

OPINION ENTERED: MAY 14, 2012

CLAIM NO. 201076867

MICHAEL MULLINS

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE

ATMOS ENERGY CORP.  
and HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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

**SMITH, Member.** Michael T. Mullins ("Mullins") appeals from the December 1, 2011 Opinion, Award and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"), and the ALJ's January 3, 2012 order on reconsideration. The sole question on appeal is whether the ALJ erred in granting Atmos Energy Corp. ("Atmos") credit for short term disability ("STD") benefits.

On June 7, 2011, Mullins filed two Form 101s alleging injuries to his right knee on February 11, 2009 and September 8, 2010. Mullins received temporary total disability ("TTD") benefits from June 15, 2009 through June 29, 2009 in connection with the first work injury and short term disability ("STD") benefits following the second injury.

Mullins testified by deposition on July 27, 2011 and at the formal hearing held October 26, 2011. At his deposition, Mullins indicated he was off work following the September 8, 2010 incident until February 2011. He did not receive workers' compensation benefits. Instead, he first used his extended illness bank<sup>1</sup> and paid time off. He then received STD benefits. Mullins stated he didn't pay a premium for the STD policy provided through Atmos. Mullins indicated he received STD benefits until he returned to work.

At the hearing, Mullins testified he received 100% of his salary when he used his extended illness bank and personal time off. Once those hours were exhausted, he received STD benefits. He stated the STD benefits were deposited directly into his checking account. Mullins indicated no one told him he would be required to repay the STD benefits once he received workers' compensation benefits.

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<sup>1</sup> The term "Extended Illness Bank" referred to the number of sick time hours an employee had accumulated.

Atmos filed a September 2011 revision of the policies and procedures section of the company handbook. The handbook set forth provisions related to non-work-related absences. It stated "For absences due to a 'work-related' injury or illness, please refer to the **Workers' Compensation Policy**; this policy does not apply to absences due to work-related causes." In the section concerning STD benefits, the handbook states "STD benefits may be used for absences due to the employee's own serious health condition from a non-work related illness or injury . . . ."

Atmos filed more than 200 pages of wage records concerning Mullins' employment from February 1, 2008 through October 7, 2011. No withholding for premiums for the STD policy is discernable from the documentation.

The ALJ found Mullins was entitled to TTD benefits related to the second injury from October 14, 2010 through November 7, 2010 and from December 1, 2010 to February 13, 2011. With regard to the issue of credit for STD payments, the ALJ found as follows:

KRS 342.730(6) states that all income benefits shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan. To the extent that Mullins receive short-term disability benefits during the same period of time for which TTD has been paid or is being awarded, the Defendant is entitled to a credit against those payments.

Mullins filed a petition for reconsideration concerning the duration of TTD benefits and argued the ALJ erred in granting a credit for STD benefits paid. Mullins argued Atmos did not present adequate evidence and sufficient findings were not made on the issue. He cited Dravo Lime Company Incorporated v. Eakins, 156 S.W. 3d 283 (Ky. 2005) which held it was the employer's burden to establish its entitlement to a credit for disability plan payments. He also argued the handbook established that STD benefits were not extended for non-work-related injuries.

Mullins further argued his testimony was the only evidence regarding whether the STD plan was exclusively employer-funded and whether there was an internal offset. He maintained that his testimony was not sufficient to establish exclusive employer funding, nor was his testimony substantial evidence to establish there was no internal offset. Mullins requested additional findings regarding employer funding and internal offset.

By order dated January 3, 2012, the ALJ denied the petition for reconsideration relating to credit for STD payments. He made the following findings regarding the credit issue:

Plaintiff's second argument is that the ALJ erred in allowing the Defendant a credit against short-term disability benefits received by him, pursuant to KRS 342.730(6). The ALJ continues to find that the evidence in this case satisfies the requirements of a

credit under the statute. The statute operates to prevent a double recovery, and applying the statute [sic] to the evidence in this case precludes such a recovery.

On appeal, Mullins argues Atmos did not meet its burden of proof to establish a credit for the STD policy. Mullins notes the policy was not filed into evidence. Mullins notes the Board, in Sidney Coal Company, Inc. v. Newsome, claim number 2003-83329, rendered July 7, 2007, previously stated that "if the policy or plan is not introduced as evidence, it provides the ALJ no opportunity to determine whether the terms of the plan or policy comply with the provisions of KRS 342.730(6)." Thus, Mullins contends the ALJ had no opportunity to determine if the policy contained an internal offset provision that would allow the STD provider to seek reimbursement. Mullins further notes in Siegel Roberts Automotive v. Doss, claim number 2007-81679, rendered July 1, 2011, the Board upheld the ALJ's denial of a credit where the employer failed to file a copy of the plan or introduce any testimony on the issue of an internal offset provision stating that "a review of the record reveals Siegel failed to put forth the necessary proof on this issue."

Mullins argues the evidence filed in this action showed the STD policy did not qualify for a credit. As he argued in his petition for reconsideration, Mullins notes that the Supreme Court in Dravo specifically held a disability policy that, by

its terms, does not cover a work-related injury does not qualify for credit. The evidence presented by Atmos states the STD is paid only for a non-work-related illness or injury. Mullins argues, under the ALJ's ruling, Atmos would get a credit while its insurance carrier, who is in no way bound by the decision, may still be entitled to seek reimbursement under the terms of the policy.

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.

Atmos bore the burden to prove entitlement to a credit for other income benefits Mullins received against its obligation to pay workers' compensation income benefits. Dravo Lime Co. v. Eakins, supra. 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 Atmos to prove every element set out in KRS 342.730(6).

Here, Mullins' testimony and wage records filed by Atmos support a finding the STD policy was exclusively employer funded. However, there is insufficient evidence in the record to support findings that the policy extended benefits for the same disability covered by the Act or whether the policy did not contain an internal offset. We therefore reverse.

It is critical that no plan or policy was introduced, nor did the employer present testimony concerning the plan or policy. Atmos introduced a portion of the employee handbook, which significantly is a September 2011 revision, and thus, to some undetermined extent, its provisions may not have been in effect at the time of the injury or the time STD benefits were paid. We conclude the handbook cannot constitute substantial evidence on the question of whether the STD plan or policy contained an internal offset or extended benefits for the same disability.

Even if we were to assume, *arguendo*, the handbook constituted substantial evidence, the STD benefits are clearly not extended for work-related conditions. In Dravo, *supra*, the Court, in holding the employer was not entitled to an offset, stated the documents submitted:

. . . . do not state that plan benefits are offset by workers' compensation benefits; however, they state, explicitly, that the plan does not cover disability "for an injury or sickness due to employment with any employer." It is apparent, therefore, that because the plan does not extend income benefits for a disability that is covered by Chapter 342, it is not the type of plan for which KRS 342.730(6) provides an offset. Therefore, no offset is permitted on these facts.

The handbook explicitly states STD benefits are for non-work-related conditions and stresses the policy does not apply to absences due to work-related causes. Pursuant to Dravo, the STD benefit in this instance is not extended "for the same disability" and thus no offset is allowed.

To summarize, Atmos failed to present substantial evidence to show the STD plan or policy extended coverage for Mullins' disability and failed to prove the plan did not contain an internal offset for workers' compensation benefits. Thus, as a matter of law, the ALJ erred in granting a credit for STD benefits.

Accordingly, the December 1, 2011 Opinion, Award and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge, and the order ruling on Mullins' petition for reconsideration are **AFFIRMED** in part, **REVERSED** in part, and this matter is **REMANDED** for entry of an award conforming to the views expressed herein.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON JACKSON W WATTS  
131 MORGAN ST  
VERSAILLES, KY 40383

**COUNSEL FOR RESPONDENT:**

HON. ANDREW MANNO  
167 WEST MAIN STREET  
100 FIRST NATIONAL BUILDING  
LEXINGTON, KY 40507

**ADMINISTRATIVE LAW JUDGE:**

HON DOUGLAS W. GOTT  
400 EAST MAIN STREET, STE 300  
BOWLING GREEN, KY 42101