2015 IL App (3d) 140536WC-U

FILED: December 18, 2015

NO. 3-14-0536WC

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

WILLIAM DARIN, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (The City of East Peoria, Appellee).	))))))))	Appeal from Circuit Court of Tazewell County No. 13MR154 Honorable Paul Gilfillan, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Hoffman and Hudson concurred in the judgment.
Presiding Justice Holdridge dissented, joined by Justice Stewart.

ORDER

¶ 1 *Held*: The Commission committed no error in finding claimant's alleged work injuries occurred while he was participating in a voluntary recreational program and, pursuant to section 11 of the Workers' Compensation Act (820 ILCS 305/11 (West 2010)), he did not sustain a compensable work-related injury.

¶ 2 Claimant, William Darin, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits for injuries he allegedly sustained in work-related accidents on September 8, 2010, and September 15, 2010, while he was employed by the employer, the City of East Peoria. After conducting a hearing, an arbitrator found that claimant's injuries were excluded from coverage under section

11 of the Act (820 ILCS 305/11 (West 2010)) because they occurred during the performance of a voluntary recreational activity that the employer did not order or direct claimant to perform. Claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission), which unanimously affirmed and adopted the arbitrator's decision. Claimant then sought judicial review of the Commission's decision in the circuit court of Tazewell County, which confirmed the Commission's ruling.

¶ 3 Claimant now appeals, arguing (1) the Commission erred when if found he was injured while engaging in a "recreational program" under section 11 of the Act, (2) the Commission's finding that his participation in the program was voluntary and that he was not "ordered or assigned" to participate in the program was against the manifest weight of the evidence, and (3) his injuries were compensable under the "personal comfort doctrine." We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing.

¶ 6 Claimant is the Fire Chief for the City of East Peoria, a position he has held since 2009. At the time of the arbitration hearing, he was 56 years old. Claimant alleges that he suffered work-related injuries to his knees on two separate occasions in September of 2010 while exercising during the "Fall Fitness Challenge," a physical fitness program which the employer offered to its employees free of charge. Claimant testified that he had enrolled in the Fall Fitness Challenge because his supervisor, Gary Densberger, had previously told him to stay fit and to set an example for the firemen under his command by participating in a fitness program. Densberger admitted that he encouraged claimant to stay fit and to set an example by participating in fitness activities or programs, but he denied that he ever directed or encouraged claimant

or any other employee to enroll in the Fall Fitness Challenge. The parties dispute whether the exercises that led to the claimant's alleged injuries were part of a "recreational program" barred from coverage under section 11 of the Act and, if so, whether the employer "ordered or assigned" claimant to participate in the Fall Fitness Challenge, thereby rendering claimant's injuries compensable under section 11. The following is a summary of the facts and evidence relevant to the disposition of these issues.

¶ 7 Claimant has been a firefighter since 1972 and has worked for more than 40 years in various positions related to firefighting. On October 21, 2008, the employer offered claimant the position of Fire Chief of the East Peoria Fire Department. The offer did not include any physical fitness requirements or yearly physical examination. Claimant executed the employer's written offer of employment on October 22, 2008.

¶ 8 Claimant introduced into evidence the "Position Description for Fire Chief with the East Peoria Fire Department" (position description), which he was required to sign as part of his employment. According to the position description, the Fire Chief's role was to plan, direct, organize, and administer the operations and staff of the fire department; provide leadership and direction to the organization; and interpret the goals and policies of the employer under the direction of the Commissioner of Public Health & Safety and the City Administrators. Claimant's essential job functions included supervisory and administrative responsibilities. Additionally, he was required to respond to major alarms, natural disasters, and other emergencies that required the insight and authority of the Fire Chief.

¶ 9 The position description listed the physical demands of claimant's position as including, among other things: (1) exerting in excess of 100 pounds of force occasionally, or in excess of 50 pounds frequently, or in excess of 20 pounds of force constantly to move objects;

(2) ascending or descending ladders, stairs, scaffolding, ramps, poles and the like using feet and legs and hands and arms; (3) moving about on hands and knees or hands and feet; (4) having the ability to work for sustained periods of exposure to outside atmospheric conditions; and (5) being exposed to conditions such as fumes, noxious odors, dust, mists, gases, and poor ventilation that affect the respiratory system, eyes, or the skin. However, unlike the firefighters under his command, claimant was not required to pass an annual physical. Nor was he required to partake in any physical fitness program or work out, or maintain any specific physical fitness requirements. Claimant testified that the regular firefighters have a physical fitness requirement as part of their contract, but claimant does not.

¶ 10 Claimant testified that, in certain situations, he was required to perform firefighting duties. For example, while at the scene of a three-alarm fire in Morton in March 2012, claimant hauled a fire hose under 100 pounds of pressure as fast as he could for approximately 1,000 feet.

¶ 11 Claimant stated that good cardiovascular conditioning is important to firefighting and that all firefighters are encouraged to exercise. He testified that a firefighter must maintain an adequate level of physical fitness for his own safety and the safety of the citizens he serves. Claimant noted that firefighters use axes, hoses, and other tools at fire scenes, and they are often required to climb ladders while wearing 75-pound protective gear and breathing equipment and while carrying 25-pound axes and other tools. They may be called upon to lift 100 to 300 pounds. Moreover, the more physically fit a firefighter is, the less oxygen he will use and the more productive he will be in fighting fires.

¶ 12 Claimant testified there is an exercise room in all the firehouses that he and all firefighters can use anytime when they are not on a call or performing other duties. Claimant

also testified that he and all firefighters were given a free pass to exercise at the Eastside Centre in East Peoria. The Eastside Centre is a facility owned by the employer and used by the general public. Claimant stated that he is permitted to exercise at the Eastside Centre whenever he wants, separate and aside from the Fall Fitness Challenge. However, he testified that there is no requirement that he work out at the Eastside Centre during the work day or any other time, or at all. According to claimant, the employer placed no restrictions on his exercise plan. Claimant noted that some of the regular firefighters performed morning stretching exercises together at the Eastside Centre (one group went there at 8:00 a.m., and a second group went there at approximately 9:30 a.m.). Claimant could have, but chose not to, participate in these group exercises.

¶ 13 Claimant testified that, at some point, he became aware of a physical fitness program sponsored by the employer called the Fall Fitness Challenge. The Fall Fitness Challenge was a voluntary 12-week fitness and weight management competition which promoted teamwork and healthy lifestyle changes. During the competition, teams of participants worked with a personal trainer and dietician as they competed to earn points through weekly workouts, nutrition education, and weight loss. The program was supervised by East Peoria city employees, not by the fire department. It was available to City of East Peoria employees and any immediate family member aged 16 or older.

¶ 14 Claimant enrolled in the Fall Fitness Challenge in August 2010. He testified that he enrolled in the program because he "thought it would be a better way to show" Densberger, the City of East Peoria's Commissioner of Public Health and Safety, that claimant was "following [Densberger's] direction to stay fit." He also noted that some of his firefighters were enrolled in the program and he "thought it would be good" if they would see him there and "realize that

[he] was going to take fitness as an important part of our job," as Densberger was "strongly pushing."

¶ 15 When he enrolled in the Fall Fitness Challenge, claimant signed a registration form, a health history questionnaire, and a liability waiver. On the registration form, claimant indicated that his participation in the fitness program was voluntary. He also indicated that his goals were to lose weight, get in better shape, and reduce inches from his waist. In his health history questionnaire, claimant indicated that he had prior problems with his neck and low back and that he may have difficulty reaching overhead and performing pushups. Claimant testified that, during the Fall Fitness Challenge, he was supervised by Jessica Krutke, a City employee. Claimant told Krutke that he wanted to be careful in his back and neck. Krutke was aware that claimant had prior health issues and she developed an exercise program for him.

¶ 16 Claimant testified that, during the Fall Fitness Challenge, he took part in several fitness activities, including stretching, jogging, using a medicine ball and an elliptical machine, box jumps, squats, and weight lifting. He stated that, on September 8, 2010, he injured his left knee while doing either box jumps or squats. He felt pain in his knee at that time but did not immediately seek medical treatment because he believed it was a sprain or strain. He stated that he had no prior history of left knee problems. One week later, claimant was jogging at the Eastside Centre when he felt a "bad pain" in his right knee. He iced the knee and continued working without seeking immediate medical treatment. Claimant stated that, after his right knee injury, the fitness coordinator lightened claimant's workout regimen. Each of claimant's injuries occurred during a Fall Fitness Challenge exercise session while the claimant was on duty.

¶ 17 Claimant testified that, in the weeks following the September 2010, workout incidents, the pain in his knees continued getting worse. On October 19, 2010, he reported the inju-

ries to the employer. On November 14, 2010, claimant sought treatment with Dr. Gregory Moskop, his primary care physician. He gave a history of bilateral leg symptoms since participating in the Fall Fitness Challenge. Dr. Moskop ordered a magnetic resonance imaging (MRI) and x-rays and referred the claimant to Dr. Stephen Orlevitch, an orthopedic surgeon.

¶ 18 Claimant saw Dr. Orlevitch on November 19, 2010. Dr. Orlevitch diagnosed a tear of the left knee body and posterior horn of the medial meniscus with "a huge amount of bone marrow edema in the medial femoral condyle and a likely chondral lesion in the weight bearing surface." Dr. Orlevitch recommended surgery to repair claimant's left knee. The surgery was performed by Dr. Orlevitch on January 31, 2011. The surgery consisted of a left arthroscopic partial medial meniscectomy with chondroplasty of the medial and patellofemoral compartments and excision of the thickened plica.

¶ 19 Claimant underwent physical therapy and returned to light-duty work approximately one week after the surgery. However, he continued to complain of right knee symptoms. On January 18, 2011, claimant had an MRI of his right knee. The MRI revealed a torn lateral meniscus and other problems. On March 31, 2011, Dr. Orlevitch performed arthroscopic surgery on claimant's right knee, including a medial meniscectomy with chondroplasty of the medial compartment, partial lateral meniscectomy, patellar chondroplasty and excision of plica. Claimant followed up postoperatively with Dr. Orlevitch and underwent physical therapy. On May 3, 2011, claimant was released to work light duty.

¶ 20 On July 1, 2011, claimant returned to Dr. Orlevitch and reported that his right knee was "perfect." However, Dr. Orlevitch noted effusion and pain with flexing of the left knee. Over the next six weeks, Dr. Orlevitch administered four injections to claimant's left knee.

He maintained claimant's existing work restrictions, which included no prolonged or repetitive bending, stooping, standing, kneeling, or climbing.

¶ 21 On November 4, 2011, claimant returned to Dr. Orlevitch. He reported no swelling or major pain. Dr. Orlevitch opined that claimant had reached maximum medical improvement and released him from his care. He advised claimant to refrain from kneeling for the next few months but imposed no other restrictions.

¶ 22 Claimant testified that, at the time of the arbitration hearing, he was still experiencing "a little" knee pain with certain activities. He stated that he could climb, but he sometimes had pain while kneeling. Claimant testified that he could exercise on his right knee and worked out on an elliptical machine three times per week. He was walking two miles a day for exercise. However, he stayed away from jogging and box jumps. Claimant stated that he felt some aches and pains "once in a while," but "nothing significant" and "nothing *** [he] can't stand." For example, he noted that he would get some stiffness in both knees if he drove for three hours or more. He was not taking any pain medication. Claimant denied having any problems with his knees prior to beginning the Fall Fitness Challenge.

¶ 23 Gary Densberger testified on behalf of claimant. Densberger stated that he was a member of the East Peoria City Council and was currently serving as the Commissioner of Finance and Accounts for the City of East Peoria. He testified that, in 2010, he served as East Peoria's Commissioner of Health and Safety. As such, he had executive responsibility for the Fire Department and was claimant's supervisor. Densberger testified that, when the employer hired claimant as Fire Chief in 2008, he was involved in the hiring process. Densberger confirmed that there are no physical fitness requirements in claimant's employment agreement.

¶ 24 Densberger testified that, in the summer of 2010, there were some issues regarding the physical fitness of the firefighters, and Densberger was concerned about their health and safety and the number of workers' compensation claims they were filing. To address these issues, Densberger instituted fitness testing for the firefighters. Based on the results of this testing, Densberger asked the firefighters to modify their workouts to a more specific regimen as recommended by the company that did the testing. According to Densberger, the purpose of the testing and recommendations was to increase the physical fitness of the fire department.

¶ 25 Densberger testified that, in the late spring or early summer of 2010, he spoke to claimant on a few occasions by telephone and recommended that claimant and other command officers set a proper example for the fire department by participating in physical fitness activities. Densberger was aware that the employer sponsored a physical fitness program called the "Fall Fitness Challenge." Densberger believed that this program "was made available to all City employees *** to promote wellness for all of the workers." He testified that the Fall Fitness Challenge would have been consistent with what he had in mind when he encouraged claimant to participate in physical fitness programs. When asked whether it would have negatively affected his view of the claimant's job performance if the claimant had "refused to participate in fitness initiatives," Densberger replied, "I think it's important for command to lead by example, so yes." He considered it "part of the claimant's job duties" to participate in a fitness program.

¶ 26 However, during cross-examination, Densberger testified that he did not order claimant to participate in the Fall Fitness Challenge, even though he believed he had the authority to do so. He stated that he did not recommend the Fall Fitness Challenge to claimant. Nor did he order or recommend that program to any of the other firefighters. He had merely recommended that claimant "lead with physical fitness," not that he participate in the Fall Fitness Chal-

lenge. According to Densberger, it was open to claimant to find whatever avenue he wished for his own workouts. Claimant could use the Eastside Centre or the equipment in the firehouse exercise rooms at any time without being enrolled in the Fall Fitness Challenge. Claimant had the discretion to work out when he wanted (in the Eastside Centre or elsewhere), and Densberger did not know if claimant participated in any other physical activities. On redirect examination, Densberger agreed that if claimant was working out on his own at the Eastside Centre and not participating in the Fall Fitness Challenge, that activity would be consistent with the conversation he had with claimant in the summer of 2010 when he encouraged claimant to be more physically fit.

¶ 27 Densberger stated that he was somewhat familiar with the Fall Fitness Challenge but not in detail. It was a voluntary program that was designed to provide a fitness opportunity for City employees and to encourage them to be more active. The program was made widely available to all City employees and "[e]veryone would have known about it." Densberger testified that he did not know how many firefighters participated in the Fall Fitness Challenge. Regardless of whether the firefighters participated in the Fall Fitness Challenge, they had a contractual right to work out on duty at the firehouse or at the Eastside Centre.

¶ 28 Densberger testified that he and claimant saw each other on a social basis. He noted that they have been guests in each other's homes and have gone out to dinner together. Densberger stated that claimant told him that he had injured his knee while working out and had expressed frustration that his medical bills were not being covered. Densberger sent an e-mail to the City Manager and the employer's personnel manager in follow-up to an e-mail claimant had sent asking for information regarding a workers' compensation claim for injuries he allegedly suffered on September 8, 2010, and September 15, 2010, while participating in the Fall Fitness

Challenge. Densberger wrote "I can understand the WC distinction. Chief and I have discussed command setting the proper example. None of the FF have mandatory workouts." Densberger testified that he sent this e-mail because claimant had sustained an injury and was concerned about having his bills paid and Densberger wanted to make the employer's personnel manager aware that Densberger had encouraged claimant to participate in a fitness program.

¶ 29 Jessica Krutke testified on behalf of the employer. Krutke stated that she was the fitness director for the Eastside Centre in September 2010. Krutke designed the Fall Fitness Challenge and was an instructor and director for the program. She was present when participants were working out in the program. Krutke testified that the program was voluntary and free for all employees and their spouses. The program consisted of two workouts with Krutke per week with an option to come in once on their own during the week.

¶ 30 Krutke testified that, on or about September 8, 2010, she had a conversation with claimant while her boss was present. Krutke did not remember claimant ever reporting that he injured himself during his participation in the Fall Fitness Challenge. She recalled claimant telling her he had performed some yard work over the weekend and that he "overdid it" because his knees were sore. This caused Krutke to modify claimant's workout plan to put less stress on his knees. Krutke stated that claimant told her on a second occasion that he may have been overdoing it at home doing yard work. Krutke testified that 34 City employees participated in the Fall Fitness Challenge, including 4 firefighters. Krutke never filled out an incident report for an injury occurring during the Fall Fitness Challenge.

¶ 31 During cross-examination, Krutke testified that claimant complained that he had soreness in his knees after jogging. She did not recall him complaining about soreness in his knees from doing box jumps or any of the other activities he performed during the Fall Fitness

Challenge. He just said that his knees were sore. She stated that, if she had believed there was an acute injury from the Fall Fitness Challenge, she would have made a formal report and she would have recorded that. None of Krutke's notes indicated that she recommended box jumps during the Fall Fitness Challenge and there was no written record that claimant did any box jumps during the program. Moreover, Krutke testified that, prior to the dates of claimant's alleged accidents, she had suggested that claimant not do box jumps due to "other issues with his health" that claimant had reported prior to the beginning of the program. However, Krutke conceded that her notes were not "a completely accurate record" of claimant's participation in the Fall Fitness Challenge through approximately September 15, 2010, and that claimant could have jogged or performed box jumps on September 8 and 15, 2010. (The Eastside Centre's records reflect that claimant was there on those dates.)

¶ 32 On rebuttal, claimant testified that he was not clear about the difference between box jumps and "step ups" on a box. He was certain he injured his left knee at the Eastside Centre on September 8, 2010. He could not recall whether Krutke was there or not at the time, and he was not sure whether he injured his knee doing box jumps, steps, or squats. He also recalled injuring his right knee while jogging on September 15, 2010. He denied telling Krutke that he injured his knees doing yard work. However, he testified that he might have told Krutke that he had done some yard work over the weekend and that his knees were bothering him. According to claimant, there was no requirement that he report any injuries occurring at the Eastside Centre to the assistant fitness director.

¶ 33 The arbitrator found that claimant had failed to prove that he sustained accidental injuries that arose out of and in the course of his employment on September 8, 2010, and September 15, 2010. The arbitrator agreed with the employer's argument that claimant's injuries oc-

curred while claimant was taking part in a "recreational activity" that did not arise out of and in the course of his employment. Thus, the arbitrator found that claimant's injuries were barred from coverage under section 11 of the Act.

¶ 34 Although section 11 does not bar coverage when the employer "ordered or assigned" the claimant to participate in a recreational activity, the arbitrator found it "unrebutted that claimant was not ordered or assigned by his employer to participate in" the Fall Fitness Challenge. The arbitrator noted that Densberger testified that he did not order claimant to participate in the program and that Densberger "specifically stated that should [claimant] choose not to participate it would not negatively impact his performance evaluation." The arbitrator found that Densberger merely wanted claimant to "lead by example as it relates to physical fitness," and that the Fall Fitness Challenge "was but one means of achieving this goal." The arbitrator found it significant that only four firefighters signed up for the program. Given this, the arbitrator concluded that claimant's choice to lead by example by enrolling in the Fall Fitness Challenge "may not have been as beneficial as if [claimant] had taken part in the morning stretches and worked out with the firefighters in the firehouses or when they went over to the Eastside Centre as a group to exercise." Moreover, the arbitrator observed that "there [were] no directives from [the employer] requiring [claimant] to work out."

¶ 35 The arbitrator acknowledged that it was "imperative for the Fire Chief to remain physically fit, even though he is not required to do so by his employment requirement." However, the arbitrator noted that claimant "had many other options available to him to accomplish [that] task, and at the same time set an example for the firefighters." The arbitrator stated that, "[w]ith the free membership to the Eastside Centre ***, the claimant could work out as hard and often as he wanted," and he "had the flexibility [to work out] whatever time of day he wanted."

Moreover, claimant "also could work out in the firehouse exercise room anytime he wanted." Accordingly, the arbitrator found that claimant's participation in the Fall Fitness Challenge "was not required for him to set an example of physical fitness for his firefighters, especially since only [four] of them had enrolled in the program."

¶ 36 The arbitrator also found it significant that, when claimant enrolled in the program, he indicated that his specific goals were "to lose weight, get in better shape and lose inches at his waist," and "[n]one of his listed goals was to set an example for the firefighters." Moreover, the arbitrator concluded that claimant did not have to participate in the Fall Fitness Challenge to be able to meet the physical demands of his job as Fire Chief and to engage in general firefighting activities, if necessary. The arbitrator found that claimant "could have easily achieved this by continuing to work out at the firehouse and the Eastside Centre on his own."

¶ 37 In sum, the arbitrator found that claimant failed to prove by a preponderance of the evidence that his participation in the Fall Fitness Challenge was ordered or assigned by the employer. Although the program was sponsored and paid for by the employer, "participation was voluntary and there were no ramifications had claimant chosen not to participate." Having found that claimant failed to prove that he sustained an accidental injury that arose out of and in the course of his employment, the arbitrator denied benefits and found all remaining issues moot.

¶ 38 Claimant appealed the arbitrator's decision to the Commission, which unanimously affirmed and adopted the arbitrator's decision. Claimant then sought judicial review of the Commission's decision in the circuit court of Tazewell County, which confirmed the Commission's ruling.

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. Whether Section 11 of the Act Bars Claimant's Claim.

¶ 42 The Commission found that claimant's claim was barred from coverage under section 11 of the Act because claimant was injured while participating in a "voluntary recreational activity." Claimant argues that this was error because his participation in the Fall Fitness Challenge was neither "recreational" nor "voluntary."

¶ 43 To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "ar[ose] out of" and "in the course of" his employment. 820 ILCS 305/2 (West 2010). "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). The "arising out of" component is primarily concerned with causal connection. *Id.* To satisfy this requirement, the claimant must show "that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989). 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." *Id.*

¶ 44 Under section 11 of the Act, "[a]ccidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties[,] and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof." 820 ILCS 305/11 (West 2010). However, "[t]his exclusion shall not ap-

ply in the event that the injured employee was ordered or assigned by his employer to participate in the program." *Id.*

¶ 45 Whether a particular activity is a "recreational program" under section 11 of the Act is a question of law that we review *de novo*. *Elmhurst Park District v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 404, 408, 917 N.E.2d 1052, 1056 (2009). However, whether an injured claimant's participation in a recreational activity was voluntary and whether the claimant's injuries arose out of and in the course his employment are questions of fact to be resolved by the Commission. *Pickett v. Industrial Comm'n*, 252 Ill. App. 3d 355, 357, 625 N.E.2d 69, 71 (1993); *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 164, 731 N.E.2d 795, 808 (2000). The Commission's determinations on these matters will not be disturbed on review unless they are against the manifest weight of the evidence. *Pickett*, 252 Ill. App. 3d at 360, 625 N.E.2d at 73; *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 164, 731 N.E.2d at 808. For a finding of fact to be against the manifest weight of the evidence, a conclusion opposite to the one reached by the Commission must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 896 (1992).

¶ 46 Although section 11 of the Act provides some general examples of activities which may be considered "recreational,"—such as "athletic events, parties[,] and picnics"—"the "the Act does not expressly define the term." *Elmhurst Park District*, 395 Ill. App. 3d at 408-09, 917 N.E.2d at 1056. "Absent statutory definitions indicating a different legislative intention, courts will assume that words have their ordinary and popularly understood meanings." *Id.* at 409, 917 N.E.2d at 1056; see also *General Motors Corp., Fischer Body Division v. Industrial Comm'n*, 62 Ill. 2d 106, 112, 338 N.E.2d 561, 564 (1975). In determining the ordinary meaning

of a statutory term, it is appropriate to consult a dictionary. *Elmhurst Park District*, 395 Ill. App. 3d at 409, 917 N.E.2d at 1056-57. In *Elmhurst Park District*, we consulted a popular English language dictionary and construed the ordinary meaning of the term "recreation" to mean "the act of recreating or the state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY." *Id.* at 409, 917 N.E.2d at 1057 (quoting Webster's Third New International Dictionary 1899 (2002)).

¶ 47 Further, we note section 11 of the Act expressly includes "athletic events" as one of the general examples of activities which may be considered "recreational." The term "athletics" is defined as "exercises, sports, or games engaged in by athletes." Merriam-Webster's Collegiate Dictionary 72 (10th ed. 2000); see also Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/athletic (last visited Nov. 19, 2015) (defining the term "athletic" as "of or relating to sports, games, or exercises").

¶ 48 Additionally, while "the extent to which an employer benefits from an employee's participation [in an activity], the extent to which the employer actively organizes and runs the recreational event, and the extent to which the employer sponsors and compels attendance in the event are *** legitimate inquiries, they are only important insofar as a question arises as to whether the activity is voluntary." *Kozak v. Industrial Comm'n*, 219 Ill. App. 3d 629, 633, 579 N.E.2d 921, 924 (1991). Such factors "have no bearing whatsoever on whether the activity is a recreational program as defined by the Act." *Id.*

¶ 49 Here, we find the Fall Fitness Challenge was a "recreational program" for which section 11 of the Act bars compensation. Evidence showed the program was a 12-week fitness and weight management competition that promoted teamwork and healthy lifestyle changes. Program participants exercised with a personal trainer and claimant's personal trainer developed

an exercise program for him. Claimant described the fitness activities he performed while engaging in the program as stretching, jogging, using a medicine ball and an elliptical machine, box jumps, squats, and weight lifting. Claimant's exercise activities fall within the definition of the term "athletics" and the Act expressly includes "athletic events" as an example of a "recreational activity" for which compensation is precluded.

¶ 50 Despite the inclusion of "exercises" within the definition of the term "athletic," the dissent, nevertheless, insists that the Fall Fitness Challenge—and the exercises claimant performed while participating in the program—did not constitute an "athletic *event*." We disagree. The dissent points out that the term "event" may be defined as "any of the contests in a program of sports." See Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/event (last visited Dec. 4, 2015) (defining an "event" as "something that happens: OCCURRENCE," "a noteworthy happening," "a social occasion or activity," or "any of the contests in a program of sports"). It further contends that given the inclusion of "parties and picnics" as examples of recreational activities in section 11, the legislature intended " 'athletic events' to mean athletic or sporting *contests or games*, not merely physical exercises performed *** for fitness or weight loss purposes." *Infra* ¶ 65 (Holdridge, P.J., dissenting)

¶ 51 However, even taking into consideration the definition of "event" relied upon by the dissent, the Fall Fitness Challenge constituted a "recreational program." The Fall Fitness Challenge was described as a voluntary 12-week fitness and weight management *competition* which promoted teamwork and healthy lifestyle changes. During the competition, participants worked in teams and competed to earn points through weekly workouts, nutrition education, and weight loss. Thus, the Fall Fitness Challenge was a competition or contest, *i.e.*, event, that in-

volved exercise, *i.e.*, athletics. The program, therefore, falls within the definition of an "athletic event" and constituted a "recreational program" as set forth in section 11.

¶ 52 Further, we find that a physical exercise program performed for health and fitness purposes falls within the definition of "recreation" more generally, in that it may be engaged in for the purpose of "refreshment of the strength and spirits after toil," "diversion," or "play." In this instance, claimant engaged in the Fall Fitness Challenge and identified personal goals he wished to accomplish, including losing weight, getting in better shape, and reducing inches from his waist. Thus, the Commission committed no error in finding the Fall Fitness Challenge constituted a "recreational program" as referenced in section 11 of the Act.

¶ 53 Having found claimant was engaged in a "recreational program" at the time he was injured, we now turn to whether his participation in the program was "voluntary," which would bar coverage under the Act, or whether he was "ordered or assigned by his employer to participate in the program," in which case the Act's recreational-program exclusion would not apply. 820 ILCS 305/11 (West 2010). After reviewing the evidence presented, we find the Commission's determination that claimant's participation in the Fall Fitness Challenge was voluntary is supported by the record and an opposite conclusion from that made by the Commission is not clearly apparent.

¶ 54 In this case, claimant held the position of Fire Chief and his essential job functions included supervisory and administrative responsibilities. Unlike firefighters under his command, claimant was not required to pass an annual physical. He was also not required to engage in any physical fitness program, work out, or maintain any specific level of physical fitness. The Fall Fitness Challenge was a program that was available to all City employees and their immediate family members who were 16 years of age and older. Both claimant and Densberger,

claimant's supervisor, testified at arbitration that the Fall Fitness Challenge was a "voluntary program." Moreover, when registering for the program, claimant indicated on the registration form that his participation was voluntary.

¶ 55 Claimant and Densberger also testified that claimant was encouraged to stay fit and set an example for others within the fire department. However, claimant acknowledged that the employer did not put any restrictions on his exercise activities. Further, Densberger testified he did not order claimant to participate in the Fall Fitness Challenge, nor did he recommend the program to claimant or any firefighter. He stated it was "open to [claimant] to find whatever avenue for his own work-outs" and his recommendation was only that claimant "lead with physical fitness."

¶ 56 In short, the record fails to show claimant was "ordered or assigned" by the employer to participate in the Fall Fitness Challenge. Although claimant was encouraged to maintain physical fitness, the manner and method in which he chose to do so was at his discretion. As noted by the arbitrator, whose decision was affirmed and adopted by the Commission, there were many options available to claimant to stay fit and serve as an "example" to those under his command. Also, the record fails to reflect claimant would have suffered any repercussions by not participating in the Fall Fitness Challenge specifically. Given the circumstances presented, the Commission's finding that claimant's participation in the Fall Fitness Challenge was voluntary and barred compensability under the Act was not against the manifest weight of the evidence.

¶ 57 B. The Personal Comfort Doctrine

¶ 58 On appeal, claimant also argues that his injuries are compensable under the "personal comfort" doctrine. However, claimant never raised this argument before the Commission. Accordingly, the argument is forfeited. *Kearns v. Industrial Comm'n*, 312 Ill. App. 3d 257, 265,

726 N.E.2d 1129, 1135 (2000). However, even if we were to address the argument, we would reject it. The personal comfort doctrine applies when an on-duty employee is injured on his employer's premises while engaging in some act of comfort that is incidental and foreseeable to his employment, such as eating lunch, using the restroom, or seeking relief from heat or cold. See, *e.g.*, *Union Starch v. Industrial Comm'n*, 56 Ill. 2d 272, 307 N.E.2d 118 (1974). That did not occur in this case. Here, by contrast, claimant was injured outside of his workplace while exercising, not while performing some foreseeable act of "personal comfort" in the workplace.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the circuit court's judgment.

¶ 61 Affirmed.

¶ 62 PRESIDING JUSTICE HOLDRIDGE, dissenting.

¶ 63 I dissent. I agree that the personal comfort doctrine does not apply in this case. However, in my view, Section 11 does not bar the claimant's claim from coverage because the claimant's participation in the Fall Fitness Challenge was neither "recreational" nor "voluntary."

¶ 64 As the majority notes, in applying section 11 we have construed the ordinary meaning of the term "recreation" to mean "the act of recreating or the state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY." *Elmhurst Park District v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 404, 409 (2009) (quoting Webster's Third New International Dictionary 1899 (2002)). In this case, the claimant testified that he injured his knees while jogging and while doing "box jumps" or "step up" exercises during the Fall Fitness Challenge. The claimant performed these exercises in order to lose weight and to improve his physical fitness. In my view, performing these types of physical exercises for fitness purposes does not constitute "recreation," "refreshment of the strength and spirits after toil, "di-

version," or "play." The employer cites no cases suggesting that exercise conducted for physical fitness purposes is "recreational" under section 11. Nor have I found any. Cases addressing "recreational programs" covered by section 11 typically involve athletic or sporting contests (such as basketball, softball, tennis, golf, or walleyball games), or other company-sponsored leisure activities.[1] Physical exercise performed for health and fitness purposes is not the same type of recreational or leisure activity contemplated by section 11.

¶ 65 In support of its holding, the majority notes that section 11 expressly includes "athletic events" as an example of a "recreational activity," and it references an online dictionary that defines "athletic" as "of or relating to sports, games, *or exercises*." (Emphasis added.) *Supra* ¶ 47. However, the statute refers to "athletic *events*" (not "athletics," "athletic activities," or "athletic exercises"). (Emphasis added.) 820 ILCS 305/11 (West 2010). The online dictionary cited by the majority defines "event" as including "any one of the contests in a sports program." Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/event (last visited December 4, 2015). Moreover, in section 11, the legislature includes "athletic events" within an illustrative list of recreational activities that also in-

[1] See, *e.g.*, *Elmhurst Park District*, 395 Ill. App. 3d 404 (walleyball game); *Gooden v. Industrial Comm'n*, 366 Ill. App. 3d 1064 (2006) (volleyball game during company picnic); *Pickett v. Industrial Comm'n*, 252 Ill. App. 3d 355 (1993) (basketball game); *Kozak v. Industrial Comm'n*, 219 Ill. App. 3d 629 (1991) (tennis tournament); *Auto-Trol Technology Corp. v. Industrial Comm'n*, 189 Ill. App. 3d 1065 (1989) (motorcycle accident during company picnic); *Law Offices of William W. Schooley v. Industrial Comm'n*, 151 Ill. App. 3d 1069 (1987) (softball game); *Fischer v. Industrial Comm'n*, 142 Ill. App. 3d 298 (1986) (company-sponsored golf event).

cludes "parties and picnics." Thus, it is clear that the legislature intended the phrase "athletic events" to mean athletic or sporting *contests or games*, not merely physical exercises performed by individuals for fitness or weight loss purposes.

¶ 66 In any event, even assuming *arguendo* that the claimant's injuries occurred during a "recreational" program, injuries incurred during such a program would be barred from coverage under section 11 only if the program was "voluntary." 820 ILCS 305/11 (West 2010). The Act's recreational-program exclusion does not apply if the injured employee was "ordered or assigned by his employer to participate in the program." *Id.* The majority concludes that the Commission's determination that the claimant's participation in the Fall Fitness Challenge was voluntary is not against the manifest weight of the evidence. *Supra*, ¶¶ 51-54. I disagree.

¶ 67 In my view, the manifest weight of the evidence establishes that the claimant's enrollment in the Fall Fitness program was not purely voluntary. In the late spring or early summer of 2010, Densberger told the claimant on more than one occasion to set a proper example for the fire department by participating in physical fitness activities. Shortly thereafter, the claimant enrolled in the Fall Fitness program. The claimant testified that he enrolled in the program to show Densberger that he was "following [Densberger's] direction to stay fit" and to show other firefighters that he "was going to take fitness as an important part of our job," as Densberger was "strongly pushing." Densberger testified that he was aware of the Fall Fitness program and that it was consistent with what he had in mind when he encouraged the claimant to participate in physical fitness programs. Densberger stated that he considered it "part of the claimant's job duties" to participate in a fitness program. Densberger noted that, if the claimant had refused to participate in fitness initiatives, it would have negatively affected his view of the claimant's job performance. Thus, the manifest weight of the evidence establishes that the

claimant enrolled in the Fall Fitness program in an effort to perform a job duty that Densberger had expressly directed him to perform.

¶ 68 In support of its holding that the claimant's participation in the Fall Fitness Challenge was "solely voluntary," the Commission noted that: (1) Densberger did not order the claimant to participate in the Fall Fitness Challenge *specifically*, but rather merely ordered him to "lead by example as it relates to physical fitness"; (2) the claimant could have fulfilled Densberger's directive through any number of physical fitness activities, and the Fall Fitness Challenge was merely one of several ways to do so; (3) given that only four firefighters were enrolled in the Fall Fitness program, the claimant could have "better met" Densberger's directive by "participating in morning stretches, working out with the firefighters in the firehouse exercise rooms or with them at the Eastside Centre"; (4) the claimant could work out wherever and whenever he liked; (5) Densberger "specifically stated that should [the claimant] choose not to participate" in the Fall Fitness Challenge, it "would not negatively impact his performance evaluation"; and (6) when the claimant enrolled in the Fall Fitness program, he indicated that his specific goals were "to lose weight, get in better shape and lose inches at his waist," not to set an example for the firefighters. In affirming the Commission's decision, the majority cites several of these same facts and adds that: (1) the claimant and Densberger testified that the Fall Fitness Challenge was a "voluntary program"; and (2) the claimant indicated on the registration form that his participation in the Fall Fitness Challenge was voluntary.

¶ 69 In my view, these facts do not support a reasonable inference that the claimant's enrollment in the Fall Fitness program was "solely voluntary." Densberger directed the claimant to participate in a fitness regimen to set an example for the firefighters, and he testified that the Fall Fitness program was consistent with what he had in mind when he issued that directive. The

fact that he did not order the claimant to enroll in any one particular program (and the fact that the Fall Fitness Challenge was a voluntary program) does not change the fact that the claimant's enrollment in the Fall Fitness program was both consistent with Densberger's order and done in furtherance of that order. Moreover, Densberger testified that he considered the claimant's participation in such fitness activities to be part of his job duties and that the claimant's refusal to do so would have negatively impacted his performance evaluation. Further, the fact that the claimant could have achieved Densberger's directive through other means is irrelevant. The dispositive question is whether the claimant enrolled in the program entirely on his own initiative or pursuant to a directive from the employer. Here, the evidence overwhelmingly suggests the latter. The fact that the employer did not control every aspect of the claimant's exercise regimen or workout schedule does not alter the fact that the claimant enrolled in the program in order to fulfil the employer's directive. In addition, the fact that the claimant indicated that his goals for the Fall Fitness program were "to lose weight, get in better shape and lose inches at his waist" is of no consequence. Those goals are entirely consistent with Densberger's directive that the claimant serve as an example to the other firefighters by demonstrating a commitment to physical fitness.

¶ 70 In sum, the claimant enrolled in the Fall Fitness program pursuant to Densberger's directive and in furtherance of his job duties. Accordingly, contrary to the Commission's finding and the majority's ruling, the claimant's enrollment in that program was not purely voluntary. Densberger's directive to the claimant made the claimant's enrollment in the Fall Fitness program incidental to his employment. Therefore, the injuries that he incurred during the program arose out of his employment.

¶ 71 Two additional points bear mentioning. The employer argues that there is no evidence that any other firefighters observed the claimant working out during the Fall Fitness program or that the claimant's enrollment and participation in that program "had any effect or did anything to promote physical fitness for other firefighters." That is a red herring. The important question is whether the claimant enrolled in the program in response to the employer's directive, not whether the claimant ultimately succeeded in advancing the employer's purposes.

¶ 72 Finally, the employer argues that "*all employees* from *all occupations* have various physical demands included as part of their employment," but "that does not mean that recreational activities performed outside of the workplace that help improve an employee's physical abilities arise out of and in the course of her employment." I agree. What makes this case different, however, is Densberger's directive. This is not a case where an employee worked out on his own initiative during his personal time to improve his physical conditioning. As noted, the claimant's supervisor directed the claimant to commit to a physical fitness program or regimen in order to advance a work-related purpose, and he considered the claimant's fulfillment of that directive to be part of the claimant's job duties. These unusual facts bring the claimant's physical fitness activities outside the reach of section 11 and within the scope of his employment.

¶ 73 I would therefore reverse the circuit court's judgment and vacate the Commission's decision.

¶ 74 Justice Stewart joins this dissent.