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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000361-WC

AMERICAN NURSING CARE, INC. — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002093-WC
WORKERS' COMPENSATION BOARD NO. 06-88542

MARY ANN JENKINS;
HONORABLE DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined in this medical fee dispute that the need for the proposed surgery resulted from the claimant's work-related injury. The Workers' Compensation Board (Board) affirmed the decision and the Court of Appeals affirmed the Board. The employer appeals, asserting that the ALJ erred by finding the procedure to be compensable in the absence of sufficient evidence of medical causation.

We affirm. The finding of causation was reasonable under the evidence and properly affirmed on appeal.

The claimant worked for the defendant-employer as a home health nurse. She filed an application for benefits in which she alleged two work-related

injuries. At issue presently is a left shoulder injury sustained in a fall that occurred on February 5, 2005.[1] After being treated initially at the Concentra Medical Center, the claimant came under the treatment of Dr. Hoblitzell, an orthopedic surgeon, in March 2005.

Dr. Hoblitzell diagnosed a chronic cervicothoracic strain, bilateral shoulder strain, and left elbow strain/contusion. A bone scan that he ordered suggested arthritis in the shoulders. His records indicate that the initial shoulder complaints were diffuse and appeared to concern the trapezial area and scapula. He noted in February 2006, however, that the claimant's pain seemed to be localizing in the subacromial region of the left shoulder and that she had a positive impingement sign. Concerned that she might be developing a small rotator cuff tear, he ordered an MRI that revealed some tendinitis but no full thickness tear as of March 2006. He noted on June 15, 2007 that the claimant experienced a chronic neck and left shoulder strain that exacerbated underlying degenerative changes. She exhibited pain over the subacromial bursal region of the left shoulder and had a mildly positive impingement sign.

The claimant also submitted a report from Dr. Bender, an orthopedic surgeon, who examined her and reviewed her medical records in September 2006. He opined that the February 5, 2005 event caused a cervicothoracic strain and a left shoulder acromioclavicular joint (*i.e.*, AC joint) sprain with a resulting rotator cuff tendinopathy that produced a loss of range of motion and

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[1] The back and neck conditions alleged to have resulted from the fall are not at issue. Nor is the knee injury that is alleged to have resulted from an earlier incident.

warranted a 3% permanent impairment rating. He limited her to lifting no more than 15 pounds using both arms and imposed various other restrictions aimed at "preserv[ing] the left shoulder."

The employer submitted an evaluation by Dr. Hogya, a board-certified medical evaluator, who found no basis for any ongoing left shoulder restrictions. He stated that the MRI showed no evidence of an impingement, a tear, or muscle atrophy and that the biceps and glenoid labrum were intact. He characterized the slightly increased signal intensity in the supraspinatus as being a normal age-related finding that did not suggest any acute tendinitis or a rotator cuff injury and stated that the EMG showed no neurological deficits. He assigned a 0% impairment rating to the injury and stated that the injury required no ongoing medical or surgical treatment. He recommended only the home application of ice and heat and stretching, flexibility, and low impact exercises, including Therabands.

Sometime after the benefit review conference, the parties agreed to waive the scheduled hearing and place the claim in abeyance. An ALJ approved a subsequent agreement to settle the claimant's entitlement to income and vocational benefits for the shoulder injury on June 21, 2007. The agreement reserved her right to medical expenses.

The claimant's shoulder complaints continued after the settlement. In November 2007 Dr. Hoblitzell ordered left shoulder MRI scans, which showed "increased signal within the supraspinatus tendon felt most likely to represent tendinopathy." He diagnosed acromioclavicular arthritis and an aggravation of

the claimant's rotator cuff tendinitis with no significant tear. On August 8, 2008 Dr. Hoblitzell noted that the claimant's left shoulder symptoms dated to the February 2005 injury and had not improved with conservative treatment. He referred her to Dr. Heis for a second opinion concerning the advisability of surgical intervention. After examining the claimant Dr. Heis recommended and sought pre-authorization for a left shoulder arthroscopic evaluation with subacromial decompression and Mumford procedure and possible glenohumeral debridement.

The employer submitted the request to Dr. Wolens, who reviewed the claimant's medical records, noted that her shoulder symptoms had changed significantly in the past three years, and recommended denying pre-authorization. He opined in September 2008 that the abnormal MRI signal within the rotator cuff was neither unusual nor pathological for a woman her age. He also stated that if the claimant did have a true AC joint arthropathy that required a Mumford resection, the condition was unrelated to the February 2005 injury. The employer then filed the motion to reopen and medical fee dispute that are presently at issue.

The claimant submitted a report from Dr. Heis, who questioned Dr. Wolens' qualifications to assess the need for orthopedic surgery.[2] Dr. Heis also pointed to various inaccuracies in Dr. Wolens' summary of the claimant's medical record and took issue with his conclusions.

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[2] Dr. Wolens' Medical Index Number at the Department of Workers' Claims is 8224, which falls within the family practice category.

In a subsequent report Dr. Wolens emphasized that the claimant did not exhibit a clinical pattern that warranted surgery when injured in February 2005. He concluded that her present rotator cuff tendinopathy and AC joint pain represented new findings that might warrant the need for arthroscopy but were unrelated to the February 2005 accident.

The ALJ found the treating, board-certified orthopedic surgeons to be more reliable and persuasive than Dr. Wolens. The ALJ noted that he was not an orthopedic surgeon, had not examined the claimant, and had overlooked the fact that Dr. Hoblitzell had treated the claimant continuously for left shoulder pain since the injury. Moreover, Dr. Hoblitzell noted on June 15, 2007 that the injury had produced a chronic shoulder strain that exacerbated underlying degenerative changes. Then the November 2007 MRI revealed the condition for which surgery was recommended. The ALJ concluded from the records of Drs. Hoblitzell and Heis that the February 2005 injury caused a chronic left shoulder strain and aroused degenerative changes, which produced the need for the arthroscopic procedure recommended by Dr. Heis."

Having failed to convince the Board or the Court of Appeals, the employer persists in arguing that the claimant failed to produce substantial evidence of medical causation to show that the need for the proposed surgery resulted from the February 2005 injury. The employer maintains that the claimant's experts failed to refute Dr. Wolens' opinion as to causation and, thus, that the ALJ erred in disregarding it. We disagree.

KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases with the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence.[3] Substantial evidence of a disputed fact is evidence sufficient to permit a reasonable finding for the proponent.[4] The "substantial evidence" test concerns the weight of evidence necessary to support a finding for the party with the burden of proof on a factual issue; whereas, the "compelling evidence" test concerns the weight of evidence necessary to require a finding for the party with the burden of proof.[5] When the parties present conflicting evidence on a matter relevant to the outcome of their dispute, the ALJ must weigh their evidence and determine which is more persuasive.

The employer had the burden in this medical reopening to prove that the proposed surgery was unreasonable or unnecessary.[6] The claimant had the burden to prove causation, *i.e.*, that the condition for which she sought surgery resulted from the work-related injury.[7] She succeeded in doing so. Thus, the employer's burden on appeal was to show the decision to be unreasonable because no substantial medical evidence supported it. The employer

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[3] *See Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

[4] *Id.*

[5] *See Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

[6] *Mitee Enterprises v. Yates*, 865 S.W.2d 654, 655 (Ky. 1993).

[7] *Jones v. Newberg*, 890 S.W.2d 284, 285 (Ky. 1994).

maintained that medical causation is a matter for the medical experts[8] and that Dr. Wolens' opinion was unrebutted.

Dr. Wolens stated clearly that any need for surgery did not result from the February 2005 injury, but his testimony was not unrebutted. Evidence found in treatment notes from Drs. Hoblitzell and Heis, both of whom were orthopedic surgeons, provided the ALJ with a reasonable basis to infer that they attributed the need for the proposed surgery to the February 2005 injury. Although their notes make references to the claimant's "history," nothing indicates that she reported an inaccurate history of the mechanism of her injury or symptoms. The fact that Dr. Hoblitzell treated her from the outset supports the accuracy of the post-injury medical history that is recorded in his notes.

Dr. Hoblitzell's notes indicate clearly that the claimant's left shoulder complaints began with the February 2005 incident that produced what he diagnosed at the time as a neck and shoulder strain. They also indicate that what began as diffuse shoulder complaints became chronic; localized in the rotator cuff and subacromial region by February 2006; and persisted at reopening. Exercising the prerogative of the fact-finder, the ALJ found the claimant's experts to be more persuasive than Dr. Wolens because he was not an orthopedic surgeon; did not examine the claimant; and failed to consider that Dr. Hoblitzell had treated her continuously for left shoulder pain since the

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[8] *Hill v. Sextet Mining Corporation*, 65 S.W.3d 503, 507 (Ky. 2001).

injury. The ALJ inferred reasonably from the treatment notes that Drs. Hoblitzell and Heis attributed the need for left shoulder surgery to the work-related injury.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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