

RENDERED: JULY 27, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000093-WC

JULIAN PUCKETT

APPELLANT

PETITION FOR REVIEW OF A DECISION OF THE  
v. WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-73040

MILLERSBURG MILITARY INSTITUTE;  
HONORABLE R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE; AND  
THE WORKERS' COMPENSATION BOARD

APPELLEES

AND:

NO. 2007-CA-000304-WC

MILLERSBURG MILITARY INSTITUTE

CROSS-APPELLANT

CROSS-PETITION FOR REVIEW OF A DECISION OF THE  
v. WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-73040

JULIAN PUCKETT; HONORABLE R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE; AND  
THE WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING IN PART  
REVERSING IN PART  
AND REMANDING

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BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,<sup>1</sup> SENIOR JUDGE.

ABRAMSON, JUDGE: Julian Puckett petitions (2007-CA-000093) and Millersburg Military Institute cross-petitions (2007-CA-000304) for review of a December 22, 2006 Order of the Workers' Compensation Board awarding Puckett permanent total disability benefits for an injury he sustained in the course of his employment at Millersburg. The Order grants Millersburg credit against the award for both temporary total disability benefits (TTD) and wages paid to Puckett during the period of his eligibility. Puckett contends that the Board erred by granting Millersburg a credit for his wages, and Millersburg counters by insisting that its wage credit should have been calculated on a dollar-per-dollar rather than a week-per-week basis. Although we agree with the Board that Puckett's disability award was not tolled during his periods of post-injury employment, we nevertheless agree with Puckett's underlying contention that Millersburg's wage credit was not authorized. We, therefore, must reverse the Board's Order and remand for entry of a corrected award.

The parties do not dispute the pertinent facts. Millersburg hired Puckett as a full-time maintenance worker in 1992, when he was either fifty-eight or fifty-nine years old. Puckett worked primarily as a painter. On December 1, 2003, when he was seventy

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<sup>1</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

years old, Puckett fell while painting some bleachers and suffered a compression fracture to his lumbar spine. His injury required back surgery, which was performed in January 2005. Although Puckett made two attempts to return to work, once before his surgery from April until December 2004 and again after the surgery from about May until November 2005, he was never able to tolerate full duty and ultimately had to cease working altogether. The Administrative Law Judge (ALJ) found that notwithstanding his brief periods of post-injury employment, Puckett's injury had rendered him permanently and totally disabled as of December 1, 2003. This finding would ordinarily have entitled Puckett to appropriately calculated disability benefits "during [his] disability." KRS 342.730(1)(a). KRS 342.730(4) provides, however, that

[a]ll 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 under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs.

Because Puckett had qualified for Social Security retirement benefits prior to his injury, under this statute his eligibility for workers' compensation disability benefits was limited to the two-year period from December 1, 2003 until December 1, 2005, and those are the benefits the ALJ awarded in June 2006. Millersburg then moved for credit against that award for TTD benefits it had paid to Puckett as well as the nearly \$18,000.00 in wages it had paid him during his post-injury periods of employment. The ALJ and the Board upheld both credits, with the effect that Puckett's disability award was completely extinguished.

Puckett does not dispute that Millersburg is entitled to credit for its voluntary payment of TTD benefits. *Triangle Insulation and Sheet Metal Company v. Stratemeyer*, 782 S.W.2d 628 (Ky. 1990). He argues, however, that the two-year period during which he could receive benefits should be deemed “tolled” while he worked, and thus that his benefits should continue beyond December 1, 2005 for a period equal to the duration of his post-injury employment. The Board rejected this argument, and we have no quarrel with its observation that KRS 342.730(4) makes no provision for “tolling.” The gist of Puckett’s contention, however, is that his disability benefits should not have been reduced because of his post-injury wages, and with that contention we agree.

As our Supreme Court has emphasized, workers’ compensation benefits duly awarded become a statutory entitlement that may not be reduced “absent some statutory authority to do so.” *Williams v. Eastern Coal Corporation*, 952 S.W.2d 696, 701 (Ky. 1997). KRS 342.730 provides for certain offsets against disability benefits, but wages are not one of the recognized offsets.<sup>2</sup> On the contrary, for the simple and obvious reason that wages are paid for labor services received and not as compensation pursuant to KRS Chapter 342, our law has long disallowed a credit against compensation payments for bona fide wages. *Hawkins Brothers Coal Company v. Thacker*, 468 S.W.2d 256 (Ky. 1971) (citing *E. & L. Transport Company, Inc. v. Hayes*, 341 S.W.2d 240 (Ky. 1960)). Compare *Baker v. Standard Rolling Mills*, 131 N.Y.S.2d 739, 741 (N.Y. 1954)

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<sup>2</sup> KRS 342.730(7) provides that an employee receiving a permanent total disability award shall notify his employer or payment obligor if he returns to work. If wages were to be offset, this would have been a logical place to provide for that.

(noting that “compensation does not include wages paid for value received.”); and *see generally* Larson, *Larson’s Workers’ Compensation Law*, Chapter 82 (2006).

There is no suggestion in this case that Puckett’s wages were anything but bona fide. Neither the Board nor Millersburg has referred us to any statutory authority altering the rule disallowing wage credits, and thus the Board misconstrued controlling authority when it permitted Millersburg a wage credit against its workers' compensation liability. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). We are obliged, therefore, to reverse the Board’s December 22, 2006 Order and to remand for a recalculation of Puckett’s award without reduction for his post-injury wages. This ruling renders Millersburg’s cross-petition moot.

ALL CONCUR.

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