

RENDERED: August 22, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-002078-WC

HILL & HILL CONSTRUCTION COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-79282

SUSAN WILLEY; HON. J. KEVIN KING,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: PAISLEY AND TACKETT, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

PAISLEY, JUDGE. Hill & Hill Construction Company petitions for
review of an opinion of the Workers' Compensation Board (board),

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by
assignment of the Chief Justice pursuant to Section 110(5)(b) of the
Kentucky Constitution and KRS 21.580.

which affirmed the decision of the Administrative Law Judge (ALJ) awarding Susan Willey permanent partial disability benefits based on a 30% disability rating and a 20% functional impairment rating involving injuries to Willey's bladder, kidney, and lumbar spine. Hill & Hill asserts that the portion of the award which relates to Willey's kidney condition is not based on objective medical findings. After reviewing the record and the arguments of counsel, we agree with appellant as to that issue. Thus, we affirm in part, reverse in part, and remand with directions.

On November 18, 1998,² during her second day of employment as a flag-person for Hill & Hill, Willey was injured when a large boulder fell from a truck, struck her in the abdomen, and knocked her to the ground. She was taken to a hospital emergency room where she was diagnosed with bruised ribs and kidneys and was treated with pain medication. She returned to work the next day and continued to work part-time at Hill & Hill doing various jobs for approximately six months until she was laid off. She has been employed at several restaurants since 1999.

² There is some testimony in the record from Willey that the injury occurred on November 8, 1998. This appears to be erroneous, but the reason for the inconsistency is unclear.

About two weeks after the incident, Willey was seen by Dr. Sandra Dionisio, a family physician, with complaints of general soreness, tenderness and swelling near her stomach, as well as urinary urgency and leakage, and pelvic region numbness. A urinalysis indicated some traces of blood in her urine. Dr. Dionisio referred her to a urologist, Dr. Juan Drachenberg, whose preoperative diagnosis was second-degree cystourethrocele and urinary incontinence. On January 26, 2000, Dr. Drachenberg performed a "retropubic cystourethropexy by Burch" surgical procedure to attach Willey's bladder to her pelvic bone. The operation resolved her urinary leakage problem, but she continued to experience abdominal pain and swelling, left leg pain, pelvic numbness, and urinary incontinence. Willey is not currently receiving active treatment for her physical complaints.

On October 29, 2001, Willey filed an Application for Resolution of Injury Claim claiming injury to her ribs, kidney, and bladder based on the November 1998 incident. She included notes from Dr. Dionisio pertaining to several visits. Subsequently, she filed a report and Form 107 prepared by Dr. Paul Forberg of the Kentucky Orthopedic and Chiropractic Center involving an examination performed on January 14, 2002. In his two-page report, Dr. Forberg diagnosed Willey as suffering from bladder avulsion, kidney contusion with hematria, sexual

dysfunction, numbness in the peroneal region, and bilateral SI joint pain. He reported that Willey told him she continued to have bladder incontinence, painful sex, bloody urine, constant low back and hip pain, leg numbness, and an inability to stand for long periods of time. In his Form 107, Dr. Forberg assessed a 20% permanent whole body impairment under the most recent American Medical Association (AMA) Guides to Evaluation of Permanent Impairment, of which he attributed 9% to a kidney condition, 7% to a bladder condition, and 5% to lumbosacral abnormalities. He stated Willey should avoid prolonged standing, and that she needed GV and GYN follow-up. Hill & Hill objected to the filing of Dr. Forberg's report for evidentiary purposes, based on the physician's alleged failure to set forth sufficient objective medical findings. The ALJ overruled the stated objection on the ground that it went to the weight rather than the admissibility of the evidence.

On February 20, 2002, Hill & Hill filed the report of a neurologist, Dr. Joseph Zerga, who examined Willey on February 13, 2002. Dr. Zerga's physical examination indicated that Willey had tenderness in her left lower abdomen, subjective decreased numbness in the left suprapubic region, no atrophy, and fasciculation or muscle tenderness in her legs. He stated that Willey's symptoms were predominately in the distribution of the iliohypogastric nerve, and that her urinary complaints might

be due to a lumbosacral plexus trauma or local trauma to the bladder. Dr. Zerga noted there was no impairment rating given in the AMA Guides for an iliohypogastric nerve injury, but after reviewing impairment ratings for other similar nerve conditions he assigned impairment ratings of 2% for sensory deficit, 2% for dysesthesias associated with the iliohypogastric nerve condition, and 3% for impairment related to urinary problems for a total whole person impairment of 7%. He felt that Willey's only restriction should be to avoid heavy lifting.

On March 27, 2002, Willey testified during a hearing before the ALJ that she suffered constant stomach pain, numbness in her left arm and leg, and urinary incontinence and overflow. She said that she could perform daily activities but that she had difficulty performing heavy manual labor. On April 30, 2002, the ALJ issued an opinion awarding Willey benefits commensurate with a 30% permanent partial disability rating under KRS 342.730, based on the 20% functional impairment rating (20% X 1.5) assessed by Dr. Forberg. The ALJ indicated that he utilized Dr. Forberg's impairment rating because he felt that Dr. Forberg's emphasis on Willey's urinary problems, as opposed to Dr. Zerga's focus on Willey's peripheral nerve deficit, more closely correlated with the condition which had the greatest impact on Willey's functional ability.

On May 6, 2002, Hill & Hill filed a petition for reconsideration seeking a reduction of the award or additional findings of fact based on a lack of objective medical findings to support Dr. Forberg's impairment rating of 9% for Willey's kidney condition. On May 22, 2002, the ALJ denied the petition to reconsider, stating that the objection involved the merits of the case which is an improper ground for collateral review. See Wells v. Beth-Elkhorn Coal Corp., Ky. App., 708 S.W.2d 104 (1985). He also stated that Dr. Forberg relied on a provision of the AMA Guides which provides for the assessment of impairment for signs of upper urinary tract dysfunction that do not require continuous treatment or surveillance. On September 11, 2002, the board affirmed the ALJ's decision. This appeal followed.

Hill & Hill argues that the ALJ erred in awarding benefits based on Dr. Forberg's impairment rating as it related to Willey's kidney condition. It does not dispute the portion of the award which is based on Dr. Forberg's functional impairment ratings associated with Willey's bladder and lumbosacral abnormalities, but it maintains that Dr. Forberg provided no objective medical findings to support the impairment rating for her alleged kidney dysfunction. Unfortunately, as asserted by Hill & Hill and admitted by Willey, the board misunderstood the issue which was raised by Hill & Hill as to

the award of benefits for a kidney infection. Instead, the board addressed only the evidence supporting benefits related to Willey's bladder condition.

As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of evidence. Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002); Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993). In a workers' compensation action, "the claimant bears the burden of proof and the risk of nonpersuasion" as to every essential element. Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999). When the fact-finder's decision favors the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence, which is defined as some evidence of substance and consequence sufficient to "induce conviction in the minds of reasonable people." Transportation Cabinet, Department of Highways v. Poe, Ky., 69 S.W.3d 60, 62 (2001); McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 860 (2001).

KRS 342.0011 provides in pertinent part as follows:

(1) "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. . . .

. . . .

(33) "Objective medical findings" means information gained through direct observation and testing of the patient applying objective or standardized methods.

The interplay between these two sections was discussed by the Kentucky Supreme Court in Gibbs v. Premier Scale Co./Indiana Scale Co., Ky., 50 S.W.3d 754 (2001). After discussing the legislative history of KRS 342.0011(1), the court recognized a legislative intent to make the requirements for proving a claim for occupational injury more stringent, stating that "although a worker may experience symptoms and although a physician may have diagnosed a work-related harmful change, the harmful change must be evidenced by objective medical findings as that term is defined by KRS 342.0011(33). Otherwise, it is not compensable as an 'injury.'" Id. at 761. The court noted that a claimant's complaints of symptoms are not objective medical findings as defined by KRS 342.0011(33), and that subjective claims must be confirmed by direct observations or standardized tests. Id. at 762. The claimant must offer either direct or indirect evidence of the harmful change in the form of objective medical findings which demonstrate the existence of symptoms of a harmful change. Id. See also Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001). Substantial evidence of a harmful change in the human organism constituting a compensable "injury" must include

objective medical findings. See, e.g., Gibbs, supra; Staples, supra.

In the current case, Hill & Hill challenges the ALJ's finding that Willey suffered from a permanent partial disability related to her kidney. The majority of the ALJ's opinion with respect to the medical evidence involved his acceptance of Dr. Forberg's rather than Dr. Zerga's impairment assessment, as well as his acceptance of Dr. Forberg's impairment ratings as to Willey's bladder and lumbosacral condition. However, the ALJ did not specifically discuss Willey's kidney condition, and Dr. Forberg did not indicate either that he performed or that Willey's medical history contained any diagnostic or evaluative tests pertaining to her kidney condition. Indeed, aside from his ultimate diagnosis of kidney contusion with hematuria and the impairment rating, the only reference in Dr. Forberg's report to Willey's kidney condition lies in his notation about her subjective reference to having blood in her urine. However, a medical report dated November 30, 1998, from the White House Clinic states that Willey was told in the emergency room on the day of the incident that she might have a bruised kidney and "[t]he hematuria lasted about 2-days and has resolved." Moreover, at the hearing before the ALJ, Willey testified that she was never specifically treated for a kidney condition and that she did not know of any abnormalities with her kidney.

On appeal to this court, Willey has pointed to no specific objective medical evidence to support benefits for a kidney impairment. Instead Willey relies on Dr. Forberg's report, which contains no analysis, medical test reports, or direct observations related to her kidney. Although Hill & Hill requested the ALJ to make additional findings to support the conclusion that a kidney impairment exists, that request was denied. As our review of the record shows that Willey has failed to provide objective medical findings of a compensable "injury" to her kidney as required by KRS 342.0011(1) and (33), we must conclude that substantial evidence does not support the ALJ's and the board's findings that Willey suffers a permanent impairment as a result of a kidney condition.

We therefore affirm in part, we reverse that portion of the ALJ's award of permanent partial disability benefits which is associated with Willey's kidney condition, and we remand for an award based solely on her bladder and lumbosacral conditions.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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