

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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-000706-WC

MERCER COUNTY FISCAL COURT

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000158-WC
WORKERS' COMPENSATION NO. 09-96126

JERRY ARNOLD;
HONORABLE JACKSON W. WATTS,
ADMINISTRATIVE LAW JUDGE;
HONORABLE JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Mercer County Fiscal Court ("Mercer County"), appeals from a decision of the Court of Appeals which denied it a credit for unemployment benefits paid to Appellee, Jerry Arnold. Mercer County argues on appeal that KRS 342.730(5) mandates that it receive a credit for the unemployment benefits paid to Arnold during the time period in which he was later adjudged to be permanently and totally disabled. For the following reasons, we affirm the Court of Appeals.

On January 30, 2009, Arnold suffered a physical injury clearing debris from an ice storm while in the employ of Mercer County. Arnold alleged that the injury rendered him totally disabled and he received temporary total disability payments until January 24, 2010. In March 2010, Mercer County terminated Arnold from his employment because he was unable to perform required tasks.

A hearing was held before an Administrative Law Judge ("ALJ") to determine if Arnold was permanently and totally disabled. Mercer County admits that at the hearing it did not seek a credit for any unemployment benefits paid to Arnold because it believed that he was only permanently partially disabled and therefore eligible to receive unemployment benefits.¹

During the hearing, Arnold testified that he was drawing unemployment benefits. He testified that he was receiving "432 or 33 dollars every two weeks, and then I get a 44 dollar check from Obama, or whatever." Upon being asked by Mercer County how long he had received the benefits, Arnold stated "I'm not real sure. I think maybe three, four months." Arnold's counsel objected to this line of questioning and Mercer County did not inquire about unemployment benefits again.

The ALJ found that Arnold was permanently and totally disabled and awarded him workers' compensation benefits in the sum of \$400.34 per week.

¹ Mercer County argues that it did not know that Arnold was receiving unemployment due to a clerical error. However, this is irrelevant to our decision because Mercer County admits that its decision to not seek a credit for unemployment benefits was because of its position that Arnold was not totally disabled.

The ALJ's opinion and award did not state whether Mercer County could take a credit for the unemployment benefits previously paid to Arnold.

Mercer County filed a petition for reconsideration requesting that Arnold's award be amended to give it a credit for the unemployment benefits he received. The ALJ denied the motion finding that the issue of the unemployment benefit credit was unpreserved because it was not listed in either the Benefit Review Conference ("BRC") order or hearing order. The ALJ further found that Mercer County "totally failed" in its proof because there was no evidence in the record of specific dates, duration, or amounts of unemployment benefits paid to Arnold. Thus, without this information the ALJ found it would be impossible to award a credit. The Workers' Compensation Board and Court of Appeals affirmed the ALJ's decision on the same grounds – that Mercer County waived the issue of the unemployment benefits credit and alternatively that Mercer County did not present sufficient evidence to determine the credit amount to which they were entitled.

Mercer County now appeals to this Court arguing that KRS 342.730(5) compels that a credit be granted to them for the unemployment benefits Arnold received while disabled. KRS 342.730(5) states:

All income benefits pursuant to this chapter otherwise payable for temporary total and permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability.

Based on the inclusion of the word "shall" in KRS 342.730(5), Mercer County argues that the ALJ had no choice but to apply a credit in their favor regardless of whether it raised the issue at the disability hearing. *Hardin County v.*

Wilkerson, 255 S.W.3d 923, 927 (Ky. 2008) (holding that the use of shall imposes a mandatory duty); *Alexander v. S&M Motors, Inc.*, 28 S.W.3d 303 (Ky. 2000) (holding that when considering construction of statutes, KRS 446.010(20) provides that “may” is permissive, and “shall” is mandatory).

Mercer County directs our attention to the manner in which KRS 342.730(4) is generally applied in workers’ compensation cases as an example of how KRS 342.730(5) should be applied. KRS 342.730(4) states in pertinent part: “All income benefits payable pursuant to this chapter *shall* terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits . . .” (emphasis added). Mercer County argues, that language applying KRS 342.730(4) is included in almost all workers’ compensation opinion and awards (even if not raised by a party) because it is understood that KRS 342.730(4) must be applied in every case due to the inclusion of the word “shall.” Thus, Mercer County believes language applying KRS 342.730(5) should have automatically been included in the opinion and award, because of the presence of the word “shall” in the statute.

Yet Mercer County’s argument overlooks the difference between KRS 342.730(4) and KRS 342.730(5). An injured worker’s qualification for “normal old-age Social Security retirement benefits” is something which will happen in the future. An ALJ does not need to know the exact date of when those Social Security benefits will begin (or if they will begin). It just needs to be known that when they do begin, pursuant to KRS 342.730(4), workers’ compensation benefits will cease. In contrast, the credit for unemployment benefits in KRS

342.730(5) deals with something that has occurred in the past and affects workers' compensation benefits in the present. Therefore it is imperative that an ALJ knows whether unemployment benefits have been paid to the worker at the time of the hearing so that she may properly calculate the present day workers' compensation award.

As this Court has previously said, even though an employer may be entitled to a credit, "it is that party's responsibility to present evidence to support that position. A motion to reopen is not the proper avenue." *American Standard v. Boyd*, 873 S.W.2d 822, 824 (Ky. 1994). Additionally, 803 KAR 25:010 Section 13(14) states in regard to a BRC, "[o]nly contested issues shall be subject to further proceedings."

In this matter, Mercer County admits that it did not request a credit for the unemployment benefits Arnold received until its petition for reconsideration. Mercer County apparently did not request the credit because it believed Arnold was not totally disabled. But the hearing before the ALJ was to determine if Arnold was *permanently and totally* disabled. As such, Mercer County should have raised the issue of receiving an unemployment benefit credit at the ALJ hearing, if for no other reason but to preserve its right to request the credit if Arnold was adjudged totally disabled. Further, there is no requirement that the ALJ should have *sua sponte* awarded a credit to Mercer County just because Arnold testified he received unemployment benefits.

Mercer County also implies in its brief that KRS 342.730(5) placed an affirmative duty on Arnold to disclose information about his unemployment benefits to the ALJ since he was the party seeking a total disability benefit. We disagree. KRS 342.730(5) places no responsibility or burden on an injured worker to raise the issue of the unemployment benefits credit.

The decision of the Court of Appeals is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting.

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