
In the Matter of the Compensation of
JANET G. CAVALLIERE, Claimant
WCB Case No. 11-03966
ORDER ON REVIEW
Black Chapman et al, Claimant Attorneys
Olson Vu & Dickson LLP, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Somers. Member Langer dissents.

Claimant requests review of Administrative Law Judge (ALJ) Smith's order that upheld the self-insured employer's denial of claimant's injury claim. On review, the issue is course and scope of employment. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." In addition, we provide the following summary of pertinent facts.

Claimant worked in the employer's hospital kitchen as an "a.m. tray person," preparing food trays for patients. (Tr. 6). Shortly after beginning her shift on the morning of April 29, 2011, she fell while walking across the kitchen. (Tr. 43). Claimant reported to the emergency room with a primary complaint of right shoulder pain. (Ex. 7-1). The emergency room physician noted that claimant "had a mechanical ground-level fall and injured her shoulder. * * * She has no syncope or presyncope. She had no head injury or loss of consciousness. She states she struck her face and hit her tooth but did not injure it." (*Id.*) An Emergency Department Nursing Assessment included a history that claimant "caught shoe & tripped & fell on [right] shoulder - painful." (Ex. 4-1).

On the day of the accident, claimant completed a claim form, describing the event as follows: "Walking - my shoes gripped and I fell - fell face forward - hit teeth/nose/[right] shoulder/fell on knees." (Ex. 9).

Three days later, claimant saw Dr. Wilson, describing the event as: "Stopped by my shoe as I was walking & couldn't get my balance fast enough to recover." (Ex. 11). Dr. Wilson diagnosed a right shoulder strain, attributing it to the fall at work. (Ex. 10).

Claimant testified that at the time of her fall, she was walking through the work area to put her lunch in the refrigerator, when as she was walking, her “foot catches for some reason” and she “just stopped,” and fell forward. (Tr. 16, 26, 28). She explained that her “foot caught” or her “shoe gripped.” (Tr. 26, 27). She extended her right hand to break the fall, and the hand slipped forward as it came into contact with the floor. (Tr. 28, 30). She was not moving fast, and does not know what caused her foot/feet to grip the floor. (Tr. 56). She did not see water or food on the floor, and was not aware of anything on the floor that caused her to fall. (Tr. 46). Nor did she see any water or other foreign substance on her shoes. (Tr. 35). At the time of the fall, claimant was wearing skid-resistant shoes, as required by the employer. (Tr. 19).

A coworker of claimant, Ms. Wagner, testified that she was walking behind her just before the accident and saw her fall. (Tr. 64). According to Ms. Wagner, there was no water or foreign substance on the floor in the area where claimant fell, and the floor was not greasy or wet. (Tr. 64, 66-68). She said that claimant was walking with her normal shuffling gait. (Tr. 64).

Claimant was diagnosed with fibromyalgia years earlier, and pain from that condition had occasionally caused her to limp. (Tr. 38-39). She had sometimes used a cane, but was not using it on the day of the accident. (Tr. 39). She had also undergone a heart ablation procedure in February 2011 for arrhythmia. (Tr. 50). Her heart medication had caused her some dizziness. (Tr. 51). Claimant also had bilateral lymphedema in the ankles and lower legs, and she had recently undergone therapy for that condition. (Tr. 7, 49-50). However, on the morning of her accident, she was “feeling pretty good,” and thought it was “a really good day.” (Tr. 15, 61). She did not recall having any dizziness, fibromyalgia, or edema symptoms on that day. (Tr. 11, 15). She acknowledged that these “health problems” had caused her to have trouble in the past with balance and “things of that nature.” (Tr. 9).

Claimant testified she had issues with stumbling when it came to steps and curbs. She agreed she had a history of falls and stumbles. (Tr. 53). In 1991, she stepped down on the wheel of a dumpster at work; in September 2000, she fell at work after stepping in water and debris; in 2008, she caught her right foot and fell while at work; and in February 2009, she fell at home. (Tr. 10, 55, 60).

On June 17, 2011, the employer denied compensability of her injury claim on the basis that the fall “was related to idiopathic factors” and there was “no substantial employment contribution to your fall from your work environment[.]” (Ex. 18). Claimant requested a hearing.

In October 2011, Dr. Stone, claimant's treating physician, agreed with the employer's attorney that claimant had told him she "really had no idea as to why she fell." (Ex. 20-2). He concurred that claimant had some peripheral neuropathy from Type II diabetes that affected her balance and mobility; and that her arrhythmia medication had caused her to experience significant edema in her feet/ankles, along with some dizziness. (*Id.*) He further agreed that claimant also had bad knees and a thyroid condition, which could affect her balance. (*Id.*) Dr. Stone could not eliminate idiopathic conditions as causative explanations for claimant's fall. (*Id.*) Dr. Wilson agreed with Dr. Stone's opinion. (Ex. 21).

During deposition, Dr. Stone explained that after having reviewed claimant's own contemporaneous account of the injurious event, and knowing how forthcoming she is, he would "slightly amend" his October 2011 concurrence. Specifically, after the statement "She just kept saying she really didn't know what happened," he would add "comma, my shoe caught[,]" or "but my shoe just caught." (Ex. 22-26).

Dr. Stone also testified that he had questioned claimant extensively, and she denied experiencing dizziness, fatigue, or any other idiopathic factors at the time of her fall. (Ex. 22-12). Claimant told Dr. Stone that she believed she caught her shoe and tripped/fell, and he believed that to be the case based on probability. (Ex. 22-17-18). Dr. Stone agreed that a person can catch her shoe if she missteps, or if the shoes have gum-soles. (Ex. 22-19). He acknowledged that at the time of the fall, claimant had been suffering from significant edema and lymphedema. (*Id.*) He agreed that she has "a little less mobility of the ankle, range of motion of the ankle," and therefore has "potentially increased loss of proprioception and sensation." (Ex. 22-20-21).

Dr. Stone could not eliminate the possibility that claimant had tripped because "she didn't pick her foot up sufficiently to move forward." (Ex. 22-21). He "[could not] say that none of the idiopathic conditions contributed to the fall." (Ex. 22-23). He agreed that claimant had previously fallen a few times and that "those other falls [have] been associated with peripheral neuropathy or edema or dizziness or other intrinsic body idiopathic conditions[.]" (*Id.*) Ultimately, Dr. Stone agreed, that it was "more likely" that claimant fell due to "some issue between the floor and the shoe than her intrinsic idiopathic personal risks[.]" (Ex. 22-25). However, he could not say it was "not possible" that idiopathic factors had contributed to claimant's fall. (Ex. 22-28).

CONCLUSIONS OF LAW AND OPINION

The ALJ noted that the employer did not dispute that claimant's injury, which occurred when she tripped and fell while walking at work, occurred in the course of employment. In evaluating whether the injury arose out of employment, the ALJ analyzed the accident as an unexplained fall. Reasoning that claimant had not eliminated idiopathic causes of the fall, the ALJ concluded that the fall was not "truly unexplained." Accordingly, the ALJ upheld the denial.

On review, claimant contends that her injury arose out of employment because, rather than being unexplained, it was caused by employment-related tripping and falling. We agree with claimant's contention.

The parties do not dispute that claimant was injured "in the course of" employment. Accordingly, the issue is whether the injury "arose out of" employment.

The "arising out of" prong of the unitary work connection inquiry tests the causal link between the worker's injury and the worker's employment. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 525-26 (1996). To satisfy this element, the "causal connection must be linked to a risk connected with the nature of the work or a risk to which the work environment exposes [the] claimant." *Redman Indus., Inc. v. Lang*, 326 Or 32, 36 (1997); *Halsey Shedd RFPD v. Leopard*, 180 Or App 332, 338 (2002). Risks causing injury to a claimant may generally be categorized as follows: risks "distinctly associated with the employment" are universally compensable; risks "personal to the claimant" are universally noncompensable; and "neutral" risks are compensable if the conditions of employment put the claimant in a position to be injured. *Lang*, 326 Or at 36; *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983).

Where the cause of a fall is unknown, it is a "neutral" risk that is considered to arise out of employment as a matter of law so long as it occurs in the course of employment. *Russ*, 296 Or at 29-30. A fall will be deemed "truly unexplained" only if the claimant "persuasively eliminates all idiopathic factors of causation."¹ *Blank v. U.S. Bank of Oregon*, 252 Or App 553, 557-58 (2012); see *McTaggart v. Time Warner Cable*, 170 Or App 491, 504 (2000), *rev den*, 331 Or 633 (2001).

¹ As used in this context, the term "idiopathic" means "peculiar to the individual," not "arising from an unknown cause." *Russ*, 296 Or at 27.

Where it is “equally possible” that “idiopathic” factors or work-related factors (which are unidentified) caused the unexplained fall, the claim is not compensable. *Blank*, 252 Or App at 558 (citing *Russ*, 296 Or at 30, and *Mackay v. SAIF*, 60 Or App 536 (1982), *rev den*, 296 Or 120 (1983)). Therefore, for a fall to be “truly unexplained,” a claimant must adequately eliminate all possible idiopathic causes. *Id.* at 560. Conversely, “Where idiopathic causes for an unexplained fall have been eliminated, the inference arises that the fall was traceable to some ordinary risk, *albeit unidentified*, to which the employment premises exposed the employee.” *Russ*, 296 Or at 32 (emphasis added).

Here, based on our review of this particular record, we disagree that an “unexplained fall” analysis applies. Rather, the record establishes that the immediate cause of claimant’s fall is known. Specifically, claimant testified that she was walking at work when, “for some reason,” her “foot caught” or her “shoe gripped,” causing her to fall. (Tr. 21, 26-27). Her testimony is further corroborated by Ms. Wagner, who testified that claimant “was shuffling and she tripped and fell over her foot, went down.” (Tr. 64).

The employer contends that the fall was “unexplained” because claimant could not identify why her shoe “gripped,” causing her to fall. (Tr. 46, 56). Nevertheless, where a worker is known to have tripped and fallen, the fall is not “unexplained” even if there is uncertainty regarding precisely how the worker tripped. *See Arthur E. Fredrickson*, 52 Van Natta 897 (2000) (fall caused when the claimant “hooked” his toes on “something” in or near a parking lot was not an “unexplained” fall, although the claimant could not identify what specific hazard or impediment “hooked” his toes). Therefore, the analysis applicable to “unexplained” falls, requiring a worker to eliminate idiopathic causes, is not applicable. Instead, we determine whether the fall was caused by a risk connected with the nature of claimant’s work or a risk to which the work environment exposed her. *See Lang*, 326 Or at 36.

Nonetheless, in conducting this analysis, we still consider the employer’s contention regarding the contribution of idiopathic causes. In doing so, we recognize that falls that are not “unexplained,” but are caused by idiopathic factors, are generally not compensable. *See Tina Holliday*, 48 Van Natta 1024 (1996) (fall caused by fainting due solely to idiopathic factors was not compensable).

Here, as previously detailed, claimant has a history of falls and health problems that have caused balance issues and interfered with her ability to work. (Tr. 7-15, 53-56). However, she testified that the work fall in question occurred

when her shoe “gripped” the floor, not because of other, idiopathic factors. Further, Dr. Stone opined that it was “more likely” that the cause of the fall was “some issue between the floor and the shoe than her intrinsic idiopathic personal risks.” (Ex. 22-25). Finally, a coworker corroborated claimant’s ultimate version that she fell from her shoe “gripping” the floor while she walked.²

Under such circumstances, the preponderance of the record does not support a conclusion that claimant’s fall was attributable to a personal risk. Instead, we are persuaded that claimant fell as a result of her shoe “gripping” the floor as she walked.³

The employer argues that the risk of claimant’s shoe “gripping” the floor was not an employment risk because the existence of hazard on the floor has not been established. However, compensability does not depend on the presence of some particular hazard arising from the employer’s premises, nor is it undermined by claimant’s own “shuffling” gait. *Wilson v. State Farm, Ins.*, 326 Or 413, 418 (1998) (injury caused by unusual “skip-step” compensable); *Schaefer*, 59 Van Natta at 3032; *Robert L. Dawson*, 50 Van Natta 2110 (1998), *aff’d without opinion*, 160 Or App 700 (1999) (ankle sprain compensable despite the absence of identified hazards contributing to the injury).

Here, claimant testified that she was wearing a “skid-resistant” shoe because of the employer’s requirements and concerns regarding “things on the floor.” (Tr. 20). Ms. Wagner confirmed that “non-skid” shoes were required. (Tr. 65). Thus, even if there was no hazard on the floor, the risk of claimant’s shoe “gripping” was distinctly associated with her employment. Further, even if the “gripping” mechanism of the accident were a “neutral” risk, rather than one distinctly associated with employment, it would have been one to which claimant’s

² Although Ms. Wagner described claimant’s gait as “shuffling,” she noted that the “shuffling” gait was normal for claimant. (*Id.*) We do not interpret her testimony as establishing an idiopathic cause of the fall, but instead as supporting claimant’s account that she was walking and tripped when her shoe “gripped” the floor.

³ It is our duty as a fact finder to evaluate the substantive evidence in the record, and apply the law to the facts in the case to determine whether claimant’s injury was sufficiently work related. See *Nicholas B. Martin*, 59 Van Natta 7, 13-14 (2007) (Board’s duty as fact finder is to “evaluat[e] the substantial evidence in the record, and apply the law to the facts in the case[.]”); *Kelly Howard*, 57 Van Natta 2411, 2412 (2005) (same). Thus, while a medical opinion is probative evidence of whether there is a causative medical link between the mechanism of injury and the injury sustained, it is not necessarily determinative of a question of fact; *e.g.*, whether claimant tripped because of shoe “gripping,” her “shuffling” gait, or a hazard on the floor. The ultimate resolution of that fact rests with us.

employment exposed her. *See Brenda K. Davis*, 60 Van Natta 1345, 1348 (2008) (injury incurred while descending stairs resulted from a “neutral” risk to which conditions of employment exposed the claimant); *Schaefer*, 59 Van Natta at 3031.⁴

Alternatively, even assuming idiopathic factors partially contributed to claimant’s fall, we would still find that her injury arose out of employment under the “mixed risk” doctrine. Under that doctrine, if claimant’s fall was due to both personal and employment reasons (*i.e.*, was not truly “unexplained”), her injury is compensable. *See Scott M. Hanna*, 64 Van Natta 1462, 1465 (2012); *Theresa A. Graham*, 63 Van Natta 740, 744, *recons*, 63 Van Natta 970 (2011) (the “mixed risk” doctrine applies to situations where both a personal and employment risk contribute to the cause of a fall or accident).⁵ In such circumstances, “[t]he law does not weigh the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat compensability.” *Graham*, 63 Van Natta at 744; *see also William H. Schaefer*, 59 Van Natta 3029, 3031 (2007) (the “personal risk” of the claimant’s idiopathic condition, which contributed to the claimed injury, did not defeat compensability where an employment risk also contributed).

⁴ In *Davis* and *Schaefer*, the claimants were injured by the act of walking. *Davis*, 60 Van Natta at 1348; *Schaefer*, 59 Van Natta at 3029. The employer argues that in this case, claimant was directly injured by her fall, rather than by walking, and that the intervening fall should change our analysis. However, regardless of the precise mechanism of injury, our conclusion remains the same so long as claimant’s fall resulted from either an employment-related risk or a neutral risk to which her work environment exposed her.

⁵ Although the “mixed risk” doctrine has not been expressly approved by the court, we have, as set forth above, applied the doctrine on several occasions. Moreover, that doctrine is consistent with the court’s unitary “work connection” test that an injury should be deemed compensable when there is a sufficient nexus between the injury and the employment. *See Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997); *Graham*, 63 Van Natta at 744 n 6. In other words, where a workplace fall is not truly unexplained and the workplace actually contributes to a fall/accident that occurs “in the course of” employment, there is a compensably sufficient nexus between the injury and the employment, notwithstanding a simultaneous personal contribution to the fall/accident.

Moreover, there is no inconsistency between the “mixed risk” doctrine and the court’s observation in several cases (involving “unexplained fall” analyses) that a workplace contribution must be more than “equally possible.” *See Graham*, 63 Van Natta at 744 n 6; *see also Russ*, 296 Or at 30; *McAdams v. SAIF*, 66 Or App 415, 418-19 (1984); *Mackay v. SAIF*, 60 Or App 536, 539 (1982); *Raines v. Edward Hines Lumber Co.*, 36 Or App 717, 719 (1978) (the claimant did not meet her burden of proving legal causation where the competing explanations of her claimed injury were “equally plausible”). None of these cases involved a scenario where the court found both workplace and idiopathic contributions to a fall (*i.e.*, the fall was “explained”); rather, the court used such language to indicate a claimant’s burden to establish a *probable* workplace contribution necessary to satisfy the “arising out of” prong when the cause of the fall is *unknown*, not that any actual identified workplace contribution must be greater than any idiopathic contribution.

Thus, even assuming an idiopathic contribution to her fall, claimant's injury would still "arise out of" employment because her fall was due to both employment (her employer-required "traction" shoes "gripping" on the floor, as discussed above) and personal causes. *Id.*

Accordingly, because we find that claimant's injury arose out of her employment, we conclude that her injury claim is compensable. Consequently, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing and on review is \$13,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, her counsel's fee representation, and the employer's objection), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated April 29, 2013 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing in accordance with law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$13,500, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on February 4, 2014

Member Langer dissenting.

I disagree with the majority's conclusion that claimant's injury arose out of her employment. Accordingly, I dissent.

Whether a fall is truly unexplained is a question of fact. A fall will be deemed "truly unexplained" only if the claimant "persuasively eliminate[s] all idiopathic factors of causation." *Blank v. U.S. Bank of Oregon*, 252 Or App 553, 557-58 (2012); *Phil A. Livesley Co. v. Russ*, 296 Or 25, 30 (1983); see also *McTaggart v. Time Warner Cable*, 170 Or App 491, 503 (2000), *rev den*, 331 Or 633 (2001). "[T]he purpose for eliminating idiopathic causes is not to disprove other possible explanations of how the injury occurred, but, rather, to determine whether the fall--whose precise causation is by definition unknowable--arose out of the employment." *Blank*, 252 Or App at 558. "Where it is 'equally possible' that 'idiopathic' factors or work-related factors caused the fall, the claim is not compensable." *Id.* (quoting *Russ*, 296 Or at 30).

The majority reasons that the "unexplained fall" analysis does not apply, because the immediate cause of claimant's fall is known--her "foot caught" or her "shoe gripped." And, because the employer required claimant to wear non-skid shoes, the majority reasons that the "gripping" mechanism was distinctly associated with claimant's employment and her injury arose out of it.

I disagree with the majority's attempt to separate the catching of claimant's foot from the fall itself as a means of avoiding the "unexplained fall" analysis. In *Mackay v. SAIF*, 60 Or App 536 (1982), *rev den*, 296 Or 120 (1983), for example, the claimant fell at work due to the buckling of her knee. Although the immediate cause of her fall was that her knee buckled, the court employed the "unexplained fall" analysis and the requirement that the claimant eliminate all idiopathic causes for the fall caused by the buckling knee. *Id.* at 539. The court concluded that, because the claimant failed to eliminate all idiopathic factors of causation for her fall and buckling knee, the fall was not compensable.

Here, when claimant reported her accident, she stated that her "shoes gripped and [she] fell." (Exs. 9, 9A). At hearing, she testified: "Well, my foot catches for some reason and I go." (Tr. 26). She agreed that her "foot caught or [her] shoe gripped or something happened that made [her] fall down." (*Id.*) No objects or hazards were found on the floor that could have caused claimant to fall. (Tr. 46, 64-65). On this record, I am unable to find why claimant's shoe gripped or her foot caught and why she fell.

I further disagree with the majority's finding that the evidence affirmatively establishes an employment-related cause of claimant's fall (skid-resistant shoes required by the employer).⁶ At best, the skid-resistant shoe is merely one possibility explaining the "shoe grip" and subsequent fall. Claimant, however, suffers from multiple idiopathic conditions that could have caused her foot to catch or her shoe to grip and, ultimately, a fall. Her fibromyalgia has caused her to limp and use a cane on occasions. (Tr. 38-40). She had used medication that caused her to experience dizziness. (Tr. 51; Ex. 12). She has other conditions that affect her balance, mobility and gait. (Tr. 53; Exs. 18C, 20). She has had frequent prior falls to which her medical conditions contributed. (Tr. 10-11; Ex. 22-23). Her medical providers deem her a "fall risk." (Exs. 12, 19B, 21A).⁷

Because claimant cannot conclusively establish an employment cause of her "shoe grip" and subsequent fall, and she did not persuasively eliminate all idiopathic factors of causation, her fall is not "unexplained." Moreover, to the extent it is equally possible that idiopathic factors or work-related factors caused the fall, the claim is not compensable. *Blank*, 252 Or App at 557-58; *Patricia C. Duff*, 57 Van Natta 3116, 3118 (2005) (because it was at least equally possible that the claimant's fall was due to idiopathic causes as that it was work-related, idiopathic causes had not been eliminated and the fall was not truly unexplained). For the same reason, the "mixed risk" doctrine does not apply. *See Theresa A. Graham*, 63 Van Natta 740, 744 (2011) (the doctrine applies only if both personal and employment risks contribute to the cause of a fall or accident; a workplace contribution must be more than "equally possible").

For the foregoing reasons, I would affirm the ALJ's order concluding that claimant's injuries did not arise out of her employment. Because the majority concludes otherwise, I respectfully dissent.

⁶ Claimant herself does not argue that the required type of shoes supplies the employment-risk element. Instead, she acknowledges that she was not able to identify a definite work risk, but she knew that something "gripped" her shoe.

⁷ I agree that the ultimate resolution of the fact why claimant fell rests with us as fact finders. Identifying medical conditions that could have contributed to her fall, however, properly rests with medical experts. Here, the medical opinion ascertaining possible idiopathic causes of shoe gripping and falling is relevant to determining whether claimant's fall is attributable to a personal risk. In contrast, we need not defer to Dr. Stone's "opinion" that claimant probably fell because of some traction issue between her shoe and the floor (Ex. 22-24, -25), because that is a question of fact only we are authorized to resolve.