

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000350-WC

MARY A. HUTCHINS

APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
2005-SC-000627-WC

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-91930
v.

GENERAL ELECTRIC COMPANY; AND
HON. LAWRENCE E. SMITH,
ADMINISTRATIVE LAW JUDGE

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: JOHNSON¹ AND TAYLOR, JUDGES; BUCKINGHAM,² SENIOR JUDGE.

JOHNSON, JUDGE: Mary A. Hutchins has petitioned for review of an opinion of the Workers' Compensation Board entered on January 21, 2005, which affirmed an order by the Administrative Law Judge (ALJ) which dismissed her cumulative trauma claim. Having

¹ Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² 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.

concluded that the Board has not committed an error in assessing the evidence so flagrant as to cause a gross injustice³, we affirm.

Hutchins filed this workers' compensation claim alleging a cumulative trauma injury to her neck and low back with an accident date of March 6, 2002. Hutchins began working for GE in 1973, and worked on the assembly line. At the time of her alleged injury, she was working on a water valve job which required her to screw the water valve onto a dishwasher. Hutchins had worked on this job for two to three weeks prior to March 6, 2002. Before the water valve job, Hutchins had worked on a collection chamber job which required her to affix the collection chamber to the wash tub with three screws.

In 1992 Hutchins filed a claim for workers' compensation benefits for alleged cumulative trauma injuries to her neck, low back, and right arm, with an accident date of February 19, 1990. At that time, she treated with Dr. Lawrence Jelsma, a neurosurgeon, for neck and low back complaints. She also was treated by her family physician, Dr. Gerald Sasser, and Dr. C. W. Dinwiddie, a chiropractor, who she saw through 1993. Her workers' compensation claim was dismissed in August 1992 for lack of prosecution.

³ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 688 (Ky. 1992).

In September 1997, Hutchins filed a second workers' compensation claim alleging a cumulative trauma injury to her back with an accident date of April 1995. She alleged low back pain which radiated to her hips and legs as a result of repetitive work activities. She again saw Dr. Dinwiddie for treatment to both her low back and neck from 1995 through 1999. In August 1995, her workers' compensation claim was found to be compensable and she was awarded 5% permanent partial disability.

Following her second workers' compensation claim, Hutchins continued to receive treatment in 1999 for her neck, low back, arms, and shoulders which she attributed to the 1995 injury. In September 1999, she was seen by Dr. John Guarnaschelli, a neurosurgeon, for neck and low back complaints. He noted that she had been seen by a number of doctors for chronic pain dating back to 1988. Dr. Guarnaschelli diagnosed her with degenerative disc disease and chronic pain in her low back and neck. Dr. Guarnaschelli advised Hutchins that she was not a surgical candidate and released her to return to work.

Hutchins then filed this claim for workers' compensation benefits on February 27, 2003, alleging new cumulative trauma injuries to her low back and neck with an accident date of March 6, 2002. Hutchins testified that on March 6, 2002, she had pain shoot down her right arm and back while she was performing the water valve job. GE denied the

claim on May 8, 2003, and a formal hearing was held before the ALJ on December 17, 2003.

Hutchins submitted evidence through her deposition testimony taken on May 23, 2003, and her testimony at the hearing. She also submitted medical records and reports from Dr. Guarnaschelli, Dr. Gary Davis, and Dr. Larry Zhou. GE submitted medical records and reports from Dr. William Bizot, Dr. Theodore Swirat, and Dr. Martin Schiller.

Dr. Davis saw Hutchins on March 8, 2002, and noted that she hurt her back at work. She was complaining of having upper back, lower back, right arm, and neck pain. Dr. Davis referred her to Dr. Guarnaschelli. His records do not contain any indication as to his opinion regarding the cause of her injury.

Dr. Guarnaschelli saw Hutchins on April 3, 2002, and was provided a history that Hutchins had had low back pain on and off for a number of years. However, she reported that while at work on March 6, 2002, she developed the abrupt onset of low back, neck, shoulder, and right arm pain. Dr. Guarnaschelli ordered an MRI, as well as an arthritic profile. He saw Hutchins again on April 11, 2002, and noted that the arthritis profile ruled out a serious underlying connective tissue disorder. The MRI scan was read to show evidence of multi-level degenerative changes and spondylosis in both the cervical and

lumbar spine. There was no disc herniation or other surgically significant abnormalities. He referred Hutchins to Dr. Zhou, a pain management physician.

Dr. Zhou first saw Hutchins on April 19, 2002. She reported constant pain in her back, neck, arms, and legs which was much worse since March 6, 2002. Dr. Zhou diagnosed her with lumbar and cervical degenerative disc disease with radiculitis, myofascial pain, and cervical and lumbar facet arthropathy. Dr. Zhou noted that Hutchins's medical history was significant for arthritis. On Hutchins's medical application for pension benefits from GE dated May 16, 2002, Dr. Zhou listed the same diagnoses and indicated that her condition had gotten worse over the last six months, but had been ongoing for several years.

Dr. Swirat and Dr. Bizot, who are on GE's medical staff, reviewed GE's medical records and diagnosed Hutchins with cervical degenerative disc disease which was chronic and not work-related. Dr. Swirat further stated that cervical degenerative disc disease was not a repetitive motion disorder but, rather, occurred over time. He observed that Hutchins's cervical degenerative disc disease was noted in GE's medical records from August 1999.

Dr. Schiller saw Hutchins for an independent medical examination in July 2003 and reviewed medical records and reports from Dr. Guarnaschelli and Dr. Davis, as well as x-ray

reports and an MRI scan. He reported a history of low back pain on the job since 1995, and complaints of neck pain in 1999 with no acute injury. He stated that her diagnosis was age-related degenerative changes that were shown on the MRI. He did not believe there were objective medical findings to link the diagnosis to her work activities.

On June 23, 2004, the ALJ issued an opinion and order dismissing Hutchins's claim on the basis that the evidence was more persuasive that Hutchins's pain incidents were the result of degenerative changes rather than a work-related traumatic and cumulative injury occurring on March 6, 2002. Hutchins filed a petition for reconsideration with the ALJ which was denied on August 25, 2004. He then appealed to the Board which affirmed the ALJ's opinion and order. This petition for review followed.

Hutchins argues on appeal that the ALJ erred by relying upon the testimony of Dr. Schiller because his testimony was based upon an incomplete and inaccurate history. In support of her argument, Hutchins relies upon Cepero v. Fabricated Metals Corp.⁴ In Cepero, our Supreme Court held that "where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on

⁴ 132 S.W.3d 839 (Ky. 2004).

the issue of causation cannot constitute substantial evidence.”⁵
We conclude that the facts of this case are distinguishable from Cepero where a claimant completely omitted a past injury from his history leading the medical expert to opine that the claimant’s injury was entirely work-related. The expert then testified that, had she known of the previous injury, her opinion would have been different.

Hutchins asserts that Dr. Schiller was unaware that Hutchins was claiming she sustained an injury on March 6, 2002, when he examined her. However, in his deposition, Dr. Schiller testified that he took a history from Hutchins and reviewed the medical records of Dr. Guarnaschelli and Dr. Davis, as well as X-ray and MRI reports which were made after her alleged injury on March 6, 2002. From his testimony, it is clear that Dr. Schiller knew Hutchins was claiming a work-related injury, and he specifically testified that he reviewed a report from Dr. Guarnaschelli which noted that Hutchins claimed to have had an abrupt onset of low back, arm, shoulder, and neck pain while at work on March 6, 2002. We cannot concede that the history obtained by Dr. Schiller was substantially inaccurate or incomplete. Thus, the ALJ did not err in relying upon that history in dismissing Hutchins’s claim.

⁵ Id. at 842.

Hutchins next argues that the ALJ erred by failing to consider a September 2003 letter from Dr. Guarnaschelli to Hutchins's counsel. In the letter, Dr. Guarnaschelli stated that Hutchins's episode at work occurring on March 6, 2002, "would appear to be a precipitating event superimposed on her chronic and (sic) symptoms for which she has been treated in the past." In his opinion and order, the ALJ did not reference this letter but did refer to a September 2002 letter from Dr. Guarnaschelli to GE's insurance carrier which stated that he would agree with the reports of GE's doctors that Hutchins's current problems were "most likely related to ongoing age-related and development of changes related to spondylosis."

Hutchins, as the claimant, bears the burden of proof and risk of nonpersuasion as to every element of the claim.⁶ In an appeal where the party with the burden of proof was unsuccessful, the question is whether the evidence is so overwhelming based upon consideration of the whole record as to compel a finding in that parties' favor.⁷ In order to justify reversal, Hutchins must do more than present evidence that would support a contrary conclusion.⁸ Further, as the fact-finder, the ALJ has the sole authority to determine the weight, credibility,

⁶ Cepero, 132 S.W.3d at 842.

⁷ Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

⁸ Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001).

substance, and inferences to be drawn from the evidence.⁹

Finally, the ALJ has the right to accept part of the evidence and to reject other parts, whether it comes from the same witness or the same party's total proof.¹⁰

We disagree with Hutchins's contention that the ALJ erred by failing to consider the September 2003 letter from Dr. Guarnaschelli. The letter was part of the medical evidence introduced by Hutchins at the hearing, and simply because the ALJ did not specifically mention the letter in his opinion and order does not mean that he did not consider it. His decision dismissing Hutchins's claim was supported by substantial evidence. Although there is evidence which could have supported Hutchins's claim, the record does not compel a finding in her favor. Accordingly, the Board did not commit an error in assessing the evidence so flagrant as to cause gross injustice.

Based upon the forgoing, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert M. Lindsay
Louisville, Kentucky

BRIEF FOR APPELLEE:

Judson F. Devlin
Louisville, Kentucky

⁹ KRS 342.285; See also Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

¹⁰ Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

