OPINION ENTERED: APRIL 5, 2012

CLAIM NO. 201193943

JON DAVID SEYMOURE PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

KENTUCKY COMMUNITY AND TECHNICAL COLLEGE SYSTEMS
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. Jon David Seymoure ("Seymoure") appeals from the December 15, 2011 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") dismissing Seymoure's back injury claim. On appeal, Seymoure argues his injury is compensable because it arose out of the course of his employment, and the ALJ's decision was contrary to the uncontradicted and compelling evidence.

Seymoure filed a Form 101 Application for Resolution of Injury Claim on June 10, 2011, alleging injuries to his lumbar spine occurring on January 24, 2011 and February 11, 2011. He stated both injuries occurred while performing his duties at the Kentucky Community and Technical College Systems, Gateway Community College Branch ("KCTCS") in Park Hills, Kentucky. The first injury occurred on January 24, 2011, as Seymoure was lifting a vacuum cleaner over a threshold. The second injury occurred on February 11, 2011, when, while vacuuming, he experienced back pain that forced him to the floor. Seymoure indicated he timely advised his supervisor of the injuries on the dates each injury occurred.

Seymoure testified by deposition on September 1, 2011, and at the hearing held October 20, 2011. He began working for KCTCS as a custodian in November 2010. His duties included picking up trash, vacuuming, sweeping, mopping, removing trash, and snow removal. His job required him to constantly stoop, bend, push, and lift.

On January 24, 2011, Seymoure was called to work to assist in snow removal. He, Doug Hardebeck (“Hardebeck”), and another worker were shoveling snow when he experienced back pain. Seymoure testified he reported the back pain to Hardebeck and was advised to take a break. Instead,

Seymoure continued to work shoveling snow. The following day, he sought medical attention at the emergency room. He was placed on restricted duty for five days. Seymoure stated he did not report the injury as work-related because he feared he would lose his job. He also testified he had been bothered by continuing low back pain for a long time and used pain medication whenever he had flare-ups. He stated his pain in January 2011 was similar to his prior back pain.

Seymoure was placed on light duty work for five days, before returning to his regular duties. Then, as he was vacuuming on February 11, 2011, he again experienced back pain that “threw him to the floor". Seymoure stated he called Hardebeck and reported the injury. Hardebeck came to the work location and relieved him. Seymoure sought treatment at the emergency room for his back pain which, by then, had radiated into his leg.

Seymoure first sought follow-up treatment with Dr. Patrick Brunner, his chiropractor. Dr. Brunner ordered an MRI and later referred Seymoure to Dr. Set Shahbabian. Dr. Shahbabian performed surgery in May 2011. Seymoure indicated he did well following surgery but continued to have numbness. His pain returned in August 2011. Following another MRI, further surgery was recommended. Seymoure

testified he continued to have pain throughout his spine with numbness in his leg. He was advised not to return to maintenance work.

Seymoure acknowledged a prior injury in January 2010 while he was working in Ohio. At that time, Seymoure suffered a right quadriceps injury. He did not understand how workers' compensation claims worked and he initially thought his injuries in 2011 would be covered by the Ohio claim.

Seymoure acknowledged he did not complete an accident report for the January 24, 2011 work incident. He indicated he failed to do so because he thought it was "just regular back pain." Seymoure also indicated he was afraid of losing his job at KCTCS if he reported a work injury. When questioned regarding the history recorded at Christ Hospital on January 25, 2011 that he had been shoveling his driveway at home, Seymoure acknowledged he did not provide a truthful history to Christ Hospital because he did not want to lose his job. Seymoure acknowledged he knew, based upon his prior work as a supervisor, the first thing to be done following an injury was the completion of an incident report.

Seymoure introduced medical records from Mercy Franciscan Hospital where he was examined on January 27,

2010. He had reported falling the prior day and having thigh pain and difficulty walking. Seymoure was then referred to Mercy Orthopedics for thigh and groin strain secondary to a fall at work.

KCTCS submitted treatment records from Christ Hospital. Seymoure was seen in emergency department on August 13, 2010 for low back pain. Seymoure had no leg pain and negative straight leg raising test. He had tenderness of the lumbar spine with pain and spasms. He was diagnosed with low back pain and administered a Toradol injection. He was to discontinue use of Flexeril and was prescribed Skelaxin.

Seymoure returned to Christ Hospital on January 25, 2011 with complaints of back pain. Seymoure indicated he had low back pain for over a year due to a fall at work, which would wax and wane. Seymoure reported that, after it had snowed on Friday, he had to shovel his driveway which led to increased pain on Saturday morning. Seymoure reported movement and lifting at work made his pain unbearable. He indicated pain was radiating across his low back down into both legs. The records noted a past history of chronic back pain.

On physical examination, Seymoure had tenderness to palpation of the lumbar paraspinal muscles bilaterally with no vertebral point tenderness or step-off noted. He had

some mild limited range of motion at the hip secondary to pain. Diagnostic studies revealed mild L4–L5 and L5–S1 disc narrowing and small lower lumbar degenerative spurs.

Seymoure returned to Christ Hospital once again on February 11, 2011 with complaints of chronic back pain. The records noted Seymoure had been seen on January 25, 2011 for the same complaints after shoveling snow. This time Seymoure reported pain radiating from his lower back into his legs. Examination revealed normal neck range of motion, lumbar pack pain and spasms, normal strength, and no tenderness, swelling, edema, deformity, or lacerations. Seymoure was given prescriptions for Flexeril and Vicodin.

Both parties submitted records from Patrick J. Brunner, M.D. who examined Seymoure on August 24, 2010. Seymoure had reported having low back pain since he was in his twenties with no specific incident. However, recently he had been having pain radiating into the right side and leg. Seymoure reported straining his back in January when he tore part of his quad. He thought this may have changed his gait. Dr. Brunner indicated that, taking into consideration Seymoure's past and present history, physical evaluation and radiographic evaluation, it appeared he had a lumbar inter-vertebral disc syndrome, possibly a bulge, protrusion or even a herniation with associated radicular pain on the

right side. He also had a short right leg with lumbar compensatory posture and sacroiliac subluxation. Dr. Brunner planned to administer conservative treatment and noted a progressive exercise program would be initiated. Seymoure was encouraged to lose weight and practice proper ergonomics. Dr. Brunner noted that if Seymoure did not respond to conservative care quickly, an MRI would be indicated and a possible change in treatment. On September 2, 2010, Seymoure reported his leg and back pain had improved.

Seymoure saw Dr. Brunner again on May 4, 2011 with complaints of low back and left leg pain. Dr. Brunner noted Seymoure was last seen on September 2, 2010 and had been successfully treated in three visits and was released in a pain-free condition. Dr. Brunner recorded a history of lower back pain starting on January 24, 2011. He noted Seymoure's injury occurred as he was running cleaning equipment on carpeting. However, the injury did not disable him at that time. Dr. Brunner also noted Seymoure was entering a building on February 11, 2011 when his pain became so severe "his back went out completely" and he fell to the floor.

On examination, Dr. Brunner found Seymoure had an antalgic and compensated gait. Seymoure was tender to touch

in the lumbosacral area bilaterally, greater on the left than the right. Seymoure reported pain shooting into the left leg and foot.

On May 9, 2011, Dr. Brunner noted the MRI results revealed a large fragment, and Seymoure's prognosis was poor. Dr. Brunner noted Seymoure had seen Dr. Shahbabian who had scheduled him for surgery.

On June 27, 2011, Dr. Brunner noted Seymoure had undergone surgery and continued to have low back pain, and left leg numbness with pain to the foot. Dr. Brunner concluded Seymoure was temporarily disabled from any type of work.

The lumbar MRI report of May 20, 2011 indicated significant multilevel disc protrusions from L3–4 through L5–S1 causing severe thecal sac compression at L4-5 and evidence of multiple nerve root compression/impingements.

KCTCS submitted records from Doctors Urgent Care dated February 11, 2011 and February 18, 2011. The February 11, 2011 records noted Seymoure had been seen one year earlier when he had fallen on his right thigh injuring his thigh and lower back. Seymoure now complained of lower back pain radiating down to both knees which "started acting up again" on January 24, 2011. "No new injury" was noted. Seymoure was seen again on February 18, 2011. He still complained of

pain stating he was unable to bend. He had been taking medications consisting of Ultram and a Medrol dose pack which had provided little relief.

Both parties submitted the February 22, 2011 treatment notes of Reconstructive Orthopedics and Sports Medicine. Seymoure reported having low back pain which began after a work injury on January 26, 2011. He stated he had experienced intermittent back pain for a while but nothing significant until this injury. Seymoure reported he was vacuuming when he slipped, essentially doing the splits and jamming his back. Since that time, he had severe pain in his lower back radiating down both lower extremities. Seymoure was diagnosed with lumbar radiculopathy. He was to be referred to a spinal surgeon for further intervention.

Seymoure introduced medical records from Dr. Shahbabian who first examined Seymoure on May 10, 2011. Dr. Shahbabian reviewed a lumbar MRI and found a large disk fragment at L4–5 and a smaller fragment at L5–S1 on the right side. Dr. Shahbabian recommended lumbar laminectomy surgery at L4–5 on the left and a discectomy at the L4-5 level. He stated Seymoure needed to lose weight before he would address the L5–S1 issue. Dr. Shahbabian stated Seymoure would be unable to work for an extended period of time and recommended that he apply for Social Security benefits.

Dr. Shahbabian performed surgery on May 21, 2011. He then conducted a follow-up examination on August 29, 2011. Seymoure had a large recurrent disc herniation and needed decompressive laminectomy and discectomy at L4–L5 and L5-S1 with internal stabilization, pedicle screw, rods, and fusion. Dr. Shahbabian indicated he would not do further surgery until Seymoure lost weight. He stated Seymoure would be unable to return to work for at least two years or more. He felt Seymoure should seek permanent disability. On May 10, 2011, Dr. Shahbabian stated:

> From the description of his injury at work as well as the acuteness of the problem, it is my opinion that the L4–L5 disc herniation occurred and is related to the February incident at work. I advised him to me [sic], this is definitely a work-related injury.

Hardebeck, supervisor of maintenance for KCTCS, testified by deposition on September 6, 2011. He stated Seymoure would contact him when he was unavailable for work or would be late. Hardebeck would prepare a draft e-mail which he would save for these incidents. Hardebeck prepared a draft concerning January 24, 2011, noting Seymoure was unable to finish his work assignments that evening. The following day, Seymoure was late for work due to back pain and stated he had to go to the hospital. Hardebeck testified Seymoure did not report the back pain as a work

injury. When he returned, Seymoure had work restrictions of no lifting over 10 pounds.

Hardebeck also drafted an e-mail concerning February 10, 2011 through February 14, 2011. He noted Seymoure stated his sides were bothering him on February 10, 2011 but that he thought he could work. At approximately 6:30 p.m., Seymoure called asking permission to go to the doctor. Hardebeck stated he told Seymoure it was up to him if he wanted to see a doctor. Hardebeck stated Seymoure called back around 7:44 PM. He was breathing heavily and stated he could not stand the pain anymore. Hardebeck arrived at 8 p.m. to relieve Seymoure. Hardebeck stated Seymoure did not report the pain was the result of a work injury. To the contrary, during subsequent conversations, Seymoure stated his employment with KCTCS had nothing to do with his back pain. Hardebeck testified that, had Seymoure indicated his back pain was related to work, an accident report would have been completed.

Hardebeck stated he was first made aware Seymoure was claiming a work injury on March 1, 2011 when Seymoure met with Phyllis Yeager ("Yeager") and Hardebeck. Yeager then prepared a First Report of Injury. It was noted Seymoure had returned to work on January 26, 2011. The injury description stated Seymoure was "vacuuming – back was

already hurting – went to lift vacuum cleaner to move and back went out." The form indicated the administrator was notified of the injury on February 28, 2011, but that Seymoure's employment had been terminated on February 24, 2011.

Seymoure completed an Ohio first report of injury form on May 4, 2011. He described the accident as "On January 24 while working I felt severe back pain burning & painful to move on Feb 11 back went completely out and fall [sic] to floor by entrance way of school building."

After reviewing the evidence, the ALJ made the following findings of fact and conclusions of law relevant to this appeal:

> The Administrative Law Judge has no doubt that the plaintiff's back hurts and that he needed the surgery done by Dr. Shahbabian. However, as the law is clear the plaintiff bears the burden of proof and persuasion as to all issues, including the fact that his injury is work-related, not merely that he experienced some symptoms at work.
>
> The plaintiff has a long history of back pain that predates the alleged dates of injury herein. He also has provided, to various medical professionals, statements which cast doubt on any allegation that the sole or primary cause of his low back pain is work-related. These statements include, but are not limited to, his aforementioned history of back pain and the incidents

> at home including shoveling snow at home.
>
> I am not unmindful of the statements by various physicians, including treating physicians and the treating surgeon, Dr. Shahbabian, stating the plaintiff's condition is work-related. I have most certainly considered them. However, I conclude that these statements were made based entirely on the history provided by the plaintiff, which is in contradiction to other statements he has made and his own medical history.
>
> I am not particularly persuaded by the plaintiff himself.
>
> Accordingly, for the above reasons, I find that the plaintiff's low back condition, however legitimately painful and disabling, is not work-related. This claim is dismissed in its entirety.

On appeal, Seymoure argues his injuries are compensable because they arose out of the course of his employment. He argues the evidence is compelling and uncontradicted that there is a causal relationship between his employment with KCTCS and his injury. He notes both Dr. Brunner and Dr. Shahbabian opine he had a very large double disc fragment requiring emergency attention which prevented him from working. They concluded the injury was work related due to the timing of the injury. Seymoure argues that, had he had the injury prior to February 10, 2011, it would have prevented him from working. Furthermore, he argues that, if

he had a significant disc fragment prior to the work injury, it would likely have been found by Dr. Brunner during Seymoure's previous treatment in 2010. Therefore, Seymoure argues, the only reasonable conclusion is that he sustained the injury on February 10, 2011 at work after lifting the vacuum cleaner.

Seymoure further argues the ALJ’s decision is arbitrary and capricious in light of compelling evidence. He states that work relatedness was not readily apparent to a layman and thus medical expertise was required in determining causation. He argues the only medical evidence offered with respect to causation consisted of reports of Drs. Brunner and Shahbabian indicating the injury was work related. Seymoure notes KCTCS offered no opinion from a medical expert contradicting their conclusions. Seymoure notes the ALJ simply disregarded these opinions because he concluded they were based on statements from Seymoure. However, Seymoure argues the ALJ ignored the fact the medical opinions of Drs. Shahbabian and Brunner were not based solely on statements from Seymoure, but also on the absence of evidence of such a severe disc fragment in previous medical records. Thus, Seymoure contends the ALJ ignored compelling and uncontradicted medical evidence that warrants reversal of the decision.

Seymoure, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation/work-relatedness. KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Seymoure was unsuccessful in his burden, the question on appeal is whether, upon consideration of the whole record, the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

Typically, causation is a question for medical experts. However, case law provides even uncontroverted testimony can be rejected if the ALJ provides a sufficient explanation. Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985). In Osborne v. Pepsi-Cola, 816 S.W.2d 643 (Ky. 1991) the Supreme Court stated as follows:

> 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. [citation omitted]. After all, the opinion does not rest on the doctor's own knowledge, an essential predicate to make uncontradicted testimony conclusive. [citation omitted]

If an ALJ believes a medical opinion is based upon an inaccurate history, he is free to reject the opinion. Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). As we so often note, it is within the ALJ's discretion as fact-finder to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the sole authority to judge the weight of the evidence and inferences to be drawn from that evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). 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 (Ky. 2000). Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Here, the ALJ did not find Dr. Shahbabian's opinion regarding causation persuasive. The ALJ cited conflicting statements Seymoure had given to medical professionals and also noted the significant history of back pain prior to the alleged work injuries. Dr. Brunner's August 24, 2010 note indicated he believed Seymoure had a lumbar intervertebral disc syndrome, and possibly a bulging or herniated disc at that time. Dr. Brunner was also considering ordering an MRI, depending on Seymoure's response to treatment. Significantly, this note was only a few months prior to the first alleged injury date.

It is also important to note Seymoure reported to Christ Hospital on January 25, 2011 his chronic back pain was increased by shoveling his driveway. Although Seymoure testified he lied to the hospital, the ALJ is not bound by that testimony. The ALJ was free to reject that testimony and conclude the pain was the result of activity at home rather than at work. The ALJ was well within his role as fact-finder in determining Seymoure was not persuasive regarding the occurrence of the alleged incidents on January 24, 2011 and February 11, 2011. Hardebeck's testimony was in conflict with Seymoure's testimony regarding those events and provides a basis for the ALJ to reject Seymoure's account.

We believe there were significant contradictions between Seymoure's testimony and the medical records sufficient to cast doubt upon the accuracy of the history that formed the basis for Dr. Shahbabian's causation opinion. The evidence is not so overwhelming as to compel a different result. We are convinced the ALJ considered all the evidence of record in finding Dr. Shahbabian's opinion regarding causation lacking in probative value. There being substantial evidence in the record to support the ALJ's conclusion, we may not reverse. *See* KRS 342.285(2).

Accordingly, the decision of Hon. Chris Davis, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON STACEY L GRAUS
40 W PIKE
COVINGTON, KY 41011

COUNSEL FOR RESPONDENT:

HON K LANCE LUCAS
1511 CAVALRY LANE STE 201
FLORENCE, KY 41042

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 W. CHESTNUT ST, 7TH FLOOR
LOUISVILLE, KY 40202