

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000967-WC

PRESCOTECH INDUSTRIES, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-00512

SHERYL WESTMORELAND; HON. JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Prescotech Industries, Inc., has petitioned for review of an opinion entered by the Workers' Compensation Board on April 4, 2001. The Board reversed and remanded an opinion and award rendered by the Administrative Law Judge on October 23, 2000, as modified by an order dated December 5, 2000. Having concluded that Prescotech waived its right to claim an offsetting credit under KRS<sup>1</sup> 342.730(6) because it failed to raise the issue at the hearing before the ALJ and that the Board did not err in

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<sup>1</sup>Kentucky Revised Statutes.

remanding the case for consideration of lay testimony in assessing the claimant's ability to return to her previous employment, we affirm.

In May 1997, Sheryl Westmoreland began her employment as a production line worker with Prescotech Industries in Louisville, Jefferson County, Kentucky. Westmoreland's job required her to remove various die-cut materials such as Styrofoam®, fiberglass, aluminum, cardboard, rubber and wire screen from their frames, to inspect the pieces, and then to remove any excess material still attached. At the hearing before the ALJ, Westmoreland characterized her job as highly repetitive, requiring her to continuously perform the same pulling motion with her upper body.

Not long after Westmoreland began her employment at Prescotech, she began experiencing a sensation of numbness in her hands. Often the sensation would be most acute in the mornings, but would abate in the afternoons. On May 14, 1998, however, her symptoms intensified and she notified her supervisor of the numbness she had been experiencing. After informing her supervisor that she had no feeling whatsoever in her hands, Westmoreland left Prescotech and sought medical treatment at the emergency room at Jewish Hospital.

The physicians at Jewish Hospital diagnosed Westmoreland with bilateral carpal tunnel syndrome and treated her with injections of cortisone and velcro wrist splints. While Westmoreland testified that her condition improved and that she could perform some aspects of her job as long as she wore her wrist braces, she never fully returned to work at Prescotech.

From May 1998 until February 1999, when Westmoreland ended her employment with Prescotech, her work attendance was sporadic.

On August 24, 2000, a hearing was held before the ALJ who had been assigned to review Westmoreland's claim for workers' compensation benefits. The contested issues were listed as: the extent and duration of the injury, the average weekly wage, Westmoreland's entitlement to temporary total disability benefits and medical expenses, Westmoreland's entitlement to vocational rehabilitation, whether Prescotech was given proper notice of the claim, and whether Westmoreland's injury was work-related. In support of her claim, Westmoreland introduced the deposition testimony of several medical experts as well as her own testimony. Prescotech countered with the deposition testimony of its medical experts and the testimony of its human resources director, Rose Marie Kuchenbrod. Both Westmoreland and Kuchenbrod testified about "short-term disability" benefits that Westmoreland received from Prescotech subsequent to her injury. However, the testimony concerning the benefits was only in the context of whether the payment of the benefits tended to show that Westmoreland's injury was not work-related. According to Kuchenbrod, the company's policy limited the payment of "sick-leave" benefits to injured Prescotech employees who had been injured outside the scope of their employment.

On October 23, 2000, the ALJ rendered an opinion awarding Westmoreland temporary total disability benefits in the amount of \$152.11 per week for the periods of May 15, 1998, through September 8, 1998, and December 3, 1998, through March 1, 1999. The ALJ also awarded Westmoreland permanent partial

disability benefits in the amount of \$18.25 per week, beginning on March 2, 1999, and continuing for a period of 425 weeks. On November 1, 2000, and November 6, 2000, respectively, the parties filed petitions for reconsideration of the ALJ's opinion and award. Citing KRS 342.730,<sup>2</sup> Prescotech, for the first time, requested a credit for the short-term disability benefits it had voluntarily paid to Westmoreland. In her petition, Westmoreland noted, pursuant to KRS 342.730(1)(b), that the ALJ failed to apply the statutory multiplier of 1.25 to her permanent partial disability award. Westmoreland also claimed that she was entitled to have her permanent partial disability award further enhanced by a factor of 1.5 because her disability precluded her from returning to the same type of work she had been performing at the time of her injury.<sup>3</sup>

On December 5, 2000, the ALJ rendered an order which addressed the parties' petitions for reconsideration. The order first acknowledged the computation error alleged by Westmoreland and applied the correct 1.25 multiplier to her permanent partial

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<sup>2</sup>KRS 342.730(6) provides:

All 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.

<sup>3</sup>See KRS 342.730(1)(c).

disability award.<sup>4</sup> The ALJ also agreed with Prescotech and awarded it a credit of \$3,900.00<sup>5</sup> for the short-term disability payments it had made to Westmoreland. Finally, the ALJ ruled that Westmoreland was not entitled to have her permanent partial disability award enhanced by a factor of 1.5 because "no physician testified that the plaintiff is incapable of returning to the work performed at the time of the injury."

Westmoreland appealed the ALJ's revised award to the Workers' Compensation Board. Westmoreland argued that Prescotech had waived any credit from the short-term disability payments because it had failed to properly raise the issue before the ALJ. Westmoreland further claimed that the ALJ had erred when he held that she was not entitled to have her award enhanced by a factor of 1.5 due to the lack of medical evidence. The Board rendered an opinion on April 4, 2001, reversing and remanding. The Board reversed the ALJ on the issue of the credit for payments under the short-term disability plan because "the issue was never raised before the ALJ[.]" The Board noted:

The purpose of a petition for reconsideration is to bring to the attention of the fact finder those issues not addressed in his opinion but raised and litigated by the parties. . . . If we were to accept the argument of Prescotech, this would allow for nothing more than trial by ambush and deny Westmoreland a fair opportunity to be heard.

The Board also opined that "[e]ven if we were to attempt to address the merits, we believe Westmoreland must still prevail for failure of proof on the part of Prescotech."

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<sup>4</sup>See KRS 342.730(1)(b).

<sup>5</sup>\$150.00 per week for 26 weeks.

As to the issue of the ALJ's denial of an enhancement by the 1.5 factor, the Board stated that "[i]f in fact it was the ALJ's opinion that enhanced benefits could not be awarded because no physician specifically testified to pre-employment versus post-employment capabilities, the ALJ erred." The Board then rejected Westmoreland's argument that the evidence of record compelled a finding in her favor. The Board remanded this matter to the ALJ "to consider the entirety of the medical evidence, including whatever reasonable inferences he may draw from it, as well as Westmoreland's testimony to which he may assign such weight or credibility as he deems appropriate." This petition for review followed.

While both Westmoreland and Kuchenbrod testified at the evidentiary hearing concerning the payment of short-term disability benefits, Prescotech never listed its claim to a credit as a contested issue. Likewise, Prescotech never mentioned its claim to a credit at either the pre-conference hearing or the evidentiary hearing. Based on these omissions, Westmoreland argues that Prescotech was precluded from raising the issue in its petition for reconsideration.

Pertinently, 803 KAR<sup>6</sup> 25:010 § 18(6)-(7) provides that:

- (6) If at the conclusion of the prehearing conference the parties have not reached agreement on all issues, the administrative law judge shall:
  - (a) Prepare a summary stipulation of all contested and uncontested issues not previously stipulated at the benefit review conference which

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<sup>6</sup>Kentucky Administrative Regulations.

shall be signed by representatives of the parties and by the administrative law judge; and

(b) Schedule a final evidentiary hearing.

(7) Only contested issues shall be the subject of further proceedings.

This regulation has been interpreted by our Supreme Court as limiting Board review to only issues which were contested before the ALJ.<sup>7</sup>

KRS 342.730(6) states that a credit will not be given "where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision." As the Board stated in its opinion, "we cannot assume that the internal offset provision for workers' compensation benefits contained in the benefits plan is consistent with the provisions of the statute." The burden was on Prescotech to raise the offset issue before the ALJ and to present sufficient evidence in support of its claim. It failed to do either. Accordingly, we hold that Prescotech waived its right to assert a credit pursuant to KRS 342.730(6).

The second issue for our review is whether the Board erred when it remanded Westmoreland's case to the ALJ for consideration of lay testimony in determining the extent of her injury. In his order of December 5, 2000, the ALJ stated that Westmoreland was not entitled to have her award enhanced by a factor of 1.5 because "no physician testified that the plaintiff

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<sup>7</sup>See Roberts v. Estep, Ky., 845 S.W. 2d 544, 547 (1993) (holding that an issue which was not listed as a contested issue at the evidentiary hearing phase was considered waived for purposes of Board review).

is incapable of returning to the work performed at the time of the injury." The Board agreed with Westmoreland that this language meant that the ALJ had considered only expert testimony in arriving at his conclusion regarding the extent of Westmoreland's disability. Prescotech, on the other hand, argues that the ALJ's statement meant only that he was more heavily influenced by the physician testimony in the case, but that he had considered both lay and expert testimony in arriving at his conclusion.

We hold that the Board was correct in ruling that Westmoreland was entitled to more specific findings on this issue. It was error for the ALJ to fail to consider Westmoreland's testimony concerning the extent of her injury. As our Supreme Court stated in Ira A. Watson Department Store v. Hamilton:<sup>8</sup>

It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. . . . A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured [citations omitted].

Accordingly, we hold that the Board properly remanded this matter to the ALJ for consideration of Westmoreland's own testimony in addition to the other evidence of record.

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<sup>8</sup>Ky., 34 S.W.3d 48, 52 (2000).



For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Thomas Hectus  
Louisville, Kentucky

BRIEF FOR APPELLEE, SHERYL  
WESTMORELAND:

Christopher P. Evensen  
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