

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001412-WC  
AND  
NO. 2007-CA-001551-WC

SWIFT PORK COMPANY

APPELLANT/CROSS-APPELLEE

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-65201

ILEANA CAMEJO; HON. A. THOMAS  
DAVIS, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES/CROSS-APPELLANTS

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: Swift Pork Company ("Swift") has petitioned for review of the June 11, 2007, opinion of the Kentucky Workers' Compensation Board ("Board") which reversed in part, vacated in part, and remanded a decision of the Administrative Law Judge ("ALJ") awarding permanent partial occupational disability for a left shoulder injury to Ileana Camejo ("Camejo"). In its award, the ALJ found a claimed right shoulder injury to be non-compensable, but the Board disagreed. We affirm.

Camejo was born in Cuba on November 16, 1967, and has a twelfth grade education. She began working for Swift on August 12, 2002, in its slaughterhouse as a

pork processor. On June 9, 2005, Camejo claimed a work-related cumulative trauma injury to her left shoulder which resulted from processing approximately 105-110 hogs per hour. She was treated for her injury that day at BaptistWorx and was diagnosed with longstanding tendonitis of the left shoulder. As a result, she was placed on work restrictions, prescribed medication, and told to undergo physical therapy. After five sessions of physical therapy, Camejo showed little improvement and on June 23, 2005, BaptistWorx diagnosed her with persistent left shoulder tendonitis. Camejo was referred to an orthopedic specialist on June 30, 2005, for further evaluation.

On July 8, 2005, Camejo began treating with Dr. Stacie Grossfeld ("Dr. Grossfeld") who diagnosed her with bicipital tendonitis and AC joint sprain. Dr. Grossfeld recommended cortisone therapy and cleared Camejo to return to work with certain restrictions on lifting with her left shoulder. Camejo returned to work for Swift in a different job which would accommodate her restrictions. Her new duties required only the use of her right arm. On July 29, 2005, Dr. Grossfeld modified her diagnosis to include possible rotator cuff tendonitis and lateral epicondylitis and ordered Camejo to undergo an MRI of her left shoulder. The MRI revealed mild arthropathic changes of the left acromioclavicular joint but no rotator cuff tearing.

On September 19, 2005, Camejo returned to Dr. Grossfeld and related her condition had somewhat improved but she had begun experiencing pain in her right shoulder. Dr. Grossfeld modified her diagnosis to bilateral biceps tendonitis, left AC joint strain, and right shoulder strain. Camejo was again cleared to return to work under lifting restrictions. On October 3, 2005, Dr. Grossfeld diagnosed Camejo with right rotator cuff tendonitis and right bicipital tendonitis, ordered physical therapy, and

continued Camejo's work restrictions. On October 17, 2005, Dr. Grossfeld placed Camejo on permanent restrictions including lifting no more than five pounds from waist to shoulder and no overhead lifting for both shoulders. She opined Camejo would attain maximum medical improvement ("MMI") within approximately three weeks.

Camejo was fired from her employment with Swift in late October 2005 for reasons unrelated to her shoulder injury. Because of her termination, Camejo lost her health insurance benefits. Subsequently, she has been unable to seek additional medical treatment for her shoulder injuries, even though she experiences ongoing pain and difficulty when lifting, dressing, or grooming. Moreover, she has been unable to obtain further employment.

On April 26, 2006, Camejo obtained an independent medical examination ("IME") from Dr. John Nehil ("Dr. Nehil") at the request of her attorney. Dr. Nehil diagnosed adhesive capsulitis in both shoulders and assigned a fourteen percent whole body impairment. He opined Camejo could no longer work in any occupation requiring repetitive shoulder movement.

On September 20, 2006, at Swift's request, Camejo underwent a second IME with Dr. Michael Moskal ("Dr. Moskal"). He found tenderness and painful range of motion in Camejo's right shoulder, as well as extreme pain in response to any touch or movement in any direction of nearly every body part. He found no logical, medical or pathological connection to the reported pain. His only significant medical finding was an "abnormal acromioclavicular joint with surrounding marrow edema," a condition not present in Camejo's 2005 MRI. However, because this condition presented after her termination from Swift, Dr. Moskal opined there was no objective medical evidence of

any causal relationship between the work-related injury and Comejo's medical diagnosis and subjective behavior. He found Comejo had robust non-vocational use of both arms and opined she "has long since been at MMI and does not have an identifiable injury related to work." Dr. Moskal further opined Comejo was malingering and assigned a 0% impairment rating.

On May 3, 2006, Comejo filed a claim for benefits (Form 101) alleging a cumulative trauma injury to her left shoulder which manifested itself on or about June 9, 2005, as well as a right shoulder injury incurred as a result of compensating for her left shoulder injury. The matter was assigned to ALJ Richard Joiner and a scheduling order was entered on May 17, 2006, requiring Swift to file a notice of claim denial or approval (Form 111) within a period of forty-five days, and informing Swift that its failure to file such notice would be deemed an admission of the allegations. Swift did not timely file the required notice and on July 12, 2006, Comejo filed a motion to preclude Swift from presenting any defenses to her claims because of its failure. Shortly thereafter, Swift filed a response to Comejo's motion to preclude it from presenting its defenses and also filed the required notice. In its Form 111, Swift accepted Comejo's claim as compensable under the Workers' Compensation Act as a work-related injury, but contested the amount of compensation due.

On July 31, 2006, ALJ Joiner overruled Comejo's motion. The matter was thereafter transferred to ALJ A. Thomas Davis ("ALJ Davis")<sup>1</sup> and the claim proceeded to a Benefits Review Conference ("BRC"). The only contested issues identified by the

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<sup>1</sup> The record contains no explanation for the transfer of this matter to ALJ Davis.

parties for determination were (1) entitlement to vocational rehabilitation, and (2) extent and duration of disability.

ALJ Davis entered his opinion and award on December 18, 2006, finding Camejo (1) suffered a work-related injury to her left shoulder, (2) failed in her burden of proving a work-related injury to her right shoulder, (3) had a seven percent whole body impairment because of her left shoulder injury, (4) was not entitled to vocational rehabilitation benefits, and (5) was not entitled to the three multiplier of benefits set forth in KRS 342.730(1)(c)(1). ALJ Davis awarded permanent partial disability (PPD) benefits based on the seven percent impairment rating beginning June 23, 2005, at the basic rate of \$21.43 per week until her date of termination in October 2005, and then enhanced by the two multiplier as set forth in KRS 342.730(1)(c)(2) to \$42.86. The enhanced benefits were to revert to the basic rate upon Camejo's reemployment. Medical benefits were awarded only for the left shoulder injury.

On December 29, 2006, Camejo filed a petition for reconsideration requesting ALJ Davis reconsider his finding that she had not suffered any work-related right shoulder injury, his failure to apply the three multiplier, his denial of vocational rehabilitation, and his designation of the time PPD benefits would revert to the basic rate. On January 23, 2007, ALJ Davis denied the petition for reconsideration, and Camejo appealed his decision to the Board.

On June 11, 2007, the Board entered its opinion reversing in part, vacating in part and remanding the matter to the ALJ for further proceedings.<sup>2</sup> The

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<sup>2</sup> The Board ordered the ALJ to make further findings regarding the extent and duration of Camejo's right shoulder injury. Further, the ALJ was to determine anew on remand whether Camejo was entitled to the three multiplier due to the bilateral shoulder injuries, as well as vocational rehabilitation and medical benefits for the right shoulder injury.

Board held Swift had waived the issue of causation and work-relatedness of Camejo's right shoulder injury. The Board noted that 803 KAR<sup>3</sup> 25:010 §13(14) mandates only contested issues be the subject of further proceedings, and held, because Swift had only listed Camejo's entitlement to vocational rehabilitation benefits and the extent and duration of her injury as contested issues, consideration of arguments concerning other unidentified matters, including work-related causation of Camejo's right shoulder injury, was precluded. The Board held:

[t]he ALJ, in his opinion, was persuaded by Dr. Moskal that Camejo sustained an injury to her left shoulder, but apparently unconvinced by Camejo's exaggerated testimony, did not believe she met her burden of proving a work-related right shoulder condition. Work-relatedness/causation, however, was never a contested issue for the ALJ's consideration. As explained above, only contested issues shall be considered.

Further, the Board held Swift had accepted Camejo's claim as compensable and disputed only the amount of compensation owed. The Board also noted Camejo did not cede the issue nor did Swift take the opportunity to raise it before the ALJ. Finally, the Board concluded the issue had not been tried by implied consent. Therefore, the Board held the ALJ had abused his discretion by addressing the issue of any causal relationship between Camejo's diagnosed right shoulder condition and the work-related injury. The Board further held Camejo had raised for the first time on appeal her argument that Swift had failed to timely file its Form 111 identifying contested issues and was thereby precluded from presenting any work-related causation defense pertaining to her right shoulder condition. Thus, the Board held the matter was unreserved.

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<sup>3</sup> Kentucky Administrative Regulations.

Swift filed its petition for review before this Court alleging the Board erred in holding ALJ Davis abused his discretion in finding Camejo's right shoulder injury to be non-work-related and non-compensable. Swift argues this non-contested issue was nevertheless tried by implied consent, that Camejo failed to carry her burden of proof, and the ALJ had thus correctly denied her claim. Camejo cross-petitioned for review of the Board's holding that she had failed to preserve the issue of Swift's failure to timely file its Form 111. We now affirm the opinion of the Board.

In workers' compensation cases, "a reviewing court may not substitute its judgment for that of the Board as a finder of fact." *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 420 (Ky. 1985). Only when a question of statutory interpretation is present will Kentucky courts grant a *de novo* review. *Newberg v. Thomas Industries*, 852 S.W.2d 339 (Ky.App. 1983). If no statutory interpretation is in issue, we defer to the findings of the Board unless we determine the Board has "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Thus, in the absence of a statutory construction question, the standard of appellate review is whether there is "sufficient evidence of probative value to support the finding of the Board. . . ." *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 336 (Ky. 1985).

Here, the Board opined Swift failed to identify the work-relatedness of Camejo's right shoulder injury as a contested issue, accepted her claimed injuries in its Form 111, and work-relatedness was not tried by implied consent of the parties. Swift admits it did not raise the issue of causation and accepted her claim as compensable,

but instead argues Camejo was still required to prove the work-relatedness of her injuries. Swift cites *Jones v. Newberg*, 890 S.W.2d 284 (Ky. 1994), in support of its argument that causation can never be waived. However, unlike the situation presented in *Jones*, the question Swift now seeks to raise was not raised or litigated before the ALJ or the Board. Although Dr. Moskal opined Camejo's right shoulder injury was not work-related, neither party asked the ALJ to consider or rule on causation. The ALJ did so *sua sponte* and, as correctly noted by the Board, he erred in doing so.

A careful review of the record indicates there was sufficient evidence to support the Board's conclusion Swift had waived the issue of causation when it accepted Camejo's claim and did not list it as a contested issue before the ALJ. If Swift desired to contest the causal connection between Camejo's diagnosed right shoulder condition and her work-related injury it could have moved to amend its Form 111 or otherwise placed Camejo on notice of the need to offer proof concerning the matter prior to the BRC. Had it done so, the ALJ would have been correct in determining the matter of work-related causation. Instead, Swift failed to avail itself of numerous opportunities to identify the matter for litigation. Having failed to properly raise this issue at the administrative level, Swift waived its opportunity to litigate the matter. *Leslie County Fiscal Court v. Adams*, 965 S.W.2d 152, 154 (Ky. 1998). We hold the Board did not overlook or misconstrue any controlling precedent or statutes, but rather, correctly applied the law to the facts. Thus, we conclude the Board committed no error and affirm its decision.

Swift's argument that the ALJ correctly denied Camejo's claim because she failed to meet her burden of proving work-related causation is without merit.

Contrary to Swift's contention, any failure by Camejo to submit such proof was occasioned by Swift's failure to properly identify the issue as contested. Certainly, it is reasonable that Camejo should be able to rely upon Swift's listing of contested issues in determining what evidence she must submit to prove her claim. Swift should not be rewarded with any unfair benefit arising from its own failure to properly identify the issue of work-related causation as a contested issue based on its argument that Camejo had impliedly consented to litigate the matter, particularly now that the time for submission of proof has closed and the claim has progressed past the BRC. Indeed, the purpose of requiring an employee to file the Form 111 is to place the parties on notice as to what issues must be proven and argued before the ALJ. To adopt Swift's implied consent argument in the present claim would be to defeat that purpose. Here, Swift never raised work-related causation of Camejo's right shoulder condition as an issue, and Camejo never conceded the matter was contested. Though medical reports contained differing opinions as to the work-related causation of Camejo's right shoulder condition, this alone does not equate to identifying the issue as contested or to be fully litigated. Clearly, the ALJ erred in determining the right shoulder condition to be non-work-related, as the Board correctly held.

Finally, as to Camejo's cross-petition, we believe the Board correctly held she raised the issue of Swift's failure to timely file its Form 111 for the first time on appeal. Under the same analysis as above, Camejo did not raise the issue before the ALJ, did not list it as a contested issue, and did not seek reconsideration of the ALJ's ruling. As such, her argument was wholly unpreserved for the Board's review.

For the foregoing reasons, the opinion of the Board reversing in part, vacating in part, and remanding this matter to the ALJ for further proceedings is affirmed in all respects.

ALL CONCUR.

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