

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."  
PURSUANT TO THE RULES OF CIVIL PROCEDURE  
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),  
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER  
CASE IN ANY COURT OF THIS STATE; HOWEVER,  
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,  
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR  
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED  
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE  
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION  
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED  
DECISION IN THE FILED DOCUMENT AND A COPY OF THE  
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE  
DOCUMENT TO THE COURT AND ALL PARTIES TO THE  
ACTION.

# Supreme Court of Kentucky

2011-SC-000088-WC

JAMES BRADY

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2010-CA-001408-WC  
WORKERS' COMPENSATION NO. 09-94750

KENTUCKY AMERICAN WATER CO.;  
HONORABLE ROBERT L. SWISHER,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

The Court of Appeals affirmed a decision in which the Workers' Compensation Board found no error in the Administrative Law Judge's (ALJ's) refusal to order the claimant's employer to reimburse him for TTD payments that it required him to surrender and to reinstate sick leave that the employer required him to use during the initial weeks of his temporary total disability (TTD) awards. The court, like the Board, determined that circuit court was the proper forum for what were enforcement and employment issues.

We affirm. Although the claimant asserts correctly that TTD is a statutory benefit that is not interchangeable with sick leave, we do not construe his award as entitling the employer to credit surrendered TTD checks

or sick leave against its liability. KRS 342.305 permits him to enforce the terms of his award in circuit court. Circuit court is also the proper forum to resolve his entitlement to have sick leave restored because the issue does not arise under Chapter 342.

This appeal concerns benefits awarded in a claim for two work-related injuries. The record indicates that the employer was served with the claim; with all pleadings filed before the ALJ; and with the benefit review conference (BRC) memorandum. Yet, the employer failed to enter an appearance or make any attempt to defend the claim before the ALJ or on appeal. The evidence consisted largely of the claimant's testimony and a medical report.

The claimant testified that he injured his left elbow while working on December 18, 2007. He missed about six months' work, during which time his employer's insurance carrier issued checks for TTD benefits voluntarily. His employer required him to use all of his accrued sick leave initially and, during that initial 12-week period, to surrender the TTD checks. He testified that the employer did not require him to use vacation time; that he did not endorse the checks that he surrendered; and that his employer allowed him to keep the subsequent checks.

The claimant testified that he returned to his usual duties after recovering from the elbow injury but injured his right shoulder while working on July 2, 2008. He missed work from January 2, 2009 to September 30, 2009, after which he returned to his regular duties. Again, the employer's insurance carrier issued checks for TTD benefits voluntarily and, again, the

employer required him to use all of his accrued sick leave and surrender the TTD checks. He used his entire 18 weeks of accumulated sick leave and surrendered the corresponding TTD checks, which he did not endorse. His employer allowed him to keep the subsequent checks.

The claimant's brief to the ALJ requested an order requiring the employer to pay 12 weeks of TTD benefits for the first injury and 18 weeks for the second injury to reimburse him for the benefits that the employer required him to surrender. Speculating that the source of any controversy over TTD benefits might be a condition or term in the parties' employment agreement, the ALJ noted that the record contained no evidence concerning the actual dates for which TTD was paid or the rate at which it was paid. The ALJ awarded TTD as follows:

For temporary, total disability, Plaintiff shall receive from the Defendant/Employer or its carrier such benefits as have heretofore been paid by the Defendant/employer and/or its carrier as to the injury of December 18, 2007 and the injury of July 2, 2008. Defendant/employer shall take credit for any and all such payments heretofore paid.

The claimant's petition for reconsideration requested an order requiring the employer to restore the surrendered TTD benefits and reinstate the sick leave that it required him to use. He argued among other things that a coordination of benefits was not an issue and that he did not receive a double recovery because he did not receive long- or short-term disability benefits during his absence from work but used his sick leave.

The ALJ denied the petition. Inferring that the claimant received his full salary while on sick leave and noting that KRS 342.730(1) limited his TTD benefit to a lesser amount, the ALJ pointed out that the record contained nothing to indicate whether the employer credited his sick leave account on a dollar-for-dollar basis for the TTD that he surrendered. Moreover, the proper manner to seek reimbursement for the surrendered benefits would be an enforcement action under KRS 342.305 or an employment action.

Having failed to convince the Board or the Court of Appeals to reverse the ALJ's decision, the claimant continues to assert that the ALJ erred by failing to order the employer to reimburse the surrendered TTD benefits and restore the sick leave it required him to use. We disagree.

Chapter 342 creates an administrative procedure in order to promote the prompt and efficient processing of workers' compensation claims at minimum expense to the injured worker. KRS 342.325 requires an ALJ to decide all disputed issues arising under Chapter 342. Among such issues are a worker's entitlement to receive the TTD benefits mandated by KRS 342.730(1)(a) and an employer's entitlement under KRS 342.730(6) to credit its liability for statutory benefits based on the payment of other types of benefits. Entitlement to such credit must be authorized by statute<sup>1</sup> and is not automatic. An employer must plead and prove its entitlement. An employer who fails to offer evidence in the administrative proceeding to prove its entitlement to credit based on the

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<sup>1</sup> *Williams v. Eastern Coal Corporation*, 952 S.W.2d 696, 698-700 (Ky. 1997).

payment of another type of exclusively employer-funded benefit may not be granted credit in a subsequent enforcement action.<sup>2</sup>

We do not construe the claimant's award as entitling the employer to credit its liability for TTD based on the checks that it required him to surrender or based on the sick leave that it required him to use. We construe the award as granting TTD benefits for the period during which the carrier issued TTD benefit checks and construe the credit granted against awarded benefits "for any and all such payments heretofore paid" as referring to the TTD checks that the employer allowed the claimant to keep. TTD checks that the employer required him to surrender clearly were not "paid" to him and could not offset the employer's statutory liability.

The claimant testified that his employer required him to surrender his initial 12 and 18 weeks of TTD checks until he exhausted his sick leave and requested the ALJ to order the surrendered checks and sick leave to be restored. Having failed to appear and defend the claim, the employer offered no evidence to prove that it was entitled to have its liability for TTD benefits offset under KRS 342.730(6) based on the payment of sick leave or any other exclusively employer-funded benefits. The ALJ made no specific finding granting credit based on the payment of sick leave and the record would not have supported such a finding had it been made. Should the employer fail to

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<sup>2</sup> *Ephraim McDowell Regional Medical Center v. Grigsby*, 862 S.W.2d 331 (Ky. App. 1993) (circuit court properly denied credit for disability payments in enforcement action where employer failed to offer evidence to prove its entitlement to credit in the administrative proceeding).

comply with the award voluntarily, KRS 342.305 entitles the claimant to enforce its terms in circuit court.

The ALJ did not err by determining that the claimant's entitlement to have his sick leave restored is an employee benefits issue rather than an issue that arises under Chapter 342. The issue must be raised in circuit court.

All sitting. All concur.

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