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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: APRIL 30, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000320-WC

JACOR BROADCASTING OF LEXINGTON — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2017-CA-001549
WORKERS' COMPENSATION BOARD NO. 97-WC-59280

LEANN TRUE NORTON;
HON. DOUGLAS W. GOTT, CALJ; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT
AFFIRMING

Leann True Norton (Ms. Norton) was involved in a work-related motor vehicle accident while working for JACOR Broadcasting of Lexington (JACOR). Thereafter, JACOR and Ms. Norton entered into a Form 110 settlement agreement. JACOR agreed to cover injuries sustained during the accident to Ms. Norton's neck, back, left shoulder, and left knee. Recently, Ms. Norton sought and was denied a claim for surgery on her right knee, which she asserts was also injured in the work-related accident. Ms. Norton filed a *pro se* motion to reopen the claim asserting that her right knee is covered under the original settlement agreement. Chief Administrative Law Judge Robert Swisher (CALJ Swisher) found that Ms. Norton's right knee was compensable under the original settlement agreement. JACOR thereafter filed a petition for reconsideration, which was denied by Chief Administrative Law Judge Douglas Gott (CALJ Gott). The Worker's Compensation Board (the Board) affirmed

CALJ Gott's ruling, and the Court of Appeals subsequently affirmed the Board. JACOR now appeals to this Court and argues that the injury to Ms. Norton's right knee is non-compensable. After review, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 26, 1997, Ms. Norton was returning to JACOR's broadcasting station when she was involved in a motor vehicle accident. Both of her knees hit the steering column, and although both knees were injured in the accident, the left knee was injured more severely. Therefore, her medical treatment at that time focused primarily on her left knee. On July 13, 1999, a Form 110 settlement agreement between Ms. Norton, *pro se*, and JACOR was approved by separate order by Chief Arbitrator Kevin King. The agreement acknowledged and agreed to compensate Ms. Norton for injuries to her neck, back, left shoulder, and left knee, but did not say anything regarding compensation for an injury to Ms. Norton's right knee.

Ms. Norton has consistently received medical treatment for her injuries since the accident, including doctor's visits that involved her right knee. All of her medical bills have been approved and covered by JACOR's insurance carrier Zurich Insurance Company (Zurich). Zurich's claims adjuster on Ms. Norton's case, Patricia Painter (Ms. Painter), attested that any payments made to cover treatment for Ms. Norton's right knee were inadvertent. Ms. Painter expounded that it was impossible to separate bills for doctor's visits wherein Ms. Norton received treatment for her right knee in addition to injuries already deemed compensable. Ms. Norton was unaware that Zurich did not intend to cover treatment for her right knee until she filed a claim for surgery on her right knee in 2016. Zurich denied the surgery claim which was based on the

recommendation of Dr. Christian Lattermann, Ms. Norton's orthopedic surgeon.

After Zurich denied Ms. Norton's claim for surgery, she filed a *pro se* motion to reopen the claim. JACOR contested the motion arguing that the original settlement agreement did not agree to compensate Ms. Norton for any injury to her right knee. JACOR asserted that she could not prove causation and work-relatedness, and the claim was barred by the applicable statute of limitations.

During the hearing on the matter in January of 2017, CALJ Swisher heard testimony from Ms. Norton and considered testimony from Ms. Painter via deposition. He also reviewed medical records from Dr. Lattermann; Dr. Terry Trout, a pain management physician; and Dr. Jerold Friesen, an orthopedic surgeon, all providers for Ms. Norton regarding her right knee.

Pertinent to our review,[1] CALJ Swisher noted that the only issue was the "compensability of [the] contested…right knee surgery on the basis on reasonableness/necessity, causation/work-relatedness, and statute of limitations," and made the following findings:

> As to the threshold issue of whether [Ms. Norton's] right knee symptoms are directly and causally related to the motor vehicle accident of March 26, 1997, the evidence is uncontradicted in establishing exactly that causal relationship. Unrebutted evidence compels a finding for the party that it favors unless the fact finder has a proper basis for rejecting it. *Franklin Ins. Agency, Inc. v. Simpson*, 2008 WL 5051613 (Ky.). Having reviewed the evidence in this matter, including the treatment notes and records submitted by the parties and the deposition of Patricia Painter, the undersigned discerns no reasonable basis on which to reject the unrebutted expert medical opinion of Dr.

[1] Ms. Norton's ongoing chiropractic treatment was also at issue. But, as that claim is not relevant to this appeal, we will not discuss it.

Lattermann. [Ms. Norton's] right knee condition is found, therefore, to be directly and causally related to the underlying work-related motor vehicle accident.

With respect to [JACOR's] essential argument that because the settlement agreement does not mention the right knee as an injured body part, the right knee is non-compensable, the undersigned infers that the settlement agreement was drafted by the carrier's adjuster, and not [Ms. Norton]. More importantly, KRS[2] 342.125(7) provides,

> When an agreement has become an award by approval of the administrative law judge, and the reopening and review of that award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party. The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application of benefits.

Simply stated, no representations, and by implication, no admissions, in the settlement agreement shall be construed as an admission against the interest of any party. That the settlement agreement does not specifically reference the right knee is immaterial with respect to the present reopening/medical dispute.

Similarly, although [JACOR] argues that the right knee claim is barred pursuant to KRS 342.270, the so-called joinder/merger statute, that argument likewise fails. KRS 342.270(1) specifically refers to an application filed by a claimant. No application was filed in the present case as the matter was settled by agreement. The merger/bar provision of KRS 342.270 do not preclude compensability of the right knee injury.

Finally, [JACOR's] argument that the right knee claim is barred by the statute of limitations is unpersuasive. [Ms. Norton] executed a settlement agreement with respect to the injuries arising from the work-related

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[2] Kentucky Revised Statute.

> motor vehicle accident, and that agreement was approved by an administrative law judge well within the two year statute of limitations applicable to the claim.
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> Moreover, [JACOR's] implicit contention that it never intentionally approved treatment of the right knee or it did not know that plaintiff was treating for the right knee is likewise misplaced. The undersigned finds it of particular significance that [JACOR], although being well aware of Dr. Lattermann's request for pre-authorization for right knee surgery, never submitted that matter to utilization review and never filed its own medical dispute to contest compensability of that treatment. The only medical dispute filed by [JACOR] was to contest chiropractic treatment. As a matter of law [JACOR] would be precluded from denying compensability of the proposed medical treatment under these circumstances. *Lawson v. Toyota Motor Mfg. Kentucky, Inc.*, 330 S.W.3d 452 (Ky. 2010).
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> Although [JACOR] preserved a contest regarding compensability of the proposed surgery by Dr. Lattermann on the basis of reasonableness and necessity, it offered no medical proof to satisfy its burden on that issue. Accordingly, the undersigned finds that this aspect of the medical dispute is resolved in favor of [Ms. Norton], and [JACOR] shall immediately pre-certify treatment of [Ms. Norton's] right knee as recommended by Dr. Lattermann.

JACOR then filed a petition for reconsideration with CALJ Gott, which was denied. On review, the Board affirmed CALJ Gott's denial. The Board agreed that Ms. Norton's right knee injury was causally related to the work-related accident, and that KRS 342.125(7) kept Ms. Norton's right knee claim from being barred. Specifically, that

> [Ms.] Norton did not litigate her initial claim to completion and the arbitrator who approved the settlement agreement made no judicial determination on any issue. As such, the settlement agreement did not bind the parties regarding whether [Ms.] Norton sustained a right knee injury in addition to the other conditions outlined in the settlement agreement in the March 26, 1997 [accident]. A settlement is the product of a compromise. Therefore, the terms contained in the agreement may or may not be totally

> accurate. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999), *Beale v. Faultless Hardware*, [837 S.W.2d 893 (Ky. 1992)], and *Newberg v. Davis*, 841 S.W.2d 164 (Ky. 1992), explain that the parties to a settlement are entitled to the benefit of their bargain and KRS 342.125(7) prohibits any statement contained in a settlement agreement from being considered as an admission against interest if the claim is reopened.

The Board accordingly affirmed. The Court of Appeals also affirmed, noting:

> JACOR posits that KRS 342.270(1), [the joinder statute], should be applied to settlement agreements in the same way it is to claims. However, as noted by both the ALJ and the Board, KRS 342.270(1) only applies where an application of resolution of injury claim is filed because the parties "fail to reach an agreement in regard to compensation." In this case, no application was filed because the parties reached a prior settlement. As such, KRS 342.270 does not apply.[3]

The Court of Appeals further held that the record supported CALJ Swisher's determination that Ms. Norton's right knee injury was causally related to the 1997 accident.[4]

Additional facts are discussed below as necessary.

II. ANALYSIS

The authority of this Court to review a workers' compensation claim was clearly delineated by *Western Baptist Hosp. v. Kelly*, which held:

> The [Board] is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the [Board] in the Court of Appeals 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

[3] *JACOR Broad of Lexington v. Norton*, 2017-CA-001549-WC, 2019 WL 1976970, at *4 (Ky. App. May 3, 2019).

[4] *Id.* at *5.

> gross injustice. The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude.[5]

We review issues of statutory interpretation de novo.[6]

JACOR asserts two arguments on appeal. First, that Ms. Norton failed to prove that her right knee injury was causally related to the 1997 work-related accident. Second, that Ms. Norton was required by the joinder statute, KRS 342.270(1), to include her right knee claim in the original settlement agreement, and accordingly her claim is barred by the applicable statute of limitations. This Court will address both claims in turn.

A. Causation Issue

JACOR first argues that the medical evidence considered by CALJ Swisher clearly shows that Ms. Norton's right knee injury was not causally related to the 1997 work injury. We disagree.

We note first that "an ALJ has sole discretion to decide whom and what to believe, and 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 adversary party's total proof."[7] That said, there was more than enough evidence upon which CALJ Swisher could have determined that Ms. Norton's right knee injury was the result of the work-related accident.

During the hearing presided over by CALJ Swisher Ms. Norton testified that both of her knees hit the steering column during the accident. She did not

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[5] 827 S.W.2d 685, 687–88 (Ky. 1992).

[6] *See Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007).

[7] *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009) (citing *Caudill v. Maloney's Disc. Stores*, 560 S.W.2d 15, 16 (Ky. 1977)).

go to hospital that day because she had a deadline to meet, but she went the following day because she began having pain in her back and both knees. Her left knee was the immediate concern for treatment, as it was more severely injured than her right knee. To date she has had five surgeries on her left knee, and her right knee has bothered her since the day of the accident. Her understanding of the settlement agreement was that she would continue to have coverage for the injuries listed on the agreement as well as her right knee because JACOR knew she injured it. We reiterate that Ms. Norton was not represented by counsel when she entered into the settlement agreement with JACOR.

The first physician she saw after the accident was a chiropractor, Dr. Skinner, who encouraged her to file a worker's compensation claim. She informed him she injured both knees, and he referred her to a specialist when he realized the extent of the injury to them. She tried to get records from Dr. Skinner's office but could not since they are twenty years old and the office no longer had them. She acknowledged her failure to retain those records but stated she did not anticipate needing them based on her understanding of the settlement agreement.

The first medical record she offered was a report from October of 2007 with Dr. Friesen. That report stated, in relevant part,

> patient is a 34 year old female who is seen for multiple complaints including lower back, left and right knees. Several years ago, she was involved in a motor vehicle accident and both knees were injured, but the left was more severe than the right. The right knee, however, now has developed some increasing symptoms of pain with catching sensation and intermittent swelling and a tendency to give way. She has tenderness to palpation of right knee at the patellofemoral region more so medial facet.

On cross-examination by JACOR Ms. Norton stated she attempted to get records from Dr. Friesen's office that pre-dated 2007 memorializing her right knee issues. However, the office began computerizing its records in 2007 and no longer had them.

The next piece of evidence Ms. Norton provided was an office report by Dr. Troutt from May 31, 2013. That report noted her chief complaint that day was "[i]ncreasing right knee pain…after change in job station."[8] Further, that "[s]he [was] having difficulty standing and walking associated with increased right knee pain." During cross-examination Ms. Norton said that she had right knee pain between 2007 and 2013, but she did not submit every medical record that mentioned her right knee during that time. She said she only submitted the records she thought were pertinent to the claim. Her main goal was to demonstrate that her right knee issues did not "come out of the blue." And she "did not want to overwhelm everyone" by submitting all of her records.

Ms. Norton further attested that Dr. Troutt began administering injections to her right knee for pain in July of 2015. She believes this was the first actual treatment she received on her right knee. Dr. Troutt referred her to Dr. Rawlings, an orthopedic surgeon, for her right knee. Dr. Rawlings in turn referred her to Dr. Lattermann in late 2015. Dr. Rawlings believed Ms. Norton was a good candidate for a surgery that Dr. Lattermann performed in lieu of a total knee replacement. Her physicians do not believe a total knee replacement is in her best interest because of her young age.

[8] Prior to this visit Ms. Norton got a new job that required her to walk more than was previously required.

Dr. Lattermann conducted an MRI which revealed a hole in Ms. Norton's right patella. Dr. Lattermann believed this injury was caused by the 1997 work-related accident. He is the only doctor she is currently seeing for her right knee. Her current right knee issues include swelling, popping, and pain; the weather is a big indicator of the severity of her symptoms.

JACOR offered no evidence to suggest that Ms. Norton's right knee injury was not causally related to the 1997 accident. As noted by CALJ Swisher in his findings, "unrebutted evidence compels a finding for the party it favors unless the fact-finder has a proper basis for rejecting it."[9] Further, as noted *supra*, assessing the credibility and weight of evidence is left to the sound discretion of our administrative law judges. We therefore decline to disturb CALJ Swisher's holding that Ms. Norton's right knee injury was causally related to the 1997 work-related accident.

B. Ms. Norton was not required by KRS 342.270 to include her right knee injury in the settlement agreement.

JACOR next asserts that the lower courts erred by "handcuffing themselves" to the language and prior interpretations of KRS 342.270 without considering whether the legal principles therein should be extended to settled claims. More specifically, JACOR contends that the joinder requirements of KRS 342.270(1) must apply to settled claims, thereby preventing Ms. Norton from being compensated for her right knee injury because she did not include it in the settlement agreement. We disagree.

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[9] *Franklin Ins. Agency, Inc. v. Simpson*, 2007-SC-000748-WC 2007-SC-000914-WC, 2008 WL 5051613, at *4 (Ky. Nov. 26, 2008) (citing *Collins v. Castleton Farms, Inc.*, 560 S.W.2d 830, 831 (Ky. App. 1977)).

We note first that when appellate courts "handcuff" themselves to the language of a statute, they are functioning precisely as they are designed.[10] Therefore, we must begin our analysis with the language of the statute itself. KRS 342.270(1) provides:

> **If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim**. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him or her. **Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee**.[11]

The language of KRS 342.270(1) could not be more clear. It applies only when the parties to a worker's compensation claim fail to reach an agreement regarding compensation, and mandates that if a party files an application for resolution of a claim he or she must include all accrued causes of action. We consequently decline to extend the joinder requirements of KRS 342.170(1) to worker's compensation claims resolved by settlement agreement.

Accordingly, KRS 342.270(1) is not applicable in any way to this case. Ms. Norton and JACOR entered into a settlement agreement and therefore did not fail to reach an agreement regarding compensation. And, because the parties entered into a settlement agreement, Ms. Norton never filed an application for the resolution of her claim.

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[10] *Whittaker v. McClure*, 891 S.W.2d 80, 83 (Ky. 1995) ("[w]here the language of a statute is clear on its face, the Court is not free to construe it otherwise").

[11] (Emphasis added).

JACOR asserts in the alternative that Ms. Norton should be estopped from asserting a known injury to her right knee twenty years after the settlement agreement. We likewise disagree with this assertion. KRS 342.125(7) directs that

> [w]here an agreement has become an award by approval of the administrative law judge, and a reopening and review of that award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party. **The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits**.[12]

Here, the settlement agreement between Ms. Norton and JACOR became an award by approval of an administrative law judge. Therefore, under KRS 342.125(7), when Ms. Norton sought to re-open her claim she was permitted to raise any issue which could have been considered upon her original application for benefits. Ms. Norton claimed that her right knee was injured in the work-related accident. She therefore could have included the injury to her right knee in her original claim for benefits. Accordingly, she is not prevented from asserting injury to her right knee upon re-opening of her claim.[13]

III. CONCLUSION

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[12] (Emphasis added).

[13] *See also, e.g.*, *Jo Ann Coal Co., Inc. v. Smith*, 492 S.W.2d 192, 193 (Ky. 1973) (holding "Appellant has cited no case, and we know of none, holding that where a claimant has entered into an agreement for compensation predicated on an injury to a specific member of the body he may not reopen and recover compensation for disability caused by secondary involvement of another part of the body resulting from the same accident. It is our opinion that claimant is not so restricted.").

Based on the foregoing, we affirm.

All sitting. All concur.

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