

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 24, 2020

CLAIM NO. 201775469

JUDITH PENNINGTON

PETITIONER

VS.           **APPEAL FROM HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE**

ASHLAND COMMUNITY & TECHNICAL COLLEGE and  
HON. JONATHAN R. WEATHERBY, ALJ  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING IN PART, VACATING IN PART  
AND REMANDING**

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and VACANT, Members.

**ALVEY, Chairman.** Judith Pennington (“Pennington”) appeals from the September 24, 2019 Opinion and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”), dismissing her claim for a fall she sustained on July 6, 2017 while working for Ashland Community and Technical College

(“ACTC”). Pennington also appeals from the October 21, 2019 order denying her petition for reconsideration.

On appeal, Pennington argues the ALJ’s decision is particularly erroneous and unreasonable. She also argues the ALJ failed to make additional findings of fact requested in her petition for reconsideration. Pennington additionally argues ACTC’s evidence did not overcome the presumption of work-relatedness of her fall with competent medical evidence. The finding Pennington did not trip over a trowel line while working for ACTC on July 6, 2017 is supported by substantial evidence, and a contrary result regarding this finding is not compelled. We therefore affirm that portion of the ALJ’s decision.

However, we note the ALJ found “the far more likely explanation was that Plaintiff’s blood sugar was significantly elevated as confirmed by the emergency room records, and that this caused the Plaintiff to lose consciousness and fall.” The ALJ correctly recited the evidence establishing Pennington’s blood sugar was high. However, he did not cite to any evidence in the record supporting his determination that this caused her to lose consciousness and fall. We therefore vacate the ALJ’s determination that Pennington lost consciousness and fell due to her elevated blood sugar. On remand, we direct the ALJ to point to the evidence of record supporting a determination that Pennington lost consciousness due to elevated blood sugar. If the ALJ is unable to point to such evidence, he must perform the appropriate analysis of whether Pennington’s fall was due to an unexplained cause, idiopathic cause, or some work-related cause.

Pennington filed a Form 101 on August 29, 2018, alleging she injured her knees, hands, and face on July 6, 2017, while working at ACTC as a business affairs associate. Pennington indicated she reported the incident to her supervisor on the date of the accident. In the Form 104 employment history filed with her claim, Pennington noted she worked as an accounts payable clerk at a bank from 1973 to 2000, and as a business associate for ACTC from 2000 to 2017.

Pennington testified by deposition on November 27, 2018, and at the hearing held July 26, 2019. Pennington is a resident of Ashland, Kentucky, and was born on December 9, 1949. She testified that prior to her employment at ACTC, she was employed at a bank for 27 years, working in various job positions. She sustained no injuries while working for the bank. She began working for ACTC in 2000. Her job required taking and logging tuition payments. She was later promoted when her supervisor retired.

On July 6, 2017, Pennington had just returned from lunch. She was working temporarily from a location different from her usual workstation due to HVAC repairs. She sat her purse on the desk and was going to the restroom prior to beginning her afternoon work duties. She did not take an insulin shot prior to heading to the restroom. She testified she was wearing sandals on the day of the accident. She related that she caught her toe on a trowel line left over from a repair performed in the hallway many years before. She testified the hallway had a concrete base with tile on top. She stated she had tripped and almost fallen in that hallway before, and had seen other workers stumble. When she fell, she was unable to get up, and sat in the hallway for forty-five minutes before anyone found her.

Pennington stated she bruised her chin and nose when she fell, in addition to injuring both knees. She stated she did not lose consciousness. She also stated she broke crowns off her teeth in the fall, which dentist Dr. James Daniel replaced.

Eventually a worker in a different section saw her, and advised a security guard of the situation. When they assisted her with an attempt to stand, she was unable to do so due to the pain in her legs. She was placed in a desk chair and wheeled into the office. Pennington was taken by ambulance to the hospital, then underwent in-patient rehabilitation for six weeks. She had an additional eight weeks of outpatient physical therapy at her sister's home. She last treated in November or December 2017. She testified it is hard for her to get up or down stairs, or to walk very far due to her physical limitations stemming from the accident. She had a ramp built for her home to allow her to get from her car to the porch.

Pennington testified she treated for diabetes and high blood pressure prior to the accident. She also had a cardiac stent placed in November 2016. Pennington testified she was taking injections for her diabetes prior to the work incident. In November 2017, she began dialysis due to kidney problems. She has also had a stroke affecting her left side. Regarding the high blood sugar noted by both the ambulance report and the emergency room, Pennington testified high blood sugar does not make her dizzy or weak, it is when it drops that she has problems.

Pennington did not return to work after the accident. She used all of her sick time and vacation days. When those were exhausted, she retired. Pennington stated that ACTC denied her claim in its entirety. She never received any workers' compensation benefits, and none of her medical expenses were paid.

In support of her claim, Pennington filed Dr. Bruce Guberman's Form 107-I medical report. Pennington advised him that on July 6, 2017, she caught her shoe on a raised area of the floor at work, and she fell forward, striking her face and nose, and landing on both knees. Pennington reported continued pain in both knees, worse on the left. She also reported intermittent knee stiffness and locking. She also advised her problems are worse with prolonged standing, walking, and sitting, especially when she attempts to stand after sitting for long periods. Pennington stated that her job with ACTC was primarily sedentary, but she had to go up and down stairs, and move files. She reported difficulty with going up and down stairs since the accident. She also noted she would have difficulty moving heavy files.

Pennington reported she previously sustained a left knee injury in 2005 requiring surgery. She bumped the left knee into the corner of a metal file cabinet. She had also undergone a previous right knee arthroscopic surgery. On physical examination, Dr. Guberman noted Pennington had an antalgic gait, but she was steady.

Dr. Guberman diagnosed Pennington with bilateral tibial plateau fractures. He also diagnosed a history of contusions to the face, chin, and nose. He stated all of those conditions were caused by the work accident. He assessed a 6% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, he found 4% was due to the left knee, and 2% to the right knee. Dr. Guberman stated Pennington is unable to return to her job at ACTC. He noted she is only able to sit for 30 to 40 minutes at a time, for a total of four to five hours per

day, and she is only able to stand for three to four hours per day, not to exceed 20 minutes at a time.

Pennington filed records from the Kings Daughters Medical Center (“KDMC”) emergency department. The notes reflect that on July 6, 2017, Pennington had fallen and had significant knee pain. She reported she had caught her shoe, tripped and fell on a tile floor. She also reported that she had fallen face first and hit both knees. She had a bruised forehead, and was reportedly unable to walk due to knee pain. On July 7, 2017, Dr. Chambers noted Pennington had fallen at work, had considerable difficulty with weight bearing, and was unable to stand. The July 10, 2017 discharge summary from KDMC reflects Pennington had a left lateral tibial plateau fracture, and a right tibial spine avulsion.

Pennington also filed treatment records from KDMC Orthopedics. Those records reflect five treatment dates with Dr. Michael Chambers from July 26, 2017 to November 16, 2017. The records outline Pennington’s progress subsequent to the July 6, 2017 injuries she sustained in the fall. On October 3, 2017, Dr. Chambers stated Pennington had been unable to work since July 6, 2017, and her treatment was ongoing. Dr. Chambers diagnosed Pennington with healed right and left tibial plateau fractures as of November 16, 2017. He stated Pennington could return to sedentary work only, with no bending, squatting, or lifting. He limited her standing to less than five minutes at a time. He recommended additional physical therapy for Pennington’s work injuries. Pennington had a history of multiple conditions prior to the July 6, 2017 fall. He noted she had a history of kidney

problems, anxiety disorder, community acquired pneumonia, diabetes mellitus, hyperlipidemia, irritable bowel syndrome, lupus, and prior knee problems.

Pennington subsequently filed additional treatment records including the February 9, 2018 KDMC emergency department record revealing she experienced pain due to a fall that morning. She was diagnosed with a patellar fracture. On December 24, 2018, it was noted that Pennington complained of bilateral knee pain. She reportedly had generalized weakness possibly attributable to end-stage renal disease. Pennington also filed physical therapy records from KDMC physical therapy for 29 treatment dates between July 11, 2017 and August 21, 2017.

Pennington also filed unpaid medical bills and documentation of out-of-pocket medical expenses she had paid.

On March 20, 2019, ACTC filed a Special Answer asserting Pennington had failed to follow reasonable medical advice by not taking insulin immediately after lunch on July 6, 2017.

Dr. J. Kevin Shockey evaluated Pennington at ACTC's request on December 12, 2018. He noted the July 6, 2017 accident when Pennington purportedly tripped over an uneven surface in the hallway at work where a tile was replaced years before. She reported she was unable to get up after the fall, and required assistance getting into a chair. She was taken to the emergency room for a facial contusion, and fractures of both the left and right tibial plateaus. There was no reported loss of consciousness. Dr. Shockey stated, "Ms. Pennington was noted to have a significant elevation of her glucose level." Dr. Shockey stated Pennington walked slowly during her examination, but did not have significant analgia. Dr.

Shockey noted Pennington had multiple medical issues increasing her risk of a fall, and she has a high risk for recurrent falls. He found no additional treatment is necessary due to the fall at work. He found Pennington had reached maximum medical improvement, her fractures had healed, and she had a good range of motion. He found no indication that Pennington could not return to work. He stated any limitation in function is due to her co-morbidities. He assessed a 4% impairment rating pursuant to the AMA Guides, of which he attributed 2% to each knee.

ACTC also filed the records from the KDMC emergency department. ACTC also filed the intake sheet from Tri-State Rehabilitation dated October 14, 2017. That record reflects Pennington's reported difficulties with standing, walking, stair claiming, lifting, sitting, and other physical activities.

ACTC additionally filed the February 27, 2018 note from Jeremy Kaltenbach, PA-C, from KDMC Orthopedics. He noted Pennington had fallen from a standing height two and a half weeks before, with an indirect blow to her right knee. He noted she had full range of motion, and was encouraged to engage in full weight bearing activities, as tolerated, with the use of a walker.

ACTC also filed the July 7, 2017 Boyd County EMS records. The notes record Pennington's fall, and her appearance when the EMTs arrived. The notes reflect Pennington complained the floor caused her fall. Her blood pressure was measured as 179/78, and her Glucose level was 525. She was noted to have a history of hypertension, diabetes, and she had a stent placed one year prior. The records reflect Pennington had eaten lunch, and had not yet taken her insulin when she fell.

ACTC filed Dr. Daniel's treatment ledger, largely illegible, which it asserts reflects Pennington needed to have the dental work performed after the incident, even before its occurrence. Pennington filed an undated note from Dr. Daniel stating she had several teeth rebuilt on December 6, 2016. Dr. Daniel noted when he saw Pennington on May 21, 2018, all of her anterior teeth (numbers 6, 8, 9, 10, 11) were damaged and replaced with a partial plate.

Kellie Allen ("Allen"), the director of human resources at ACTC, testified by deposition on March 7, 2019. She stated that at the time of the incident, Pennington was working in a different location due to HVAC repairs in the area of her usual workstation. She was aware of Pennington's accident. After the accident, the maintenance department was contacted to determine if repairs were necessary to the floor in the area of the fall. No defects were reportedly found. Allen stated that Pennington did not provide any reason for her fall. She just reported that she fell, and was in a lot of pain. Allen called an ambulance. She testified no blood was found at the scene, and there was no evidence of a fall. She stated that after Pennington exhausted all of her leave, she retired. Allen also testified that Pennington's job was sedentary. She noted that as a cashier, Pennington took tuition payments and dealt with third party billing. She stated Pennington was not required to lift much, and if lifting was required, assistance was available for her.

James Michael Blevins ("Blevins"), the capital project manager for the Kentucky Community and Technical College System in eastern and northern Kentucky, testified by deposition on March 7, 2019. He has held that position since July 1, 1999. Prior to that, he worked for Ashland Oil. Blevins testified that a floor

renovation to the area of the fall occurred in the summer of 2002. At that time, a sewer leak from the restrooms was found. A small area of the floor was excavated to access the sewer lines. He testified after the repairs were performed, the floor was put back the way it was previously, with no trowel lines. After the concrete was poured, the floor was tiled and buffed. He stated if a bump was seen in the tile, it was taken up and replaced. He stated the floor had not been repaired or touched since the repairs were completed in 2002.

A benefit review conference was held on July 26, 2019. The parties identified the contested issue as benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, temporary total disability benefits, unreasonable failure to follow reasonable medical advice, and duration of benefits.

In the September 24, 2019 opinion, the ALJ determined Pennington had not sustained her burden of proving she sustained a work-related injury, and dismissed her claim. The ALJ noted Pennington alleged she tripped over trowel lines from repair work performed many years before. He noted Blevins' testimony directly contradicted that assertion. The ALJ specifically found as follows:

The ALJ finds that Mr. Blevins was credible in his testimony that the area identified by the Plaintiff as the spot of her fall was not included in the repair work that was referenced. The ALJ further finds that the pictures of the area attached to the deposition of Kellie Allen depicted no uneven or raised surface or any perceptible risk of fall.

The ALJ next determined that it was more likely that Pennington's fall was caused by her elevated blood sugar. He specifically found as follows:

The ALJ finds that the far more likely explanation was that the Plaintiff's blood sugar was significantly elevated as confirmed by the emergency room records, and that this caused the Plaintiff to lose consciousness and fall. This theory is also supported by the nature of the Plaintiff's injuries as pointed out by the Defendant Employer. More particularly, the Plaintiff fell forward but made no apparent effort to break her fall as evidenced by the injuries to her face and teeth. Significantly, there was no evidence of bruising to the hands or arms from an attempt to breach the fall.

Pennington filed a petition for reconsideration arguing the evidence does not support the ALJ's finding that her fall was most likely caused by her elevated blood sugar. She requested a finding that none of the evidence submitted by either party supports that determination. Pennington also requested a correction of the ALJ's statement in the decision of Allen's testimony indicating she was not told what happened. Pennington requested additional findings regarding what she advised emergency room personnel regarding the reason for her fall. The ALJ summarily denied the petition.

On appeal, Pennington argues the ALJ's decision is particularly erroneous and unreasonable. She argues the ALJ failed to make additional findings of fact requested in her petition for reconsideration. Pennington additionally argues ACTC's evidence did not overcome the presumption of work-relatedness of the fall within competent medical evidence. She argues the evidence does not support the ALJ's determination that she fell due to her increased blood sugar level.

As the claimant in a workers' compensation proceeding, Pennington had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was unsuccessful, the

question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party’s total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of this Board in reviewing the ALJ’s decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ’s role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record.

Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

It is undisputed that Pennington fell on ACTC's premises on July 6, 2017. It is also clear that she sustained multiple injuries in the fall. Regarding whether Pennington tripped over a trowel line in the floor from a repair performed 15 years prior, we find the ALJ performed the appropriate analysis. The evidence supports his determination that she did not in fact trip over a floor imperfection. The determination that she did not trip over a trowel line is supported by Blevins' testimony, and the photographs reviewed by the ALJ. Because substantial evidence supports this determination, and a contrary result is not compelled, on this finding, we affirm.

However, our review of the record does not reveal any evidence supporting the ALJ's determination that the fall was most likely caused by her elevated blood sugar. We acknowledge both the EMS and the emergency room records document that indeed Pennington's blood sugar was elevated, but we do not discern any evidence indicating this caused her fall. Pennington in fact testified at the hearing that she does not feel ramifications when her blood sugar is high, "It's when it drops low it makes you dizzy and weak." On remand, we direct the ALJ to point to the evidence that establishes the elevated blood sugar caused Pennington's fall. We do not direct any particular determination, however if there is no evidence directly linking the fall to the blood sugar, the ALJ must determine if there is another explanation for Pennington's fall, or if in fact it is unexplained.

KRS 342.0011(1) defines “injury” as a work-related traumatic event “arising out of and in the course of employment” that is the proximate cause producing a harmful change in the human organism. It has long been established that “in the course of employment” refers to the time, place, and circumstances of an accident, while “arising out of” refers to the cause or source of the accident. AK Steele Corp. vs. Adkins, 253 S.W.3d 59 (Ky. 2008).

Where an employee sustains an injury at work due to a purely individual cause, i.e., such as an internal weakness, and the work does not contribute independently to the effects of the resulting harmful change, the injury as a matter of law is idiopathic in nature and, therefore, not compensable. Workman vs. Wesley Manor Methodist Home, *supra*. By contrast, an unexplained fall is exactly what its designation purports - that which cannot be identified sufficiently with any thoroughness of detail. Salyers vs. G. & P. Coal Co., 467 S.W.2d 115 (Ky. 1971) and Coomes vs. Robertson Lumber Co., 427 S.W.2d 809 (Ky. 1968).

In Workman vs. Wesley Manor Methodist Home, 462 S.W.2d at 900, the Court acknowledged there is a rebuttable presumption that an unexplained fall which occurs during the course of employment is work-related. In the absence of such rebutting evidence, the ALJ cannot find against the claimant on the issue of whether the accident arose out of the employment. However, the Court found the rebuttable presumption had been reduced to a permissible inference when the employer presented enough evidence to establish the employee’s fall was not unexplained, but, rather, resulted solely from a prior, non-work-related back condition. Id. at 901-902. Consequently, the Court held the evidence did not

compel a finding the employment was a causative factor in the employee's injuries. Rather, the ALJ was free either to decide in the claimant's favor or to remain unpersuaded claimant's work was a causative factor in precipitating the injury. Id.

In Vacuum Depositing, Inc. v. Dever, 285 S.W.3d 730, 734 (Ky. 2009), the Kentucky Supreme Court held "that evidence the claimant was clumsy and wearing high heels was not sufficient to prove that the cause of her fall was idiopathic. The evidence did not overcome the presumption that the fall was unexplained and, thus, that it was work-related." Dever testified she slipped and fell in the break room, but did not know why. The claimant was wearing boots with two inch heels, and denied being dizzy or feeling any pain. Another witness testified the claimant reported being clumsy. Id. at 731-732. The ALJ determined substantial evidence existed to rebut the Workman presumption of work-relatedness. Therefore, the presumption was reduced to a permissible inference, and the weight of reliable evidence established the fall did not arise from claimant's employment. Id. at 732. The Board reversed and remanded, and the Kentucky Court of Appeals affirmed. In affirming, the Supreme Court stated as follows:

To summarize, a work-related fall occurs if the worker slips, trips, or falls due to causes such as a substance or obstacle on the floor of the workplace or an irregularity in the floor. When the cause of a workplace fall is unexplained, the fall is presumed to be work-related under Workman. Unexplained falls divide ultimately into two categories: 1.) those the employer has shown to result from a personal or idiopathic cause but which may be compensable under the positional risk doctrine; and 2.) those that remain unexplained and entitled to a presumption of work-relatedness.

The claimant alleged an unexplained fall but, as in Workman, the ALJ found that the employer rebutted

the presumption of work-relatedness and showed the fall to be personal or idiopathic. The employer asserts that the Board erred by substituting its judgment for the ALJ's and, thus, that the Court of Appeals erred by affirming the Board. We disagree.

The ALJ characterized the claimant as “not an entirely credible witness” but determined that a workplace fall occurred although its cause was idiopathic. The fact that the claimant's work did nothing to cause her fall was immaterial under Workman. The record contained no evidence that she suffered from a pre-existing disease or physical weakness that caused her to fall and no evidence that she was engaged in conduct when she fell that would take the injury outside Chapter 342. Nor did the record contain evidence that her footwear was inherently dangerous and inappropriate for work in the employer's offices. Like the Board and the Court of Appeals, we are convinced that evidence the claimant was clumsy and wearing high heels was not sufficient to prove that the cause of her fall was idiopathic. The evidence did not overcome the presumption that the fall was unexplained and, thus, that it was work-related.

Id. at 733-734

As noted above, in this instance, the ALJ determined Pennington did not trip over a trowel line, thus eliminating that explanation as a reason for her fall. On remand, he must determine from the evidence whether Pennington's accident occurred from some other explained or idiopathic cause or whether the fall was unexplained, and therefore presumptively compensable. Again, we do not direct any particular result, however we do direct the ALJ to conduct the appropriate analysis based upon the evidence.

Accordingly, the September 24, 2019 Opinion and Order, and the October 21, 2019 order on reconsideration rendered by Hon. Jonathan R.

Weatherby, Administrative Law Judge, are **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for additional determinations in accordance with the direction set forth above.

STIVERS, MEMBER, CONCURS.

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