OPINION ENTERED: May 24, 2013

CLAIM NO. 201168484

MICHAEL ARNOLD PETITIONER

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

NESCO RESOURCE
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Michael Arnold ("Arnold") appeals from the January 9, 2013, opinion, order, and award and the January 25, 2013, order overruling his petition for reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the January 9, 2013, opinion, order, and award, the ALJ awarded permanent partial disability ("PPD") benefits at

the rate of $2.87 a week for 425 weeks and medical benefits.

On appeal, Arnold makes three arguments. First, Arnold asserts the ALJ erred as a matter of law by finding Arnold performed bona fide work when he performed work under Nesco Resource's ("Nesco") modified duty agreement and in refusing to award temporary total disability ("TTD") benefits. Second, Arnold asserts the ALJ erred as a matter law in his interpretation of Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008). Finally, Arnold asserts the ALJ erred as a matter of law by failing to impose sanctions against Nesco for its refusal to voluntarily pay TTD benefits.

The first Form 101 (Claim #2011-68484), filed on June 19, 2012, by Nesco, alleges Arnold injured his right shoulder on November 3, 2011, in the following manner: "Plaintiff reportedly was lifting pallets and stretching when he developed right shoulder pain." The second Form 101 (Claim #2011-68484), filed by Arnold on August 17, 2012, alleges Arnold injured his right shoulder and low back on November 3, 2011, in the following manner: "Stretching over a conveyor with a pallet on which concrete blocks were to be stacked. Felt sharp jolt of pain in right shoulder. Plaintiff is right hand dominant. When stood up felt pain

in lower back." The record reveals Nesco is a temporary employment agency, and Nesco placed Arnold with Boyle Block, a concrete block manufacturer.

On August 17, 2012, Arnold filed a "Motion to Consolidate Claims" which was sustained by order dated September 4, 2012.

The record reveals Arnold did not work for Nesco from November 4, 2011, through December 5, 2011. Additionally, Arnold was off work from March 27, 2012, the date he underwent a right shoulder manipulation performed by Dr. Janak R. Talwakar, through April 12, 2012. The record further reveals Arnold was physically present at Nesco, ostensibly performing light duty work pursuant to a "Modified Duty Offer" from December 6, 2011, through March 26, 2012, and again from April 13, 2012, through July 18, 2012.

The October 30, 2012, benefit review conference ("BRC") order reflects the contested issues were: benefits per KRS 342.730 and TTD benefits. Under "other" is the following:

> Wage continuation paid 11/04/11 through 12/05/11- $1010.65 and 03/27/12 through

> 04/12/12- $663.26.[1] Regular wages paid 12/06/11 through 03/26/12 and 04/13/12 through 07/18/12. Issue exists of appropriate credit, if any, to employer for wage continuation paid. Further issue of sanctions under KRS 342.040(2).

Concerning Arnold's entitlement to TTD benefits, the ALJ determined as follows:

> I agree with the Plaintiff's contention that workers' compensation benefits are a statutory creation not typically modified by equity or the common law, but they are guided and controlled by the published decisions of the Kentucky Court of Appeals and the Kentucky Supreme Court. It is also true that wage continuation is not a benefit for which the statute provides credit against workers' compensation benefits. KRS 342.730(6)
>
> However, the issue of credit for wage continuation is guided by *Millersburg Military Institute v. Puckett* 260 S.W.3d 339 (Ky. 2008). That case stands for the principle that while non-bona fide wages do not provide a credit against benefits that bona fide wages for work actually performed does provide a credit against benefits that would otherwise be owed.
>
> In this matter I find that however boring, frustrating and otherwise unpalatable the work the employer asked the Plaintiff do it was nonetheless bona fide work, for the benefit of the

[1] While the Board does not know exactly what "wage continuation" refers to, it appears the ALJ has used this term of art to describe the wages paid to Arnold when he was not physically present at Nesco for the period of time directly after the November 3, 2011, injury and after a March 27, 2012, right shoulder manipulation performed by Dr. Talwalkar.

> employer and the wages paid were bona fide. Said wages were paid through July 18, 2012, the date of MMI. As such no additional TTD benefits are payable.

Arnold filed a petition for reconsideration asserting he is entitled to an award of TTD benefits from November 3, 2011, through July 18, 2012. Arnold maintained as follows:

> During the post-work related injury period in issue, the employer required that Arnold report each day to perform what NESCO Resource, 'NESCO', designated as 'Modified Duty'. In Arnold's case, the modified duty consisted of jobs limited to use of his non-dominant left hand or no activity at all except sitting in a room by himself or with two other injured workers for hours at a time. Arnold was paid at his usual hourly wage rate less taxes withheld. If he failed to show up for assignment of a job activity by the NESCO office personnel, he received no income.

Consequently, Arnold argued as follows:

> The Plaintiff respectfully submits that the denial of an award of temporary total workers' compensation disability income benefits to Arnold for the period when, because of the work injury, he was medically restricted from engaging in the type of work he was performing at the time of his work injury or similar work and before he had reached maximum medical improvement status, constituted patent error as a matter of law.

By order dated January 25, 2013, the ALJ denied Arnold's petition for reconsideration. Handwritten in the order is the following: "Again, the wages paid was [sic] for bona fide work."

Arnold was deposed on September 10, 2012. Arnold testified he started working for Nesco on June 3, 2011, and was placed at Boyle Block on that same date. He was injured on November 3, 2011. Arnold testified his pre-injury duties at Boyle Block were to rotate concrete blocks, push them onto a conveyor, and stack them. Each block weighed between 25 to 37 pounds. His testimony concerning the November 3, 2011, incident is as follows:

> A: That morning I started the regular job. I started up the machine, ready to stack blocks. The job they had, that was required to be done is done usually by, it's a two-man job, but on that day, the reason I know it's a two-man job because I've done the job before, and it was always two people.
>
> Q: There was always someone working with you?
>
> A: Yes.
>
> Q: All right.
>
> A: But on this day, they figured- I don't know who it was- they figured one man could do that job, and that one man happened to be me, and as I, they'd pass up on the other side of the conveyor and turned blocks on the other side so-

Q: Let me back up for a minute. Explain that. You were-

A: Okay, I'm-

Q: -physically located on one side of the conveyor?

A: And having to reach, stretch all the way over to-

Q: That's what I thought you meant, okay.

A: -stretch all the way over to put a pallet on the other side. So once the pallet gets shot out, the box can be stacked on top of the pallet where when there are two people there, there's someone on the other side of the conveyor to put the pallet [sic] for me. But on this day, there wasn't [sic] nobody [sic] there to put the pallets up for me. I had to do it all by myself.

Q: So basically you're reaching across the belt-

A: Stretching across with the pallet, yes.

Q: -to put the-

A: Yes.

Q: -block on the pallet and normally you would have another guy on the other side of the belt and you would hand, the two of you would work together?

A: Yes, he's putting the pallet up and I'm turning the concrete blocks.

Q: All right, I understand. And what happened?

> A: I couldn't just let the pallet go on the opposite side, because it had to be set up straight, so I had to physically lay it down, and I had a pallet. I know they had one pallet so heavy, so I'm stretching over, and the next thing I know I just hurt something. I pulled in my shoulder.

Arnold testified he was required to sign a "modified duty consent form" in Nesco's office on November 3, 2011, after he was injured. Arnold testified as follows:

> Q: What if anything were you told as to whether or not you were required to sign the modified duty consent form before you had medical treatment? What did Ms. Weir tell you, if anything, about the sequence of that? What had-could you get medical treatment if you refused to sign that?
>
> A: I wouldn't be able to get medical treatment.
>
> Q: Did she tell you that?
>
> A: Yes.

Arnold testified concerning the work he performed after he returned to work at Nesco as follows:

> Q: -you were brought back in to work actually at Nesco, is that correct? You were not taken back to Boyle Block?
>
> A: Correct.
>
> Q: All right. Tell me what you did. I mean, I know what this form says, but tell me what [sic] in your own words

> what you did when you were brought back?
>
> A: Sat in a little room with the door closed.
>
> Q: Did you ever hold a sign?
>
> A: Periodically.
>
> Q: Did you ever help with applications, new applications being brought in, sorting them?
>
> A: No, sir, they had me sit at a desk highlighting name here, Social Security here.
>
> Q: Maybe that's what I'm thinking of.
>
> A: Okay.
>
> Q: Those were on new applications-
>
> A: Yes.
>
> Q: -that were brought in? When you were in the room, this was inside the Nesco office here in Danville-
>
> A: Yes.
>
> Q: -is that correct? Were you allowed to, during downtime, read or what were you-
>
> A: No, no reading, no writing, no MP3 player, no computer.

Arnold attempted to engage in a portion of his physical therapy on one occasion when he was in the room. He explained as follows:

> A: I attempted to do therapy one day. I was laying on the floor. I had just

> left therapy from being tugged and pulled with my arm, so I was laying on the ground-
>
> Q: Where were you laying on the ground?
>
> A: In the little room.
>
> Q: All right. What happened?
>
> A: I was still doing my stretches, then Missy opens the door. She told me I need to get up off the floor. I told her I was doing my therapy because I was still hurting, and I said the floor felt good to my shoulder. She said you need to get up off the floor because it looks like you're sleeping. I said, I just got out of therapy. I'm not sleeping. She said you need to get up off the floor, and it was not normal talk. I was being yelled at. I got up off the floor and I sat in a chair.

Exhibit 1 to Arnold's deposition is a copy of Nesco's "Modified Duty Offer." The first paragraph of this document reads as follows:

> Nesco Resource desires to provide our injured employees with the most expedient and quality medical care for their work related injuries. Nesco has developed a modified duty program that will allow our injured workers to return to work on modified duty status by making accommodations for work restrictions.

In that same document, Arnold's job duties were described as follows:

> If weather permits will be holding or sitting with 'NOW HIRING' Nesco sign. Garbage will be removed every afternoon from all trash containers and taking [sic] out. Washing of from [sic] lobby windows. Use only your left hand to do such.

The document was signed by Arnold and dated December 6, 2011.

Arnold testified at the November 14, 2012, hearing. He described the job he was performing at Boyle Block at the time of his injury as follows:

> A: Sorting out blocks and having to reach over to put in a pallet, which was the second man's job to do, to put the pallet up on the conveyor, but instead of two people doing it, I am doing it, I am doing one, reaching over the conveyor to lay the pallet down, which the pallet ended up catching, snagging my shoulder down because if you drop it, the pallet would have splattered and split because it was wood. So I had to lay it down, so doing that in the same motion and having the other part in front of me and leaning way over there, basically the pallet got away from me and snatched me down.

After he was injured, Arnold was told he would not be paid if he did not sign the modified duty agreement. "I would go home. It's not debatable. I go home. I don't get paid." He was also told he would "have to take care of

[him]self" in terms of medical benefits if he refused to sign.

Arnold testified that he was eventually fired by Nesco on July 18, 2012.

At the hearing, Arnold testified his pre-injury duties at Boyle Block were to turn and stack cement blocks. He described his post-injury modified duty as follows:

> Q: Okay. Well, what was done? What were you told to do during the periods when-
>
> A: Sit in the room.
>
> Q: Okay. What kind of a room?
>
> A: More like a jail cell.
>
> Q: Well, okay, but it wasn't a jail cell, it was a room, right?
>
> A: Yeah.
>
> Q: All right. How big was the room?
>
> A: Nine by- I'd say 9 x 12.
>
> Q: Were there any windows?
>
> A: No.
>
> Q: Any pictures?
>
> A: No.
>
> Q: Any chairs?
>
> A: One.
>
> Q: Well, there [sic] other people in there with you sometime, weren't there?

> A: But you have to look at the whole picture. They separated us because at the time there was [sic] three people, there was [sic] three chairs, and that was it. Then when I got separated again, I'm put in the back in a room by myself in a closed room where I had to sit in there with the door closed.
>
> Q: Okay. Did this happen once, or twice, or how long did this go on?
>
> A: Eight months.
>
> Q: But there were times when you weren't there all the time in the room for eight months? There were a few days-
>
> A: You could split that in half.
>
> Q: Okay.
>
> A: Four months by myself in that room.
>
> Q: Okay. Was there ever a time in which you were in the room sitting there and anyone in control at Nesco told you [sic] had to move out of there?
>
> A: Yes.
>
> Q: Explain when that was and what the situation was.
>
> A: Missy told me I needed to get out of that room because it didn't look right for me to be in that room with two women.

Arnold testified that holding the "now hiring" sign outside Nesco’s office was not beneficial to him because he was forced to use his right arm to brace the sign in the wind and ended up injuring his shoulder again.

Arnold further testified that during the period of modified duty, he would not have been able to perform the type of work he was performing at the time of his injury.

Joanne Prewitt ("Prewitt"), area vice-president of Nesco, was deposed on November 7, 2012. Prewitt described Arnold's modified duty at Nesco as follows:

> He was putting applications packets together, making copies, highlighting, holding a "Now Hiring" sign, passing out flyers, whether that was like out in the parking lot of in our lobby, depending on what the flyer was, and other administrative tasks. He put up drug screens, he folded T-shirts for us.

Prewitt agreed that there were days when Arnold did not have anything to do. She testified as follows:

> Q: There were days and weeks, weren't there, when he was in a room with the door closed and under restrictions about talking, using cell phones, and reading and sleeping, that sort of thing?
>
> A: Correct. Uh-huh, (affirmative).
>
> Q: And he would get a two- a 10 minute break in the morning and a 10-minute break in the afternoon and a lunch- I don't know, an hour, a half hour, something like that?
>
> A: An hour. Uh-huh, (affirmative).
>
> Q: But the rest of the time he would be in this room?

> A: No, he came- he walked the halls a lot.
>
> Q: But he spent many hours in this room with the door closed.
>
> A: I wasn't, you know, I-
>
> Q: You can't say whether it's true or not because you weren't there all the time; were you?
>
> A: I wasn't there all- I mean, I was there some. I mean, I saw him walking the halls a lot, so I mean, if he didn't have something to do, yeah, he went to that room and sat.

Brian Pollack ("Pollack"), corporate risk manager for Nesco, testified at the final hearing that the modified duty program is in place because "it's in the best interest of injured workers to continue to stay in the workforce, to transition back in to their full-duty job." Additionally, Pollack testified it is a requirement of the insurance carrier.

Temporary total disability means the condition of an employee who has not reached maximum medical improvement (“MMI”) from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Generally, the duration of an award of TTD benefits may be ordered only through the earlier of those two dates. Case law establishes that a "return to

employment" does not mean a return to "any type of work" or "minimal work." KRS 342.0011(11)(a); Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000). A "return to employment" means the claimant is capable of returning to work that is "customary" or work that he or she was "performing at the time of [the] injury." Central Kentucky Steel v. Wise at 659.

In the January 9, 2013, opinion, order, and award, the ALJ determined, based on the medical evidence in the record, Arnold reached MMI on July 18, 2012. Thus, the inquiry the ALJ should have engaged in regarding Arnold's entitlement to TTD benefits is whether Arnold had "returned to employment" as defined in Central Kentucky Steel v. Wise, supra at any point between November 4, 2011, and July 18, 2012. The answer to that inquiry is no.

At the time of the November 3, 2011, injury, Arnold was moving and stacking concrete blocks that weighed approximately 25 to 37 pounds. The tasks or lack thereof that Arnold performed following the November 3, 2011, injury pursuant to the "Modified Duty Offer" are, on their face, the type of menial or "minimal work" Central Kentucky Steel v. Wise, supra, directly addresses. Indeed, the record reveals Arnold spent much of his time at Nesco from December 6, 2011, through March 26, 2012, and again from

April 13, 2012, through July 18, 2012, simply sitting in an empty room with absolutely nothing to do. As the ALJ determined the date of MMI to be July 18, 2012, and as Arnold was unable to return to "customary" work or work that he was "performing at the time of [the] injury" at any point before July 18, 2012, the date Arnold reached MMI, Arnold is entitled to TTD benefits spanning November 3, 2011, through July 18, 2012. Central Kentucky Steel v. Wise at 659.

We feel compelled to address the ALJ's statement in the January 9, 2013, opinion, order, and award that "no *additional* TTD benefits are payable." (emphasis added). The Board is unclear as to what the ALJ labeled as TTD benefits, as TTD benefits were clearly not paid to Arnold. However, implicit in this statement is that the ALJ believes Arnold is indeed entitled to TTD benefits from November 4, 2011, through July 18, 2012.

Regarding the issue of credit for wages paid to Arnold from December 6, 2011, through March 26, 2012, and again from April 13, 2012, through July 18, 2012, we refer to Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008), a case misinterpreted by the ALJ. In the January 9, 2013, opinion, order, and award, the ALJ determined Millersburg, supra, stands for the proposition

that "bona fide wages for work actually performed does provide a credit against benefits that would otherwise be owed." However, Millersburg, supra, clearly and unambiguously holds the exact opposite. In Millersburg, supra, the Supreme Court of Kentucky affirmed the decision of the Court of Appeals affirming the Board's reversal of the ALJ "on the ground that Chapter 342 *does not* authorize a credit for bona fide wages." Id. at 340. (emphasis added.) In Millersburg, supra, the Court determined "claimant's wages were 'bona fide' because they were paid ostensibly for labor and because the evidence did not permit a reasonable finding that the employer intended to pay them in lieu of workers' compensation benefits." Id.

In the January 9, 2013, opinion, order, and award, the ALJ determined the wages paid by Nesco from December 6, 2011, through March 26, 2012, and again from April 13, 2012, through July 18, 2012, were "bona fide" wages. That determination will not be disturbed by this Board. Additionally, in the case *sub judice*, as in Millersburg, supra, there is simply no evidence indicating Nesco intended to pay these wages in lieu of workers' compensation benefits. The record, particularly Pollack's testimony at the hearing, indicates Nesco has the modified duty program in place to help workers transition to full-

time work and because it is allegedly required by its insurance carrier. Thus, Nesco is not entitled to a credit for the wages paid to Arnold from December 6, 2011, through March 26, 2012, and again from April 13, 2012, through July 18, 2012.

Regarding credit for the "wage continuation" Arnold received from November 4, 2011, through December 5, 2011, and March 27, 2012, through April 12, 2011, as correctly noted by the ALJ in the January 9, 2013, opinion, order, and award, "wage continuation is not a benefit for which the statute provides credit against workers' compensation benefits. KRS 342.730(6)." (emphasis added).

Regarding Arnold's argument the ALJ erred by not imposing sanctions on Nesco for failing to pay TTD benefits, this Board will not disturb the ALJ's discretion.

Accordingly, the ALJ's determination Arnold is not entitled to TTD benefits from November 4, 2011, through July 18, 2012, is **REVERSED**. The case is **REMANDED** to the ALJ for entry of an amended opinion, order, and award awarding Arnold TTD benefits from November 3, 2011, through July 18, 2012, and ordering Nesco is not entitled to credit for bona fide wages and wage continuation paid during that time period.

ALVEY, CHAIRMAN, CONCURS.

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