

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000408-WC

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF TRANSPORTATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-03937

LINDA THOMPSON;
ROBERT WHITTAKER,
DIRECTOR OF SPECIAL FUND;
HON. SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: This is an appeal from an opinion and order by the Workers' Compensation Board (Board), affirming a decision by the Chief Administrative Law Judge (CALJ) which overruled the employer's motion to reopen. The employer sought to recover an overpayment of income benefits out of future payments owed to the claimant by the Special Fund. The CALJ and the Board determined that the employer was not entitled to recover a voluntary overpayment of income benefits where that recovery would

adversely affect payment of future income benefits to the claimant. We agree with the Board, and hence, we affirm.

The underlying facts of this action are not in dispute. Linda Thompson sustained a work-related injury on January 26, 1993, while in the employ of the appellant, Commonwealth of Kentucky, Department of Transportation (DOT). On May 14, 1995, Thompson entered into a settlement agreement with DOT and the Special Fund based upon a twenty-five percent occupational disability. Pursuant to this agreement, Thompson was to have received periodic payments spanning 425 weeks, beginning May 3, 1993. DOT was liable for payments for the first 212.5 weeks from and after May 3, 1993. Thereafter, the Special Fund was to make payments for the remaining 212.5 weeks.

DOT's 212.5 week period should have ended on May 29, 1997. However, due to a mistake on DOT's part, DOT continued to pay benefits through December 31, 1997, resulting in an overpayment of \$1,404.13. After realizing its error, DOT filed a motion to reopen on March 9, 1999. DOT requested that the Special Fund's payment of benefits to Thompson should be directed to DOT for a period of thirty weeks until the overpayment was recovered.

By order rendered April 14, 1999, the arbitrator overruled DOT's motion. DOT subsequently requested a *de novo* review, which was assigned to the CALJ. The CALJ, relying on Triangle Insulation & Sheet Metal Co. v. Stratemeyer, Ky., 782 S.W.2d 628 (1990), held that DOT's overpayments to Thompson must be characterized as voluntary, because the overpayment cannot be

credited against future benefits. The Board agreed with the CALJ's reasoning, and this appeal followed.

We agree that this case involves an issue of first impression. However, as noted by both the CALJ and the Board, the policies set out by the Supreme Court of Kentucky in Triangle Insulation v. Stratemeyer are relevant to a consideration of the issues presented. DOT argues that Stratemeyer is limited to the situation in which prior to an award the employer makes payments of temporary total disability (TTD) benefits, and those payments are determined to be in excess of the amounts ultimately awarded. In contrast, DOT's overpayments were made following the award. DOT also notes that the Board's denial of a credit for the overpayment and unfairly penalizing it for an innocent mistake, gives Thompson a windfall. Thompson responds that the CALJ and the Board analyzed the issue correctly. Thompson also disputes DOT's "assumption" that she received a double payment during the period in which DOT paid benefits by mistake.¹

In Triangle Insulation v. Stratemeyer, the employer paid voluntary benefits to the employee at the rate of \$240.12 per week from December 21, 1983 through November 26, 1984. Thereafter, the "old" Board determined that the employee was temporarily totally disabled from December 21, 1983 through September 25, 1984, and awarded benefits at the same rate for that period. The employee was found to be thirty-eight percent

¹In its brief, DOT states that "we assume that the Special Fund began making its payments pursuant to law". However, there was no evidence offered concerning when the Special Fund's payments to Thompson commenced.

permanently partially disabled, with the employer found liable for twenty-eight percent and the Special Fund liable for the remaining ten percent. The employee was awarded \$79.14 per week for 425 weeks beginning September 25, 1984. Since the employer made voluntary payments of \$240.12 for an additional 8.86 weeks, the "old" Board included a provision allowing the employer credit for payments of compensation previously made.

In considering the circumstances under which a dollar-for-dollar credit is appropriate, the Supreme Court analyzed the case law as follows:

[General Electric Co. v. Morris, Ky., 670 S.W.2d 854 (1984)] is factually distinguishable from this case. The rationale supporting the conclusion and holding in Morris was concerned with the effects on the employee's future benefits. The primary concern of the majority in Morris was the effect on the employee of the loss of future payments. If the employer were to receive credit on a dollar for dollar basis, the sum of the future weekly benefits to be paid to the employee could be diminished, with the employee being deprived of many future periodic payments. This Court recognized that not allowing a full credit could inhibit prompt issuance of voluntary compensation benefits in other cases, but in Morris allowed the employer to take credit for overpayment of voluntary benefits on a week by week basis.

The rationale in Western Casualty and Surety v. Adkins, Ky.App., 619 S.W.2d 502 (1981) recognized that it would be counter-productive to penalize an employer who voluntarily paid weekly benefits to an injured employee in excess of the ultimate liability and could result in discouraging such voluntary payments which would be detrimental to the injured employee in the long run. In Adkins, the employer was entitled to credit against the final award for the entire amount of the voluntary payments. The fact that in Adkins, supra, the award was an open ended total disability does

not contradict this situation which involves future periodic benefits.

W.T. Sistrunk & Company v. Kells, Ky.App., 706 S.W.2d 417 (1986) struck down a dollar for dollar credit where the overpayment by the employer consumed all of the future benefits to which the employee was entitled.

The two methods of computing credit are not mutually exclusive. It is important to encourage employers to make voluntary payments to injured employees. Employers are not obligated to pay benefits until a claim has been litigated and an award entered. Such payments are voluntary. The circumstances involved in each specific case must be carefully evaluated so that the employee is not unduly harmed and the employer is encouraged to make voluntary payments. Cf. Adkins.

A rigid limitation on the method of credit by an employer works an ultimate disservice to an employee. There is a considerable social and economic benefit to an employee who obtains voluntary income benefits in the initial stages of an injury. When a dispute arises and an application is filed, the rights of both parties can be adjudicated. An employee who has received an overpayment of income benefits should not be deprived of future income as a result of any such overpayment. However, an over-payment which can be credited fully against a past due amount without affecting future benefits is within the purview of the statutes.

Id. at 629-30.

Since benefits accrue from the date of disability, a portion of these benefits will be past due when the award is made. Stratemeyer allows the employer to take a dollar-for-dollar credit for voluntary disability payments against the past due portion of an award. Eastern Coal Corp. v. Blankenship, Ky., 813 S.W.2d 808, 810 (1991). However, a credit which results in a reduction in future benefit payments to the employee runs counter to the purposes of the Workers' Compensation Act. General

Electric Co. v. Morris, 670 S.W.2d at 856. Under such circumstances, a dollar-for-dollar credit will not be allowed. Nevertheless, Stratemeyer also cautions against rigid limitation on the [method of credit] due to an employer. The circumstances involved in each case must be carefully evaluated so that the employee is not unduly harmed and the employer is encouraged to make voluntary payments.

In the present case, DOT erroneously continued to make payments of income benefits to Thompson after the period for its liability had expired. The overpayment was not made prior to the final award of income benefits, and there is no past-due amount against which the overpayment could be credited. Thus, as noted by the Board, Stratemeyer is not directly on point with this case.

However, the Board also noted that Stratemeyer's holding is not limited to situations involving an overpayment of TTD benefits. Rather, the Court in Stratemeyer speaks generally in terms of overpayment of "income benefits." Furthermore, the Court's primary concern in Stratemeyer was that the claimant's future benefits should not be affected by any credit for overpayment. The credit which DOT seeks would directly affect the amount of future benefits payable to Thompson.²

²In its response to the Petition for Review to this Court, the Special Fund states that it agrees with the decision of the Board and, by implication, with Thompson's position. The Special Fund also adds that its period of liability for payment of income benefits to Thompson will expire on or about June 20, 2001. Any re-direction of those payments to DOT would eliminate most, if not all of the weeks remaining in Thompson's award.

In addition, we agree with the CALJ and the Board that DOT's overpayment of income benefits must be deemed as voluntary. In Stratemeyer, the employer inadvertently overpaid TTD benefits because it incorrectly concluded that the claimant reached maximum medical improvement at a much later date than was found by the ALJ. Similarly, DOT inadvertently continued periodic payments beyond the end of its period of liability. The employer in Stratemeyer had the legitimate excuse that its liability for income benefits had not yet been fixed at the time it made the overpayment. Nevertheless, the Supreme Court deemed those payments to be voluntary. We find no reason to treat the overpayment in this case differently.

We recognize the long-standing policy against double recovery by injured workers under the Act. Matney v. Newberg, Ky., 849 S.W.2d 526 (1992). Likewise, we agree with the CALJ and the Board that denial of the credit to DOT would result in a windfall to Thompson, assuming that Thompson actually received income benefits from both DOT and the Special Fund during the period in question. However, as noted by the Board:

We remind the parties that workers' compensation is founded upon equity rather than hard and fast law. Arbitrators, ALJs, this Board, and our Courts of Justice regularly are called upon to balance the interest of the employer against the interest of the injured worker in reaching judgment. In situations such as the instant claim, we believe the Supreme Court has determined the interest of the injured worker not to suffer any disturbance in payment of future income benefits outweighs the interest of the employer to recover overpayment of benefits accidentally made.

Accordingly, the opinion and order by the Workers' Compensation Board is affirmed.

ALL CONCUR.

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