

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-001150-WC

CITY OF OWENSBORO

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-88-41803

GARY DEWAYNE ADAMS; LLOYD R. EDENS,  
ADMINISTRATIVE LAW JUDGE; AND THE  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND MILLER<sup>1</sup>, JUDGES.

KNOPF, JUDGE: In May 1987, Gary Adams and a co-worker, laborers for the City of Owensboro, were assigned to clean-out a section of sewer line. They opened a manhole, and the co-worker descended. Almost immediately he collapsed. Adams radioed for assistance then entered the manhole to rescue his colleague. No sooner had he reached the bottom of the hole, however, than he too was overcome by fumes and passed out, striking the back of his head against the brick wall of the hole as he fell. About twenty minutes later, rescue workers introduced oxygen into the

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<sup>1</sup>Judge Miller concurred in this opinion prior to his retirement effective January 1, 2003.

hole, and Adams revived enough to stand up. Rescuers were then able to pull him to safety. The co-worker, however, was killed.

Following the incident, Adams suffered from a sore neck and from intermittent pain above his right eye and along the right side of his face. He was able to return to work and settled his workers' compensation claim in July 1989 for 9.5% occupational disability. The pain in his neck, which had at first been the more worrisome, eventually resolved, but the pain in his face persisted. It would bother Adams for a few days, then abate, then come back again. In 1994, it became more continuous and much more severe. Eventually, even morphine provided no relief. Adams's physician referred him to neurologists at the University of Cincinnati, Drs. Tew and van Loveren. Both physicians are widely recognized experts in trigeminal neuralgia, a characteristic pain confined to the territory of the trigeminal nerve, the three branches of which innervate the face. Dr. Tew performed microvascular decompression surgery on Adams, and for about three years thereafter, Adams was relatively pain-free. In 1998, however, he developed a similar excruciating pain on the left side of his face, and there began a frustrating series of surgeries and other treatments that provided only limited or short-lived relief, the pain always recurring, first on the left and eventually on both sides of Adams's face.

In December 2000, Adams moved to reopen his workers' compensation award. He had struggled to continue working, but the episodes of pain, he claimed, had finally rendered him

totally disabled. The reopening was granted, and by order entered November 26, 2001, an administrative law judge (ALJ) awarded Adams benefits for permanent and total disability. The City of Owensboro appealed to the Workers' Compensation Board. It did not dispute that Adams suffers from nerve damage in his face, but argued that Adams had failed to prove a causal link between his condition and the work incident in 1987. In particular, the City contended that Dr. van Loveren's testimony for Adams in support of such a link should not have been admitted because it failed to meet the so called Daubert standard of reliability as adopted in Kentucky in Mitchell v. Commonwealth<sup>2</sup> and Goodyear Tire & Rubber Company v. Thompson.<sup>3</sup> It also maintained that even if Dr. van Loveren's testimony was admissible, it did not adequately support the ALJ's ruling. By order entered May 2, 2002, the Board affirmed the ALJ's award. It agreed with the City that the Daubert reliability standard for expert witnesses applies in workers' compensation cases, but ruled that Dr. van Loveren's testimony was admissible under that standard and of sufficient substance to support the ALJ's decision. It is from that order that the City has appealed. It renews its contentions that Dr. van Loveren's testimony on the issue of causation should be deemed neither admissible nor persuasive. We agree with the Board on both points, however, and therefore affirm.

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<sup>2</sup>Ky., 908 S.W.2d 100 (1995).

<sup>3</sup>Ky., 11 S.W.3d 575 (2000).

Kentucky Rule of Evidence 702, which applies to workers' compensation hearings pursuant to 803 KAR 25:010 section 12, provides that

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule matches its federal counterpart, and our Supreme Court has held<sup>4</sup> that Kentucky trial courts and administrative bodies seeking to apply it are to be guided by the United States Supreme Court's discussion of the federal rule in such cases as Daubert v. Merrell Dow Pharmaceuticals, Inc.<sup>5</sup> and Kumho Tire Company v. Carmichael.<sup>6</sup>

Under the rule, a court or tribunal considering the admissibility of expert testimony exercises a gatekeeping function to assess whether the proffered evidence is sufficiently reliable and relevant; that is, whether the data, methods, and reasoning underlying the expert's proffered opinion is sufficiently valid to make the opinion trustworthy, and whether the opinion is relevant to the facts at issue. This assessment is to be a flexible one; the tribunal may consider whatever factors bearing on reliability it finds useful. Frequently these factors will include whether the expert's data, reasoning, and

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<sup>4</sup>Mitchell v. Commonwealth, supra; Goodyear Tire & Rubber Company v. Thompson, supra.

<sup>5</sup>509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).

<sup>6</sup>526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999).

methods have been tested, subjected to peer review, published, or accepted by the relevant professional community. The assessment should focus on the expert's principles and methods, however, not his conclusions. And there is no requirement that the proffered expert testimony be irrefutable or certainly correct. Like all testimony, after all, expert testimony is subject to cross-examination, contrary evidence, and burdens of proof. The admissibility assessment, rather, should be more narrowly aimed at excluding only unreliable evidence in the guise of science or expertise that is apt to be more misleading than helpful.<sup>7</sup> This Court reviews a tribunal's decision to admit or exclude evidence for abuse of discretion.<sup>8</sup>

The City contends that Dr. van Loveren's testimony to the effect that Adams's 1987 exposure to sewer fumes (probably methane) caused his trigeminal neuralgia was inadmissible because it was not based on reliable scientific methodology. Although the City concedes that Dr. van Loveren, a certified neurologist who has taught and published in the field for many years and has treated more than a thousand patients with the sort of characteristic facial pain suffered by Adams, is a qualified expert, it notes that Dr. van Loveren cited no epidemiological studies, no peer-reviewed published studies, no animal studies, and no laboratory data in support of a link between toxic exposure and trigeminal neuralgia. Instead, Dr. van Loveren merely relied on a differential diagnosis and the temporal

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<sup>7</sup>Goodyear Tire & Rubber Company v. Thompson, *supra*.

<sup>8</sup>*Id.*

relationship between Adams's exposure to a lethal gas and the onset of his symptoms to support his conclusion of a probable causative link. The City contends that under KRE 702 and Goodyear Tire, this is not enough. We disagree.

Differential diagnosis is a standard scientific technique for identifying the cause of a medical problem. Generally, a differential diagnosis is carried out

by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely. . . . This technique has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results.<sup>9</sup>

Dr. van Loveren testified that the most common known causes of trigeminal neuralgia are blood vessels that compress the nerves, tumors that compress the nerves, and multiple sclerosis. Adams did not have a tumor or abnormal blood vessels. Although there was some evidence of multiple sclerosis, Dr. van Loveren, after repeated scans and spinal fluid tests, believed that that evidence was weak and that Adams did not have MS. Adams also suffered from an unusual form of the condition. He did not respond well to standard treatment, and he experienced pain on both sides of his face, whereas the vast majority of patients have pain on only one side. Again, multiple sclerosis is by far the most common cause of bilateral trigeminal neuralgia, but after several years of the neuralgia, Adams had

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<sup>9</sup>Westberry v. Gislaved Gummi AB, 178 F.3d 257, 262 (1999) (citations and internal quotation marks omitted).

never shown any but the most equivocal signs of MS, usually a progressive disease. All these facts suggested an unusual cause in Adams's case and eventually they led Dr. van Loveren to suspect that Adams's severe methane exposure was probably it. Although the doctor conceded that there were no reported cases of toxin-induced trigeminal neuralgia, he testified that methane is well known to be toxic to nerves. Also significant, the doctor believed, was the fact that Adams's symptoms had first appeared soon after his methane poisoning.

Notwithstanding the novelty of Dr. van Loveren's conclusion, we agree with the ALJ and the Board that his differential diagnosis was admissible. Numerous courts have admitted similar diagnoses under the federal counterpart to KRE 702.<sup>10</sup> Although Dr. van Loveren's opinion is not certain, it is based on the careful application of an established medical technique and reasonably and accurately reflects the outcome of that technique. We agree with the Board that the ALJ did not abuse his discretion when he admitted Dr. van Loveren's testimony.

Even if Dr. van Loveren's causation testimony was admissible, the City next contends, it was so speculative as not to provide any genuine support for the ALJ's finding. As the City concedes, however, this Court may correct the Board

only where the [ ] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error

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<sup>10</sup>Westberry v. Gislaved Gummi AB, *supra* (collecting cases).

in assessing the evidence so flagrant as to cause gross injustice.<sup>11</sup>

We are not persuaded that the Board committed such an error here. On the contrary, we agree with the Board that Dr. van Loveren's testimony provided substantial evidence in support of the ALJ's ruling. Substantial evidence need not be conclusive or uncontradicted. It need only be capable of convincing a reasonable person that a particular fact is more likely so than not.<sup>12</sup> Evidence of causation, moreover, need not include objective medical findings.<sup>13</sup> Dr. van Loveren's testimony meets these standards. Although other doctors opined that Adams's trigeminal neuralgia probably resulted from multiple sclerosis, all the doctors agreed that a diagnosis of multiple sclerosis was problematic; the usual evidence of it was missing. Given that testimony, the ALJ could reasonably be persuaded by Dr. van Loveren that Adams's severe work-related exposure to methane, a known nerve toxin, was more likely than MS to be the cause of Adams's unusual and debilitating facial pain. Accordingly, we affirm the May 2, 2002, order of the Workers' Compensation Board.

ALL CONCUR.

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<sup>11</sup>Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

<sup>12</sup>Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

<sup>13</sup>Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001).