2016 IL App (5th) 150067WC-U

NO. 5-15-0067WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARTIN McMANUS,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Clinton County.
	)	
v.	)	No. 12-MR-51
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al.* (S.M. Bush Enterprises,	)	William J. Becker,
Inc., d/b/a New Baden Wilbert Vault, Appellee).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's finding that the claimant's accident did not arise out of his employment is not against the manifest weight of the evidence where, at the time of the accident, he was engaged in a personal project without the permission or acquiescence of the employer. The arbitrator's rejection of OSHA and State Fire Marshal reports was not an abuse of discretion.

¶ 2 The claimant, Martin McManus, filed an application for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2006)), alleging he sustained second and third degree burn injuries in an April 29, 2004, accident arising from his employment with his employer, S.M. Bush Enterprises, Inc. The claim proceeded to a bifurcated arbitration hearing on November 23 and December 21, 2010.

The arbitrator denied the claim finding that the claimant failed to prove that the accident arose out of his employment. The claimant sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision. The claimant filed a timely petition for review in the circuit court of Clinton County, which confirmed the Commission's decision. The claimant appeals. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearings on November 23 and December 21, 2010.

¶ 5 The claimant testified that he started working for the employer in September 2002, at age 17, when he dropped out of high school after completing his junior year. The employer manufactured concrete burial vaults and delivered them to cemeteries for funerals. The claimant was hired as a driver but also assisted with the production of the vaults and other shop work.

¶ 6 The claimant testified that there was an oxygen-acetylene torch system at the employer's facility that was used to repair equipment and fix other items around the shop. He testified that he did not have any specialized training on how to use it and that, prior to his accident, he had used the oxygen-acetylene torch "very little" in his job.

¶ 7 The claimant testified that on April 29, 2004, he brought to work two 55-gallon barrels a friend had obtained from a Saturn automobile dealer. He planned to use the oxygen-acetylene torch to cut the barrels in half to use as burn barrels for an upcoming camping trip. After the morning concrete pour, while waiting for the concrete to cure, he

went to get the barrels from his truck. He admitted that he intended to cut the barrels on company time. He testified that, as he was walking to his truck, he saw the plant manager, Edward VanMierlo, and asked permission to use the oxygen-acetylene torch to cut the barrels. As best he could remember, VanMierlo said "okay" or shook his head. The claimant testified that VanMierlo did not indicate that he could not use the torch to cut the barrels. He stated that he could have used the torch without permission from the employer, but he did not believe it would be "worth getting in trouble over." He admitted that he had some problems remembering the events of the day of the accident. He could not remember any conversation with his coworker, Kevin Schwaegel, and could not remember where and when he obtained the barrels from his friend.

¶ 8 The claimant testified that he went to his truck and drove it to the shed where the oxygen-acetylene torch was located. He stated that Schwaegel took one barrel while he placed the other barrel on a forklift. He then started the torch and touched it to the barrel, which exploded. Both men were burned. When he attempted to cut the barrel, he did not know that it contained a flammable liquid. Although one barrel was marked, the barrel he cut had no markings.

¶ 9 The claimant testified that he did not remember details of the accident. He remembered putting the torch to the barrel and then being on fire. He was airlifted to St. John's Hospital in Missouri where he stayed until the end of August. He suffered second and third degree burns to his torso and arms. He was placed in a medically induced coma. He had skin grafts from his legs and suffered numerous infections resulting in the

amputation of two toes. He had not worked since the accident and was receiving Social Security disability benefits.

¶ 10 VanMierlo testified that he worked for the employer at the time of the accident but had since retired. He had worked for the employer at the location of the accident and in the St. Louis location for 35 years. He stated that the claimant was a driver, but he also worked in the plant in the manufacturing process because all personnel were used to complete every job. VanMierlo testified that he thought the claimant had used the oxygen-acetylene torch to repair company equipment. He did not know if the claimant had formal training on how to use it, but he believed that the claimant had used an oxygen-acetylene torch at his grandmother's junk yard.

¶ 11 VanMierlo testified that he was at the plant on April 29, 2004, but did not witness the accident. He was in his office in the main building, and the explosion occurred in the shed approximately 100 yards away. He denied giving the claimant permission to cut the barrels. He testified that he did not know that the claimant and Schwaegel were cutting barrels on the day of the accident and only became aware of it after the explosion. Cutting barrels was not part of the claimant's job duties, and cutting a barrel he brought to the facility did nothing to further the employer's business interests. VanMierlo stated that if a barrel needed to be cut, the employer provided the barrel, and it was cut in the St. Louis plant. During his tenure with the employer, barrels were cut once every couple of years to be used as water containers to wash equipment. He stated that everything in the barrels at the plant was water-based.

¶ 12 The claimant testified that the employer allowed employees to use company equipment or company supplies for personal projects. He stated that employees used the waste concrete to make patio blocks, curbs, or steps for their homes. The claimant admitted that he was making the burn barrel for his personal use and that it would not have any benefit to the employer. It was the first and only time he brought barrels to the employer's facility to cut open.

¶ 13 VanMierlo testified that employees were allowed to use company equipment for personal projects on a case-by-case basis. It was up to him whether to grant or deny the permission. However, personal projects were never allowed to be done on company time. He stated that he did not give the claimant permission and that he was never advised of the fact that the claimant planned to do this project.

¶ 14 VanMierlo testified that Occupational Safety and Health Administration (OSHA) officials came to the plant on April 30, 2004, to investigate the accident. On September 30, 2004, OSHA conducted a closing conference at the employer's plant. The OSHA representative went over the final report with VanMierlo.

¶ 15 The claimant sought to enter into evidence an uncertified copy of the OSHA report, a certified copy of the OSHA report, and an Illinois State Fire Marshal's report. The employer objected, and the arbitrator rejected the exhibits on the grounds that the reports were hearsay and contained hearsay within hearsay. The claimant asserted that the reports should be admitted under the business records exception to the hearsay rule, but the arbitrator ruled that the claimant could not lay a proper foundation for the exception. The arbitrator also denied admission of the exhibits under the public records

exception to the hearsay rule. However, the arbitrator allowed the claimant to use the reports for impeachment purposes. In addition, by stipulation, the claimant was allowed to question VanMierlo about workplace violations determined by OSHA as a result of the investigation.

¶ 16 VanMierlo testified that, as the OSHA investigation progressed, OSHA officials gave him preliminary reports about what they had accomplished up to that point. He stated that he did not have any problems with the preliminary reports but did have a problem with the final report. VanMierlo was asked why the OSHA report stated that early in the investigation he had told an OSHA official that he had granted the claimant permission to use the oxygen-acetylene torch and at the closing conference he had denied giving the claimant permission. He stated he first saw the inconsistent statement about permission when he reviewed the final OSHA report with the investigator. He testified that he told the inspector that the part of the report that said he had given the claimant permission was false and that he wanted it taken out of the report. The OSHA representative told him that the statement could not be removed from the report.

¶ 17 VanMierlo admitted that the final report contained several violations, including failing to properly train employees in the use of an oxygen-acetylene torch and in the proper preparation of barrels containing flammable liquids before they were cut with an oxygen-acetylene torch. OSHA fined the employer $2,500, which was later reduced.

¶ 18 VanMierlo testified that numerous agencies had investigated the accident and that he had not told the Illinois State Fire Marshal or the insurance company that he had given the claimant permission to use the oxygen-acetylene torch to cut the barrels. When asked

why the fire marshal's report stated that he had given the claimant permission to use company equipment to cut the barrels, he stated that the claimant did not have permission.

¶ 19 The arbitrator found that the claimant failed to prove that on April 29, 2004, he sustained accidental injuries arising out of his employment with the employer and denied all benefits. This finding was based upon the arbitrator's determination that, at the time of the accident, the claimant was engaged in a personal endeavor, for his own benefit, such that the injury resulted from a personal risk that was not connected to his employment. On the issue of whether the claimant had permission to use company equipment to cut the barrel, the arbitrator, noting that the claimant admitted having trouble remembering the events of the day of the accident and that VanMierlo, who had retired from the employer, was an unbiased witness, found the testimony of VanMierlo more credible than that of the claimant. That finding notwithstanding, the arbitrator found that employer acquiescence alone cannot convert a personal risk into an employment risk.

¶ 20 The claimant sought review of the arbitrator's decision before the Commission, which affirmed and adopted the arbitrator's decision. The claimant sought judicial review of the Commission's decision in the circuit court of Clinton County, which confirmed the Commission's decision. The claimant appeals.

¶ 21 ANALYSIS

¶ 22 The claimant argues that the Commission's determination that his April 29, 2004, accident did not arise out of his employment is against the manifest weight of the

evidence. Although he acknowledges that he was engaged in a personal project at the time of his injury, the claimant argues that the fact that the employer permitted or acquiesced in his use of dangerous company equipment for the project, combined with the employer's knowledge that the claimant had not been adequately trained to use the equipment for the project, increased the risk of injury such that the claim should be compensable.

¶ 23 The claimant has the burden of proving, by a preponderance of the evidence, that his injury arose out of and in the course of his employment. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 35, 976 N.E.2d 1. The determination of whether an injury arose out of and in the course of a claimant's employment is a question of fact for the Commission to resolve, and its finding will not be set aside on review unless it is against the manifest weight of the evidence. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 24, 990 N.E.2d 284. A finding of fact is contrary to the manifest weight of the evidence when an opposite conclusion is clearly apparent. *Id.* The test of whether the Commission's decision was against the manifest weight of the evidence is whether there is sufficient evidence to support the Commission's finding, not whether another tribunal might reach an opposite conclusion. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1.

¶ 24 The Act is intended to protect an employee against risks and hazards that are peculiar to the nature of the work he is employed to do. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 1008 (1987). A claimant's injury is compensable under

the Act only if it arises out of and in the course of employment. *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 25, 990 N.E.2d 284. Both elements must be present at the time of the claimant's injury in order to justify compensation. *Id*. " 'In the course of' the employment refers to the time, place, and circumstances under which the claimant is injured." *Id*. An injury occurs in the course of employment when it is sustained while the claimant is at work or while performing reasonable activities in conjunction with his employment. *Id*. "Arising out of" the employment refers to the cause of the claimant's injury. *Id*. ¶ 26. An injury arises out of the employment when the risk of injury is peculiar to the work or is a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. *Orsini*, 117 Ill. 2d at 45, 509 N.E.2d at 1008. A risk is incidental to employment when it is connected with what the employee must do to fulfill his duties. *Id*. An injury does not arise out of employment if it results from a hazard to which the employee would have been equally exposed apart from the employment. *Id*. at 45, 509 N.E.2d at 1008-09. "Thus, an injury is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment." *Id*. at 45, 509 N.E.2d at 1009. Injuries resulting from personal risks generally do not arise out of employment unless the workplace conditions significantly contribute to the injury or expose the employee to an added or increased risk of injury. *Rodin v. Industrial Comm'n*, 316 Ill. App. 3d 1224, 1229, 738 N.E.2d 955, 959 (2000). Here, the sole finding of the Commission was that the claimant's injury did not arise out of his employment. Accordingly, we will limit our analysis to that issue.

¶ 25 The claimant argues that the cause of the accident was his use of inherently dangerous equipment owned by the employer, for a personal project, with the employer's permission or acquiescence. He asserts that he was young, untrained, and inexperienced in the operation of an oxygen-acetylene torch and using it to cut a barrel that contained a flammable liquid. He argues that he should have been trained on the use of the torch and the material to be worked on. He asserts that the permissive use of dangerous equipment without adequate training created workplace conditions that contributed to his injury and increased his risk of injury, converting a personal risk into an employment risk and rendering the claim compensable.

¶ 26 *Orsini* is instructive. In *Orsini*, the claimant worked as an automobile mechanic for the employer. *Orsini*, 117 Ill. 2d at 41, 509 N.E.2d at 1007. While awaiting the delivery of parts needed to complete a job he was performing for the employer, the claimant began to adjust the carburetor on his personal automobile, which was parked in one of the employer's service bays. *Id.* at 42, 509 N.E.2d at 1007. The car engine was running. *Id.* The claimant was leaning over the front of the car to adjust the carburetor, when the car lurched forward, pinning him between the car and a work bench and fracturing both of his femurs. *Id*. The owner of the garage testified that he knew the claimant was working on his personal automobile on the day of the accident and that the claimant had done so on previous occasions with his knowledge and permission. *Id*.

¶ 27 The supreme court upheld the Commission's finding that the claimant's injury did not arise out of his employment. *Id*. at 49, 509 N.E.2d at 1010. The court found that the risk to the claimant was not increased by any condition of the employment premises; the

injury was a result of a defect in the claimant's car and could have occurred anywhere; the tools provided by the employer were not defective; and the claimant was not required to work on his personal automobile during work hours. *Id*. at 46-47, 509 N.E.2d at 1009. The court held that the claimant voluntarily exposed himself to an unnecessary danger entirely separate from the activities and responsibilities of his job, and was performing an act of a personal nature solely for his own convenience, an act outside of any risk connected with his employment. *Id*. at 47, 509 N.E.2d at 1009. The court further found that employer acquiescence alone cannot convert a personal risk into an employment risk. *Id*. The court stated that it had "consistently held that where the injury results from a personal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable." *Id*. at 47, 509 N.E.2d at 1009-10.

¶ 28 The claimant seeks to distinguish this case from *Orsini*, arguing that here the employer permitted or acquiesced in his use of inherently dangerous equipment without proper training. The claimant concedes that permission or acquiescence *alone* will not convert a personal risk into an employment risk. Nevertheless, the claimant asserts that here there was also a risk inherent in the workplace, being the claimant's use of inherently dangerous equipment without proper training. Thus, it is clear that proof of permission or acquiescence is critical to the claimant's argument. If the claimant used the torch to attempt to cut the barrel without any knowledge of the employer, as VanMierlo testified, there is little doubt that the injury resulted solely from a noncompensable personal risk. Under those circumstances, the claimant's accident would fall squarely within the *Orsini* court's description of a claimant having voluntarily exposed himself to an unnecessary

danger entirely separate from the activities and responsibilities of his job, while performing an act of a personal nature solely for his own convenience, which was outside of any risk connected with his employment.

¶ 29 Here, there was conflicting evidence on the issue of whether the claimant had permission to use the torch to cut the barrel. While admitting that his memory of the day of the accident was lacking, the claimant testified that he told VanMierlo he was going to cut the barrels and that VanMierlo either said "okay" or shook his head. On the other hand, VanMierlo adamantly denied that he ever gave the claimant permission to use the torch to cut the barrel and testified that he had no knowledge of the claimant's personal project until after the explosion. VanMierlo was impeached with the OSHA and State Fire Marshal's reports, both of which noted that he had given the claimant permission. VanMierlo testified that he never told an OSHA investigator that he had given permission and pointed out that the report itself documented that, at the closing conference, he had objected to that part of the report and insisted that it be removed from the report. The State Fire Marshal's report simply stated that, "McManus or Schwaegel had permission to use company equipment to cut the barrels." When confronted with that statement, VanMierlo insisted that he never told the investigator that he had given permission. Schwaegel was not called as a witness. Neither the OSHA investigator nor the State Fire Marshal investigator was called as a witness. On this issue, based upon the evidence presented, the Commission noted the claimant's lack of memory, found VanMierlo to be an unbiased witness because he had retired from the employer, and found VanMierlo to be more credible than the claimant. It is the function of the Commission to decide

questions of fact, judge the credibility of witnesses, determine the weight their testimony is to be given, and resolve conflicts in the evidence. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 35, 976 N.E.2d 1. Here, the Commission determined that the claimant failed to prove that he had permission to use the torch to cut the barrel, and that finding is not against the manifest weight of the evidence.

¶ 30 The claimant alternatively argues that, despite the lack of permission, the employer acquiesced in his use of the torch by establishing a practice of allowing employees to use company equipment for personal projects. The claimant testified that employees were allowed to use excess concrete to make patio blocks and steps and that one employee was allowed to fill a barrel with concrete. There was no evidence that employees had been allowed to use the oxygen-acetylene torch for personal projects. VanMierlo testified that the employer's company policy was that employees could ask permission to use company property for a personal project, but that no personal projects were allowed on company time. The Commission, noting that the accident took place on company time, credited the testimony of VanMierlo over that of the claimant. In addition, the Commission found that "there was no practice of allowing employees to cut barrels." Thus, the Commission found that the employer had not acquiesced in a practice of allowing employees to engage in personal projects that would have justified the claimant using the torch to cut a barrel on company time, and that finding is not against the manifest weight of the evidence.

¶ 31 Once it is determined that the employer neither permitted nor acquiesced in the claimant's use of the torch to cut the barrel, the claimant's argument fails. We need not

analyze whether the claimant's use of dangerous equipment without proper training was the type of workplace risk that would convert a personal risk into an employment risk when his use of the equipment was without the employer's permission or knowledge. Here, the Commission found that at the time of the accident the claimant was engaged in a personal project without the employer's knowledge. Accordingly, the Commission's finding that the accident did not arise out of the claimant's employment is not against the manifest weight of the evidence.

¶ 32 Finally, the claimant argues that the arbitrator abused her discretion by refusing to admit the OSHA report and the State Fire Marshal report into evidence. The claimant asserts that he was prejudiced by this ruling because the reports would have shown that VanMierlo made inconsistent statements about whether he gave the claimant permission for the personal project and would have shown that OSHA issued citations against the employer for not properly training the claimant. The Commission did not discuss this specific evidentiary ruling but adopted the arbitrator's decision in its entirety. We review evidentiary rulings made during the course of a workers' compensation proceeding under the abuse-of-discretion standard. *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, ¶ 47, 47 N.E.3d 1167. An abuse of discretion occurs when no reasonable person would take the view adopted by the Commission. *Id.*

¶ 33 The arbitrator rejected the reports on the ground that they were hearsay, and contained hearsay within hearsay, and the claimant failed to lay a foundation for any recognized exception to the hearsay rule. Hearsay is defined as "a statement, other than

one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Hearsay is not admissible unless the testimony falls within a recognized exception to the hearsay rule. Ill. R. Evid. 802 (eff. Jan. 1, 2011). "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in [the Illinois Rules of Evidence]." Ill. R. Evid. 805 (eff. Jan. 1, 2011). Without doubt, the investigator's statements contained within the reports are hearsay. Likewise, the statements the investigators attributed to VanMierlo within their reports are hearsay within hearsay.

¶ 34 The claimant first argues that the reports are not hearsay because they were not offered to prove the truth of the matter asserted. He argues, in his brief, that "the OSHA file was offered to prove that VanMierlo gave completely contradictory statements to the OSHA investigators at the beginning and then at the end of the investigation." He then concludes that "the report was offered to prove he made the statements, not to prove the truth of the matter asserted." This argument is nonsensical. Clearly, the report was at least offered to prove the truth of the investigator's assertion that VanMierlo made the statements, and the investigator's statements in the report are hearsay.

¶ 35 At arbitration, the claimant argued that the reports were admissible under either the business records exception or the public records exception to the hearsay rule. The arbitrator rejected this argument because the claimant failed to lay a foundation for the business records exception and because the reports were not the type of public records to which the public records exception is applicable. It is clear that no witnesses from OSHA

or the State Fire Marshal's office were called to lay a foundation under the business records exception. Further, these were reports of investigations containing investigators' comments, opinions, and conclusions, which are generally not the type of public records falling within the public records exception. See *Oak Lawn Trust & Savings Bank v. City of Palos Heights*, 115 Ill. App. 3d 887, 896, 450 N.E.2d 788, 796 (1983) ("[R]ecords which concern causes and effects, involve the exercise of judgment and discretion, expressions of opinion, or the drawing of conclusions are not admissible under the public records exception."). In this court, and before the Commission, the claimant also argued that VanMierlo's statements contained within the reports were admissible as an admission of a party opponent. We have scoured the record and cannot find that this argument was made to the arbitrator. Regardless, even if VanMierlo's hearsay within hearsay statements contained within the reports were admissible under an exception to the hearsay rule, the reports themselves would still be inadmissible hearsay. Accordingly, we cannot say that the arbitrator's rejection of the OSHA and State Fire Marshal reports was an abuse of discretion.

¶ 36 Furthermore, even if the arbitrator erred in excluding the reports, errors in the admission or exclusion of evidence do not require reversal when there has been no prejudice or the evidence does not materially affect the outcome. *Presson v. Industrial Comm'n*, 200 Ill. App. 3d 876, 880, 558 N.E.2d 127, 130 (1990). Throughout these proceedings, the claimant has maintained that he was seeking to admit the reports to prove that VanMierlo made inconsistent statements and that OSHA issued violations to the employer for failing to properly train the claimant. As previously stated, the

arbitrator allowed the claimant to use the reports for impeachment. During a lengthy cross-examination, VanMierlo admitted that the reports documented that he told the investigators that he had given the claimant permission to use the torch to cut the barrel, but he denied making those statements. Further, by stipulation, the claimant was allowed to use the reports to introduce VanMierlo's testimony that OSHA issued the employer safety violations for failing to properly train the claimant. During cross-examination, the claimant's counsel read the specific violations to VanMierlo from the report and VanMierlo admitted that OSHA issued the violations and that the employer paid a fine. Thus, the claimant was allowed to meet both objectives without introducing the reports into evidence, and any error in excluding the reports was harmless.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm the judgment of the circuit court of Clinton County, confirming the decision of the Commission.

¶ 39 Affirmed.