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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 29, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000811-WC

HOMETOWN CONVENIENCE, LLC — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-000555-WC
WORKERS' COMPENSATION NO. 09-93569

BARBARA MCCOY;
DR. DANIEL KRENK;
HOLSTON VALLEY HOSPITAL;
HONORABLE GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Hometown Convenience, LLC, appeals from a decision of the Court of Appeals which upheld the Administrative Law Judge's ("ALJ") finding that there was insufficient evidence to show Appellee, Barbara McCoy, unreasonably failed to follow medical advice. Hometown argues on appeal that the ALJ applied the wrong legal standard to determine whether it was entitled to the affirmative defense provided in KRS 342.035(3) due to McCoy's failure to follow her doctor's instructions. For the reasons set forth below, we affirm the Court of Appeals.

On March 10, 2009, McCoy injured her right ankle as a result of falling off of a ladder while working for Hometown. Subsequently, on June 4, 2009, McCoy underwent surgery to repair her ankle. The parties reached a settlement regarding the ankle injury. After the ankle surgery, McCoy was restricted by her doctor from putting any more than "toe-touch"[1] weight on her right leg for eight to twelve weeks.

Two weeks after the surgery, McCoy went to the emergency room complaining of right knee pain. She stated that the pain began when her right knee had "given out" a few days earlier. A medical examination found that McCoy's leg was not fractured, but that her patella appeared to be out of place. She underwent knee surgery on October 19, 2009.

McCoy claimed that her knee injury was related to her fall from the ladder and requested that Hometown provide workers' compensation. McCoy contended that she complained of right knee pain immediately after falling off of the ladder, but that due to the severity of her ankle injury, the doctors failed to treat the knee. Hometown refused to pay workers' compensation for the knee injury contending that it was not caused by McCoy's fall from the ladder, but from her failure to follow the doctor's weight restrictions on her right leg. Hometown claimed the affirmative defense provided by KRS 342.035(3). That statute provides that, "[n]o compensation shall be payable for the death or

[1] Dr. Phillip Corbett, an expert witness in this case, stated in his deposition that "toe touch" weight means that the individual does not want to put enough pressure on the leg to "break an egg under your foot. You don't want any pressure on that foot whatsoever."

disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice." Supporting Hometown's contention that McCoy caused the knee injury by placing too much weight on her right leg are the medical reports of Dr. Ronald Fadel and Dr. Phillip Corbett who both found that the injury only could have happened as a result of her ignoring the doctor's restrictions. The two doctors also found no evidence in McCoy's medical records that she complained of knee pain immediately after her fall.

After the taking of evidence and a hearing, the ALJ made the following pertinent findings:

> . . . McCoy did not injure her right knee on March 10, 2009, when she fell from a ladder and injured her right ankle. As the employer points out, there are no complaints of knee problems contemporaneous with the ankle injury.
>
> However, the [ALJ] is persuaded McCoy injured her right knee a few days before June 16, 2009 when her knee gave out.
>
> . . .
>
> The next question therefore becomes whether this knee injury occurred as a result of McCoy's unreasonable failure to follow medical advice. In putting forth this argument, the employer points out McCoy was restricted to toe-touch weight bearing only on the right foot following her ankle surgery. It also points out the opinions of Dr. Fadel and Dr. Corbett indicate McCoy could only have torqued her knee sufficient to cause her injury if she had exceeded her restrictions by putting too much weight on her right foot. Such explanations are also persuasive to the [ALJ].
>
> However, the [ALJ] is not persuaded McCoy 'unreasonably' exceeded her restrictions. According to the record, McCoy was restricted to toe-touch weight bearing only. The question becomes, how much is 'toe-touch' weight bearing? Obviously, it suggests that the patient at least be permitted to touch the toe to the ground, ostensibly without putting any more weight than that on it. The record does not establish why McCoy was putting more than toe-touch weight on her foot. While McCoy may have simply

> unreasonably disregarded her restrictions, it is also entirely possible McCoy unintentionally or accidentally put too much weight on her foot while trying only to toe-touch. Without more evidence on the subject, the [ALJ] is simply not persuaded McCoy unreasonably failed to follow her medical restrictions.

Accordingly, the ALJ found that Hometown was responsible for all reasonable and necessary expenses for McCoy's knee injury. The Workers' Compensation Board and Court of Appeals affirmed. Hometown then filed the present appeal.

I. HOMETOWN FAILED TO PRESENT SUFFICIENT EVIDENCE REGARDING HOW MCCOY INJURED HER KNEE

Hometown argues that the ALJ erred by finding there was insufficient evidence to show McCoy acted unreasonably by ignoring medical advice and placing too much weight on her right leg. Instead of looking for evidence to explain why McCoy failed to follow medical advice, Hometown believes that the ALJ should have applied the definition of what is unreasonable as it relates to a failure to follow medical advice. That definition is whether the proposed treatment is "free from danger to life and health and extraordinary suffering, and according to the best medical or surgical opinion, offers a reasonable prospect of restoration or relief from disability." *See Fordson Coal Co. v. Palko*, 282 Ky. 397, 138 S.W.2d 456 (1940). Because McCoy was awarded benefits for her knee injury, the question before this Court is whether that decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App.1984). A review of the record supports the ALJ's decision.

Teague v. South Central Bell, 585 S.W.2d 425, 428 (Ky. App. 1979), places the burden of proof to claim the KRS 342.035(3)[2] defense on the employer. The employer must show that: 1) the employee failed to follow medical advice and 2) that the failure to follow the medical advice was unreasonable. A third factor is whether the unreasonable failure to follow the medical advice caused the disability in question. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 336 (Ky. App. 1995).

In this matter, there is evidence from Dr. Fadel and Dr. Corbett that McCoy placed more than toe touch weight on her right leg and that this caused the right knee injury. But the burden of proof to claim the KRS 342.035(3) defense is on the employer, and Hometown had to show that McCoy not only failed to follow medical advice but that her failure to do so was *unreasonable*. *Teague*, 585 S.W.2d at 428. Yet, there is no evidence in the record as to what McCoy was doing at the moment her knee gave out and accordingly no evidence that McCoy was acting unreasonably at the time she injured her right knee. Hometown never asked McCoy during her deposition what she was doing at the exact moment her right knee "gave away." Because there is no evidence about the event which injured McCoy's right knee, the ALJ's conclusion that there is no way to know if McCoy was acting unreasonably is logical. We find the ALJ's opinion and award is supported by the record and his interpretation of the law is correct.

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[2] Then codified as KRS 342.035(2).

For the reasons set forth above, the decision of the Court of Appeals is affirmed.

All sitting. All concur.

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