

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

07/09/2008

BONNIE MARIE STREET, Claimant

Opinion by DIAMOND
Commissioner

v. VWC File No. 203-70-82

GARDEN SOUTH, Employer
SOUTHERN STATES INSURANCE EXCHANGE, Insurer

Bonnie Marie Street
Claimant, *pro se*.
(Copy sent Priority Mail)

C. Ervin Reid, Esquire
for the Defendants.
(Copy sent Priority Mail)

REVIEW on the record by Commissioner Diamond, Commissioner Dudley, and Commissioner Williams at Richmond, Virginia.

This case is before the Commission at the request of the claimant for Review of the Opinion of the Deputy Commissioner issued on December 19, 2007, which found that she had received all compensation awarded pursuant to an October 25, 2002 Opinion and was not due a penalty for untimely payment. We AFFIRM.

The employer moves to dismiss the Review on the grounds that the claimant failed to specifically assign error to the Opinion below, as provided in Rule 3.1 of the Rules of the Virginia Workers' Compensation Commission, and failed to file a written statement pursuant to Commission Rule 3.2. We decline to dismiss this Review. The language in Rules 3.1 and 3.2 is not mandatory; the Commission retains the discretion to address any errors on its own motion. See Russell Stover Candies v. Alexander, 30 Va. App. 812, 520 S.E.2d 404 (1999). Upon our consideration of the record, we affirm the Deputy Commissioner's Opinion.

The claimant suffered a compensable injury by accident on September 11, 2000. Following hearings in 2002, at which the claimant was represented by counsel, a Deputy Commissioner entered an October 25, 2002 award for temporary total disability benefits of \$448.72 per week for the period from December 8, 2000 through March 18, 2001. The award provided that the “employer is entitled to a credit for all compensation voluntarily paid to the claimant during any period of disability awarded hereunder. Accrued benefits, less credit and a deduction for attorneys’ fees awarded hereinafter, shall be paid in one lump sum.”

The claimant requested a review of the denial of disability benefits after March 18, 2001, but she did not request review of the credit to the employer. During subsequent proceedings before the Commission, on remand before a Deputy Commissioner, and again before the Commission, the claimant failed to prove eligibility for additional wage loss benefits and did not challenge the credit awarded in the 2002 award.

The claimant filed a July 11, 2006 claim alleging a \$4,757.20 underpayment of compensation awarded in the October 25, 2002 Opinion and seeking a twenty percent penalty for overdue compensation. The employer defended that the compensation had already been paid in the form of employer-funded short term disability benefits paid to the claimant. The employer further defended that a credit for voluntary payments had been previously awarded and the question of credit was barred by *res judicata*, and by the holding of Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922). The employer designated portions of the 2002 transcript in which the claimant’s former counsel agreed during the 2002 hearings that compensation for the period at issue had already been paid.

The claimant testified that following her accident she was unable to work, and she received a short term disability benefit of sixty percent of her pre-injury wages. The short term disability benefit was paid for entirely by the employer. She had not worked long enough before the injury to be eligible

for eighty percent of her pre-injury wages, although she received this amount in error during part of the time. She testified that she later repaid the excess payments. Payroll deductions were taken from the short term disability benefits she received. She stated that the employer paid wages while she was disabled, using her vacation and leave days.

The claimant agreed that her earnings statement introduced into evidence showed payment of wages for Christmas Day, 2000 and New Year's Day, 2001. She did not work those days, which were paid holidays.

Yolanda Wright, a senior claims adjuster with the insurer, testified that she has been responsible for the claimant's file since March 2006, replacing the prior adjuster, Mr. Dilworth Cook. She reviewed the wage information in the claimant's file and testified to its accuracy. She testified that all of the payments to the claimant through the short term disability benefit were made before any award entered by the Commission. She stated that the employer paid all employees full pay on Christmas and New Year's Day, and these payments did not reduce leave or vacation time.

The designated portion of Dilworth Cook's testimony from the July 18, 2002 hearing indicated that the claimant was paid short term disability benefits in the gross amount of \$8,787.37. He testified that these benefits were fully funded by the employer. Copies of checks dated May 15, 2001, in the amount of \$7,901.31¹ were admitted to the record at the May 22, 2002 hearing, and Mr. Cook testified that this amount was paid to the employer by the insurer, due to the claimant's temporary total and temporary partial disability compensation. Mr. Cook testified that the insurer paid these amounts to reimburse the employer "since money had already been paid to Ms. Street." The claimant's counsel at that time agreed that benefits for that period had already been paid.

¹ These included a check for \$6,461.28 indicating that it was for temporary total benefits due 11/26/00-03/05/01, (Exhibit 5), and \$1,440.03 for temporary partial benefits due 3/6/01-04/29/01, (Exhibit 7.)

The Deputy Commissioner found that the issue of the credit for voluntary payments to the claimant prior to the entry of the award is final, and further litigation of this issue is barred by *res judicata*. He found that the net proceeds of short term disability benefits paid to the claimant under the employer-funded plan exceeded the amount of her workers' compensation award of \$6,474.40. He denied the claims, finding that there has been no underpayment of compensation benefits to the claimant, and therefore, the claimant is not due a twenty percent penalty on overdue compensation.

Virginia Code § 65.2-520 provides, in pertinent part, that:

Any payments made by the employer to the injured employee during the period of his disability. . . , which by the terms of this title were not due and payable when made, may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation, provided that, in the case of disability, such deductions shall be made by reducing the amount of the weekly payment in an amount not to exceed one-fourth of the amount of the weekly payment for as long as is necessary for the employer to recover his voluntary payment.

“Voluntary payments” include any type of payment that is not required under the Virginia Workers' Compensation Act, and we have held that employer funded short term disability payments may be taken as a credit against a lump sum award of compensation in an appropriate case. See, e.g., Litke v. Diebold Southeast Manufacturing, VWC File No. 205-06-12 (December 8, 2003).

On Review, we agree that the question of a credit for voluntary payments has already been decided. Our review is limited to consideration of the amount of voluntary payments made by the defendants as compared to the award to the claimant. We agree with counsel for the employer that the evidence establishes that at a minimum, the claimant received short term disability payments of at least \$6,359.83² as well as holiday pay for Christmas and New Year's Day of \$269.29, which total \$6,629.07. As these voluntary payments exceeded the compensation of \$6,474.40 awarded in the

² The documentary evidence indicates short term disability pay of \$6,771.99, including \$1,646.27 paid at eighty percent rather than sixty percent. The short term disability payments were made from December 22, 2000 through June 8, 2001. Although the claimant asserts that she repaid the excess short term disability payments, she produced

October 25, 2002 Opinion, we find that the Deputy Commissioner did not err in denying her claim for payment of an underpayment and a penalty.

For these reasons, the December 19, 2007, Opinion is AFFIRMED.

This matter is removed from the Review docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days of receipt of this Opinion.

cc: Garden South
Southern States Insurance Exchange

no documentation of such payment.