

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000046-WC

AK STEEL CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-01201

BEVERLY ADKINS; HON. A. THOMAS  
DAVIS, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: AK Steel Corporation petitions for the review of the Workers'

Compensation Board's opinion affirming an Administrative Law Judge's (ALJ's) opinion

ordering AK Steel to pay for Beverly Adkins' right rotator cuff surgery as being

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

reasonable and necessary for the cure and relief of the effects of Adkins' work-related injury. For the following reasons, we affirm.

Adkins worked as a coal handler at AK Steel. On February 16, 2005, after unloading seven coal cars and attempting to close an eighth coal car's door with a door-closing bar, Adkins fell to the ground. She testified that she landed on her “buttock and continued to go backward until [her] head hit the ground[,]” on neither the left or right side. Although Adkins did not land on her right arm or shoulder, she experienced immediate pain in her right shoulder. She was taken off work in late February 2005, underwent rotator cuff surgery in October 2005, and has not returned to work since.

Adkins testified that she did not know what caused her to fall at work. While she surmised that she must have simply lost her footing, she did not actually recall losing her footing. Adkins admitted that she had previously taken medication for pain she experienced as early as December 1998 in her right ear, down her neck, and across the top of her shoulder. She also admitted that she previously sought treatment for feeling “off balance.” By contrast, Adkins described the pain experienced after her fall as being located in the joint where her right arm attaches to her body.

Immediately following her fall, Adkins was evaluated by Dr. Alfred Baldera, an occupational medicine physician employed by AK Steel. Dr. Baldera testified that Adkins complained of having difficulty moving her right shoulder, but that during the initial examination he did not see any bruising, swelling or redness in her right hand, elbow, or shoulder. Sheila Webb, the nursing manager of AK Steel's medical

department, echoed Dr. Baldera's testimony. So did Dr. David Hinchman, who evaluated Adkins several days after her fall. Dr. Hinchman also testified that without knowing the mechanism of Adkins' fall, he did not see how one could determine what injuries the fall caused. He also opined that it was very unusual that Adkins was unable to relate how or why she fell, since she did not lose consciousness.

Dr. Hinchman referred Adkins to Dr. Larry Dial, whose notes again indicated that Adkins was unsure as to how or why she fell. Dr. Dial noted that Adkins' MRI demonstrated a tear of the supraspinatus and infraspinatus tendons at their insertion, and also indicated tendonopathic changes. Dr. Dial ultimately believed Adkins' injury was directly caused by the work-related incident. Dr. Dial referred Adkins to Dr. Stanley Tao, who assessed Adkins as having a full thickness right rotator cuff tear. Dr. Ben Kibler performed Adkins' right rotator cuff surgery in late October 2005.

Dr. Timothy Wagner opined that as Adkins was not yet at maximum medical improvement following her rotator cuff surgery, he would not assign an impairment rating. However, Wagner further opined that half of whatever impairment was eventually assigned would be attributable to pre-existing tendonopathic changes in Adkins' rotator cuff. At his deposition, Dr. Wagner indicated that this opinion was based upon an "inconsistent" history that Adkins gave him of her injury, in that she relayed more information to him regarding how she fell than she relayed to other providers. In an addendum to his initial opinion, Dr. Wagner opined that he could not say with a reasonable degree of medical certainty that Adkins' fall caused her to need rotator cuff

surgery, assuming that she (1) did not know how she landed; (2) did not point to anything in her work environment which caused her to fall; and (3) did not provide a mechanism of injury.

Based upon this evidence, the ALJ found that Adkins did not suffer a fall resulting from idiopathic or personal causes. Rather, Adkins suffered an “unexplained fall.” As such, the ALJ applied the presumption for unexplained falls set forth in *Coomes v. Robertson Lumber Co.*, 427 S.W.2d 809 (Ky. 1968), and *Workman v. Wesley Manor Methodist Home*, 462 S.W.2d 898 (Ky. 1971). The ALJ found Adkins' fall to be a work-related injury, and ordered AK Steel to pay for her right rotator cuff surgery. The Board affirmed the ALJ's opinion, and this petition for review followed.

As an initial matter, we note that if a workers' compensation claimant succeeds in his burden of proof and risk of persuasion before an ALJ, as here, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). “Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

The employee in *Coomes* returned to work after lunch and began unloading two-by-fours from a truck. A salesman then went into the lumber yard and found Coomes dazed and staggering to his feet, with a bloodied forehead. The salesman saw nothing “on the ground which would suggest what caused Coomes to fall or what he may

have struck when he fell, but there was a truck with lumber on it 'and some—a couple of pieces may be pulled out three or four feet.’” 427 S.W.2d at 810. Although evidence was introduced intimating that Coomes' unexplained fall and injury may have been caused by a previous head injury and/or an epileptic seizure, Coomes was unable to explain what had happened, and the court characterized the case as one

where no one saw the accident, and little circumstantial evidence was available to suggest exactly how it happened, yet happen it did, and during the course of Coomes' employment with the Lumber Company.

*Id.* Still, the court found that the reason Coomes fell was unexplained rather than innately personal.

The court adopted a rebuttable presumption of compensability “when an employee is found unexplainably injured on his employer's premises in the course of his employment[.]” *Id.* at 811. The court relied in part on KRS 342.004, which instructed that questions of workers' compensation law be liberally construed, and in part on Larson's commentary that “the injury would not have happened but-for the employment, whatever specifically caused it.” *Id.* at 813, quoting Larson's Workmen's Compensation Law § 10.31 (edition not stated). Applying this presumption to the facts before it, the *Coomes* court concluded that Coomes' injury was work-related as having occurred in the course of and arising out of his employment.

Similarly, the claimant in *Workman* fell and broke her hip while at work. In one deposition, Workman testified that she did not slip or trip on anything when she fell, but that her back instead simply went out. She also testified that her back had been

hurting and had given out on a couple of occasions in the few days prior to her fall. In a second deposition, Workman testified that she had not experienced any pain in her back shortly before or at the time of her fall, and that she was heavily medicated during her previous deposition testimony. 462 S.W.2d at 900.

Since Workman suffered an unexplained fall in the course of her employment, the court applied the *Coomes* rebuttable presumption that Workman's fall was compensable. However, since the employer came forward with sufficient evidence that Workman's work was not the cause of her fall, the rebuttable presumption was reduced to a permissible inference, leaving the board free to determine whether Workman's work caused her fall. Ultimately, the court affirmed the Board's decision that Workman's fall did not arise out of and in the course of her employment. 462 S.W.2d at 901.

AK Steel argues that the Board erred by affirming the ALJ's application of the *Coomes* rebuttable presumption because workers' compensation law is largely statutory and the legislature has not enacted a presumption for unexplained fall cases. AK Steel contends that the legislature certainly knows how to enact such a presumption, as evidenced by KRS 342.680, which provides a presumption of work-relatedness in cases where the claimant is dead or is physically or mentally unable to testify. We recognize that there is no statutory presumption for unexplained fall cases. However, KRS 342.0011(1) defines "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of

employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” Thus, it was necessary for the ALJ to determine whether Adkins' fall arose out of and in the course of her employment in order to determine whether she sustained a work-related injury. Certainly *Coomes* and *Workman* are applicable since they discuss whether certain employees' unexplained falls arose out of and in the course of their employment.

Next, AK Steel argues that the ALJ erred by applying the *Coomes* rebuttable presumption to Adkins' case because KRS 342.004, on which *Coomes* relied in part in adopting the presumption, was repealed effective July 1980. We disagree.

KRS 342.004 required courts to liberally construe questions of law in workers' compensation matters. Even though the statute has been repealed, the sentiment remains active in workers' compensation law. *See, e.g., Webster County Coal Corp. v. Lee*, 125 S.W.3d 310, 315 (Ky.App. 2003) (courts “are required to interpret the workers' compensation statutes in a manner that is consistent with their beneficent purpose”). Further, KRS 342.004 was not the only basis for *Coomes*' adoption of a rebuttable presumption in unexplained fall cases, as the court also relied on Larson's treatise on workers' compensation law, which indicated that most courts confronted with unexplained fall cases have awarded compensation on the theory that but for the employment, whatever specifically caused the fall would not have occurred. Courts continue to deal with unexplained falls in this manner, 1 *Larson's Workers' Compensation* § 7.04[1][a] (desk ed. 2003), and *Coomes* and *Workman* continue to be

good law. Indeed, Kentucky's Supreme Court recently applied the *Workman* rebuttable presumption in *Jefferson County Public Schools/Jefferson County Bd. of Educ. v. Stephens*, 208 S.W.3d 862 (Ky. 2006).

With regard to the application of the *Coomes* rebuttable presumption to the facts now at issue, the ALJ found that Adkins' fall was unexplained rather than the result of idiopathic or personal causes. As such, it was rebuttably presumed that her injury was compensable. *See Workman*, 462 S.W.2d at 900. The ALJ also found that AK Steel did not present sufficient evidence to rebut the presumption but that even if it did, the best evidence was that the fall was work-related. An ALJ has the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences therefrom, to judge the weight to be afforded the testimony of a particular witness, and to reject any testimony and believe or disbelieve various parts of the evidence, even if the evidence comes from the same witness or from the same adversarial party's total proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). As such, we cannot say that the ALJ erred by finding that Adkins' injury was work-related given the substantial evidence supporting that decision, including Adkins' testimony that she did not experience any dizziness or pain prior to her fall, and that she did not trip or fall on anything. Although AK Steel presented evidence that Adkins had experienced dizziness in the past, and that it was possible that her fall occurred due to whatever caused the dizziness or due to a vasovagal event, at most AK Steel rebutted the presumption that Adkins' fall was



work-related, reducing the presumption to a permissible inference that Adkins' fall was work-related. *Workman*, 462 S.W.2d at 900. In that event, the ALJ was free to determine the nature of the fall, and he did not err by concluding that Adkins' fall was work-related.<sup>2</sup>

Next, AK Steel argues that the ALJ erred by finding that Adkins' fall caused her right shoulder injury. We disagree.

AK Steel highlights the opinions of Dr. Wagner and Dr. Hinchman that they could not determine whether Adkins' fall caused her right shoulder injury. Indeed, had the ALJ chosen to believe these doctors' opinions, the decision would have been supported by substantial evidence. However, the ALJ instead chose to believe Dr. Dial's opinion that Adkins' fall did cause her right shoulder injury. As Dr. Dial's opinion constitutes substantial evidence, the ALJ did not err by holding that Adkins' fall caused her right rotator cuff injury.

Finally, AK Steel argues that the ALJ erred by failing to find that Adkins had a pre-existing condition. We disagree.

As set forth above, Adkins admitted that she previously took medication for pain which she experienced as early as December 1998 in her right ear, down her neck, and across the top of her shoulder. Dr. Wagner testified in his deposition that Adkins had shoulder problems at least intermittently from December 1998 to June 2003. Again, a finding by the ALJ that Adkins had a pre-existing injury would have been supported by

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<sup>2</sup> As the *Workman* court noted, our discussion thus far presupposes “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.” 462 S.W.2d at 901.

substantial evidence. However, the ALJ held instead that Adkins did not have a pre-existing injury. As the Board's opinion set forth, this decision was supported by substantial evidence in the form of Shelia Webb's testimony that Adkins had not complained of any shoulder problems in the time shortly before her injury, as well as Dr. Dial's note that Adkins had no limitations prior to her injury. The ALJ's opinion was also supported by Adkins' testimony that the "old" pain she felt was different from the pain she felt following her fall at work.

The Workers' Compensation Board's opinion, affirming the ALJ's opinion ordering AK Steel to pay for Adkins' rotator cuff surgery, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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