RENDERED: August 22, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000100-WC

ELIZABETH OLIVER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-00185

SQUARE D COMPANY;
HON. DONNA H. TERRY, ALJ; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, and JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Elizabeth Oliver fell and fractured her skull while working at her job with Square D Company. Although Oliver had been diagnosed with a seizure disorder, there was a question concerning what caused her to fall and to be injured. An administrative law judge (ALJ) denied Oliver's claim for income benefits, and the Workers' Compensation Board (Board) affirmed the ALJ's decision. We affirm the Board.

Oliver began employment as an assembler at Square D in 1994. On September 24, 2001, Oliver left work and sought treatment at a hospital emergency room for what she believed was a panic attack. The emergency room physician witnessed myocolonic jerking movements, and an EEG performed on that date confirmed a primary generalized seizure tendency. Oliver stayed off work from that time until December 10, 2001, the date of her injury.

On her first day back on the job, Oliver was working at the pack out station with duties that included assembling and labeling cartons, placing electrical boxes into the cartons, and sealing the cartons with a glue gun. In her testimony, Oliver recalled that her cartons kept falling down and that she stumbled and fell backwards while trying to gather them. She lost consciousness and did not recall anything until she awakened three days later in a hospital. Oliver sustained a skull fracture and brain contusion as a result of the fall. She was the only witness to her falling. Those who attended to Oliver immediately after she fell observed seizure-like symptoms due to her body shaking and her arms and legs jerking.

Oliver filed a claim for income benefits and medical expenses. The ALJ framed the issue as "whether her impact on the ground was caused by an industrial accident as she sought to retrieve falling cartoons, by a seizure resulting from her

preexisting seizure disorder, or by idiopathic reasons." The ALJ found that Oliver failed to sustain her burden of proving that her current condition was the result of a work-related fall. Oliver filed a petition for reconsideration, and the ALJ stated that she "continues to find, that plaintiff failed to convenience [sic] the trier of fact that she stumbled while attempting to catch falling cartons or tripped on a glue stick, or that she otherwise sustained a work injury on December 10, 2001." Oliver appealed to the Board, and the Board affirmed the ALJ's decision. This petition for review followed.

Before addressing Oliver's arguments, we will address the law applicable to these types of situations. In Stasel v. American Radiator & Standard Sanitary Corp., Ky., 278 S.W.2d 721 (1955), the court stated as follows:

> A workman is not entitled to an award under our Workmen's Compensation Act by merely proving that he was injured while in the course of his employment. He also has the burden of proving that the injury arose out of the employment, and this means that he must prove a causal connection between the employment and the injury.

Id. at 723. In that case a worker was awarded benefits due to an injury suffered from a fall against a hot stove or upon hot sand during a fainting spell which was subsequently diagnosed as an epileptic seizure. Id. at 724. The court further held that "[t]he accident must be one resulting from a risk reasonably incident to the employment." Id. at 723.

In Workman v. Wesley Manor Methodist Home, Ky., 462 S.W.2d 898 (1971), the court held that "an injury from a fall resulting during the course of the employment but solely from a cause or causes to which the work is not a contributing factor is not compensable." Id. at 901. In that case, benefits were denied to a worker who fell and broke her hip in the course of her employment. Id. at 902. The facts indicated that the worker did not slip or stumble but fell after her back gave way due to an injury previously suffered in an automobile accident. However, the court noted that, under the "positional risk theory," benefits may be allowed due to an injury from a fall "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." Id. at 901, quoting Larson, Workmen's Compensation Law, § 12.11.

In Indian Leasing Co. v. Turbyfill, Ky. App., 577 S.W.2d 24 (1978), this court held as follows:

> Liability under the positional risk theory for idiopathic falls is limited to those cases in which the employment placed the employee in a position increasing the dangerous effects of the idiopathic fall. The Stasel case was treated as having been decided under the positional risk theory. Id., 462 S.W.2d at 904, footnote 4. In level fall cases involving no increased danger attributable to the employment, liability may be imposed on the employer only if the work was a substantial factor in causing the injury.

Id. at 27-28. In that case, benefits were allowed where a worker suffered a heart attack and then fell from the top of a truck on which he was working and suffered a crushed skull. Id. at 28.

In addition to these legal principles in cases of this nature, there are general legal principles governing our review of cases where a claimant has been denied benefits. The claimant has the burden of proof and risk of persuading the fact-finder (the ALJ). Snawder v. Stice, Ky. App., 576 S.W.2d 276, 279 (1979). If the claimant is unsuccessful before the ALJ, the issue becomes whether the evidence was so overwhelming as to have compelled a finding in the claimant's favor. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). For the evidence to be compelling, it must be "so overwhelming that no reasonable person could reach the conclusion" of the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985). Furthermore, the function of this court "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Oliver's first argument is that the ALJ and the Board should be reversed due to the failure of the ALJ to make

adequate findings of fact. In support of her argument, Oliver cites Shields v. Pittsburg and Midway Coal Mining Co., Ky. App., 634 S.W.2d 440 (1982). Therein, this court held that in workers' compensation cases "it is required that basic facts be clearly set out to support the ultimate conclusions." Id. at 444. Also, in Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999), the Kentucky Supreme Court held that "the parties are entitled to a sufficient explanation by the ALJ of the basis for the decision." Id. at 481. See also KRS[1] 342.275(3).

Oliver points to three portions of the ALJ's decision in support of her argument that inadequate findings of fact were made. Each reference by Oliver to the ALJ's decision involves statements concerning the circumstances around her fall. First, the ALJ stated that Oliver "fell, stumbled, or collapsed." Oliver asserts that if she fell or stumbled, then she would be entitled to compensation. However, she maintains that she did not "collapse." Second, Oliver refers to the ALJ's statement that she was "unconscious before she hit the ground and does not have any memory of the event." Third, Oliver refers to the ALJ's characterization that Oliver had "admittedly diminished memory of the event." She maintains that she remembered the first part of her fall and that there was no evidence to contradict her testimony in that regard.

[1] Kentucky Revised Statutes.

The gist of the ALJ's decision was that Oliver did not sustain her burden of proving that her fall was work-related. The ALJ stated on page 10 her opinion that she accepted Square D's argument that the fall was the result of either a seizure or idiopathic reasons rather than Oliver's argument that the fall was caused by imbalance or accident. Further, the ALJ stated on page 12 of her opinion that she did not accept Oliver's speculation that she struck her head on the side of her table or on the assembly line rather than on the floor.

In the Workman case Judge Palmore noted the difference in a "positive finding" and a "negative finding" in a case involving circumstances similar to those in this case. 462 S.W.2d at 901. Therein, the fact-finder denied a claim for benefits based on a positive finding that the injury did not arise out of and in the course of employment. The court noted on appeal that:

> A negative finding to the simple effect that the claimant had not satisfied the burden of proving that the injury arose out of the employment would have been a preferable form, because (1) that is as far as the board needed to go in its findings and (2) the evidence may not have been sufficient (though we need not decide the point) to warrant a finding which, in substance, determines as a positive fact that the injury would have occurred independently and regardless of the employment.

Id. at 901. In the case *sub judice*, the ALJ made a positive finding that the accident occurred due to a pre-fall seizure or

due to idiopathic reasons. However, the ALJ needed only to go so far as to find that Oliver did not prove to the ALJ's satisfaction that the accident occurred in the manner she described. At any rate, the ALJ set forth the basic facts to support her ultimate conclusion as required by the Shields case. See Shields, 634 S.W.2d at 444. In short, we conclude that the ALJ's findings were not inadequate.

Oliver maintains that there were no eyewitnesses or other evidence to contradict the circumstances of her fall. Thus, she contends that the ALJ erred in rejecting her testimony concerning those circumstances. The finder of fact "has the authority to determine the quality, character and substance of the evidence." Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). Furthermore, "[t]he fact-finder may reject any testimony and believe or disbelieve various parts of the evidence." Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000). In short, it was within the province of the ALJ to reject Oliver's testimony.[2]

Next, Oliver argues that the ALJ's decision should be rejected because it was based on "incompetent evidence, conjecture and surmise." First, the medical records of Dr.

[2] In rejecting Oliver's testimony concerning the fall, the ALJ relied upon testimony from other employees who were present immediately after Oliver fell. This testimony included statements that Oliver's body was shaking or jerking and that there were no boxes on the floor. The ALJ also appeared to give considerable weight to the fact that Oliver had been diagnosed with a seizure disorder prior to the fall.

Michael Balm, Oliver's treating neurologist, contained notes from Dr. Patrick Leung, a neurologist associated with Dr. Balm who was on call when Oliver was brought to the hospital, that indicated he had talked by telephone with Oliver's boyfriend who advised him that Oliver had a seizure three days earlier and had suffered another seizure at work. Second, Eva Elam, Square D's occupational health coordinator, testified that she called Oliver's home following Oliver's fall and was advised by the adult male answering the phone that Oliver had been having seizures at home. Oliver, after pointing out that her boyfriend denied making any statements concerning seizures, argues that the ALJ erroneously relied upon these two hearsay statements as a basis for her decision. The Board rejected Oliver's argument in this regard and made reference to KRE[3] 803(2)-excited utterance, KRE 803(4)-statement for purposes of medical treatment or diagnosis, KRE 803(6)-records of regularly conducted activity, and KRE 801A(a)-prior statement of witnesses. While we question whether three of the exceptions were applicable, we agree with the Board that KRE 801A(a)(1) was. The statements made by Oliver's boyfriend to Dr. Leung and Ms. Elam were prior inconsistent statements. Such statements were admissible for substantive purposes. See Thurman v. Commonwealth, Ky., 975 S.W.2d 888, 893-94 (1998).

[3] Kentucky Rules of Evidence.

The long and short of this case is that the ALJ found that Oliver failed to prove that her fall and injury were work-related. The ALJ first determined that it was more probable that Oliver's fall was due to a seizure or idiopathic reason rather than due to her stumbling. Having made that determination, the ALJ determined that Oliver's work station did not supply any increased risk of injury. Therefore, the ALJ concluded that the results of the fall, including skull fracture and contusion, were not compensable. From our review of the evidence, we are not persuaded that it compelled a finding in Oliver's favor.

The Board's decision is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE, SQUARE D COMPANY:
David B. Allen Lexington, Kentucky	Bennett Clark Lexington, Kentucky