# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: May 17, 2019**

CLAIM NO. 201579652

JACOB HERALD PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, CHIEF ADMINISTRATIVE LAW JUDGE**

NORTH AMERICAN STAINLESS
HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**STIVERS, Member.** Jacob Herald ("Herald") appeals from the February 11, 2019, Opinion and Order of Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"). The CALJ sustained Herald's December 7, 2018, motion to reopen to the extent he clarified that the 15% decrease in income benefits specified in KRS 342.165(1) applies to the temporary total disability ("TTD") benefits paid to Herald from the date of injury through February 17, 2017, the date Dr. Thomas Gabriel

deemed Herald to be at maximum medical improvement ("MMI"). The CALJ also overruled Herald's claim that North American Stainless ("Stainless") is not entitled to a credit. In the same order, on his own motion, the CALJ amended the August 25, 2018, Opinion, Award, and Order of Hon. Tanya Pullin, ALJ ("ALJ Pullin").

On appeal, Herald asserts three arguments. First, Herald argues Stainless "has waived any right to contest the previously paid TTD benefits." Second, Herald argues that, as a matter of law, the 15% decrease does not apply to TTD benefits. Finally, Herald asserts that, even if the 15% reduction does apply to TTD benefits, the employer cannot recoup the overpaid TTD benefits "in the form of a credit against Permanent Total Disability ("PTD") benefits owed."

Because of the highly specific issues on appeal, we will not discuss much of the record, including the entirety of the medical testimony, deposition testimony, and hearing testimony.

The record contains a Form 110 Settlement Agreement entered into between Herald and Stainless and approved by Hon. Robert Swisher, former Administrative Law Judge, on October 20, 2016, which settled the vocational rehabilitation component of Herald's claim. The agreement indicates on June 19, 2015, Herald sustained a left hand degloving injury with amputation of his left fingers in the following manner: "Was troubleshooting snubber roll. While taping cardboard to the roll, he gave the all clear to start the roll, then went back to apply more tape and his hand got caught in the equipment." Herald underwent abdominal flap surgery with graft and was still undergoing treatment at the time of the settlement agreement.

The Form 101 was filed on October 9, 2017.

On October 13, 2017, Herald filed a Form SVC alleging Stainless violated KRS 338.031(1) in the following manner: "The machine Jacob was operating was provided with insufficient machine guarding which created an unsafe place to work. He also alleged the employer also provided unsafe and incorrect Standard Operating Procedures ("SOP") which contributed to an unsafe workplace."

Subsequently, Stainless filed a Form SVE alleging Herald failed to obey the following safety rules and regulations: "SOPs – physical contact with operating equipment; OSHA regulations, Defendant's policies/procedures re: lockout/tagout for servicing/maintaining equipment; direct order from Plaintiff's group leader concerning maintenance of the subject equipment." Stainless further alleged Herald intentionally failed to utilize the lockout/tagout device on June 19, 2015, and stated as follows: "LOTO prevents operation of equipment undergoing maintenance. Violation SOPs re: physical contact with equipment caused him to place his arm on/near moving equipment. Directed by group leader not to use it until leader made adjustments, but he did so."

The June 12, 2018, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: benefits per KRS 342.730 and KRS 342.165 violation. Under "other" is the following: "PTD; Plaintiff claims safety violation; Defenant [sic] Employer claims a safety violation." The parties stipulated Stainless voluntarily paid TTD benefits at the rate of $765.87 per week from June 20, 2015, through February 17, 2017, and medical expenses in the amount of $121,560.86.

In the August 25, 2018, Opinion, Award, and Order, ALJ Pullin determined Herald is permanently totally disabled as a result of the June 19, 2015,

work injury and awarded PTD benefits from the date of injury. ALJ Pullin found Herald committed a safety violation, and pursuant to KRS 342.165(1), reduced the PTD benefits by 15%, commencing from the date of injury.[1] While ALJ Pullin, in the "Introduction" section of the August 25, 2018, Opinion, noted Stainless voluntarily paid TTD benefits, this was not reflected in her order and award. *Importantly, neither party filed a petition for reconsideration nor an appeal to this Board.*

On December 7, 2018, Herald filed a Motion to Reopen alleging "mistake" and requesting the ALJ to clarify the August 25, 2018, Opinion, Award, and Order on the following issues:

> 1. That the 15% reduction in benefits assessed against Jacob Harold pursuant to KRS 342.165, does not apply to reduce the Temporary Total Disability ("TTD") which were paid to Jacob Herald beginning over three (3) years prior to the date of the Order; and,
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> 2. That there is no legal basis for the Defendant NAS to reduce the amount of TTD benefits previously paid to Plaintiff Jacob Herald, or to reduce the amount of Permanent Total Disability ("PTD") benefits owed to Plaintiff Jacob Herald pursuant to this Court's Opinion, Award, and Order rendered on August 25, 2018.

In the February 11, 2019, Order, the CALJ set forth the following findings:

> This claim is before the Chief Administrative Law Judge on the Frankfort Motion docket on Plaintiff Jacob Herald's motion to reopen on grounds of mistake under KRS 342.125(1)(c).

[1] The order and award reads, in relevant part, as follows: "Plaintiff, Jacob Herald, shall recover of Defendant Employer, North American Stainless, and/or its insurance carrier, permanent total occupational disability benefits decreased by 15% pursuant to KRS 342.165 payable at the rate of $650.99 per week commencing on June 19, 2015 and continuing for so long as Plaintiff is disabled subject to the limitations of KRS 342.730(4)."

Herald suffered a left hand degloving injury on June 19, 2015. An ALJ found Herald had 51% impairment and permanent total disability in an Opinion issued on August 25, 2018. The ALJ reduced the PTD award by 15% under KRS 342.165 for Herald's violation of a safety rule leading to his injury. The ALJ noted that the PTD award would have been $765.87 per week, but the 15% reduction yielded an award of $650.99 per week. The award was made from the date of injury, June 19, 2015, subject to any time limitation under KRS 342.730(4).

The award paragraph on page 28 of the Opinion did not reference the stipulated payment of temporary total disability benefits at the rate of $765.87 per week from the date of injury through February 17, 2017. In essence, the ALJ's award converted liability for temporary total disability into permanent total disability, since both forms of benefits are paid at the same weekly rate.

Neither party petitioned the ALJ for reconsideration of the findings, and neither appealed to the Workers Compensation Board. In tendering a check to bring Plaintiff's benefits current (from the last payment of TTD on February 17, 2017), the Defendant took credit for the overpayment of TTD, since PTD was awarded at $650.99 per week but TTD benefits had been paid at $765.87 per week. The Defendant calculated benefits owed through September 25, 2018, and Herald does not appear to dispute that the liability was $58,021.91. What is disputed is the Defendant's reduction of that sum by $10,667.94, the difference between the total it paid in TTD for 87 weeks ($67,304.07) and the amount it claims it owed given the ALJ's imposition of the 15% safety penalty against weekly benefits ($56,636.13).

Indicating an intent to file an enforcement action in circuit court to recover the credit claimed by the Defendant, Herald asks that this claim be reopened for an order to better inform a circuit judge of the underlying circumstances. Westvaco Corporation v. Fondaw, 698 S.W.2d 837 (Ky. 1985).

The CALJ conducted a phone conference with the parties on February 8, 2019. The parties agreed that the

issue had been fully briefed in the pleadings and could be resolved by Order without further argument.

The CALJ finds that the Defendant properly took credit for overpayment of TTD.

Initially, the CALJ recognizes the well-known case of Triangle Insulation and Sheet Metal Co. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990), which stands for the proposition that, as a result of an award, an employer may take credit for overpayment of voluntary TTD, but only against past due compensation so as not to affect a claimant's future benefits. Kentucky's courts have also suggested that credit for involuntary payment of TTD (an interlocutory order, for example) could be taken against future weekly benefit payments. Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1989); Dotson Trucking v. Hunt, [sic] Workers Compensation Board No. 2011-97859.

Herald argues that the Defendant waived its right to claim a credit for TTD overpayment by failing to preserve it as an issue on the BRC Order. This argument is not persuasive because "benefits per KRS 342.730" was preserved on the June 12, 2018, BRC Order, and that issue encompasses all claims and defenses related to all income benefits, be it temporary or permanent. UPS, Inc., v. Stoudemire, 251 S.W.3d 331 (Ky. App. 2008); Sidney Coal Co. v. Shuffman, 233 S.W.3d 710 (Ky. 2007). Further, entitlement to the credit is a function of application of the statute. The ALJ determined what weekly income benefits were owed, and, if the Defendant has paid more than that, it is entitled to a credit; otherwise, Herald has a windfall.

Herald also argues that the safety penalty reduction does not apply to paid TTD benefits. This argument is also not persuasive because the Defendant had no finding in its favor from which to claim a credit until the ALJ weighed the evidence and issued a decision on the safety penalty issue. It would have been an unfair claims practice for the Defendant to unilaterally reduce Herald's TTD benefits for a claimed safety penalty before an ALJ found that it was entitled to do so. KRS 342.165(1) addresses increases or decreases in "compensation" for violations of safety rules and

> regulations; "compensation" includes both temporary and permanent income benefits. KRS 342.0011(14).
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> In Wheatley v. Bryant Auto Service, 860 S.W.2d 767 (Ky. 1993), an administrative law judge reopened a claim on his own motion after it had become final to correct an error in the duration of benefits awarded. The Court said an ALJ was allowed to reopen a claim on his own motion to correct such an error.
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> Therefore, Herald's motion to reopen is sustained to the extent that he is entitled to an order clarifying the Defendant's entitlement to a credit for compensation previously paid. His claim that the Defendant is not entitled to that credit is overruled.

On his own motion, the CALJ amended paragraph one of the Order and Award to reflect as follows:

> 1. Plaintiff Jacob Herald shall recover from Defendant/Employer North American Stainless or its insurance carrier temporary total disability benefits at the rate of $650.99 per week from June 20, 2015 through February 17, 2018, and permanent total disability benefits at the rate of $650.00 per week from February 18, 2018, for as long as he remains so disabled, subject to the limitations of KRS 342.730(4). The Defendant shall take credit for compensation previously paid against past due compensation.
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> *No petition for reconsideration was filed.*
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> We affirm on all issues raised on appeal.

On appeal, Herald raises issues which should have been raised in a timely filed petition for reconsideration and, if still deemed necessary, an appeal to this Board of the August 25, 2018, Opinion, Award, and Order. We recognize ALJ Pullin labeled the entirety of Herald's income benefits as PTD benefits. As recognized by the CALJ in the February 11, 2019, Order, ALJ Pullin "converted liability for temporary total disability into permanent total disability." However, this is a distinction without

a difference, as PTD and TTD benefits are paid at identical rates. Since Herald failed to file a petition for reconsideration or an appeal to this Board contesting the award of PTD benefits at the reduced rate, ALJ Pullin's reduction of his benefits commencing on the date of the injury is the law of the case or *res judicata*. *Whether these benefits are labeled TTD benefits or PTD benefits is irrelevant*. Consequently, the time for Herald to have contested imposition of the 15% reduction of his income benefits has passed, and filing a motion to reopen alleging "mistake" does nothing to revive it. Importantly, Herald is not alleging an error in *calculating* income benefits. Herald is alleging the 15% reduction does not apply to TTD benefits or, in the alternative, does not apply to TTD benefits paid prior to the final order and award. Both arguments should have been made immediately after ALJ Pullin's final order and award in a petition for reconsideration and, if appropriate, an appeal to this Board and not in a motion to reopen.

Further compounding the difficulties Herald faces in this appeal is the fact that he failed to file a petition for reconsideration after the CALJ's February 11, 2019, Order. Therefore, even though the issues on appeal are mixed questions of law and fact, inadequate, incomplete, or even inaccurate fact-finding on the part of the CALJ will not justify reversal or remand if there is substantial evidence in the record supporting the CALJ's ultimate conclusions.

Herald first asserts Stainless' failure to list the issue of a credit for overpayment of TTD benefits as a contested issue at the BRC bars it from asserting it post-award. However, as determined by the CALJ, "benefits per KRS 342.730," which *was* listed as a contested issue at the BRC, includes "all claims and defenses related to

all income benefits, be it temporary or permanent." This was decreed by the Kentucky Court of Appeals which held as follows in United Parcel Service, Inc. v. Stoudemire, 251 S.W.3d 331, 333-334 (Ky. 2008)

> Although the issue of additional TTD benefits was not raised at the initial benefit review conference, the extent and duration of disability was specifically designated as a contested issue in the parties' stipulations. **UPS's preservation argument ignores that the term "disability" as used in KRS 342.730, encompasses both temporary total disability benefits and permanent partial disability benefits.** Moreover, the Supreme Court of Kentucky has recently rejected the argument now poised by UPS.
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> In *Sidney Coal Co., Inc./Clean Energy Mining Co.,* 233 S.W.3d at 713–714, the Court held the parties' list of contested issues that included the "extent and duration" of disability, included the employee's claim to additional TTD benefits. Relying on the Board's consistent interpretation of its own regulation, the Court concluded:
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> > The employer notes that the parties listed the contested issues as being: "Extent and duration" and "Overpayment of TTD." It asserts that the claim should not be remanded for additional findings regarding TTD because the claimant failed to list his entitlement to TTD beyond what the employer paid voluntarily, *i.e.,* underpayment of TTD. This argument ignores the Board's statement that it has interpreted the regulation consistently and has held that "questions regarding the appropriateness and duration of TTD are encompassed within the question of extent and duration." We are convinced that the Board's interpretation is reasonable. Mindful that the courts give great deference to an administrative agency's interpretation of its own regulations, we find no error in that regard. *See J.B. Blanton Co. v. Lowe,* 415 S.W.2d 376 (Ky.1967). *Id.*

> Based on the Supreme Court's decision, UPS's contention that the issue of additional TTD benefits was not properly preserved for the CALJ's consideration must fail. (emphasis added)

The reduction in Herald's income benefits could not have occurred until ALJ Pullin determined a reduction was required by Herald's conduct. Since both parties identified safety violations as an issue, one could reasonably expect that if either party was successful there would be an increase or decrease in income benefits specified in the ALJ's final decision. Thus, the first time Stainless could apply the reduction would be after rendition of the award. The statute permits "the compensation for which the employer would otherwise have been liable under this chapter" to be decreased by 15%. Hence, Stainless properly applied the 15% reduction post-award. Consequently, we affirm on this issue.

Next, Herald asserts that, as a matter of law, the 15% reduction does not apply to TTD benefits. We affirm on this issue.

While this second argument is ambiguous, it appears Herald is arguing TTD benefits *in general* are not subject to the 15% safety penalty reduction. As argued by Herald, "TTD benefits serve the important purpose of paying an injured worker a 'wage' to live on while they are under medical care and cannot return to work. Thus, TTD *is not* compensation for an injury (like an amputation) or a disability, as PPD and PTD benefits are compensation for permanent injuries." (emphasis in original)

KRS 342.165(1) reads, in relevant part, as follows:

> If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees

> or the public, **the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment**. (emphasis added)

There is no distinction made between temporary income benefits and permanent income benefits in this statute. KRS 342.0011(14) is plain that TTD benefits are in fact considered "compensation." Consequently, TTD benefits are subject to the 15% reduction. As KRS 342.165(1) and KRS 342.0011(14) are unambiguous, we affirm on this issue.[2]

Finally, Herald asserts that, even if the 15% reduction applies to TTD benefits, Stainless "is not entitled to a 'credit' for the TTD benefits it properly paid to Jacob beginning three (3) years before the Award." He asserts that allowing the reduction to apply to TTD benefits paid before the order and award results "in the penalty unfairly harming the injured worker by taking away benefits the worker was entitled to and received three (3) years before the penalty was assessed." Herald claims the Kentucky Supreme Court has only allowed such a credit when voluntary payments of TTD benefits were made after the claimant reached MMI citing to Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990). We affirm on this issue.

As stated above in response to Herald's second argument on appeal, KRS 342.165(1) is unambiguous on its face. Just as the statute does not make a distinction between temporary and permanent income benefits, there is nothing in the statute indicating the 15% reduction is not applicable to TTD benefits voluntarily paid

[2] KRS 342.0011(14) reads as follows: "Compensation" means all payments made under the provisions of this chapter representing the sum of income benefits and medical and related benefits.

before a final judgment is rendered. To do so would penalize any employer who voluntarily pays TTD benefits before a final order and award. If Herald's argument were taken to its logical extreme, a claimant would not be entitled to have TTD benefits voluntarily paid before a judgment enhanced by the 30% safety penalty, and this Board fails to see the fairness or logic in such an outcome.

Herald's assertions regarding Stratemeyer, supra, miss the mark as well. Stratemeyer establishes an employer can only receive a credit against past due and owing benefits for a voluntary overpayment of benefits and not against future benefits. Here, ALJ Pullin determined Herald received PTD benefits in excess of what he is entitled. The CALJ determined the same except by calling them TTD benefits. The end result is the same. Stainless is entitled to recoup this excess as long as the recoupment does not affect Herald's future benefits. To hold otherwise would grant Herald a windfall. As held by the Supreme Court in Stratemeyer, "[t]here is a considerable social and economic benefit to an employee who obtains voluntary income benefits in the initial stages of an injury." Id. at 630. We decline to penalize an employer who has overpaid voluntary income benefits prior to the rendition of a decision when the credit may be applied without affecting the claimant's future benefits. We affirm on this issue.

Accordingly, on all issues raised on appeal, the February 11, 2019, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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