RENDERED: OCTOBER 2, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000906-WC

ALLEN WHEELER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-08-00573

FUGATE TRUCKING, INC.;
UNINSURED EMPLOYERS FUND;
HON. RICHARD JOINER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HARRIS, SENIOR JUDGE: Allen Wheeler appeals from a decision of the Workers' Compensation Board, which affirmed the finding of the Administrative Law Judge that his injury was not work-related and was, therefore, not compensable. Wheeler argues that the Board committed such a flagrant error in assessing the evidence that a gross injustice resulted. Because the Board overlooked controlling precedent, we reverse and remand.

Wheeler was employed by Fugate Trucking, Inc., to haul cars from the Toyota plant. He would bid for haul runs every 2 ½ months. On January 8, 2007, Wheeler picked up his truck at the Fugates' residence and drove to the Ryder Systems office to receive the paperwork for the haul. He then drove to the Toyota plant and attached the truck to a trailer. While Wheeler was completing his safety inspection, he alleged that he tripped and fell. Wheeler stated that he was sure he had tripped, but could not determine what he tripped upon. Wheeler was unable to complete the haul run and returned the truck to the Fugates.

Wheeler first sought medical attention at the Georgetown Community Hospital on the night of the injury. He required stitches on his chin and was having dizzy spells. The hospital report indicated that Wheeler stated that he tripped on something and denied any loss of consciousness. He also saw his family physician, Dr. Frederick. Dr. Frederick ordered a CT scan and referred him to Dr. Mehari. On January 11, 2007, Dr. Mehari examined Allen. In describing

Allen's present illness, Dr. Mehari's report stated that Allen presented with a history of a blackout spell. On the work excuse form, Dr. Mehari recommended that Allen refrain from working for at least 90 days unless "another black-out occurs." On July 31, 2008, Dr. Anthony McEldowney of West Virginia performed an independent examination upon Allen. The report stated that Allen "sustained an injury to face and neck region following a black out and fall on January 8, 2007." On September 12, 2008, Dr. McEldowney attached an addendum to his report, which stated that Allen's fall was the result of a tripping incident and not a black-out.

Allen's claim was heard before the ALJ. The ALJ heard the testimony of Allen, Kimberly Fugate, and Jerry Fugate. The ALJ summarized the evidence of record in his opinion and order and noted several additional disputed issues. Ultimately as the threshold issue, the ALJ found that Allen had not met his burden of proving that he sustained an injury compensable under the Workers' Compensation Act. The ALJ did not make any other specific findings including whether an employment relationship actually existed at the time of the incident. The Board affirmed in an opinion entered on April 14, 2009. This petition for review followed.

Wheeler argues that the Board's assessment of the evidence was so flagrantly erroneous as to cause a gross injustice. Specifically, Wheeler argues that the conclusion that Allen suffered an idiopathic fall was not based upon any evidence in the record.

When reviewing a decision of the Board, we will only reverse the decision if 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*, 827 S.W.2d 685, 687-88 (Ky. 1992). Upon review of a decision unfavorable to the claimant, the test is whether the evidence compelled a result in the claimant's favor. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986).

Although the parties have not raised the issue, we find that the Board overlooked controlling precedent in this case. In Kentucky, there is "a presumption that an unexplained workplace fall arises out of the employment unless the employer presents substantial evidence to show otherwise." *Vacuum Depositing, Inc. v. Dever,* 285 S.W.3d 730, 733 (Ky. 2009) (citing *Workman v. Wesley Manor Methodist Home*, 462 S.W.2d 898, 900 (Ky. 1971)).

The ALJ denied Allen's claim on the basis that he did not meet his burden of proving that his injury was work-related. The Board affirmed on the basis of the deference owed to the ALJ as fact-finder. However, neither the decision of the Board nor the opinion of the ALJ provided any indication that the evidence was weighed and considered in light of the *Workman* presumption.

Therefore, we reverse the decision of the Workers' Compensation Board and remand with directions to remand this matter to the Administrative Law Judge to make additional findings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
UNINSURED EMPLOYERS FUND:

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