2012 IL App (3d) 110634WC-U

NO. 3-11-0634WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

DOUGLAS E. SCHNEIDER,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Peoria County.
	)	
v.	)	No. 11-MR-40
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, (Personal Management, Inc.),	)	Honorable
	)	Michael E. Brandt,
Appellees.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman and Hudson concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held*: The Commission's decision that the claimant's injuries did not arise out of his employment is not against the manifest weight of the evidence.

¶ 2 In a proceeding under section 19(b) of the Illinois Workers' Compensation Act (the Act), the arbitrator denied workers' compensation benefits to the claimant, Douglas E. Schneider, for burn injuries to both of his hands. 820 ILCS 305/19(b) (West 2010). The claimant appealed to the Illinois Workers' Compensation Commission (Commission), which clarified, affirmed, and adopted the arbitrator's decision that the claimant's injuries did not arise out of his employment. The claimant appealed the Commission's decision to the circuit court of Peoria County. The circuit court confirmed the Commission's decision, finding that it was not against the manifest weight of the evidence. From the decision of the circuit court, the claimant filed a timely notice of appeal to this court.

¶ 3 BACKGROUND

¶ 4 The facts are derived from the arbitration hearing. The claimant was employed by Personal Management, Inc. (employer) as a maintenance supervisor at Timberbrook Apartments, the apartment complex where he was required to live as part of his job. Part of his compensation included living there rent-free. On November 24, 2009, the claimant was in his apartment at the end of his work day. However, at that time, he was on call and required to respond to telephone calls from the manager, Tonya Brewer. The claimant testified that he was on call every other week. The employer required him to have a phone so that he could respond to and take care of any maintenance duties that occurred after his

regular daytime shift. He had a cellular phone but not a land line. He owned the phone, and used it to make and receive personal calls as well as calls related to his employment.

¶ 5 Earlier that day, the claimant had been getting an apartment ready for a "turnover" so that a new tenant could move in. His duties that day included making sure that the blinds, faucets, dishwasher, and everything else in the apartment were in working order and that all required maintenance was completed. At about 7 p.m., Tonya called and asked him to move some barricades from the parking lot so that the new tenant could move in. He did so and then returned to his apartment. He testified that he was "on the clock" and being paid an hourly wage from the time Tonya called him.

¶ 6 After the claimant returned to his apartment, where he lived alone, he began to fix dinner. At this time, he was "on standby" and still "on the clock" for that evening until he finished moving the barricades. He testified that, when he was on call, he was allowed to do as he pleased in his apartment. In particular, the employer did not instruct him on when to eat, what to cook, or how to cook anything. He was aware that Tonya would call him to return the barricades to the parking lot after the new tenant finished moving in. While he waited for Tonya to call him back, he did his laundry and started cooking dinner. The stove in his apartment is electric, and the burners turn on and off with a button on top of the stove. He planned to use a frying pan to fry a tenderloin and french fries, a meal he had prepared before. He had used that frying pan "numerous times" previously without incident.

¶ 7 The claimant testified that he put oil in the frying pan and turned the burner on so that

the oil would heat enough to fry the tenderloin. He said that the oil was almost hot enough for him to add the tenderloin when the phone rang. He is right-handed, and he used his right hand to hold the phone. When he answered, Tonya told him that the new tenant had finished moving in and that he should return to the parking lot and return the barricades. Tonya told him that he needed to get out to the parking lot "right now." He explained that there was work being done in that area of the parking lot and that Tonya did not want anyone else to use the parking lot after the new tenant's moving truck left.

¶ 8 While the claimant was talking to Tonya on his phone, he used his left hand to turn off the burner under the frying pan and to move the pan to another burner. He estimated that the frying pan weighed about 5 ½ pounds when filled with oil. He testified that, when he moved the frying pan, it hit the other burner, some of the oil splashed out of the pan, and "it kind of caught flame on the burner." He said that was when he "dropped it on the stove." The claimant testified that he did not finish the conversation with Tonya because he put the phone down and used both hands to grab the frying pan and move it to the sink. As he moved the pan, some of the hot oil splashed onto his hands, burning them. He left the pan of oil in the sink.

¶ 9 He testified that, before this incident, he had always used both hands to move this particular frying pan to the sink when it was filled with hot oil because it was heavy, it had a long handle, and it was "off balance" unless moved with both hands. Previously, he had never had any incidents in which oil spilled or a fire started. He agreed with the arbitrator

that, after he put the phone down and tried to move the pan to the sink, he was trying to move the pan as fast as he could to get it into the sink and that, in doing so, hot oil burned his hands.

¶ 10 The claimant testified about the medical care he received after burning his hands, and the employer did not dispute any of the medical evidence.

¶ 11 The arbitrator found that the sole disputed issue was whether the claimant's injuries arose out of his employment and that the facts of the claim were essentially undisputed. The arbitrator noted that there was no dispute that the claimant's injury occurred during the course of his employment. The arbitrator determined that the claimant was on call at the time of his injury and that he was required to respond to phone calls while on call but that his injuries did not arise out of his employment. The arbitrator stated:

> "The issue is whether taking a work call while cooking dinner in his apartment arose out of his employment. [The claimant] testified that he owned the phone and could cook dinner anytime. In fact, he could do anything he wanted while he was on call in his own apartment.
>
> The arbitrator finds that the cooking did not create an increased risk inherent to the [claimant's] employment. Nothing about the [claimant's] cooking benefitted the employer, and the cooking was personal to the claimant."

Based on these findings, the arbitrator denied compensation.

¶ 12 On review, the Commission affirmed the arbitrator, agreeing that the claimant's

injuries did not arise out of his employment. The Commission noted that the arbitrator had found that the claimant had moved hot oil off the burner of the stove and had severely burned both hands. The Commission pointed out additional testimony upon which the arbitrator had not commented. Essentially, the Commission pointed out the additional testimony in order to show that there was a dispute between the parties "concerning a significant fact." The Commission explained:

> "The Commission notes that Petitioner[1] testified that when Tonya called and he answered the phone, he was holding his cell phone in his right hand. He then approached the stove, and moved the pan with his left hand. According to Petitioner, that is when the oil initially splashed and caused a flame on the burner. Petitioner's testimony did not establish whether, after he approached the stove, he was cradling the phone in his neck or whether he continued to hold it with his right hand. This fact is relevant to determining whether Petitioner's use of his cell phone contributed to the occurrence in the first instance. If the phone was cradled, Petitioner could have used both hands to move the pan to the other burner. Without knowing this fact, the Commission cannot conclude that Petitioner's use of his cell phone contributed to the incident in the first instance. The Commission notes that it is Petitioner's burden of proof to establish all the elements of his claim.

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[1]We refer to Mr. Schneider as the claimant, but the Commission refers to him as "Petitioner."

Furthermore, the Commission finds Petitioner's testimony regarding the sequence of events significant. After Petitioner initially put the pan down on the stove with his left hand, causing oil to splash which resulted in a flame, he dropped the phone, dropped the pan, then picked up the pan *** again with both hands, and moved towards the sink. It was not until Petitioner again picked up the pan to move it to the sink with both hands that oil spilled on his hands causing his injuries. *** It is also significant that Petitioner testified that in the past, he moved the pan containing hot oil with both hands, and never had any problems. The Commission finds that when the oil spilled out of the pan onto his hands, Petitioner was holding the pan with two hands, just as he did in the past. While Petitioner was required to answer his phone and respond to any directions due to his 'on call' status, he failed to establish that this requirement increased his risk of injury.

With the above findings and clarifications of the Commission, the Decision of the Arbitrator is otherwise affirmed and adopted."

¶ 13 The circuit court found that the Commission's decision was not against the manifest weight of the evidence and confirmed it. This appeal followed.

¶ 14 ANALYSIS

¶ 15 Both the claimant and the employer acknowledge that the sole issue on review is whether the claimant's injuries arose out of his employment. They differ, however, on the applicable standard of review. The claimant argues that we should employ a *de novo*

standard of review because the facts are essentially undisputed. The employer argues that there is a question of fact and, accordingly, we must apply the manifest weight of the evidence standard of review. The correct standard of review is stated in *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 279, 947 N.E.2d 856, 860 (2011) ("Even in cases where the facts are undisputed, this court must apply the manifest-weight standard if more than one reasonable inference might be drawn from the facts"). Only cases in which the undisputed facts are susceptible to only one reasonable inference involve a question of law and employ the *de novo* standard of review. *Id.* In the case before us, more than one reasonable inference can be drawn from the facts, so we are required to affirm the Commission unless its decision is against the manifest weight of the evidence. For the Commission's findings of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id.*

¶ 16 The claimant argues that his employment obligation to take work-related calls while on call and "on the clock" was a contributing factor to his injury and that he is thus entitled to workers' compensation benefits. He contends that the testimony that he was "injured as a result of simultaneously taking a work related call with one hand while attempting to remove the frying pan with oil from the burner with the other hand so that he could comply with his supervisor's directive to immediately replace the barricades" is unrefuted. The claimant misconstrues the evidence. As the Commission pointed out, the claimant testified that he was talking on the phone when he used his left hand to turn off the burner and move

the frying pan to another burner, but he also testified that the pan hit the other burner, oil spilled out, flames erupted, and then he put the phone down. After he put the phone down, he grabbed the pan with both of his hands, as he had done many times previously when that particular frying pan was filled with hot oil. He was not injured while talking on the phone with the manager but after he put the phone down and grabbed the pan with both hands.

¶ 17 An employee seeking workers' compensation benefits bears the burden of proof to establish all of the elements of his right to compensation. *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App. 3d 1103, 1106, 641 N.E.2d 578, 581 (1994). "In order for accidental injuries to be compensable under the Act, a claimant must show such injuries arose out of and in the course of his or her employment." *Id.* In the case at bar, the parties agree that the claimant's injuries occurred in the course of his employment, so the issue before us is whether his injuries arose out of his employment.

> "An injury which 'arises out of' a person's employment may be defined as one which has its origin in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. [Citation.] Conversely, if the injury is caused by something unrelated to the nature of the employment or is not fairly traceable to the employment environment as a contributing proximate cause, but results instead from a hazard to which the employee would have been equally exposed apart from the employment, then it does not arise out of it." *Material Service Corp. v. Industrial Comm'n*, 53 Ill. 2d 429, 433, 292

N.E.2d 367, 369 (1973).

¶ 18 The Commission determined that the claimant's injuries did not arise out of his employment because his injuries occurred when he was performing a task unrelated to his employment, a task that he had performed in the same manner previously without any problems. The Commission carefully analyzed the claimant's testimony and paid particular attention to the sequence of events. After its thorough review of the evidence, the Commission determined that the claimant failed to establish that his employment duty of answering the phone increased his risk of injury. We find support in the record for the Commission's decision.

¶ 19 "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he or she was instructed to perform by the employer, acts which he or she had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his or her assigned duties. " *Nabisco Brands, Inc.*, 266 Ill. App. 3d at 1106, 641 N.E.2d at 581. In the case at bar, the employer instructed the claimant to answer his phone while on call but had no authority over or direction of his cooking activity. The claimant had no common law or statutory duty to perform any cooking activity while on call in his apartment. The employer had no reason to expect him to perform any cooking activity as an incident to his assigned maintenance duties.

¶ 20 Although the claimant urges us to find that the telephone call from his employer was a causative factor in his accident, it is equally reasonable to infer, as did the Commission, that

the phone call was not a causative factor in the accident, but that the only causative factors involved the claimant's personal decisions about how to cook his meal and how to move a pan full of hot oil. "An injury which results from a hazard to which the employee would have been equally exposed apart from the employment or a risk purely personal to the employee, however, is not compensable." *Id.* The claimant would have been exposed to the same risks if he had received a personal call. Thus, the injuries he received, while unfortunate, resulted from hazards to which he was equally exposed apart from his employment and risks that were purely personal to him.

¶ 21 The claimant argues that the Commission's finding that there is a dispute about whether he was holding his phone in his right hand or cradling it with his neck is erroneous. We find support for the Commission's determination that the claimant did not establish what he was doing with his right hand at the precise moment he chose to use only his left hand to move the frying pan filled with hot oil. The Commission's decision did not turn on that fact, however, and it is immaterial to our disposition.

¶ 22 The Commission's decision was based on the facts that the claimant was injured as a result of his personal actions while cooking and that he had no employment obligation to cook. The claimant testified that he had used the frying pan numerous times before this incident and that he always moved it with both hands when it was filled with hot oil because it was too heavy and unbalanced to move with only one hand. He was injured when he performed a purely personal activity of cooking and moved the pan using both of his hands,

just as he normally did. Whether his right hand was free to assist him when he initially moved the pan has no bearing on his later action of moving the pan as he normally did, with two hands. The Illinois Supreme Court's analysis in *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 509 N.E.2d 1005 (1987) is instructive.

¶ 23 In *Orsini*, the claimant was injured while working on his personal automobile, which he was allowed to do during working hours, while he was being paid, if he was caught up with his employment duties. *Orsini*, 117 Ill. 2d at 42, 509 N.E.2d at 1007. The claimant in our case was injured while cooking in his apartment, which he was allowed to do as he waited for instructions during his on call duty. The Court in *Orsini* held that the fact that the employer allowed the claimant to perform the personal activity of working on his own automobile during working hours did not convert the claimant's personal risk into an employment risk. *Orsini*, 117 Ill. 2d at 47, 509 N.E.2d at 1009 ("Employer acquiescence alone cannot convert a personal risk into an employment risk"). The *Orsini* court contrasted the facts in that case with those cases where liability *was* imposed, because "the injury to the employee occurred as a direct result of a defect in the employer's premises or was directly related to the specific duties of the employment." *Orsini*, 117 Ill. 2d at 48, 509 N.E.2d at 1010. In the instant case, the record supports the Commission's ruling because the claimant's injuries occurred as a result of a risk purely personal to the claimant and not connected in any way to any defect in the employer's premises or related to the specific duties of the claimant's employment as a maintenance supervisor.

¶ 24 The Commission adopted and affirmed the arbitrator's ruling, including the arbitrator's findings that the claimant could cook dinner or do anything he wanted while he was on call in his own apartment. The Commission also adopted the arbitrator's finding that the claimant was injured as a result of cooking, that his cooking did not create an increased risk inherent to his employment, that nothing about his cooking benefitted the employer, and that his cooking was purely personal. The findings of the arbitrator as adopted by the Commission are supported by the evidence and an opposite conclusion is not clearly evident. Therefore, we affirm.

¶ 25 CONCLUSION

¶ 26 For all the reasons stated, we affirm the circuit court's decision confirming the Commission's denial of benefits to the claimant.

¶ 27 Affirmed.

¶ 28 JUSTICE HOLDRIDGE, dissenting:

¶ 29 I respectfully dissent. An injury "arising out of" a claimant's employment is generally defined as one which "has its origins in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury." *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987). A risk is incidental to the employment when "it belongs to or is connected with what the employee has to do in fulfilling his duties." *Id.*

¶ 30 Here, the claimant's injuries resulted from a risk incidental to his employment. The claimant

was "on call" and was required to answer the call from his employer and to respond to his employer's specific instructions. The entire chain of events which led to the claimant's injury began when the claimant took a phone call from his employer and was instructed to immediately stop whatever he was doing and come down to the parking lot. There is no dispute that the claimant's employer communicated a sense of great urgency in the phone call, as well as the need for the claimant to report immediately to the parking lot. There is also no dispute that answering the employer's call and responding immediately to the employer's command was within the scope of claimant's employment. The record is clear that the fire which ultimately lead to the claimant's injuries resulted from the claimant attempting to talk to his employer on the phone while, at the same time, attempting to move the pan with only one hand. The record is also clear that the claimant was injured *while* attempting to put out the fire and, at the same time, hurrying to report to the parking lot in response to the urgency of the employer's instructions. In hurrying to respond to the employer's instructions, the claimant spilled hot oil on himself and was injured.

¶ 31 It was the urgency communicated by the employer and the claimant's need to immediately respond to the employer's command that gave rise to his injury and created a causal connection between his employment and his injury. How the hot oil came to be within the claimant's proximity, *i.e.* cooking a meal, and how the fire started are not relevant to whether the claimant's employment created a risk that was *incidental* to his employment. The claimant was injured while fulfilling his duty of responding immediately to his employer's urgent instructions. This is sufficient to establish that his injuries arose out of a risk incidental to his employment and were thus compensable. I would find that the Commission's conclusion to the contrary was against the manifest weight of the

evidence. I would, thus, reverse the decision of the Commission and remand the matter for further consideration.