attend a vocational retraining evaluation in contravention of ALJ Smith's prior Order. Moreover, the provisions in KRS 342.710(5) are mandatory, stating:

Refusal to accept rehabilitation pursuant to an order of an administrative law judge shall result in a fifty percent (50%) loss of compensation for each week of the period of refusal.

Accordingly, as a matter of law, plaintiff's award of benefits must be reduced by $\frac{1}{2}$ effective March 10, 2011, the date the defendant employer moved for the reduction in benefits and continuing until plaintiff complies with the order for a vocational evaluation, which shall be scheduled again by subsequent notification from the Department of Workers Claims. As it appears from the record that plaintiff's prior appointment for a vocational evaluation was cancelled and the record does not establish plaintiff simply did not attend, the reduction in benefits can only begin subsequent to the February 24, 2011 missed appointment for vocational evaluation.

Commensurate with this finding, the ALJ entered the following award:

1. For permanent, total disability, plaintiff shall receive the sum of \$328.51 per week beginning November 5, 2010 and continuing until plaintiff qualifies for normal, old-age Social

Security retirement, except that beginning March 10, 2011 plaintiff's weekly amount shall be reduced by one-half to \$164.26 per week until such time as she completes a vocational rehabilitation assessment to be scheduled by the Department of Workers Claims, at which time her weekly award shall return to \$328.51.

2. The employer shall be allowed a credit against its future liability for amounts paid in excess of \$164.26 since March 10, 2011.

On July 7, 2011, Hazard filed a petition for reconsideration asking for clarification of its entitlement to credit for its previous payment of permanent disability benefits. It specifically noted in the reopening claim, the ALJ had awarded permanent total disability stemming from the May 22, 2006 incident at the rate of \$328.51 per week from November 5, 2010 until Combs qualified for normal, old age Social Security retirement. Hazard pointed out it previously provided payment of PPD benefits at the rate of \$325.23 per week per the February 2009 opinion and award which resolved the initial application. It therefore asked the opinion, order and award on reopening be amended to reflect it was entitled to a dollar-for-dollar credit for its past payment of PPD benefits.

In its petition, Hazard also pointed out the ALJ ordered a reduction to Combs' permanent total disability

benefit rate by 50% based on Combs' failure to comply with vocational retraining efforts per the previous 2009 opinion. Hazard maintained this reduced Combs' weekly income benefit rate to \$164.24 per week following March 10, 2011. Hazard noted the ALJ further ordered upon completion of a vocational rehabilitation assessment scheduled by the Department of Workers' Claims, Combs' weekly income award would return to the full permanent total disability benefit rate. Hazard submitted Combs' future permanent total disability benefit rate should continue to be reduced by 50% until Combs not only attended a vocational rehabilitation evaluation, but should continue until Combs had completed a vocational rehabilitation program deemed to be appropriate by the vocational rehabilitation evaluator and deemed reasonable by the ALJ.

Combs also filed a petition for reconsideration. Combs argued granting credit against future income benefits of an injured worker was contrary to the law. She pointed out under the law, injured workers were entitled to receive the full benefit of future periodic payments and that the demarcation of past due and future benefits was the rendition date of the opinion which was June 27, 2011. In support of her argument, Combs relied on the Workers' Compensation Board opinion entered March 21, 2008, Cheryl

Scott v. RX Crossroads, Inc., Claim No. 2006-97032, which was affirmed by the Kentucky Court of Appeals on May 29, 2009.

Combs acknowledged her benefits would be reduced by 50% beginning June 27, 2011 and this reduction would continue until she attended the ordered vocational evaluation. Combs also admitted her petition did not center on the 50% reduction. Rather, using the Department of Workers' Claims website as authority, and based on existing case law, Combs indicated she was owed an additional \$3.28 per week beginning November 5, 2010 for a total of \$110.11. However, as of June 27, 2011, the date the opinion was rendered, Combs contended based on the award on reopening, the ALJ gave Hazard credit of \$164.24 per week beginning March 10, 2011 totaling \$2,581.23. Therefore, Combs argued Hazard was entitled to a total credit of only \$110.11 which represented the amount of past due benefits she was owed as of the date the opinion was rendered.

On August 2, 2011, the ALJ entered the following order ruling on both petitions for reconsideration:

This matter comes before the Administrative Law Judge pursuant to the parties' petitions for reconsideration of the Opinion, Order and Award rendered herein on June 27,

2011. In their petitions, the parties each request amendments to the credit to be awarded to the defendant employer for the reduction in plaintiff's benefits for failing to attend vocational rehabilitation.

Having reviewed the parties' petitions and being otherwise sufficiently advised, the June 27, 2011 Opinion, Order & Award is hereby amended as follows:

Paragraph #1 of the Order & Award is amended to read:

1. *For permanent, total disability, plaintiff shall receive the sum of \$328.51 per week beginning November 5, 2010 and continuing until plaintiff qualifies for normal, old-age Social Security retirement, with the defendant employer taking credit for permanent partial disability benefits previously paid. Beginning March 10, 2011 plaintiff's weekly amount shall be reduced by one-half to \$164.26 per week until such time as she completes a vocational rehabilitation assessment to be scheduled by the Department of Workers' Claims, at which time her weekly award shall return to \$328.51.*

In addition, the typographical error noted on page 5 is corrected to read, "Although such evidence does not include a higher impairment rating than in the original litigation, it includes statements that allow for the conclusion that plaintiff's occupational disability has increased to the point she is not [sic] permanently and totally disabled."

In all other respects, the June 27, 2011 Opinion, Order & Award remains unchanged. Specifically, the

defendant's petition to amend the award to reduce plaintiff's weekly benefits until she completes vocational retraining or until advised by the evaluator that retraining is not appropriate is denied. Similarly, plaintiff's motion to amend the award to only allow the ordered credit from June 27, 2001 [sic] forward is also denied.¹

On appeal, Combs again argues the ALJ erred in allowing Hazard credit against its future liability for amounts paid in excess of \$164.26 since March 10, 2011. Combs maintains granting such a credit is contrary to the law. Combs again stresses Hazard is only entitled to a total credit of \$110.11 which is the amount of additional past due income benefits she was owed as of the date the opinion was rendered. Combs again supports her position with the Board opinion rendered March 21, 2008 in Cheryl Scott v. RX Crossroads, Inc., Claim No. 2006-97032, and the Supreme Court decisions in General Electric Co. v. Morris,

¹ It is apparent this is a misstatement and the ALJ meant to say credit was due and owing up to the date of the opinion, order and award upon reopening.

670 S.W.2d 854 (Ky. 1984) and Triangle Insulation and Sheet Metal Co., Div. of Triangle Enterprises Inc. v. Stratemeyer, 782 S.W. 2d 628 (Ky. 1990).

KRS 342.710(5) provides as follows:

Refusal to accept rehabilitation pursuant to an order of an administrative law judge shall result in a fifty percent (50%) loss of compensation for each week of the period of refusal.

KRS 342.125 (4) provides in part as follows:

. . . Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen. No employer shall suspend benefits during pendency of any reopening procedures except upon order of the administrative law judge.

In the case *sub judice*, ALJ Smith ordered Combs be referred to the Department of Vocational Rehabilitation for a vocational evaluation in his opinion, order and award dated February 23, 2009. On March 10, 2011, Hazard filed its motion to reopen alleging Combs did not attend a scheduled vocational evaluation on April 16, 2009 nor did she attend a second vocational evaluation scheduled for February 24, 2011. As a result, Hazard moved pursuant to KRS 342.710(5) to reduce any award for future compensation

by 50% until Combs complied with ALJ Smith's previous order.

In his opinion, order and award upon reopening, ALJ Roark determined Combs could not unilaterally decide not to attend a vocational retraining evaluation in contravention of ALJ Smith's previous order. As a result, pursuant to the provisions of KRS 342.710(5), ALJ Roark determined as a matter of law, Hazard's motion to reopen was sustained to the extent Combs' award of benefits was ordered reduced by one-half effective March 10, 2011 which represented the date Hazard filed its motion to reopen and continuing until Combs complied with ALJ Smith's previous order for a vocational evaluation. In the award section, the ALJ allowed Hazard credit against its future liability for amounts paid in excess of \$164.26 since March 10, 2011.

Contrary to the arguments espoused by Combs, the ALJ was correct in his award allowing credit against Hazard's future liability for amounts paid in excess of \$164.26 per week since March 10, 2011. We therefore must affirm.

In Stratemeyer, supra, the Court noted it was important to encourage employers to make voluntary payments to injured workers. (Emphasis added) In so noting, the Court continued as follows:

. . . Employers are not obligated to pay benefits until a claim has been litigated and an award entered. Such payments are voluntary. The circumstances involved in each specific case must be carefully evaluated so that the employee is not unduly harmed and the employer is encouraged to make voluntary payments. (Emphasis added). Cf. Adkins. [Western Casualty and Surety v. Adkins, 619 S.W. 2d 502 (Ky. App. 1981)].

A rigid limitation on the method of credit by an employer works an ultimate disservice to an employee. There is a considerable social and economic benefit to an employee who obtains voluntary income benefits in the initial stages of an injury. (Emphasis added). When a dispute arises and an application is filed, the rights of both parties can be adjudicated. 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.

In RX Crossroads, LLC v. Cheryl Scott, Claim No. 2008-CA-000773-WC, rendered May 29, 2009 and ordered not to be published, the Court of Appeals elaborated by noting as follows:

Kentucky's Workers' Compensation Act permits employers to be credited for overpayment of voluntary temporary total disability benefits it has paid to its employees. (Emphasis added). General Electric Co. v. Morris, 670

S.W.2d 854, 856 (Ky. 1984). Such credits permit an employer to recoup its overpayments and, by providing sufficient incentive to employers to pay, permit employees to receive income benefits during the early stages of a workplace injury. Triangle Insulation and Sheet Metal Co, Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628, 629-30 (Ky. 1990).

While employers can receive credit for the overpayment of voluntary income benefits, our courts have stated that employees cannot be deprived of future periodic payments in the process of allowing credits for overpayment of voluntary benefits. (Emphasis added). Stratemeyer, 782 S.W.2d at 630. If an employee's future periodic benefits are interfered with, the purpose of the Workers' Compensation Act would be frustrated because employees would not obtain the full benefit of receiving "periodic payments over a statutorily set period...." Morris, 670 S.W.2d at 856. However, an award of overpayment credit is allowed if the overpayment can be fully credited against "a past due amount" without affecting an employee's future benefits. Stratemeyer, 782 S.W.2d at 630.

As pointed out by Hazard in its appellate brief, the distinction between the facts in this case and Stratemeyer and Scott is clear. Hazard's payments in this claim were not voluntary, but were paid pursuant to ALJ Smith's order to pay income benefits per the previous February 23, 2009 opinion and award. Pursuant to KRS 342.125(4), upon Hazard's motion to reduce Combs' income benefits, Hazard

was prohibited from unilaterally reducing payments as it was under a continuing order to provide payment during the pendency of the reopening claim. As pointed out by Hazard, if Hazard had unilaterally reduced its payments, this action would no doubt have led to a bad faith claim in that it was under a continuing order to provide payment. KRS 342.710(5) is mandatory in its language. The language of KRS 342.710(5) reduces future compensation to employees who choose to violate an ALJ order by refusing to accept rehabilitation. As such, it works as a financial penalty by requiring an employee to forfeit 50% of the employee's compensation for each week the employee refuses to undergo vocational rehabilitation. To rule otherwise would allow Combs a windfall as she would receive almost double payment during her period of noncompliance without allowing Hazard the ability to recover its mandatory overpayment.

Accordingly, the opinion, order and award on reopening dated June 27, 2011 and the order dated August 2, 2011 ruling on the petition for reconsideration are hereby **AFFIRMED.**

ALL CONCUR.

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