

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001204-WC

DANNY OSBORN

APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-00-01344, WC-00-1317, AND WC-99-93288

COUGAR COAL COMPANY;
BEECHFORK PROCESSING;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.
JOHNSON, JUDGE: Danny Osborn has appealed from an opinion of the Workers' Compensation Board entered on May 8, 2002, which affirmed the opinion, award and order of the Administrative Law Judge granting Cougar Coal Company credit on an award for temporary total disability (TTD) benefits for payments Cougar made to Osborn as "salary continuation". Having concluded that the Board has not overlooked or misconstrued controlling

statutes or precedent,¹ and that the ALJ correctly applied the law, we affirm.

Osborn began working for Cougar as an underground mine foreman in 1991. On January 6, 1999, Osborn injured himself at work while attempting to lift a metal bar. Osborn notified Cougar's day-shift mine superintendent of his injury and Cougar placed him on limited-work detail for the following two weeks. When the pain persisted, Osborn consulted a family practitioner, Dr. Don Bryson, who advised him to refrain from working until March 15, 1999. Consequently, Osborn did not work during the period of January 29, 1999, to March 15, 1999, but Cougar paid him "salary continuation" during this period.² Osborn returned to work on March 15, 1999, and he continued working for Cougar until July 1999, when the mine was shut down and he was transferred to Beechfork Processing. Osborn worked for Beechfork until August 4, 2000, but he has not worked since August 2000.

Osborn filed a claim for workers' compensation benefits on November 3, 2000,³ and his claim was heard by the ALJ

¹ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

² "Salary continuation" was paid on a bi-weekly basis in the amount of \$2,041.00. The parties' stipulation to this fact can be found in the benefit review conference order and memorandum dated March 12, 2001.

³ Osborn asserted several claims in his workers' compensation petition, including an occupational hearing loss claim, a cumulative trauma claim, and a work-related injury claim. However, the only issue before us pertains to the salary continuation Osborn received.

on October 29, 2001. The ALJ awarded Osborn TTD benefits in the amount of \$487.20 per week from January 29, 1999, through March 15, 1999, and thereafter the sum of \$36.54 per week for a 10% permanent disability, commencing on March 16, 1999, and continuing for a period not to exceed 425 weeks.⁴ The ALJ also granted Cougar credit for the "salary continuation" it paid Osborn from January 29, 1999, through March 15, 1999. Osborn filed a petition for reconsideration and on January 24, 2002, the ALJ denied the petition.⁵ Osborn subsequently appealed to the Workers' Compensation Board and on May 8, 2002, the Board affirmed the ALJ's ruling. This petition for review followed.

Osborn claims in his petition that the ALJ erred by failing to apply KRS⁶ 342.730(6) to the credit she allowed Cougar for the payment of salary continuation. Specifically, Osborn argues that the ALJ failed to follow the mandates of KRS 342.730(6) when she granted Cougar credit for any payments made in the form of "salary continuation". Whether the ALJ failed to follow the mandates of KRS 342.730(6) in giving Cougar credit for the payment of "salary continuation" constitutes a question

⁴ The TTD benefits were awarded against Cougar. No income benefits were awarded against Beechfork; however, the ALJ did hold Beechfork liable for any medical expenses pertaining to Osborn's work-related hearing loss.

⁵ The ALJ found that Osborn's petition for reconsideration sought to reargue the merits of his claim and thus failed to point out any error patent on the face of the opinion and award as required by KRS 342.281.

⁶ Kentucky Revised Statutes.

of law subject to this Court's independent determination.⁷ Thus, our analysis of the issue begins with the language of KRS 342.730(6), which 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.

Pursuant to KRS 342.730(6) an employer is only entitled to receive credit for disability payments made in lieu of workers' compensation benefits if the payments were made pursuant to an exclusively employer-funded plan, which covers the work-related disability, and only if the plan did not contain an internal offset provision for workers' compensation which is inconsistent with the statute. If, the plan complies with the statute, the employer is entitled to an offset for any benefits paid pursuant to the employer-funded disability plan.

Osborn's argument is flawed because, as noted by the Board, the attorneys for Osborn and Cougar signed the stipulation from the benefit review conference order and memorandum which included on line 5 the following pre-printed information: "Temporary total disability benefits were paid at

⁷ Halls Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327, 330 (2000).

the rate of \$_____ per week from _____." Following "from", someone, presumably the ALJ, wrote: "Salary continuation from 1-29-99 thru 3-15-99; 8-5-00 thru 12-22-00." We agree with the Board's conclusion that in light of the parties having stipulated that Cougar paid Osborn his salary from January 29, 1999, through March 15, 1999, and since no TTD benefits were paid during this period and since in the stipulation the salary continuation information was placed on the line referencing TTD benefits, the ALJ correctly allowed Cougar credit for the salary continuation payments against the TTD benefits owed to Osborn for this same time period.

This area of the law has caused confusion for years. Prior to the adoption of KRS 342.730(6) in 1996, there was no statute addressing such a credit; but to encourage employers to voluntarily pay TTD benefits, the Board had applied the equitable rule that any compensation the employer had previously voluntarily paid to the employee would be credited against any compensation that it was ordered to pay. Unfortunately, such a simple concept got distorted and caused a great deal of litigation. While the Supreme Court in American Standard v. Boyd,⁸ and GAF Corp. v. Barnes,⁹ helped to clarify this area of

⁸ Ky., 873 S.W.2d 822 (1994).

⁹ Ky., 906 S.W.2d 353 (1995).

the law, as we see in this case, the enactment of KRS¹⁰ 342.730(6) in 1996 may result in additional confusion.

In the case sub judice, KRS 342.730(6) is not applicable since the stipulation provided that the payments at issue were a continuation of Osborn's salary which was being paid in lieu of TTD benefits. If in fact these payments were from some type of employee disability benefit, then Osborn waived his right to have these payments analyzed pursuant to KRS 342.730(6) when he entered into the stipulation.

For the foregoing reasons, the opinion of the Board as to the issue of credit for the payment of salary continuation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Drew Anderson
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Denise Kirk Ash
Lexington, Kentucky

¹⁰ The confusion appears to have resulted from the Board, when it was the fact-finder, using language in the award stating that the employer "is to take credit for any compensation heretofore paid." South Central Bell Telephone Co. v. George, Ky.App., 619 S.W.2d 723, 724 (1981). This very general language was then broadly applied by the Court of Appeals in George and Beth-Elkhorn Corp. v. Lucas, Ky.App., 670 S.W.2d 480 (1983), and Copher v. American Standard, Ky.App., 732 S.W.2d 508 (1987), to include not only voluntary payments of TTD benefits through workers' compensation insurance coverage, but also payments from disability insurance coverage provided through the employer.