IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-16-04 Ella Growitt, D.C.

2003-SC-0659-WC

KARA ROBERSON APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-2339-WC
WORKERS' COMPENSATION BOARD NO. 01-WC-75231

NORTON HOSPITAL; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a decision of the Court of Appeals which upheld the Workers' Compensation Board in affirming the decision of the Administrative Law Judge to dismiss the claim as filed.

The questions presented are whether the Court of Appeals erred in determining that the medical testimony was conflicting and whether the ALJ committed error in choosing the evidence he deemed most reliable.

Roberson, age 36 years, was employed by Norton's Kosair Children's Hospital as a registered nurse in the neonatal intensive care unit. She testified that she became symptomatic with pneumonia on March 12, 1998. The following day she went to the immediate care center, had a chest x-ray and was taken off work for three days with a diagnosis of pneumonia. She was placed on antibiotics and attempted to return to work

three days later, but when she arrived at the hospital, she was very sick and was immediately sent to the emergency room and thereafter admitted to the hospital. During her admission, she was under the treatment of Dr. Anna Huang, an infectious disease specialist from the University of Louisville. She remained in the hospital for several days and was advised by Dr. Huang that she had respiratory chlamydia pneumonia. She was treated at home with oxygen, home health care and I.V. antibiotics. In May 1998, Roberson returned to work on a part-time basis. About two weeks after her return, she was given her annual tuberculosis test which was found to be positive. She was then taken off work and paid temporary total disability benefits until it was determined that she did not have tuberculosis but had only been exposed to the disease. She was advised that her respiratory chlamydia pneumonia had returned. Both Roberson and her employer attempted to obtain workers' compensation benefits, but the claims were denied by the insurance carrier.

Roberson's physical condition deteriorated thereafter and by December 1998, she was being treated with multiple antibiotics. The medication was not successful and she underwent three surgical procedures in an attempt to repair her eroded esophagus. All of the procedures were unsuccessful. By February 2001, she had lost 28 pounds, was put on a feeding tube and could receive only clear liquid orally. By March 2002, her weight had dropped from 208 to 87 pounds. She has been unable to work since May 1998.

Roberson argues that she contracted the pneumonia while at work in the hospital complex and accordingly is eligible for workers' compensation benefits. The hospital responds that the evidence in the record regarding the question of whether Roberson's condition is work-related is conflicting, and the ALJ was correct in choosing the

evidence he deemed most reliable and thus dismissing the claim. The Workers' Compensation Board agreed as did the Court of Appeals in a unanimous opinion. This appeal followed.

Roberson presented Dr. O.M. Patrick, a general surgeon, who rendered an opinion that within reasonable medical probability, her condition was due to her employment. He assessed a 75 percent permanent functional impairment. Dr. Patrick was deposed twice. During the second deposition, Dr. Patrick admitted that he was not an expert on pneumonia but, following the first deposition had done some reading on it. His testimony amounted to a belief that the claimant contracted the pneumonia at the hospital because that's where the germs were. He acknowledged that the condition was more common in children between the ages of 2 to 6, as well as in young adults, but not in infants. He also testified that he did not know with specificity where Roberson contracted the disease.

The hospital presented evidence from Beth Hewitt Stover, who has been employed as its infectious control nurse since January 1975. She differentiated the chlamydia pneumonia from the type of pneumonia found in neonatal care units. She testified that respiratory chlamydia pneumonia is a disease of the general public. She indicated that there was no incidence of an infant having contracted this kind of pneumonia during her years at the hospital and that it was not present in the intensive care nursery at the time Roberson worked there to the best of her knowledge.

The hospital also filed a report from Dr. Kristina Bryant in the Division of Infectious Diseases with the Department of Pediatrics at the University of Louisville School of Medicine. Dr. Bryant reported that the chlamydia pneumonia is a common cause of pneumonia, bronchitis and sinusitis with the peak age of infection from 5 to 15

years, but it is uncommon in preschool children. She reported that she could find no published case describing this kind of infection in neonatal intensive care unit patients. Her testimony was that it was highly improbable if not impossible that Roberson contracted the disease while working in the neonatal intensive care unit. Accordingly, she believed that Roberson acquired it in the general community.

The hospital also presented a medical report from Dr. Anna K. Huang, the treating physician, who concluded that after reviewing all the records and in her best professional judgment, she could not state with any reasonable medical probability that Roberson contracted the pneumonia while working in Kosair Children's Hospital in ICU between January and March 1998. She stated that she believed the patient acquired the infection out in the community. Dr. Huang stated that she had undertaken to determine if there were any cases of the disease at the hospital, not just in the neonatal unit at the time Roberson contracted the illness. She found none. Dr. Huang is an infectious disease specialist who is on the faculty of the University of Louisville School of Medicine.

A careful review of the record indicates that the ALJ considered all of the lay and medical testimony in the record in great detail. He rendered a comprehensive 17-page opinion and order dismissing the claim because Roberson had failed to prove the existence of a work-related occupational disease. It can hardly be said that the ALJ ignored uncontradicted medical evidence. There was nothing incredible about the testimony of Drs. Huang and Bryant. Their testimony constituted substantial evidence upon which the ALJ could rely. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The Board, in its unanimous opinion, determined that it was within the province of the ALJ to rely on the medical witnesses of the hospital who were experts in the field

of infectious disease. The testimony of Dr. Huang was to the effect that the claimant was more likely to have contracted the disease in the community at large which was substantial evidence upon which the ALJ could rely. The Board further concluded that it was without authority to overrule the ALJ and the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2).

The Court of Appeals stated that the evidence in this case was not so overwhelming as to require the panel to supersede the findings of fact of the ALJ. The medical testimony of Drs. Patrick and Huang was conflicting and accordingly, it was within the province of the ALJ to decide which evidence was more reliable.

It is well settled that the ALJ, as the finder of fact, has the sole authority to determine the weight, credibility, substance and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977).

There was substantial evidence upon which the ALJ could rely, and therefore, the Board and the Court of Appeals were correct in that they were without authority to hold otherwise. The issue on appeal is whether the evidence compels a different result. Compelling evidence is generally defined as that which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. As long as any evidence of substance supports the opinion of the ALJ, it cannot be said that the evidence compels a different result. Francis, supra.

The decision of the Court of Appeals is affirmed.

All concur except Graves, J., who dissents without opinion.

COUNSEL FOR APPELLANT:

James D. Howes
HOWES & PAIGE, PLLC
Watterson City West, Suite 1020
1941 Bishop Lane
Louisville, KY 40218

George M. Streckfus
HOWES & ASSOCIATES
Watterson City West, Suite 1020
1941 Bishop Lane
Louisville, KY 40218

COUNSEL FOR APPELLEES:

Timothy P. O'Mara
MIDDLETON & REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202

Larry M. Greathouse
Department of Workers' Claims
Perimeter Park West
1270 Louisville Rd. Building C
Frankfort, KY 40601