

OPINION ENTERED: August 24, 2012

CLAIM NO. 200890251

YNAYVIS HERNANDEZ

PETITIONER

VS.

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

UNITED PARCEL SERVICE  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
REVERSING AND REMANDING**

\* \* \* \* \*

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

**STIVERS, Member.** Ynayvis Hernandez ("Hernandez") seeks review of the December 21, 2011, order of Hon. Chris Davis, Administrative Law Judge ("ALJ") granting United Parcel Service ("UPS") a credit for short-term disability ("STD") payments in the amount of \$5,661.99 "against any indemnity benefits that may be awarded in this matter." Hernandez also appeals from the January 13, 2012, order denying her

petition for reconsideration filed in response to the December 21, 2011, order.

Hernandez's Form 101 alleges an April 14, 2008, injury and a cumulative trauma injury spanning from April 14, 2008, through March 14, 2009, while an employee of UPS. Hernandez alleged the April 14, 2008, injury occurred while she was lowering a "131 pound box down with team member." She alleged both incidents at work injured her lower back and abdomen.

In the November 11, 2011, opinion, order, and award, the ALJ identified the following issues:

The issues to be decided are benefits per KRS 342.730; unpaid medical expenses; temporary total disability benefits; work-relatedness/causation; injury as defined by the Act; notice; credit for short term benefits; vocational rehabilitation; and exclusion for pre-existing disability/impairment.

Concerning the alleged injuries, the ALJ determined as follows:

As for work-relatedness/causation the undersigned does believe, pursuant to the Baptist Worx record that the Plaintiff had a temporary injury to her low back. For that injury she reached maximum medical improvement on December 8, 2008, the date Dr. Martin released her to return to work. She is entitled to TTD and medical expenses from April 14, 2008 through December 8, 2008.

As for permanency the undersigned relies on the weight of the medical evidence, including Dr. Zhou, Dr. Best and Dr. Banerjee. All of these physicians have stated the Plaintiff does not have a permanent work-related injury and their opinions have been adequately summarized, above, and will be relied upon.

Further, the Plaintiff has simply not convinced me. Her testimony and medical records are rife with gaps and contradictions. It may well be, as the Plaintiff herself states and has argued in her pleadings, that these are all due to poor translations, the language barrier and a lack of understanding. However, it is her burden to convince me. The sheer number of these gaps mitigates against giving her the benefit of the doubt. Combined with the medical evidence I cannot find she has any injury, requiring either income or medical benefits, which persisted beyond December 8, 2008.

The Plaintiff shall receive TTD benefits in the amount of \$268.07 from April 14, 2008 through December 8, 2008 and medical benefits for her low back strain through that date. Any and all claims for any benefits beyond that date are dismissed for lack of a permanent injury beyond that date.

The ALJ denied a credit for STD payments stating as follows:

Credit for short-term disability payments was listed as an issue but no evidence was provided for this. The undersigned cannot make an award or finding without evidence.

UPS filed a petition for reconsideration stating as follows:

The Defendant respectfully requests that the Administrative Law Judge reconsider the statement he made in the first full paragraph on page 17 of the Opinion, Order and Award in which the Administrative Law Judge stated that the Defendant had presented no evidence of short-term disability benefits paid. The Defendant filed a Motion for Credit for Short-Term Disability Benefits Paid to the Plaintiff and attached to that Motion the log showing Aetna Life Insurance Co. paid \$5,661.99 in short-term disability benefits to the Plaintiff 'after taxes.' The Administrative Law Judge issued an Order allowing the Defendant to seek this credit. Those documents are attached to this Petition for Reconsideration.

Accordingly, UPS requested the ALJ grant a credit of \$5,661.99 against the past-due TTD benefits awarded.

In her response to UPS' petition for reconsideration, Hernandez asserted the ALJ was correct in finding credit cannot be awarded without evidence, and UPS needed to do more than file a motion for permission to receive the credit. Hernandez argued UPS should have presented evidence in the record in support of its claim for a credit.

In the December 21, 2011, order, without making the necessary findings as required in KRS 342.730(6), the

ALJ granted UPS' petition for reconsideration merely stating as follows:

[T]he Defendant is granted a credit of \$5,661.99 against any indemnity benefits that may be awarded in this matter. Counsel is reminded to carefully review the hearing order for the listed evidence.

Hernandez filed a petition for reconsideration identifying the issue as "whether any evidence was admitted of long-term disability payments."<sup>1</sup> Hernandez requested the December 23, 2011, order be set aside.

In a January 13, 2012, order, the ALJ denied Hernandez's petition for reconsideration stating as follows:

1. Notice that the Defendant was seeking a credit for employer-funded disability benefits was filed via Motion, along with the attachment of a disability log showing the payment of said benefits.
2. Credit for employer funded disability benefits was listed as a contested issue on the BRC Order, completed on September 14, 2011.
3. On the Hearing Order, which lists the evidence to be considered, the disability log was not listed. However, and [sic] this file, in its entirety was larger than ideal for a workers' compensation claim, it is evident that the parties and the

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<sup>1</sup> The reference to long-term disability payments appears to be a typographical error.

Administrative Law Judge were or should have been aware of its existence.

4. Under these circumstances the Administrative Law Judge believes that it is proper to consider the disability log as probative evidence on the issue of credit for disability payments. Any other holding would merely be a technicality that fails to recognize that, in fact, the log was made available to all parties and the Administrative Law Judge prior to the Hearing of this claim.

5. The Administrative Law Judge has a responsibility to list all evidence on the Hearing Order. Each party offering evidence, and who wishes it considered, has a responsibility to see that their evidence is listed on the Hearing Order.

6. The Petition for Reconsideration is DENIED.

On appeal, Hernandez argues "the ALJ should have considered only evidence which was introduced in the record." She posits had UPS introduced evidence regarding STD payments, she would have had the opportunity to rebut it by establishing the "disability payments were not received, that the disability payments were exclusively funded by [UPS], and/or that the disability plan did not contain an internal offset for workers' compensation benefits."

Citing Dravo Lime Company, Inc. v. Eakins, 166 S.W.3d 283, 290 (Ky. 2005), Hernandez argues UPS had the

burden of proof, and to meet that burden it must prove the disability policy was exclusively funded by the employer and there was no internal offset for workers' compensation benefits. Hernandez argues the employer must also prove the STD benefits were paid. Hernandez argues UPS failed to introduce such evidence. Consequently, Hernandez maintains the ALJ's order granting a credit should be reversed, and she is entitled to an award of TTD benefits without a credit for STD benefits.

The November 5, 2010, BRC order reflects credit for STD benefits was not identified as a contested issue. The first time UPS raised the issue of entitlement to a credit for the payment of STD benefits was in a motion styled "Defendant's Motion For Credit For Short-Term Disability Benefits Paid to the Plaintiff" filed on April 7, 2011. In its motion, UPS stated as follows:

Comes now the Defendant-Employer, by and through counsel and for its Motion for Credit for Short-Term Disability Benefits Paid to the Plaintiff states as follows:

1) The attached payment log shows that the Plaintiff was paid \$5,661.99 in short-term disability benefits through Aetna Life Insurance Company 'after taxes.' The short-term disability plan was fully funded by the Defendant, UPS, and there is no internal offset provision regarding the short-term disability plan.

2) KRS 342.730(6) states:

'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.'

The second page of the motion contains the affidavit of UPS' counsel wherein he states as follows:

Now comes the Affiant, Lance O. Yeager, after first being duly cautioned and sworn, states as follows:

1. That he is an attorney of record for the Defendant/Employer.

2. That all statements in this Motion are true and accurate to the best of undersigned's knowledge.

FURTHER, Affiant saith naught.

Attached to the motion is a five page printout containing the following heading:

Aetna Life Insurance Company Disability  
Payment Report

From: 06/05/2008 To: 12/24/2009

Sort Order: Name.

The document contains Hernandez's name and reflects the first payment covered the period from April 18, 2008, through May 23, 2008, and the last payment covered the period from October 13, 2008, through October 16, 2008.

The end of the document reflects as follows:

Total Earnings:	7,196.77
Total Taxes:	1,534.78
Total Deductions:	0.00
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	5,661.99

There is no testimony from an employee of Aetna Life Insurance Company or of UPS who had knowledge of or was responsible for administering the plan pertaining to the printout. Moreover, the person generating this five-page printout did not testify or verify that it related to the payment of STD benefits. UPS offered no evidence explaining the various entries contained in the printout.

UPS offered no evidence, as required by KRS 342.730(6), establishing the STD benefit plan was exclusively employer-funded, extended income benefits for the same disability covered by the Workers' Compensation Act, and did not contain an internal offset provision for workers' compensation benefits. The only testimony

regarding STD benefits came from Hernandez at her September 22, 2010, deposition when she testified as follows:

Q: Through UPS, well, since April 14, 2008, since you've been off work, have you applied through UPS for short-term disability or long-time disability benefits?

A: Both.

Q: And what did the company tell you after you applied for those?

A: Yes, they gave me the short-term and the long-term.

Q: Do you remember approximately what? When you started receiving the short term disability benefits and how much those benefits where [sic]?

A: I remember the amount.

Q: Where those benefits paid on a weekly basis or monthly basis?

A: If I remember correctly, at the beginning it was week to week and then it changed to monthly.

Q: When you were getting those weekly, do you know how much?

A: \$200 something.

Q: And I should be able to get this information. I just want to see what I get matches up with what she thinks she got. And do you think it changed from weekly to monthly when it converted from short-term to long-term?

A: I think it was the same.

Q: And when it changed to monthly, do you remember how much you were getting?

A: \$810.00 I think it was.

During the September 14, 2011, hearing, Hernandez merely acknowledged she received STD benefits while off work.

In Ohio Farmers Insurance/Westfield Insurance v. Breeding, Claim No. 200801615, rendered March 1, 2012, this Board discussed proof requirements relative to the credit contained in KRS 342.730(6) stating as follows:

Finally, Ohio Farmers argues the ALJ erred by failing to provide credit for LTD benefits received by Breeding. Breeding argues the ALJ erred by allowing credit for STD benefits he received. KRS 342.730(6) requires a three-part analysis. In the case of either STD or LTD benefits, the plan must be exclusively employer funded, it must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits. Specifically KRS 342.730(6) states as follows:

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.

While Breeding testified the STD plan was provided by Ohio Farmers, he was unsure whether the LTD plan was employer-funded. Other than the payment information submitted post-hearing, Ohio Farmers failed to introduce any testimony on this issue, and failed to file either plan in the record. The record is devoid of evidence establishing whether there was an internal offset provision in the short-term disability plan for workers' compensation benefits. In fact, Ohio Farmers failed to address the issue of an internal offset provision entirely in its brief to the ALJ and its petition for reconsideration. Ohio Farmers bore the burden to prove entitlement to a credit for STD and LTD benefits. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2005). In Dravo Lime Co., the Court stated:

The employer asserted that KRS 342.370(6) permitted it to credit the short-term disability benefits the claimant received against its liability for his workers' compensation award. Hence, it was the employer's burden to establish its entitlement.

Id. at 290.

Since Ohio Farmers failed to provide any evidence establishing whether the STD or LTD benefits plans contain an internal offset provision, we do not believe it is entitled to credit for either. Without the plan, the ALJ could not determine whether there was, in fact, an offset/set off

contained therein. Since Ohio Farmers did not introduce either plan in support of its position, we believe the ALJ erred in providing credit for the STD benefits paid, but did not err in denying credit for LTD benefits. Simply put, Ohio Farmers failed in its burden to establish its entitlement to credit for the payment of either STD or LTD benefits.

We therefore vacate the ALJ's determination of credit for the STD benefits received. On remand, the ALJ is hereby directed to find Ohio Farmers is not entitled to a credit for either STD or LTD benefits paid to Breeding.

The above language applies in this case. The only document filed in evidence by UPS is a printout which does not identify whether this is a log of payments of STD benefits or of long-term disability ("LTD") benefits. Hernandez testified she received both. A copy of the actual plan was not introduced. There was no testimony from an employee of Aetna Life Insurance Company or UPS establishing the printout is an accurate reflection of STD benefits paid and the STD benefit plan satisfied the criteria set forth in KRS 342.730(6). Further, in its brief to the ALJ, UPS did not discuss its entitlement to the credit permitted by KRS 342.730(6). In the penultimate sentence in its "Conclusion", UPS stated as follows:

The Defendant does respectfully request a credit for short-term disability

benefits paid in the amount of \$5,661.99 should any award be rendered in this matter.

Additionally, the affidavit of counsel for UPS merely declares "all statements contained in the motion are true and accurate to the best of [his] knowledge." However, counsel did not provide the basis for his statements. Counsel's knowledge cannot support the ALJ's decision to grant UPS an offset pursuant to KRS 342.730(6). More importantly, since this was a contested issue, the canons of ethics prohibit counsel from testifying in this proceeding. See Rules of the Supreme Court (SCR) Rule 3.130, Rules of Professional Conduct Rule 3.130 (3.7). Hernandez cannot be placed in the position of having to depose UPS' counsel or obtain documents in the possession of UPS which UPS had the burden of introducing. Since there is no evidence of substantial probative value to support the ALJ's decision, the decision must be reversed. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Assuming, *arguendo*, the verified motion of UPS' attorney and the attached printout constitute competent evidence relative to the credit set forth in KRS 342.730(6), contrary to the attorney's statement the printout does not show Hernandez was paid STD benefit payments. Further, UPS' attorney does not represent the STD plan extends income

benefits for the same disability covered by the Workers' Compensation Act as required by KRS 342.730(6). Thus, UPS failed in its burden of establishing entitlement to a credit for payment of STD benefits pursuant to KRS 342.730(6). While the dissent would have us remand for additional fact-finding, additional fact-finding is unnecessary as the only issue is whether as a matter of law the printout and motion entitle UPS to the credit in KRS 342.730(6).

Accordingly, the ALJ's December 21, 2011, order granting UPS a credit of \$5,661.99 and the January 13, 2012, order on reconsideration denying Hernandez's petition for reconsideration are **REVERSED**. This matter is **REMANDED** to the ALJ for entry of an order overruling UPS' petition for reconsideration and directing UPS is not entitled to a credit for short-term disability benefits.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

**MEMBER, SMITH.** I dissent. First, I would find that the ALJ had sufficient evidence from which to base his opinion. However, even if that were not the case, I would vacate and require additional findings. If UPS is correct, it would be an inappropriate windfall to Hernandez. If Hernandez is correct, the issue would be supported by substantial

evidence rather than any lack of evidence through a procedural misstep.

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