

NOTICE
Decision filed 06/27/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

No. 1-10-1290WC

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).

Workers' Compensation
Commission Division
Filed: June 27, 2011

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

ELITE STAFFING,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY
Appellant,)
)
v.) No. 09 L 1453
)
ILLINOIS WORKERS')
COMPENSATION COMMISSION, *et*)
al.,)
(ORLANDO MAX,) HONORABLE
) JAMES A. MURRAY,
Appellee).) JUDGE PRESIDING.

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

O R D E R

HELD: The decision of the Illinois Workers' Compensation Commission, finding that the injuries sustained by Orlando Max arose out of and in the course of his employment with Elite Staffing, is not against the manifest weight of the evidence.

Elite Staffing, appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois

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Workers' Compensation Commission (Commission), awarding the claimant, Orlando Max, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), for injuries he allegedly received on September 2, 2008. 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 January 14, 2009, arbitration hearing on the claimant's petition for adjustment of claim.

The claimant testified that, on the date of the accident, he was working as a forklift driver for Elite Staffing. He said that he was typically assigned to "plant C" but was assigned to plant B on that day. At plant B, where he was considered a helper with the least seniority, he was supervised by Tiburcio Perez and Hilberto Segura. The claimant said that he and the other workers had worked through their normal lunchtime and that Segura told him that they would not be able to use the catering truck that typically served them. The claimant responded in the affirmative when asked if Segura "directed" him to go pick up the food, and he denied that he had volunteered to go for food. During cross-examination, the claimant clarified that Segura told the claimant to "wait a minute," "went and asked everybody else what they wanted," then "came back, *** gave [the claimant] the money, and *** said 'Go.'" The claimant testified that he had never before gone to pick up lunch food for his coworkers. With driving directions from Segura, the claimant drove his own car to

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pick up burritos for himself and his coworkers. On his return trip to the plant, he was involved in an automobile accident that led to his injuries.

In his testimony, Segura recalled that the claimant came into his office near lunchtime to request a lunch break, and Segura "told him if he'd hold on a few minutes since he's not with our building, we like to take brunch together, *** so if he could hold on *** a couple of guys are talking about ordering out." According to Segura, the claimant stated a preference for ordering out, and Segura responded by telling him they would have to check with all the workers before deciding lunch plans. Segura said that the workers told him that they preferred to order out and that, when he informed the workers that delivery would take an hour, the claimant "volunteered to go pick up the lunch." Segura denied having directed the claimant to pick up the lunch, but he agreed that he gave the claimant permission to leave the grounds for that purpose.

Following the arbitration hearing which was held pursuant to section 19(b) of the Act ((820 ILCS 305/19(b) (West 2008)), the arbitrator found that the claimant's injury arose out of and in the course of his employment. In his decision, the arbitrator both recited the claimant's testimony that he was directed to leave work to pick up lunch and noted Elite Staffing's contention that the claimant volunteered for the task. The arbitrator "[found] that there [was] no real dispute that the [claimant] was on a company errand at the time of his injury" and that the claim

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that the claimant volunteered was "irrelevant." He concluded that, "[b]ecause [the claimant] was clearly on a company errand that was sanctioned by his supervisor in an effort to further [the company's] interest in keeping its workers fed, the Arbitrator finds that the accident *** arose out of and in the course of the [claimant's] employment." The arbitrator awarded the claimant temporary total disability (TTD) benefits for 19 1/7 weeks and ordered Elite Staffing to pay \$57,617.98 for necessary medical services rendered to the claimant. Additionally, the arbitrator ordered Elite Staffing to pay for certain prospective medical treatment recommended by one of the claimant treating physicians .

Elite Staffing sought review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission affirmed and adopted the arbitrator's decision and remanded the matter back to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

Elite Staffing 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.

On appeal, Elite Staffing challenges the Commission's determination that the claimant proved that he sustained accidental injuries arising out of his employment. An employee's injury is compensable under the Act only if it arises out of and

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in the course of his or her employment. 820 ILCS 305/2 (West 2008). "The phrase 'in the course of' refers to the time, place and circumstances under which the accident occurred." *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603 (1989). "The words 'arising out of' refer to the origin or cause of the accident and presuppose a causal connection between the employment and the accidental injury." *Illinois Bell Telephone Co.*, 131 Ill. 2d at 483. Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co.*, 131 Ill. 2d at 483. Here, the parties dispute only the "arising out of" issue.

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. "An injury sustained by an employee arises out of his employment if the employee at the time of the occurrence was performing acts he was instructed to perform by his employer, acts which he has a common law or statutory duty to perform while performing duties for his employer, or acts which the employee might be reasonably expected to perform incident to his assigned duties." *Howell Tractor & Equipment Co. v. Industrial Comm'n*, 78 Ill. 2d 567, 573, 403 N.E.2d 215 (1980). "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar*

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Tractor Co., 129 Ill. 2d at 58.

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

As Elite Staffing observes, the general rule under the Act is that, "[w]here a lunch period is not subject to the employer's control or restricted in any way, the employee being free to go where he will at that time, and the employee is injured on a public street, the injury does not arise in the course of such employment." *Klug v. Industrial Comm'n*, 381 Ill. 608, 614, 46 N.E.2d 38 (1943). However, here, the evidence demonstrates, and the Commission found, that the claimant was not unfettered in his activities during his lunch hour: he left his workplace only with

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the permission of his supervisor. Accordingly, we agree with the Commission that the general rule from *Klug* does not apply.

We further agree with the Commission that, regardless of whether the claimant volunteered for the duty of retrieving lunch for the workers at the plant, that duty was incident to his employment, both because his work created the necessity that the workers leave for lunch and because he retrieved the lunch at the behest of his supervisor for the benefit of his coworkers. In short, the claimant's trip was not a personal errand taken on his own behalf during his free time; it was an errand taken under limited permission from his supervisor for a purpose suggested by his supervisor and a need created by his work.

Elite Staffing also argues that the claimant's accident did not arise out of his employment because his driving--the activity that led to his injury--was not an employment activity that exposed him to any unusual risk. We disagree.

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 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).

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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 his employment significantly contributed to the injury by increasing the risk of an accident or the effects of the accident. *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 an extent greater than that to which the general public is exposed. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163.

As we explained in *Stembridge Builders, Inc. v. Industrial Comm'n*, 263 Ill. App. 3d 878, 636 N.E.2d 1088 (1994):

"The respondent argues that the risk [of a car accident] was purely personal to claimant and was no different from that to which the general public was exposed and, for that reason, is not compensable. However, the supreme court long ago stated:

'If the work of the employee creates the necessity for travel, he is in the course of his employment. Persons using the highway are subjected to certain

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traffic risks and one of them is the danger of collision. The perils of modern-day travel upon the highways are well-known. Risk of accident is an ever-present menace. When it is necessitated by the employment the risks incidental thereto become the risks of the employment and remain so as long as the employee is acting in the course of his employer's business.' "

Stembridge, 263 Ill. App. 3d at 881 (quoting *Olson Drilling Co. v. Industrial Comm'n*, 386 Ill. 402, 413, 54 N.E.2d 452 (1944)).

As the above-quoted passage makes clear, the claimant's driving constituted the type of increased employment risk that can sustain liability under the Act. For that reason, and because we conclude that the claimant's lunch trip was not a personal errand, we agree with the Commission's conclusion that the claimant's injury was the result of an accident that arose out of his employment.

Based upon the foregoing analysis, we affirm the judgment of the circuit court, which confirmed the Commission's decision awarding the claimant benefits under the Act, and we remand this matter back to the Commission for further proceedings.

Affirmed and remanded to the Commission.