

In the Matter of the Compensation of
LILY T. BLANK, Claimant
WCB Case No. 10-00922
ORDER ON REVIEW
Alana C DiCicco, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Rissberger's order that set aside its denial of claimant's injury claim resulting from a workplace fall. On review, the issue is course and scope of employment. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized below.

On February 1, 2010, claimant fell while taking a break in the employer's lunchroom. (Ex. 126-1). She initially reported tripping and falling forward. (Ex. 114-1). She later advised that she was uncertain whether she tripped or just lost her balance when she fell. (Ex. 115).

On April 20, 2010, claimant was examined by Dr. Sandell and Dr. Green on behalf of the employer. Dr. Sandell noted that claimant was "unsure how she fell, perhaps she lost her balance, but she cannot recall." (Ex. 126-1). In a separate report, Dr. Green noted that claimant "does not recall whether she slipped, stumbled, became dizzy or faint, or simply lost her balance. * * * she is certain that she did not lose consciousness * * *." (Ex. 127-1; *see also* Tr. 9).

Dr. Green opined that it was possible, but not probable, that claimant's preexisting Churg-Strauss Syndrome (CSS) "could have contributed to a loss of balance and her subsequent fall * * *." (Ex. 127-22). He later clarified that claimant's medical history and diagnosis of CSS "clearly raises the possibility that idiopathic factors caused [her] to fall at work on February 1, 2010." (Ex. 128-2). He explained that several manifestations of CSS could have caused claimant to fall, such as balance deficiencies secondary to inner ear problems and peripheral neuropathy/lower extremity numbness. (*Id.*) When asked whether idiopathic factors could be ruled out as a cause of claimant's fall, Dr. Green responded that claimant's CSS could not be excluded. (*Id.*) He agreed that no "work-related" risks for the fall had been found to exist. (*Id.*)

During a deposition, Dr. Green testified that, in addition to the CSS factors that could have caused claimant's fall, her untreated sleep apnea was also a potential cause. (Ex. 129-21). He ultimately opined that it was more likely that claimant fell due to her CSS or her sleep apnea than to a work-related risk. (Ex. 129-23, -24).

Claimant testified that she experiences numbness in the bottom middle part of her left foot as a result of her CSS, but that such numbness did not cause her to fall on February 1, 2010. (Tr. 11, 14). According to claimant, she was not having a flare up of any of her CSS symptoms when she fell. (Tr. 26, 27). However, she stated that her inner ear problems are always present. (Tr. 29).

CONCLUSIONS OF LAW AND OPINION

In setting aside the denial, the ALJ concluded that claimant's fall was "unexplained" and thus arose out of her employment. In so finding, the ALJ determined that claimant's testimony, as supported by Dr. Green's physical examination findings, persuasively established that no idiopathic conditions contributed to her fall.

On review, the employer contends that claimant's fall was not unexplained. The employer argues that Dr. Green's uncontroverted and persuasive opinion identified multiple potential idiopathic causes of claimant's fall and that claimant did not eliminate such causes. For the following reasons, we agree.

To be compensable, an injury must "aris[e] out of and in the course of employment." ORS 656.005(7)(a). Although the phrase represents a unitary test and neither part is dispositive, both the "arising out of" and the "in the course of" elements must be satisfied to some degree. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 531 (1996). Whether the injury occurred "in the course of" employment depends on the time, place, and circumstances under which the accident took place. *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994). Whether the injury "arose out of" employment depends on the causal relationship between the injury and the employment. *Id.*

There is no dispute that claimant's injury occurred "in the course of" employment. Instead, the question on review is whether claimant's fall was truly unexplained (*i.e.*, the cause of the accident cannot be directly established) such that it "arose out of" her employment.¹ A fall occurring within the course of

¹ Claimant does not contend that an employment risk contributed to her injury. Moreover, our review finds no such "employment risk" contribution. Therefore, the "mixed risk" doctrine does not apply. See *Theresa A. Graham*, 63 Van Natta 740, 744 (2011) (the "mixed risk" doctrine applies to situations where *both* a personal and employment risk contribute to the cause of a fall or accident).

employment results from a “neutral” risk and arises out of employment as a matter of law if all idiopathic causes of the fall have been ruled out. *Phil A. Livesley Co. v. Russ*, 296 Or 25, 30 (1983); *McTaggart v. Time Warner Cable*, 170 Or App 491, 500, 503 (2000), *rev den*, 331 Or 633 (2001). Where idiopathic factors are at least equally likely as work-related factors to have caused the fall, it is not compensable. *Russ*, 296 Or at 30; *Mackay v. SAIF*, 60 Or App 536, 539 (1982) (a fall is not compensable where it is equally possible that its cause was idiopathic as it was work-related); *Alfred L. Hillard*, 60 Van Natta 254, 257-58 (2008).

Here, although claimant could not identify the cause of her fall, the medical record raises the possibility that idiopathic risks (such as her CSS and sleep apnea) caused, or contributed to, the fall. We acknowledge that Dr. Green found no evidence of postural instability, ataxia, or significant peripheral neuropathy when he examined claimant. (Ex. 127-22). However, despite these findings, Dr. Green unequivocally concluded that idiopathic factors, including claimant’s CSS and untreated sleep apnea, could not be excluded as a cause of the fall. (Exs. 128-2, 129-25).

Specifically, Dr. Green confirmed on several occasions that symptoms of CSS, such as balance deficiencies secondary to inner ear problems and peripheral neuropathy/lower extremity numbness, were potential causes of claimant’s fall. (Exs. 128-2, 129-21). Regarding claimant’s inner ear condition, he explained that such a condition could affect balance and, because it waxes and wanes, it may be different at one point compared to weeks or years before. (Ex. 129-13-14). In concluding that claimant’s sleep apnea was a “prominent potential risk” of claimant’s fall, Dr. Green explained that sleep apnea can “cause considerable morbidity, including episodes of microsleep that are not predictable and * * * potentially could be a cause of this fall.” (Ex. 129-21).

Accordingly, despite claimant’s testimony that she was not experiencing a flare-up of CSS symptoms before her fall, Dr. Green’s uncontroverted opinion suggests potential idiopathic causes for her fall and there is no medical evidence to the contrary.² This case, therefore, is distinguishable from *Cynthia E. Beatty*, 60 Van Natta 3363 (2008).

In *Beatty*, where there was no medical evidence supporting an idiopathic factor as a cause of the claimant’s fall, we relied on the claimant’s testimony that no idiopathic factors were a cause. *Id.* at 3366. Here, unlike in *Beatty*, medical

² We see no inconsistencies in Dr. Green’s opinion regarding the potential contribution of claimant’s idiopathic conditions to her fall.

evidence supports an idiopathic contribution to claimant's fall (at least to some degree). Therefore, claimant's testimony that such conditions did not cause her fall is not un rebutted and cannot stand on its own.

In sum, because claimant has not eliminated the potential idiopathic causes of her fall identified by the medical evidence, her fall was not truly "unexplained."³ Therefore, consistent with *Russ*, *McTaggart*, and *Hillard*, claimant's injury claim is not compensable. Accordingly, we reverse.

ORDER

The ALJ's order dated December 22, 2010 is reversed. The ALJ's \$6,200 attorney fee award is also reversed.

Entered at Salem, Oregon on July 26, 2011

³ Portions of Dr. Green's opinion concerning idiopathic contributions to claimant's fall are phrased in terms of possibility. Notwithstanding such phrasing, Dr. Green's opinion does not support a conclusion that idiopathic causes were eliminated as contributors to claimant's fall. As such, the record does not establish that claimant's fall was truly unexplained.