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MICHAEL KOENIG, Employee/Appellant, v. NORTH SHORE LANDING and MINN. ASSIGNED RISK PLAN (ADMINISTERED BY WAUSAU), Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 27, 1996

No. *[redacted to remove SSN]*

HEADNOTES

CAUSATION - ARISING OUT OF - IDIOPATHIC FALLS. Where the employee fell, as the result of a seizure or some unknown nonwork-related cause, injuries sustained as the result of simply striking a flat level floor, albeit a hard tile surface, do not arise out of the employment. The hard flat floor is not a hazard of employment such that injuries caused by striking it are compensable.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Hefte, J.
Compensation Judge: Donald C. Erickson.

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's finding that the injuries he sustained on November 30, 1993, did not arise out of the employee's work activities. As there is substantial evidence in the record to support the compensation judge's factual determination, we affirm.

BACKGROUND

On November 30, 1993, the employee, Michael Koenig, worked for North Shore Landing, the employer, as a part-time janitor and backup cook. His weekly wage was $90.00. The employee was 38 years old at the time of the injury. The employee reported for work on November 30, 1993, between 8:00 and 10:00 a.m. Sometime during his shift, which was scheduled to end at approximately noon, the employee was asked if he could stay on to do some cooking, as the regular cook could not make it in to work. He testified that he was the only one working in the kitchen that day. He stated that he did not have any problems during the work day and felt fine, without any dizziness. (T. 25-31.) He testified that he had not had any alcohol to drink during the November 30th work day. He stated that he "had drank the night before" the day of the accident. He did not recall the exact amount he had consumed. (T. 30).

The employee testified that at approximately 7:00 p.m. he "had brought a tray of glasses or dishes into the kitchen area" en route to the dishwasher. He testified that "I went from behind the bar into the kitchen area. I remember hitting the back of my head and that's it, until the ambulance got there." (T.33). The employee stated that the area where he fell was flat and was covered with slate tiles. (T. 34, see also T.70). On direct examination he testified as follows:

> Q So do you remember anything other than hitting the back of your head?
>
> A The ambulance getting there.
>
> Q Anything else before you hit your head?
>
> A No.
>
> Q Do you recall hitting any other part of your head?
>
> A No, just the back of it.

(T. 35). On cross examination the employee testified he "assumed" he slipped but he only recalled striking his head. He didn't recall whether the floor was wet or dry. (T. 52). On questioning from the court the employee testified, "I remember walking through the doorway into the kitchen and no, I don't recall if I set the tray down and then fell or not. I am not sure about that. But the thing I remember after going through the doors is a thump on the back of my head and then the ambulance coming." (T. 62). The employee was found unconscious on the floor of the kitchen area in the North Shore Landing Restaurant at approximately 7:00 p.m. The employee's coworker, Ms. Radtke, testified that when the employee was found he was on the floor in front of the grill, and not near the doorway to the bar. He was taken by ambulance to the Lakeview Hospital in Two Harbors and later, at about midnight, was transferred to St. Luke's Hospital in Duluth.

He stayed in St. Luke's Hospital from December 1, 1993 until his discharge on December 9, 1993. During his hospitalization he was seen by a number of physicians, including Dr. Robert Donley, a neurosurgeon, Dr. David Mast, an internist, Dr. Clyde Olson, a psychiatrist, Dr. Thomas Silvestrini, a rehabilitation and physical medicine specialist, and Dr. Thomas Kunze, in the emergency room. Sometime following his discharge, he returned to the Landing Restaurant, where he worked for approximately one month before he was terminated. (T. 40.)

Prior to the incident at the employer, the employee had a long history of alcohol abuse. He indicated that he regularly drank 12 cans of beer per day. The medical records indicate that he reported consuming a minimum of 12 cans per days and a maximum of 24 cans of beer per day. (CD counselor notes, St. Luke's Hospital records, Ex. E1, 12/8/93.) Apparently

the employee was treated in four chemical dependency treatment programs, all of which were unsuccessful. The employee had a history of seizures predating his injury, the last of which occurred on July 10, 1991. At that time he was seen at the Two Harbors Community Health Center and at Lakeview Hospital with a history of having fallen at work as a result of a seizure. He was noted to have been shaking vigorously. The history given at that time indicated that the employee also had a seizure approximately one year earlier. (Employer's Ex. 4; Employer's Ex. 1.) In addition to seizures experienced prior to the incident, the employee also experienced a grand mal seizure in April of 1994. Apparently he struck his head against a table, causing a cut which required suturing at the local hospital. Sometime later in the day, he experienced the seizure.

The employer and insurer refused to pay for the medical care and treatment provided to the employee shortly after the November 30, 1993 incident. As a result, on March 16, 1994, a claim petition was filed seeking payment for medical expenses. The total amount sought was $15,181.10, consisting primarily of a hospitalization bill of $10,753.59 from St. Luke's Hospital for the period from December 1 through December 9, 1993. In its April 15, 1994 answer, the employer and insurer denied that the employee's injuries arose out of his employment responsibilities. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on April 19, 1995. In his Findings and Order, served and filed June 5, 1995, the compensation judge found that the employee had failed to establish that his work activity in any way contributed to his injuries and denied payment for the medical expenses incurred. The employee appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

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DECISION

The employee's appeal is based on two principle arguments: (1) if the compensation judge is deemed to have concluded that the employee's fall was caused by a seizure resulting from withdrawal from the use of alcohol that such finding is not supported by substantial evidence in the record and is clearly erroneous, and (2) if the compensation judge's determination is that the employee's fall was idiopathic, or from an unknown cause, then liability should flow because the work environment was so hazardous as to aggravate the injuries resulting from the fall. We will treat each theory separately.

With respect to the matter of causation, the compensation judge determined that the employee had failed to establish that his theory of how the accident occurred was credible. At the hearing, the employee claimed that he "assumed he slipped" while walking. His counsel argued that the floor may have been wet noting that on December 7, 1993, the employee advised Dr. Silvestrini that he had slipped on a wet floor. The compensation judge found this theory of how the fall occurred to be not credible "as no glasses or dishes were found in the area" and there was no evidence corroborating the employee's theory that the floor was wet. (Finding 10.) The employee's coworker, Ms. Radtke, testified that the floor was not wet in the area where the employee was found. We interpret this finding to hold that the employee had failed to meet his burden of persuasion that his fall was caused by his work activities and conditions at the work place. The compensation judge did comment that, "The most likely cause of the employee's fall was that it was due to a seizure caused by the employee's long term alcohol abuse." (Finding 11.) This finding, however, does not indicate that the compensation judge's denial of liability was based on an absolute conclusion that the cause of the employee's fall was a seizure, but only that in light of the employee's inability to explain the fall that it was the most likely cause of his fall.

There is substantial evidence in the record to support the compensation judge's finding that the most likely cause of the employee's fall was a seizure or the effects of alcohol withdrawal. Several doctors who examined the employee during his hospitalization at St. Luke's Hospital in Duluth indicated that the most likely cause of the employee's fall was a seizure related to withdrawal from the use of alcohol. Dr. Donley and Dr. Kunze indicated that the employee's fall was likely caused by a seizure related to alcohol withdrawal. These physicians, together with Dr. Olson and Dr. Mast, noted the employee's long history of alcohol abuse and reached the conclusion that the employee's suffered from chronic alcoholism and alcohol withdrawal. The results of lab tests indicated that at 2 a.m. on December 1, 1993, shortly after admission at St. Luke's Hospital that the employee had some alcohol in his system, although it was not in excess of the "legal" limit. The employee exhibited delirium tremens during examination on admission and was given medication to ease these symptoms. During his admission, a chemical dependency counselor interviewed the employee. This counselor's notes stated that the employee indicated that although he had been in four alcoholism treatment programs he was still drinking on a daily basis. The employee gave a history of drinking between a minimum of 12 and a maximum of 24 beers per day. The hospital records indicate that the employee stated that he had not consumed

any alcohol on the day of the injury, but had consumed it on the day prior to the injury. The employee's coworker, Ms. Radtke, testified that at 4 p.m. on November 30th, she noticed that the employee was shaking while he was working. (T. 71, 84). Based on this information and the opinions of the physicians, the compensation judge would not have been unreasonable in concluding that the employee had consumed a large quantity of alcohol prior to coming to work, that while at work and not consuming any alcohol, the alcohol was being absorbed into his system, thus leading to symptoms of withdrawal. Withdrawal then caused the seizure, which caused the employee to fall, striking his head on the floor.

The employee contends that the doctors' opinions undoubtedly relied upon by the compensation judge lacked adequate foundation in that they were based on histories taken early in the employee's admission at St. Luke's. The employee contends that the only doctor whose opinion was adequately founded was that of Dr. Silvestrini, who interviewed the employee on December 7, 1993, during a rehabilitation consultation. The employee contends that his earlier sessions with physicians were tainted because he had not yet adequately recovered from the head injury to give a clear history of the events of the fall. The employee contends that Dr. Silvestrini states that the diagnosis of alcohol withdrawal-related seizure is speculative. In addition, the employee notes that the history taken by Dr. Silvestrini indicates that the employee stated that he slipped on a wet floor.

We note that Dr. Donley, the neurosurgeon, saw the employee while he was in St. Luke's Hospital on December 1, 2, 5, 7, 8 and 9. Dr. Olson, a psychiatrist, saw the employee on at least December 7 and 8. Dr. Mast, the internist, saw the employee on December 1, 2, 3 and 6. Psychometric testing was performed by Dr. Krossner, clinical psychologist, on December 7, 1993. All of these doctors saw the employee at a time contemporaneous with the consultation made by Dr. Silvestrini and had the same foundation as did Dr. Silvestrini. We also note that Dr. Silvestrini's notes indicate that he found a discrepancy between the employee's recitation of the events and the histories taken at Lakeview Hospital in Two Harbors and St. Luke's Hospital in Duluth. Those admission records indicate that the employee had a very difficult time remembering even his name and could not relate how he had been injured. Dr. Silvestrini merely mentions that "from the chart it is speculated that he seized and subsequently fell." Dr. Silvestrini does not opine that the chart references to the cause are incorrect and gives no opinion regarding the cause of the employee's fall. (Ex.. B1).

Based on these factual conflicts and the opinions of these treating physicians, it was not unreasonable for the compensation judge to make the conclusion that the employee's fall "most likely" was caused by a seizure caused by withdrawal from long term alcohol abuse. As a result, the compensation judge's findings in this regard are affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

The employee argues that even in cases where the employee has failed to show that his work activities contributed to a fall, where there is an internal cause for a fall, such as a seizure, or where there is no known cause for an employee's falling at work, that the employee would be

entitled to compensation where the work environment aggravated the injuries resulting from the fall. The employee cites several decision of this court and the Minnesota Supreme Court for the proposition that a fall caused by an idiopathic condition may be compensable where the employment environment increases the risks of injury from a fall. He indicates that the hazard need not be unique to the work environment but only that it increases the risk that an injury would occur if an employee fell for some unknown reason or as the result of a reason unrelated to work. O'Rourke v. North Star Chemicals, Inc., 281 N.W.2d 192, 31 W.C.D. 672 (Minn. 1979); Nelson v. City of St. Paul, 81 N.W.2d 272, 19 W.C.D. 120 (Minn. 1957); Stenberg v. Raymond Coop. Creamery, 296 N.W. 498, 11 W.C.D. 415 (Minn. 1941); Miller v. Goodhue/Rice/Wabasha Citizens Action Council, 196 N.W.2d 424, 26 W.C.D. 187 (Minn. 1972). He argues that the hazardous condition in this case was the extremely hard slate tile floor in the kitchen where he fell. The employee argues that had he not been working in the kitchen when he fell, he would not have hit his head on the hard tile floor. He contends that this type of floor increased the risk of serious injury over that likely to have occurred if he had fallen in some other parts of the establishment where the floors were covered with carpeting or wood. (Employee's brief at 8.)

The employee made a similar argument to the compensation judge at trial. The compensation judge rejected that argument, indicating that Minnesota had adopted the position that idiopathic falls or falls not caused by work activities are not generally compensable. He cited the supreme court in O'Rourke and Professor Larson in his treatise on workers' compensation, section 12.11, which states:

> When an employee, solely because of nonoccupational heart attack, epileptic fit, or fainting spells, falls and sustains a skull fracture or other injury, the question arises whether the skull fracture, as distinguished from the internal effects of the heart attack or disease, which of course are not compensable, is an injury arising out of the employment.
>
> The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as height, near machinery or sharp corners, or in a moving vehicle. The current controversial question is whether the effects of an idiopathic fall on the level ground or bare floor should be deemed to have arisen out of the employment.

> . . . a distinct majority of jurisdictions ... have denied compensation in level fall cases. The reason is that the basic cause of harm is personal and that the employment does not significantly add to the risk. A significant minority, however, make awards for idiopathic level-floor falls.

We have reviewed the decisions cited by the employee and conclude that they do not resolve the question of whether injuries resulting from striking a flat hard surface after an idiopathic fall are compensable. The Stenberg case involved a situation where the employee collapsed and struck his head on a desk and then on the floor. There was no discussion concerning the hardness of the floor surface. In Miller, the employee, a person suffering from epilepsy and other physical disabilities, fell when his left leg "locked" while ascending stairs. In O'Rourke,[1] the employee fell as the result of a cerebral hemorrhage into a hopper car full of bauxite. The court found that his death was caused by inhalation of bauxite. The Nelson decision did not deal with idiopathic falls. From these cases we cannot conclude what Minnesota has adopted what Professor Larson describes as the minority position.

We choose to adopt the majority position outlined by Larson. We do not believe that injuries sustained by striking flat surfaces after idiopathic falls are injuries which arise out of employment. A flat floor, regardless of its softness or hardness, is the ordinary standard for workplaces and does not pose a unique or unusual hazard. We think it unwise to distinguish between types of flat level floors since such an exercise would require the establishment of a standard of acceptable hardness which would be impractical in application. The only alternative would be to adopt the minority position that all injuries sustained after idiopathic falls are compensable. We do not believe that rule to be equitable, especially in cases like the one at hand.

As a result, we affirm the compensation judge's determination that the employee's work environment did not "aggravate" the employee's injury.

SEPARATE CONCURRING OPINION

DEBRA A. WILSON, Judge

I concur with the result reached by the majority in this case. I cannot, however, agree with the majority's analysis.

Relying on Professor Larson's treatise, the majority concludes that "injuries sustained by striking flat surfaces after idiopathic falls" are not compensable in Minnesota. I concede that the law on idiopathic falls is not entirely clear, and I also agree that the cases cited by the employee do not necessarily resolve the issue presented by the matter now before us.

[1] We note that the supreme court cites section 12.10 of Larson's treatise as support for its analysis in that decision.

However, the Minnesota Supreme Court's analysis in Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 9 N.W.2d 6, 12 W.C.D. 531 (1943), at the very least strongly suggests that injuries caused by idiopathic level-floor falls are in fact compensable under the Minnesota Workers' Compensation Act, as long as the employee was performing work activities at the time of the fall.[2] Because the rule adopted by the majority in the present case apparently conflicts with the supreme court's reasoning in Barlau, I am unable to concur with the majority's rationale for affirming the compensation judge.

As the majority, quoting Professor Larson, points out, "[t]he basic rule . . . is that the effects of [an idiopathic fall] are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on height, near machinery or sharp corners, or in a moving vehicle." 1 A. Larson, The Law of Workmen's Compensation, § 12.11. In my opinion, this general rule should be used to determine compensability without regard to whether the employee's fall happened to occur on a level surface. Because, in the present case, the employee did not establish that his work activities or environment increased the risks of the fall or aggravated his injuries,[3] the employee did not establish that those injuries arose out of his employment. On this basis, I agree that the compensation judge's decision denying benefits should be affirmed.

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[2] In Barlau, the employee's fall was evidently caused by an epileptic seizure. Citing numerous cases from other jurisdictions, the supreme court held that "an accidental injury or death of an employee, while doing his work, caused by falling because of an epileptic seizure, arises out of the employment." Barlau, 214 Minn. at 579, 9 N.W.2d at 13, 12 W.C.D. at 543-44. There was no indication that Barlau involved anything other than a level-floor fall, and Professor Larson notes that Barlau is "frequently cited as a leading case supporting the extreme [minority] view" that idiopathic level-floor falls arise out of and in the course of the employment. 1 A. Larson, The Law of Workmen's Compensation, § 12.14(a) n.25. While noting also that Barlau's value as precedent is weakened by its facts, Professor Larson concludes that the case "quite unmistakably approves the doctrine" that injuries caused by such falls are compensable. Id. Although Barlau was decided under the former rule of liberal construction, such case law remains valid unless expressly overruled by the supreme court or altered by the legislature. See Foley v. Honeywell, Inc., 488 N.W.2d 268, 271-72 n.2 (Minn. 1992).

[3] The employee contends that the hard tile floor on which he struck his head aggravated the effects of the fall. There is, however, no real evidence to this effect.