

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000366-WC

EDWARD RICHARD WILLIS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-01-00339

SALLEE HORSE VANS;  
HONORABLE DONALD G. SMITH,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Edward Richard Willis (hereinafter "Willis") has petitioned this Court for review of the Workers' Compensation Board's (hereinafter "the Board") opinion affirming in part and reversing in part and remanding the Administrative Law Judge's (hereinafter "ALJ") opinion and award. Specifically, Willis is appealing the Board's holding that the ALJ's assignment of a 10% functional impairment rating is not supported by substantial evidence. Having considered the parties' arguments, the record, and the applicable case law, we affirm.

Willis is currently a fifty-nine year-old resident of Lexington, Kentucky. He completed high school, has obtained a CDL driver's license, and has specialized training in law enforcement and as a firefighter/EMT. While working for the Clay County Sheriff's Department in Florida in 1983, Willis sustained a work-related injury to his low back when he fell after stepping in a hole. He underwent surgery for a herniated disc at L5-S1, and continued experiencing problems with his back until around 1998. Willis began working for the Sallee Horse Vans (hereinafter "Sallee") in 1998 transporting horses in an 18-wheeler with a 45-foot trailer. In January 2000, Willis was involved in a motor vehicle accident as a passenger in the cab of an 18-wheeler. He sought treatment for low back and left leg pain, and was later released to his regular duties for Sallee.

On December 22, 2000, Willis sustained a work-related injury to his low back when he slipped on ice while stepping up onto a trailer. He did not immediately experience a lot of pain, but noted the onset of pain when he drove from Lexington to Cincinnati and back on December 24<sup>th</sup>, and then flew from Lexington to Florida the next day. He sought treatment for low back and left leg pain from chiropractor Dr. Bob Hutchinson in Florida on December 26<sup>th</sup>. He continued seeking treatment upon his return to Lexington, and he was eventually released to work in April 2001. Willis is currently working for Sallee.

On March 9, 2001, Willis filed an Application for Resolution of Injury Claim with the Department of Workers' Claims. The claim was assigned to ALJ Donald Smith, and proof

time began on March 29, 2001. Willis filed the medical reports of Dr. Hutchinson and Dr. William Brooks, and Sallee took the deposition of treating physician Dr. Gregory Snider. Willis testified by deposition and at the final hearing.

Dr. Hutchinson first saw Willis on December 26, 2000, for complaints of severe pain in the low back and left hip radiating into the left leg. Willis received treatment from him in the form of adjustments and massage therapy until he returned to Lexington, and Dr. Hutchinson noted slow but steady improvement.

Dr. Brooks evaluated Willis on February 13, 2001, at which time his chief complaint was low back and left leg pain. He noted a history of a 1983 excision of a herniated intervertebral disc. Dr. Brooks ordered physical therapy and prescribed medication. A March 12, 2001, MRI of the lumbar spine revealed previous surgery on the left at L5-S1, but no herniation. In an April 2, 2001, letter, Dr. Brooks stated his diagnosis as a musculoligamentous strain of the lumbar spine, and released him to work on April 16, 2001, with the restriction that he avoid lifting over 35 to 50 pounds. Dr. Brooks also stated that Willis' symptoms were directly related to the December 22, 2000, incident. He later assigned a 10 to 13% whole person impairment pursuant to DRE lumbar Category III of the AMA Guides.

Dr. Snider originally treated Willis following his January 2000 motor vehicle accident for neck, low back, and left leg pain. He then saw Willis on January 5, 2001, for complaints of low back and left leg pain, noting a history of a slip and

fall. Dr. Snider diagnosed low back pain with left sciatica, but the etiology of the problem was unclear to him as it did not seem to be related to the slip at work. Willis did not keep his follow-up appointment scheduled for January 26, 2001.

Following the prehearing conference and final hearing, the contested issues remained notice, Sallee's right to cross-examine Dr. Brooks, and extent and duration. The ALJ issued an opinion and award on September 5, 2001. On the issue of the right to cross-examine witnesses, the ALJ acknowledged that an adverse party may depose reporting physicians, but it must be done in a timely manner. In this case, Sallee did not timely seek an extension of proof time in order to take Dr. Brooks' deposition and was therefore precluded from doing so. On the issue of notice, the ALJ found that Sallee was notified of the injury by Dr. Hutchinson on December 26<sup>th</sup>, and that this evidence was unrebutted and credible.

On the issue of extent and duration, the ALJ found that Willis did not retain the physical capacity to return to the same work due to the lifting restrictions imposed by Dr. Brooks, and that he was not earning more money at that time because he was working less hours, albeit it at the same wages. He found Dr. Brooks' assignment of a 10% functional impairment rating as the most persuasive. The ALJ awarded Willis permanent partial disability benefits in the amount of \$57.27 per week for 425 weeks beginning December 23, 2000, for the 10% impairment rating as well as medical expenses.

Both Willis and Sallee filed petitions for reconsideration. Willis' petition was denied as untimely, and Sallee's was granted only to the extent that benefits were to terminate when Willis qualified for social security benefits and that he would only receive half of the benefits for weeks he returned to work at the same or greater wages. Both Willis and Sallee appealed to the Workers' Compensation Board.

On January 23, 2002, the Board issued an opinion affirming in part, and reversing in part and remanding. The Board affirmed on Willis' argument that he should have received an award of TTD benefits, reasoning that because he did not timely seek reconsideration of that issue, the ALJ was precluded from reviewing it. Sallee raised three issues, including whether the ALJ erred by assuming Willis' 10% impairment was due to the December 22, 2000, accident, for failing to apportion any of the impairment to his previous injury, and for misconstruing his wages. The Board reversed on the first issue, holding that the ALJ erred in relying on the impairment rating of Dr. Brooks because he did not mention a level of the spine it was related to and did not specifically attribute it to the work incident. It could not be assumed that the rating was for the musculoligamentous condition Dr. Brooks found. Because the award of permanent partial disability benefits is predicated on the existence of a functional impairment rating, proof of the impairment rating is an essential element. In this case, the Board found that there was not substantial evidence to support a

permanent partial disability award. Due to this holding, the other issues Sallee raised were moot.

Willis petitioned this Court for review solely on the issue as to whether the 10% impairment rating was supported by the record, arguing that the ALJ is permitted to draw conclusions based upon the evidence as a whole. Willis also contends that based upon the letters and reports from Dr. Brooks, the ALJ could logically infer and conclude that because the limitations and work restrictions were based solely on the work injury, the impairment rating was also based solely upon that injury. In response, Sallee argued that the ALJ could not assume a causal connection between the December 2000 incident and the 10 to 13% impairment rating. It was uncontradicted that Willis had undergone a previous surgery to his low back at L5-S1 for which the AMA Guides would apply a 10 to 13% impairment even if asymptomatic. While Dr. Brooks stated that the symptoms were attributable to the December 2000 incident, he did not attribute the functional impairment to the incident. The ALJ may not make assumptions that are not supported by the evidence.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the

evidence so flagrant as to cause gross injustice." Id., at 687-88.

The standard of review applicable to situations where the party with the burden of proof is successful before the ALJ is well settled in the Commonwealth. "The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor." Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979). "When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, Ky. 708 S.W.2d 641, 643 (1986).

Although a court cannot substitute its evaluation of the weight and credibility of the evidence for that of the Workmen's Compensation Board, nevertheless, the findings of fact of the board when it decides in favor of the claimant must be supported by substantial evidence. Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.

Smyzer v. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971).

Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Union Underwear Co. v. Scearce, Ky., 896 S.W.2d 7, 9 (1995).

The issue in this appeal, therefore, is whether there is substantial evidence to support the ALJ's finding that the 10% functional impairment assigned by Dr. Brooks was related to the December 22, 2000, work incident. We agree with the Board and Sallee that there is not substantial evidence to support this

finding. Although Dr. Brooks clearly stated that the symptoms were related to the work injury, he never related the 10 to 13% functional impairment rating to it. In his May 8, 2001, letter to Willis' attorney, Dr. Brooks stated, "I am in receipt of your letter and would concur with the DRE lumbar Category III indicating a 10 to 13% impairment of the whole person." Nowhere did he relate this impairment to the work incident. Indeed, Sallee points out that the 5<sup>th</sup> Edition of the AMA Guides assigns a 10 to 13% impairment under DRE lumbar Category III for a history of a herniated disc and surgery. It is undisputed that Willis had a herniated disc and surgery to correct it in 1983. It would not be logical for the ALJ to conclude that even though Dr. Brooks related Willis' symptoms to and imposed restrictions based upon the December 2000 incident, it necessarily followed that the functional impairment was also related to the work incident. Because there was no evidence of substance to support the ALJ's finding that the 10% functional impairment was related to the work incident, we believe that the Board did not err in assessing the evidence, did not substitute its judgment for that of the ALJ, and properly reversed and remanded on this issue. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

The Board's opinion affirming in part, and reversing in part and remanding the ALJ's opinion and award is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

L. Davis Bussey  
Lexington, KY

BRIEF FOR APPELLEE:

Charles E. Lowther  
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