2016 IL App (1st) 143745WC-U

Order filed: May 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

KATHLEEN A. HAGAN, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Illinois Workers' Compensation Commission, Defendants-Appellees).	)))))))))))	Appeal from the Circuit Court of Cook County, Illinois. Appeal No. 1-14-3745WC Circuit No. 13-L-51027 Honorable Robert Lopez Cepero, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman and Stewart concurred in the judgment.
Justice Harris dissents from the judgment, joined by Justice Hudson.

ORDER

¶ 1 *Held*: The uncontroverted facts regarding the frequency to which the claimant was exposed to the neutral risk of stepping down off a platform established that the claimant was exposed to a risk of injury greater than the general public; thus, the decision of the Commission that the claimant's injuries did not arise out of and in the course of her employment was reversed.

¶ 2 The claimant, Kathleen A. Hagan, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), seeking benefits for injuries to her right knee allegedly sustained while working as an arbitrator for the Illinois

Workers' Compensation Commission (employer) on February 13, 2008. These injuries were alleged to have occurred while the claimant was conducting a hearing at the employer's Chicago office. The matter was tried by special arbitrator Alan Rosen, appointed pursuant to section 18.1 of the Act. 820 ILCS 305/18.1 (West 2004). Following a hearing on July 11, 2013, the special arbitrator found that the claimant had failed to establish that the injuries sustained by the claimant on February 13, 2008, arose out of her employment. More specifically, the special arbitrator found that at the time and place the claimant was injured she was not exposed to a risk of injury greater than that to which the general public would be exposed. The decision of the special arbitrator became the decision of the Illinois Workers' Compensation Commission (Commission). 820 ILCS 305/18.1 (West 2004). The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the decision of the Commission.[1] The claimant then filed a timely appeal with this court.

¶ 3 Although both parties propose several issues, the ultimate issue is whether the special arbitrator's finding that the claimant was not exposed to a risk of injury greater than that to which the general public was exposed was either contrary to law or against the manifest weight of the evidence.

¶ 4 FACTS

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on July 11, 2008. The claimant was the only witness to testify at the hearing.

¶ 6 The claimant had been employed by the employer since 1983, initially as an administrative clerk and assistant to the Chairman. She was employed as an arbitrator since

[1] Although there is no judicial review of decisions of the Commission involving the State as employer, the Act provides for judicial review of cases involving former or current employees of the Commission. 820 ILCS 305/18.1 (West 2004).

1989, and was employed in that capacity on February 13, 2008. As an arbitrator, the claimant conducted pre-trials and trials, retrieved and returned files to and from a vault, and performed other various administrative functions. The claimant testified that she had conducted thousands of trials over her tenure with the employer.

¶ 7 The claimant was assigned to hearing room 210 at the employer's Chicago office. She had been assigned that particular hearing room for several years and had conducted hundreds of trials in that hearing room. The claimant testified as to the layout and configuration of the hearing room in great detail. The arbitrator's desk was located on a riser or platform which elevated the desk approximately eight inches above the floor of the room. Two separate desks for the opposing attorneys were located immediately in front of the arbitrator's desk. Those desks, however, were not on the riser. The attorney desks were approximately six inches apart and approximately four inches from the arbitrator's desk. The record established that only hearing rooms in the Chicago office had risers or platforms. The claimant further testified that there were chairs on the riser for a witness and for a court reporter. Those chairs were located to the left of the arbitrator's chair. On the claimant's right side was a bookcase which abutted her desk. There was a three-foot gap between the bookcase and the wall of the room, which was the claimant's only ingress and egress from her desk. When the claimant wished to go to or from her desk, she would step down off the riser to access the three-foot gap between the bookcase and the wall. After stepping down off the riser, she would then traverse between the bookcase and the wall to exit the hearing room. The record established that only the arbitrator, *i.e.*, the claimant, would utilize the area between the bookcase and the wall to step off the platform and exit the room. The claimant testified that there was a strip of white tape on the left side of the riser near the witness chair, which was there to alert witnesses and court reports to the risk of

falling off the platform and onto the floor. There was no corresponding strip of white tape on the right side of the riser.

¶ 8 The claimant testified that her routine would be to work in her office until approximately 8:45 a.m. and then proceeded to the hearing room. She conducted pre-trials and heard motions from 9:00 a.m. until approximately 10:30 a.m. Her normal procedure was to leave the hearing room after completing pre-trials in order to retrieve files for the upcoming trial. The files were located in a vault in a room adjacent to the hearing room. She testified that she retrieved the files herself prior to the start of each trial, as opposed to having someone bring the files to her. She testified that this was the most efficient way to keep the hearing process moving. Further, she testified that prior to each hearing she would go to the vault to retrieve the relevant files.

¶ 9 On February 13, 2008, the claimant had just finished the morning pre-trials and was preparing for the first trial of the morning. She testified that she rose from her chair to go to the vault to retrieve the file for the next case. As she rose from her chair, she turned and stepped toward the edge of the platform in the direction of the passage between the bookcase and the wall. As she stepped off the platform, leading with her right foot, she spotted out of the corner of her eye a file resting on the top of the bookshelf. Remembering that the file needed to be returned to the vault, she reached back to grab it, as she was still descending off the platform. While still in mid-step off the platform, she turned her body toward the file on top of the bookcase, and reached for it with her left hand. As she reached toward the bookcase, her right foot came down awkwardly on the floor, which was approximately eight inches lower that her left foot and the rest of her body. Her right knee twisted, causing her to fall forward. As she fell, she was still holding onto the file. Her left forearm struck one of the desks, and she came to rest on the floor. The claimant testified that the force of the fall "knocked the wind out of her." She testified that she experienced immediate severe pain in her right knee.

¶ 10 The claimant further testified that, after she fell, she was able to "hop" back to her chair, with assistance from the court reporter. The court reporter then retrieved the file from the vault and the claimant conducted the trial, which lasted several hours. The claimant testified that her right knee was very painful throughout the trial.

¶ 11 After concluding the trial, the claimant sought treatment in the emergency department at Northwestern Memorial Hospital. The staff-generated report noted that claimant gave a history of "twisted knee stepping awkwardly today." The report further noted the claimant reported that she "took a wrong step down stairs this a.m." and "twisted knee while getting up from chair."

¶ 12 The following day, February 14, 2008, the claimant completed a standard notice of injury form in which she noted that her "right knee twisted" while she was "stepping down from the riser in [her] hearing room *** at the right side of [the] Arbitration desk." The claimant did not note in the injury form that she was reaching backward to grab a file on top of the bookcase at the time of the accident. When asked why the injury report did not mention her reaching for a file, the claimant testified that, at the time, she did not think that it was important. She also testified that she did not believe there was enough room in the injury form to go into great detail.

¶ 13 On February 21, 2008, the claimant sought treatment with Dr. Stephen Gryzlo, a board certified orthopedic surgeon at Northwestern Medical Faculty Foundation. Dr. Gryzlo made the following notation: "while at work in the courthouse, stepping away from the desk, twisted the right knee, heard an audible pop and had immediate swelling." The record established that the claimant underwent two right knee MRIs in February 2008. On April 1, 2008, Dr. Gryzlo performed a right knee arthroscopy with debridement and microfracture repair of the medial and lateral femoral condyle. The claimant's post-operative care included use of a CPM machine, knee immobilization, the use of a walker, anti-inflammatories, and physical therapy. Dr. Gryzlo removed the claimant from all work from April 1, 2008, until June 16, 2008.

¶ 14 On May 22, 2008, Dr. Gryzlo noted that the claimant had fallen approximately three weeks prior, while using her walker. Dr. Gryzlo diagnosed a grade 1 medial collateral ligament sprain of the left knee. He prescribed additional physical therapy for both knees and the use of anti-inflammatories as needed. The claimant's condition did not improve.

¶ 15 On April 9, 2009, the claimant reported continuing right knee pain. On April 17, 2009, an MRI of the right knee revealed additional pathologies. On July 10, 2009, Dr. Gryzlo performed a second right knee arthroscopy with debridement. The claimant was unable to work from July 10, 2009, to August 9, 2009. On September 14, 2009, Dr. Gryzlo authorized the claimant to return to work with desk duty only. On March 25, 2010, Dr. Gryzlo authorized a return to work without restriction, with a recommendation for annual follow-up examinations.

¶ 16 On October 21, 2011, Dr. Gryzlo examined the claimant and noted her report of right knee soreness, stiffness, and discomfort. He recommended continued aquatic exercise, periodic use of a knee brace, and occasional use of anti-inflammatories.

¶ 17 On November 6, 2012, the claimant was examined at her request by Dr. Preston Wolin, a board certified orthopedic surgeon. Dr. Wolin noted that the claimant reported an injury in February 2008 when "[s]he stepped down for a 6-8 inch platform as she was reaching back for a file on her desk when her right knee twisted and gave way as she stepped onto the floor below the platform *** she felt a crunch and severe pain in her right knee." Dr. Wolin opined that the claimant's condition of ill-being of the right knee was causally related to the February 2008 accident. He further opined that the claimant's left knee condition of ill-being was related to the consequences of the injury to the right knee, which forced overuse and increased pressure to the left knee to compensate for the diminished use of the right knee. He further opined that the claimant was at maximum medical improvement (MMI) in regard to both knees.

¶ 18 On November 21, 2012, the claimant was examined at the request of the employer by Dr. Nikhil Verma, a board certified orthopedic surgeon. Dr. Verma recorded that, on February 13, 2008, the claimant injured her right knee when she stepped down form a riser at which time her right knee twisted and gave way resulting in immediate knee pain. He diagnosed pathologies related to the February 13, 2008, incident. He further opined that the claimant was at MMI. Dr. Verma gave no diagnosis or opinion regarding the left knee.

¶ 19 At the time of the hearing before the special arbitrator, the claimant was employed full time without restriction as a public service representative for the Illinois Secretary of State. She testified that she still experiences right knee pain which radiates above and below the knee.

¶ 20 The special arbitrator denied the claimant's application for benefits on the ground that she failed to show that her injury arose out of her employment because she did not demonstrate that her employment qualitatively or quantitatively increased her risk of injury. The special arbitrator determined that the risk that contributed to the claimant's fall was a neutral risk since descending a step is a universal necessity that exists in nearly all buildings and that the claimant had failed to demonstrate that she was exposed to a risk of injury to a greater extent that the general public. The special arbitrator compared the riser to a curb at the edge of a parking lot that any member of the general public would be expect to negotiate while walking to or from a building. He further noted that the claimant presented no evidence that there was any defect in or hazard on the riser, nor had she established that she was carrying anything at the time of the accident as he did not credit her testimony that she was reaching for or carrying a file at the time she fell. The special arbitrator noted that the claimant failed to provide testimony of other witnesses who could have corroborated her testimony. The employer did not present any evidence to rebut the claimant's testimony regarding how the accident occurred or the frequency to which the claimant was exposed to the risk.

¶ 21 Based upon the finding that the claimant's injury did not arise out of her employment, the special arbitrator did not address the claimant's other issues regarding temporary disability benefits, medical expenses, or the nature and extent of her permanent injuries. The special arbitrator's decision became the decision of the Commission by operation of law. 820 ILCS 305/18.1 (West 2008).

¶ 22 The claimant sought review in the circuit court of Cook County, which confirmed the decision of the Commission. The claimant then filed this timely appeal.

¶ 23 ANALYSIS

¶ 24 In order to recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his or her injury "arose out of" and "in the course of" the employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). In the present case, the parties do not dispute that the claimant's injuries occurred in the course of her employment, *i.e.*, within the general time and place boundaries of her employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). The disputed issue here concerns the "arising out of" element of a workers' compensation claim.

¶ 25 For an injury to arise out of one's employment, it must have its origin in some risk connected with or incidental to the employment, so that there is a causal connection between the employment and the injury. *Lakeside Architectural Metals v. Industrial Comm'n*, 267 Ill. App. 3d 1058, 1062 (1994). There are three types of risks to which an employee might be exposed: (1) risks distinctly associated with the employment; (2) risks which are personal to the employee; and (3) neutral risks which have no particular employment or personal characteristic. *First Cash Financial Services*, 367 Ill. App. 3d at 106. Where a neutral risk is concerned, to sustain a compensable accident, the claimant's employment must expose her to a risk to a greater degree than that to which the general public is exposed. *Adcock v. Illinois Workers' Compensation*

Comm'n, 2015 IL App (2d) 130884WC, ¶33. When analyzing a neutral risk, the increased degree of risk to the claimant may be either qualitative (*i.e.*, when some aspect of the employment contributes to the risk) or quantitative (*i.e.*, when the employee is exposed to the risk more frequently than members of the general public by virtue of the employment). *Id.* at ¶ 32.

¶ 26 Here, the special arbitrator found that the claimant's injuries were the result of the claimant's exposure to a neutral risk and that she had failed to establish that her exposure to that risk was greater than that to which the general public was exposed. On appeal, the claimant challenges both the characterization of the risk to which she was exposed as "neutral" and the finding that her exposure to risk was not greater than that to which the general public was exposed.

¶ 27 The claimant first maintains that the special arbitrator erred in characterizing the risk to which she was exposed as "neutral." On the contrary, she maintains the risk to which she was exposed was "distinctly associated" with her employment and thus compensable as a matter of law. Citing our recent decisions in *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC and *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, the claimant maintains that act of traversing up and down the riser specifically for the purpose of retrieving files from the vault which were necessary to the conduct of her employment was an "employment related task," thus making the risk of injury while performing that task an "employment risk" and not a "neutral risk." See *Autumn Accolade*, 2013 IL App (3d) 120588WC at ¶23; *Young*, 2014 IL App (4th) 130392WC at ¶ 28.

¶ 28 The employer counters by referring to our recent decision in *Adcock* wherein a majority of this court questioned whether the Commission could forego a "neutral risk" analysis any time the claimant was injured while performing his or her required work duties. *Adcock*, 2015 IL App

(2d) 130884WC ¶41 n.2. The employer suggests that the *Adcock* footnote, stating that "to the extent that *Young* and *Accolade* conflict with our analysis in this case, we decline to follow them," effectively overruled our holdings in *Young* and *Autumn Accolade*. We agree that the claimant's injuries were the result of a "neutral risk" and, thus, she must establish either a qualitative or quantitative increased exposure to a risk greater than the general public.

¶ 29 Generally whether a claimant's injury arose out of and in the course of her employment is a question of fact for the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1056, 1059-60 (2004). However, when the facts are undisputed and susceptible to a one single inference, the question becomes one of law and is subject to *de novo* review. *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC ¶ 19. In the instant case, the relevant facts were undisputed by the parties. The claimant was the only witness to testify at the hearing. Her undisputed testimony established that on February 13, 2008, she was injured when she fell approximately eight inches off a riser or platform while attempting to negotiate a three foot wide passage which was the only pathway to the vault where the necessary files were located. The claimant's unrebutted testimony further established that it was necessary for her to perform the task of stepping on and off the riser on hundreds of occasions over several years. While there is no specific testimony as to the exact number of times the claimant was required to step on and off the riser, the employer concedes in its brief that the record would establish that the claimant was required to step on and off the riser at least six times per day, on at least ten days per month. The record is also undisputed that the claimant had been working in that particular hearing room for several years.

¶ 30 The employer posits, without reference to any evidence in the record, that six times per day would be less than one trip per day down a flight of stairs. This comparison is not relevant.

A relevant comparison would be traversing a parking lot curb six times per day, ten days per month for several years. While there is nothing in the record to establish how many times per day a member of the general public would be expected to traverse a parking lot curb, the claimant herein clearly established that her risk of injury was quantitatively greater than that to which the general public might reasonably be expected to be exposed.

¶ 31 Based upon the unrebutted facts of record, we find that the claimant established that she was exposed to a risk greater than that to which the general public is exposed. Claimant was injured while descending from an eight inch high riser to the floor. As the special arbitrator noted, the general public is exposed to a similar risk when traversing the curb of a parking lot. However, the record clearly established that the claimant was exposed to an increased degree of risk from a quantitative standpoint because she was exposed to the risk more frequently than members of the general public. *Adcock*, 2015 IL App (2d) 130884WC at ¶32. The record established that, while the claimant's action in stepping down off the riser was a neutral risk, the position of her chair in close proximity to the edge of the riser and the narrow passageway she had to traverse while stepping down from the riser with the degree of frequency that she was required to perform this maneuver was significantly greater in frequency than members of the general public would be expected to perform the similar maneuver of stepping down off a curb.

¶ 32 The employer maintains that, while the claimant's testimony was unrebutted, the special arbitrator, nonetheless, found her testimony not credible. We note, however, that the only portion of the claimant's testimony that the special arbitrator found to be not credible was her testimony that she was reaching for a file at the time she fell. Both the claimant and the employer recognize in their respective briefs that the fact that the claimant may or may not have been reaching for a file when she fell has no relevance to the question of whether she suffered a compensable injury. The salient facts regarding the fall itself, and the frequency to which the

claimant was exposed to the increased risk of falling were not rebutted or discredited. Therefore, reviewing the record *de novo*, we do not defer to the special arbitrator's findings. We find that the special arbitrator erred in finding that the claimant failed to prove that she sustained a compensable injury on February 13, 2008.

¶ 33 The claimant next maintains that the Commission erred in not awarding her temporary total disability benefits, permanent partial disability benefits, and certain medical expenses. Since those issues were not actually ruled upon by the Commission, the appropriate remedy is to remand the matter to the Commission for a full determination of those issues. *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 285 (2004).

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court which confirmed the decision of Commission is reversed. The decision of the Commission is reversed and the cause is remanded for further proceedings consistent with this decision.

¶ 36 Circuit court reversed; Commission reversed; cause remanded.

¶ 37 JUSTICE HARRIS, dissenting:

¶ 38 I respectfully dissent. In its analysis, the majority supplies a missing piece of evidence, then finds that the relevant facts are undisputed and concludes that, based on a *de novo* review, claimant's risk of injury was quantitatively greater than the risk posed to the general public. In my view, the circuit court's decision confirming the Commission's denial of benefits should be affirmed as it was not against the manifest eight of the evidence.

¶ 39 Here, the Commission found "that stepping off the step was a neutral risk and not a risk peculiar to [claimant's] employment with the Commission, and that by stepping down she was not exposed to a risk of injury greater than that to which the general public was exposed." The majority acknowledges there was nothing defective about the step itself. Instead, it finds

claimant was exposed to a neutral risk to a greater degree than the general public from a quantitative aspect. However, the majority concedes "there is no specific testimony as to the exact number of times the claimant was required to step on and off the riser[.]" In fact, there was no testimony at all on this point. In over 100 pages of testimony, claimant provided no information establishing the frequency of her traverses of the step. The majority attempts to supply the missing evidence by looking to the employer's brief where, after noting claimant presented no evidence as to the frequency of her traversing the step, the employer states *"[i]t may be inferred* that [claimant] crossed the riser in her hearing room at least six times a day: when starting and stopping for the day, coming to and from lunch, and going to and returning from the vault for files." (Emphasis added.) However, the Commission drew no such inference. Nor was it required to do so.

¶ 40 In her brief, claimant does not even argue a quantitatively increased risk of injury posed by her traversing the step. Instead, she argues she was "subject to unusual risks" including "1) the configuration of the hearing room; 2) the tight space from which she had to exit her desk; 3) the eight inch platform in the room; and 4) the necessity that she regularly traversed the riser to access and depart from her desk supplied to her by the Employer." Her argument on appeal appears to mirror the "arising out of" theory she presented at the arbitration hearing. Thus, it is not surprising the record does not contain evidence bearing on the quantitative aspect of the neutral risk posed by her traversing the step since she did not even make this argument at the hearing below.

¶ 41 Further, assuming *arguendo* the propriety of the majority's inference that claimant traversed the step at least six times per day, ten days per month, the Commission was still free to reject the *next* inference the majority draws—that the frequency of traversing the step exposed claimant to a risk of injury greater than that to which the general public was exposed. Assuming

claimant did traverse the steps six times per day, ten days per month, this would only amount to sixty times per month. Consider an employee who must traverse a curb on the way from the parking lot to her office. Assuming the employee works a five day work week, and leaves for lunch each day, an assumption at least as reasonable as the one the majority makes in this case, she would traverse the curb four times each day—once at the start of the day, twice at lunch, and once at the end of the day. Over the course of a month, the hypothetical employee would traverse the curb *eighty* times as compared to claimant's sixty times here. The Commission was not compelled to infer that claimant was exposed to a risk greater than the general public. *See Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 60, 541 N.E.2d 665, 668 (1989) ("It is well settled that if undisputed facts upon any issue permit more than one reasonable inference, the determination of such issues presents a question of fact, and the conclusion of the Commission will not be disturbed on review unless it is contrary to the manifest weight of the evidence."). The majority's *de novo* review in this case has resulted in it assuming the role of factfinder. In my view, we should instead apply the manifest weight of the evidence standard.

¶ 42 In sum, the record does not contain evidence from which we may conclude claimant's risk of injury was quantitatively increased as compared to the risk posed to the general public. Even if one were to draw an inference relating to the frequency of claimant's traverses of the step as suggested by the majority, the Commission was still free to infer that this frequency did not expose her to a quantitatively increased risk of injury as compared to the general public. The Commission's finding that traversing a step is a neutral risk and that claimant was not exposed to the risk to a greater degree than the general public is not against the manifest weight of the evidence. I would affirm.

¶ 43 JUSTICE HUDSON joins in the dissent.