RENDERED: November 7, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-003075-WC

MARK A. JONES — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-95-44994

COX INTERIOR, INC.;
ROBERT E. SPURLIN, ACTING
DIRECTOR OF SPECIAL FUND;
HON. DENIS S. KLINE,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: WILHOIT, CHIEF JUDGE; COMBS and JOHNSON, Judges.

JOHNSON, JUDGE: Mark A. Jones (Jones) petitions for review of an opinion of the Workers' Compensation Board (Board) entered on October 11, 1996, which affirmed the Administrative Law Judge's (ALJ) decision to deny Jones' claim for benefits due to his injury not being work-related. We affirm.

On April 28, 1994, Jones injured his right knee while lifting a door for his employer, Cox Interior, Inc. (Cox). He was taken to the emergency room, treated, and released. He returned to work the next day, performed an easier job for a week, and then

resumed his regular job. He continued to work at Cox until August 22, 1994, without missing a day.

On August 22, Jones voluntarily quit his job at Cox and returned to employment at his father's construction company where he had worked prior to being employed for Cox. When Jones had previously worked for his father's company, he did carpentry work. However, when he returned to his father's business in August 1994, he was not able to do carpentry work because of problems with his knee locking so he drove a truck.

After Jones' injury on April 28, 1994, his knee would lock two to three times a day and his knee would pop 20-30 times per day. However, Jones was able to unlock the knee and he did not seek medical care until a severe knee locking episode occurred on May 2, 1995. Jones testified that when he was getting out of his waterbed on May 2, his knee locked. He stated his knee would not unlock, and he had to go to the emergency room. The hospital notes that were handwritten by Dr. John Mullins, the emergency room physician, state that Jones told Dr. Mullins that he was injured when he stepped on a board that day at work. Based upon x-rays, Dr. Mullins referred Jones to Dr. Thomas Loeb, an orthopedic surgeon. Dr. Loeb's diagnosis was a bucket handle tear of the medial meniscus and in December 1995, Dr. Loeb performed arthroscopic knee surgery on Jones. When Jones was released from medical care, he returned to work for his father's business as a finish carpenter and has had no further knee problems.

On November 1, 1995, Jones filed the claim that is at issue in this action. At the hearing on April 29, 1996, Jones

testified and presented the deposition of Dr. Loeb. Cox presented the depositions of Jones, Dr. Mullins, and Dr. John Nehil, an orthopedic surgeon, who examined Jones for Cox.

The issue in dispute is whether Jones established work-related causation. Dr. Mullins' testimony was based solely on the medical records since he had no independent recollection of the emergency room visit. He stated that he saw Jones in the emergency room at 4:25 p.m. and that Jones told him that he injured his knee by "stepping on a board today at work." Dr. Mullins stated that Jones "gave me a past medical history that was significant for a patellar dislocation." He diagnosed him with a patellar dislocation which had spontaneously unlocked, then released him at 5:30 p.m. Dr. Mullins suggested that Jones see Dr. Loeb.

Dr. Loeb testified that it was his opinion that Jones had no pre-existing condition and had injured his knee while working for Cox on April 28, 1994, when he lifted a door. Dr. Loeb explained that the daily episodes of knee popping and locking which Jones had experienced since the April 28, 1994 injury were classic symptoms of a medial meniscus tear. He stated that the May 2, 1995 episode was merely a continuation of the original injury that had never healed and was not a separate injury. He explained that many people with this condition go for years without surgery, and that Jones was in the emergency room because he could not unlock the knee on that day--not because he had been additionally injured.

Dr. Nehil testified that upon reviewing the records and examining Jones that Jones had suffered a medial meniscus tear. When asked whether the May 2, 1995 episode might have caused such

a tear, Dr. Nehil stated that it may have caused the tear if there had been some twisting motion involved. There was no proof that a twisting motion occurred on May 2, 1995.

The ALJ's May 28, 1996 opinion stated in part as follows:

> The threshold issue presented is whether the Plaintiff's current condition is related to his April 28, 1994 knee injury. The Plaintiff, of course, bears the burden of proof and the attendant risk on non-persuasion in cases of this nature.
>
> Based upon the testimony of Dr. Mullins, and the Defendant's Exhibit Number One (1) to his deposition [the emergency room record], I will conclude that the Plaintiff suffered an injury while working for his father on May 2, 1995[,] when he stepped on a board. I believe it was this incident which led to his current problems, and his claim for any additional workers[']compensation benefits against the Defendant, Cox Interior, Inc., will be dismissed.

In the Board's October 11, 1996 opinion, the Board stated in part as follows:

> It was Jones' burden of proof to show causation and the employer is not necessarily required to provide countervailing evidence that there was twisting of his leg in the 1995 incident. The ALJ can simply disbelieve Jones' version of how his knee problems suddenly increased. As long as it was reasonable for the ALJ to conclude a second superseding injury occurred in May of 1994 [sic], there is no compelling evidence supporting the Plaintiff. The testimony of Dr. Nehil certainly stated that this was a definite possibility, given the assumption that there was a twisting type of injury. The evidence is conflicting, although the medical opinions do not necessarily contradict one another. Given the fact that a presumably reliable piece of evidence, the emergency room record, contains an entirely different account of the 1995 incident as that attested to by Jones, not only is Jones' credibility called into question but there is a reasonable basis to support the ALJ's conclusion. Given the significant

> change in symptomatology, ability to work[,] and rapid deterioration of the knee as compared with his condition before May 1995 when he was working full-time and not missing any work, not only is his credibility in question, but, in conjunction with Dr. Nehil's testimony there is substantial evidence in the record from which the ALJ could find that there was a superseding injury and, hence, no causation.

The Board further noted that when evidence is conflicting the ALJ may believe some parts of the evidence and disbelieve other parts even if it comes from the same witness or the same party's proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

The function of the Court of Appeals in reviewing the Board's decision "is to correct the Board only where . . . the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Where the party with the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compelled a different result. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

Jones strongly argues that "the absence of a twisting event renders Dr. Nehil's testimony worthless as concerning causation of an injury that occurred in May, 1995[.]" However, as the Board correctly noted, it was within the ALJ's authority to find that a May 1995 work incident did occur and that the May 1995 work incident was the cause of the injury. The emergency room report and Dr. Nehil's testimony constitute substantial evidence in support of this finding. It was reasonable for the ALJ to infer that by stepping on a board Jones twisted his knee. While there is substantial evidence that would have supported a finding of causation, we cannot say that this evidence compelled a finding of causation. We affirm the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Ben T. Haydon, Jr.
Bardstown, KY

BRIEF FOR APPELLEE,
COX INTERIOR, INC.:

Hon. Gregory Y. Dunn
Horse Cave, KY

BRIEF FOR APPELLEE,
SPECIAL FUND:

Hon. Judith K. Bartholomew
Louisville, KY