OPINION ENTERED: APRIL 27, 2012

CLAIM NO. 201001597

LEO D. RICE PETITIONER

VS. **APPEAL FROM HON. CAROLINE PITT CLARK, ADMINISTRATIVE LAW JUDGE**

LEXINGTON COAL COMPANY, LLC,
COMMONWEALTH SLEEP & REHAB,
STONE RIVER PHARMACY SOLUTIONS,
and HON. CAROLINE PITT CLARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION REVERSING IN PART AND REMANDING

* * * * * *

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

SMITH, Member. Leo David Rice ("Rice") appeals from the August 29, 2011 Opinion, Award and Order and the October 10, 2011 Order on reconsideration rendered by Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ"), granting Lexington Coal Company, LLC ("Lexington Coal") credit for short term disability ("STD") and long term disability ("LTD") benefits. On appeal, Rice argues the ALJ's decision to grant a credit to the employer abolished the language of KRS

342.730 (6) and should be reversed. We affirm the ALJ's opinion awarding benefits and reverse only that portion of the opinion pertaining to credit for LTD and STD benefits.

Because the issue on appeal is narrow, no lengthy recitation of evidence is necessary. The ALJ determined Rice was temporarily totally disabled from September 26, 2009 through July 15, 2010 and awarded him temporary total disability ("TTD") benefits. Thereafter, Rice was awarded permanent partial disability ("PPD") benefits based upon a 35.1% permanent partial disability.

Rice testified by deposition on March 10, 2011, and at the formal hearing held June 28, 2011. In his deposition, Rice testified disability insurance premiums were deducted from his paycheck. Rice also indicated he did not receive STD benefits while he was receiving TTD. He testified he was entitled to LTD benefits for a period of 18 months.

At the formal hearing, Rice testified his LTD benefits had been terminated based upon his receipt of Social Security benefits. He also indicated payments would be reinstated if he repaid approximately $7000 as a result of overpayment of LTD benefits. Rice introduced as an exhibit at the hearing, a May 24, 2011 letter from Guardian Life Insurance ("Guardian"), the LTD carrier, regarding the overpayment. It stated in part:

We have recently received notice of your award of Social Security Disability benefits as of March 1, 2010 in the amount of $1153 per month. Your group plan provides for the offset of Social Security benefits from your Guardian Long-Term Disability benefit. Therefore we will begin to reduce your long-term Disability benefits by your Social Security payments from your first entitlement date of March 1, 2010.

Under the terms of your group plan, we were able to continue your full monthly disability benefits while you were awaiting the Social Security Administration decision with regard to your application. As you have now received your Social Security Disability benefits, we must request that you reimburse the amount we overpaid you while awaiting these benefits.

Your Benefits

Guardian LTD	$1736.00/mo.	03/25/10-04/24/11
Worker's Comp	$2862.21/mo.	09/25/09-07/14/10
Social Security	$1153.00/mo.	03/01/10-ongoing
Minimum Benefit	$50.00/mo.	
Approved Attorney Fee		$3747.25

Your Social Security benefits have been reduced due to workers compensation benefits. Upon adjustment of your Social Security benefits please submit a copy of the updated award letter. At the time we will calculate any additional overpayment to Guardian.

. . .

Plan Provisions

Income We Integrate with: A covered person may receive, or be entitled to

> receive, income shown in the list below. We will integrate his or her *gross monthly benefit* with such income to determine his or her *monthly benefit* from this *plan*.
>
> Commissions received, due to be received, overpaid after disability benefits start. This includes vested and non-vested renewal commissions.
>
> Disability benefits from any mandated benefit act or law. This includes all temporary disability or state disability benefits required by law.
>
> Disability benefits from all group plans of: (1) the *plan sponsor* or (2) the *employer*. This includes payments made by group life insurance plan do [sic] to the covered person's *disability*. This does not include provisions made from a group life insurance plan's: (a) accelerated death benefit; or (b) like provisions that allow payment of such plans proceeds due to terminal illness. (Italics in original.)

The letter indicated Rice had been overpaid $7014.09.

Debbie McQuady ("McQuady"), human resources manager for Lexington Coal, testified by deposition on April 21, 2011. She is responsible for employee benefits, including managing payroll, insurance and retirement records. She testified Lexington Coal offers STD and LTD insurance coverage to all employees. If an employee is disabled for 180 days or longer, the LTD plan pays up to 50% of an employee's wages. McQuady testified Rice was covered by workers' compensation

insurance, so STD benefits were not paid to him. She testified Rice had been receiving $1,736 per month since April 27, 2010, and would be paid that amount until he reached normal retirement age. She explained any outside funds such as Social Security would offset his gross benefit. McQuady testified Lexington Coal paid the premium to Guardian for the disability policies.

McQuady reviewed documents regarding payment of LTD benefits. With regard to one document, she stated "you see his gross benefit was $1,736; his offset to gross was his workers' comp that he was getting paid. So the minimum amount that they pay per month is $50."

An April 27, 2010 statement from Guardian addressed to McQuady was attached as an exhibit to her deposition. The statement indicates disability benefits were offset in the amount of $2,862.21 for workers' compensation benefits.

The ALJ's finding in the opinion, award and order regarding the credit is as follows:

> Lastly, Defendant Employer requests a credit for the employer funded short-term and long-term disability benefits Plaintiff received. Pursuant to KRS 342.730(6), Defendant Employer is entitled to the requested credit.

Rice filed a petition for reconsideration arguing Lexington Coal was not entitled to the offset because the employer-funded plan contained an internal offset.

By order dated October 10, 2011, the ALJ denied the petition for reconsideration indicating she saw no errors patently appearing on the face of the opinion, award and order.

On appeal, Rice again argues the ALJ erred in allowing the credit since the STD and LTD policies contained an internal offset for workers' compensation benefits. In support of his argument, Rice points to his own testimony, the letter he received from Guardian regarding overpayment, and McQuady's testimony concerning the offset. He argues the unequivocal and uncontested evidence does not permit the offset awarded by the ALJ.

Lexington Coal bore the burden to prove entitlement to a credit for other income benefits received by Rice against its obligation to pay workers' compensation income benefits. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2005). Our analysis begins with KRS 342.730(6) which provides:

> All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter,

> except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

An employer is only entitled to receive credit for disability payments if the payments were made pursuant to an exclusively employer-funded plan "which extends income benefits for the same disability" as covered by KRS Chapter 342 and only if the plan did not contain an internal offset provision for workers' compensation which is inconsistent with the statute. In order to prevail, it was necessary for Lexington Coal to prove every element set out in KRS 342.730(6).

In Dravo Lime Co., Inc. v. Eakins, supra, the Court stated KRS 342.730(6) "was enacted to address situations where an employer-funded plan permits benefits without regard to the cause of the recipient's disability and fails to contain an offset for workers' compensation benefits." Id. at 291. The Court also stated the purpose of KRS 342.730(6) was to prevent workers from receiving duplicate private disability and workers' compensation benefits.

We agree with Rice that the LTD plan contains an internal offset provision for workers' compensation benefits which is inconsistent with the provisions of the statute. Debbie McQuady's testimony unquestionably established, in

computing the monthly LTD benefits to which Rice was entitled, there was an offset for the workers' compensation benefits. McQuady testified Rice received no STD because he was paid TTD. She further stated, with regard to LTD benefits, "You see his gross benefit was 1736; his offset to gross was his workers' comp that he was getting paid." Plaintiff's exhibit one, attached to McQuady's deposition, stated "In deriving the 'net payment', the 'net benefit' was increased to the 'minimum amt' of: 50.00. The other income offset amount consists of: workers compensation 2862.21." Further, the language in the letter to Rice regarding overpayment established benefits would be offset for state disability payments, i.e. workers' compensation benefits.

The evidence clearly established there was an internal offset for workers' compensation benefits. Lexington Coal failed to prove all of the essential elements that would entitle it to a credit pursuant to KRS 342.730(6). Thus, the ALJ erred in granting Lexington Coal a credit for LTD benefits against its liability to pay PPD benefits. Therefore that portion of the award must be reversed and this matter remanded for entry of an amended award finding Lexington Coal is not entitled to a credit or offset.

Accordingly, the August 29, 2011 Opinion, Award and Order and the October 10, 2011 Order on reconsideration

rendered by Hon. Caroline Pitt Clark, Administrative Law Judge, are hereby **REVERSED** in part and this matter is **REMANDED** for entry of an award consistent with this opinion.

ALL CONCUR.

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