RENDERED: JULY 25, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-001938-WC

HETEM PRUSHI — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-06-01119

HYATT CORPORATION; HON. ANDREW F. MANNO, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.
ACREE, JUDGE: Hetem Prushi appeals from an order of the Workers'

Compensation Board affirming the Administrative Law Judge's dismissal of his

[1] 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 Kentucky Revised Statutes (KRS) 21.580.

claim. The ALJ noted that he did not find Prushi's testimony regarding the existence of a work-related injury to be credible. Prushi argued before the Board that the ALJ disregarded uncontroverted medical testimony that he suffered a work-related injury. The law, however, is clear that the trier of fact is not bound by a medical opinion on causation based solely on the history provided by the patient. *Osborne v. Pepsi-Cola,* 816 S.W.2d 643, 647 (Ky. 1991)(superseded by statute on other grounds). Consequently, the decision of the Board is affirmed.

At the time of his alleged injury, Prushi had been employed as a cook at the Hyatt Regency Hotel in Louisville for over six years. He has a twelfth-grade education, as well as having completed a three-year culinary program in his native Kosovo. Prushi entered the United States as a refugee in 1999 and has been employed at the Hyatt since August of that year. He also worked part time at an Arby's restaurant. On November 26, 2005, Prushi arrived at work at 5:15 a.m. He later claimed that, while lifting a heavy pan of cooking oil into the deep fryer, he felt a sharp pain in his lower back. After several minutes, the pain subsided and he resumed his work until his wife contacted him to advise him that his father had died in Kosovo.

Prushi at first sought to return to Kosovo for his father's funeral. When he was unable to obtain airline tickets, his employer allowed him to take the traditional three-day mourning period off of work. Prushi did not tell anyone at work about his alleged work injury until after he returned to work. He then told his supervisor, Jeremy. However, no accident report was filled out at that time

because Jeremy did not believe the alleged injury was serious enough to merit a report. Prushi did not seek medical treatment until January 2006, and he told neither the first nor second doctor he saw about any alleged work injury. It was not until March 13, 2006, that Prushi told the third doctor who treated him that he first injured his back while lifting a grease pan at work.

Hyatt received the first written notification that Prushi was alleging a work-related injury on August 28, 2006. Prushi testified by deposition and at a hearing before the ALJ. He described trying to lift a sixty to seventy pound grease pan to put into the deep fryer for reheating sausages made the previous day. According to Prushi, reheating the sausages in the deep fryer kept their casings softer and gave them a fresher appearance than reheating them on the grill. As he lifted the pan, Prushi felt a sharp pain in his lower back and was forced to rest for a few minutes before returning to work. He admitted that he did not report his accident for three of four days after returning to work because he did not think it was serious. According to Prushi, when he told his supervisor about the incident, no report was filed because his account was not taken seriously.

When Prushi first sought medical treatment for leg and ankle pain from Dr. Torlak, his family doctor, he did not inform her of any accident or injury. After he failed to obtain relief from prescribed medication, Dr. Torlak referred him to Dr. Catalano. Prushi gave differing accounts of his failure to mention the alleged work-related accident to Dr. Catalano. He claimed at one point that the doctor misunderstood him when he explained how he had hurt his back. However,

he also stated that he was afraid to report a work-related injury for fear of losing his job and his insurance because there was no initial report made when the injury occurred. Nevertheless, Prushi told Dr. Catalano that he was at work, bending down to pick something up when he felt pain in his back and leg. Finally, Prushi testified that Dr. Catalano never asked him whether he had been injured.

After Dr. Catalano diagnosed a pinched nerve, he offered Prushi a choice between surgery or epidural shots. Prushi chose the injections and was referred to Dr. Nelson. This third physician to treat him was the first one to be told about any alleged work injury from lifting a grease pan. Prushi told the ALJ that Dr. Nelson was the only doctor who was interested in finding out the cause of his back problems. He also stated that, although he continued to fear for his job, Prushi felt that he had no choice other than to tell Dr. Nelson the truth about his back injury. According to Prushi, he has been able to continue with his regular job duties and his pain is sufficiently managed by taking Darvocet and Advil. His medical bills have all been paid, subject to terms of the insurance policy obtained through his employment at Hyatt.

The ALJ also heard testimony from Tom Kasperski, the head of Hyatt's human resources department. He testified that the employee handbook contains a provision requiring reporting of any work-related injuries within twenty-four hours. The handbook advises employees that they can report accidents to the security department and the guard will fill out a report. All employees are required to sign the handbook, acknowledging their familiarity with its terms. According to

Kasperski, no employee had ever been disciplined for reporting a work-related accident. He also testified that Prushi had received an annual review and a raise since reporting his alleged accident on August 28, 2006, and that his employment continues without any problems. Finally, Kasperski told the ALJ that the deep fryer would not be filled with grease until 10:30 a.m. because otherwise the grease would become rancid before lunch time. The procedure for reheating sausages was to use the grill and not the deep fryer.

Prushi also introduced medical evidence from two doctors who performed an independent medical review of his condition. Dr. Lach's report, filed October 5, 2006, assessed Prushi with a ten percent whole body impairment for herniated nucleus puplosis at the L5-S1 level. He recommended a ten-pound lifting restriction. Dr. Ballard's report, filed November 29, 2006, assessed the same impairment rating, but set the lifting restriction at fifty pounds, with no repetitive bending. Both doctors opined that Prushi was capable of working at his current job subject to their respective restrictions. Each doctor noted a history taken from the patient of an injury suffered while lifting a heavy pan of grease at work. Dr. Ballard's report stated that, if the reported incident did occur, it had caused a harmful change in the human organism, which fits the statutory description of an "injury" contained in the Worker's Compensation Act. KRS 342.0011(1).

The ALJ dismissed Prushi's claim based on a finding that he failed to prove the existence of a work-related injury. The finding stated in relevant part as follows:

> After careful consideration of all the evidence offered in this claim, the ALJ is unable to find that it is more likely or not that Mr. Prushi sustained a back injury on November 26, 2005 while at work for the Defendant. This ALJ notes that Mr. Prushi failed to tell his first two medical providers about the lifting incident at work. The Defendant had no record of an injury being reported prior to the filing of the Form 101. Mr. Prushi provided inconsistent testimony concerning notification of the injury provided to the Defendant and information provided to medical providers. This ALJ did not find the testimony of Mr. Prushi to be credible.

Because Prushi failed to prove that he suffered a work-related injury, the ALJ found that he was not entitled to medical benefits or income benefits under KRS Chapter 342.

Prushi appealed to the Board arguing that he gave timely notice of his injury and that the medical proof that his condition was caused by a work-related injury was unrefuted. Thus, he argued the ALJ's factual findings were an abuse of discretion. In its decision affirming the ALJ, the Board noted that KRS 342.285 determined that the ALJ would be the fact finder. "For that reason, the facts as found and any reasonable inferences that can be drawn from those facts are conclusive if supported by substantial evidence." (Board's opinion, page 7). The Board found that Prushi's delay in seeking medical attention, as well as his failure

to inform the first two treating physicians that he had been injured at work supported the ALJ's decision. This appeal followed.

On appeal, Prushi essentially presents the same issues regarding the timeliness of his notification to his employer and the unrebutted medical evidence of a work-related injury. He argues that the ALJ's finding that he failed to prove a work-related injury is clearly erroneous and that the ALJ abused his discretion in dismissing the claim. "The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor." *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky.App. 1979) (Citations omitted). "[I]f the claimant is unsuccessful before the board . . . the question before the [appellate] court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). "Compelling evidence is evidence 'so overwhelming that no reasonable person could reach the conclusion' of the ALJ." *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky.App. 1999) (Citation omitted). Where the evidence conflicts, "the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented. . . ." *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). "The fact-finder 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 adversary party's total proof." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) (Citation omitted).

The threshold issue in this case is whether Prushi has met his burden of proving that he sustained a work-related injury. If he fails to meet this burden, then other considerations--such as timely notification to his employer--become moot. Prushi essentially argues that the ALJ improperly ignored uncontroverted medical evidence that he suffered a work-related injury. While it is true that the medical reports of both Dr. Lach and Dr. Ballard make reference to the onset of back pain following an incident at work, it is equally clear that the sole source of this information is the patient history given by Prushi himself. In fact, Dr. Ballard's report specifically contains language limiting her finding of causation, "assuming that the 11/26/05 event did occur, this has resulted in a harmful change to the human organism[.]"

> 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. *See,* Michael M. Martin, *Basic Problems of Evidence,* Vol. 2, at 361 (6th ed. 1988). After all, the opinion does not rest on the doctor's own knowledge, an essential predicate to make uncontradicted testimony conclusive.

*Osbourne*, 816 S.W.2d at 646-7 (citation omitted). Consequently, the ALJ was not bound by the fact that these two physicians linked Prushi's objective medical

symptoms to his subjective account of a work-related incident that, by his own admission, he failed to describe until he was seen by his third treating physician.

As the Board's opinion pointed out, Prushi's claim rested largely on his credibility in establishing that he actually suffered the injury which he described as occurring on November 26, 2005. The ALJ clearly found that Prushi's testimony was not credible based on his own contradictions, as well as the discrepancies between his account of the morning routine in the kitchen and the account provided by Kasperski. As recognized by the Kentucky Supreme Court, the function of the Workers' Compensation Board is

> to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result. These are judgment calls. No purpose is served by second-guessing such judgment calls[.] Our Court must provide appeals where the Constitution so mandates, but in so doing we . . . should [not] encourage multiple appeals of the same issue.
>
> . . .
>
> The present appeal fails to reach beyond the threshold for routine affirmance. The view taken by the [Board]. . . may not be the only one possible, but it is not improbable.

*Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). The Board correctly determined that the ALJ's finding that Prushi failed to meet his burden of proving a work-related injury was supported by the evidence. Consequently, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John M. Longmeyer
Louisville, Kentucky

BRIEF FOR APPELLEE:

Ronald J. Pohl
Ronald E. Thornsberry
Lexington, Kentucky