

**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**NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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

2011-SC-000018-WC

MICKEY BOONE

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2010-CA-000327-WC  
WORKERS' COMPENSATION NO. 07-86319

DAWAHARES;  
HONORABLE IRENE STEEN,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

An Administrative Law Judge (ALJ) found that the claimant sustained a work-related left knee injury that aggravated a pre-existing degenerative condition, resulting in a torn meniscus. The ALJ also found, however, that left knee replacement surgery performed subsequently was unrelated to the injury and non-compensable. The Workers' Compensation Board affirmed the finding, convinced that substantial evidence supported it.<sup>1</sup> The Court of Appeals also affirmed.

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<sup>1</sup> The Board reversed and remanded with respect to a matter no longer at issue.

Appealing, the claimant asserts that unrebutted medical evidence compelled a finding that the work-related injury aroused a pre-existing dormant degenerative condition, which rendered the knee replacement surgery work-related and compensable.

We affirm. Medical evidence concerning the role of the claimant's injury in the need for knee replacement surgery was not so overwhelming as to compel a favorable finding. Moreover, substantial evidence indicated that although the knee injury aggravated pre-existing degenerative changes and resulted in a meniscal tear, the need for knee replacement surgery resulted solely from the degenerative changes and was unaffected by the injury or torn meniscus. Thus, neither the surgery nor the disability that resulted was compensable.

The employer no longer disputes that the claimant sustained a work-related injury when she stepped on a piece of cardboard, slipped, and twisted her left knee on March 14, 2007. She testified that she felt a pull in her knee at the time but no immediate pain or swelling. She first sought treatment at Bardstown Ambulatory Care on March 26, 2007; was diagnosed with a knee strain; and eventually was referred to Dr. Mehta.

Dr. Mehta performed arthroscopic surgery on June 11, 2007 to repair a torn meniscus. The operative report notes that the claimant understood "her arthritic symptoms might not be better" with the surgery but that the mechanical symptoms from the torn meniscus would improve. Dr. Mehta

cautioned her about the possibility of re-injuring her knee; advised her to use a knee brace at work and continue her exercises; and released her to return to work on July 16, 2007.

The claimant filed the application for benefits that is the subject of this appeal on February 1, 2008. She testified subsequently that she returned to work after the surgery and that her knee was "doing fine" until she underwent an independent medical evaluation by Dr. Bilkey on April 1, 2008. She stated that Dr. Bilkey performed a range of motion test, which caused her knee symptoms to return. She underwent knee replacement surgery in June 2008. Although she returned to work with a different employer, she quit shortly before her claim was heard because her knee was symptomatic. She stated that the knee continued to swell and that she used pain pills and a pain patch.

Dr. Bilkey reported to the claimant's attorney that she had completed her course of treatment with Dr. Mehta, having experienced "good wound healing" following the meniscal repair and "considerable improvement" in her symptoms. She returned to work with continued symptoms that included left knee tenderness as well as pain with activities such as stair climbing, squatting, and kneeling. Dr. Bilkey noted that her current medications related to conditions other than her knee but that they controlled her knee symptoms as well.

A physical examination revealed decreased range of motion in the knee and decreased strength but no loss of stability. Dr. Bilkey opined that the

meniscal tear and a left knee sprain resulted from the work-related incident. He assigned a 5% permanent impairment rating; and imposed various work restrictions.

Dr. Corbett evaluated the claimant for the employer in April 2008. She complained of severe swelling, pain, and burning in her left knee since the evaluation by Dr. Bilkey and reported that the symptoms prevented her from standing or walking for more than 30 minutes at a time. She also reported that she had undergone a recent MRI and was to see Dr. Mehta that afternoon. Dr. Corbett noted that the left knee lacked eight degrees of full extension and that the claimant walked with a shortened stride. He also noted that x-rays, the previous MRI that revealed the meniscal tear, and Dr. Mehta's operative report all indicated that the claimant had longstanding degenerative changes in the knee that existed before the March 2007 accident.

Dr. Corbett opined that the history of injury and the length of time between the accident and the onset of swelling were not consistent with an acute meniscal tear, which would have produced immediate pain and swelling. Although his findings revealed "a significant mechanical disorder" in the left knee that he thought would make it difficult for the claimant to work, he stated that he could not determine its cause without reviewing the most recent MRI. He concluded that she had not reached maximum medical improvement (MMI) and warranted further evaluation.

Dr. Mehta performed total left knee replacement surgery on June 9, 2008 based on a diagnosis of severe degenerative osteoarthritis. The operative report

notes "severe bone-on-bone appearance" and a thickened and hypertrophic synovium. Treatment notes indicate that the claimant's recovery was normal until August 28, 2008, when she reported significant swelling in the knee from standing on concrete while working and requested that she be taken off work. X-rays taken in October 2008 showed a well-situated total knee replacement.

Dr. Corbett prepared a supplemental report in October 2008 after reviewing additional medical records, including those related to the knee replacement surgery. He agreed with Dr. Mehta that the surgery was performed to address degenerative joint disease. He noted, however, that the changes mentioned in the operative report "obviously were greater than one year and probably greater than 5-10 years in their duration." Moreover, he opined that the "degenerative osteoarthritic involvement of this knee is the medically probable source of the meniscal pathology identified at the first operation" and that none of the diagnosis related to the accident at work. Nonetheless, Dr. Corbett found it "conceivable that a degenerative tear of the meniscus was completed and made symptomatic by the episode of 3/14/2007," enabling him to "reasonably consider" that it contributed to the need for the procedure. He stated, however, that the episode "does not in any way play a role in her second operative procedure, *i.e.*, total knee replacement." He stated finally that if the March 2007 accident did contribute to the torn meniscus, the injury would warrant a 1% permanent impairment rating.

Dr. Corbett examined the claimant for a second time in December 2008. She had full extension of the left knee and x-rays revealed satisfactory positioning of the knee. He found her to be at MMI and assigned a 20% impairment rating.

The claimant submitted a report from Dr. Henderson, who evaluated her in January 2009. He noted complaints of left knee pain and swelling and received a history of the accident at work; of "acute severe pain and . . . acute swelling" in the knee that worsened over the following week; and of two subsequent left knee surgeries. Physical examination revealed a slight antalgic gait and an inability to extend the left knee fully. Dr. Henderson assigned a 20% impairment rating based on the knee replacement and recommended that the claimant be restricted to performing light to sedentary work. He opined from the medical records and history he received that the work-related injury "brought a pre-existing, nonsymptomatic condition into disabling reality."

Noting the contrast between the claimant's description of the work-related accident and immediate symptoms and the description reported by Dr. Henderson, the ALJ questioned why they differed since both were given by the claimant. Nonetheless, the ALJ determined that the claimant sustained a mild twisting injury to her left knee that was superimposed on pre-existing degenerative changes. The ALJ also found that the accident resulted in the need for the arthroscopic surgery performed in June 2007, noting the evidence that narcotic medication the claimant took for back pain probably decreased her initial knee pain and relying on Dr. Corbett's opinion that the meniscal

tears were degenerative but were aggravated by the accident at work. The ALJ determined, however, that neither the injury nor torn meniscus affected the need for knee replacement surgery, which resulted entirely from the longstanding and pre-existing osteoarthritic condition. The ALJ reasoned that “the medical records and the operative report by Dr. Mehta,” which noted severe degenerative changes “evidenced by bone rubbing against bone in her knee,” led to the conclusion that Dr. Corbett’s opinion was the “most accurate.”

The claimant’s petition for reconsideration asserted that the ALJ misread the evidence from Dr. Corbett. Noting his opinion that the injury aroused the pre-existing degenerative changes and caused the torn meniscus, she argued that he failed to take fact that it aroused the degenerative changes into account when stating that neither the injury nor torn meniscus resulted in the need for knee replacement. Noting that only after the injury did she have symptoms that warranted knee replacement surgery and that Dr. Corbett and Dr. Henderson agreed that the injury aroused the degenerative changes in her knee, she concluded that the evidence compelled a favorable decision.

Responding to the petition, the employer pointed out that the claimant had no ongoing knee problems or work restrictions after recovering from the meniscal repair and being released from treatment. Moreover, Dr. Corbett’s reports indicated that the knee replacement addressed the longstanding and pre-existing degenerative condition rather than the effects of the injury. Thus, the claimant failed to meet her burden of proving causation with respect to the need for knee replacement.



The Board determined that Dr. Corbett's reports contradicted Dr. Henderson's opinion and supported the ALJ's finding that the need for knee replacement surgery did not result from the injury. The Court of Appeals agreed and affirmed.

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

An injured worker bears the burden of proof and risk of non-persuasion before the ALJ with regard to every element of the claim.<sup>2</sup> KRS 342.285 designates the ALJ as the finder of fact. It permits an appeal to the Board but, 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." As a consequence, the ALJ has the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence.<sup>3</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 same party's total proof.<sup>4</sup> Moreover, an ALJ may reject even the uncontroverted testimony of a medical expert if a reasonable explanation is given.<sup>5</sup>

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<sup>2</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>3</sup> *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

<sup>4</sup> *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

<sup>5</sup> *Commonwealth v. Workers' Compensation Board of Kentucky*, 697 S.W.2d 540 (Ky. App. 1985).

KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"<sup>6</sup> whether the decision "was procured by fraud;"<sup>7</sup> or whether the decision was erroneous as a matter of law.<sup>8</sup> Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

A finding that favors the party who had the burden of proof must be affirmed if supported by substantial evidence, *i.e.*, the finding was reasonable under the evidence.<sup>9</sup> When a party fails to meet its burden of proof, however, that party has the greater burden of showing that the unfavorable finding was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, *i.e.*, no reasonable person could have failed to be persuaded by the favorable evidence.<sup>10</sup> Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.<sup>11</sup>

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<sup>6</sup> KRS 342.285(2)(a).

<sup>7</sup> KRS 342.285(2)(b).

<sup>8</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>9</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>10</sup> *Id.*

<sup>11</sup> *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

## II. ANALYSIS.

The claimant asserts that the Court of Appeals misapplied *Finley v. DBM Technologies*<sup>12</sup> by equating the term “impairment” with a permanent impairment rating although the terms have different meanings. She notes that Dr. Corbett considered total knee replacement to be necessary due to the osteoarthritis in her left knee but failed to address whether the arthritic condition was “dormant” or “active” before the injury or whether the injury aroused the pre-existing arthritic condition into disabling reality. She argues on that basis that his opinions failed to rebut Dr. Henderson’s with respect to causation and did not provide substantial evidence to support a finding for the employer. We disagree.

The claimant’s focus on authority concerning the exclusion of pre-existing active disability misses the mark. The ALJ determined that the knee replacement was non-compensable because the need for the procedure did not result from the claimant’s work-related injury. The evidence did not compel a finding that the injury or its effects, including the torn meniscus, contributed to or hastened the need for surgery.

The claimant testified that she was “doing fine” after the initial surgery until the range of motion exam performed by Dr. Bilkey caused her knee to become symptomatic again. Although a condition that results from medical treatment for a work-related injury is compensable, no medical expert related

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<sup>12</sup> 217 S.W.3d 261 (Ky. App. 2007).

the need for the knee replacement to the exam. Moreover, the exam appears to have been performed for the purpose of litigation rather than treatment.

The claimant underwent two surgical procedures for two different left knee conditions that required surgery at different times. The ALJ relied on Dr. Corbett to find that the accident at work aggravated the pre-existing degenerative condition, helping to cause the meniscal tear. No physician opined that the meniscal repair contributed to the need for knee replacement and Dr. Corbett testified that it did not. At issue, therefore, is whether the evidence compelled a finding that the claimant's injury, when superimposed on her pre-existing degenerative condition, contributed to or hastened the need for knee replacement.

The parties did not dispute the presence of a pre-existing osteoarthritic degenerative knee condition or the fact that the condition necessitated knee replacement surgery. Contrary to the claimant's assertion, they presented conflicting medical evidence concerning whether the work-related accident or its effects helped to cause or hasten the need for the knee replacement. The ALJ was free under the circumstances to decide which expert to rely upon.

When addressing causation Dr. Henderson stated only that the work-related injury probably "brought a pre-existing, nonsymptomatic condition into disabling reality." He failed to specify what resulted. His testimony would have permitted but did not compel the ALJ to infer that the claimant's injury contributed to the need for a knee replacement as well as the need for the meniscal repair.

Although Dr. Corbett failed to state specifically whether the fact that the work-related injury aroused the pre-existing degenerative condition, helping to cause the meniscal tear, meant that it also contributed to the need for total knee replacement, his testimony permitted the ALJ to infer reasonably that he considered the matter and concluded that it did not. Dr. Corbett opined initially that neither surgery resulted “in any way” from the work-related accident but stated subsequently that the work-related accident could reasonably be considered to have aggravated pre-existing degenerative changes in the claimant’s knee, helping to cause the meniscal tear. He then relied on Dr. Mehta’s operative report, which he noted revealed “severe bone-on-bone appearance,” as a basis to opine that the pre-existing degenerative changes Dr. Mehta observed were longstanding and severe; that they resulted in the need for knee replacement; and that the knee replacement was not related to the injury or meniscal tear. He noted in a subsequent report that the degenerative changes probably warranted an impairment rating immediately before the work-related injury; that the knee replacement did not address the residuals of the injury; and that neither the injury nor the arthroscopic surgery caused it to be necessary.

Dr. Corbett’s statements permitted the ALJ to conclude reasonably that the injury’s arousal of the claimant’s degenerative changes helped to cause her meniscal tear, which necessitated the initial surgery, but had no effect on the need for total knee replacement. Stated differently, the evidence permitted a

reasonable inference that Dr. Corbett thought the knee replacement would have been necessary at that time even had no work-related injury occurred.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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