

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2006-CA-000181-WC

AUDREY M. AUSTIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-85270

WEYERHAEUSER COMPANY;  
HON. ANDREW F. MANNO,  
ADMINISTRATIVE LAW JUDGE;  
AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TAYLOR AND WINE, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Audrey M. Austin petitions for our review of an opinion of the Workers' Compensation Board (Board) affirming an opinion and order of an administrative law judge (ALJ) dismissing her claim for benefits for a back injury she

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

claims to have suffered while employed by Weyerhaeuser. We affirm.

Austin began working for Weyerhaeuser, a manufacturer of corrugated boxes, in July 1998. She testified that she was a machine operator and that her work was repetitive and very physical.

Austin was involved in a motor vehicle accident in early 2000. She was transported by ambulance to a hospital and was off work for two days. She testified that she experienced muscle pain in her low, mid, and upper back, and subsequently went to physical therapy for her back and neck.

Austin claims a repetitive trauma-type work injury to her back and left leg. She testified that on January 13, 2003, she began having pain in her left leg and low back while at work. She further testified that the pain progressed to the point that she told her supervisors of her condition on January 15 and went to see her family physician, Dr. Patterson, on January 16.

Dr. Patterson referred Austin to Dr. William Schwank, a neurosurgeon. Dr. Schwank performed surgery, consisting of a laminectomy and discectomy, on March 5, 2003. Thereafter, Austin underwent physical therapy and epidural blocks. She testified that she is not currently working and that she last worked on February 11, 2003.

An ALJ heard Austin's claim for benefits. In addition to receiving medical evidence, the ALJ also received evidence from lay witnesses. One of the lay witnesses was Dick Ealing, production manager at Weyerhaeuser. His deposition was taken after the final hearing by the agreement of the parties.<sup>2</sup> During Ealing's deposition, he introduced short-term disability paperwork from Austin's employee file.<sup>3</sup> The records included a Physician Statement from Dr. Schwank indicating that Austin's back problems were not work-related. The evidence was considered by the ALJ without objection by Austin.

The ALJ found that Austin did not suffer a work-related injury and dismissed her claim. In doing so, the ALJ stated as follows:

This ALJ finds that Ms. Austin has not met her burden of showing she sustained a work related injury on or about January 15, 2003. There is little doubt that Ms. Austin had back pain and her condition ultimately led to surgery and other treatments. However, there is no evidence that Ms. Austin or any medical expert felt her injury was related to her work during January and February 2003. In fact, her supervisors testified Ms. Austin told them her condition was not related to work. Dr. Schwank indicated on February 28, 2003 in Ms. Austin's application for short-term disability, that her condition required

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<sup>2</sup> At the final hearing, the parties agreed that the deposition of certain lay witnesses, including Ealing, could be taken after the hearing.

<sup>3</sup> A short-term disability benefits application is apparently for the employer to determine whether an employee qualifies for short-term disability benefits while he or she is off work due to a condition that is not work-related.

surgery but noted Ms. Austin's condition was not work related. It was not until more than two months after her alleged injury, and after her surgery, that a First Report of Injury was completed. There is no medical evidence indicating the condition was work related in 2003. The first medical opinion of causation in the record was given by Dr. Huffnagle on August 12, 2004, over a year and a half from the alleged injury. Therefore, this ALJ finds that Ms. Austin did not sustain a work-related injury on or about January 15, 2003.

On appeal to the Board, Austin argued that the ALJ erred in relying on Dr. Schwank's report that was produced in Ealing's deposition. She asserted that because the deposition was taken after the final hearing, she did not have the opportunity to cross-examine Dr. Schwank and that the evidence constituted surprise.

The Board affirmed the ALJ's opinion and order dismissing Austin's claim. Citing *Copar, Inc. v. Rogers*, 127 S.W.3d 554 (Ky. 2003), the Board held that Austin's claim of error was not preserved for review due to her failure to object to the admissibility of the evidence.<sup>4</sup> We agree with the Board's reliance on the *Copar* case, and we adopt the following portion of the Board's opinion as our own:

Here, as in *Copar, supra*, the introduction of the report did not violate the two physician rule of KRS 342.033, and

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<sup>4</sup> In *Copar*, the Kentucky Supreme Court upheld the ALJ's reliance on medical opinions contained in hospital records on the ground that the party seeking to prevent the use of such opinions had failed to raise a timely objection as required by the Kentucky Rules of Evidence (KRE) 103. *Id.* at 561.

at no time did Austin object to the filing. We are satisfied the ALJ did not abuse his discretion in his reliance on Dr. Schwank's report. Furthermore, the ALJ was also persuaded by evidence that indicated Austin herself did not initially treat her back condition as work-related. The ALJ found significant Dr. McCord's statement that Austin's more impressive changes of the lumbar spine were not work-related. Since the decision of the ALJ is supported by substantial evidence, we must affirm. KRS 342.285; *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Counsel for Austin attended Ealing's deposition. No objection to the introduction of Dr. Schwank's report was registered at the time of the deposition, nor was any attempt made to either exclude the report or seek an extension of time for rebuttal. In the absence of a contemporaneous objection challenging the admissibility of the report or request for leave to cross-examine Dr. Schwank on the issue of work-relatedness, Austin's claim of error is not preserved for appellate review. *Copar v. Rogers, supra*.

The Board's opinion affirming the ALJ's opinion and order dismissing Austin's claim is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael D. Lindsey  
Bowling Green, Kentucky

BRIEF FOR APPELLEE,  
WEYERHAEUSER COMPANY:

Laurie Goetz Kemp  
Louisville, Kentucky