

NOTICE: This order was filed pursuant to Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances permitted under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Workers' Compensation Commission Division

GENE MAY, INC.,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 09—MR—325
)	
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION and JASON CONLEY)	Honorable
)	Bonnie M. Wheaton,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman, Holdridge, and Stewart concurred in the judgment.

ORDER

Held: The decision of the Workers' Compensation Commission that the claimant's accident occurred in the course of his employment was contrary to the manifest weight of the evidence.

Claimant, Jason Conley, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2000)). In it, he alleged that he sustained injuries to his whole body in a vehicle accident which occurred in the course of his

employment with respondent, Gene May, Inc. In its primary argument, respondent contends that the Commission's decision that claimant sustained an accident arising out of and in the course of his employment is contrary to the manifest weight of the evidence. Respondent raises a number of additional arguments that are contingent upon its success on its primary argument. Respondent also argues that the Commission's award of permanent partial disability (PPD) (820 ILCS 305/8(d)(2) (West 2000)) is excessive; however, given our disposition of the first issue, this argument is moot. For the reasons that follow, we reverse.

I. BACKGROUND

Claimant was injured in a motor vehicle accident. He has no recollection of the accident, or the events that occurred that day or the day before. In fact, claimant testified that he had no memory of anything between June 17, 2001, and June 21, 2001. On June 21, he recalls waking up at Edwards Hospital and his mother telling him he had been in an accident. On the day of the accident, claimant had been working on a job site at Scheffer Road and Ohio Street in Aurora. Prior to the accident, his supervisor had sent him to pick up a furnace unit at the Conner Company on Lake Street in Aurora. Claimant testified he did not recall any of these events. Claimant was 22 years' old at the time of the accident and had been working for respondent for about one year. As a result of the accident, claimant underwent two surgeries to his right foot. Claimant testified that his foot is "sore every day, [and] it's deformed." He continued: "I can't play sports of any type, go up and down ladders. Walking hurts. Standing for a period of time hurts. Beginning to be arthritic."

Claimant also testified that he was employed by respondent on the date of the accident as an installation and service technician of HVAC (heating, ventilation, and air conditioning) products. He made \$12 per hour and was employed full time. Claimant was in a union apprentice in a program

that would have allowed him to become a licensed HVAC technician. On a typical day, he would go to the company's shop in Sugar Grove and wait for a fax or telephone call instructing him about the day's job. Some days, no job would come in. When a job came in, claimant would drive a company truck to the job site. He would usually follow a supervisor. When they got to the job site, the supervisor would direct claimant as to what he was required to do. Claimant would sometimes be directed to pick up various items needed for the job--such as air conditioners and heating units or parts for such systems--at various wholesalers and retailers around Aurora. Most of the jobs were in Aurora, but some were in nearby cities. Claimant lived in Plano at the time, where he had grown up. He had not spent much time in Aurora prior to the time he worked for respondent.

Employees were given a lunch period. Sometimes claimant would bring his lunch, sometimes he would eat at a co-workers house, and sometimes he would "go out somewhere and get something to eat." Lunch was at noon, but claimant could not remember if it lasted for an hour or a half hour. If he did not bring lunch, he would use the company truck to go to a fast food restaurant in the area of the job he was working.

During cross-examination, claimant testified that about 20% of his job with respondent consisted of "going back and forth to pick up parts." Claimant agreed that he had been to the Conner Company several times per week to pick up supplies while in respondent's employ. Claimant testified that respondent did not permit employees to use company vehicles for personal business. He never took a company vehicle home overnight. Employees were, however, permitted to use company vehicles to "get our lunch and things like that." Claimant is currently employed, working 50 hours per week. He is no longer a member of a union. He is able to mow the lawn at his home, but he does not shovel snow.

Respondent called Todd May (as Mr. May shares a surname with another witness, we will refer to him by his first name). He testified that he is the son of Gene May, the owner of the company for which claimant worked. Todd was one of respondent's foremen. On the date of the accident, Todd was the foreman on the job on which claimant was working. They were installing an air conditioner at 839 North Ohio Street in Aurora. Todd testified that one of claimant's daily duties was to use the company pick-up truck to get supplies and equipment. At about 11 a.m. on June 19, 2001, Todd instructed claimant to go to Conner Company to pick up a condenser for the Ohio-Street job. Claimant may have left as late as 11:15. He had sent claimant to Conner Company "[f]ive times probably a week [sic] or daily." Conner Company was four or five miles from the job site, and, May opined, the trip should take 10 to 15 minutes. Claimant had never gotten lost on a trip to Conner Company before. He would have expected claimant to be back in about 45 minutes. Claimant called Todd and asked if he needed anything else. Todd said no and told claimant "he was to return to the job and drop off the equipment." Claimant never returned. After about an hour, Todd tried to call claimant. He paged claimant and also called his cell phone. Todd got no response. He later learned that claimant had been involved in a traffic accident. The accident scene was not on the route between the job site and Conner Company. When asked whether he did "direct, order, authorize, permit or allow [claimant] to deviate from the direct route from Conner Company to the job site," May answered, "No." Claimant was not allowed to take side trips while picking up supplies.

Todd testified that company vehicles were not to be used for personal business. He never knew claimant to have used a company vehicle in such a manner. Employees were allowed to use the vehicles to get lunch, but they would have to tell someone that they were going to lunch. Lunch

break was half an hour. Further, Todd added, “[I]t would be within a, you know, like in that area where there were restaurants within a quarter of a mile.” He later stated, however, that the restaurant had to be “in the general area, not a separate town or, you know, several miles away.” Todd did not recall claimant either asking permission or otherwise informing him that he intended to get lunch on the day of the accident. Claimant would use a vehicle “daily if [he] didn’t bring [his] lunch.” Todd testified that there were no fast food restaurants in the vicinity of where the accident occurred.

During cross-examination, Todd testified that there were “quite a few” fast food restaurants along Route 59 between Routes 88 and 34 (though he questioned whether they existed at the time of the accident, their suitability for a quick lunch, and their distance from the job site). He further testified that if claimant had been returning from Conner Company and felt ill, he could stop and use a bathroom or to get a drink, “if it was enroute [sic], within reason.” Todd did not furnish claimant with a map to the job on Ohio Street. The truck claimant was driving was towed by the North Aurora police department. When Todd saw it after the accident, the air conditioning unit was in it.

Respondent next called Beverly May (we will also refer to Ms. May by her first name to avoid confusion), respondent's president. At the time of the accident, she was one of the company’s officers. It was company policy that employees could not use company vehicles for personal business. To her knowledge, claimant had never used a company vehicle for a personal matter prior to the accident. Employees could use company vehicles to go to lunch. Lunch break was half an hour.

On cross-examination, Beverly acknowledged that, beyond visiting claimant in the hospital, she had no personal knowledge regarding the events surrounding the accident. She had never previously disciplined claimant for improper usage of a company vehicle. When they got the truck

back, she did not find any liquor bottles or drug paraphernalia. Further, there were no “letters, documentation, receipts or anything else that suggested [claimant] misused that truck in any way.” Beverly testified that, had the truck been low on gasoline, claimant would have been expected to stop and get fuel. She agreed that there were gas stations located on Route 59 and that the accident occurred about a mile from Route 59 (during redirect she stated that there were gas stations much closer than Route 59). Beverly testified that claimant was a good worker and that they would have kept him as an employee if it was not for the accident. No other employee ever told Beverly that claimant was doing something other than what he was supposed to be doing when the accident occurred. She added that she had heard from claimant’s sister-in-law that claimant's fiancée’s father had passed away that morning, but no one ever told her that claimant was on his way to a wake or anything else connected to the death. No other witness were called. We will set forth any additional evidence as it is relevant to the issues raised by the parties.

The arbitrator noted that motor vehicle accidents generally fall under the Act unless there is some deviation from employment involved. She then found:

“Whether [claimant] at that moment was getting lunch, had completed eating lunch, had purchased gasoline, or was simply lost does not reflect a detour or deviation sufficient to deny compensation. In this instance, [claimant] was permitted to use respondent’s vehicle to obtain lunch. The map introduced into evidence [citation] showing the locations involved does not seem to reflect a substantial deviation or detour where a reasonable person could conclude that [claimant] was acting outside of the scope of his employment by respondent.”

The arbitrator then found that claimant “at the time of the accident was performing a task or duty on behalf of respondent as he was employed to do.” In turn, she found claimant suffered an accident in the course of and arising out of his employment.

The Commission adopted the decision of the arbitrator in most respects, but modified it in two ways. First, it changed the arbitrator’s findings with respect to average weekly wage. Second, it noted what it deemed an erroneous finding of fact. Namely, the arbitrator found a police report indicated that claimant was lost and in a hurry to return to the job site. After reviewing the police reports in the record, the Commission found no such statement. The Commission then found that, while the accident did not occur on the direct route between Conner Company and the job site, “the evidence as a whole supports the Arbitrator's conclusion that [claimant’s] deviation from that route was not so substantial as to remove him from the scope of his employment.” Citing *Potenzo v. Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 118 (2007), the Commission also employed an alternate analysis, finding claimant to be a traveling employee. A traveling employee is afforded heightened protection under the Act because the employee is exposed to the risks of the street to an extent greater than the general public. See *Potenzo*, 378 Ill. App. 3d at 118. The Commission rejected respondent’s contention that claimant was engaged in actions immediately prior to the accident that were neither reasonable nor foreseeable that removed him from the scope of employment. These acts consisted of speeding inside a construction zone. The Commission acknowledged that witness reports indicate that claimant was going anywhere from 55 miles per hour to well over 70 miles per hour. These reports further indicate that the accident occurred just as claimant entered the construction zone after a dump truck had pulled out in front of him and that a large cement mixer obstructed claimant’s view of the dump truck. The Commission then found that

the confluence of these “unusual driving conditions” contributed to the accident. It acknowledged that, had claimant been going more slowly, he might have been able to avoid the accident. However, citing *Stembridge Builders, Inc. v. Industrial Comm’n*, 263 Ill. App. 3d 878, 883 (1994), the Commission held that excessive speed alone is no impediment to recovery under the Act. It then noted Beverly’s testimony that claimant was a good worker and that she found nothing in the truck to indicate that claimant was using drugs or drinking. Accordingly, it found that claimant’s conduct did not take him out of the scope of his employment. One commissioner dissented, finding that claimant’s deviation from the route between Conner Company and the job site was such that it removed him from the scope of employment and that trying to explain claimant’s presence at the site of the accident was mere speculation. The circuit court of Du Page County confirmed the Commission’s decision, and respondent then filed this appeal.

II. ANALYSIS

On appeal, respondent first contends that the Commission’s finding that claimant suffered an accident arising out of and in the course of his employment is contrary to the manifest weight of the evidence. This issue is factual in nature. *Hosteny v. Workers’ Compensation Comm’n*, 397 Ill. App. 3d 665, 674 (2009). We will only overturn a decision of the Commission on a factual matter if it is contrary to the manifest weight of the evidence. *Parro v. Industrial Comm’n*, 260 Ill. App. 3d 551, 554 (1993). A decision is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Copperweld Tubing Products, Co. v. Workers’ Compensation Comm’n*, 402 Ill. App. 3d 630, 633 (2010). That we might come to a different result if we considered the case in the first instance is immaterial. *Pietrzak v. Industrial Comm’n*, 329 Ill. App. 3d 828, 833 (2002). Resolving conflicts in the evidence, weighing evidence, and assessing the

credibility of witnesses are primarily matters for the Commission. *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 887 (2007). Before the Commission, the burden was on claimant to establish all elements of his claim (*Horath v. Industrial Comm'n*, 96 Ill. 2d 349, 356 (1983)); however, on appeal, the burden is on the appellant--respondent in this case--to affirmatively demonstrate error from the record (*Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, 396 Ill. App. 3d 597, 606 (2009)).

An injury is compensable under the Act if it arises out of and occurs in the course of employment. *Potenzo*, 378 Ill. App. 3d at 116. For an injury to arise out of employment, it must be related to some risk connected with or incidental to the employment. *Potenzo*, 378 Ill. App. 3d at 116. It has been explained that “[t]he ‘in the course of’ element refers to the time, place and circumstances under which the accident occurred.” *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572, 575 (1999). An injury occurs in the course of employment if “it occurs within the period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or is engaged in something incidental thereto.” *J.S. Masonry, Inc. v. Industrial Comm'n*, 369 Ill. App. 3d 591, 596 (2006).

A personal deviation by an employee can remove him or her from the scope of employment, thereby breaking the causal chain. *Aaron v. Industrial Comm'n*, 59 Ill. 2d 267, 270 (1974). When a deviation from employment is at issue, the burden is on the claimant to prove that it was reasonable. *U.S. Industries, Production Machine Division v. Industrial Comm'n*, 40 Ill. App. 3d 469, 473 (1968). The employee's burden is a simple preponderance of the evidence. *McKernin Exhibits, Inc. v. Industrial Comm'n*, 361 Ill. App. 3d 666, 670 (2005). Here, we hold that respondent

has fulfilled its burden on appeal (*Lenny Szarek, Inc.*, 396 Ill. App. 3d at 606) of showing that claimant failed to carry that burden before the Commission.

In this case, the Commission's decision is a sufficient departure from the evidence in the record such that an opposite conclusion to the one it drew is clearly apparent. Its conclusion that claimant had not deviated from the scope of his employment rests upon mere speculation. It is clear from the record that, as discussed at oral argument, the accident occurred several miles from the job site while claimant was traveling in a direction away from the job site. While the evidence shows that there were permissible purposes that might have brought claimant to the site of the accident, claimant has produced no persuasive evidence to establish that he was engaged in some permissible activity at the time and place of the accident. It is true that there was testimony that there were restaurants in the general direction claimant was heading and it was lunch time. However, we note Todd's testimony that an employee was limited in the area that he could go to lunch to within a quarter mile of the job site. He later testified that anything in the general area would be acceptable as long as the restaurant was not in the next town or several miles away. There were no restaurants within such a range in the direction claimant was heading. Further, Todd testified that he had directed claimant to return to the job site from the Conner Company. As for the possibility that claimant was looking for gasoline, we note Beverly's testimony that there were gas stations that were closer and thus find it extremely unlikely that claimant was traveling such a distance to get gas. It has also been suggested that claimant was simply lost. However, there was evidence that claimant had been driving in the area for about one year and that he had routinely made trips to various suppliers, including Conner Company. As such, the notion that claimant was lost is unpersuasive. An award cannot be based on speculation or conjecture. *Palos Electric Co. v. Industrial Comm'n*,

314 Ill. App. 3d 920, 926 (2000). The Commission disregarded this principle here. Quite simply, though there were permissible things that claimant might have been doing at the time of the accident, there was no evidence adduced to establish that claimant was in fact engaged in any of them. As such, the Commission's decision that claimant had not departed from the scope of his employment is unsupported by the record and amounts to mere speculation.

We acknowledge that Beverly testified that she never knew claimant to use a company vehicle for personal business and that she had never previously disciplined claimant for improper usage of a company vehicle. She further testified that claimant was a good worker and that they would have kept him as an employee if it was not for the accident. Moreover, when the truck was returned to respondent, they found nothing to indicate claimant had misused it. While this all may be true, it does not mean that claimant was engaged in some permissible activity when he was involved in the accident miles from the job site. Even if he had never engaged in a frolic of this nature before, that would not have precluded him from engaging in one for the first time when he was involved in the accident. As noted above, if a deviation from employment is at issue, the burden is on the claimant to prove that it was reasonable. *U.S. Industries, Production Machine Division v. Industrial Comm'n*, 40 Ill. App. 3d 469, 473 (1968). The lack of evidence on that issue leaves that burden unfulfilled. As the Commission's decision is contrary to the manifest weight of the evidence, we are compelled to reverse it.

Given our resolution of the first question, we need not address the Commission's alternate finding that claimant was a traveling employee. As claimant had left the scope of his employment, his status as a traveling employee, which involves the arising-out-of element of the analysis (see *Potenzo*, 378 Ill. App. 3d 118-19), is beside the point.

III. CONCLUSION

We hold the Commission's decision that the claimant's accident occurred in the course of his employment is contrary to the manifest weight of the evidence. Accordingly, the judgment of the circuit court of Du Page County confirming the decision of the Commission is reversed.

Reversed.