RENDERED: SEPTEMBER 18, 2003
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2002-SC-0922-WC DATE 12-18-03, ENACTED, P.C.

STEEL TECHNOLOGIES, INC. — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0167-WC
WORKERS' COMPENSATION BOARD NO. 97-78122

KENNY POPP; HON. W. BRUCE COWDEN, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a decision of the Court of Appeals affirming the Workers' Compensation Board and the Administrative Law Judge, which held that the employer is not entitled to a credit as a result of the settlement with a third party tortfeasor.

I.

The issue as framed by Steel Technologies, Inc., is that the ruling of the Administrative Law Judge that the employer is not entitled to a credit against the award of income and medical benefits is erroneous as matter of law.

The employer argues it upheld its burden of proof, entitling it to a credit, by merely showing that the claimant received $98,000 as a result of his settlement. The employer then contends that the claimant never brought any evidence before the

Administrative Law Judge to counter this proof, and therefore, the employer is entitled to the entire $98,000 as a credit.

The employer argues that the ALJ, the Board and the Court of Appeals have all misconstrued controlling precedents in this area, in particular, Whittaker v. Hardin, Ky., 32 S.W.3d 497 (2000) and Davidson v. Travelers Ins. Co., Ky.App., 56 S.W.3d 457 (2001).

Popp alleges that he received a severe electrocution injury to his shoulder and arm while replacing fuses in an electric control box in 1997. Popp filed a workers' compensation claim and also a third-party action in circuit court against Morehouse Electric. Liberty Mutual was the workers' compensation insurer for Steel Technologies at the time of this accident. It intervened in the third-party action to recoup the monies it had paid and might pay in the future on Popp's behalf. The third-party action was settled for $165,000. No settlement agreement was ever introduced into evidence. In the workers' compensation claim, the ALJ determined that the employer had not satisfied its burden of proof. The Workers' Compensation Board affirmed, as did the Court of Appeals. This appeal followed.

II.

The employer has the burden of proving entitlement to a credit. Once that burden is met, the burden of going forward falls on the claimant. Whittaker, supra. Assuming the employer met its burden by showing that the claimant received $98,000, the employer's evidence was rebutted. As the ALJ pointed out, the testimony of Mr. Hoback, counsel for the insurer, supported the idea that the $25,000 received was not just for past disability payments by the insurer. It seems very reasonable that the insurer believed $25,000 was as good as they could do for all of the case. The

employer is correct that the ALJ cannot assume what portion of the recovery was for past and what portion was for future disability with regard to the employer. However, the ALJ can take notice of the fact that the insurer only took $25,000 and is not the one seeking a credit now.

In the civil suit, Morehouse Electric agreed to settle with the Popps and Liberty Mutual Insurance Company for $165,000. Liberty Mutual was paid $25,000 as a partial reimbursement for the funds already paid and for future benefits. The Popps portion of the settlement was $140,000, of which they received $98,000, with the balance of the money being used for attorney fees and other expenses. The ALJ concluded that Popp sustained an occupational disability of 38.5% as well as being entitled to a 1.5% multiplier pursuant to KRS 342.730(1)(c)(1). He declined to give a credit to Steel Technologies against the monies received in the civil suit settlement. The ALJ explained pursuant to Whittaker, that the employer had the burden of proving the affirmative events of an entitlement to a credit and he concluded that the employer had not satisfied this burden.

The ALJ relied on the decision of this Court that an ALJ had jurisdiction to determine credit for subrogation and that the burden of proving the affirmative defense of entitlement to a credit was on the employer, and where prima facie evidence of a credit was introduced, the burden of going forward with evidence that a portion of the tort recovery is not available for subrogation credit should be placed on the employee. In Davidson v. Travelers Ins. Co., supra, the Court of Appeals reached a similar conclusion, holding that because Davidson and the tortfeasor did not agree to an allocation of the proceeds, the fact finder bore the duty to account for the entire sum. Steel Technologies continues to argue that it is entitled to the entire $98,000 settlement

because the claimant did not present probative and substantive evidence that would allow an allocation of damages by the ALJ between pain and suffering, loss of future earnings or future medical benefits and the claim of Mrs. Popp for a loss of consortium.

Here, the employer bears the burden of proof and if unsuccessful on appeal, the question really becomes whether the evidence is so overwhelming as to compel a decision in its favor. See Paramount Foods, Inc. v. Burkhart, Ky., 695 S.W.2d 418 (1985).

III.

A decision in favor of the claimant should not be disturbed on appeal if it is supported by substantial evidence of probative value. We find that to be the case here. In addition, the Supreme Court should not overturn a decision of the Court of Appeals unless it perceives that the court has overlooked or misconstrued controlling statutes or precedent or committed error in assessing the evidence so flagrant as to cause an injustice. See Western Baptist Hosp. v. Kelley, Ky., 827 S.W.2d 685 (1992). In this case, the Court of Appeals correctly determined that the employer had the burden of proving the affirmative defense of entitlement to a credit and where that is the case and it is not successful, then the question on appeal is whether the evidence is so overwhelming in consideration of the entire record as to have compelled a finding in its favor. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). We find that the Court of Appeals correctly decided the case and that there is no manifest or flagrant injustice.

The decision of the Court of Appeals is affirmed.

All concur except Stumbo, J., who concurs in result only.

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