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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001098-WC

NESCO RESOURCE — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-11-68484

MICHAEL ARNOLD;
HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

JONES, JUDGE: This is an appeal from the Workers' Compensation Board's ("Board") decision reversing the Administrative Law Judge's ("ALJ") January 9, 2013, Opinion, Order and Award denying Appellee, Michael Arnold, temporary

total disability benefits ("TTD"). Appellant, Nesco Resource ("Nesco") argues that the Board exceeded its authority by reversing and remanding Arnold's claim to the ALJ with directions to award Arnold alleged past-due TTD benefits. For the reasons more fully explained below, we affirm in part, reverse in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Nesco is a temporary employment agency. It hired Arnold on June 3, 2011, and assigned him to Boyle Block, a manufacturer of concrete cinderblocks, that same day. On November 3, 2011, while working at Boyle Block, Arnold injured his right shoulder as he attempted to lean across a belt line to lift a concrete cinderblock. Arnold's supervisor at Boyle Block took him off work and notified Nesco.

Following his November 3, 2011 work injury, Arnold began treating at Danville Family Physicians with Joann Arnold, APRN. She diagnosed Arnold with low back and shoulder pain, took him off work, and directed him to follow up with her in one week. As directed, Arnold treated with Ms. Arnold for his follow-up appointment the following week. During this appointment, Arnold reported that his low back pain had improved, but that his shoulder pain was no better. Ms. Arnold continued his restrictions and advised him not to return to full duty work until he had been evaluated by an orthopedist.

Arnold remained completely off work from November 4, 2011, through December 5, 2011. On December 6, 2011, Arnold reported to Nesco's office where he met with his supervisor. Arnold testified that his supervisor asked

him to sign Nesco's "Modified Duty Offer." Arnold further testified that he was told by his supervisor that that he would not be eligible for workers' compensation benefits if he refused to sign the offer. The "Modified Duty Offer," signed by Arnold reads as follows:

> Nesco Resource desires to provide our injured employees with the most expedient and quality medical care for their work related injuries. Nesco has developed a modified duty program that will allow our injured workers to return to work on modified duty status by making accommodations for work restrictions.

The Modified Duty Offer also included a description of Arnold's job duties while under work restrictions. Those duties were described as follows:

> If weather permits will be holding or sitting with 'NOW HIRING' Nesco sign. Garbage will be removed every afternoon from all trash containers and taking [sic] out. Washing of from [sic] lobby windows. Use only your left hand to do such.

Arnold performed light duty work for Nesco pursuant to the Modified Duty Offer from December 6, 2011, through March 26, 2012. During this time, Arnold continued to treat for his work-related right shoulder injury and eventually came under the care of Dr. Janak R. Talwalkar. Dr. Talwalker preformed a surgical manipulation of Arnold's right shoulder on March 27, 2012. Arnold followed up with Dr. Talwalker on April 11, 2012, at which time Dr. Talwalker released Arnold to perform light duty work, with restrictions of no lifting greater than fifteen pounds, and no overhead activity.

Arnold was off work completely from March 27, 2012, the date of his right shoulder surgery, through April 12, 2012. Arnold returned to work at Nesco on April 12, 2012, under the light duty restrictions. Thereafter, Arnold continued to

perform various job duties pursuant to the Modified Duty Offer. He followed up with Dr. Talwalker on June 6, 2012. Arnold reported that his right shoulder was "still not right." Dr. Talwalker indicated that he did not believe Arnold was a candidate for further surgical intervention. He estimated Arnold would reach maximum medical improvement ("MMI") in approximately six weeks. Arnold continued working under the Modified Duty Offer through July 18, 2012.

On June 19, 2012, Arnold filed a Form 101 Application for Resolution of Injury Claim with the Department of Workers' Claims seeking benefits for his work-related right shoulder injury. Arnold's claim was assigned to an ALJ. Following a period for discovery, the ALJ conducted a Benefit Review Conference ("BRC") on October 30, 2012. At the BRC, the parties stipulated to jurisdiction under the Workers' Compensation Act ("the Act"); an employment relationship existed between Arnold and Nesco; Arnold's date of injury (November 3, 2011); average weekly wage ($331.63); date of birth (November 6, 1967); education level (10th grade); and that Nesco had paid medical expenses on Arnold's behalf ($7,627.57). The parties identified the contested issues as: permanent disability benefits pursuant to KRS[1] 342.730; TTD benefits; Nesco's

[1] Kentucky Revised Statutes

entitlement to a credit for the "wage continuation;" and sanctions pursuant to KRS 342.040(2).

On November 14, 2012, the ALJ conducted a formal hearing. In addition to Arnold's testimony at the formal hearing, Brian Pollack, a corporate risk manager for Nesco, also testified. Additional evidence relied on by the parties included: Arnold's September 10, 2012, deposition testimony transcript; Nesco's Modified Duty Offer signed by Arnold on December 6, 2011; the November 7, 2012, deposition testimony transcript of Joanne Prewitt, Nesco's area vice-president; the September 24, 2012, deposition testimony of Dwight Lovan, the commissioner of the Kentucky Department of Workers' Claims; and various medical records and reports.

The record reveals that Arnold testified that prior to his work-related injury his job duties at Boyle Block included rotating concrete blocks, pushing them onto a conveyor, and stacking them. He estimated that each block weighed approximately twenty-five to thirty-seven pounds.

Following his work-related injury, Nesco required that Arnold report each day to perform modified duty pursuant to the Modified Duty Offer. His post-injury modified duties consisted of jobs limited to use of his non-dominant left hand or no activity at all except sitting in a room by himself or with two other injured employees. Prewitt testified that Arnold's modified work duties at Nesco included putting application packets together, making copies, highlighting, holding

a "Now Hiring" sign, passing out flyers, and other administrative tasks. Prewitt further testified that there were days when Arnold did not have anything to do. She testified Arnold would walk the halls of Nesco or sit in a room with the door closed when no modified duties were available.

Brian Pollack, the corporate risk manager for Nesco, also testified at the final hearing. Pollack testified that the modified duty program is in place because "it's in the best interest of injured workers to continue to stay in the workforce, to transition back in to their full-duty job." Pollack testified that the modified duty program was required by its compensation insurance carrier.

The evidence revealed that Nesco paid Arnold his usual hourly wage less taxes withheld while he was working light duty. If he failed to show up for assignment of a job activity by Nesco, Arnold would receive no income. Additionally, Nesco paid Arnold "wage continuation" while he was completely off work from November 4, 2011, through December 5, 2011, in the amount of $1,010.65, and again from March 27, 2012, through April 12, 2012, in the amount of $663.57. Nesco reported these amounts to the Department of Workers' Claims.

The ALJ rendered an Opinion, Order and Award on January 9, 2013. The ALJ determined Arnold reached MMI on July 18, 2012. The ALJ awarded Arnold permanent partial disability ("PPD") benefits at the rate of $2.87 a week for 425 weeks and medical benefits. With respect to Arnold's claim for TTD benefits, the ALJ, found that as follows:

> I agree with the Plaintiff's contention that workers' compensation benefits are a statutory creation not typically modified by equity or the common law, but they are guided and controlled by the published decisions of the Kentucky Court of Appeals and the Kentucky Supreme Court. It is also true that wage continuation is not a benefit for which the statute provides credit against workers' compensation benefits. KRS 342.730(6)
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> However, the issue of credit for wage continuation is guided by *Millersburg Military Institute v. Puckett* 260 S.W.3d 339 (Ky. 2008). That case stands for the principle that while non-bona fide wages do not provide a credit against benefits that bona fide wages for work actually performed does provide a credit against benefits that would otherwise be owed.
>
> In this matter I find that however boring, frustrating and otherwise unpalatable the work the employer asked the Plaintiff do it was nonetheless bona fide work, for the benefit of the employer and the wages paid were bona fide. Said wages were paid through July 18, 2012, the date of MMI. As such no additional TTD benefits are payable.

The ALJ also determined that sanctions were not in order.

Arnold then filed a timely petition for reconsideration with the ALJ. The ALJ denied Arnold's petition. Thereafter, Arnold appealed the ALJ's decision to the Board. Arnold asserted the following arguments before the Board: 1) the ALJ erred as a matter of law by finding Arnold performed bona fide work under the Modified Duty Offer; 2) the ALJ erred in refusing to award TTD to Arnold for the period he performed under the Modified Duty Offer; 3) the ALJ erred as a matter of law in his interpretation of *Millersburg, supra*; and 4) the ALJ erred as a matter

of law by failing to impose sanctions against Nesco for its refusal to voluntarily pay TTD benefits.

On appeal, the Board first observed that the ALJ erred when he concluded that "no *additional* TTD benefits" were payable to Arnold because the parties stipulated that Nesco had not paid any TTD benefits to Arnold. The Board then concluded the ALJ was correct in finding that the evidence compelled a finding that Arnold was entitled to receive TTD benefits for the period of November 4, 2011, through July 18, 2012.

The Board then examined whether Nesco was entitled to a "credit for wages paid to Arnold from December 6, 2011, through March 26, 2012, and again from April 13, 2012, through July 18, 2012, while he was performing under the Modified Duty Offer. The Board concluded that the ALJ's factual finding that Nesco paid Arnold for bona fide work during this period was supported by substantial evidence and should not be disturbed. However, the Board held that the ALJ misapplied *Millersburg, supra*, which dictates that there is no credit available if an employee engages in bona fide work for the employer.

Regarding the periods from November 4, 2011, through December 5, 2011, and March 27, 2012, through April 12, 2012, the Board concluded that the parties had stipulated that this was a "wage continuation," which "is not a benefit for which the statute provides a credit against workers' compensation benefits." KRS 342.730(6). With respect to the issues of sanctions, the Board held that it

would "not disturb the ALJ's discretion" and upheld the ALJ's decision denying them.

The Board then remanded the claim to the ALJ with directions to award Arnold "TTD benefits from November 3, 2011, through July 18, 2012, and ordering Nesco is not entitled to credit for bona fide wages and wage continuation paid during that time period."

Nesco appealed to this Court. On appeal, Nesco argues that: (1) it should receive a credit for the "wage continuation" benefits it paid Arnold during the periods he was completely off work because it is clear that Nesco intended these benefits to be in the nature of TTD; (2) the type of work Arnold was performing at the time of injury is superfluous to the Court's inquiry regarding his eligibility for TTD because Arnold returned to full-time work for the same employer; and (3) *Millersburg, supra* has no bearing on the resolution of Arnold's TTD claim.

II. STANDARD OF REVIEW

Pursuant to KRS 342.285, the ALJ is the sole finder of fact in workers' compensation claims. Our courts have construed this authority to mean that the ALJ has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth–Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Moreover, an ALJ has sole discretion to decide whom and what to believe, and may reject any testimony and believe or disbelieve various parts of the evidence,

regardless of whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

On review, neither the Board nor the appellate court can substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact. *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky. App. 1982). A reviewing body cannot second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Bd. of Educ., Shelby County*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). To demonstrate an abuse of discretion, "[a] party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence." *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 754 (Ky. 2011).

Statutory interpretation is a matter of law reserved for the courts, and courts are not bound by the ALJ's or the Board's interpretation of a statute. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329-330 (Ky. App. 2000). "Indeed, it is the appellate court's province is to ensure that ALJ decisions, and the Board's review thereof, are in conformity with the Workers' Compensation Act. KRS 342.290; *Whittaker v. Reeder*, 30 S.W.3d 138, 144 (Ky. 2000)." *Bowerman v. Black Equip. Co.,* 297 S.W.3d 858, 874-75 (Ky. App. 2009).

III. ANAYLSIS

"[T]he primary purpose of the Workers' Compensation Act is to provide for the timely payment of income benefits to injured workers." *Newberg v. Sarcione*, 865 S.W.2d 317, 319 (Ky. 1993). It is "a product of compromises by workers and employers." *Labor Ready, Inc. v. Johnston*, 289 S.W.3d 200, 204 (Ky. 2009). "Workers agree to forego common law remedies in exchange for statutory benefits awarded without regard to fault. Employers agree to pay such benefits and to forego common law defenses in exchange for immunity from tort liability." *Id.*

Income benefits under the Act are available for both temporary and permanent disabilities. *See* KRS 342.730. With respect to permanent disability, benefits can either be for a total disability or a partial disability. *Id.* This is not the case with respect to temporary disabilities; the Act provides compensation only for temporary *total* disabilities. *Id. Robertson v. United Parcel Serv.*, 64 S.W.3d 284 (Ky. 2001) ("As enacted by the legislature, KRS 342.730(1) authorizes income benefits for temporary total disability, but it does not provide benefits for temporary partial disability."). At issue, in the present case is whether TTD benefits are available to a worker who, prior to reaching MMI, is not able to return to his pre-injury work duties, but does return to work for the same employer performing light duty work of an entirely different nature.

KRS 342.0011(11)(a) defines TTD as "the condition of an employee who has not reached [MMI] from an injury and has not reached a level of improvement that would permit a return to employment." The Act does not define the "employment" in relation to TTD. In other words, the Act does not explicitly lay

out whether the term means simply a return to any employment or a return to the type of employment the worker was performing at the time of injury. Likewise, the Act does not specify whether it matters for the purpose of awarding TTD whether the employee returns to work for the same employer he was working for at the time of injury.

The seminal, modern-day TTD case is *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000). In *Wise*, the claimant sustained a work-related left arm injury on April 28, 1997. On July 11, 1997, Wise's physician released him to perform light duty work. However, Wise did not return to employment until September 30, 1997, after he moved out-of-state. The ALJ awarded Wise TTD through September 30. On appeal, the employer argued that it should not be liable for TTD beyond July 11, 1997, when Wise was released to return to light duty employment. The Kentucky Supreme Court rejected this argument on appeal, holding that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." *Id.* at 659.

The Kentucky Supreme Court further delineated the term "employment" as related to TTD in *Double L Const., Inc. v. Mitchell*, 182 S.W.3d 509 (Ky. 2005). Mitchell sustained a work-related eye injury on January 6, 2003, while performing carpentry work for Double L. Mitchell's physician released him to perform light duty work on March 3, 2003, but did not release him to return to full duty carpentry work until August 18, 2003. In addition to the carpentry work Mitchell

performed for Double L, he also worked as a janitor for another employer, Sky-Brite. Notwithstanding his eye injury, Mitchell continued to perform his regular janitorial duties at Sky-Brite. Double L argued that it did not owe Mitchell any TTD because he continued working for Sky-Brite throughout the duration of his injury, or, alternatively, that it did not owe any TTD past March 3, 2003. The Kentucky Supreme Court concluded that Mitchell was eligible for TTD despite the fact that he continued to work for Sky-Brite. It reasoned that "a worker whose injury renders him temporarily unable to perform the work in which the injury occurred should not be penalized for performing what work he is able to do." *Id.* at 514. Nevertheless, it concluded that because Mitchell continued in his concurrent employment, his average weekly wages ("AWW") should be based only on his wages from the carpentry job.

We also look to the published decisions of our Court for guidance. Our opinion in *Bowerman*, 297 S.W.3d 858, is particularly instructive. While working as a mechanic for Black on October 14, 2004, Bowerman suffered a work-related back injury as he repaired a forklift. Following the injury, Bowerman was able to return to some light work activities, and resumed working at Black in this light duty capacity for some period of time. On appeal, we were required to determine whether a release to return to less than full duty employment for the same employer for whom the employee was working at the time of injury is tantamount to the ability to return to employment under KRS 342.0011(11)(a). Relying on *Wise,* we concluded that Bowerman was entitled to "on-going TTD"

benefits even though he had been released to and, at least for a portion of time, did return to work for the same employer in a light duty capacity. We based this decision on the fact that despite the release and return to light duty employment, Bowerman was unable "to return to the type of work he performed when injured or to other customary work." *See Bowerman*, 297 S.W.3d at 876.

Having reviewed *Wise* and its progeny, we are confident that the law in Kentucky is well-settled with regard to determining eligibility for TTD. To demonstrate that he is entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury. If an injured worker proves both of these elements to the ALJ's satisfaction, then our courts have held that the worker is entitled to TTD under the Act. *See, e.g., Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman*, 233 S.W.3d 710, 714 (Ky. 2007) ("As interpreted in [*Wise*], KRS 342.0011(11)(a) authorizes TTD benefits if a worker has not reached MMI and has not reached a level of improvement that would permit a return to his customary employment.").

A. Arnold's Entitlement to TTD

Under *Wise*, employment for the purposes of determining eligibility for TTD pursuant to KRS 342.0011(11)(a) means work that is "customary or that [the employee] was performing at the time of his injury[.]" *Wise*, 19 S.W.3d at 659. An employee does not forego his right to receive TTD even if he continues performing some work prior to MMI so long as he remains unable to return to the type of work he was performing at the time of injury. *See Mitchell*, 182 S.W.3d at 514. Likewise, an employee who returns to some light duty work for the same employer that employed him at the time of injury may nonetheless receive TTD until such time as he obtains MMI or is able to return to his pre-injury duties, whichever occurs first. *See Bowerman*, 297 S.W.3d at 876.

At the time of his injury, Arnold was assigned to Boyle Block where his duties required heavy lifting using both his shoulders, including rotating concrete blocks that weighed approximately twenty-five to thirty-seven pounds, pushing them onto a conveyor, and stacking them. The work Arnold performed at Nesco through July 18, 2012, was primarily administrative in nature and entirely different from the type of work Arnold was performing at the time of his injury. Moreover, it is quite evident from the stipulations, lay testimony, and the medical evidence that from the time of his November 3, 2011, work-related injury through July 18, 2012, Arnold was neither at MMI nor was he medically released to perform the type of work he was performing at the time of his injury. Thus, a strict application

of *Wise* and its progeny would compel a finding that Arnold was entitled to TTD from November 4, 2011, through July 18, 2012.

However, Nesco asserts that *Wise* is inapposite where an injured worker actually returns to work for the same employer who is able to accommodate the workers' restrictions with light duty work. As Nesco explains, a worker like Arnold who has "in fact returned to work and resumed earning wages that had been otherwise lost following the injury and for which TTD benefits are intended to compensate the injured worker . . . can no longer be considered temporarily totally disabled under Chapter 342, as a matter of fact, because that worker has actually resumed working for the employer and receiving income for his labor." Nesco's argument has a certain amount of logical appeal. However, try as we might, we do not believe that it can be reconciled with either binding case law precedent or the statutory directives established by our General Assembly.

Wise and its progeny have been quite clear that the "employment" for the purposes of KRS 342.0011(11)(a) does not just mean any "employment"; it means the type of work the employee was performing at the time of injury. It would open a whole new can of worms were we to interject into this analysis issues regarding the identity of the employer, the rate of pay, or the amount of hours worked post-injury. For instance, we would be left to carve out a common-law remedy where an employee returned to light duty work for the same employer, but at different rate of pay or at reduced hours. In such a case, would the employee be ineligible for any TTD because he returned to work for the same employer or would he be

eligible for TTD such that his wages and benefits totaled his pre-injury salary or totaled 66 2/3% of his pre-injury AWW?

The Act addresses these issues with respect to permanent partial disability benefits. For example, a worker is entitled to increased permanent partial disability benefits in certain situations if his work-related injury prevents him from having the physical capacity to return to his prior type of work. *See* KRS 342.730(1)(c)(2). Also relevant to the inquiry is whether the worker returns "to work at a weekly wage equal to or greater than the average weekly wage at the time of injury," even if the return is at a lighter duty position. *See* KRS 342.730(1)(c); *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). We believe that the

General Assembly would have included similar provisions for TTD had it intended it to work in the way Nesco asserts in its brief.

Additionally, when dealing with permanent total disability, the General Assembly included KRS 342.730(7), which requires a worker who receives benefits for permanent total disability to notify the employer of any return to work. Yet, the General Assembly did not choose to include a similar provision with respect to temporary total disability. This tends to suggest that a return to just "any employment" is insufficient to trigger an end to temporary disability benefits.

We are simply unable to find any evidence in either the Act or our case law to support Nesco's assertion that an employee who has returned to light duty full-time work for the same employer forgoes his right to TTD benefits. Two recent

panels from our Court also reached this same conclusion. *See Mull v. Zappos.com, Inc.*, No. 2013–CA–001320–WC, 2014 WL 3406684, at *8 (Ky. App. July 11, 2014); *Tipton v. Trane Commercial Sys*, No. 2014–CA–000626–WC, 2014 WL 4197504, 1 (Ky. App. Sept. 12, 2014).

B. Credit for Light Duty Work

As the Board noted, what Nesco is seeking is somewhat akin to a credit for the light duty pay Arnold received. While the Act provides instances where credits are available, it is silent with respect to credit for wages. In matters of workers' compensation, credits are available only where statutorily authorized by our General Assembly. *See Williams v. Eastern Coal Corp.*, 952 S.W.2d 696, 698–700 (Ky.1997). KRS 342.730 provides two circumstances in which an employer may receive a credit against its TTD obligation. KRS 342.730 (5) provides "[a]ll 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." KRS 342.730 (6) provides "[a]ll 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."

In his January 9, 2013, Opinion and Order, the ALJ relied on *Millersburg Military Inst. v. Puckett* to conclude that "while non-bona fide wages do not provide a credit against benefits that bona fide wages for work actually performed does provide a credit against benefits that would otherwise be owed." As such, the ALJ determined that Arnold was not entitled to any "additional TTD benefits" because the wages paid to Arnold through July 18, 2012, were for bona fide work. Like the Board, we believe that the ALJ misinterpreted *Millersburg* to create a credit for light duty wages where none exists by statute.

In *Millersburg*, the Kentucky Supreme Court, noting that the employer had confused wages and benefits, explicitly held that "[w]ages are paid for performing labor; income benefits are paid for work-related disability." *Id.* at 342. The Court then held that a credit is unavailable where wages are "paid ostensibly for labor" and not "in lieu of workers' compensation benefits." In this case, the ALJ made a factual determination that Arnold's wages while on light duty were bona fide. In other words, he was paid for work actually performed. In such a case, one cannot claim that the payments were "in lieu of workers' compensation benefits." And, as already established, the Act does not provide a credit against TTD for wages earned while on light duty.

The ALJ made a factual finding that the payments Arnold received while on light duty from December 6, 2011, to March 26, 2012, and April 13, 2012, through July 18, 2012, were wages for bona fide work. Having reviewed the record, we agree with the Board that this factual finding was based on substantial evidence.

Thus, we must affirm the Board's conclusion that Nesco remains responsible for paying Arnold TTD during this period without application of any credit.

We pause to note that some might agree with Nesco's position that allowing Arnold to claim TTD benefits while simultaneously earning wages on light duty results in an unjustified windfall. It is likely, however, that others would no doubt stridently disagree with this position. An employee who opts into the workers' compensation system surrenders the right to sue his employer in tort in exchange for guaranteed benefits that are awarded regardless of fault. While the benefits are guaranteed, they are limited. Under the workers' compensation scheme there is no compensation for pain and suffering; there is no compensation for loss of consortium; and there are no punitive damages. An injured worker that returns to light duty employment may nonetheless have additional life expenses as a result of his injury. For example, such an employee may have previously been able to maintain his own lawn and do his own housekeeping. His injury may require him to hire temporary additional help to manage these tasks. One could argue that the TTD he receives in addition to the wages he earns on light duty does not result in a windfall, but rather helps the injured employee cover these temporary additional expenses.

In any event, we presume that the General Assembly weighed the various public policy considerations and chose to enact the current statutory scheme in light of them. We will not "correct" a result that the General Assembly may well have already considered when it chose to abolish partial temporary disability in the

first instance. We are also cognizant that the General Assembly is free to amend the Act in light of Nesco's concerns. We, however, are not in the business of amending statutes. We must apply the law as written.

C. "Wage Continuation Benefits"

Next we turn to Nesco's argument that the Board erred by not awarding it a credit for the "voluntary unspecified indemnity benefits" paid to Arnold while he was completely off work for his work-related injury, *i.e*, the periods of November 4, 2011, through December 5, 2011, and March 27, 2012, through April 12, 2012.

Specifically, Nesco maintains that while completely off work, Arnold received a net weekly benefit of $221.09, two-thirds of his AWW ($331.63), and that Nesco reported these "unspecified indemnity benefit payments" to the Department of Workers' Claims as required by the Act. Arnold counters that Nesco did not characterize the payments as TTD payments. Arnold also notes that Nesco withheld taxes on the payment. Arnold further points out that throughout the proceedings below, Nesco characterized these payments as a form of "wage continuation."

The record on this issue is far from satisfactory. The ALJ concluded that all the wages paid to Arnold from November 4, 2011, through July 18, 2012, were for bona fide work. The ALJ did not award Arnold any "additional" TTD, after concluding that Nesco had not yet paid Arnold any TTD. Arnold appealed to the Board. With respect to the payments made from November 4, 2011, through December 5, 2011, and March 27, 2012, through April 12, 2012, we are at a

complete loss how the ALJ could have concluded that they were for "bona fide work" since it is undisputed that Arnold did not perform any work for Nesco during these periods. The Board did not address this portion of the ALJ's opinion, indicating only in very simplistic terms that there was no credit for "wage continuation" under the Act.

While there is no *per se* credit for "wage continuation" under the Act, the Board ignored the fact that KRS 342.730(6) does provide an employer a credit for certain "benefits that it funds exclusively against its liability under KRS 342.730(1) for overlapping past-due or future income benefits that are based on the same disability." *UPS Airlines v. West*, 366 S.W.3d 472, 476 (Ky. 2012). Thus, where Arnold did not perform any labor for Nesco during the periods of November 4, 2011, through December 5, 2011, and March 27, 2012, through April 12, 2012, it is possible that Nesco could have been entitled to a credit for the "wage continuation" benefits it paid Arnold during this time. To be entitled to such a credit, Nesco would have to establish that the benefits were paid "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." KRS 342.730(6).

The ALJ made no findings in this regard. Instead, the ALJ incorrectly concluded that these payments were for bona fide work where it was undisputed from the evidence that Arnold performed no work during these two periods. We

conclude that the Board erred as a matter in law in upholding this portion of the ALJ's opinion as it was unsupported. There may well be a statutory credit available for a wage continuation benefit that is not paid in exchange for bona fide labor if the employer is able to establish that the benefit conforms to the requirements of KRS 342.730(6). *See, e.g.*, *Sidney Coal Co. v. Stump*, No. 2003-SC-1061-SC, 2004 WL 2624230, at *1 (Ky. No. 18, 2004) (holding that the ALJ must determine as a factual matter whether the salary continuation benefit offered by the employer was intended to supplement or duplicate the injured employee's TTD benefits before deciding whether KRS 342.730(6) authorized a credit). Given that KRS 342.730(6) may in some instances authorize a credit for a wage or salary continuation benefit paid while the worker is under a covered disability, the Board should have remanded this portion of the claim to the ALJ to conduct an appropriate inquiry pursuant to KRS 342.730(6).

Accordingly, we reverse this portion of the Board's decision and remand this matter for additional factual determinations. On remand the fact-finder shall make the appropriate inquiry under KRS 342.730(6) with respect to the benefits that Arnold received from November 4, 2011, through December 5, 2011, and March 27, 2012, through April 12, 2012. *See UPS Airlines v. West*, 366 S.W.3d 472, 476 (Ky. 2012). If the ALJ determines that Nesco is entitled to a credit under KRS 342.730(6), it shall award Arnold his TTD plus interest at the statutory rate minus the credit due Nesco. If the ALJ determines that the wage continuation benefit

does not fall within the purview of KRS 342.730(6), then Nesco would not be entitled to any credit.

IV. CONCLUSION

For the reasons set forth above, we affirm in part, reverse in part, and remand this claim for further proceedings consistent with this Opinion.

ALL CONCUR.

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