Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 6, 2013

CLAIM NO. 201201160

QUAD/GRAPHICS, INC. PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

MARIO HOLGUIN
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Quad/Graphic, Inc., ("Quad") appeals from the April 12, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") and from the May 15, 2013 Order denying its petition for reconsideration. The sole issue on appeal is whether Quad is entitled to a credit against its obligation to pay

temporary total disability ("TTD") benefits for wages provided to Mario Holguin ("Holguin") while he was restricted to light duty work.

The facts in this matter are largely uncontested. Holguin sustained an injury to his third finger on his left hand on December 27, 2011, when it was caught in a machine. The tip of the finger was severed and Holguin underwent surgery that day to reattach the tip. Holguin was released for one handed duty and returned to Quad the following day.

Testimony from Cynthia Maynard ("Maynard"), the safety coordinator at Quad, confirmed Holguin was placed on light duty in various positions from December 28, 2011 through February 12, 2012. She acknowledged these positions would not be staffed absent the need to find work for Holguin. As the ALJ noted, "it is undisputed that none of the tasks or duties assigned to [Holguin] were actually necessary or significantly beneficial to the employer."

Maynard further explained employees on light duty were allowed to work forty hours per week and could not work overtime. Quad also continued to carry the cost of the employee benefits. Maynard indicated an injured employee would have to bear the cost of the employee benefits if receiving TTD benefits.

The ALJ awarded Holguin TTD benefits from December 28, 2011 to February 12, 2012 because he was unable to perform any of the work duties he had previously performed for Quad. As to whether Quad should be credited for the wages paid to Holguin from December 28, 2011 through February 12, 2012, the ALJ explained:

> The burden is on the employer when seeking a credit against its workers' compensation liability. The Act contains two bases for an offset of the employer's liability to pay workers' compensation income benefits by non-compensation income benefits paid to the employee. KRS 342.730(5) provides for an offset or credit for unemployment benefits paid to the employee. Clearly, this exception is not applicable in this case. KRS 342.730(6) provides that certain payments made under a non-compensation disability plan funded solely by the employer may offset the employer's statutory obligation to pay temporary total disability benefits. However, the plan must qualify and comply with the statute. In the case at hand, the policy or program of Quad/Graphics, Inc. does not comply with this statutory provision. The Defendant-Employer makes no attempt to show that its light duty policy bears any resemblance with a program that is attempting compliance with the statute. Based on the facts and circumstances of this case, The ALJ finds the money paid by Quad/Graphics, Inc. to Mr. Holguin during the period of time in question cannot possibly qualify for a credit against the obligatory payments of temporary total disability benefits to which the Plaintiff was entitled.

Quad filed a petition for reconsideration raising the same arguments it now makes on appeal. On May 15, 2013, the ALJ issued an order denying Quad's petition. The ALJ indicated he considered Quad's arguments prior to rendering the opinion and the arguments were adequately addressed in the opinion.

On appeal, Quad concedes Holguin met the statutory definition of TTD during the period in question. Quad characterizes the work performed by Holguin during this period as "make work" and not bona fide work, and thus asserts the payments were not bona fide wages. Instead, Quad maintains the wages for light duty work were offered in lieu of income benefits, and it should be entitled to a credit equal to the amount it paid, less taxes, during the period in question. Quad notes the amount can be determined through use of sources whose accuracy cannot be reasonably questioned, *i.e*. the Internal Revenue Code.

An employer can receive a credit against its TTD benefits obligation in three circumstances. KRS 342.730(5) permits an offset for unemployment insurance benefits paid for unemployment during the period of TTD. KRS 342.730(6) allows an offset for payments made under a qualifying

disability or sickness and accident plan. As the ALJ determined, neither of these provisions applies.

In the third instance, an employer is entitled to a dollar-for-dollar credit for any voluntary payment of past-due income benefits, so long as the claimant's future benefits are not affected. Triangle Insulation & Sheet Metal Co., Div. of Triangle Enter., Inc. v. Stratemeyer, 782 S.W. 2d 628 (Ky. 1990). In some situations, an employer may choose to continue to pay an employee's regular wages or salary during a period of TTD when the employee is not reporting to work. Such salary or wage "continuation" can be construed as a voluntary payment of past income benefits if it is determined the payments were made in lieu of income benefits. *See e.g*. CPC Commodities, LLC v. Poland, WCB 201082823 (February 22, 2013). *See also* Larson, Larson Workers' Compensation Law, Chapter 82 (2006)(noting an employer may be permitted to receive credit for post-injury wages if the facts indicate that it intended to pay them in lieu of compensation).

The credit issue becomes more confused when an employee reports to work during a period of TTD. In Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008), the claimant suffered a work-related injury to his back. During a period of TTD, he nonetheless returned

to his position as a maintenance worker at light duty. The Kentucky Supreme Court determined the employer was not entitled to a credit for the wages paid during claimant's period of TTD. The Court stated, "The 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. at 342.

Quad interprets the above quote from Puckett to mean that if wages are *not* bona fide, and the wages *were* received in lieu of workers' compensation benefits, the employer is entitled to a credit. As stated above, Quad "concedes" the wages were not *bona fide* wages because Holguin was not performing *bona fide* work. Further, Maynard repeatedly testified Holguin's wages were paid in lieu of income benefits.

We find Quad's interpretation too narrow a reading of Puckett. Puckett affirmed the Court of Appeals "on the ground that Chapter 342 does not authorize a credit for bona fide wages." Id. at 340. In this case, the ALJ did not make a specific finding as to whether Holguin received *bona fide* wages. For purposes of determining whether Holguin met the statutory definition of TTD, the ALJ did determine that Quad's "make-work" did not

constitute a return to the type of work Holguin customarily performed.

Nonetheless, it is unnecessary to remand this matter to the ALJ because we determine, as a matter of law, that the wages paid to Holguin were *bona fide* wages. We do not accept Quad's "concession" otherwise. The fact an employee is performing "make work" is relevant to an analysis of whether the employee had returned to his customary employment, for purposes of qualifying for TTD benefits. It is not relevant to an analysis of bona fide wages.

Maynard testified Holguin would not have been paid if he did not report to work during the period in question. This testimony was not rebutted. The undisputed testimony is Holguin was required to be present at Quad in order to receive his wages. The fact Quad did not have meaningful work for Holguin to perform within his restrictions does not change the nature of the wages paid.

We acknowledge this analysis would apply equally to an employer who does, indeed, have meaningful work within restrictions for an employee to perform during a period of TTD. Nonetheless, workers' compensation is a statutory creation and KRS 342.730 does not include an

offset for post-injury wages. This Board is not at liberty to create one.

Accordingly, the April 12, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative Law Judge, and the May 15, 2013 order denying Quad's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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