MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE

COURT OF APPEALS OF INDIANA

Connie Hussung,
Appellant-Plaintiff,

v.

Woodland Hills Care Center,
Appellee-Defendant

December 29, 2021

Court of Appeals Case No. 21A-EX-1435

Appeal from the Full Worker's Compensation Board of Indiana

The Honorable Linda Peterson Hamilton, Chairman

Application Number: C-242220

Crone, Judge.

Case Summary

[1] Connie Hussung appeals the order of the Full Worker's Compensation Board of Indiana (the Board) denying her claim for worker's compensation benefits. She argues that the Board erred by concluding that she failed to carry her burden to show that her injury was compensable. Because the evidence does not lead inescapably to a conclusion contrary to the Board's, we affirm.

Facts and Procedural History

[2] The undisputed findings of fact and supporting evidence show that Hussung was the director of housekeeping and laundry services at Woodland Hills Care Center (Woodland Hills). Hussung had worked at this facility since 1979. In March 2014, Woodland Hills acquired the facility and hired Hussung. Hussung had preexisting conditions of rheumatoid arthritis, osteoarthritis, osteopenia, and osteoporosis, which necessitated the long-term use of medications including prednisone and Fosamax. Appealed Order at 5 (finding #18). From January 26 to May 23, 2016, Hussung underwent chiropractic treatment for cervical, thoracic, and low back pain, which traveled to her left hip and left leg. *Id*. From May 31 to August 4, 2016, she underwent physical therapy for persistent left hip pain. *Id*. Fellow coworkers Beverly Tackett and Angie Turner observed Hussung "limping with a worsening effect in the weeks leading up to August 4, 2016." *Id*. (#19).

[3] On August 4, 2016, Hussung was at work cleaning a recently vacated room on the third floor of the facility in preparation for the annual state inspection. She

set up a cardboard box and began carrying items such as braces, lamps, blankets, and learning toys to the box and putting them inside. As she "leaned over the box to place an item inside, she felt immediate pain and her left leg gave out." *Id*. at 3 (#4). Hussung placed the weight of her body onto the cardboard box and lowered herself to the ground. Hussung did not slip on anything, trip over anything, or fall before her leg gave out. Tr. Vol. 2 at 30. Hussung did not remember what item she was placing in the box, and there were no witnesses to the event.

[4] After she lowered herself to the floor, Hussung was unable to get up and used her cellphone to call the front desk. Tackett and coworker Jeannine Hiatt came to Hussung's assistance and called 911. Hussung was taken to Dearborn County Hospital, "where a history was taken that [Hussung] was at work and bent forward and heard a pop." Appealed Order at 3 (#10). An x-ray revealed that Hussung had an "angulated and mildly displaced proximal femoral fracture." *Id*. Hussung was examined by an orthopedic surgeon, whose notes indicate that Hussung suffered a "left hip subtrochanteric fracture without trauma today while leaning over." *Id*. (#11). The surgeon's notes also indicate that Hussung had been treated for several years with Fosamax for osteoporosis, that Fosamax is a bisphosphonate medication, that bisphosphonates have been associated with subtrochanteric fractures, and that Hussung had a "pathological fracture due to osteoporosis." *Id*. at 4.

[5] As part of Woodland Hills's investigation into Hussung's injury, it obtained written statements from Tackett and Hiatt. Tackett stated that Hussung told her

that her "leg gave out, I leaned over on the boxes I was packing and slid to the floor." *Id*. at 3 (#9). Hiatt's statement indicates that she received a phone call from Hussung, and Hussung told her that "her leg had just broke." *Id*. (#8). When Hiatt found Hussung on the floor in the vacated room, Hussung told Hiatt that she "was just standing here. I brought stuff up to the room and my leg gave out and I grabbed the boxes that were beside me and lowered myself to the floor." *Id*.

[6] Woodland Hills denied Hussung worker's compensation benefits. In May 2018, she filed an application for adjustment of claim with the Board. A single hearing member held a hearing, at which the parties submitted stipulated facts[1] and exhibits, including the written statements of Tackett and Hiatt and expert medical reports. Hussung, Tackett, and Turner testified. In December 2020, the single hearing member issued his decision, concluding that Hussung "met her burden of proving that she sustained injury by accident in the course of and arising out of her employment with [Woodland Hills] when she suffered a fractured left femur while leaning over [and] packing a carboard box on August 4, 2016." Appellant's App. Vol. 2 at 14.

[7] Woodland Hills filed an application for review by the full Board. The Board heard oral argument, but no new evidence was submitted. In June 2021, the

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[1] The stipulated facts are extremely basic, such as the date Woodland Hills hired Hussung, her average weekly wage, her claimed injury, that she received medical treatment, that Woodland Hills did not pay her medical expenses, and the date that she filed her application for adjustment of claim. Appealed Order at 1-2.

Board issued its decision reversing the single hearing member's decision. The Board concluded as follows:

> 14. At the request of [Woodland Hills], Dr. Robert Gregori performed a records review on March 30, 2020. Dr. Gregori opined [that Hussung's] left hip fracture on August 4, 2016 was solely due to [Hussung's] pre-existing medical condition and not the result of a fall or other trauma. He noted that [Hussung's] rheumatoid arthritis, age of 50, being a female, being post-menopausal, and being treated long term with Prednisone all contributed to her osteopenic bones. While he acknowledged [Hussung's] history of bending over when her left femur fractured, he opined that [Hussung's] fracture was not induced by trauma, rather it occurred under routine physiologic stress. He noted that hip fractures frequently occur under routine physiologic [stress] in individuals such as [Hussung] with a history of osteopenia and osteoporosis. Dr. Gregori observed that there was nothing about Plaintiff's employment duties or the tasks she was performing at the time of her injury that caused or increased her risk of the hip fracture. Dr. Gregori concluded that the fracture occurred due to [Hussung's] osteopenic bones and routine physiologic stress and not as a consequence of [her] employment with [Woodland Hills]. Dr. Gregori's opinion is credible and is consistent with the overall medical evidence contained in the record.
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> 15. At the request of [Hussung], Dr. Larry Olson issued a report dated April 20, 2020 following a records review and telephonic interview of [Hussung]. Like Dr. Gregori, Dr. Olson acknowledged [Hussung's] pre-existing conditions of rheumatoid arthritis, osteoarthritis, and osteoporosis and recognized the increased occurrence of hip fractures in post-menopausal women with osteoporosis. Dr. Olsen recorded a history that [Hussung] turned her body to place an item in the box and twisted her left leg, which is contrary to [Hussung's] testimony that she was leaning over the box when her leg gave out. Dr. Olson concluded

that [Hussung] "suffered a left subtrochanteric hip fracture while loading a resident's items into a box. In my opinion these pre-existing conditions likely contributed to the injury suffered by [Hussung]." Dr. Olson opined that [Hussung] had reached maximum medical improvement and assessed a nine percent (9%) whole person impairment as a result of the August 4, 2016 injury. Dr. Olson's opinion is based on an inaccurate history of the incident.

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20. [Hussung's] fracture was caused by routine stress on the bones while engaging in routine everyday activities of standing and leaning over. The medical evidence supports that the fracture could have occurred anywhere and the fact it simply occurred at work does not make the injury compensable under the Act.

CONCLUSIONS OF LAW

1. [Hussung] has failed to meet her burden of proving that she sustained injury by accident in the course of and arising out of her employment with [Woodland Hills] when she suffered a fractured left femur while packing a cardboard box on August 4, 2016. The overwhelming medical evidence is persuasive that [Hussung's] pre-existing conditions consisting of rheumatoid arthritis, osteoarthritis, Osteoporosis/osteopenia with long term use of Prednisone and Fosamax, a bisphosphonate drug, precipitated her injury. Dr. Earl's opinion that the fracture was due to osteopenia is most persuasive in this regard. Dr. Gregori, who is found credible, also opined that [Hussung's] pre-existing personal conditions were the sole factor leading to [Hussung's] hip fracture.

2. The opinion of Dr. Olson, [Hussung's] expert, is given little weight due to the fact that it is based on an inaccurate

> understanding of [Hussung's] mechanism of injury and/or the onset of her pain. The evidence contained in the record is clear that [Hussung's] injury occurred either when she was standing or leaning over when her leg gave out. There is no evidence that [Hussung's] fracture occurred by twisting her left leg.
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> 3. [Hussung's] August 4, 2016 subtrochanteric left hip/femur fracture occurred due to her own personal health condition rather than an employment related or even a neutral risk. Nor was [Hussung's] pre-existing condition aggravated or exacerbated by her work activities. Therefore, [Hussung's] injury is not compensable under the Worker's Compensation Act.

Appealed Order at 4-5. This appeal ensued.

Discussion and Decision

[8] Hussung contends that the Board erred by concluding that her injury is not compensable under the Worker's Compensation Act (the Act). The purpose of the Act is to provide "compensation for personal injury or death by accident arising out of and in the course of employment." Ind. Code § 22-3-2-2. Hussung bore the burden of proving she suffered an injury by accident arising out of and in the course of employment. *Bertoch v. NBD Corp.*, 813 N.E.2d 1159, 1161 (Ind. 2004). "The Board is not obligated to make findings demonstrating that a claimant is not entitled to benefits; rather, the Board need only determine that the claimant has failed to prove entitlement to benefits." *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1116 (Ind. Ct. App. 2008), *trans. denied* (2009).

[9] When an appellate court reviews a worker's compensation decision, we are bound by the Board's factual determinations and may not disturb them "unless

the evidence is undisputed and leads inescapably to a contrary conclusion." *Christopher R. Brown, D.D.S., Inc. v. Decatur Cnty. Mem'l Hosp.*, 892 N.E.2d 642, 646 (Ind. 2008). "We examine the record only to determine whether there are any substantial evidence and reasonable inferences that can be drawn therefrom to support the Board's findings and conclusion." *Id*. We neither reweigh evidence nor judge witness credibility. *Fitzgerald v. U.S. Steel*, 892 N.E.2d 659, 662 (Ind. Ct. App. 2008). "To the extent the issue involves a conclusion of law based on undisputed facts, it is reviewed de novo." *DePuy, Inc. v. Farmer*, 847 N.E.2d 160, 164 (Ind. 2006). Nevertheless, we employ "a deferential standard of review of the interpretation of a statute by an administrative agency charged with its enforcement in light of its expertise in the given area." *Wright Tree Serv. v. Hernandez*, 907 N.E.2d 183, 186 (Ind. Ct. App. 2009), *trans. denied*. We will reverse the Board only if it incorrectly interpreted the Act. *Burdette v. Perlman-Rocque Co.*, 954 N.E.2d 925, 928-29 (Ind. Ct. App. 2011). "We will construe the Worker's Compensation Act liberally in favor of the employee." *Triplett*, 893 N.E.2d at 1116.

[10] Here, the parties do not dispute that Hussung's injury occurred by accident. Her femur broke unexpectedly when she leaned over the packing box to place an item inside. *See Bertoch*, 813 N.E.2d at 1162 ("[T]he statutory phrase 'injury or death by accident' means 'unexpected injury or death' and does not require an unusual event precipitating the [injury or] death.") (quoting *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 975 (Ind. 1986)). Nor do the parties dispute that her injury occurred in the course of her employment; she was

cleaning a resident's room in preparation for a state inspection. *See Global Constr., Inc. v. March,* 813 N.E.2d 1163, 1166 (Ind. 2004) ("An accident occurs 'in the course of' employment when it takes place at the time and place of a person's employment while an employee is fulfilling his duties.") (quoting Ind. Code § 22-3-2-2).

[11] The sole dispute is whether Hussung carried her burden to prove that her injury arose out of her employment. "An injury 'arises out of' employment when a *causal nexus* exists between the injury or death and the duties or services performed by the injured employee." *Bertoch*, 813 N.E.2d at 1161 (emphasis added). The "nexus is established when a reasonably prudent person considers the injury to be born out of a risk incidental to the employment, or when the facts indicate a connection between the injury and the circumstances under which the employment occurs." *Milledge v. The Oaks*, 784 N.E.2d 926, 929 (Ind. 2003), *superseded in part on other grounds*. Hussung asserts that a causal nexus exists on both grounds.

[12] Turning first to whether a reasonably prudent person would consider Hussung's injury to be born out of a risk incidental to her employment, we observe that risks incidental to employment fall into three categories: (1) risks distinctly associated with employment, (2) risks personal to the claimant, and (3) risks neither distinctly associated with employment nor distinctly personal in character. *Id*. at 930. Risks in the first and third categories generally are covered by the Act. *Id*. However, risks personal to the claimant, those "caused by a pre-existing illness or condition unrelated to employment," are not compensable.

Id. The question here is whether Hussung's risk of injury was personal to her, in which case her injury is not compensable, or whether the risk was neither distinctly associated with employment nor distinctly personal in character, in which case her injury may be compensable.

[13] Hussung acknowledges that she had preexisting conditions that contributed to her fracture but asserts that her fracture is a compensable injury because "a worker may be awarded compensation when a preexisting condition is aggravated by an accident that occurs during the performance of his or her regular work duties." Appellant's Br. at 13 (citing *Ellis v. Hubbell Metals, Inc.*, 174 Ind. App. 86, 92, 366 N.E.2d 207, 211 (1977)).[2] Hussung argues that her "preexisting conditions were aggravated by the act of bending over to pack a box." *Id*. at 14.

[14] In support of her argument, Hussung relies on *Waters v. Indiana State University*, 953 N.E.2d 1108 (Ind. Ct. App. 2011), *trans. denied*. There, Waters was employed by Indiana State University (ISU) to make custom drapery. She weighed 360 pounds, suffered from diabetes, and walked with a cane due to problems with her knees. ISU held an employee luncheon at a restaurant where Waters sat in a booth. At the conclusion of the luncheon, Waters had trouble getting out of the booth. She had to rock back and forth to gain the necessary

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[2] Although the *Ellis* court stated that a worker may be awarded compensation when a preexisting condition is aggravated by an accident that occurs during the performance of regular work duties, the court made that statement in addressing whether the employee had suffered a compensable "accident" under the Act, not whether the employee's injury arose out of employment. 174 Ind. App. at 89-93, 366 N.E.2d at 210-12.

momentum to stand, and then as she was starting to stand, she had to twist her body in order to get out of the booth. As she twisted, she felt a "pop" and pain in the upper part of her right leg. *Id*. at 1111. Waters sustained a cracked right femur. ISU denied her worker's compensation benefits, and she filed an application for adjustment of claim with the Board. By stipulation of the parties, the facts were undisputed, and the sole dispute was whether Waters's injury arose out of her employment. The single hearing member concluded that the risk that resulted in Waters's injury was personal to her and did not arise out of her employment. The full Board affirmed, and Waters appealed.

[15] On appeal, the sole issue was whether the Board erred by concluding that Waters's injury arose out of her employment. *Id*. at 1113. In addressing that issue, the *Waters* court noted that the undisputed evidence showed that Waters had difficulty getting out of the booth and had to rock back and forth and twist while starting to stand, and thus even if Waters's preexisting physical conditions made her more susceptible to being injured, the booth, which was a condition of her work environment, also contributed to her injuries. *Id*. at 1114. Significantly, the *Waters* court observed that the record contained *no evidence* supporting a conclusion that Waters's injury was caused by her preexisiting conditions, but rather the medical reports attributed her injury to her exit from the booth. *Id*. Therefore, the *Waters* court concluded that "the Board's conclusion that Waters's injury was a result of risks personal to her is not supported by substantial evidence." *Id*.

[16] *Waters* is distinguishable. In *Waters*, the circumstances of Waters's injury—that she had to rock back and forth and twist her body to get out of the booth—supported a reasonable inference that getting out of the booth caused her injury. In contrast to *Waters*, the circumstances of Hussung's injury do not show that Hussung was performing an act that required her to put stress on her body such that the circumstances alone would support an inference that the act she was performing contributed to her injury. Hussung does not direct us to any evidence that supports her assertion that the act of bending over aggravated her preexisting conditions other than the fact that at that moment the fracture occurred.

[17] In addition, unlike in *Waters*, there is substantial evidence that Hussung's preexisting conditions caused her injury. In Dr. Earl's opinion, Hussung's fracture was due to osteopenia, which the Board found persuasive. Appealed Order at 3-4 (finding #11) and 5 (conclusion #1). The Board also found the opinion of Dr. Gregori to be credible and consistent with the overall evidence. In Dr. Gregori's opinion,

> [T]here was nothing about [Hussung's] employment duties or the tasks she was performing at the time of her injury that caused or increased her risk of the hip fracture[, and] the fracture occurred due to [her] osteopenic bones and routine physiologic stress and not as a consequence of [her] employment with [Woodland Hills].

Id. at 4 (#14). The Board rejected the opinion of Hussung's expert as not credible because it was based on an inaccurate history of the incident.[3] Thus, we conclude that the evidence is not undisputed and does not lead inescapably to a conclusion contrary to that reached by the Board. *Cf. Bertoch*, 813 N.E.2d at 1163 (reversing Board's denial of benefits to employee security guard who responded to a fire alarm where expert medical opinions and circumstances surrounding employee's death were compelling evidence that fire and employee's attempted response to it aggravated his preexisting coronary condition and contributed to his fatal heart attack).

[18] Hussung next asserts that "[e]ven if the injury was not born out of a risk incidental to the employment, an injury arises out of employment if the facts indicate a connection between the injury and the circumstances of Hussung's employment." Appellant's Br. at 15. On this point, her argument is simply that "while in the process of packing a resident's items in anticipation of an inspection, Hussung leaned forward to place an item in the box and suffered a broken leg," and therefore, there is a causal connection. *Id*. The facts Hussung

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[3] In a footnote in her statement of the facts, Hussung raises a fleeting challenge to the Board's finding that Dr. Olson's opinion was based on an inaccurate understanding of the mechanism of Hussung's injury. Appellant's Br. at 7 n.2 (citing Tr. Vol. 1 at 18, 45, 51). Hussung directs us to her and Tackett's testimony that her leg was rotated when Tackett came to her assistance and found her on the floor. *Id*. However, both also testified that the rotation was a sign of the injury, not a cause of it. Tr. Vol. 1 at 18, 51. At any rate, Hussung does not pursue that argument any further, and therefore it is waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (failure to present cogent argument waives issue for appellate review), *trans. denied*.

relies on certainly establish that her accident occurred in the course of her employment. *See Global Constr.*, 813 N.E.2d at 1166. However, it was Hussung's burden to prove that she was entitled to worker's compensation benefits, and under these circumstances, the facts that establish that her accident occurred in the course of her employment do not also establish that her accident arose out of her employment. *See Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987) ("The mere fact that an injury occurs at work does not, *ipso facto*, render it compensable.").

[19] Hussung emphasizes that some kind of extra exertion beyond the normal duties of normal employment are *not* required for compensability under the Act. *See Bertoch*, 813 N.E.2d at 1162. While Hussung is correct, there nevertheless must be evidence of a causal nexus between the injury and the duties or services performed by the injured employee. *See id*. at 1161. Here, there is evidence that her leg fracture was not caused by leaning forward but was solely the result of her preexisting conditions. We may not reverse the Board's decision unless the evidence is undisputed and leads inescapably to a contrary conclusion. Accordingly, we affirm.

[20] Affirmed.

Bradford, C.J., and Tavitas, J., concur.