

96-CA-0467-WC

CHERILYNN CORNELL, Widow and
Next of Kin of Gary Cornell

APPELLANT

v. PETITION FOR REVIEW UNDER CR 76.25
OF THE WORKERS' COMPENSATION BOARD
WC-94-41351

AMERICAN STANDARD; SPECIAL FUND;
THOMAS A. NANNEY,
Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, HOWERTON, and SCHRODER, Judges.

HOWERTON, JUDGE. Cherilynn Cornell (Cherilynn), widow and next of kin of Gary Cornell (Cornell), petitions for review of an opinion of the Workers' Compensation Board (Board) rendered January 19, 1996. The Board affirmed the decision of the Administrative Law Judge (ALJ), which dismissed Cornell's claim for benefits upon a finding that there was no causal relationship between Cornell's exposure to asbestos while employed at American Standard and his development of lung cancer. After reviewing the record, we must affirm.

Gary Cornell was employed by American Standard from September 1, 1971, until the plant closed November 13, 1992. Cornell worked as a helper preparing sinks and tubs for the enamelling process, and later as a heater where he was required to load and unload pieces from a furnace. Following his employment with American Standard, Cornell developed lung cancer which was diagnosed on October 29, 1993. In a letter to Cornell in May of 1994, a Dr. Baeker opined that the lung cancer was causally related to cigarette smoking and asbestos exposure. Cornell filed his claim for benefits on October 6, 1994; however, he died on November 20, 1994, and Cherilynn was substituted as the claimant.

The evidence presented to the ALJ included the video testimony of Cornell and the testimony of Jerry Bartlett, a coworker of Cornell's. Both testified that the firebrick lining the sides of the furnace and the lining on the furnace doors contained asbestos. In addition, they each stated that the aprons and gloves Cornell wore were made from asbestos. However, both admitted that they learned of the asbestos from third parties, neither having personal knowledge of the location and levels of asbestos present in the plant. Additionally, Bartlett testified that he was part of a study that the union performed around 1984 regarding the presence of asbestos which revealed asbestos was present in various areas where Cornell would have been exposed. However, the report was evidently never produced, as there is no evidence of such in the record.

Medical testimony was also presented from Dr. Thomas Baeker, Cornell's treating physician, and Dr. Judah Skolnick. Baeker stated that both Cornell's cigarette smoking and exposure to asbestos were contributing factors to his lung cancer. Skolnick also stated that asbestos exposure would have been a substantial factor in causing the cancer. Both doctors admitted, however, that Cornell had provided the only information they had regarding his exposure. Furthermore, both conceded that it is not medically possible to distinguish between the causes of lung cancer when more than one contributing factor may exist.

American Standard presented testimony from Janice McMonigal, who worked as an environmental safety coordinator and participated in an asbestos abatement program at the American Standard plant in 1985, as well as Neil Stamp, vice-president of National Environmental Contracting, an environmental remediation firm specializing in asbestos removal. Both testified as to the presence of asbestos in the plant and the removal actions that were undertaken. Stamp provided extensive information as to the forms of asbestos and the dangers associated with exposure. He opined that the type of asbestos, if any, that Cornell was exposed to did not likely create a risk of injury because it was not friable, or in such a form as to be inhaled into the respiratory system.

In the ALJ's opinion and order, he notes that both doctors attributed asbestos exposure to Cornell's lung cancer. However, he noted that those opinions were based upon the history

given by Cornell, who admitted to having no personal knowledge as to whether he was in fact exposed to asbestos. The ALJ placed great weight upon the testimony of McMonigal and Stamp in concluding that at best there was only a possibility that asbestos was a contributing factor, and since Cherilynn had not satisfied the burden of proof, the ALJ dismissed the claim. The Board affirmed.

Cherilynn presented to the Board the same arguments she now presents to this Court. She contends that the ALJ and the Board ignored compelling medical evidence indicating that Cornell's lung cancer was work related and compensable. We disagree. We agree that the general rule is that uncontradicted medical testimony will be regarded as conclusive when the issue is one that falls solely within the realm of medical expertise. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981); Bullock v. Gray, Ky. App., 296 Ky. 489, 177 S.W.2d 883 (1944). However, as stated by the Board, when a physician bases his opinion solely upon the patient's self-reported history, the ALJ may disregard that opinion when the underlying history is sufficiently impeached. Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991).

Here, both doctors admitted that they had no independent knowledge of any exposure Cornell may have had aside from the history he provided. The ALJ concluded that the testimony of Stamp and McMonigal sufficiently impeached Cornell's

reported history of exposure. Thus, it was within the ALJ's discretion to disregard the medical testimony. Osborne, supra.

Cherilynn also argues that the ALJ and Board erred in excluding statements made by Cornell to Doctors Baeker and Skolnick regarding his asbestos exposure. Cherilynn maintains that the ALJ excluded the statements as hearsay in contravention of KRE 803(4), regarding statements made for the purposes of medical treatment or diagnosis. We do not find this to be what occurred.

The Board determined that the ALJ did not refuse to admit the statements by Cornell contained in the doctors' testimony because they were hearsay, but rather because the statements themselves were incompetent evidence. Cornell testified that he had no personal knowledge of whether the equipment he had contact with contained asbestos, but only the information he had been told by coworkers. Therefore, although the statements made to the doctors were admissible under KRE 803(4), the statements themselves were incompetent because they concerned matters that were not within the personal knowledge of the declarant. KRE 602.

As fact finder, the ALJ has the sole authority to judge the weight, credibility, substance and inference to be drawn from the evidence. Where the evidence is conflicting, the ALJ has the sole authority to determine whom and what to believe. See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Further, the claimant in a workers' compensation case has the

burden of proof and risk of persuasion, and if unsuccessful, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in the claimant's favor. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). The ALJ determined that Cherilynn had not, in fact, satisfied her burden of proof and we cannot conclude that there exists compelling evidence to warrant a decision otherwise. As the ALJ's decision was supported by substantial evidence in the record, it must be upheld. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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