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January 26, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 170054WC-U

NO. 4-17-0054WC

Order filed January 26, 2018

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

B. NADINE RUND,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Champaign County.
	)	
v.	)	No. 16-MR-75
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION, *et al.*,	)	Thomas J. Difanis,
(University of Illinois, Appellee).	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The Commission erred when it reversed the decision of the arbitrator and denied benefits to the claimant because it concluded that she did not sustain an accident which arose out of her employment. The Commission employed a flawed neutral risk analysis that did not consider the claimant's quantitative-increased-risk argument that she was exposed to a common risk more frequently than the general public. There is only one reasonable inference to be drawn from the undisputed facts relevant to the claimant's quantitative-increased-risk argument: the claimant was exposed to a common risk—that

of falling while engaging in the everyday activity of traversing stairs—more frequently than the general public, and therefore her injury arose out of her employment and was compensable.

¶ 2 FACTS

¶ 3 The claimant, B. Nadine Rund, appeals the decision of the circuit court of Champaign County that confirmed the unanimous decision of the Illinois Workers' Compensation Commission (Commission), which found the claimant had failed to prove she sustained accidental injuries arising out of and in the course of her employment with the employer, the University of Illinois. On April 17, 2014, the claimant filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2014)), wherein she alleged that on February 21, 2014, while in the course and scope of her employment, she suffered an injury to her right wrist, right thigh, and right hip as a result of a fall down stairs. An arbitration hearing was conducted on the application on February 23, 2015.

¶ 4 The first witness to testify at the hearing was the claimant. She testified that she was a staff nurse employed by the University of Illinois at the University's McKinley Health Center (McKinley), and had been so employed for seven years as of the date of the hearing. Her duties included getting back labs for patients, helping doctors with procedures, assessing vital signs of patients, and "just [taking] care of patients." She testified that on February 21, 2014, she was working. She testified that day was a Friday, which was "usually busy," and that her department, the Women's Health department, covered the University's "Dial-A-Nurse" telephone program "from 3 to 4 every day." The claimant testified that her department was "short staffed" on the day she was injured,

with only two registered nurses on duty, as well as "one MA person that helps get patients in rooms," because the department's two LPNs were not there at the time. She testified that handling the "Dial-A-Nurse" program always put her "a little behind," and forced her to "work a little faster" after it so she could complete her work before her shift ended at 4:30. She testified that on the day she was injured, a student patient had tested positive for a sexually transmitted disease, so the claimant had to "call and go over instructions" with the student. She spoke with the student at 4:20, and learned that the student "was going to be going home for the weekend and [the claimant] needed to start her on an antibiotic." The student was going to come in to pick up her antibiotic, so the claimant told her to give the claimant "a little bit of time to get it down to pharmacy." She testified she was "kind of in a hurry to go down to pharmacy to take the prescription."

¶ 5 While taking the prescription down to the pharmacy, the claimant "fell down the stairs." She testified that she did not know what caused her to fall. She described the stairs as "steeper" and stated that she always held onto the railing when going down the stairs. She had the prescription in her left hand and held the railing with her right hand. She testified that once she began to fall, she used her right hand to try to protect herself from hitting the wall. She testified that the pharmacy closed at 5:30, and that the pharmacy employees "like to have" prescriptions delivered to them "at least an hour before so they can get it prepared before the kids get there" to pick it up. She testified that it was important for the student to get her prescription filled that afternoon "because she had a sexually transmitted infection she needed to get treated." She testified that the

other nurse on duty was "out in the hall doing something" when the claimant left for the pharmacy. When asked if the other nurse could have taken care of the prescription if the claimant hadn't gotten to it before her shift ended, the claimant testified, "I don't know. I mean there is that possibility but she was busy doing end-of-the-workday stuff, but I wouldn't have left it for her to do because it was busy and we were short." She testified that if the other nurse had been too busy, the prescription "may not have gotten down there." When asked if there was a way to the pharmacy other than via the stairs, she testified there was an elevator; when asked why she didn't take the elevator, she testified that she sometimes used the elevator, but only when it is immediately available, stating, "sometimes when I do that I will push the elevator button and if it's right there I will get on it." Otherwise, she simply took the stairs, as she did just before she was injured. She testified that "on an average day" she would go up and down the stairs she was injured on "[p]robably 10 to 15 times." She testified that she had "tripped on those stairs before but never fallen." She described the stairs she fell down as "steep," testifying that "the first level you go down are [*sic*] totally different. They are more of a normal stairway. Then you hit the landing and then you go down the other ones and they are just steeper." She testified that after her fall, she and her husband inspected the stairs, but the only reason she could conclude she fell was because she "was in a hurry that day to try to take the prescription to pharmacy." The claimant also testified extensively about her injuries and recovery, which are not relevant to the issues raised in this appeal.

¶ 6 On cross-examination, the claimant conceded that there were other pharmacies the student could have gone to if her prescription had not been available in time from

McKinley, but noted that students "get a cheaper rate at McKinley." She testified that she "was in a hurry" when she descended the stairs, and did so "quicker than usual," but didn't know if she was running. She couldn't remember exactly where she began to fall, but thought she was past the landing and "was at the top part of the stairs" when she fell. She testified that the stairs were available for use by the general public. With regard to the elevator, she agreed it was another option for getting down to the pharmacy. When asked how long it "typically" took for the elevator to arrive after she pushed the button to summon it, the claimant testified, "It depends. Our building is kind of old so it may be a few, maybe a minute or two. I mean it might be a few minutes. It depends on where the elevator is. We have three floors." When asked if she was "placed in a hurry by the employer," she testified that "they don't like us to have overtime," that she had other tasks she still had to complete by the end of her shift at 4:30, and that she was "supposed to call and get approval" for overtime. When asked if the other nurse would have been available after 4:30 to take the prescription to the pharmacy, she first testified, "[s]he was busy because we were short staffed, so that is not possible," then added, "I mean it could have been possible but I don't ever – I don't leave my work." She explained that if she had talked to a student and "charted" that student's care, she believed it was her responsibility to take the prescription to the pharmacy. She was not asked on cross-examination about the frequency with which she used the stairs on a daily basis.

¶ 7 The other witness who testified at the arbitration hearing was Janna Franks. She testified that she had been employed at McKinley for "a little more than five years" as a staff registered nurse. She and the claimant worked together at McKinley and had

"worked together previously at another institution for probably 20 years in the same department." She described the claimant as "a very good nurse," as well as "a very hard worker, dependable, good to the patients." Franks testified that she was working with the claimant on February 21, 2014, with her shift running from 9 to 5:30. She testified that she and the claimant had "the same responsibilities but different doctors" with whom they worked. She agreed that if "anything was left" after the claimant's shift ended, it would be up to her "to get it done." When asked if the claimant "typically" left work for Franks to complete, Franks testified, "Only things that she can't finish herself." She described February 21, 2014, as a "very busy" day that she remembered "very well." She testified that if she were to chart a prescription for a patient, she would typically take it to the pharmacy, and would only leave it for someone else to do if she was "tied up doing something else." She testified she was familiar with the staircase the claimant fell down, which she testified she had to use "all the time." She added that she used the staircase "quite a lot." She described the staircase as "very steep compared to most stairs." On cross-examination, Franks testified that she didn't use the elevator to the pharmacy "very often," and added that "we are discouraged from [using the elevator] to save the elevators for the patients." She agreed that if the claimant had not been able to get the prescription taken care of, it "would have been permissible by McKinley" for the claimant to allow Franks to "complete that task for her."

¶ 8 On March 31, 2015, the arbitrator issued his decision, in which he found, *inter alia*, that the claimant's accident arose out of and in the course of her employment. The arbitrator ordered the employer to pay all reasonable and necessary medical bills, to pay

the claimant temporary total disability (TTD) benefits of $621.47 per week for 24 2/7 weeks, from February 22, 2014, through August 10, 2014, and to pay the claimant permanent partial disability (PPD) benefits of $559.32 per week for 51.25 weeks, because the arbitrator concluded that "the injury sustained caused the 25% loss of use of the right hand." In support of his finding that the accidental injury arose out of and in the course of the claimant's employment, the arbitrator examined several cases from this court and the Supreme Court of Illinois, and concluded on the basis of his comparison of those cases to the claimant's case, that the claimant "was subject to a greater risk of injury than the general public and that the accident sustained arose out of and in the course of her employment."

¶ 9 The employer sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission), as did the claimant. On December 16, 2015, the Commission issued a unanimous decision in which it reversed the decision of the arbitrator and concluded that the claimant had failed to prove that her injury arose out of and in the course of her employment. Accordingly, the Commission denied all benefits to the claimant. In its decision, the Commission conducted its own analysis of "arising out of" decisions issued by this court and the Supreme Court of Illinois. First, the Commission noted the three general groups of risks to which an employee may be exposed: (1) those distinctly associated with employment; (2) personal risks; and (3) neutral risks. The Commission then examined each group in more detail, and concluded that the claimant's case did not involve either of the first two groups, but instead involved the third group. The Commission therefore performed a neutral risk analysis, and

concluded that the claimant was not exposed to a greater risk of harm than the general public of falling while "traversing" the stairs in question.

¶ 10 The Commission noted that although the claimant had presented "a number of arguments" as to why she was exposed to a greater risk of harm than the general public—including that "[o]n a daily basis, according to [the claimant], she had to traverse the stairs up to fifteen times"—the arguments ultimately were, in the opinion of the Commission, "self-serving and unpersuasive." The Commission analyzed the claimant's arguments with regard to "her haste" when descending the stairs just prior to her fall, and concluded that "explanations of this kind go to [the claimant's] subjective experience and are immaterial in the final analysis." The Commission did not analyze or further comment upon the claimant's argument—which, as noted above, it had previously acknowledged—that on a daily basis she had to, as the Commission put it, "traverse the stairs up to fifteen times." The Commission noted that it also rejected the claimant's position because her "fall was unexplained" and therefore "to find a compensable accident in these circumstances would be to adopt the positional risk doctrine," which had been rejected by the Supreme Court of Illinois. As a result, the Commission found "that compensation in this matter is unwarranted," denied all benefits to the claimant, and declared that "[a]ll other issues are moot."

¶ 11 The claimant filed a timely petition for judicial review in the circuit court of Champaign County. On December 19, 2016, the circuit court affirmed the Commission's decision. On January 17, 2017, the claimant filed this timely appeal.

¶ 12 ANALYSIS

¶ 13 On appeal, the claimant contends the Commission erred when it reversed the decision of the arbitrator and denied benefits to her because it concluded that she did not sustain an accident which arose out of and in the course of her employment. Both the claimant and the employer agree that this case implicates only the question of whether the claimant's injury arose out of her employment, because it is undisputed that the accidental injury occurred in the course of her employment. Moreover, the claimant does not take issue with the Commission's conclusion that her accidental injury did not involve an employment risk or a personal risk; instead, she contends the Commission's neutral risk analysis was flawed because it was contrary to both the undisputed facts of this case, and the applicable case law. We agree.

¶ 14 To be compensable under the Act, a claimant's injury must be one "arising out of and in the course of the employment." 820 ILCS 305/2 (West 2014). As explained above, in this appeal the disputed issue is whether the claimant's injury "arose out of" her employment. A claimant's injury arises out of his or her employment if the origin of the injury "is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Saunders v. Industrial Comm'n*, 189 Ill. 2d 623, 627 (2000). "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling" the employee's duties. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987). The fact that an injury happened at the claimant's place of employment "does not automatically establish that the injury arose out of the claimant's employment." *Saunders*, 189 Ill. 2d at 628. This court has "recognized three general types of risks to which an employee may

be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics." *Metropolitan Water Reclamation Dist. of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011). As a general proposition, we have consistently held that if an activity is "an activity of everyday life," then an injury resulting from that activity should be analyzed under the neutral risk doctrine. See, *e.g.*, *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶ 33. We have specifically held that "[f]alling while traversing stairs is a neutral risk." *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, ¶ 20. "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Metropolitan Water*, 407 Ill. App. 3d at 1014. The increased risk in question "may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Id*; see also, *e.g.*, *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 19. "It is not enough that the employment placed claimant in a particular place at a particular time. This is known as positional risk and Illinois has expressly and repeatedly rejected this doctrine." *Illinois Institute of Technology Research Inst. v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163 (2000).

¶ 15 "The burden of establishing the necessary causal relationship between the injury and the employment rests with the claimant." *Saunders*, 189 Ill. 2d. at 628. "The question of whether an injury arises out of employment is generally a question of fact for the Commission and we will not disturb its determination unless it is against the manifest weight of the evidence." *Technology Research*, 314 Ill. App. 3d at 164. A finding of fact is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370 (2009). However, we "apply a *de novo* standard of review when the facts essential to our analysis are undisputed and susceptible to but a single inference, and our review only involves an application of the law to those undisputed facts." *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 17.

¶ 16 In this case, as noted above, the Commission failed to analyze or otherwise consider the claimant's quantitative-increased-risk argument that she was exposed to a common risk more frequently than the general public, despite the fact that the Commission acknowledged the claimant had made such an argument. The facts related to that argument are undisputed: the unrebutted testimony of the claimant was that "on an average day" she would go up and down the stairs she was injured on "[p]robably 10 to 15 times," and that in addition to the stairs, she used the elevator when it was immediately available to her. Although the employer could have attempted to challenge this testimony on cross-examination, counsel for the employer did not ask the claimant a single question about the frequency with which she used the stairs. Instead, the employer focused on the fact that an alternative way of reaching the pharmacy—via the elevator—

existed. The testimony regarding the elevator was undisputed as well: it could take "maybe a minute or two," or possibly up to "a few minutes" for the elevator to become available, and McKinley employees were "discouraged from [using the elevator] to save the elevators for the patients." Although the employer speculates "it could be argued the general public utilize stairs as often or on a more frequent basis than" the claimant, there is no basis in the record, or in common sense, for the proposition that members of the general public traverse stairs 10 to 15 times per day. To the contrary, there is only one reasonable inference to be drawn from the undisputed facts relevant to the claimant's quantitative-increased-risk argument: the claimant was exposed to a common risk—that of falling while engaging in the everyday activity of traversing stairs—more frequently than the general public, and therefore her injury arose out of her employment and was compensable. See, *e.g.*, *Metropolitan Water Reclamation Dist. of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011). Accordingly, the Commission erred when it reversed the decision of the arbitrator and denied benefits to the claimant because it concluded that she did not sustain an accident which arose out of her employment.

¶ 17 On appeal, the employer also contends "[t]here was no defect in the stairs." However, this argument is irrelevant to the issue of whether the claimant was exposed to a common risk—that of falling while engaging in the everyday activity of traversing stairs—more *frequently* than the general public. The employer also argues that the claimant's "rush was self-imposed" rather than imposed upon her by the employer. This too is irrelevant to the issue of whether the claimant was exposed to a common risk—that

of falling while engaging in the everyday activity of traversing stairs—more *frequently* than the general public, as is the employer's argument that because the claimant was holding the prescription in her left hand, "her right hand was free to hold the railing and safely descend the stairs." Moreover, it is axiomatic that the purpose of the Act is to provide prompt recovery without proof of fault for accidental injuries that happen in the work place during the course of work. See, *e.g.*, *Locasto v. City of Chicago*, 2016 IL App (1st) 151369, ¶ 10. To the extent the employer is attempting to insinuate that when the claimant was injured she was engaged in some kind of misconduct or wrongdoing that would prevent compensation under the Act, the employer has not adequately briefed this issue and has forfeited it. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing); see also, *e.g.*, *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208 (2009) (when party fails to support argument with citation to authority, party has forfeited claim on appeal).

¶ 18 Our decision in this case is consistent with prior cases in which we have considered, and found persuasive, a quantitative-increased-risk argument within the context of a neutral risk analysis. See, *e.g.*, *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶¶ 33-34 (injury compensable under neutral risk analysis because undisputed evidence established that the "claimant's job required him to turn in a chair more frequently than members of the general public while under time

constraints, which increased the risk of injury both quantitatively and qualitatively"); *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, ¶¶ 20-21 (injury compensable under neutral risk analysis because evidence that claimant had to traverse the stairs where he fell "a minimum of six times per day" established "that the frequency with which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis from that to which the general public is exposed"); see also *Komatsu Dresser Co. v. Industrial Comm'n*, 235 Ill. App. 3d 779, 788 (1992) (injury compensable because everyday activity of bending while working exposed claimant to greater risk than general public because of both frequency of bending, and manner in which claimant was forced to bend); *Kemp v. Industrial Comm'n*, 264 Ill. App. 3d 1108, 1111 (1994) (injury compensable because bending and stooping required of claimant differed "both in type and frequency" from that required of "average member of the general public"). We note as well that if, rather than acknowledging and then ignoring the claimant's quantitative-increased-risk argument that she was exposed to a common risk more frequently than the general public, the Commission had considered it, and after so doing had concluded her injury did not arise out of her employment, that conclusion would be against the manifest weight of the undisputed evidence, described in detail above, and therefore likewise would constitute reversible error by the Commission. See *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶ 36 (if claimant "confronted a neutral risk of daily living to a greater degree than members of the general public" then "a finding that the injury did not arise out of the employment is against the manifest weight of the evidence").

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, we reverse the judgment of the circuit court of Champaign County confirming the Commission's decision, vacate the Commission's decision, and remand to the Commission with instructions to consider the arguments of the claimant and the employer with regard to compensation, and to thereafter determine the amount of compensation to be awarded to the claimant.