

**COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
BEFORE STEPHANIE L. KINNEY, ALJ
CLAIM NO: 2015-97106**

LOWONDA D. MCDONALD

PLAINTIFF

VS.

**COMMONWEALTH OF KENTUCKY/
DEPARTMENT OF JUVENILE JUSTICE**

DEFENDANT

OPINION, AWARD AND ORDER

INTRODUCTION

Plaintiff, Lowonda McDonald, filed a Form 101 on October 28, 2015, alleging she sustained injuries to her left knee, a deep contusion and a torn/shredded meniscus while in the course and scope of her employment with the Defendant on January 13, 2015. She was walking past the control center at FRJDC when she slipped and fell on a freshly mopped floor that had not been marked or identified.

A BRC was held on May 19, 2016, before Administrative Law Judge (hereinafter "ALJ") Thomas G. Polites with the parties entering into agreed upon stipulations and identifying the contested issues to be determined. A formal hearing was also held on May 19, 2016, with the case being taken under submission as of that date. Through an order dated July 20, 2016, the claim was reassigned to ALJ Stephanie L. Kinney. The ALJ has reviewed all of the evidence of record and the matter is now ripe for decision.

SUMMARY OF EVIDENCE

LOWONDA MCDONALD: Plaintiff gave testimony in this matter through a deposition taken on January 13, 2016, and at the May 19, 2016, formal hearing. She is 51 years old, has a 12th grade education with an Associate Degree in Arts and various types of job training earning a Martial Arts Certificate, taking a course in defensive driving and earning a Youth Worker Certificate. As to prior left knee problems, Plaintiff denied ever having them, including pain, a limp or treatment of any kind. When this subject was revisited at the hearing, Plaintiff still did not recall being treated by Dr. Hester for knee pain.

In October 2013, Plaintiff began working for the Defendant and her job title was Youth Worker. Prior to that time, Plaintiff had worked as a paraeducator with special education children in Fayette County schools for 15 years and then was hired by the Kentucky Department of Corrections to work at Blackburn Correctional Center where she was a corrections officer. She testified that while working at Blackburn, she would have to walk roughly 4 to 5 miles per day (as measured by pedometer) and climb stairs throughout the facility checking cells and keeping track of inmates. Plaintiff would have to sometimes walk the entire 500 acre Blackburn property, climbing fences and walking through brush looking for an inmate. Weapons were not carried by the officers at Blackburn so Plaintiff was required to be able to use a form of martial arts to restrain inmates. After working in that position for 3 years, Plaintiff transferred to the Department of Juvenile Justice transporting juvenile inmates throughout northeastern Kentucky.

As Plaintiff transported incarcerated juveniles with the Department of Juvenile Justice, she was required to be able to perform Aikido takedowns for restraint purposes. This form of martial arts involved pivoting and shifting of the knees. However, in the 3 years she worked for the Defendant, Plaintiff believes she only had to use her training about 3 times to restrain a

juvenile. Plaintiff was not an official peace officer so she was not allowed to carry or use any type of weapon such as a gun or taser. Consequently, they used Aikido as their main form of defense.

On January 13, 2015, Plaintiff was at her office when she received a call for an emergency transport. She left her office, went through the lobby and then a set of double doors to the control center. Plaintiff was walking around the control center when she slipped and fell, landing on her left knee and had instantaneous swelling. It was her understanding someone had spilled trash on the floor, mopped the floor but did not put down a wet floor sign. She went to medical and was examined by a nurse who thought Plaintiff had broken her left knee. The accident was reported to her superintendent and supervisor, Lynn Lockridge, who is located in Louisville, Kentucky. Her husband picked her up from work and took her to the ER at Frankfort Regional Medical Center. Next, she was treated by Dr. Buchar and then by Dr. Dana Soucy, an orthopedic surgeon.

Plaintiff went to Dr. Veronica Vasicek for a second opinion and transferred her care to his physician after her evaluation. A left total knee replacement was recommended and then performed by Dr. Vasicek on July 14, 2015. According to Plaintiff, she was advised by Dr. Vasicek before her surgery to engage in as much activity as possible, including riding her motorcycle. Plaintiff testified that what is not seen on the surveillance video of her riding her motorcycle is the fact she was wearing a knee brace under her clothing. Following her surgery, Dr. Vasicek recommended Plaintiff attend 24 to 36 p.t. visits but as her medical and TTD benefits were terminated at the end of August 2015, she was only able to attend 12 formal p.t. sessions. She has been performing exercises at home since being released by Dr. Vasicek. Plaintiff is not receiving treatment for her left knee at the current time but has been seeing her

primary care physician, Dr. Matthew Buchar, for what she called situational depression. Dr. Buchar prescribes Plaintiff medication for this condition. She is not taking any medicine for left knee.

At the time her deposition was taken in January 2016, Plaintiff had not returned to the job she was performing on the date of her work accident on January 13, 2015. Dr. Vasicek had imposed permanent restrictions following the surgery which do not allow her to test for certification or engage in any type of Aikido maneuvers, engage in restraint of a juvenile, or stoop, bend, kneel, climb, lift, pivot or twist on her left knee. Plaintiff candidly admitted she was not having problems with her left knee unless she bumped her knee on something or it rained. She testified she has put in approximately 150 job applications with the state and had gone on 6 interviews. Plaintiff had also applied for clerical positions in the private sector but was advised she was not marketable until after the workers' compensation claim had been resolved.

It is Plaintiff's understanding that all of her medical bills are unpaid. Although the workers' compensation carrier initially approved her treatment, including surgery, and paid for those bills, the carrier reversed their decision to accept the claim, issued a denial and asked for a refund of the medical bills which had been paid. At the time of the May 19, 2016, formal hearing, Plaintiff testified she has collection agencies pursuing payment of medical bills.

KEVIN DAVIS: The deposition of Mr. Davis was taken on May 3, 2016. He is a private investigator with 17 years of experience, hired by Global Options and was assigned to conduct video surveillance of Plaintiff for several days and then compile a written report of his observations. An edited version of the video surveillance and a copy of the written report was attached to his deposition. Mr. Davis reported that in conducting surveillance on Plaintiff, he did not notice her walking with an altered gait or use an orthopedic device to assist her when

walking. He confirmed that he was paid \$6,600.00 for his services by Global Options. The surveillance video and written report summarizing the findings of the investigator have been reviewed and considered in this claim as well.

LEXINGTON CLINIC: Renee Leach, A.P.R.N., saw Plaintiff on September 30, 2004, to assess her complaints of left knee pain which she had been experiencing the prior 3 weeks and had worsened the 3 days before her office visit that she was having difficulty walking. Ms. Leach did note mild erythema with tissue swelling of the left knee and a questionable positive ballottement test. Plaintiff was referred to Dr. Hester for consultation of a possible septic left knee. X-rays of her left knee was taken that same date and they showed osteoarthritis with her medial tibiofemoral and medial patellofemoral joint spaces being reduced.

On November 4, 2004, Plaintiff was being evaluated by Dr. Craig Irwin for various complaints, one of which was knee pain. Dr. Irwin noted Plaintiff had seen Dr. Peter Hester and she was being treated conservatively with anti-inflammatories and bracing. However, they did discuss future care of her knees which would include a total knee replacement.

FRANKFORT REGIONAL MEDICAL CENTER: Plaintiff presented to the emergency room on January 13, 2015, following her slip and fall at work with complaints of left knee and foot pain with inability to bear pain. She was observed to have normal gait. Her clinical exam was normal and the x-rays showed moderate medial femorotibial joint degenerative changes. She was diagnosed with having sustained a knee abrasion, prescribed medication and given a knee immobilizer.

CAPITAL MEDICAL GROUP: Plaintiff was seen by Dr. Matthew Bucher on January 20, 2015, to assess her ongoing complaints of left knee pain from the January 13, 2015, slip and fall on a wet floor at work. She was found to have moderate pain with motion of her left knee

and swelling. Plaintiff had swelling on testing of her MCL and tenderness along the medial joint line suggestive of a meniscal tear. Dr. Bucher noted Plaintiff had never had problems with her left prior to January 13, 2015, and suggested she see Dr. Soucy.

DR. DANA SOUCY/REBOUND ORTHOPEDICS & SPORTS MEDICINE:

Plaintiff was referred to Dr. Soucy by Frankfort Regional Medical Center and was first seen on January 21, 2015, for complaints of left knee pain, swelling and dislocation of her kneecap. On exam, Plaintiff did not have varus or valgus of the left knee but she did have 2+ intraarticular effusion. The medial and patellofemoral joint lines were tender. Her ligament and meniscal stability as well as motor testing were normal. Dr. Soucy did find Plaintiff's x-rays to show bone on ~~bone~~ osteoarthritis in the medial compartment. She was taken off of work, given exercises and advised to stay in her immobilizer. At her follow-up visit on January 28, 2015, Plaintiff's examination did not change other than her effusion decreasing. Dr. Soucy did note Plaintiff having an antalgic gait. She was kept off work and advised to perform home exercises.

Dr. Soucy saw Plaintiff again in February 11, 2015, where she advised her pain remained the same. An MRI of her left knee was ordered. The MRI results were reviewed with Plaintiff on February 25, 2015. The test determined she had a fractured left patella, advanced osteoarthritis greater in the medial compartment and a macerated medial meniscus tear. She was prescribed a hinged brace and arthroscopic surgery was discussed. On March 4, 2015, Plaintiff's entire knee was tender to palpation, her pain level remained the same and she had an antalgic gait. Dr. Soucy commented that arthroscopic surgery would not be of benefit to her given her findings and that she needed a total knee replacement. Plaintiff agreed to move forward with the surgery. When seen back in follow-up on April 8, 2015, Plaintiff advised Dr. Soucy she had undergone an IME and was approved for arthroscopic surgery only. It was Dr. Soucy's opinion

that this procedure would provide no benefit in alleviating her symptoms and a total knee replacement was his recommendation. Plaintiff was going to explore options on her own.

DR. VERONICA VASICEK: The Defendant submitted the records of Dr. Vasicek who first saw Plaintiff on April 29, 2015 as a workers' compensation second opinion regarding additional treatment and the need for a total knee arthroplasty. On physical exam, Plaintiff has a varus deformity of 1°, was tender and had palpable spurs along the medial joint line, had mild effusion, had palpable crepitation and a positive patellar compression test. After reviewing Plaintiff's x-rays and MRI which showed she was bone on bone with large spurs and had a calcified/extruded meniscus, Dr. Vasicek diagnosed her as having end stage osteoarthritis in her left knee with a meniscal tear. It was her opinion that Plaintiff tore her meniscus when she fell and twisted her knee. Dr. Vasicek also stated that Plaintiff's pre-existing osteoarthritis became symptomatic as a result of the fall. As Plaintiff had severe degenerative changes in all 3 compartments of her knee, Dr. Vasicek recommended a total knee replacement.

Plaintiff began treating with Dr. Vasicek after the second opinion appointment and was seen in follow-up on May 8, 2015. Dr. Vasicek recommended Plaintiff either undergo injections or have a total knee replacement. Since Plaintiff had recently undergone dental surgery, any of the treatment proposed by Dr. Vasicek was postponed until her mouth healed. Plaintiff was prohibited from working her job before or after her total knee replacement as it required her to have the ability to perform martial arts which she was incapable of doing. Dr. Vasicek indicated on May 29, 2015, that the total knee replacement surgery had been approved and it was performed on July 14, 2015.

At her first post-op visit on August 7, 2015, Plaintiff was noted to be doing very well and was not using any assistive device to ambulate. She had normal range of motion, her

neurological exam was normal and x-rays showed the prosthesis to be well positioned. Dr. Vasicek kept Plaintiff off of work and continued p.t.

At the request of Plaintiff's attorney, Dr. Vasicek completed a Form 107 on October 23, 2015, regarding Plaintiff's treatment, current complaints, assessing an impairment rating and recommending restrictions. She noted Plaintiff had evidence of severe medial osteoarthritis in her left knee, a fracture patella and a torn meniscus on both x-rays and an MRI. Plaintiff underwent total left knee arthroplasty on July 14, 2015. Dr. Vasicek thought Plaintiff sustained an exacerbation of a pre-existing condition, primarily osteoarthritis in her left knee as well as a fracture of her left patella and meniscal tear as a result of her work accident. Dr. Vasicek did not think Plaintiff had a pre-existing active condition.

Dr. Vasicek determined Plaintiff reached maximum medical improvement on October 23, 2015, retains a 15% permanent impairment rating as a result of the January 13, 2015, work accident. Dr. Vasicek noted Plaintiff has to have the physical capability to perform martial arts as part of her job duties in addition to walking, sitting, standing and climbing stairs. It was Dr. Vasicek's opinion Plaintiff did not retain the physical capacity to return to her former work.

DR. MICHAEL BEST: On March 17, 2015, Plaintiff underwent an IME with Dr. Best. She advised him of her slip and fall work with a subsequent dislocation of her left patella. Her symptoms at the time of this IME consisted of swelling and pain which she rated to be 7.5/10. Plaintiff denied ever having sustained any prior injuries to her left knee or having any problems with it before the subject work accident.

Plaintiff presented to her evaluation wearing a knee brace, she had no effusion, did not have varus or valgus deformities but did have a positive Apley and McMurray's sign. Her range of motion was decreased as well. Dr. Best did not think Plaintiff's patella dislocated at the time

of her slip and fall otherwise she would not have been able to stand or walk without having problem. He diagnosed her as having a unicortical nondisplaced patellar fracture. Dr. Best opined the arthritis found on her diagnostic studies was not caused by her work accident. He thought the arthroscopy and subchondroplasty proposed by Dr. Soucy was reasonable and necessary but not due to the effects of the January 13, 2015, slip and fall. Dr. Best did think however the macerated meniscus was due to the work accident and was the cause of her pain at the time of his IME. Dr. Best did not think Plaintiff was at MMI and would not reach MMI until 4 to 6 weeks after the arthroscopic surgery. If she underwent a meniscectomy, which would be related to the work accident, Plaintiff would retain a 1% impairment rating. He did not think the knee brace prescribed by Dr. Soucy was related to her work accident. As for her work activities, Dr. Best would restrict her to a desk job and prohibit her from transporting juvenile offenders until after she reached MMI from the arthroscopy when she could be released to full duty.

DR. RONALD F. FADEL: A utilization review was conducted by Dr. Fadel on April 29, 2015, wherein he concluded corticosteroid and visco-supplementation injections were reasonable and necessary. Then on May 6, 2015, Dr. Fadel conducted a utilization review to determine the reasonableness and necessity of Dr. Vasicek's proposed total knee replacement. While Dr. Fadel commented about the work-relatedness of the surgery, specifically whether it was all due to the pre-existing arthritis, he ultimately concluded the total knee replacement was indicated.

DR. ANDREW DEGRUCCIO: An IME was conducted by Dr. DeGruccio on January 14, 2016, to assess Plaintiff's left knee. She advised that her pain was minimal, had very good range of motion but the strength in her left leg was not yet normal. He received a history of how her injury was sustained and subsequent treatment which was consistent with the medical records. Plaintiff specifically denied having any prior problems with her knees. As the workers'

compensation insurance carrier reversed its initial decision to approve her total knee replacement after she underwent the surgery, Plaintiff was only able to follow-up with Dr. Vasicek for 3 months. At that time Dr. Vasicek told her to perform home exercises and imposed permanent restrictions which precluded a return to her former job with the Defendant.

Dr. DeGruccio did not detect absolutely any sign Plaintiff was engaging in symptom magnification or exaggeration. She was able to walk throughout his office with a normal gait, on her own not using any assistive device. Plaintiff did not have any signs of effusion, her knee range of motion was nearly normal, lacking 7° of flexion on the left as compared to the right. Stability testing was normal. Dr. DeGruccio took x-rays which he interpreted as showing a normal left knee arthroplasty and moderate osteoarthritis of the right knee with slight varus alignment. He also reviewed Plaintiff's February 2015 left knee MRI as showing a degenerative tear of her medial meniscus and a patellar contusion.

In addition to having medical records to review, Dr. DeGruccio also had video clips of surveillance on Plaintiff's activities, her job description and a manual outlining how to do the Aikido takedowns Plaintiff was required to perform as part of her job duties. He noted Plaintiff was last seen by Dr. Vasicek on October 23, 2015, where it was reported Plaintiff had good range of motion but needed to continue strengthening exercises. She was put at MMI as of that date and assessed as having a 15% impairment rating to the body as a whole under the *Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment*.

Responding to questions posed to him as part of the IME, Dr. DeGruccio did not think the recommendation of Plaintiff undergoing left knee arthroscopic surgery by Dr. Best was warranted as medical literature indicated underlying arthritis can exacerbated as a result of that procedure and actually worsen the condition. He also did not think the medial meniscal tear was

related to the work accident. It was Dr. DeGruccio's opinion that when Plaintiff fell she sustained a patellar infraction or incomplete fracture with a bone contusion which probably created a significant amount of anterior joint and knee swelling "in the face of an underlying severely arthritic knee." He thought the arthritis in Plaintiff's knee had been dormant and asymptomatic given that she was active and functional before her work injury. Then, as a result of the work accident the arthritis was aroused into disabling reality.

Dr. DeGruccio clarified that Plaintiff had a varus deformity in both her knees and if she was symptomatic before the work accident, more than likely she would have had an antalgic gait. While he agreed with Dr. Fadel's statement in his report that moderate to severe arthritis typically causes some symptoms, Dr. DeGruccio pointed out that people living with osteoarthritis tolerate their symptoms for a long period of time until it becomes symptomatic. He pointed out again Plaintiff was very active and trim before her fall at work. Dr. DeGruccio was in agreement with Dr. Vasicek on two additional subjects. First, he thought the total knee replacement was reasonable and necessary and related to the work accident. Second, he did not think Plaintiff could return to her former job if she was required to execute martial arts/takedown maneuvers.

On the subject of an impairment rating, Dr. DeGruccio concluded since Plaintiff's February 2015 MRI did show bone on bone in the medial compartment, she had a whole person impairment rating of 20% immediately prior to the work accident according to *Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment*. He could not go so far as to state she would have needed permanent restrictions before January 13, 2015, as she was active. Dr. DeGruccio placed Plaintiff at MMI on October 28, 2015. With regard to her impairment rating attributable to the work injury, Dr. DeGruccio found her whole body impairment had decreased

to 15% based on the excellent result she achieved from the total knee arthroplasty. Permanent restrictions for Plaintiff's current activities include no kneeling, crawling, squatting, substantial running, jumping, landing and no explosive takedowns or maneuvers. Thus, Dr. DeGruccio did not think Plaintiff had the physical ability to continue in her employment as a youth worker but could work in a less physical setting. As for future medical treatment, Plaintiff's left knee would need to be examined annually, including x-rays.

Dr. DeGruccio prepared an addendum report dated February 12, 2016, discussing whether Plaintiff's varus deformity pre-existed her work accident. The varus deformity was "reflective" of her arthritis. He thought the deformity did pre-exist her January 13, 2015, work accident but the patellar infraction she sustained from the fall did not have any impact on the development of it.

A second addendum report was drafted by Dr. DeGruccio on April 15, 2016, following his review of the Lexington Clinic records on Lowonda McDonald, a/k/a Deshayn Ciper, both of whom have the same date of birth. The records indicate that Plaintiff was seen several times in 2004 for complaints of severe knee pain. A September 30, 2004, x-ray report indicates Plaintiff had bilateral knee osteoarthritis with significant narrowing of the medial tibiofemoral joint space which also had osteophytes. These notes further indicate Plaintiff had been seen by Dr. Peter Hester for evaluation of her left knee pain, had gotten a brace and a total knee replacement had been discussed. Dr. DeGruccio pointed out that Plaintiff's condition very could have been dormant prior to her work accident in January 2015 since she had lost a substantial amount of weight and again, as he stated in his original report, "people living with osteoarthritis tolerate their symptoms for a long period of time until it becomes symptomatic." He could not make any additional comments regarding her varus deformity in 2004 as there was not enough

information in her records. The x-rays taken in 2004 did not change his opinion regarding her 20% impairment rating he assigned for her bone on bone arthritis in existence at the time of her work accident. Dr. DeGruccio declined to formulate a specific opinion regarding Dr. Hester's passing comment regarding Plaintiff's need for a total knee replacement in 2004 and stated he was not changing the opinions he made in his original IME report. Lastly, he agreed that the surveillance video did depict a person who seemed to be asymptomatic as she did not have an antalgic gait.

The deposition of Dr. DeGruccio was taken on May 9, 2016. He did clarify that patients who have moderate to severe arthritis, when challenged, will admit to having some pain but it is not sufficient enough to undergo surgery. He could not state that a person with a higher pain level will have more severe arthritis. Dr. DeGruccio indicated Plaintiff's actual MRI findings on her left knee were stated in terms of her arthritis as being advanced or bone-on-bone kissing lesions as there is no cartilage in either side of the joint. He did not necessarily think that because a person has osteoarthritis in their knees that restrictions were warranted on their activities. Dr. DeGruccio also explained how he arrived at the pre-injury 20% impairment rating and agreed the 15% impairment rating is an accurate reflection of the fact she is probably less impaired at the current time given a person's increased functionality with a knee replacement.

Dr. DeGruccio's opinion regarding the surveillance video was that the person being recorded appeared to be a fully capable functioning individual but he did not go so far as to agree Plaintiff had returned to her pre-injury baseline. He also could not go so far to say Plaintiff's arthritis was totally inactive or asymptomatic at the time of her work accident but she was doing well enough to function.

STIPULATIONS

The parties have stipulated the following:

1. Jurisdiction under the Act. Yes.
2. An employment relationship existed between the Plaintiff and Defendant-Employer at all times herein relevant. Yes.
3. Plaintiff sustained a work-related injury or injuries on **January 13, 2015**.
4. The defendant-employer received due and timely notice of Plaintiff's injury(ies). Yes.
5. Temporary total disability benefits were paid at the rate of \$346.50 per week from 1/14/15 through 9/2/15 for a total of \$11,261.25.
6. The Defendant-Employer has paid on behalf of the Plaintiff medical expenses in the amount of \$24,353.61.
7. Plaintiff's average weekly wage (AWW) was \$588.04.
8. Plaintiff does _____ retain the physical capacity to return to the type of work performed at the time of the injury. At issue.
9. Plaintiff returned to work on _____ at a wage (= / </>) _____ his/her AWW. Plaintiff currently earns wages (= / </>) _____ his/her AWW.
10. Plaintiff's date of birth is **September 21, 1964**.
11. Plaintiff's educational level: **12th grade with 2 years of college**.
12. Plaintiff specialized or vocational training: Martial Arts Certificate, Defensive driving training and Youth Worker Certificate.

CONTESTED ISSUES

The parties reserved the following contested issues for determination by the undersigned at the May 19, 2016, Benefit Review Conference:

1. Benefits due and owing per KRS 342.730;
2. Work-relatedness/causation;
3. Unpaid or contested medical expenses;
4. Injury as defined by the ACT; and,
5. Exclusion for pre-existing disability/impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GENERAL AUTHORITY: As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

A. WORK-RELATEDNESS/CAUSATION, INJURY AS DEFINED BY ACT, & PRE-EXISTING ACTIVE CONDITION.

It has long been held in Kentucky courts that a worker is entitled to be compensated for all harmful changes that flow from a work-related injury which are not attributable to an independent, intervening cause. Elizabeth Sportswear v. Stice, 720 S.W.2d 732, 734 (Ky. App. 1986). Even having proven the existence of an injury, a Plaintiff is also required to establish causation with regard to each and every element of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). As fact-finder in a workers' compensation claim, it is the function of the ALJ to determine the issue of whether a causal nexus exists between the claimant's injury and his/her work activities. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2005). Whether a causal nexus exists between the work activities and claimant's injury is a factual determination.

However, when a causal relationship between trauma and an injury is not readily apparent to laymen, the question is to be put before the medical experts. Mengel v. Hawaiian-Tropic Ne. & Cent. Distrib., Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proved to a reasonable medical probability with expert testimony... [however] [i]t is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, i.e. to the level necessary to prove a particular medical fact." Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004).

"Objective medical findings" are defined by KRS 342.0011(33) as being information gained through direct observation and testing of a patient, applying objective or standardized

methods. In Gibbs v. Premier Scale Co., 50 S.W. 3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if it is based on symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. The Court in Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), concluded though that while objective medical evidence must support a diagnosis of a harmful change, it is not necessary to prove causation of an injury through objective medical findings.

The burden of proving Plaintiff has a pre-existing, active disability lies with the defendant/employer. Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007). The Court in Finley, supra, noted the Workers' Compensation Board had correctly set forth the law on pre-existing conditions in its Opinion. Specifically, the Board stated, in part, that "[t]o be characterized as *active*, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the *AMA Guidelines* immediately prior to the occurrence of the work-related injury." *Id.* at 265. (Emphasis ours.)

~~There is~~ evidence Plaintiff had pre-existing osteoarthritis in her left knee per the September 30, 2004 x-ray ordered by Dr. Peter Hester which was confirmed on her February 2015 left knee MRI. Based on these findings of joint space narrowing, Dr. DeGruccio assessed Plaintiff as having a 20% impairment rating prior to her January 13, 2015, work accident. However, Finley, supra, requires not only that Plaintiff's pre-existing left knee condition be impairment ratable but also be symptomatic before a finding of a pre-existing active condition can be made. This ALJ has reviewed the evidence in this file and can find no persuasive evidence Plaintiff's left knee was symptomatic immediately preceding her January 13, 2015, work accident. The evidence presented shows just the opposite. Plaintiff worked physically

demanding jobs, requiring the use of her legs/knees to walk long distances, climb stairs, twist and pivot for at least 5 years prior to this work accident. As such, the Defendant has failed to meet its burden of proving a pre-existing active condition. Even Dr. DeGruccio, initially concluded the work accident aroused Plaintiff's pre-existing arthritic changes into a symptomatic and disabling reality.

The ALJ has reviewed the evidence in this claim and finds Plaintiff has met her burden of proving a left knee injury. Plaintiff had an acute work event on January 13, 2015 as a result of a slip and fall. Plaintiff experienced an immediate onset of left knee swelling. Plaintiff sought treatment at the emergency room at Frankfort Regional Medical center, where physicians noted swelling and a left knee abrasion, all of which indicate work-related trauma to Plaintiff's left knee. This trauma was sufficient enough to fracture Plaintiff's left patella, as noted by the February 25, 2015 left knee MRI.

This ALJ finds the January 13, 2015, work injury aggravated a pre-existing dormant condition into a symptomatic disabling reality, relying on Dr. Vasicek. The ALJ notes Plaintiff's extensive degenerative changes, which existed prior to January 13, 2015. However, those degenerative changes did not require ongoing medical treatment or formal work restrictions.

B. UNPAID/CONTESTED MEDICAL BENEFITS

KRS 342.020(1) provides that “[i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.” In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future

medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Instead, liability for medical expenses exists “for so long as the employee is disabled regardless of the duration of the employee’s income benefits.”

It has consistently held that a worker who has established a work-related impairment rating has also established a disability for purposes of KRS 342.020 and need prove nothing else to receive an award of future medical benefits.

In this case, the ALJ has determined Plaintiff did sustain a work-related injury to her left knee. Therefore, Plaintiff is entitled to a general award of future reasonable, necessary and work-related medical benefits pursuant to KRS 342.020 for Plaintiff’s her left knee, including a left knee replacement.

C. BENEFITS PER KRS 342.730

After concluding Plaintiff sustained a work-related injury to her left knee, this ALJ must now address what, if any, permanent impairment Plaintiff retains. Dr. DeGruccio opined Plaintiff’s left knee condition warranted a 20% impairment rating prior to the work injury. This ALJ has previously held the Employer failed to meet its burden of proving a pre-existing, active left knee condition.

Plaintiff’s treating orthopedic, Dr. Vasicek, assessed her as having a 15% permanent impairment rating for her left knee following the total knee replacement surgery. This is the only impairment rating in the record addressing permanent impairment following Plaintiff’s work injury and total knee replacement surgery. Consequently, this ALJ finds Plaintiff retains a 15% impairment rating as a result of her January 13, 2015, work accident and subsequent left knee replacement performed by Dr. Vasicek.

Next, the ALJ must address whether Plaintiff retains the physical capacity to perform her previous work. Plaintiff testified she does not feel capable of returning to her pre-injury work. Dr. DeGruccio opined Plaintiff did not have the physical ability to continue her employment as a youth worker. Dr. Vasicek also agreed Plaintiff did not retain the physical capacity to return to her former work. Both physicians have restricted Plaintiff from engaging in martial arts which was an essential component of her job with the Defendant. This ALJ finds Plaintiff does not retain the physical capacity to perform her pre-injury work, relying on Plaintiff's testimony and the opinions of Drs. DeGruccio and Vasicek. Plaintiff's permanent partial disability benefits are calculated as follows:

$$\$588.04 \times .66 \& 2/3 \times 15\% \times 1 \text{ (grid factor)} \times 3.2 \text{ (multiplier)} = \$188.17/\text{week}$$

Plaintiff argues she is permanently and totally disabled as a result of the January 1, 2013, injury. Permanent Total Disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. Work is defined as meaning providing service to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining whether a worker is totally disabled, an ALJ must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The ALJ is required to undertake a 5 step analysis in order determine whether a claimant is permanently and totally disabled. The ALJ must determine whether there has been a work-related injury, what Plaintiff's impairment rating is, and address permanent disability. Finally,

the ALJ must determine whether Plaintiff can perform any type of work and that total disability is due to the work injury. Ashland v. Stumbo, 461 S.W. 3d 392 (Ky. 2015).

As set forth above, this ALJ has concluded Plaintiff's sustained a left knee injury, which left Plaintiff with a 15% impairment rating and restrictions/limitations which prevent her from returning to her pre-injury job duties. The ALJ notes Plaintiff's is 51 years old with a 12th grade education, and Associates Degree in Arts. Plaintiff's age and educational background do not support a finding of permanent total disability.

Plaintiff's past employment history is commendable and she continues to apply for and seek employment. Plaintiff was never completely restricted from working. Dr. Vasicek indicated Plaintiff does not retain the physical capacity to perform her pre-injury work, but never restricted Plaintiff from all work. Therefore, this ALJ believes Plaintiff does retain the physical capacity to perform some form of work as enumerated by KRS 342.0011(34). As such, this ALJ does not find Plaintiff to be permanently and totally disabled.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED AND ADJUDGED:**

1. The Plaintiff, Lowanda McDonald, shall recover from the Defendant, Commonwealth of Kentucky, Department of Juvenile Justice, and/or its insurance carrier, permanent partial disability benefits in the sum of \$188.17/week commencing on January 13, 2015, and continuing for a period not to exceed 425 weeks, suspended during any period of TTD benefits, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation.

2. All unpaid installments of compensation awarded herein shall carry interest at the rate of 12% per annum until paid. The benefits are subject to the limitations set forth in KRS 342.730 (4), (5), (6), and (7).
3. The Plaintiff, Lowonda McDonald, shall recover from Defendant, Commonwealth of Kentucky, Department of Juvenile Justice, and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the care and relief from the effects of the work-related injury to left knee, including a left knee replacement. Defendant's obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.
4. Any motion for approval of attorney's fees shall be filed within thirty (30) days after the final disposition of this award. Any such motion must include an itemization of services together with either the actual times or a reasonable accurate estimate of the time expended on each of the itemized services listed.

Rendered and copies deposited in the United States Mail addressed to the parties shown below on this the 19th day of August, 2016.

Stephanie L. Kinney
STEPHANIE L. KINNEY
ADMINISTRATIVE LAW JUDGE

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