

No. 35957-0-II

COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION TWO

CHUNYK & CONLEY/QUAD C,

Respondent,

v.

SAMMIE L. WILLIAMS ,

Appellant.

BRIEF OF RESPONDENT CHUNYK & CONLEY/QUAD C

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WSBA #22679

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I. INTRODUCTION

On the appeal by employer Chnyk & Conley Co./Quad C ("Quad C"), a skilled nursing facility, to the Superior Court in January 2007 from an administrative decision at the Board of Industrial Insurance Appeals in 2005, the jury found in favor of Quad C, the Respondent herein. The employee Sammie Williams is the Appellant herein.

The case presented to the jury conformed to the procedure designated for appeal of an administrative hearing, and the trial court judge made no decisions that were beyond his discretion (and none that could have adversely confused or misled the jury). On the contrary, the evidence was substantial and clear, that Mr. Williams' ongoing knee problems and weight gain arose from his long-standing degenerative joint disease and from his long-standing obesity. The evidence from *objective medical findings*, the standard for determining industrial claims, fully supported Quad C's and the Department of Labor & Industries' positions. The jury had ample evidence to decide as they did.

Moreover, the judge's clarifying instruction (CP at 178 [Instruction No. 15) was, first, an instruction previously approved by the Supreme Court, and, second, a correct and unbiased statement of the law in any event. There is no evidence that the jury was somehow biased by the statement or that they were misled by its content. It was a neutral and fair

jury instruction.

This appeal herein should be denied. Indeed, there are no grounds upon which to reverse the verdict or to challenge the trial court's decisions. The province of the jury should not be disturbed on the issues raised by the Appellant, only upon weightier and prejudicial missteps by a trial court.

II. STATEMENT OF THE CASE

At issue here is whether the evidence supported the jury's decision to overturn a Board of Industrial Insurance Appeals' decision that they were instructed was "presumed correct". The jury not only knew the weight the Board's decision should be given (CP at 165. [Instruction No. 4), they overcame that presumption and did so unanimously! (CP at 186-88, 199-200) The Appellant's grasping aside, the jury's decision was a resounding correction of the faulty Board analysis and opinion.

We note a few corrections and additions to the factual statements by the Appellant's opening brief:

First, Quad C's argument was never that Mr. Williams was "lazy and gluttonous". Indeed, the facts show that he had been obese for many years despite working, that he had a degenerative joint condition in his knees that slowed his activity over the years, and that he had thyroid condition. The employer's position was simply that these conditions and

his resulting health and degenerative joint disease process, were unrelated to the industrial injury, a bump of his knee on a linen cart. (Williams, Board Tr., at 13 [00170]) Quad C did not need to resort to any “bias” arguments – and none can be found in the transcript – because the facts and evidence fully supported Quad C already.

Second, Dr. Richard McCollum was not the “only” medical witness supportive of closure on this claim, as suggested in the opening brief. In actuality, **most of the evidence and medical examiners favors Quad C:**

- Dr. Jiganti’s February 1998 surgery was successful, by all accounts (Jiganti, Board Tr., at 18 [00267]; McCollum, Board Tr., at 15 [00402])
- Dr. John Jiganti, attending surgeon, released Mr. Williams to work in July 2000, saying he could perform sedentary work, such as that of a parking attendant, which was offered to him. (Jiganti, Board Tr., at 31 [00280])
- Mr. Williams went two years without going back to Dr. Jiganti, from 2000-02; Dr. Jiganti did not examine him again until November 12, 2002. (Jiganti, Board Tr., at 32-33 [00281-82])
- Dr. Jiganti agreed in Exhibit 1 that Mr. Williams had reached “maximum medical improvement? √ Yes”, and did

not examine him thereafter. (Jiganti, Board Tr., at 37 [00286]; Exh. 1, 00205)

- Dr. Jiganti testified, tellingly:

Q. What did [the May 11, 1999, MRI] reveal?

A. He had some changes in the meniscus consistent with the [surgical procedure] and not a lot else besides that.

Q. Did you expect to do more surgery?

A. No . . . I did not have any specific plans to treat his knee in terms of surgery following that MRI. (Jiganti, Board Tr., at 18-19 [00267-68])

- Dr. Foster, who performed an IME on September 19, 2002, and ordered the new MRI on September 25, 2002, opined that there were “no other changes” other than “pre-existing” degenerative joint disease. (CP at 56; Exh. 2, 00149, 00205 [Exh. 2 admitted, CP at 157])
- Dr. Foster opined that Mr. Williams could “work without limitations”. (*Id.*)
- Dr. Fenner performed an IME on June 17, 2000, and noted that Mr. Williams’ knee was “fixed and stable”, that he had “no work restrictions” and he could work “as a housekeeping assistant [same job as at the time of injury] without restrictions”. (*Id.*)
- The experts at the Department of Labor & Industries reviewed all the medical evidence and concluded that:

- “the preponderance of medical evidence . . . supports Mr. Williams ability to work”;
 - Mr. Williams is “not eligible for vocational services”; and
 - Mr. Williams has the “ability to perform his regular job duties”. (CP at 55, 57; Exh. 2, 00148-50, 00206-08)
- Dr. McCollum, a Board Certified orthopedic surgeon and authorized provider and certified examiner with the Department of Labor & Industries (McCollum, Board Tr., at 6-7 [00393-94]:

- Relied only on “objective, medical” findings (*Id.* at 17-19 [00404-06];
- Noted that Mr. Williams played basketball “subsequent” to the surgery, and “hurt his knee then” (*Id.* at 15 [00402];
- Noted that he did not see his surgeon for two years, then was cleared by Dr. Jiganti for employment (*Id.* at 17 [00404];
- Explained medically why the industrial injury did not activate the prior degenerative joint disease (to understand this, please review the illustrations¹ of the knee anatomy spoken of, attached hereto):

A. In addition to a tear in the medial meniscus, he had a chondromalacia diffusely present on the medial femoral condyle, which included a weight bearing surface. . . .

¹ These same illustrations were utilized in closing arguments for illustrative purposes only, to show the jury what the doctors were talking about.

Q. In your review of the operative report were those conditions related to the injury or were they unrelated?

A. Well, I think probably the chondromalacia – this is a very obese man. I think probably chondromalacia was not caused by this injury. . . . The reason I say this is because the tear that he had was a flap tear. It only involved the posterior horn, and if the chondromalacia was just in the exact juxtaposition to the posterior tear, then you might incriminate the chondromalacia due to this injury. But, since it involved the whole medial femoral condyle [as noted in Dr. Jiganti's operative report] diffusely over it, I think it was an area that far exceeded that which might be caused from a flap tear in the posterior horn from four months earlier. That would be my reason. (Id. at 14-15 [00401-02])

This is some of the evidence the jury heard in support of Quad C's position. The jury, therefore, had plenty of evidence to support its decision to overturn the Board's misguided opinion. Most of the doctors (Dr. Jiganti partially, and Drs. Foster, Fenner, and McCollum, fully) supported Quad C's position, the Department of Labor & Industries supported that position, and the jury supported that decision. Only the Board was not in step.

From an evidentiary standpoint, the evidence is not only sufficient, not only a "fair preponderance", but rather substantial, in favor of the employer Quad C.

III. ARGUMENT

A. Burden of Proof

The party that moves for review of a Board's decision at the superior court must bear the burden of proof. The burden of proof for appeal at that level is beyond a preponderance of the evidence. RCW 51.52.115. The court in *Garrett Freightlines v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 725 P.2d 463 (1986), quoting *Department of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983), stated:

This presumption means that the Board's decision will only be overturned "if the trier of fact finds from a fair preponderance of the evidence that such findings and decision of the board are incorrect. It must be a preponderance of the credible evidence. If the trier of fact finds the evidence to be equally balanced then the findings of the board must stand."

Garrett, 45 Wn. App. at 339.

The Appellant appears to suggest that a standard beyond "fair preponderance" was applicable. This is not the case. Their citation of *Venezelos v. Department of Labor & Indus.*, 67 Wn.2d 71, 406 P.2d 603 (1965) (not a jury verdict, but a trial judge's granting of a non-suit), is not supportive of a standard of "substantial evidence".

However, whether by a "fair preponderance" or "substantial evidence" to support the jury's findings, the factual evidence fully supports their verdict here. (See evidence outlined above)

B. Objective Evidence Versus Subjective Complaints

The law requires, in industrial injury cases, that objective medical evidence support the claim. “A physician may not base an opinion as to causation of a physical condition on subjective symptoms and self-serving statements. He must base his opinion as to causation on objective medical evidence.” *Cooper v. Department of Labor & Indus.*, 20 Wn.2d 429, 432, 147 P.2d 522 (1944). A claimant must establish a causal relationship between the industrial injury and the new condition (many years later), by competent medical testimony based upon *objective medical findings*. WAC 296-20-280; *Phillips v. Department of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956) (symptoms must be observed by doctor; dismissal affirmed); *Loushin v. ITT Rayonier*, 84 Wash. App. 113, 924 P.2d 953 (1996); *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

In *Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), an injured worker sought to re-open his case based upon aggravation of a prior work-related back injury, which claim had been paid out and closed. He sought to recover for a two-year time period almost 8 years after the original injury. Since the “only objective findings appear to relate to the existence of Mr. Oien’s preexisting condition”, the Court found that the claimant failed to make his case. Where the physician testified that the “objective findings would be the [degenerative] radiologic changes in the spine . . . supported by the subjective complaints of the patient”, this was not enough. Without a better connection, the

present symptoms could be related to any number of factors. *Id.* at 570.

Such is the case here. The Appellant's witnesses relied heavily on subjective complaints of Mr. Williams. For example, Dr. Johnson admitted he relied mainly on subjective statements and that he did not review available MRIs or x-rays. (Johnson, Board Tr., at 49, 63 [00340, 00354]) Objective findings do not connect the industrial injury to Mr. Williams's present condition. Rather, there is logical alternative, based on objective findings -- his degenerative joint disease. Indeed, all "medically necessary" treatment must relate to the industrial injury to be covered -- not just needed for the "convenience" of the claimant because of various life changes. See WAC 296-20-01002 (as amended as of January 8, 2000); *In Re Housden*, Docket No. 99 20560 (BIIA, 2001).

The best example of this is the issue of Mr. Williams' foot problems (plantar fasciitis), which the Appellant claims resulted -- several years later -- from the bump of the knee and the subsequent surgery. The Appellant presented no objective medical findings to support a "probable" causal connection to the industrial injury. Dr. McCollum testified that the condition was unrelated: "I can't see any scientific reason. It just developed later, much later." (McCollum, Board Tr., at 20 [00407])

Rather than submit objective medical evidence on this plantar fasciitis issue, the Appellant relied on impermissible, speculative medical testimony. The law states, however, that possibility is not enough to establish causation -- it must be "medical probability". *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). *See also Herskovits v.*

Group Health, 99 Wn.2d 609, 664 P.2d 474 (1983); *Young v. Group Health*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975).

Testimony to the effect that certain acts "might have," or "could have," or "possibly did," cause the condition is insufficient:

In a case such as this, medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom. The evidence will be deemed insufficient to support the jury's verdict, if it can be said that considering the whole of the medical testimony the jury must resort to speculation or conjecture in determining such causal relationship. In many recent decisions of this court we have held that such determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability "might have" or "possibly did" result from the hypothesized cause. To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of "probably" or "more likely than not" caused the subsequent disability.

O'Donoghue, 73 Wn.2d at 824. Furthermore, the degree of proof from the physician must be sufficient to establish that more likely than not the act was the proximate cause of the alleged injuries to avoid speculation or conjecture. The Supreme Court recommended the following instruction as a statement of the law in *Young*:

You are instructed that the causal relationship of the alleged negligence of the defendants to the resulting conditions of the child must be established by medical testimony beyond speculation and conjecture. The evidence must be more than that the alleged act of the defendants "might have", "may have", "could have", or "possibly did", cause the physical condition. It must rise to the degree of proof that *the resulting*

condition probably would not have occurred but for the defendants' conduct, to establish a causal relationship.

85 Wn.2d at 337 (emphasis supplied).

The Supreme Court further upheld the requirement of competent medical testimony to establish causation in industrial injury cases. In *Dennis v. Department of Labor & Indus.*, 109 W.2d 467, 745 P.2d 1295 (1987), the court stated:

The causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony which shows that the disease is *probably, as opposed to possibly*, caused by the employment.

Id. at 477 (emphasis supplied).

Here, Dr. Jiganti's testimony as to the plantar fasciitis condition is inadequate. He responded to a question of whether the industrial injury "had something to do with" the plantar fasciitis: "I believe it could have, yes." (Jiganti, Board Tr., at 39 [00288]) This is not enough, under the above case law.

Later-treating physician Dr. Tonia Jensen, as well, testified inadequately on this subject. She stated that "he does walk with a pronounced limp, and it is possible that limping for all these years could cause chronic foot pain and plantar fasciitis." (Jensen, Board Tr., at 10 [00220], emphasis supplied) When later prompted by counsel, she changed her testimony to "probably"; but a jury could certainly have considered such inconsistency and determined that her *initial* response was the truthful one and inadequate.

C. Challenge to Dr. McCollum is Inaccurate and Irrelevant

As noted in the factual evidence above, Dr. McCollum was not the only medical witness (and evidence) in favor of Quad C and the Department. The medical testimony and exhibits were overwhelmingly against Mr. Williams. The Appellants' challenges to Dr. McCollum's testimony, though interesting if misguided, are irrelevant on appeal – these are matters left to the jury to weigh, and cannot be disturbed on appeal. *See Bennett v. Dept. of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P.2d 104 (1981).

First, Dr. McCollum relied only on objective evidence. This is critical. (See B above) The benefit of not examining the patient in an industrial case like this is that the records-examining physician is not swayed by the emotion of subjective complaints.

Second, Dr. McCollum's testimony before the Board was in the presence of Appellant's counsel. He cross-examined the doctor. Even if Appellant's arguments on appeal regarding the sufficiency of Dr. McCollum's testimony were valid (they are not), those are all things that should have been brought out on cross. Some were, and to the extent they were brought out on cross, the jury had reason to hear and consider those issues. If they were not brought out on cross (for example, Dr. McCollum lumping in causation resulting from *knee surgery* as opposed to *industrial*

injury, which testimony the Appellant claims was confusing), then Appellant's counsel is to blame for not raising the jury's awareness of that failure (if any). The Appellant cannot now criticize Dr. McCollum for any confusing testimony (if any) that could have been remedied on cross and re-direct.

Either way, it is not a basis for overturning a jury's decision. It is not in the realm of trial court error, either. "The weight of such testimony is for the jury." *Bennett*, 95 Wn.2d at 534.

D. Jury Instruction No. 15 Was Correct and Not Misleading

The law allows that "special consideration" should be given to the opinion of an attending physician in industrial injury cases. *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 570, 761 P.2d 618 (1988). This was Jury Instruction No. 14. (CP at 177) The law also states that the fact finder "

is not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, [the fact finder] may consider . . . the reasons given for that opinion, the sources of the doctor's information, together with the factors already given you for evaluating the testimony of any other witness.

Id. at 573. This was an approved supplemental jury instruction in that case. *Id.* The trial court accepted it as Jury Instruction No. 15. (CP at 178)

Quad C's proposed instruction on this issue exactly quoted

Hamilton:

You are not bound by the attending physician's opinions. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that doctor, the reasons given for the opinion, the sources of the doctor's information, together with the factors already given you for evaluating the testimony of any other witnesses.

(CP at 136 [Respondent's Proposed No. 6] This was the correct statement of the law and the previously allowed instruction. *Hamilton*, 111 Wn.2d at 573. The trial court in our case actually watered the instruction down, after discussion with Appellant's counsel during trial, by combining it with WPI (5th) 2.10 (proposed by the Appellant). (CP at 118 [Appellant's Proposed Instruction No. 11])

The result, Jury Instruction No. 15, is still a correct statement of the law. It does not discount the attending doctor's opinion: it simply notes that the jury should take care to look at all the surrounding evidence. Because the judge included the instruction that that jury should view the attending physician's testimony and opinion with "special consideration" (CP at 177 [Instruction No. 14]), the additional instruction simply reminds the jury that the attending physicians' opinions are not conclusive, even if they are "special". (CP at 178 [Instruction No. 15]) The instruction reminds the jury to consider the evidence thoroughly. As much as the

Appellant would have liked the jury not to think or be thorough, thinking about the evidence is an important part of a jury's duty. Just as the Board's decision is not conclusive, though "presumed correct" (CP at 165), the attending physician's opinions are not conclusive, though presumed "special".

Finally, the Appellant's claim that the jury might have thought the trial judge was "commenting" on the inadequacy of the witnesses for Mr. Williams, is ludicrous. First, if he were so commenting, then logically he was telling the jury that he did not think Instruction No. 14 should be followed, either. If this were true, why would the judge give that instruction at all? Clearly, he was not commenting on the evidence here, but simply making the consideration of the evidence fair.

Second, if such a supposed "comment" on the inadequate witnesses for Mr. Williams was prejudicial, then the Appellant is admitting that their witnesses were in fact inadequate to begin with and thus needed additional protection. If they were "substantial" witnesses, as Appellant claims, then they would certainly stand up to whatever increased scrutiny Instruction No. 15 brought, even if it were a "comment" on the evidence. Either way, the unanimous jury verdict must stand.

IV. CONCLUSION

The trial court properly accepted the verdict of the jury, which is fairly and even substantially supported by the evidence. The trial court also gave proper instructions that were mostly favorable to the Appellant, if to anyone. There was certainly no misleading comment on the evidence in Instruction No. 15, and the Appellant presents no evidence or theory on how the jury was confused by the instruction. Indeed, recall that the jury was unanimous -- they were clear and there was no confusion there.

This appeal should be denied and proper fees and costs should be awarded to the Respondent herein.

Respectfully Submitted this November 26, 2007, at Seattle, Washington.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK

By: 

D. Jeffrey Burnham, WSBA #22679
Attorneys for Respondent

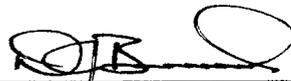

CERTIFICATION OF SERVICE

I, D. Jeffrey Burnham, declare under penalty of perjury under the laws of the State of Washington, as follows:

I served the attorneys for the Appellant Sammie Williams, by placing the **BRIEF OF RESPONDENT CHUNYK & CONLEY/QUAD C** into the U.S. Mail, on the date set forth below, and addressed to:

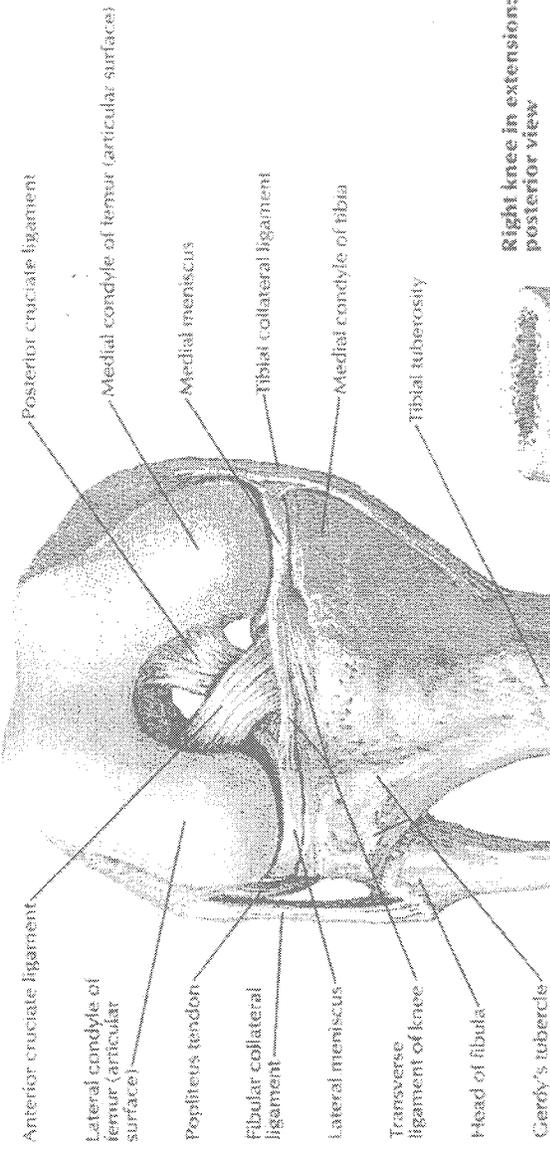
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Dated this 26th day of November, 2007, at Seattle, Washington.

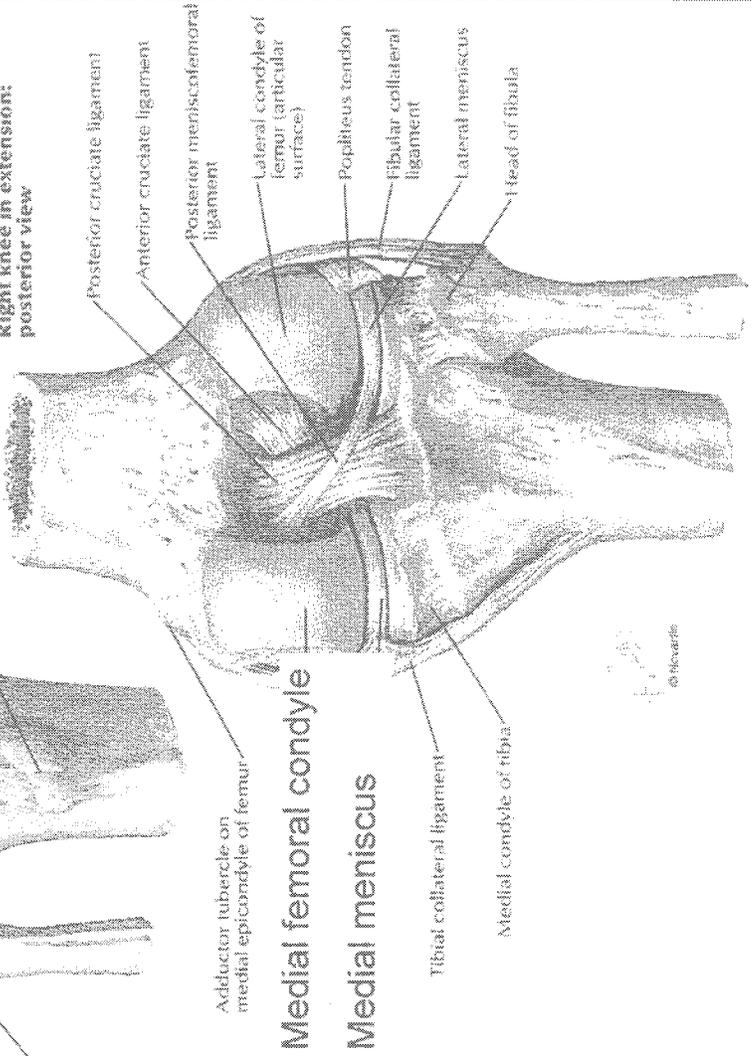


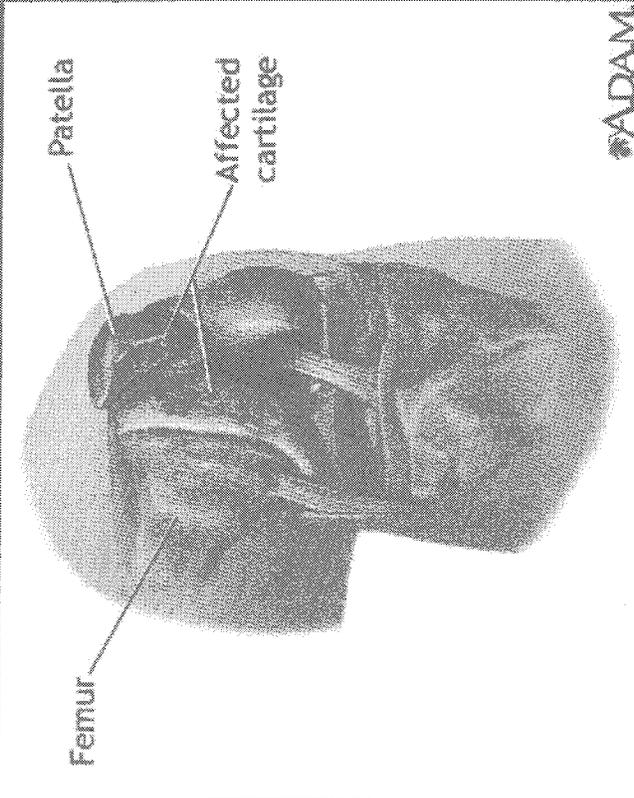
D. Jeffrey Burnham

Right knee in flexion: anterior view

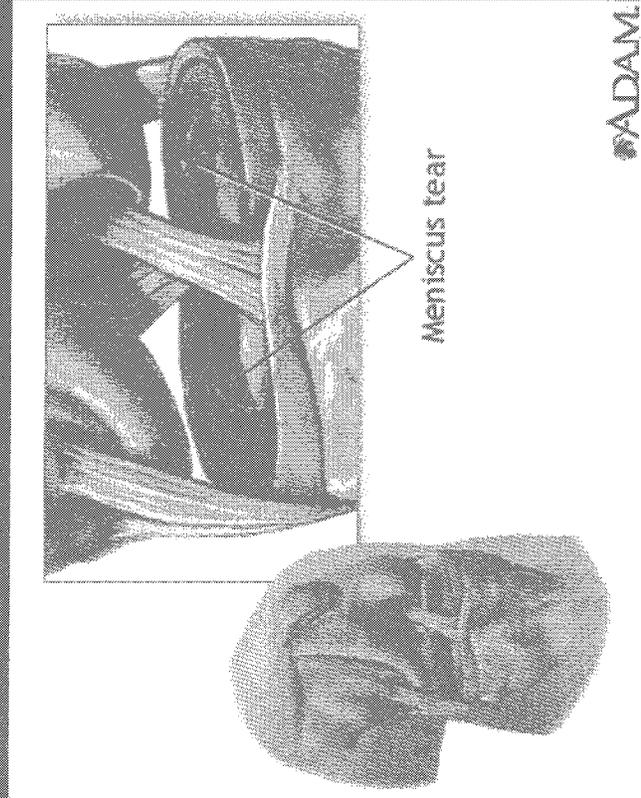


Right knee in extension: posterior view





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