

RENDERED: JANUARY 15, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001174-WC

UNITED PARCEL SERVICE, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-06-96074

VICKIE HURLEY;  
HON. EDWARD HAYS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KELLER AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: United Parcel Service (UPS) appeals from the opinion of the

Workers' Compensation Board (the Board) affirming the opinion and award of the

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Administrative Law Judge (the ALJ). On appeal, UPS argues that there was not sufficient evidence of substance to support the ALJ's finding that Vickie Hurley (Hurley) suffered a work-related cervical spine injury. Having reviewed the record and the arguments of the parties, we affirm.

## FACTS

Hurley is now forty-two years of age. She has a high school education with two years of college and training in cosmetology. In addition to working for UPS, Hurley has worked as a hair stylist, waitress, retail salesperson, and mental health technician.

On January 30, 2006, Hurley suffered an injury while lifting a box. In her claim form, she alleged only a thoracic spine injury; however, Hurley later amended her claim to include a cervical spine injury. Whether Hurley suffered a thoracic or cervical spine injury and the extent to which her physicians were informed of Hurley's complete medical history form the crux of the issue on appeal. Therefore, we will summarize the medical evidence and Hurley's testimony in some detail as they relate to that issue.

On January 28, 2006, Hurley visited Johnathan Oakley, D.C., complaining of upper back pain and headaches. Hurley stated that her upper back pain, which was nearly constant, began three months earlier, and she related it to holding her newborn. Dr. Oakley examined Hurley and found decreased thoracic spine range of motion, right sided tenderness, and "taut fibers" at T5-7, C1-2, and L4-5. Following his examination, Dr. Oakley made diagnoses of thoracic spine

pain, tension headaches, and thoracic sprain/strain with an onset date of October 10, 2005.<sup>2</sup>

During her deposition, Hurley denied having any upper back symptoms prior to January 30, 2006. Furthermore, Hurley did not disclose in her claim form or deposition that she had treated with Dr. Oakley. At the hearing, Hurley explained that she had forgotten about her one-time visit to Dr. Oakley. According to Hurley, Dr. Oakley had visited the UPS facility and handed out cards for a free evaluation/visit. Hurley stated that she went to Dr. Oakley primarily for evaluation of stress headaches related to a recent divorce and her father's illness. She admitted that she complained to Dr. Oakley of upper back pain but attributed it to just normal aches related to work. According to Hurley, the pain she experienced following the January 30, 2006, injury was significantly greater than what she experienced prior to that date.

In support of her claim, Hurley filed medical records/reports from Dr. Lester, Dr. Brooks, Dr. Templin, Drs. Stokes and Ulrich, Dr. El-Kalliny, and from her physical therapists. UPS filed the previously noted records from Dr. Oakley, a report from Dr. Templin, and the reports and depositions of Drs. Tutt and Corbett. We will review that evidence below.

Hurley first treated with Dr. Lester on January 30, 2006, for complaints of pain from her neck to her rib cage. Following his examination, Dr. Lester made diagnoses of cervical, thoracic, and left trapezius strains. He

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<sup>2</sup> Although it is not clear from the record, this date appears to coincide with the birth of Hurley's last child.

prescribed medication and physical therapy and placed Hurley on light duty.

When he last treated Hurley, on February 13, 2006, Dr. Lester noted her cervical spine pain had improved but that she continued to complain of pain between her shoulder blades and in her right trapezius.

Dr. Brooks' records reveal that Hurley first sought treatment on March 6, 2006, for complaints of dorsal pain radiating into the shoulders, which she related to the work injury. Dr. Brooks examined Hurley, reviewed her thoracic spine MRI, and made a diagnosis of non-surgical dorsal musculoligamentous strain. Dr. Brooks prescribed medication and physical therapy and took Hurley off work.

Hurley continued to treat with Dr. Brooks, who noted a significant improvement in her condition. On June 6, 2006, Dr. Brooks released Hurley to return to full-duty work. When she returned to Dr. Brooks on July 10, 2006, Hurley noted that her pain had increased, and Dr. Brooks recommended an updated thoracic MRI. It appears that Hurley did not undergo that testing.

Hurley filed records from PT Pros, which indicate that she underwent physical therapy from March through June 2006, for complaints of cervical and thoracic pain.

On May 7, 2007, Dr. Templin performed an independent medical evaluation at the request of Hurley's attorney. Hurley complained to Dr. Templin of chronic pain from the top of her bra strap to her shoulder level, which she related to the January 30, 2006, injury. As part of his evaluation, Dr. Templin

reviewed numerous medical records regarding Hurley's post-injury treatment; however, it appears that he did not review Dr. Oakley's records.

Dr. Templin's examination revealed full range of motion of the cervical and dorsal spine and shoulders; midline tenderness in the upper thoracic spine; decreased right hand strength; and normal lower extremity sensation and reflexes. Based on his examination and review of the medical records, Dr. Templin made diagnoses of degenerative thoracic disc disease and chronic thoracic musculoligamentous strain that he related to the work injury. Dr. Templin assigned Hurley a 5 percent impairment rating and stated that Hurley could return to her pre-injury activities "with pain."

Following his 2007 evaluation, Dr. Templin reviewed additional medical records. Based on his review of those records, Dr. Templin issued a revised report on January 17, 2008. In his 2008 report, Dr. Templin noted that, contrary to what Hurley had told him, the medical records revealed that she had received treatment for complaints of back and neck pain in 1999 and for complaints of upper back pain two days before the injury. Noting Hurley's complaints to Dr. Oakley, Dr. Templin stated that "at best" he could only state that the January 30, 2006, injury exacerbated a pre-existing musculoligamentous strain. Furthermore, in light of the new information, Dr. Templin stated that Hurley would have a 0 percent impairment rating.

The September 12, 2007, note from Drs. Stokes and Ulrich, Hurley's family physicians, indicates that Hurley had received treatment following her work

injury for strains of the musculature of the right posterior/lateral neck, upper trapezius, posterior shoulder, and upper thoracic spine.

The November 12, 2007, report from H. Tom Bowden, physical therapist, indicates that Hurley complained of mid thoracic pain and tenderness with muscle spasm and right scapula pain.

Dr. El-Kalliny began treating Hurley on December 19, 2007, for complaints of intra-scapular and right chest pain. Following his initial examination and review of Hurley's MRI, Dr. El-Kalliny stated that Hurley's symptoms did not match his findings. He indicated that he suspected Hurley's symptoms originated in her cervical spine; therefore, he recommended a cervical MRI. On January 8, 2006, Dr. El-Kalliny reviewed Hurley's cervical MRI and noted a "small piece of disc on the right at C5-6." Because the disc displacement was not large and it did not impinge on any nerves, Dr. El-Kalliny recommended against surgery.

Ultimately, Dr. El-Kalliny made a diagnosis of mechanical neck pain with referred pain into the inter-scapular area due to a C5-6 disc herniation with symptoms of right C6 radiculopathy. Dr. El-Kalliny related Hurley's condition to the work injury, assigned her an 8 percent impairment rating, and stated that she could not return to her pre-injury work.

Dr. Corbett performed an independent medical evaluation at the request of UPS on April 24, 2008. Hurley complained to Dr. Corbett of pain from her mid-back to her neck and, when questioned, denied any other "issues" or treatment related to her back.

Dr. Corbett's examination revealed complaints of pain to palpation in the T2-4 region, decreased but inconsistent range of motion of the cervical spine, no muscle spasm, normal reflexes, normal shoulder range of motion, and slight tenderness in the trapezius muscles bilaterally. Following his examination and review of Hurley's medical records, Dr. Corbett made diagnoses of resolved complaints of thoracic and cervical spine pain with no neurologic or orthopedic deformity and cervical and thoracic degenerative changes. Dr. Corbett stated that he found no evidence of trauma related to the January 30, 2006, injury and assigned Hurley a 0 percent impairment rating. Furthermore, Dr. Corbett noted that, based on Dr. Oakley's records, Hurley's complaints of thoracic pain preceded the work injury.

In his deposition, Dr. Corbett testified that Hurley's complaints were non-physiologic - meaning that he could not explain them based on the diagnostic test results. Furthermore, Dr. Corbett questioned Dr. El-Kalliny's diagnosis of a disc herniation, noting that the MRI showed only disc desiccation. Finally, Dr. Corbett testified that Dr. El-Kalliny's diagnosis of radiculopathy and assignment of an 8 percent impairment rating were not supported by any of the examination findings or diagnostic test results.

Dr. Tutt performed an independent medical evaluation on April 29, 2008. Hurley complained to Dr. Tutt of neck and inter-scapular pain with hand numbness, occasional "drawing" of the hands and radiation of pain into the right arm and hand. Hurley admitted to Dr. Tutt that she had some mild back pain

before the injury, but stated that the pain differed from and was mild in comparison to her post-injury pain.

Dr. Tutt's examination revealed full cervical spine range of motion, no muscle spasm, tenderness in the upper thoracic paraspinal muscles, normal reflexes, no loss of strength, no atrophy, and no loss of sensation. Following his examination and review of the medical records, Dr. Tutt made a diagnosis of upper thoracic strain but noted that Hurley had similar complaints immediately prior to the work injury. Based on his findings and review of the medical records, Dr. Tutt stated that Hurley's injury was "transient," that she should have reached maximum medical improvement "within a few weeks to a couple [of] months" of the injury, and that she had no permanent impairment or restrictions.

In a follow-up report dated May 29, 2008, Dr. Tutt stated that he had reviewed Hurley's cervical MRI, EMG, and nerve conduction testing and the results of those tests did not change his opinion. In his deposition, Dr. Tutt stated that Hurley's diagnostic test results were "commensurate with the natural process of aging and living." Furthermore, Dr. Tutt stated that Hurley's complaints of arm pain and finger contraction were not consistent with radiculopathy or Hurley's diagnostic test results. Finally, Dr. Tutt stated that Dr. El-Kalliny's impairment rating was not appropriate because Hurley had not sustained an injury to her cervical spine.

Faced with this evidence, the ALJ found that Hurley suffered a work-related cervical spine injury and an aggravation of a pre-existing active thoracic



spine condition on January 30, 2006. In doing so, the ALJ noted that he found Hurley to be credible; that he believed Dr. El-Kalliny's diagnosis of a work-related cervical spine injury; and that he believed the opinions of Drs. Lester, Brooks, Tutt, Corbett, and Templin that Hurley's thoracic spine condition had been temporarily aggravated by the work injury. Based on these findings, the ALJ awarded Hurley a permanent partial disability based on Dr. El-Kalliny's 8 percent impairment rating, medical expense benefits related to her cervical spine injury, and medical expense benefits related to the temporary aggravation of her thoracic spine condition.

UPS filed a petition for reconsideration arguing, as it does here, that Dr. El-Kalliny's opinion was not evidence of substance because Dr. El-Kalliny did not have a history of Hurley's pre-injury complaints to, and treatment with, Dr. Oakley. The ALJ denied UPS's petition finding that Hurley's claim involved two different body parts, the thoracic spine and the cervical spine. The ALJ noted that, although Dr. El-Kalliny did not specifically refer to Hurley's pre-injury symptoms and treatment, he was aware that Hurley had complained of symptoms related to her thoracic spine. Furthermore, the ALJ noted that Dr. El-Kalliny differentiated between Hurley's thoracic and cervical symptoms, finding that Hurley's symptoms and related impairment rating were the result of a cervical not a thoracic condition.

UPS appealed the ALJ's opinion and his order denying its petition for reconsideration to the Board. The Board, in a well-reasoned opinion, affirmed the ALJ. In doing so, the Board recited the medical evidence at length and noted that

the evidence supported the ALJ's conclusion "that Hurley's cervical condition represented a new and distinct harmful change that was solely the product of the January 30, 2006, traumatic event and otherwise did not exist prior to that time."

#### STANDARD OF REVIEW

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *Caudill v. Maloney's Disc. Stores*, 560 S.W.2d 15, 16 (Ky. 1977). If the party with the burden of proof is successful before the ALJ, the question on appeal is whether the ALJ's opinion was supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). The determinative question to be answered is whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." KRS 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). When reviewing one of the Board's decisions, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

#### ANALYSIS

As it did below, UPS relies on *Cepero v. Fabricated Metal Corp.*, 132 S.W.3d 839 (Ky. 2004), to support its argument that Dr. El-Kalliny's opinion was not substantial evidence. As did the Board, we hold that UPS's reliance on *Cepero* is misplaced.

Cepero alleged that he suffered a work-related knee injury. The ALJ awarded Cepero benefits based on evidence from two physicians that Cepero's knee condition was related to the work injury. However, neither physician was aware that Cepero had suffered a severe injury to his knee several years earlier. The Board reversed the ALJ finding that the physicians' opinions relied on by the ALJ were not evidence of substance. The Supreme Court of Kentucky affirmed and quoted the Board's holding that:

[I]n cases such as this, where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence. Medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probative.

*Cepero*, 132 S.W.3d at 842.

As noted by the ALJ on reconsideration and the Board, this case differs from *Cepero* because Cepero's alleged work and non-work related injuries were to the same body part, his knee. Herein, it is undisputed that Hurley had thoracic spine complaints that preceded her work injury. In fact, the ALJ found that to be the case. Furthermore, it does not appear from the record that Dr. El-

Kalliny had any knowledge of Hurley's pre-injury thoracic spine complaints. However, Dr. El-Kalliny stated that Hurley suffered a cervical spine injury, not a thoracic spine injury, and he based his impairment rating on that cervical spine injury. We agree with the Board that the thoracic spine and cervical spine are different body parts. We also agree with the Board that an inaccurate history regarding Hurley's pre-existing thoracic spine complaints is not sufficient to nullify the substance of Dr. El-Kalliny's opinion regarding causation of Hurley's cervical spine condition.

Furthermore, we note that Dr. El-Kalliny's opinion is supported by other evidence of record. UPS's statements to the contrary notwithstanding, when Hurley saw Dr. Oakley prior to the injury, she complained of headaches and upper back pain, not cervical pain. Although Dr. Oakley found some evidence of cervical spine tenderness on examination, he did not list cervical spine symptoms in his history and made diagnoses and treatment recommendations focused on Hurley's headaches and thoracic spine. The first contemporary documented complaint of cervical spine pain<sup>3</sup> is in Dr. Lester's office note, made the day of the injury. This notation supports Dr. El-Kalliny's diagnosis and Hurley's testimony, which the ALJ found to be credible, that her pain changed after the injury. Dr. El-Kalliny's finding that Hurley had a herniated cervical disc, with no evidence of a pre-injury herniation, also supports his opinion. Therefore, Dr. El-Kalliny's

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<sup>3</sup> We note there is some evidence that Hurley had some cervical spine symptoms in the late 1990's following a motor vehicle accident. However, there is no indication in the record that Hurley received any ongoing treatment related to those complaints.

opinion is not “completely unsupported” or without substance, and the ALJ’s reliance thereon is not reversible error.

### CONCLUSION

Because Dr. El-Kalliny’s opinion that Hurley suffered a cervical spine injury was not dependent on an accurate history of pre-injury thoracic spine complaints and his opinion is supported by other credible evidence, we affirm.

LAMBERT, SENIOR JUDGE, CONCURS.

WINE, JUDGE, CONCURS IN RESULT ONLY.

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