

On September 1, 2009, the Court of Appeals ('COA') published another batch of opinions, several involving workers' compensation claims. Among them is *Nale v. Ethan Allen*, in which the COA reversed the Industrial Commission's determination that the worker's left knee injury was caused by the admittedly work-related injury to her right knee. The employer faced an extremely high bar in reversing the Commission's decision. A determination of causation is, essentially, a finding of fact. The COA cannot reverse a finding of fact unless there is absolutely no evidence in the record to support it. If the record contains conflicting evidence of causation, the COA cannot second guess the Commission's decision. Rather, the Commission's finding is conclusive. In *Nale*, the worker injured her left knee at work and underwent arthroscopic surgery to repair it. About eight months after surgery, she returned to her doctor with complaints of pain in her right knee. The doctor eventually performed arthroscopic surgery on the right knee, and the worker tried to have that surgery covered by her workers' compensation claim. The injured worker's theory was that her right knee problems resulted from 'overcompensating' for the problems in her left knee. In other words, she shifted more of her weight to the right knee, which made it painful. The Industrial Commission agreed, relying on this sentence from the doctor's testimony, 'I have no doubt that her right knee was working harder than her left knee, given that she had arthritis in her left knee and was favoring that knee.' However, the doctor noted that the surgery revealed that the worker had a plica, or a band of scar in her right knee. He testified, 'The plica is not something that would form as a result of over activity on the knee.' Moreover, he testified that the injured worker told him she had twisted the right knee several days before she first complained to him of the problem. The COA reviewed the doctor's evidence as a whole and determined there was no evidence to support that finding that the worker's problems were caused by overuse. The doctor testified that her problems resulted from the plica and the twisting injury. Although he testified that it was possible for overcompensation to cause such problems, he never stated that it probably was the cause of the right knee pain. \*\*\*\*\* *Nale* is interesting in that it suggests appellate review of Industrial Commission opinions still has some teeth. Just based on my reading of cases over the last several years, I had the impression that the COA was extremely deferential to Commission opinions and would reverse only on a purely legal issue. *Nale* indicates, at least, that although the bar for reversing a finding of fact made by the Commission remains high, the COA won't simply roll over for any factual finding made by the Commission. Although the COA found against the injured worker in this case, I am encouraged by the Court's willingness to review the entire

record to determine what the doctor actually said. Too many times, the defense will take a single sentence from a doctor's testimony out of context and use it against the injured worker.