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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000797-WC

VACUUM DEPOSITING, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-96080

TAMATHA DEVER;
HON. A. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

KELLER, JUDGE: On January 3, 2007, Tamatha Dever (Dever) fell while in the break room at Vacuum Depositing, Inc. (VDI). As a result of her fall, Dever suffered a fractured right wrist and alleged injuries to her right hip and low back.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

The Administrative Law Judge (ALJ) dismissed Dever's claim, ostensibly because he believed the fall was idiopathic rather than unexplained. The Workers' Compensation Board (the Board) reversed the ALJ, finding that there was not sufficient evidence to rebut the presumption that Dever's fall was unexplained and thus compensable. On appeal, VDI argues that it put forth sufficient evidence to establish that Dever suffered her injuries as the result of an idiopathic fall and that the Board impermissibly substituted its findings of fact for those of the ALJ. After a thorough review of the record, we affirm.

The issue VDI raises in this appeal is fact intensive; therefore, we will summarize in some detail the evidence as it relates to Dever's fall. Because the ALJ dismissed Dever's claim, neither party has raised any issue regarding the extent of her injuries; therefore, we will only address the medical evidence filed by the parties as necessary for this appeal. After undertaking our independent review of the facts, we will summarize those portions of the opinions of the ALJ and the Board that are relevant to this appeal.

FACTS

Dever testified that, on January 3, 2007, she went from her office to the break room. She "was standing in front of the snack vending machine. There's like a Coke vending machine, a snack vending machine and then another Coke vending machine and I was standing there walking towards it and I slipped and fell." Dever did not recall if there was anything on the floor; however, she stated that "[t]here's always paper on the floor in there," and that "the garbage cans were

always overflowing. . . . [i]t was always very dirty." When asked if she knew why she fell, Dever stated that she did not; she just "slipped and fell." Immediately after falling, Dever experienced pain and swelling in her right wrist. There was no one else in the break room at the time.

After she gathered her bearings, Dever went to Myra Dempsey's (Dempsey) office to report her injury. Dever went to BaptistWorx for evaluation and was referred to a hand surgeon, Dr. Moreno, for treatment of a fractured wrist. Dever testified that her fracture has healed, but she continues to experience pain and a "popping" sensation. In addition to her wrist injury, Dever testified that she began to experience hip and back pain approximately a week after she fell. Dever stated that she had suffered from back pain before this injury; however, she could not remember when she had last treated for those prior complaints. She denied any memory of a CT scan in 2004.

Myra Dempsey (Dempsey), controller for VDI, testified that Dever was wearing black high heels when she fell. When she came to report the fall, Dever told Dempsey that she fell because "she was clumsy and she just turned around and fell and had no idea how. She said she was the only person she knew that could fall while standing still." Following the injury, Dever worked a full day on January 5th, part of the day on January 9th and January 11th, and part of the day on March 5th, when she resigned. Finally, Dempsey testified that VDI has a business casual dress code for its employees, but it is not unusual for female employees to wear high heels to work.

Michael Krafka (Krafka), first shift supervisor at VDI, testified that he inspected the break room following Dever's fall. Following his inspection, Krafka prepared a statement indicating that he found "no liquid or debris around the area where the fall occurred that could have contributed to the accident." Additionally, Krafka noted that "Tamatha Dever has concurred by stating the following 'I just turned around and fell and have no idea how it happened.'"

At the hearing, Dever testified that the dress code called for professional attire and that she wore slacks or skirts. All of the women who worked in the offices wore high heels "at different times." She was wearing boots with approximately two inch heels when she fell and did not feel dizzy or any pain before she fell.

Dever's testimony at the hearing differed somewhat from her deposition testimony. In describing her fall, Dever stated that she "was walking towards the vending machine and standing there and [she] turned around and [she] slipped and fell." Furthermore, Dever testified that "there was some trash by the vending machine. There's always stuff on the floor in the break room."

At the hearing, Dever also testified that she took photographs with the camera on her cell phone when she returned to work on January 5, 2007. Dever could not remember why she took the photographs other than that VDI was "being ugly" to her. Finally, Dever testified that Krafka lied when he testified that she spoke with him and that Dempsey lied when she testified that Dever said that she could fall while standing still.

THE ALJ'S OPINION

After summarizing the testimony of Dever, Dempsey, and Krafka, the ALJ stated that he did not find Dever to be particularly credible. In so stating, the ALJ noted Dever's inability to remember matters that would normally be subject to recall, such as her pre-injury treatment for back pain and a pre-injury CT scan. He also noted what he characterized as Dever's changing testimony about whether there was debris on the floor when she fell. Furthermore, the ALJ noted that Dever had filed a previous lawsuit for a slip and fall accident and that she took cell phone photographs two days after her fall at VDI. Taking this testimony from Dever into account, along with that of Dempsey and Krafka, the ALJ stated that he questioned Dever's "testimony as to the reason she fell."

The ALJ went on to find that:

> this case presents a classic example of an idiopathic fall case that Kentucky, and other jurisdictions, have deemed are not compensable through workers' compensation since, though they occurred during the course of employment, they do not "arise out of" the claimant's employment . . . Tamatha Dever went to the break room to get something out of the vending machine, and while turning around, she fell onto the level floor striking no objects on the way down. The "positional risk doctrine" therefore does not apply to this case . . . .
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> . . .
>
> Though Ms. Dever testified that both Mike Krafka and Myra Dempsey lied under oath about their conversations with her after the fall occurred, the believable testimony from Ms. Dempsey and Mr. Krafka

> establishes that "Ms. Dever stated that she was clumsy, and she turned around and fell and had no idea how. She said she was the only person she knew that could fall while standing still." Moreover, Ms. Dever was wearing high heels on the date of a [sic] accident, and she testified herself that her fall occurred when she was turning around from the vending machine.

The ALJ then cited to *Workman v. Wesley Manor Methodist Home*, 462 S.W.2d 898, 900 (Ky. 1971), for the proposition that, although an unexplained fall creates a presumption of work relatedness, that presumption can be rebutted by evidence that "work was not a contributing cause." If an employer can produce evidence to "cast enough doubt on the validity of the initial presumption in the case . . . to justify a reasonable man in disregarding it", then the presumption "is reduced to a permissible inference and" the ALJ is free to find for either party. *Id.*

The ALJ, applying *Workman* to Dever's claim, stated that:

> [i]n this case there is no testimony from any source tending to prove that Ms. Dever slipped on a wet floor, tripped on any debris in [sic] the floor, or on any obstruction while obtaining her food out of the vending machine. The best interpretation is that she merely turned around and fell down, and her work, in no way, contributed to the cause of her fall. The Plaintiff told Ms. Dempsey that she is "clumsy", and the additional evidence that Ms. Dever was wearing high heels at the time, constitutes sufficient evidence for the ALJ to reduce the rebuttable presumption of the fall arising out of the work situation to simply a permissible inference. Once the rebuttable presumption is reduced to a permissible inference the ALJ may determine to either find, or decline to find that the fall arose out of the Plaintiff's employment. It is the ALJ's opinion that the weight of the reliable evidence in this case indicates that the injuries did not arise from Ms. Dever's employment.

After discussing *Jefferson County Public Schools/Jefferson County Board of Education v. Stephens*, 208 S.W.3d 862 (Ky. 2006), the ALJ found that:

> [i]n the discernible facts of this case there is nothing about the circumstances of the Plaintiff's fall that suggests her work contributed to the cause of the fall. The fall could just have easily occurred when the claimant was on any other level surface anywhere. It is the ALJ's perception that it is very likely that an element of clumsiness and instability of high heels is involved. If the Plaintiff is entitled to a rebuttable presumption of a work-related fall, clearly this rebuttal [sic] presumption is reduced to a permissible inference by the evidence in the record of this case, leaving the ALJ free to decline to find the fall and resulting wrist and alleged back injury work-related and compensable. Given the evidence in the record the ALJ believes this to be the appropriate action. The Plaintiff's claim for workers' compensation is to be dismissed.

THE BOARD'S OPINION

The Board reviewed the testimony of Dever, Dempsey, and Krafka regarding the circumstances of Dever's fall. In doing so, the Board, as did the ALJ, noted the apparent inconsistencies in some of Dever's testimony and the differences between the testimony of Dever and that of Dempsey and Krafka. The Board then reviewed the ALJ's opinion, noting his reliance on *Workman* and his finding that VDI had presented evidence sufficient to overcome the presumption favoring Dever. The Board defined the issues presented as "whether Dever sustained an unexplained or idiopathic fall and if the fall was, in fact, idiopathic did the ALJ fail in not analyzing the matter under the positional risk doctrine."

In analyzing the issues raised by Dever, the Board cited primarily to *Workman* and *Jefferson County Public Schools,* and relied heavily on the latter. As to whether Dever's fall was idiopathic, the Board noted that

> [t]his case has none of the usual physical factors personal to the claimant that renders the fall idiopathic such as dizziness, a heart attack or some orthopedic instability. The ALJ applied the rule of law in Workman that the rebuttable presumption of work relatedness for an unexplained fall becomes a permissible inference when the employer submits countervailing evidence against the neutrality of the unexplained fall. Here, though the ALJ mentioned clumsiness and high heels, his ultimate decision seems to be hinged on the fact the employer was able to show there was nothing connected to work that would have caused Dever to fall.
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> After having carefully considered the facts, the law and arguments of counsel, we agree with Dever that the ALJ erroneously determined her fall to be idiopathic and therefore not work related. VDI put forth no evidence that something personal to Dever caused her fall. It submitted no evidence Dever had some physical or medical condition that caused her to fall. VDI may have persuaded the ALJ that nothing it did caused the fall. That alone, however, does not shift the inference from the rebuttable presumption of work relatedness to the permissible inference. As the Supreme Court pointed out in Jefferson County Public Schools, supra:
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> > It was the employer's burden to go forward with substantial evidence of a non-work-related cause for the claimant's fall in order to rebut the *Workman* presumption.
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> > Id [.] at p 867.
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> Accordingly, we do not believe VDI met the above described burden. In this case either the fall remained "unexplained" or it was as intimated by the ALJ an "explained fall" caused by Dever wearing high heels and

being clumsy. The high heels were part of the required business attire of VDI office personnel rendering the fall work related. The Court of Appeals (now Supreme Court) phrased it best in Workman:

> In blunt terms this means that without such rebutting evidence the Board [now ALJ] cannot find against him on the issue of whether the accident arose out of the employment.
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> Id [.] at p 900.

Thus, the ALJ erred in his conclusion Dever sustained an idiopathic fall and this matter must be remanded to the ALJ for a determination of work relatedness and an award for the injuries sustained by Dever as a result of the fall.

STANDARD OF REVIEW

When reviewing the Board's decision, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In order to review the Board's decision, we must review the ALJ's decision, because the ALJ as fact finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). In reaching his decision, the ALJ is free to choose to believe or disbelieve parts of the evidence from the total proof, no matter which party offered it. *Brockway v. Rockwell International*, 907 S.W.2d 166, 169 (Ky. App. 1995). However, when there are mixed questions of fact and law, as is

the case herein, we have greater latitude in determining if the underlying decision is supported by probative evidence. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991).

ANALYSIS

VDI does not dispute that Dever fell while in the break room. Therefore, once all the chaff is separated from the wheat, the only question before us is, why did Dever fall? There are three types of falls that can occur within the work place: (1) a fall that is the result of something peculiar to the work place, such as oil on the floor of a machine shop; (2) a fall that is the result of something peculiar to the employee (an idiopathic fall); and (3) a fall that has no explanation (an unexplained fall). There is no evidence that Dever tripped, slipped, or fell as a result of any substances or peculiarities with the floor at VDI. Therefore, we need not address scenario number one.

As to scenario number two, VDI argued, and the ALJ found, that Dever's case represented a "classic example of an idiopathic fall." As noted by both the ALJ and the Board, an idiopathic fall is one that results from something personal to the claimant and, absent factors not present here, is not compensable. In support of its argument that Dever's fall was idiopathic, VDI points to Dempsey's testimony that Dever stated that she was clumsy and the testimony of both Dempsey and Dever that Dever was wearing high heels when she fell. The ALJ stated that he found it was "very likely that an element of clumsiness and

instability of high heels [was] involved" in Dever's fall. There is no evidence that Dever suffered from any non-work related physical or mental condition that caused her to fall. Therefore, we must determine whether clumsiness and the wearing of high heels constitute factors sufficient to support VDI's argument and the ALJ's opinion that Dever's fall was idiopathic. We hold that they do not.

In *Jefferson County Public Schools/Jefferson County Board of Education v. Stephens*, 208 S.W.3d 862, 864 (Ky. 2006), the Supreme Court of Kentucky defined idiopathic "as caused by something personal to the claimant rather than the employment." *Webster's New Twentieth Century Dictionary Unabridged* (2d ed. 1979), defines idiopathic as "relating to or having the nature of idiopathy." Idiopathy is defined as "an independent disease, neither induced by nor related to another disease; a spontaneous or primary disease." *Id*. Professor Larson gives the following as examples of idiopathic conditions: "a disease, internal weakness, personal behavior, or personal mortal enemy that would have resulted in harm regardless of the employment." *Jefferson County Public Schools/Jefferson County Bd. of Educ,.* 208 S.W.3d at 866, *citing Larson's Workers' Compensation Law,* § 4 (2006). Other cases in Kentucky that address idiopathic falls, involve a heart attack, *Indian Leasing Co. v. Turbyfill,* 577 S.W.2d 24 (Ky. App. 1978), an epileptic seizure, *Stasel v. American Radiator & Standard Sanitary Corp.,* 278 S.W.2d 721 (Ky. 1955), and a back condition, *Workman v. Wesley Manor Methodist Home,* 462 S.W.2d 898 (Ky. 1971). Based on the

preceding, we hold that footwear and clumsiness do not fall within the definition of idiopathic; therefore, we hold that Dever's fall was not idiopathic.

Having eliminated the first two scenarios, we must address scenario three, the unexplained fall. As noted by the ALJ and the Board, an unexplained fall is presumed to be work-related. *Workman,* 462 S.W.2d at 899. Based on the preceding definition of idiopathic, we can find no evidence in the record that would be sufficient to rebut that presumption. Therefore, we hold that Dever's fall was unexplained and compensable.

Finally, we note VDI's argument that the Board incorrectly characterized its dress code as requiring Dever to wear high heels. As noted by VDI, the only dress requirement was "business casual." While the Board may have overstated that high heels were required business attire, the evidence established that high heels were commonly worn by the female employees of VDI. Thus, high heels were acceptable as business casual attire and the Board's statement, if error, was harmless.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

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