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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000413-WC

VALERIAN VILLAGE — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-05-95466

MAUDIE THOMAS; HON. A. THOMAS DAVIS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND

NO. 2008-CA-000623-WC

MAUDIE THOMAS — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-05-95466

VALERIAN VILLAGE; HON. A. THOMAS DAVIS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Valerian Village (Valerian) petitions this Court for review of the Workers' Compensation Board's (the Board) opinion entered January 25, 2008, vacating and remanding the matter to the Administrative Law Judge (ALJ). The Board determined that the ALJ failed to address certain evidence requested by Maudie Thomas (claimant) and failed to make a specific finding as to whether or not claimant's fall at work, which exacerbated a prior pre-existing knee condition, was temporary or permanent. The Board relied on *Derr Constr. Co. v. Bennett*, 873 S.W.2d 824 (Ky. 1994), and *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). Thomas cross-petitions for review on whether the issue of cumulative trauma was tried by implied consent. We affirm.

Claimant was born on January 25, 1937, and was 68 years old when she fell at work on January 29, 2005. She had worked for Valerian since

[1] Senior Judge Daniel T. Guidugli 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.

November 28, 2001, as a cook. She has an 8th grade education and had worked for a total of thirteen years prior to the fall. She began receiving social security benefits when she was 62 years old. Despite her testimony to the contrary, claimant had been treated for knee problems prior to the fall as recently as December 2004, had fluid drained from the knee, and received a cortisone shot in the knee. On January 29, 2005, she slipped and fell while working at Valerian. She claimed that her right knee "kind of twisted when she fell." She went to the hospital emergency room the next day and has not worked since the fall. Claimant underwent right knee replacement on January 30, 2006. She received temporary total disability benefits until October 2005.

Claimant testified before the ALJ, as did Ms. Imogene Borden, a friend of claimant. The depositions of Ms. Barbara Pearson, claimant's supervisor at Valerian; Dr. Charlene Robinson, the treating physician; and Dr. Andrew Shinar, the orthopedic surgeon, were admitted into the record. The medical report of Dr. J. Criss Yelton, who performed an independent medical examination, was also admitted. The medical evidence indicated that claimant had previous problems with her knee and had been diagnosed with degenerative joint disease and prescribed medication for the condition. Dr. Robinson indicated that claimant's employment was likely to have accelerated the progress of arthritis in her right knee. Dr. Shinar stated that the reason for the knee replacement was because of the arthritis inside the knee and the fact that claimant was now "symptomatic." He indicated that claimant did have a meniscal tear, which he could not determine was

present before the fall or caused by the fall, and which would not have produced the need for a total knee replacement. He added that meniscal tears are common within degenerative changes in the knee. Dr. Shinar also indicated that the reason for the total knee replacement was osteoarthritis, which existed before the injury, but that her symptoms became more present after the fall. Claimant was being prescribed Bextra, an anti-inflammatory drug for pain or arthritis. Dr. Yelton diagnosed claimant with "medial meniscal tear right knee and osteoarthritis." He recommended an arthroscopy medial meniscectomy based upon the meniscal tear. He assigned a 3% whole person impairment based upon the tear, whereas Dr. Shinar assigned a 15% impairment. Dr. Shinar also stated that he believed the fall brought on claimant's symptoms and certainly made them worse.

Based upon his review of the testimony and evidence, the ALJ determined that

> [t]he claimant has failed to meet her burden of proof in this case. The carrier is not found responsible for disability and medical expenses associated with the total knee replacement. Indeed, given Dr. Shinar's testimony that with the level of degeneration of the knee, he would have expected to have seen tears in the meniscus such as he did, and given that the Plaintiff was also symptomatic from these changes, the knee condition, in effect, amounts to an aggravation of a pre-existing condition for which the Defendant owes no additional benefits. See *Calloway County Fiscal Court v. Winchester*, Ky. App., 557 S.W.2d 216 (1997). Pursuant to these findings the Plaintiff has failed to show her condition to be work-related and her claim should be dismissed.

On appeal to the Board, the Board reviewed the medical evidence and the ALJ's opinion and agreed that the evidence did not compel an award of benefits to claimant. However, the Board then addressed the testimony that the fall may have hastened the need for the total knee replacement and found that the ALJ failed to consider all the evidence and to make a finding as to whether the work-related exacerbation was temporary or permanent. Specifically, the Board stated the following:

> Thomas next argues that even though the ALJ rejected Dr. Robinson's testimony as to causation, her contemporaneous office notes documenting an acute change immediately after the fall, including swelling and increased swelling seven days later, cannot be ignored. Thomas further argues that even after Dr. Shinar was made aware of evidence that would support a finding of a pre-existing active condition, he was still of the opinion that the fall hastened the need for total knee joint replacement. Thomas argues the ALJ's opinion was silent on this point and further findings were requested in her petition for reconsideration.
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> Though we are not prepared to say that an award of benefits is compelled, we are of the opinion that additional findings by the ALJ are warranted. Since 1996, Chapter 342 has based partial disability awards on permanent impairment ratings as determined under the AMA *Guides*. For that reason, the Kentucky Supreme Court noted in *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181, 183 (Ky. 2003), that "[a]n exclusion from a partial disability award must be based upon a preexisting impairment." When a work-related injury is superimposed upon a pre-existing active condition that is impairment ratable, the question often becomes whether the work injury produced additional permanent impairment, i.e., a permanent change; or only a temporary worsening of symptoms that ultimately reverts to the pre-injury state. Depending on whether the change

is permanent or temporary dictates the level of income and medical benefits due.

"[T]he burden of proving the existence of a preexisting condition falls upon the employer." *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. App. 2007). Here, without question there is more than sufficient proof that Thomas's knee condition was impairment ratable prior to the injury. Dr. Yelton believed the level of osteoarthritis in the knee justified an impairment of 3% which was preexisting. Furthermore, once the ALJ was convinced the meniscal tears were present prior to the injury Dr. Yelton's additional impairment rating for the meniscal tear might also be viewed as preexisting. Nonetheless, Dr. Robinson's clinical notes following the injury documented a worsening of Thomas's condition and both Dr. Robinson and Dr. Shinar believed the fall was a substantial factor in hastening the need for surgery. Though the ALJ concluded Thomas may have required surgery prior to the injury, he also determined her knee condition was exacerbated. What remains to be determined, and what this Board believes to be an essential finding, is whether the work-related exacerbation was temporary or permanent. We conclude the ALJ failed to make this finding and erroneously failed on petition for reconsideration to address the evidence requested by Thomas that supports her contention that the hastened surgery resulted in additional permanent impairment. *Compare Derr Construction Co. v. Bennett*, 873 S.W.2d 824 (Ky. 1994) and *Finley v. DBM Technologies*, *supra*.

Thomas's final argument is that there is medical proof contained in the record that the nature of her work is responsible for the underlying condition of her knee and the ALJ did not make findings of fact or conclusions of law on this issue. Thomas's argument is unpersuasive. Thomas's original claim was grounded on the theory of an acute trauma to the knee occurring on January 29, 2005. There was no reference or claim for cumulative trauma injury in the Form 101, nor was her claim ever amended to include cumulative trauma. More importantly, cumulative trauma was unmentioned in the

> Benefit Review Conference Order and Memorandum. The ALJ's refusal to address this alternative aspect of Thomas's claim was not error.
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> . . . .
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> For the foregoing reasons, the opinion and award of the ALJ denying benefits is VACATED and this matter is REMANDED for additional findings in conformity with the views expressed in this opinion.

We have reviewed the record, the statutes, and applicable case law, and believe that the Board's reasoning and decision to be proper. While *Derr* dealt with a work-related cumulative trauma situation, the principle that the employer is liable for future medical expenses if the present work injury contributed, at least to some degree, both to the condition and to the resulting disability, applies here. *Derr*, 873 S.W.2d at 827-28.

In her cross-petition for review, Thomas argues that the issue of cumulative trauma injury was tried by express or implied consent of the parties and should have been treated as if raised in the pleadings. Kentucky Rules of Civil Procedure (CR) 15.03. In her brief, Thomas stated "[t]he Board stated that 'there was no reference or claim for cumulative trauma injury in the Form 101,' and that 'cumulative trauma was unmentioned in the Benefit Review Conference Order and Memorandum,' and that therefore the ALJ's refusal to address this issue was not error. While the above quoted statements are true, in that cumulative error was never formally pled, respectfully the Board's conclusion that the ALJ's refusal to

address this issue was not error is incorrect." Thomas's brief fails to quote the Board's entire opinion on this issue. The Board in fact stated:

> Thomas's argument is unpersuasive. Thomas's original claim was grounded on the theory of an acute trauma to the knee occurring on January 29, 2005. There was no reference or claim for cumulative trauma injury in the Form 101, nor was her claim ever amended to include cumulative trauma. More importantly, cumulative trauma was unmentioned in the Benefit Review Conference Order and Memorandum. The ALJ's refusal to address this alternative aspect of Thomas's claim was not error.

Thomas's brief does accurately address several cases that relate to issues tried by express or implied consent of the parties, but they are not applicable to the facts herein. The Board did not err on this issue.

Finally, Thomas argues that KRS 342.730(4) is unconstitutional. However, as she points out, the Kentucky Supreme Court has upheld the constitutionality of the statute and this Court has no authority to change the current law. *See* Rules of the Supreme Court (SCR) 1.030(8)(a).

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT:
Samuel J. Bach Allison B. Rust Henderson, Kentucky	Craig Housman Geordie Garatt Paducah, Kentucky