RENDERED: APRIL 29, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000053-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 M. JOINER,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: The only question raised in this appeal is whether certain language contained in an Administrative Law Judge's (ALJ) order is a dispositive finding of fact, or merely dicta.

By way of background, this appeal is based upon a workers' compensation claim filed by Allen Wheeler regarding his allegation that he had tripped, fallen, and injured himself during the course of his employment with Fugate Trucking, Inc. As part of its defense, Fugate argued that Wheeler's fall had resulted from a medical condition that caused Wheeler to occasionally black out and that Wheeler's fall was therefore non-compensable. The matter of Wheeler's claim was previously before a panel of this court in *Wheeler v. Fugate Trucking, Inc.*, 2009 WL 3150811 (Ky. App. 2009)(2009-CA-000906-WC) (unpublished). There, we reversed the ALJ's decision to dismiss Wheeler's claim and the decision of the Workers' Compensation Board (Board) affirming the ALJ's decision after finding that 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 presumption delineated in *Workman v. Wesley Manor Methodist Home*, 462 S.W.2d 898, 900 (Ky. 1971) (holding that an unexplained workplace fall is presumed to arise out of employment unless the employer presents substantial evidence to show otherwise).

On January 4, 2010, following our remand, the ALJ determined that Wheeler had not demonstrated that he had sustained a compensable injury within the meaning of Kentucky's Workers' Compensation Act, Kentucky Revised

Statutes (KRS) 342.0011, *et seq*. In his opinion and order, the ALJ noted evidence that put into question whether Wheeler had tripped and fallen or had suffered a non-compensable "idiopathic fall" resulting from Wheeler's noted history of experiencing blackouts. Ultimately, however, the ALJ dismissed Wheeler's claim on the basis that he found no credible evidence supporting that Wheeler's fall had occurred in the workplace.

Wheeler appealed to the Workers' Compensation Board and, on June 2, 2010, the Board vacated the ALJ's opinion and order. The Board held as a matter of law that Wheeler had fallen at his workplace or, stated differently, that Wheeler had fallen and injured himself while he was employed by Fugate, at the place of that employment. Furthermore, the Board instructed that "the ALJ's sole chore, on remand, is to determine whether that fall was either idiopathic or unexplained." To this effect, the Board cited to *Vacuum Depositing, Inc. v. Dever*, 285 S.W.3d 730, 733-4 (Ky. 2009), wherein the Supreme Court of Kentucky held:

> When the cause of a workplace fall is unexplained, the fall is presumed to be work-related under *Workman*. Unexplained falls divide ultimately into 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 Board then concluded its June 2, 2010 order by providing the following instructions:

> In the case *sub judice*, we do not have an allegation the fall was due to personal or idiopathic cause but is

> compensable under the positional risk doctrine. Therefore, the ALJ must determine whether this was simply an unexplained fall or an idiopathic fall, i.e. a fall which is, due to some particular condition or problem, personal to the worker.

No party appealed the Board's June 2, 2011 opinion and order. Subsequently, this matter was remanded, again, to the ALJ.

On July 30, 2010, the ALJ entered another order dismissing Wheeler's claim, styled as an "Opinion and Order on Second Remand." In relevant part, his order states:

> If I could conclude that the fall occurred when Mr. Wheeler was employed (even this is in dispute) and inspecting his truck or otherwise preparing to drive the truck, there would be no question but that the claim would be compensable. However, the inconsistency between the claimant's testimony and the histories obtained from him by two physicians keeps me from being able to conclude that the claimant is credible and that the injury occurred as he said. When I used the term "idiopathic" I meant it in the sense of unknown cause, including both time and place. The fall in this case may or may not have occurred in the course of employment and is not adequately explained by the credible evidence.

Wheeler moved for the ALJ to reconsider its July 30, 2010 order, arguing that the ALJ had misinterpreted and failed to resolve the Board's one directive on remand, which was for the ALJ to determine whether his fall was idiopathic or unexplained, or whether he tripped and fell as he had claimed. The ALJ overruled Wheeler's motion.

Thereafter, Wheeler again appealed to the Board. On December 16, 2010, the Board again vacated and remanded the ALJ's order. In doing so, the Board explained:

> As we previously instructed, on remand the ALJ is only to determine whether the fall at the workplace was idiopathic or unexplained.
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> . . . .
>
> [W]e believe the ALJ must do as he was previously instructed and determine the nature of the fall and provide the necessary findings of facts in support of his determination so that the parties are apprised of the basis of his decision. If the ALJ believes the fall was unexplained, the injury is compensable. If the ALJ believes the fall was idiopathic or due to some particular condition or problem personal to the worker, such as a problem with episodes of black-outs or syncope, then the injury is not compensable. Regardless of whether the ALJ believes his analysis in the "Opinion and Order on Second Remand" complies with the directive of the Court of Appeals, the fact remains this Board's opinion of June 2, 2010, is the law of the case, and the ALJ must comply with the directive of that opinion. The ALJ is not permitted to decide, as he did on remand, whether a fall occurred at work.
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> . . . .
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> The ALJ is required to presume a fall at work did indeed occur and determine whether that fall was either unexplained or idiopathic.

For the second time, Wheeler has appealed this matter to our Court. Wheeler takes no issue with the Board's decision to vacate the ALJ's decision; rather, his appeal involves the Board's instructions to the ALJ in its remand. Wheeler argues that the language of the ALJ's July 30, 2010 order entitles him to

an award of workers' compensation benefits as a matter of law and that the only issue the ALJ should resolve on remand is the extent and duration of Wheeler's award.

Wheeler bases his argument upon what he classifies as an "initial finding of fact" in the ALJ's July 30, 2010 order, i.e., where the ALJ stated "If I could conclude that the fall occurred when Mr. Wheeler was employed (even this is in dispute) and inspecting his truck or otherwise preparing to drive the truck, there would be no question but that the claim would be compensable." Wheeler reasons that because the Board had already determined that he was employed by Fugate and acting in the course of his employment when his fall occurred and because the ALJ stated that Wheeler's fall would be compensable in that event, the ALJ therefore, unwittingly, found in his favor when the ALJ dismissed his claim.

When Wheeler posed this argument before the Board, the Uninsured Employers' Fund (UEF) argued that the substance of the ALJ's order that Wheeler's argument seized upon was merely *dicta*.[1] The Board agreed with the Appellees, and we agree with the Board.

Generally speaking, a court or administrative tribunal settles a question of law by entering a final decision on that question rather than merely commenting on it. *H.R. ex rel. Taylor v. Revlett*, 998 S.W.2d 778, 780 (Ky. App. 1999). Where a court, or in this instance an ALJ, merely comments on a question

[1] As noted in the caption of this opinion, both Fugate Trucking, Inc., and the UEF are designated as appellees in this matter. However, only the UEF filed an appellate brief before the Board and this Court.

of law in a case, but resolves the case on unrelated grounds, those comments are considered "dicta." *See, e.g., id.* ("We now determine that the portion of the 1996 opinion discussing the evidence concerning neglect and abandonment is dicta. We reach this decision because the former appeal turned on a procedural inadequacy which deprived this Court of jurisdiction."). And, "[d]icta in an opinion is not authoritative or binding on a reviewing court." *Board of Claims of Kentucky v. Banks*, 31 S.W.3d 436, 439 n. 3 (Ky. App. 2000) (citing *Stone v. City of Providence*, 236 Ky. 775, 778, 34 S.W.2d 244, 245 (1930); *Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952)).

In the case at bar, the ALJ's statement, referenced above, merely commented upon the one issue he was directed to resolve. The ALJ's resolution of this matter instead rested upon unrelated grounds of the ALJ's own making, namely, his unauthorized finding that Wheeler had failed to prove that his fall had occurred in the workplace. Consequently, the ALJ's statement was dicta, not a finding or decision, and the Board's instructions to the ALJ on remand were not improper.

The Board's December 12, 2010 opinion and order is hereby AFFIRMED.

CAPERTON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN RESULT.

Louisville, Kentucky BRIEF FOR APPELLEE,

UNINSURED EMPLOYERS' FUND:

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