

RENDERED: July 8, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2005-CA-000651-WC

JONATHAN WOOSLEY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-73554

KROGER DISTRIBUTION;  
HON. JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: Jonathan Woosley has petitioned this Court for review of an order of the Workers' Compensation Board (the Board) which affirmed the order of the Administrative Law Judge (ALJ) that concluded Woosley did not sustain an injury as defined in KRS 342.0011(1) and dismissed his claim. We affirm.

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<sup>1</sup> 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.

Woosley alleged that he injured his wrist on July 4, 2003, while working at the Kroger Distribution Center (Kroger). He claimed that he was filling grocery orders when he lifted a five pound box and his left hand and left wrist gave way. Woosley developed swelling and pain in the wrist and hand and was treated in the emergency room. He received temporary total disability benefits from September 5, 2003, through November 13, 2003. Woosley then returned to work and worked until January 2004, when he took medical leave due to his problems. He continued on medical leave until May 28, 2004, when he was terminated for not reporting to work. At the hearing before the ALJ, Woosley stated that he continues to have pain and swelling in the outer side of his left wrist and he loses feeling in his small and ring fingers. His fingers also become cold. He stated that he can no longer play the guitar, play basketball or work on an old truck he has.

The medical records of Doctors S. Pearson Auerbach, B. Thomas Harter, and Thomas M. Gabriel were introduced into evidence. Dr. Auerbach had performed an independent medical evaluation on March 30, 2004. Dr. Auerbach diagnosed Woosley with a left wrist injury with a loss of grip strength. He assessed a 12% impairment pursuant to the AMA guides. He placed numerous restrictions on Woosley and indicated that Woosley would be unable to perform his prior work activities. The

doctor also stated that Woosley had reached maximum medical improvement.

The medical records of Dr. Harter indicated that he first saw Woosley on August 8, 2003, and at that time diagnosed Woosley with possible synovitis tendonitis of the extensor carpi ulnaris of the left wrist. Dr. Harter later ordered two MRIs and nerve conduction studies which resulted in normal findings. In a letter dated May 7, 2004, Dr. Harter stated that he was unable to make a specific medical diagnosis due to a lack of objective medical findings.

Dr. Gabriel performed an independent medical evaluation of Woosley at the request of Kroger. Following the evaluation of November 18, 2003, Dr. Gabriel diagnosed Woosley with chronic left wrist pain. He found Woosley to be at maximum medical improvement and found no notable impairment due to any known anatomic pathology.

Based upon the above medical records, the ALJ determined that Woosley had failed to meet his burden of proof that he had incurred an injury as defined by KRS 342.0011 as there was "no credible evidence of objective medical findings to support [Woosley's] claim of an injury." The ALJ found that the MRIs and the nerve conductive studies reveal no pathology to explain Woosley's subjective claims of wrist pain. Relying primarily on the two hand surgeons, Drs. Harter and Gabriel, the

ALJ determined that Woosley had not sustained his burden of proof in establishing that he incurred an injury as defined by KRS 342.0011(1) and dismissed the claim.

On appeal to the Board, Woosley argued that the ALJ committed reversible error by misinterpreting the medical evidence and by trying to equate "objective medical findings" to be the two MRI studies and/or the nerve conduction studies. The Board, finding no error, affirmed. The Board reviewed the medical records and made the following findings in affirming the order of the ALJ:

We begin by noting Woosley is mistaken when he states that the term "objective medical findings" is not defined within the statute. That term is defined by KRS 342.0011(33) as "information gained through direct observation and testing of the patient applying objective or standardized methods." We are instructed in Gibbs v. Premier Scale Corp., 50 S.W.3d 754 (Ky. 2001), that a claimant must demonstrate by way of objective medical findings the occurrence of a change in the human organism caused by a work injury. KRS 342.0011(1). However, subsequent opinions from our supreme court lend further guidance. While it is the burden of the claimant to prove by objective medical findings that the work-related incident produced a harmful change, it is unnecessary for the claimant to establish either causation or a permanent impairment rating by way of "objective medical findings." Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001); Ryan's Family Steak House v. Thomasso, 82 S.W.3d 889 (Ky. 2002).

Here, the ALJ was faced with three medical opinions. Both Dr. Gabriel and Dr. Harter were in agreement that sophisticated diagnostic testing, as well as their findings on physical examination, did not yield information necessary to render any diagnosis or assess an impairment rating. Dr. Harter went so far as to comment that Woosley's persistent pain symptoms could not be explained on the basis of any known anatomic pathology. On the other hand, Dr. Auerbach's physical examination did yield evidence of objective medical findings including loss of grip strength, signs of puffiness, and diminished sensation to pinprick. However, even those findings did not provide Dr. Auerbach a basis for a diagnosis any more specific than "left wrist injury and loss of grip strength." This is apparent in view of his comments: "I think there is something going on, I just do not know exactly what."

When the medical testimony is divergent, it is the responsible (sic) of the ALJ to weigh the probative value of the evidence and determine which is more credible. The ALJ was more persuaded by Dr. Harter and Dr. Gabriel. Those opinions established that no diagnosis could be made based on Woosley's complaints of persistent pain.

Since Gibbs, supra, it is the law that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. This is true even in instances that exclude what appears to be a worthy claim. Since the evidence lacked objective medical findings to support a diagnosis of a harmful change in the human organism, Woosley's complaints are rendered non-compensable, both as to income benefits and future medical benefits. This is especially true of Woosley's request for additional TTD and medical benefits.

Woosley, in his petition for reconsideration and his brief before this Board, has pointed to absolutely no evidence that would support an award of additional TTD benefits. The ALJ awarded TTD that was voluntarily paid by Kroger from the time Woosley took medical leave until a week after Dr. Harter's November 6, 2003 office note wherein he stated Woosley was at maximum medical improvement. Dr. Harter further noted he did not think there was anything he could do for Woosley medically. Dr. Gabriel, in his report, agreed with Dr. Harter's opinion. Woosley has failed to point to any evidence of record that would support, much less compel, a finding that he reached maximum medical improvement later than November 16, 2003. The same is true with respect to the issue of medical expenses. There is no indication from any of the physicians that Woosley needs additional medical treatment. In fact, Dr. Harter specifically opined that no more diagnostic testing or treatment was indicated.

On petition for review to this Court, Woosley makes the same arguments that he made before the Board. We have thoroughly reviewed the record and the medical records before the ALJ and believe Gibbs, supra, is controlling in this case. As noted in Gibbs, 50 S.W.2d at 761-62:

KRS 342.0011(33) limits "objective medical findings" to information gained by direct observation and testing applying objective or standardized methods. Thus, the plain language of KRS 342.0011(33) supports the view that a diagnosis is not an objective medical finding but rather that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. The fact that a particular diagnosis is made in the

standard manner will not render it an "objective medical finding." We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purposes of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33). Therefore, we must conclude that a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an "injury" for the purposes of Chapter 342.

In that the Board did not overlook or misconstrue controlling statutes or precedent, or commit an error in assessing the evidence as to cause gross injustice, we find no error. Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

For the foregoing reason, the opinion of the Board entered February 25, 2005, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings  
Louisville, KY

BRIEF FOR APPELLEE:

Brian Gannon  
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