

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

# Supreme Court of Kentucky

2010-SC-000582-WC

MAGOFFIN COUNTY  
BOARD OF EDUCATION

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2009-CA-002128-WC  
WORKERS' COMPENSATION NO. 07-72814

DELORES OWENS;  
HONORABLE JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

An Administrative Law Judge (ALJ) found that the claimant's need for total shoulder replacement surgery resulted from her work-related shoulder injury superimposed upon a pre-existing degenerative condition. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer continues to assert that no substantial evidence supported the finding of a causal relationship between the need for shoulder replacement surgery and the claimant's injury.

We affirm. The ALJ acted within the authority granted a fact-finder and rendered a decision that the medical evidence supported.

The claimant was born in 1947 and has a twelfth-grade education. She began working for the defendant-employer in 1995 as an instructional aide. She sought workers' compensation benefits for neck, left shoulder, and left knee injuries that resulted from a slip-and-fall accident that occurred while she was working on October 9, 2007. Only the left shoulder condition is at issue presently, more specifically, the extent to which her present condition and need for surgery resulted from the work-related fall rather than her pre-existing degenerative condition.

The record indicates that in July 2007 the claimant sought treatment from Dr. Mary Ireland, an orthopedic surgeon, complaining of left shoulder pain and a limited range of motion. Dr. Ireland referred the claimant to Dr. Grant, who injected the shoulder with cortisone. Nothing indicated that future shoulder surgery was contemplated.

The claimant testified that her symptoms resolved completely after the injection and that she was able to move her left arm freely. She stated that she did not seek further treatment or experience shoulder pain again until after the work-related accident. She described the shoulder as being achy and sore immediately after the accident but stated that the discomfort developed gradually into a severe, steady pain that radiated into her neck and made it difficult to raise and use her left arm.

After learning that the physician she saw initially was out of the network included in her employer's insurance plan, the claimant sought treatment with Dr. Albaree on October 18, 2007 for complaints of neck and left shoulder pain

that she related to the fall at work. X-rays revealed moderate degenerative changes in the glenohumeral joint with hypertrophic changes in the humeral head. Dr. Albaree released the claimant to light duty on October 25, 2007. A left shoulder MRI scan performed in November 2007 showed a tear in the supraspinatus tendon as well as severe osteoarthritic changes in the shoulder. It also showed joint effusion, a probable small contusion or area of osteonecrosis of the humeral head, and focal fluid in the bicipital tendon sheath, which was suggestive of tendinitis. Dr. Albaree noted in May 2008 that he had treated the claimant with pain and anti-inflammatory medication as well as physical therapy, all of which met with little success.

Dr. Best evaluated the claimant on the employer's behalf in June 2008. He noted a history of severe pre-existing degenerative changes in the left shoulder but concluded that the work-related fall caused a left rotator cuff tear from which she had reached maximum medical improvement (MMI) and returned to her baseline status. He considered the claimant to be fully capable of performing her previous duties with the exception of lifting more than 10 pounds. He attributed the need for joint replacement surgery to the pre-existing degenerative condition rather than the injury; did not consider her to be a candidate for total joint replacement surgery due to the torn rotator cuff; and did not consider her to be a candidate for rotator cuff surgery due to the severe degenerative arthritis in her glenohumeral joint. Dr. Best assigned a 7% permanent impairment rating based on loss of shoulder range of motion.

Dr. Sajadi evaluated the claimant on August 26, 2008 on referral from Dr. Ireland. As recorded in his notes, the claimant reported that she received a cortisone shot in the left shoulder in July 2007 for arthritis and that she was “relatively asymptomatic” and had “full motion if not normal motion in that shoulder prior to the fall.” Dr. Sajadi examined her and reviewed her medical records, interpreting the MRI as showing a partial thickness supraspinatus tear and possible coexistent rotator cuff tear. He diagnosed glenohumeral arthrosis as well as a possible left rotator cuff tear. Dr. Sajadi attributed most of her pain to the arthritic condition and thought that anything less than a shoulder replacement, with or without a rotator cuff repair, would treat her condition inadequately.

Dr. Nadar evaluated the claimant in November 2008. Having examined her and reviewed medical records from Drs. Albaree, Ireland, Jenkinson, and Sajadi, he diagnosed a left shoulder strain with rotator cuff tear and degenerative arthritis in the left glenohumeral joint. He attributed her present complaints to the work-related injury; found her to be at MMI secondary to conservative treatment; but thought that she probably would need both rotator cuff repair and total joint replacement surgery. He assigned a 10% permanent impairment rating “secondary to this claim,” apportioning half to the pre-existing degenerative arthritis.

Dr. Jenkinson evaluated the claimant on her employer’s behalf in July 2009. He noted that she had what he described as a “markedly decreased” range of motion in July 2007 and was diagnosed with osteoarthritis. He opined

that the work-related fall might have produced a “transient increase” in her left shoulder symptoms but that it “should have resolved within three to four weeks.” He attributed her present symptoms entirely to her pre-existing, advanced glenohumeral osteoarthritis to which he assigned a 15% impairment rating. He thought that she would benefit from shoulder replacement surgery, the need for which he attributed entirely to the arthritic condition. He did not think that she would benefit from surgery to repair what he characterized as being a minor rotator cuff tear. Interpreting Dr. Nadar’s report as indicating that the 5% impairment rating apportioned to the October 2007 injury resulted from the rotator cuff tear, Dr. Jenkinson stated that his own examination revealed no evidence of a rotator cuff tear that contributed to the claimant’s present symptoms or accounted for part of her impairment rating.

The claimant continued to work when her claim was heard but with lifting restrictions. She testified that neither physical therapy, nor injections, nor the prescribed medications relieved her symptoms. The contested issues included, among other things, whether the need for total shoulder replacement surgery resulted from her injury.

Characterizing Dr. Nadar as being “a respected orthopedic surgeon,” the ALJ found his opinions that the claimant’s present complaints and half of her permanent impairment rating resulted from the injury to be “more convincing in light of the credible history offered by the [claimant] herself.” The ALJ concluded from the testimonies of Drs. Nadar and Sajadi that the rotator cuff and total shoulder replacement surgeries were compensable as they were

reasonable and necessary treatment for the effects of the injury superimposed upon the pre-existing degenerative condition. Again relying on Dr. Nadar, the ALJ found that the claimant's permanent impairment rating was 10%, half of which resulted from the injury and half from the pre-existing degenerative condition.

The employer's petition for reconsideration requested additional findings of fact. The first request concerned evidence in Dr. Sajadi's notes from August 28, 2008, which the employer viewed as showing that the claimant's left shoulder condition was not completely dormant and asymptomatic before the injury. The second concerned what portions of the records of Drs. Nadar and Sajadi the ALJ relied upon to find that the injury resulted in the need for shoulder replacement surgery. Denying the request as being no more than a re-argument of the merits, the ALJ noted that surgery was not recommended until after the claimant's injury; that her condition did not return to its prior status after the injury; and that Dr. Nadar attributed the claimant's complaints to the combined effects of her injury and pre-existing condition.

The employer maintains on appeal that no substantial evidence rebutted the opinions of Drs. Best and Jenkinson and supported the finding of causation with respect to shoulder replacement surgery. The employer asserts that only Drs. Best and Jenkinson addressed the causal relationship between the need for the procedure and the October 2007 injury specifically. Moreover, both opined that there was no causal relationship and the claimant failed to offer a specific medical opinion to the contrary.

Relying on Dr. Sajadi's August 26, 2008 note, the employer argues that the claimant's arthritic condition could not properly be characterized as being a pre-existing dormant condition that the injury caused to be disabling. It also argues that the ALJ lacked the necessary medical expertise to infer the requisite causal relationship simply because Dr. Nadar reported that the claimant's injury caused her present symptoms and half of her impairment rating. Relying on Dr. Jenkinson's interpretation of Dr. Nadar's report, the employer argues that the 5% impairment Dr. Nadar attributed to the injury resulted from the torn rotator cuff.

### **I. STANDARD OF REVIEW.**

The claimant bore the burden of proof and risk of non-persuasion before the ALJ with regard to every element of her claim.<sup>1</sup> KRS 342.285 provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and, together with KRS 342.290, prohibits the Board or a reviewing court from substituting its judgment for the ALJ's "as to the weight of evidence on questions of fact." Thus, the ALJ has the sole discretion to determine the quality, character, and substance of evidence.<sup>2</sup>

An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the

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<sup>1</sup> See *Roark v. Alva Coal Corporation*, 371 S.W.2d 856 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984); *Snawder v. Stice*, 576 S.W.2d 276 (Ky.App. 1979).

<sup>2</sup> *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).



same party's total proof.<sup>3</sup> KRS 342.285(2) and KRS 342.290 limit administrative and judicial review to determining whether the ALJ “acted without or in excess of his powers;”<sup>4</sup> whether the decision “was procured by fraud;”<sup>5</sup> or whether the decision was erroneous as a matter of law.<sup>6</sup> A finding that favors the party with the burden of proof must be affirmed if supported by substantial evidence, *i.e.*, if the finding was reasonable under the evidence.<sup>7</sup> Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.<sup>8</sup>

## II. ANALYSIS.

Contrary to the employer’s argument, nothing required the ALJ to rely on the history that Dr. Sajadi recorded in July 2008 regarding the claimant’s description of her condition as of July 2007 or to conclude from that history that her shoulder remained symptomatic immediately before she fell in October 2007. The ALJ found the claimant to be credible. She testified that her shoulder symptoms and limited range of motion resolved completely after the injection she received in July 2007; that the symptoms she experienced after

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<sup>3</sup> *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

<sup>4</sup> KRS 342.285(2)(a).

<sup>5</sup> KRS 342.285(2)(b).

<sup>6</sup> KRS 342.285(2)(c), (d), and (e). *See also American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964).

<sup>7</sup> *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Mosley v. Ford Motor Co.*, 968 S.W. 2d 675 (Ky. App. 1998); *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985).

<sup>8</sup> *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

she fell in October 2007 differed from those in July 2007; and that she began to experience constant and severe shoulder pain only after she fell.

Whether the claimant's injury, pre-existing degenerative condition, or their combined effects necessitated shoulder replacement surgery was a medical question to be answered from the medical evidence.<sup>9</sup> Drs. Best and Jenkinson stated specifically that the need for shoulder replacement surgery resulted solely from the claimant's pre-existing degenerative condition. Dr. Jenkinson agreed with her experts that shoulder replacement surgery would help to alleviate her impairment but attributed her present complaints and permanent impairment rating entirely to the effects of the pre-existing arthritic condition. Convinced by the claimant's testimony that the symptoms she experienced in July 2007 had resolved before she fell at work, the ALJ exercised the prerogative of a fact-finder to interpret Dr. Nadar's report and to find his opinion with respect to causation to be more persuasive than those of Drs. Best and Jenkinson.

Nothing precluded the ALJ from interpreting Dr. Nadar's statements reasonably or drawing reasonable inferences from them. Although Dr. Nadar failed to state specifically that the claimant's need for shoulder replacement surgery resulted from her work-related injury, he attributed her present shoulder complaints to the injury; attributed her impairment rating equally to the injury and pre-existing degenerative condition; and, like Dr. Sajadi,

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<sup>9</sup> See *Mengel v. Hawaiian Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App. 1981).

recommended both rotator cuff and shoulder replacement surgery to treat her present shoulder conditions. Unlike Dr. Jenkinson, the ALJ interpreted the statements to mean that Dr. Nadar attributed the compensable portion of the claimant's impairment and the need for surgery to the effects of the injury "superimposed on her pre-existing degenerative condition." The interpretation was reasonable and provided adequate support for the decision finding shoulder replacement surgery to be compensable.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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