

IN THE UTAH COURT OF APPEALS

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Susan D. Wilson,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	Case No. 20050570-CA
v.)	
)	
Labor Commission, EDG Fashion)	F I L E D
Floors, and Workers)	(October 27, 2005)
Compensation Fund,)	
)	2005 UT App 462
Respondents.)	

Original Proceeding in this Court

Attorneys: Virginus Dabney, St. George, for Petitioner

Before Judges Billings, Bench, and Greenwood.

PER CURIAM:

Susan D. Wilson petitions this court for review of the Labor Commission's (Commission) order denying her motion for review and affirming the denial of permanent total disability benefits. This is before the court on Wilson's motion for summary disposition based on manifest error. Neither the Commission nor other respondents filed a response to the motion.

Wilson asserts that the Commission erred in assigning the burden of proof regarding statutory elements under Utah Code section 34A-2-413(1)(c) to Wilson. See Utah Code Ann. § 43A-2-413(1)(c) (2001). We agree.

This court recently held that the employer bears the burden of proof regarding elements set forth in section 34A-2-413(1)(c). See Martinez v. Media-Paymaster Plus, 2005 UT App 308, 117 P.3d 1074, petition for cert. filed, Aug. 31, 2005. Distinguishing section 34A-2-413(1)(b), specifically assigning the burden of proof to the employee, from subsection (c), with no such assignment, we held that the elements listed in section 413(1)(c) are essentially affirmative defenses for which the employer bears the burden of proof. See id. at ¶¶8-9.

The employee retains the burden of proof to make the initial showings that the employee sustained an occupational injury, that

the employee is permanently totally disabled, and that the occupational injury is the cause of the total disability. See Utah Code Ann. § 34-2-413(1)(b) (2001). To find an employee permanently totally disabled, the Commission also must conclude that certain elements exist as set forth in section 34A-2-413(1)(c). See id. § 34-2-413(1)(c). Those particular elements, such as a determination that the employee cannot perform other work reasonably available, were at issue in Martinez. See 2005 UT App 308. "In effect, these factors are affirmative defenses limiting recovery." Id. at ¶9. If an employee has made a prima facie case, the employer may rebut the presumption of benefits by negating any one of the subsection (c) requirements. See id. Accordingly, assigning the burden of proof on subsection (c) elements to the employee is error. See id.

In its order denying Wilson's motion for review, the Commission stated: "In order to qualify for permanent total disability compensation, Ms. Wilson must satisfy each element of the test set out in § 413(1)(b) and (c) of the Act. Furthermore, § 413(b) [sic] specifically provides that the burden of proof is on Ms. Wilson." Additionally, in denying benefits, the Commission "conclude[d] that Ms. Wilson has failed to discharge her burden under § 413(1)(c)(iv) of establishing that she 'cannot perform other work reasonably available'" It is clear that the Commission assigned to Wilson the burden of proof regarding subsection (c) elements. As a result, the Commission committed manifest error warranting summary reversal.¹

We reverse the Commission's order denying Wilson's motion for review and remand to the Commission for further proceedings applying the appropriate burden of proof for the statutory elements set forth in Utah Code section 34A-2-413(1)(c).

Judith M. Billings,
Presiding Judge

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge

¹Because the issue of the burden of proof results in a remand to the Commission, we do not address other issues raised in Wilson's motion.