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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000203-WC

BETTS USA, INC. — APPELLANT

ON APPEAL FROM COURT OF APPEALS
V. CASE NOS. 2009-CA-001474-WC AND 2009-CA-001640-WC
WORKERS' COMPENSATION BOARD NO. 07-98477

DEBBIE MURSKI;
HONORABLE JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND 2010-SC-000221-WC

DEBBIE MURSKI — CROSS-APPELLANT

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V. CASE NOS. 2009-CA-001474-WC AND 2009-CA-001640-WC
WORKERS' COMPENSATION BOARD NO. 07-98477

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MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board reversed an Administrative Law Judge's (ALJ's) finding that the claimant did not sustain a work-related left knee injury and remanded for the entry of an award of medical benefits. The Board affirmed insofar as the ALJ failed to award permanent income benefits. The Court of Appeals affirmed.

Appealing, the employer asserts that the Board erred by substituting its judgment and finding that the claimant sustained a work-related injury that entitled her to the disputed medical benefits. The claimant asserts in a cross-appeal that the Board erred by failing to order the ALJ to determine on remand whether she has reached maximum medical improvement (MMI) and, if she has, to address her permanent impairment rating.

We affirm. The evidence compelled findings that the claimant sustained a work-related left knee injury; that it was more than a temporary sprain or strain; and that it caused her pre-existing dormant degenerative condition to become symptomatic and culminate in surgery. Thus, the surgery and other reasonable and necessary medical treatment were compensable. The ALJ determined reasonably that the claimant was not entitled to permanent income benefits.

The claimant worked for the defendant-employer as an injection mold technician. She spent most of the day on her feet, overseeing machines that manufactured toothpaste tubes. She evaluated production quality, assisted in packaging the finished product, and lifted boxes that weighed from fifteen to

thirty pounds boxes throughout the day. She also spent about two hours per day on paperwork.

The claimant volunteered to perform maintenance work on all fourteen presses during the 2007 Christmas shutdown. Her duties throughout the shutdown period required extensive kneeling, crawling, and crouching as well as raising and lowering her body in order to clean the machines. She testified that her left knee began to feel sore and that she heard a loud "pop" and experienced pain in her left kneecap while getting up from a kneeling position on January 8, 2007. She informed her supervisor immediately and was sent to St. Elizabeth Business Health Center.

The claimant testified that she had never been treated for left knee problems before January 8, 2007 except for a viral infection about six years earlier. Records from St. Elizabeth Business Health Center indicate that she sought treatment on January 8, 2007 for intermittent pain in her left knee that she rated at 3 on a scale of 10. She reported a gradual increase in left knee pain while crawling and squatting at work, which grew worse when she walked or bent the knee. She stated that the knee made a "crunchy" noise when she walked. Dr. Kunkler conducted a physical examination that revealed signs of mild tenderness in the anterior knee, more on the medial aspect, but no bruising, abrasions, swelling, or effusion. He noted that the knee was stable and that extension was normal but flexion was 60 degrees. Dr. Kunkler diagnosed a work-related knee strain for which he prescribed pain medication and recommended that she use a knee brace and work on range of motion as

her symptoms improved. He attributed the claimant's complaints to her work activities and assigned restrictions.

Notes from a follow-up exam on January 15, 2007 indicated signs of tenderness but no swelling in the pre-patellar bursa, signs of tenderness in the patellar tendon, and limited range of motion. Flexion was 100 degrees. The diagnosis remained a knee strain.

The claimant remained off work from January 9, 2007 through January 22, 2007, during which time the employer paid voluntary temporary total disability (TTD) benefits. She returned to Dr. Kunkler on February 21, 2007, at which time he noted signs of mild tenderness in the left anterior knee. Range of motion and gait were normal, and the knee was stable. He diagnosed a knee strain with persistent pain and possible PFS (patellofemoral syndrome) and noted her wish to continue performing regular duty work.

Dr. Larkin began treating the claimant in March 2007 on referral from Dr. Kunkler. His treatment notes indicate that she complained of experiencing pain and catching in the left knee since January 8, 2007 but was unsure what caused it. Physical examination of the left knee revealed signs of focal tenderness medially as well as a positive McMurray's, Apley's, and flexion compression medially, none of which were present in the right knee. Dr. Larkin thought initially that she had torn the medial meniscus and ordered an MRI. The radiologist's report noted a history of trauma with medial pain and reported findings that included a lateral femoral condyle bone bruise, patellofemoral degenerative changes, and a lateral subluxation of the patella.

Dr. Larkin's notes from March 21, 2007 indicate that the claimant continued to complain of pain when ascending and descending stairs, kneeling, squatting, and bending. He noted that the majority of the pain was anteromedial and recorded findings of positive pain with flexion compression past 120 degrees; an equivocal Apley's; and diffuse, non-specific pain with McMurray's. He noted explaining to the claimant that she was "suffering from patellofemoral [osteoarthritis] directly related to her job."

The claimant missed work from March 14 until April 29, 2007, during which time her employer again paid TTD. Her condition continued to deteriorate after she returned to work. Moreover, cortisone injections and other conservative treatment failed to relieve her symptoms.

Dr. Larkin's findings on March 14, 2007 included pain with patella compression and a positive flexion compression test but no true Apley's or McMurray's. They remained the same as of July 30, 2007. Noting the duration of the claimant's symptoms and the presence of "an underlying recurrent patella subluxation pattern," he recommended arthroscopic surgery.

On September 28, 2007 Dr. Larkin performed surgical procedures on the left knee to address patellar chondromalacia[1] as well as an extensor mechanism malalignment. His post-operative notes indicate that arthroscopic surgery revealed and he repaired a focal osteochondral defect of the lateral facet that extended onto the medial facet, which he described as being a "full

[1] TABER'S CYCLOPEDIC MEDICAL DICTIONARY 395 (19TH ED. 2001) defines chondromalacia as being a "[s]oftening of the articular cartilage, usually involving the patella.

thickness grade 3 change without exposed bone." In a separate procedure he realigned the left patella and reconstructed the extensor mechanism.

Although the claimant's symptoms improved initially after the surgery, they worsened over time and she did not return to work. In February 2008 Dr. Larkin noted her complaint that her left knee pain had become nearly unbearable. Yet, the post-operative MRI "looked absolutely fantastic." He recommended that she see a neurologist for pain management.

Dr. Burger saw the claimant in March 2008 concerning complaints of sharp and throbbing pain that she rated at six out of a possible ten. He compared the pre- and post-surgical MRIs and conducted a physical examination, which indicated that motion was good with moderate patellofemoral clicking and that there was diffuse quadriceps atrophy. He recommended physical therapy and a repeat course of anti-inflammatory medication and possibly cortisone injections. If they failed, he suggested viscosupplementation for treatment of the underlying degenerative condition.

In April 2008 Dr. Larkin noted a significant amount of patellofemoral crepitus from forty to sixty degrees but an otherwise normal exam. He stated that they would try viscosupplementation injections and recommended aquatic therapy. A final note from June 2008 indicates that the injections failed to help and that the remaining option was pain management.

Dr. Wunder evaluated the claimant in June 2008. He opined that she had an acute onset of symptoms while kneeling at work, which substantially aggravated the pre-existing chondromalacia and lateral subluxation in her

knee. He attributed her present symptoms to the injury at work, noting that her medical records described the incident and that imaging studies verified the presence of bone bruising, which would support the occurrence of "fairly significant trauma to the knee." He did not think that she had reached MMI unless treatment was discontinued, in which case she would be at MMI with a permanent impairment rating of 7%.

Dr. Bender, an orthopedic surgeon, evaluated the claimant for the employer in May 2008. He identified patellofemoral abnormalities in both knees. Although he noted that she appeared to have suffered a left knee sprain or strain on January 8, 2007, he "[did] not believe the event resulted in a harmful change in the human organism supported by objective medical findings." Noting that the chronic degenerative changes shown on the March 2007 MRI would have existed before the January 2007 incident at work, he opined that the incident did not necessitate the surgery performed by Dr. Larkin and did not require further treatment. He considered the surgery and present medical treatment to be appropriate medically but attributed the need for them to the claimant's pre-existing degenerative changes and body habitus. He stated that she could return to the work she performed before the January 2007 incident and required no additional treatment for its effects.

Dr. Bender was deposed in September 2008. When asked whether the surgical treatment was reasonable, necessary, and related to "the episode she described on January 8, 2007," he stated that it was "appropriate to perform a diagnostic arthroscopy" but that the procedure performed to adjust the

position of the claimant's patella addressed unrelated pre-existing conditions. Noting that she was deconditioned, about eighty pounds overweight, had bilateral patellofemoral disease, and significant valgus in both knees,[2] he stated that the positioning of her patella resulted from her body habitus and not her work activities of January 8, 2007. He could not say whether the pre-existing changes were more advanced in the left knee than in the right before surgery was performed.

Dr. Bender disagreed with Dr. Wunder's opinion that the claimant had reached MMI with respect to her left knee. He also took issue with the fact that Dr. Wunder had assigned an impairment rating based on an antalgic gait, noting that neither he nor Dr. Larkin or Dr. Burger found antalgia. He stated that his evaluation showed "some suggestion of symptom embellishment." He testified that viscus supplementation injections, such as those Dr. Larkin performed, are administered to repair the cartilage in arthritic joints and are not performed for an acute injury.

When cross-examined, Dr. Bender stated that he found no clinical basis to attribute a bone contusion to the January 2007 event because the claimant had no external trauma as a result of the event. He considered the MRI findings to be more consistent with a stress reaction due to the claimant's underlying arthritic changes. He acknowledged that nothing in the medical records suggested she had ongoing symptoms in her left knee before the

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[2] TABER'S at 2206 indicates that valgus is a deformity "in which the most distal anatomical part is bent outward and away from the midline of the body" and gives knock knee as an example.

incident at work. He stated that he did not consider her work activities on January 8, 2007 to be "traumatic" and that arising from a kneeling position did not support the acute onset of symptoms in the knee. Dr. Bender acknowledged, however, that a strain or sprain is an injury and can cause an arthritic condition to be symptomatic if it is severe enough.

When asked how he accounted for the sudden presence of a symptomatic condition in the left knee after the work-related event, Dr. Bender testified that the claimant had a "smoldering" knee condition; "crossed the threshold of some disability;" and sought treatment "for what appears to be chronic degenerative changes." He stated that he could identify on the initial MRI scan "no significant injury or traumatic earmarks related to the event of January 8, 2007." He acknowledged that it was the only event in her recent history that could account for the onset of symptoms but stated on re-direct examination that he could not explain the MRI finding of a bone bruise short of direct trauma to the posterolateral aspect of the left knee.

The employer submitted the report of a physical capacity evaluation conducted by Rick Pounds on August 15, 2008. Pounds indicated that no physical demand level could be estimated because the claimant refused to participate in most of the evaluation. He noted behavior consistent with symptom magnification and recommended that issues of secondary gain be addressed.

The employer paid all of the claimant's medical bills until the surgery. As listed by the parties, the contested issues included causation, the extent

and duration of disability, pre-existing impairment, and the employer's liability for further medical treatment. The employer raised three major arguments.

First, the employer asserted that the claimant suffered from a bilateral degenerative knee condition before the January 2007 incident and failed to prove that she sustained a work-related injury. The employer argued that KRS 342.0011(1) requires work to be the proximate cause producing a harmful change in the human organism; thus, symptoms that arise at work but result from a non-work-related condition are not compensable.[3] The employer also argued that medical records from the day of the alleged injury contained no objective medical findings to document a harmful change.

Second, the employer asserted that the claimant's work caused no more than a temporary aggravation of her non-work-related condition and, thus, that it was liable for no more than temporary medical benefits.[4] The employer argued that the surgery and proposed therapy related to the underlying degenerative condition rather than the effects of the January 2007 incident.

Third, the employer argued that the record contained no credible evidence that the January 2007 incident produced a permanent impairment rating. The argument focused on attacking Dr. Wunder's finding of an antalgic gait, which formed the basis for the impairment rating he assigned.

The ALJ found Dr. Bender to be most credible with respect to causation. Relying on his opinion that the objective medical findings established only the

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[3] *Pierce v. Kentucky Galvanizing Co. Inc.*, 606 S.W.2d 165 (Ky. App. 1980).

[4] *Robertson v. UPS*, 64 S.W.3d 284 (Ky. 2001).

presence of abnormalities in the claimant's knee that resulted from her body habitus, the ALJ determined that she did not sustain an injury as defined in KRS 342.0011(1). The ALJ noted that the claimant may have suffered some temporary pain while working but that no evidence showed her work aroused the underlying knee condition into disabling reality. Noting that the treatment notes through February 21, 2007 contained "no objective medical findings" but did contain a diagnosis of knee strain, the ALJ found that the employer was not responsible for medical expenses incurred after that date and attributed the need for surgery entirely to the pre-existing, non-work-related condition. Neither party petitioned for reconsideration or requested any specific findings.

The Board reversed the decision, holding that the evidence compelled a finding that the claimant sustained a work-related injury that resulted from the arousal of the pre-existing dormant degenerative condition into disabling reality. The Board also determined that Dr. Bender's testimony compelled an award for all of the medical expenses incurred in treating the claimant's left knee because not only did he testify that she sustained a work-related sprain or strain on January 8, 2007, he acknowledged that no other event would account for her subsequent problems. Convinced that the claimant failed to prove a permanent impairment rating from the injury, the Board determined that the ALJ did not err in failing to award permanent income benefits. The Court of Appeals affirmed.

The employer continues to assert that the Board usurped the ALJ's role as fact-finder by determining that the claimant sustained a permanent work-

related injury. Characterizing the ALJ's finding inaccurately, the employer reasons that substantial evidence supported the finding that the claimant sustained a work-related left knee strain for which TTD and medical benefits were payable only through February 21, 2007, when she was released to return to work without restrictions. What the ALJ found, however, was that the claimant "did not sustain an injury as defined under the Act" and that "[t]here was no evidence of an arousal of the conditions of Plaintiff's knee into disabling reality."

Contrary to the employer's assertion, the evidence compelled a finding that the claimant sustained a work-related injury, *i.e.*, a work-related harmful change in the human organism. Although KRS 342.285 designates an ALJ as the finder of fact, a finding that is unreasonable under the evidence may be reversed on appeal.[5] Although the findings were minimal, this is not a case in which no objective medical findings supported the claimant's complaints of experiencing knee pain when arising on January 8, 2007 after kneeling, crawling, and crouching while cleaning machinery.[6] On the day of the injury Dr. Kunkler noted tenderness in the anterior knee and noted that flexion of the knee was 60 degrees although extension was normal, attributing the findings "to work activities." Subsequent treatment notes document additional objective medical findings that Dr. Kunkler and Dr. Larkin attributed at least in part to

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[5] *Lizdo v. Gentec Equipment*, 74 S.W.3d 703, 705 (Ky. 2002); *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

[6] Dr. Bender's statement to the contrary was a medical opinion. What constitutes an objective medical finding for the purpose of proving a harmful change in the human organism under KRS 342.011(1) and (33) is a legal question.

the activity required by the claimant's work. Even Dr. Bender concluded from the initial treatment notes that she sustained a knee strain or sprain on January 8, 2007 and admitted that a strain or sprain was an injury.

Although the ALJ found Dr. Bender to be more credible than the other medical experts, we agree with the Court of Appeals that to believe the strain or sprain that occurred on January 8, 2007 had no connection to the persistent knee problems that culminated in surgery "strains credulity." Dr. Bender insisted that the claimant's symptoms and surgery related solely to her pre-existing knee condition, but he admitted that her bilateral knee condition was "smoldering" before January 8, 2007 and that a strain or sprain, if severe enough, can cause an arthritic condition to become symptomatic. He described the event that occurred on January 8, 2007 as rising from a kneeling position, failing to consider that she had also been engaged in extensive kneeling, crawling, and crouching. Although he stated that the surgery was not "necessitated" by the event he described and although he did not consider the event to be "traumatic,"[7] he acknowledged that it was the only event in her recent history to account for the sudden onset of symptoms.

Drs. Kunkel and Larkin considered all of the activities the claimant performed on January 8, 2007. Dr. Kunkel characterized her initial symptoms as being work-related and Dr. Larkin attributed her ongoing problems and the need for surgery to the effects of "her work activities." Considered as a whole,

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[7] Dr. Bender expressed a medical opinion. A traumatic event for the purposes of Chapter 342 includes even imperceptible minitrauma. *See Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999).

the evidence compelled a finding that the work-related activities caused more than a temporary knee strain that resolved by February 21, 2007. It compelled a finding that they aroused the claimant's pre-existing dormant knee conditions, causing symptoms that persisted and culminated in surgery. Thus, disputed medical expenses are compensable.

Dr. Wunder based the permanent impairment rating that he assigned on an antalgic gait. The ALJ noted specifically that no other physician reported such a gait and noted earlier, when reciting the evidence, Dr. Bender's statement that she did not have antalgia. Thus, we agree with the Board and the Court of Appeals that the ALJ rejected Dr. Wunder's testimony implicitly.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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