

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000720-WC

ROBERT M. SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-80391

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT;  
HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Robert Smith (Smith) appeals from an opinion and order of the Workers' Compensation Board (Board) denying him disability benefits based on a finding that he failed to substantiate a work-related injury. Smith contends that the Administrative Law Judge (ALJ) improperly ignored uncontroverted medical testimony linking his condition to a gantry lifting incident which occurred while he was working for Lexington Fayette Urban County Government (LFUCG). We agree with LFUCG's argument that medical testimony which relies solely on a

patient-provided history can be ignored if that history is sufficiently impeached. The Board's opinion denying benefits is affirmed.

Smith filed a Form 101 on January 22, 2004, alleging a work-related injury on January 29, 2003. The ALJ considered medical reports from Dr. Brian Brown, Dr. Clay Elswick, and Dr. John Vaughn, as well as testimony from Smith and several of his co-workers. The ALJ made a finding that the evidence was not persuasive that Smith sustained a work-related injury in January 2003 which caused him to have surgery for a herniated disk almost a year later. Smith appealed the ALJ's decision to the Board, arguing that the ALJ's reliance on the testimony of a chiropractor was improper and that Dr. Vaughan's opinion that the January 2003 incident caused Smith's disc to herniate was uncontradicted. The Board upheld the order denying benefits, and this appeal followed.

Smith contends that the ALJ improperly ignored Dr. Vaughn's medical opinion as to the cause of his injury. It is a well-settled proposition that claimants in an action to receive Workers' Compensation benefits bear the burden of persuasion. Snawder v. Stice, 576 S.W.2d 276 (Ky.App. 1979). The standard of review on appeal is whether the evidence was so overwhelming as to require a finding in Smith's favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). Smith claims that the

ALJ rejected all of the medical evidence as to causation and improperly substituted his own judgment. In order to assess this claim, we will review the pertinent facts from the evidence in this case.

At the time of his alleged injury, Smith was 48 years old, had a GED, and worked as an electrician at the Town Branch waste water facility. In January 2003, a crew of three maintenance workers was replacing a pump, and Smith went to check on their progress and make a list of materials he would need to connect the pump. The crew was using a gantry which tipped over, bending some controls on a non-potable water strainer and threatening to break the water lines. Smith jumped on top of the strainer and steadied the gantry, holding most of its weight by himself while waiting for help to arrive. The plant supervisor, Eric Garrity, was radioed and he came to assist the other four men in righting the gantry.

After the incident, Smith felt some soreness and tightness in his back and leg muscles. He called Mark Stager, the acting supervisor, and asked him to make a report of the incident. Smith stated that he did not believe he was injured and refused to see a doctor. For reasons unknown, no incident report was prepared at the time. Smith did not seek medical treatment or miss any work as a result of the gantry lifting incident.

In April 2003, Smith saw Dr. Brown for back pain. There was no radiation at that time. Smith did not mention the January incident or relate any traumatic occurrence which would account for his pain. He did say that it tended to be worse at the end of a long work day, but was relieved by moist heat. Dr. Brown diagnosed a sprain and spasm, administered a local injection, and advised Smith to remain off work for four days. Smith next sought medical treatment in September 2003 for back pain and muscle stiffness. He reported that he had been running a backhoe and had done some shoveling, but again denied any traumatic injury. There was no radiation, numbness, or tingling associated with the pain. Dr. Brown diagnosed a lumbar strain and prescribed medication, stretching exercises, and heat.

On October 21, 2003, Smith saw Dr. Brown with complaints of intermittent back pain over the past two weeks. He still had no radiating pain. Dr. Brown administered an injection which relieved the pain immediately. He advised Smith to take off work for three days and to undergo physical therapy. Smith stated that he had no time for physical therapy, but agreed to continue the stretching exercises. On October 23, 2003, Smith returned to the doctor stating that the injection had only relieved the pain for one day. In addition, he was experiencing a reduction in his range of motion. Dr. Brown referred him to a chiropractor.

Smith saw Dr. Elswick, the chiropractor, on October 28, 2003. He described his symptoms as pain in his lower back and leg. In giving his medical history, Smith stated that he had begun experiencing this pain only two to three weeks ago. The patient intake form asked him to circle "work, sports, auto, trauma, or chronic" as the cause of his pain. Smith did not select any of his options, instead stating that he had no idea what was causing his pain. In his interview with the doctor, he denied any serious accidents in the past and stated that he had experienced a gradual onset of pain several months ago which had returned two to three weeks ago after previously being relieved by treatment. He continued chiropractic treatment for several weeks seeing little improvement in his symptoms.

Meanwhile, Smith had returned to Dr. Brown on October 31, 2003, with low back pain radiating into his right leg. The medical history noted that radiating pain began after his last visit eight days previously. Dr. Brown ordered a CT scan which showed a herniated disc at L4-5. Based on the results of the scan, Dr. Brown referred Smith to a neurosurgeon.

The surgeon, Dr. Vaughn, evaluated Smith on November 3, 2003. For the first time, Smith identified the gantry accident as a possible cause of his back pain. Dr. Vaughn discussed both surgical and nonsurgical options for treating Smith's pain. On November 17<sup>th</sup>, his pain still unimproved, Smith

elected to schedule surgery. Dr. Vaughn performed an L4-5 discectomy on December 8, 2003. At his follow-up visit a month later Smith stated that his pain was 99% gone. He was released to return to work on January 19, 2004, with the suggestion that he limit lifting, bending, and twisting. Dr. Vaughn filed a Form 107 Medical Report on April 29, 2004, attributing Smith's back pain to the gantry lifting incident in January 2003. At that time, Dr. Vaughn was not aware of the actual date of Smith's alleged injury and he dated the symptoms to October 2003.

Smith testified before the ALJ and admitted that he did not think he was injured at the time of the gantry incident. He listed stock car racing among his hobbies and admitted that he had raced several times during 2003. Smith was able to perform the same job duties for LFUCG with the exception of a period of a few weeks occurring right before and after his surgery. In addition, he performed maintenance and electrical work outside of his employment. At the time of his action to recover benefits, Smith was working the same job he had held at the time of the accident, with no restrictions, and making more money than he had in January 2003.

Earnest Wilhoit, who was Smith's supervisor, testified that Smith worked, without incident, from the beginning of 2003 until October 21<sup>st</sup>, when he called in sick. When Smith informed

Wilhoit that he was scheduled for surgery, Wilhoit asked whether he had been injured at work, and Smith replied that his complaints were not work-related. In addition, when Smith applied for short-term disability, the form submitted by his employer did not indicate that he had been injured at work.

The medical evidence in this case consisted of records from Central Baptist Hospital and records and testimony from Doctors Brown, Elswick, and Vaughn. The hospital records indicated that Smith had first experienced back pain in October of 2000. When he was admitted for surgery, Smith dated the onset of his present condition to some six months prior and denied that it resulted from an accident. Dr. Brown did not assign Smith an impairment rating or express an opinion as to the cause of his back pain. Dr. Elswick opined that Smith's symptoms were not consistent with having suffered a herniated disc ten months prior to treatment. He did say that herniated discs could be asymptomatic and that he could not pinpoint the date when Smith was injured, but that his condition had an acute onset some three weeks prior to being seen in October 2003. Dr. Vaughn assigned a 12% permanent impairment rating and stated an opinion that Smith's disc herniated as a result of the gantry lifting incident.

The ALJ contrasted Dr. Vaughn's opinion as to causation with the evidence that Smith had worked uninterrupted

until late October, continued to race cars, and perform electrical and mechanical work outside of his employment. In addition, the ALJ cited Dr. Elswick's opinion that Smith's lifestyle during 2003 was not consistent with having suffered a herniation in January. The Kentucky Supreme Court when deciding whether an ALJ can disregard a medical opinion such as the one expressed by Dr. Vaughn reasoned as follows:

A physician's conclusions may be based upon firsthand knowledge, such as his own examination or tests of the patient, or upon secondhand knowledge, such as the patient's statements or reports performed by others . . . . When a medical opinion is based solely upon history, the trier of fact is not constricted to a myopic view focusing only on the physicians' testimony. Other testimony bearing on the accuracy of the history may be considered. After all, funneling a statement through a second party provides no additional credibility enhancement. The recitation of a history by a physician does not render it unassailable. If the history is sufficiently impeached, the trier of fact may disregard the opinions based on it. . . . After all, the opinion does not rest on the doctor's own knowledge, an essential predicate to make uncontradicted testimony conclusive.

Osborne v. Pepsi-Cola, 816 S.W.2d 646, 647, (Ky. 1991)

(citations omitted). Smith failed, multiple times, to mention his workplace accident when seeking treatment for his back pain. In addition, Dr. Vaughn was unaware of the date of the accident at the time he formed the opinion and that it was the cause of Smith's back pain. As late as April 2004, Dr. Smith had no idea



when the gantry lifting incident had occurred and the medical history he took from Smith dated the onset of his present pain to October 2003. The ALJ carefully considered the evidence in this case in reaching his conclusion that Smith failed to carry the burden of persuasion that his injury was work-related. Unfortunately for him, Smith is no more able on appeal to show that the evidence compelled a finding in his favor.

For the foregoing reasons, the judgment of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

L. Davis Bussey  
Lexington, Kentucky

BRIEF FOR APPELLEE, LEXINGTON  
FAYETTE URBAN COUNTY  
GOVERNMENT:

Sherri Porter Brown  
Lexington, Kentucky