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RENDERED: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 6-9-05 ElliaGrowth, D.C.

2004-SC-0460-WC

LINDA BEATTY APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-02388-WC
WORKERS' COMPENSATION BOARD NO. 02-02045

NORTON HEALTHCARE; WORKERS' COMPENSATION BOARD; AND HON. J. LANDON OVERFIELD, ADMINISTRATIVE LAW JUDGE APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals which upheld the Workers' Compensation Board in affirming the decision of the Administrative Law Judge to dismiss the claim as filed.

The questions presented are whether the location of the employment increased the dangerous effects of a fall; whether the presumption found in KRS 342.680 is applicable; whether the positional risk theory makes the fall compensable; and, whether the Kentucky doctrine regarding idiopathic falls should be changed.

Beatty had been a respiratory therapist for 30 years and began working for Norton Hospital, then known as Methodist Hospital, in 1985. Beatty testified at her deposition but had difficulty recalling the circumstances prior to and following her December 4, 2000 injury, but did recall going to work the day of the fall and attempting

to assist another therapist with a patient. The other therapist did not recall Beatty assisting, but testified that she heard a thud and someone call for help. The other therapist returned to the hallway and saw Beatty on the floor where there was blood near her head, but no other observable injury. The testimony from the other therapist was that there was a standup desk with chairs around it and an adjacent area where the heart monitor, a crash cart and medicine cart were kept. There was no indication that Beatty struck the cart or any other object during her fall.

The cause of her collapse was a nonwork-related syncope episode resulting from cardiac arrhythmia. This was the first documented fainting spell that she had had since a 1997 spell at home, an incident that she could not remember. As a result of her fall, Beatty suffered a severe closed head injury with a right temporal lobe injury, cerebral contusion and brain-stem injuries. She now stutters, has tremors of speech, suffers from frequent headaches and has difficulty reading and concentrating. She uses a cane and has been treated for depression. Three weeks before her injury, on November 13, 2000, Beatty was treated at Community Medical Associates for anemia and migraine headaches. At that time, she was on nine different medications for a variety of conditions. On November 20, she received a prescription for Ativan for anxiety by her family physician. Beatty did testify that this was because she had just ended a relationship and her dog had died. By December 4, 2000, she was using eleven different medications at the time she fell. The record indicates that there were other prior medical treatments including back surgery, gastric bypass surgery and a high blood pressure problem. Her coworker testified that she had seen Beatty become light-headed a couple of months before the incident and the coworker indicated that

Beatty's blood sugar had apparently dropped and she looked like she was going to pass out.

Following the fall, she was admitted to the hospital emergency room where records state that the staff on the fifth floor (5B) witnessed the fall and a note that reports they saw her start to grab something when she lost consciousness. The record indicates that the coworker was on the third floor in the respiratory department when she got a call from 5B asking that she come and treat a patient. Beatty also heard the page and decided to respond to it because she thought that she might be able to help. She never made it to the room of the patient in 5B. In support of her claim, Beatty introduced a variety of medical records, including the admission to Norton Hospital on December 5, 2000, following a syncopal episode. A head CT scan was taken as well as an MRI scan in January of 2001; a brain MRI scan was also obtained. An EEG was also administered. In March 2001, Beatty complained of hearing loss and a ringing in her left ear and a reduced ability to understand sounds and speech in the left ear to Dr. Bumpous, an otolaryngologist. The physician performed an audiogram which showed a sensory hearing loss greater in the left ear than in the right one. He next saw the claimant in November of 2002.

Beatty also presented Dr. Remmel, a neurologist, with regard to her head injury and cognitive changes. Other medical evidence was presented from Dr. Kuhn, a psychologist, and Dr. Corwin, a neurologist. After the fall, Beatty was discovered by the coworker and a unit nurse.

In defense of the claim, the employer introduced medical records of the family doctor of the plaintiff as well as Alliant Health Systems and Dr. Heinicke and a battery

of tests under the direction of Dr. Blair. The evidence also disclosed that Beatty had a pacemaker put in around April of 2001.

The ALJ, after reviewing the evidence, determined that the employee fell without hitting or otherwise making physical contact with anything other than the floor. Beatty was unable to testify as to the facts surrounding the actual fall because she had no memory of the events. She did not know whether she hit an object on her way to the floor. Based on the testimony given, the ALJ was not convinced that she hit anything other than the floor directly. The ALJ dismissed the claim. The Board affirmed that dismissal as did the Court of Appeals. This appeal followed.

I. Idiopathic Fall

There is no evidence that supports the argument that the location of the employee's employment increased the dangerous effects of her fall. The question of whether an injury caused by an idiopathic fall to level ground, or a floor, arises out of the course of employment and is thus compensable was resolved in Kentucky by Workman v. Wesley Manor Methodist Home, 462 S.W.2d 898 (Ky. 1971). Kentucky followed the majority of states in reaching the conclusion found in Larson, Workers' Compensation Law (2004) § 9.01(1), that the basic rule on which there is now general agreement, is that the effects of an idiopathic fall are compensable if the employment places the employee in a position of increasing the dangerous effects of such a fall, such as height, near machinery or sharp corners or a moving vehicle.

The ALJ determined as a result of the testimony of the employee and her coworker that it was very unlikely that she came into contact with anything during her fall. There is no evidence that Beatty struck her head on anything other than the floor. There is no evidence that there were other potential objects that could contribute to an

injury in the area. The finding by the ALJ that the place of employment did not contribute to her idiopathic fall is supported by substantial evidence and there is no overwhelming evidence which would support a different conclusion. See Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

It is well settled that the ALJ, as the finder of fact, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount, supra. Where the evidence is conflicting, the ALJ may choose what and whom to believe. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977).

As noted in Workman, supra, the positional risk theory applies to idiopathic falls only if the employment places the employee in a position increasing the dangerous effects of such a fall.

II. KRS 342.680 Presumption

Beatty argues that pursuant to KRS 342.680, her injury should have been presumed to be work-related. However, the statute applies only where an employee has been killed or is physically or mentally unable to testify as supported by medical evidence and where there is prima facie evidence indicating that the injury is work related. Here, the employee admitted she was not able to testify about the fall, but she did testify twice about the circumstances prior to the fall. Thus, no presumption is available. Coomes v. Robertson Lumber Co., 427 S.W.2d 809 (Ky. 1968), does not rely on or even refer to KRS 342.680 and offers no support to Beatty's argument. She candidly concedes that the fall was a result of a nonwork syncope episode.

III. Positional Risk

The positional risk doctrine does not provide support for the claim of the employee. Certainly she had a fall for which there was no immediate explanation.

Medical records, including those presented by the employee, stated that she fell because of a syncopal episode, and there is evidence in the medical reports that she had such episodes in the past.

In order to recover under the positional risk doctrine, her fall would have had to result in injury because she fell from, in or around an area that was dangerous, and in which she had been placed by her employer. The ALJ found that the employee was in fact placed in Unit 5B and there was no inherently dangerous condition in the area where she fell. The ALJ determined that there was only one laceration in the back of the head which required suturing, and that there was no evidence that it was caused by anything other than contact with the floor.

Workman distinguished the idiopathic fall from positional risk by citing Stasel v. American Radiator & Standard Sanitation Corp., 278 S.W.2d 721 (Ky. 1955). Stasel, supra, noted that there were unusual hazards and risks in the physical condition of the workplace. No such hazards have been presented relating to the fall in this case.

IV. Workman case

As noted earlier, the view of Kentucky in regard to idiopathic fall cases in workers' compensation claims is generally in line with a majority of other states and follows the philosophy expressed in Larson Workers' Compensation Law. Workman follows the philosophy that an employer is liable for workers' compensation benefits when there is a work-related injury. In regard to an idiopathic injury, the employer can be held responsible if the employment places the employee in a position increasing the dangerous effects of such a fall, such as height, near machinery, sharp corners, or a moving vehicle.

As noted by the Court of Appeals, a line must be drawn on either side of which situations occur that seem so similar that to attach widely different consequences to them may seem ridiculous and cruel. However, the line must be drawn somewhere. Professor Larson observes that the line of majority cases is based on one simple theory that is that although the cause of the fall was originally a personal one, employment conditions contributed some hazard that led to the final injury. Larson points out, "This theory can be stretched to the breaking point as it indeed has by the evolution already sketched out." Larson, Workers' Compensation Law § 9.01(4)(c). The legal authorities cited by Beatty are unconvincing. In this case, there are significant work-related factors involving personal medication that should not be held against the employer in a workers' compensation situation when the injury is not work-related. There are no compelling reasons to disturb the decision in Workman.

Here there was substantial evidence on which the ALJ could rely and the Board and Court of Appeals were correct in their assessment of the situation. The evidence here does not compel a different result.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., Cooper, Johnstone, Keller and Wintersheimer, JJ., concur. Scott, J., dissents by separate opinion and is joined by Graves, J.

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DISSENTING OPINION BY JUSTICE SCOTT

Respectfully, I dissent.

In this case, the question is not whether the employee would have fallen had she been in a non-work environment, but whether her surroundings at work contributed to the injuries she sustained. Therefore, this is a positional risk scenario.

The positional risk theory applies "if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle." Workman v. Wesley Manor Methodist Home, 462 S.W.2d 898 (Ky. 1971) (internal citations omitted) (*See also* Stasel v. American Radiator & Standard San. Corp., 278 S.W.2d 721 (Ky. 1955)). In Stasel, the claimant either fell against a hot stove or scraped his arms in hot sand, thereby sustaining burns which would not have been inflicted *but for* the circumstances of his employment.

Here, the majority claims there is no evidence that there were other potential objects that could contribute to an injury in the area, but in fact, the testimony from the other therapist was that there was a standup desk with chairs around it and an adjacent area where the heart monitor, a crash cart and medicine cart were kept. These all have edges and corners. Appellant's brief clearly states Beatty fell near the corner of an elongated nurse's station with chairs and movable carts nearby. Also, the emergency room records showed that the staff on the fifth floor (5B) witnessed the fall and noted the staff saw her start to grab something when she lost consciousness. If she was grabbing something when she was falling, logic dictates she was attempting to reach that object, if not more than one. The fact of her laceration is significant evidence she hit something (other than a level floor) while falling.

It is my belief Beatty sustained injuries which would not have been inflicted but for the circumstances of her employment. The laceration speaks to this. The ALJ's finding to the contrary, in light of the fact that no evidence was offered that the floor caused the laceration, is clearly erroneous.

The parties argue whether Workman, *supra*, should be reversed to change the decision in this case, but I would argue, Workman need not be changed to arrive at the conclusion that Appellant's injuries "arise out of" and "in the course of employment", and are thereby, compensable. Workman, confronts the question of whether the effects of an idiopathic fall to the level ground or bare floor should be deemed to arise out of the employment. As I believe Beatty's injuries were caused by her hitting something other than merely the hospital floor (i.e. the laceration), Workman need not dictate the conclusion in this case.

I note also that Beatty should be entitled to the presumption granted by KRS 342.680, which applies where the employee has been killed, or is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work related. Beatty admits and the medical records support her contention that she was unconscious during the fall and therefore, she cannot testify as to what exactly contributed to her work-related injuries. No evidence was submitted to rebut Beatty's statement of events, or her physical evidence (the laceration). Therefore, I believe she is entitled to the presumption that her injuries were work-related, and as there is no substantial evidence to the contrary, her injuries should be compensable.

I note lastly that under workmen's compensation law, to be compensable, an injury must occur "in the course of", and "arise out of", the employment. Larson, in his Workmen's Compensation Law, Section 29.10, says these two factors should not be applied entirely independently; that "they are both part of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other." It is undisputed that Beatty was in the course of her employment when she fell, sustaining severe injuries to her head with lacerations. Thus, I believe any perceived weakness in her establishing her injuries arose out of her employment should be balanced by the fact she was injured during the course of her employment. As such, I would argue again, that Beatty's injuries are work-related and should be compensable. Come on!

Graves, J., joins this dissent.