

NOTICE
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Workers' Compensation
Commission Division
FILED: January 24, 2011

No. 1-09-3291WC

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

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

VERICA ZIVKOVIC,)
) APPEAL FROM THE
) CIRCUIT COURT OF
 Appellant,) COOK COUNTY
)
 v.) No. 08 L 50598
)
 ILLINOIS WORKERS' COMPENSATION)
 COMMISSION, et al.,)
 (WAL-MART STORES, INC.,) HONORABLE
) ELMER TOLMARIE III,
 Appellee.)) JUDGE PRESIDING.

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

O R D E R

HELD: The decision of the Illinois Workers' Compensation Commission denying the claimant benefits under the Workers' Compensation Act by reason of her failure to prove that her injuries arose out of her employment is not against the manifest weight of the evidence.

The claimant, Verica Zivkovic, appeals from an order of the circuit court, confirming a decision of the Illinois Workers' Compensation Commission (Commission) which denied her benefits

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pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2002)) for injuries which she allegedly received on February 26, 2002, arising out of her employment with Wal-Mart Stores, Inc. (the respondent or Wal-Mart). For the reasons which follow, we affirm the judgment of the circuit court.

The following factual recitation is taken from the evidence presented at the arbitration hearing, at which the claimant testified in Bosnian through an interpreter. The claimant had worked for approximately 17 months at the respondent's store in Niles, Illinois. She worked on the night crew, from 10 p.m. until 6:30 a.m., stocking and replenishing shelves while the store was closed. At approximately 6 a.m. on February 26, 2002, the claimant began collecting shopping carts that had been left in various places around the store and was pushing them into rows at the front of the store. The area in which the carts were arranged in rows was carpeted and was open to the public during business hours.

The claimant testified that, before the accident, she was pushing five or six shopping carts, which were locked together, into a row of carts in the shopping-cart "corral," which was next to the edge of a metal shelf on which sale items were displayed. When she pushed the carts forward into the existing row, she slipped, fell, hit something hard, and did not remember anything else. She was wearing rubber-soled athletic shoes and was in the carpeted area when she fell, but did not know on what she

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slipped.

The claimant initially testified that she had finished pushing the carts when she fell, but subsequently stated that she was still holding onto and pushing the carts when she fell.

A coworker found the claimant lying on the floor and unconscious. An ambulance was called, and, when the emergency medical technicians arrived, the claimant was sitting up and was conscious, but was confused.

Bradley Wilson testified that he was the claimant's supervisor and was working at the store at the time she fell. After hearing that there had been an accident near the front of the store, Wilson proceeded to that area, where he saw the claimant on the floor and surrounded by several coworkers. According to Wilson, the claimant was sitting up and was conscious but incoherent, and there was saliva coming from her mouth. Wilson testified that nothing had been knocked off the metal shelving near the shopping-cart corral, and that there was nothing unusual about the carpeted area where the claimant had fallen. He specifically stated that there was no bump in the carpet, and it was not wet. In addition, he did not see any shopping carts near the claimant.

The claimant was taken by ambulance to Lutheran General Hospital, where she underwent a physical examination and an ECG, which was normal. The doctor who examined the claimant found no indication of trauma, including to her head or scalp, and no

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bruises or abrasions were noted. The claimant told hospital personnel that she did not know what had happened to her or why she was at the hospital. She was diagnosed as having undergone a syncopal episode or a seizure. Upon being discharged later that day, she was directed to follow up with a doctor and was released to return to work without any restrictions.

Two days later, the claimant sought treatment from her family physician, Dr. Vuko B. Zecevic, who noted injuries to her head, face, left arm, abdomen, chest, and left breast. The claimant told Dr. Zecevic that she recalled she was putting shopping carts away when she fell, but apparently lost consciousness and next realized that she was at the hospital. Dr. Zecevic referred the claimant to Dr. Milena Appleby for a neurological examination, which was performed on March 4, 2002. Dr. Appleby's notes reflect that the claimant stated she remembered pushing carts and then waking up on the floor.

Dr. Zecevic subsequently referred the claimant to Dr. Ivan Ciric, a neurologist who saw the claimant on March 21, 2002. In his report dated April 4, 2002, Dr. Ciric noted that the claimant complained of headaches but had no neurological deficits, and he indicated that her symptoms were consistent with a "postconcussion/perhaps cerebral contusion syndrome." In his report of May 16, 2002, Dr. Ciric stated that, during a follow-up visit, the claimant complained of headaches and pain in the low back and left leg. He noted that a CT scan of the claimant's

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brain was negative for any structural abnormality and that an MRI of her lumbar spine showed evidence of disc degeneration and a broad-based disc protrusion at L5-S1. Dr. Ciric stated that the pain in the claimant's low back could be the result of aggravation of her preexisting disc degeneration at L5-S1 and that the pain in her left leg may also be related to the injury and disc problem. Dr. Ciric indicated that the claimant's symptoms were disabling and prevented her from working, and he referred her to Dr. Branco Dragisic for pain management.

At the request of the respondent, the claimant saw Dr. David M. Shenker on June 14, 2002. After performing a physical examination and reviewing the claimant's previous medical records, Dr. Shenker was uncertain whether the claimant slipped and fell or whether she had a syncopal spell or seizure. He concluded that, if the claimant actually did fall, she could have sustained multiple bruises and a cerebral concussion, but he stated that he found no objective evidence of any neurologic impairment. Dr. Shenker further stated that the claimant had no indication of any low-back injury, and he opined that the claimant was capable of working without restrictions and that additional treatment or diagnostic studies were not required.

Dr. Dragisic began treating the claimant on June 20, 2002, and he diagnosed a lumbar spine disc protrusion with left side radiculopathy at L5-S1. Based on his examination and the history reported by the claimant, Dr. Dragisic opined that her fall at

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work in February 2002 caused both head and back injuries.

On July 27, 2003, the claimant was involved in an automobile accident, in which only her right arm was injured. An MRI of the claimant's lumbar spine on February 9, 2004, showed that she had degenerative-disc disease, in addition to a posterior disc protrusion/herniation at L5-S1. Another MRI performed on February 2, 2005, showed stenosis and a moderately-sized left paracentral disc protrusion/herniation at L5-S1.

The claimant began treating with Dr. Slobodan D. Vucicevic, an orthopedic surgeon, on April 28, 2005. After examining the claimant and reviewing the prior MRIs, Dr. Vucicevic diagnosed low-back pain with L5-S1 radiculopathy, and he indicated that he believed the fall at work was directly related to the claimant's present condition. On May 28, 2005, Dr. Zecevic referred the claimant for an orthopedic consultation at Cook County Hospital, where she began treatment on June 2, 2005, and was referred to Dr. George Cybulski, a neurosurgeon.

At the request of the respondent, the claimant was examined by Dr. Marshall I. Matz on July 15, 2005. Dr. Matz opined that he did not believe that the automobile accident two years earlier played an important role in the claimant's lower-back injury.

On August 17, 2005, Dr. Cybulski performed a left L5-S1 hemilaminotomy, foraminotomy, and discectomy. However, the record of the claimant's treatment at Cook County Hospital reflects that, on April 18, 2006, she had been diagnosed with

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"failed back surgery syndrome" at L5-S1. Dr. Vucicevic concurred in this diagnosis on August 31, 2006, and he attributed the failure of the surgery to the presence of scar tissue. Noting that the claimant complained of residual low-back pain radiating into both legs, Dr. Vucicevic recommended a second lumbar spine fusion surgery.

Following the unsuccessful spinal-fusion surgery, the claimant began treating with Dr. Joseph Ihm at the Rehabilitation Institute of Chicago, Spine and Sports Rehabilitation Center. On September 15, 2006, Dr. Ihm diagnosed the claimant with "chronic low back pain with intermittent left lower extremity pain." Dr. Ihm recommended continuing physical therapy and referred her to the Rehabilitation Institute of Chicago, Pain Care Center.

The claimant saw Dr. Rader at the Pain Care Center on January 12, 2007. In response to the claimant's complaints of chronic and worsening pain, Dr. Rader recommended further pain management and referred her to Dr. Radowski, a psychiatrist, for treatment of depression.

The claimant testified that she had not worked since February 26, 2002, and that she continued to experience pain in her head and spine, as well as circulation problems in both of her legs, which prevented her from looking for employment. The claimant further stated that she could not stand, lie down, or walk due to the pain in her spine.

Upon consideration of the evidence, the arbitrator found

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that the claimant had failed to prove that she suffered accidental injuries that arose out of and in the course of her employment. Specifically, the arbitrator found that the claimant had finished pushing the shopping carts when she fell and that her testimony reflected that she did not know what happened at the time of her fall. The arbitrator determined that the claimant's fall occurred in a public area of the store, though the store was closed at the time, and that she had not established that there was any defect in the area where she was found. The arbitrator concluded that the claimant had not proven that she was at any greater risk than that to which the general public would be exposed. In addition, the arbitrator stated that he had "carefully observed [the claimant's] demeanor during her testimony and [found] her testimony lacking in credibility and unworthy of belief." Based on his finding that the claimant failed to prove that she suffered an accidental injury arising out of and in the course of her employment, the arbitrator denied her any benefits under the Act.

The claimant sought review of the arbitrator's decision before the Commission. In a decision with one commissioner dissenting, the Commission modified the arbitrator's decision to find that the claimant had sustained accidental injuries in the course of her employment on February 26, 2003, but found that she had failed to prove that those injuries arose out of her employment. Accordingly, the Commission affirmed and adopted the

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arbitrator's denial of benefits under the Act.

The claimant filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

Initially, we note that, in her brief on appeal, the claimant addresses her arguments to the circuit court's decision, which she asserts is contrary to the law and against manifest weight of the evidence. This court, however, reviews the Commission's decision, not that of the circuit court. See *Boom Town Saloon, Inc. v. City of Chicago*, 384 Ill. App. 3d 27, 32, 892 N.E.2d 1112 (2008). Nevertheless, an examination of the claimant's arguments on appeal reveals that she actually is challenging Commission's denial of benefits as against the manifest weight of the evidence. Consequently, we will consider the claimant's arguments as if they were directed to the decision of the Commission.

On appeal, the claimant challenges the Commission's determination that she failed to prove that she sustained accidental injuries arising out of her employment on February 26, 2002. In particular, the claimant maintains that she presented sufficient evidence to establish that the injuries resulting from her fall that day stemmed from an employment-related risk.

Whether an injury arises out of the claimant's employment is a question of fact to be resolved by the Commission, and its

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decision in this regard will not be disturbed unless it is against the manifest weight of the evidence. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 164, 731 N.E.2d 795 (2000). For a finding of fact to be against the manifest weight of the evidence, an apposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992). A reviewing court must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665 (2003).

The "arising out of" component addresses the causal connection between a work-related injury and the claimant's condition of ill-being. *Sisbro Inc.*, 207 Ill. 2d at 203. For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58.

There are three types of risks to which an employee may be exposed: (1) risks distinctly associated with the employment, (2) risks personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal

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characteristics. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799 (2006). Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162, 731 N.E.2d 795 (2000). Personal risks include nonoccupational diseases and injuries caused by personal infirmities, such as a bad knee or an episode of dizziness, and are generally not compensable unless the claimant has established that the conditions of her employment significantly contributed to the injury by increasing the risk of falling or the effects of the fall. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162-63; *Stapleton v. Industrial Comm'n*, 282 Ill. App. 3d 12, 16, 668 N.E.2d 15 (1996). Neutral risks consist of those risks to which the general public is equally exposed. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163. As with personal risks, compensation for neutral risks depends upon whether claimant was exposed to a risk of injury to a extent greater than to which the general public is exposed. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163.

In this case, the claimant, who was the only witness to the accident, did not know the reason for her fall and could not say on what she had slipped. Contrary to the claimant's argument,

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the accident did not result from an employment risk where there was nothing obviously or inherently dangerous about pushing shopping carts in close proximity to a metal shelf.

However, the evidence adduced at the arbitration hearing indicates that the accident sustained by the claimant on February 26, 2002, stemmed from a personal risk. The record demonstrates that the claimant acknowledged that she lost consciousness and that, after being examined at the hospital, she was diagnosed as having undergone a syncopal episode or a seizure. This diagnosis was apparently accepted by several of the doctors who subsequently treated the claimant and was also consistent with Wilson's observations of the claimant's physical condition shortly after the fall.

The plaintiff argues that she presented sufficient evidence to establish that she faced an increased risk of injury based upon the fact that she was pushing several shopping carts immediately next to a metal shelf. We cannot agree.

Certainly, pushing five or six shopping carts, as was the claimant here, requires more effort than pushing a single cart, as would any member of the public who chose to use a shopping cart in the respondent's store. However, the claimant did not present any evidence that pushing multiple carts required extreme physical effort such that the exertion of that effort caused her to lose her footing and increased her risk of falling or the risk of injury after a fall. In addition, she did not present any

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evidence that the proximity of the metal shelf to the shopping cart corral increased her risk of injury beyond that to which the general public is exposed while shopping in the respondent's store.

The claimant argues that the record contains sufficient circumstantial evidence from which it can be inferred that she faced an increased risk. However, circumstantial evidence can only support an inference which is reasonable and probable, not merely possible. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106, 853 N.E.2d 799 (2006). Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot reasonably be drawn. *First Cash Financial Services*, 367 Ill. App. 3d at 106.

Here, the evidence was too speculative to support the conclusion that the claimant was exposed to a risk of injury to a extent greater than that faced by the general public. While it might be possible to infer that pushing multiple shopping carts in close proximity to a metal shelf presented an increased risk, it is equally possible to infer that it did not. Accordingly, the conclusion that the conditions of the claimant's employment increased the risk of her being injured in a fall would, at best, be mere speculation, surmise, and conjecture and, therefore, cannot reasonably be drawn.

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In reaching this conclusion, we note that it was within the province of the Commission to evaluate the testimony of the witnesses and judge their credibility, resolve any conflicts in the evidence, and draw reasonable inferences from the evidence presented. See *Sisbro Inc.*, 207 Ill. 2d at 207. The Commission, in adopting the decision of the arbitrator, found that the testimony of the claimant was "lacking in credibility and [was] unworthy of belief." Based on our review of the record, we cannot say that it was unreasonable for the Commission to decline to draw the inference that the conditions of the claimant's employment increased her risk of falling or the effects of the fall.

Finally, we note that our analysis and conclusion would be the same if the claimant's risk of falling were characterized as a neutral risk, which also requires proof that the claimant was exposed to a risk of injury greater than that faced by the general public. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163. For the foregoing reasons, we conclude that the Commission's finding that the claimant failed to prove that she suffered accidental injuries arising out of her employment is not against the manifest weight of the evidence. Accordingly, we affirm the judgment of the circuit court, which confirmed the Commission's decision denying the claimant benefits under the Act.

Affirmed.