

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 16, 2013

CLAIM NO. 201000763

U.S. CORRUGATED, INC.

PETITIONER

VS.

APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

JOHN HAMMONS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. U.S. Corrugated, Inc. ("USC") seeks review of the January 14, 2013, opinion, order, and award of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") finding John Hammons ("Hammons") sustained a work-related back injury and awarding temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits enhanced by a 3.6 multiplier pursuant to KRS 342.730(1)(c)1

and 3. The ALJ also awarded medical benefits. USC also appeals from the order entered February 21, 2013, sustaining in part Hammons' petition for reconsideration and the March 26, 2013, order overruling its petition for reconsideration and/or for clarification of the February 21, 2013, order.

On appeal, the sole issue is whether USC should have been granted a credit for voluntary salary payments it made to Hammons after he stopped working.

Hammons alleged a lower back injury occurring on June 1, 2010. The claim was initially assigned to Hon. Douglas W. Gott, Administrative Law Judge ("ALJ Gott").

Concerning the issue on appeal, during his September 23, 2010, deposition Hammons testified as follows:

Q: I understand that you have short-term disability benefits through your employment with U.S. Corrugated?

A: Yes.

Q: And I think those are provided by Cigna?

A: Yes.

Q: Okay. Are you currently receiving no short-term disability benefits?

A: I haven't yet.

Q: Okay. You haven't received any since last working on June 16th, 2010?

A: No short-term disability, no.

Q: Okay. Have you received any other kind of benefits or salary continuation through U.S. Corrugated?

A: I received four paychecks.

Q: Were they full paychecks? Were you receiving your full rate of pay?

A: Yes.

Q: I'm not necessarily trying to pin you down as to any exact dates, but can you recall for me the timeframe in which you received those work paychecks?

A: They're received on the 1st of the month and the 15th of the month. So the last one I received was the 15th of August, I believe.

Q: Are those paychecks received directly from U.S. Corrugated?

A: Yes.

Q: Have you received any kind of payment, benefit or compensation, from Cigna?

A: No.

Q: Have you actually applied for short-term disability benefits?

A: Yes.

Q: Do you recall approximately when you submitted your application?

A: It was early in July, I believe.

Q: And have you received any sort of notification as to whether determination one way or the other has been made as to whether you're entitled to benefits?

A: Yes.

Q: It was approved?

A: Yes.

Q: Have you spoken with anyone at either Cigna or U.S. Corrugated as to why you've not yet received any short-term disability benefits even though the application has been approved for a while now?

A: No, I haven't.

The December 1, 2010, benefit review conference ("BRC") order reflects the following were listed as contested issues: "work-relatedness/causation/active; notice; P claim for PTD, or PPD with 3x; P claim for TTD; D/E claim for credit for short term disability; compensability of surgery (a finding in P's favor would result in an interlocutory award) AWW."

At the February 7, 2011, hearing before ALJ Gott, the following exchange took place on cross-examination:

Q: Mr. Hammons, again, we've met before. I'm Patrick Murphy. I just have a few questions for you here today because I know you've given your testimony before. You were asked a question by your attorney about whether you'd received any income since leaving the employ of U.S. Corrugated and you'd

mentioned something about short-term disability benefits and I wanted to ask you some more about that. At some point following your alleged work accident did you actually apply for short-term disability benefits?

A: Yes.

Q: Okay. Now at the time that you applied for those benefits were you aware that the short-term disability benefits were only available for non-work-related physical injuries and physical problems?

A: No.

Q: You were not aware of that?

A: Well, repeat the question. I'm sorry.

Q: Okay. When you applied for your short-term disability benefits were you aware that those benefits are only paid for - paid for physical conditions that are unrelated to work, that they're not paid for work-related accidents or injuries?

A: I did not know that, no.

Q: You did not know that? As a supervisor position that's had a lot of experience in the plant facility, not just at U.S. Corrugated but I think at - I always mispronounce it - Weyerhaeuser -

A: Weyerhaeuser.

Q: --Weyerhaeuser, you were not aware that short-term disability benefits and workers' compensation benefits are mutually exclusive?

. . .

A: I didn't know, honestly. I - no, I didn't know.

Q: Were you ultimately approved for benefits by the short-term disability carrier?

A: I received a letter that said I was approved, yes.

Q: Okay. And then did you subsequently receive short-term disability benefits?

A: I received a check, yes.

Q: Okay. I'm going to represent to you - and Mr. Jones will testify to this in a little bit - that you ultimately received what amounted to 13 weeks of short-term disability benefits totaling approximately \$15,000, but you're telling me you only received one check?

A: The one check that said short-term disability.

Q: Okay. What did the other checks say on them?

A: The other checks were like regular payroll checks.

Q: Okay.

A: Regular salary.

Q: And would it - it was like a continuation of your normal salary then?

A: Yes.

Q: All right. And did you receive those for approximately a period of 13 weeks

after you reported your injury and applied for benefits?

A: Thirteen weeks? I don't think I got that many checks.

Q: Okay. Did you get the checks on a weekly basis?

A: No. Two weeks. Well, 1st and 15th.

Q: Okay. But in total, you don't think you received 13 weeks of benefits?

A: I don't believe I did.

Q: If we include all checks, those checks that were called short-term disability and those checks that were called paychecks, do you think you received 13 total weeks?

A: I don't believe I did.

Clarence Jones ("Jones), USC's human resources manager, also testified at the February 7, 2011, hearing.

Jones testified, in relevant part, as follows:

Q: All right. When you received that e-mail from Cigna and then subsequently spoke to Mr. Hammons, was it explained to him that short-term disability benefits are for physical conditions unrelated to the work, whereas workers' compensation benefits are for actual work accidents or work injuries?

A: We - I did - we had to explain to him that workers' comp takes care of, you know, work-related injuries. If it's a work-related injury you have to - you have to go through workers' compensation. If it is not, it will be short-term disability. But at the same

time I didn't know if it was work-related or not.

Q: Okay. And ultimately, Mr. Hammons chose to pursue the short-term disability benefits?

A: Yes.

Q: Do you happen to know whether or not Mr. Hammons' application for short-term disability benefits was approved?

A: It was not approved. It was denied.

Q: Okay. Was there then a subsequent appeal?

A: I don't remember. I don't think there was, no.

Q: Okay. Now despite that, he was - he continued to receive some salary continuation benefits?

A: Yes, we continued his salary.

Q: Okay. That was through U.S. Corrugated -

A: Yes.

Q: --itself? Can you explain to the administrative law judge how that salary continuation worked?

A: Since we did not know if he was - since it was not workers' compensation we're obligated to pay him because we think he's going to be on short-term disability. So we pay him because we're self-ensured [sic] for salary employees. So, Cigna actually manages our short-term disability for salary employees and we tell them yes, its' okay to pay this person. So we continued to pay his salary, thinking

it's going to be short-term disability. So we actually paid him up to July 30th or something like that, until we found out that it might not be workers' comp, and then, his paycheck stopped and restarted again.

Q: Okay. So if I hear you correctly it sounds like U.S. Corrugated has the right to override Cigna's initial denial?

A: Yes.

Q: All right. And so Mr. Hammons then did receive the short-term - regardless of what they were called -

A: Yeah, yes.

Q: --he had received what were, in effect, short-term disability benefits?

A: Yes. Since he didn't - wasn't approved for it we just continued his paycheck.

Q: All right. And do you recall how long that was continued for?

A: I've got pay records that they go to July the 7th I believe. I think his last check was July the 7th or something like that. July the 15th was his actual - he had an actual check issued on July 15th.

Q: Okay. After the actual paychecks were discontinued did he still continue to receive payments in some form or another past July?

A: No.

Q: Okay.

A: We kept him on payroll and actually kept him as a - as a salary employee. We put him on leave with benefits.

Q: Okay. And can you explain to the administrative law judge how that works?

A: We didn't want to take his benefits away from him because we weren't really sure if he was actually injured at work or not. And so we wanted to make sure that he was - so that's medical coverage, so we continued his medical coverage. And, we put him on a leave of absence vice termination or anything like that.

Q: All right. Cutting the chase, ultimately, how much did Mr. Hammons receive in, again, whatever you want to call it short-term disability benefits or just salary continuation?

A: It was pretty close to \$15,000 because last year he was like at almost \$25,000 up until his - everything stopped.

Q: Okay. Let me just represent for you here earlier before we come in you had indicated to me that the benefits or whatever you want to call them, you know, were paid for approximately 13 weeks for a total of \$15,750.

A: Yes.

Q: Is that correct to the best of your recollection?

A: That's my recollection, yes.

Significantly, in its brief to the ALJ, USC made no argument regarding its entitlement to a credit for disability or voluntary salary continuation payments.

On April 7, 2013, ALJ Gott entered an interlocutory opinion and award finding Hammons sustained a work-related injury, provided notice of the injury, and determining the surgery recommended by Dr. Brian O'Shaughnessy was compensable. ALJ Gott awarded TTD benefits to commence on October 12, 2010, and to continue until Hammons reached maximum medical improvement ("MMI") from the surgery. The claim was held in abeyance. Hammons subsequently underwent surgery performed by Dr. O'Shaughnessy.

In an order dated January 18, 2012, ALJ Gott recused and the claim was assigned to the ALJ.

On May 22, 2012, the ALJ entered an order removing the claim from abeyance, terminating TTD benefits, and setting a proof schedule.

Hammons was again deposed on July 2, 2012, during which there was no testimony concerning short-term disability benefits or salary continuation payments.

In its witness and exhibit list, stipulations, and contested issues, USC stated it had requested short-term disability benefits payment information from Cigna and reserved the right to file in evidence the information concerning the short-term disability benefits paid to Hammons in order to claim a dollar for dollar credit

pursuant to KRS 342.730(6). Under the heading of contested issues, USC stated as follows:

1. Work-relatedness/causation;
2. Due and timely notice;
3. Pre-existing active disability;
4. Extent and duration (including the application of any benefit multipliers);
5. Credit for short-term disability benefits.

On November 20, 2012, USC filed its short-term and long-term disability documents representing these documents included the group disability insurance certificate and other documents pertaining specifically to Hammons.

At the November 13, 2012, hearing the ALJ identified the following contested issues:

ADMINISTRATIVE LAW JUDGE: . . .

But to continue, the issues that I have in front of me now are entitlement to benefits per KRS 342.730, whether the plaintiff is entitled to any additional TTD benefits, issues of work relatedness/causation, and injury as defined by the Act or injuries that were addressed in the Interlocutory Award by Judge Gott. And as I've advised counsel, I am not going to go back and actually retry those issues unless some sort of evidence is pointed out to me in their briefs of something that was incorrectly done or a decision was improperly reached. That goes also along with the issue of notice and will be treated the same way.

We also have an issue of whether or not the employer is entitled to a credit for short-term disability benefits or unemployment benefits and whether there's an exclusion for an pre-existing disability/impairment.

At the hearing, Hammons testified, in part, as follows:

Q: I think in response to a question posed to you by your attorney you said following June of 2010, you never applied for unemployment benefits or received unemployment benefits.

A: No, I didn't apply.

Q: You did receive some short-term disability benefits for a while, but you're not exactly certain as to the dates?

A: I'm not sure about that, no.

Q: Let me ask you this. If you don't recall, you don't recall, and that's fine. I understand it's been some time.

I think - if I recall correctly from having looked at the documents, I think maybe you had received some short-term disability benefits between June of 2010, when you left work, and October of 2010, when the prior Administrative Law Judge awarded you some temporary total disability benefits.

Does that sound correct?

A: Well, it was awarded to me in October, but when it took effect, it was retroactive to . . .

Q: Fair enough. That's more correct to characterize it that way. It was backdated to you?

A: Yes.

Q: Ultimately, you don't have a recollection as to the start and stop dates on those short-term disability benefits?

A: No, I honestly don't.

At the conclusion of Hammons' testimony, the following exchange took place between the ALJ and Hammons:

ADMINISTRATIVE LAW JUDGE: Mr. Hammons, I just have a couple of quick questions just to clarify in my mind.

The short-term disability benefits that you received for whatever time period that you received those, was there any money taken out of your check to put toward a short-term disability plan, or was that something that was totally paid for by your employer?

THE WITNESS: That was provided by the employer.

ADMINISTRATIVE LAW JUDGE: So that was part of your benefit package?

THE WITNESS: Yes.

In its post-hearing brief to the ALJ, USC presented an argument under the following heading: "ARGUMENT II U.S. Corrugated is Entitled to a Credit for Any Short-Term Disability Paid to the Plaintiff." USC stated Jones testified at the final hearing before ALJ Gott

that Hammons had received approximately \$15,750.00 in short-term disability benefits and those records had been filed in evidence. It argued the offset for short-term disability benefits paid to Hammons was applicable in this claim as a disability plan was provided by USC at its expense. USC requested the ALJ find it was entitled to a dollar for dollar credit for short-term disability paid to Hammons pursuant to KRS 342.730(6).

In the findings of facts and conclusions of law set forth in the January 14, 2013, opinion, order, and award, the ALJ determined, in part, as follows:

The contested issues were identified as whether the Plaintiff suffered an injury as defined by the Act, work-relatedness/causation, whether the Plaintiff gave due and timely notice, entitlement to TTD benefits, whether the Defendant Employer is entitled to credit for payment of short-term disability benefits or unemployment benefits, exclusion for pre-existing disability/impairment, and entitlement to benefits per KRS 342.730.

. . .

Mr. Hammons also received short-term disability benefits from June of 2010 through October of 2010 from a plan that was fully funded by the Employer.

. . .

The first issues for determination are whether the Plaintiff is entitled to

any additional TTD benefits and whether the Defendant Employer is entitled to a dollar for dollar credit pursuant to KRS 342.730 (6) for any benefits that the Plaintiff received under the exclusively Employer funded disability or sickness and accident plan which extends income benefits for the same disability covered by KRS Chapter 342 when said plan does not contain an internal offset provision for Worker's Compensation which is inconsistent with this provision.

. . .

The Defendant Employer has submitted a copy of the short term disability plan under which the Plaintiff received benefits from June 17, 2010, through October 1, 2010. A close review of this plan does not indicate that it contains an internal offset provision for Worker's Compensation benefits which is inconsistent with KRS 342.730 (6). It also appears from a review of the plan as well as the Plaintiff's testimony that this plan was fully funded by the Defendant Employer. Therefore, it appears that the Defendant Employer is entitled to a dollar for dollar credit for any benefits that Mr. Hammons received under the fully Employer funded short-term disability plan for the time periods of June 17, 2010, through October 1, 2010.

Regarding the credit to which USC was entitled, the ALJ ordered:

The Plaintiff, John Hammons, shall recover from the Defendant Employer, US Corrugated, Inc., and/or their insurance carrier, TTD benefits payable to rate of \$711.29 per week commencing June 17, 2010, and continuing

thereafter through May 28, 2012, with the Defendant Employer taking a dollar for dollar credit for any TTD benefits that overlapped the payments of short-term disability benefits previously paid herein, together with interest at the rate of 12% per annum on all due and unpaid installments of said compensation, with the Defendant Employer taking credit for any benefits paid by them.

Hammons filed a petition for reconsideration arguing, in part, the short-term disability plan filed by USC contained a clear offset for workers' compensation benefits which was inconsistent with the ALJ's decision. In support of his argument, Hammons cited to page six of the plan which he attached as exhibit one. Hammons argued since the plan clearly stated short-term disability benefits were offset by workers' compensation benefits, USC was not entitled to an offset for short-term disability benefits.

In the February 21, 2013, order ruling on the petition for reconsideration, the ALJ sustained that portion of Hammons' petition for reconsideration finding and ordering as follows:

The Plaintiff's Petition for Reconsideration requesting that the Opinion, Order, and Award should be amended to reflect that the Defendant Employer shall not be entitled to a dollar for dollar credit based upon an internal offset provision contained

within the short-term disability plan which would prevent the Defendant Employer from being allowed a dollar for dollar credit pursuant to KRS 342.730(6) shall be and the same is hereby **SUSTAINED**. The undersigned Administrative Law Judge erred in finding that plan did not contain an internal offset provision when, in fact it did and apparently the undersigned Administrative Law Judge misread the short-term disability plan in question when it was found that an internal offset provision did not exist. In addition, the Defendant Employer's argument that the payment of these benefits amounted to salary continuation is not persuasive, as this issue was not preserved at the Benefit Review Conference and therefore is not subject to being addressed at this time. Therefore, the Opinion, Order, and Award shall be amended to reflect that the Defendant Employer shall not be entitled to a dollar for dollar credit for any short-term disability benefits that may have overlapped any temporary total disability benefits awarded herein pursuant to KRS 342.730(6).

This prompted USC to file a "petition to reconsider and/or for clarification of February 21, 2013 order." In its petition for reconsideration, USC argued it presented uncontested evidence the monies Hammons received were its own dollars paid solely for the purpose of making Hammons whole and keeping his benefits intact until the issue of the compensability of his claim could be determined. Therefore, it submitted preserving this issue

was not necessary because the standard boilerplate language which accompanied all awards of TTD and PPD benefits specifically allowed it to receive a credit for the income benefits it had paid. As previously noted, by order dated March 26, 2013, the ALJ overruled USC's petition to reconsider or for clarification.

On appeal, USC argues Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990) directs that employers are entitled to credit for voluntary benefits against past-due income benefits on a dollar-for-dollar basis. Relying upon Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008), USC argues it "may be entitled to the same offset if post-injury wages were paid in lieu of compensation." USC asserts as follows:

Due to the nature of the Respondent's medical history and its relation to his alleged work injury, the STD benefit administrator, Cigna, denied the Respondent's application. After learning of Cigna's decision, U.S. Corrugated began to investigate the Respondent's lower back condition. While this investigation took place, U.S. Corrugated initiated payments to the Respondent in accordance with his regular salary.

Despite his inability to work, the Respondent received payroll checks from U.S. Corrugated from June 2010 through July 2010.

USC maintains Hammons testified following his injury he received salary continuation from June 2010 to August 2010 and Jones testified at the February 7, 2011, hearing that Hammons received approximately \$15,750.00 in salary continuation. It asserts these records have been filed into evidence.

Concerning whether it preserved the issue as a contested issue, USC argues as follows:

A credit for the Respondent's salary continuation was preserved under the standard boilerplate language articulated in the Opinion, Order and Award. As with every other Opinion, Order and Award, immediately following the specified awards of TTD and PPD, it included the standard boilerplate language, 'with the Defendant Employer taking credit for any benefits paid by them' and 'with the Defendant Employer taking credit for benefits previously paid by them,' respectively. [citation omitted]

We find no merit in USC's argument it preserved the issue of its entitlement to a credit for salary continuation payments as a contested issue to be resolved by the ALJ. Before ALJ Gott, one of the contested issues was whether USC was entitled to a claim for short-term disability. However, in its brief to ALJ Gott, USC made no argument of entitlement to a credit for any type of voluntary income benefits paid. In the November 13, 2012,

BRC order, the only reference to USC's entitlement to a credit for income benefits received by Hammons relates to short-term disability benefits and unemployment benefits Hammons received. There was no mention of entitlement to a credit for salary continuation payments.

The record clearly establishes USC did not raise its entitlement to a credit for salary continuation payments as a contested issue to be decided by either ALJ. The intent behind 803 KAR 25:010 Section 13(14), which reads as follows: "[o]nly contested issues *shall* be the subject of further proceedings" following the BRC, is to identify the contested issues which are being pursued by the parties and to be decided by the ALJ. The BRC orders of December 1, 2010, and November 13, 2012, did not list as a contested issue USC's entitlement to a credit for salary continuation benefits it voluntarily paid. Throughout the proceedings, USC never argued it was entitled to a credit for salary continuation payments; rather, it argued it was due a credit for short-term disability benefits paid pursuant to a plan it had in place. Thus, the ALJ correctly concluded in his February 21, 2013, order that this issue was not preserved at the BRC and therefore was not subject to be addressed.

Similarly, we find no merit in USC's argument the issue of a credit for the salary continuation payments was preserved under the standard boilerplate language articulated in the opinion, order, and award. The mere fact the ALJ stated an employer is entitled to a credit for any benefits paid by it does not preserve the issue of USC's entitlement to a credit for salary continuation payments. USC must advise the ALJ it was raising as a contested issue, its entitlement to a credit for the salary continuation payments it made to Hammons. As USC's entitlement to a credit for salary continuation payments was not specifically identified as a contested issue at the BRC, USC waived its right to argue it was entitled to such a credit.

In addition, we point out entitlement to a credit for unemployment benefits and short-term disability benefits are statutory credits set out in KRS 342.730(5) and (6). Section 5 permits TTD benefits to be offset by unemployment insurance benefits paid for unemployment during the period of temporary total disability or permanent total disability. Section 6 permits workers' compensation income benefits to be offset by payments made under exclusive employer funded disability or sickness and accident plan which extended income benefits for the same

disability covered by KRS 342 except where the employer funded plan contains an internal offset provision for workers' compensation benefits. Entitlement to a credit for salary continuation payments is an entirely different issue than entitlement to credit for unemployment insurance benefits and short-term disability benefits paid pursuant to an employer funded disability plan. Similarly, entitlement to a credit for salary continuation payments involves the introduction of completely different evidence, as the employer is only entitled to receive such a credit when the evidence indicates the salary continuation payments are in lieu of workers' compensation benefits. Here, there was no such evidence.

Finally, assuming *arguendo*, the issue had been preserved, there is insufficient proof establishing these voluntary payments of Hammons' salary were in lieu of TTD benefits. In Millersburg Military Institute v. Puckett, *supra*, the Supreme Court stated as follows:

KRS 342.730 provides certain offsets against income benefits but does not include post-injury wages. [footnote omitted]

. . .

Thus, *Triangle Insulation and Sheet Metal Co. v. Stratemeyer*, 782 S.W.2d 628 (Ky. 1990), determined that

employers are entitled to credit voluntary benefits against past-due income benefits on a dollar-for-dollar basis but that future income benefits must not be affected. The court reasoned that such a policy encourages employers to pay benefits voluntarily and ultimately benefits injured workers. Larson, *Larson's Workers' Compensation Law*, Chapter 82 (2006), notes that 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.

Id. at 342.

Here, we believe the ALJ could conclude the evidence did not compel a finding USC continued to pay Hammons' salary in lieu of workers' compensation benefits. Rather, the testimony of Jones, USC's human resources manager, and its questioning of Hammons revealed USC continued to pay Hammons' salary for a period of time in lieu of paying short-term disability benefits. As correctly found by the ALJ, USC was not entitled to a credit for short-term disability benefits as its plan contained an internal offset for workers' compensation benefits received. Workers' compensation benefits are specifically defined on page six of USC's plan as "Other Income Benefits," and that plan permits the plan's disability benefits to be reduced by the amount of workers' compensation benefits received by Hammons. Thus, we

believe USC's argument, absent the question of whether it preserved entitlement to the credit for salary continuation payments as a contested issue, fails on its face.

As required by Millersburg Military Institute v. Puckett, supra, the facts must indicate the salary continuation was paid in lieu of workers' compensation benefits. Here, there was absolutely no proof to that effect. That being the case, the ALJ did not err in refusing to grant USC a credit for the salary continuation payments to Hammons for a period of time after June 16, 2010.

Accordingly, the January 14, 2013, opinion, order, and award as amended by the February 21, 2013, order and the March 26, 2013, order are **AFFIRMED**.

ALL CONCUR.

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