2019 IL App (3d) 180141WC-U

FILED: January 11, 2019

NO. 3-18-0141WC

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

NICOLASA GAYTAN, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Flanders Precisionaire, Appellee).	)))))))))	Appeal from Circuit Court of Kankakee County No. 17MR406 Honorable Thomas W. Cunnington, Judge Presiding.

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

ORDER

¶ 1 *Held*: By finding that the injuries petitioner sustained in a vehicular accident did not arise from or in the course of her employment, the Illinois Workers' Compensation Commission did not make a finding that was against the manifest weight of the evidence or contrary to law.

¶ 2 The Circuit Court of Kankakee County upheld a decision by the Illinois Workers' Compensation Commission (Commission) to deny a claim by petitioner, Nicolasa Gayton, for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)). She was an employee of respondent, Flanders Precisionaire (Flanders), and suffered injuries on December 1, 2014, in a head-on collision, as she was driving to a follow-up medical appointment

for an earlier, work-related injury to her elbow. The Commission had found that the injuries petitioner sustained in the vehicular accident did not arise out of and in the course of her employment. She appeals the circuit court's judgment upholding that decision. Because the Commission's finding is neither against the manifest weight of the evidence nor contrary to law, we affirm the circuit court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. The Procedural History

¶ 5 Petitioner has filed two claims for workers' compensation. One claim is for the injury to her left elbow, and that claim is not at issue in this appeal. The other claim is for the injuries she sustained in the head-on collision as she was driving to a follow-up medical appointment for her elbow injury. The traffic-accident claim, which she filed with the Commission on December 8, 2014, is the one at issue in this appeal.

¶ 6 On May 3, 2017, the Commission affirmed the decision of the arbitrator, who had found that the injuries petitioner suffered in the traffic accident did not arise out of and in the course of her employment.

¶ 7 Petitioner then sought judicial review in the circuit court. On February 7, 2018, the court issued a memorandum opinion, which concluded:

> "[Petitioner's] arguments do not support a determination by this [c]ourt that the Commission's denial of compensation was against the manifest weight of the evidence or contrary to law. [Petitioner's] injuries incurred as a result of the auto accident neither arose from nor [were] sustained in the course of her employment."

¶ 8 Petitioner filed her notice of appeal on March 5, 2018.

¶ 9 B. The Arbitration Hearing

¶ 10 An arbitration hearing was held on December 10, 2015. It is unnecessary to recount the testimony of each and every witness in the hearing. The following brief summaries of testimony should suffice to impart an understanding of the case.

¶ 11 1. *The Testimony of Elizabeth Martinez*

¶ 12 Some employees of Flanders spoke Spanish but not English. Consequently, if they sustained an injury on the job, they needed a translator. Elizabeth Martinez, a human resources assistant at Flanders, served that need. She provided translation services initially, when the employee reported the injury to the supervisor. Also, because medical facilities in the area would not necessarily have Spanish-speaking personnel, Martinez telephoned the medical facility of the employee's choosing and scheduled an appointment. If necessary, Martinez even transported the employee to the appointment and provided translation services at the medical facility. All those services were Martinez's job, and Flanders paid her to perform them.

¶ 13 It was not Martinez's job, however, nor was it the policy of Flanders, to tell the injured employee which medical facility to visit. Martinez testified:

> "A. We call to wherever the employee requests to go. So[,] if they choose to call their personal medical provider, either they will call[,] or if they request for us to call for them, that's where we would call.
>
> Q. And if an employee is not requesting to be sent to a personal physician[,] normally the call is made to [Presence] St. Mary's [Occupational Health Center (St. Mary's) in Bourbonnais, Illinois]?
>
> A. Wherever they choose for us to call. We do not make that choice for them.

* * *

Q. Is it your testimony that when a Spanish[-]speaking injured employee requests medical care, that HR [(human resources)] from Flanders would not call St. Mary's unless that injured worker specifically said[,] ['C]all St. Mary's[']?

A. Yes."

¶ 14 On November 24, 2018, someone in human resources—Martinez could not remember whether it was she or someone else—telephoned St. Mary's in Bourbonnais and arranged for petitioner to receive medical treatment there for her elbow injury. Upon receiving the call from human resources, someone at St. Mary's filled out petitioner's exhibit No. 18, titled "Authorization for Medical Treatment."

¶ 15 2. *The Testimony of Irena Kay Perkins*

¶ 16 Irena Kay Perkins was petitioner's foreperson. On Thursday, November 20, 2014, when petitioner injured her left elbow, the line leader reported the injury, and immediately, around 11 a.m., Perkins took petitioner to a conference room. With the assistance of an interpreter, Maria Araceli Ferreira, they drafted an initial injury report. Perkins gave petitioner some ice for her elbow, and petitioner said she wanted to resume working and to wait and see how her elbow felt after the weekend. (Petitioner's shift was from 4 a.m. to 4:30 p.m., according to her testimony in an earlier hearing, the hearing of October 5, 2015, on her claim for the elbow injury.)

¶ 17 The following Monday morning, November 24, 2014, petitioner told Perkins, through an interpreter named Juanita, that she wanted to speak with human resources about her injured elbow. Perkins telephoned the head of human resources, Amy Hiser, and let her know that she was sending petitioner to speak with her.

¶ 18 3. *The Testimony of Nayeli Sanchez*

¶ 19 Nayeli Sanchez was another human resources assistant at Flanders. She had the same job duties as Martinez.

¶ 20 Sanchez did not specifically recall, but she believed it was possible that she was the one who telephoned St. Mary's on November 24, 2014, to notify St. Mary's that she would be bringing petitioner there to receive medical treatment for her elbow injury.

¶ 21 Respondent's attorney asked Sanchez what was Flanders's policy regarding the choice of a medical provider to treat a work-related injury. She answered:

> "A. We ask them if they have a personal doctor that they would like to see, and if they say no, we tell them that they have choices to where they want to seek treatment.
>
> * * *
>
> Q. Is there any one facility that you tell them they have to go to, any medical facility?
>
> A. No."

¶ 22 At about 3:30 p.m. on November 24, 2014, Sanchez gave petitioner a ride to St. Mary's and provided translation services after they arrived there. After examining petitioner's elbow, the doctor recommended a follow-up appointment. Sanchez then accompanied petitioner to the front desk. With Sanchez translating, the person at the front desk suggested several alternative dates for a follow-up appointment. Petitioner chose December 1, 2014. Sanchez explained to petitioner that it was the policy of Flanders to pay employees for going to the initial medical examination but not to pay them for going to any follow-up examination. In other words, the initial medical examination was paid time, but a follow-up examination was not.

¶ 23 On December 1, 2014, petitioner had her own motor vehicle, so she did not need transportation to the follow-up appointment. But she still needed translation services. Therefore, after petitioner completed her shift on December 1, 2014, she came to the human resources office and told Sanchez, " ['I am here.'] " Sanchez then set out for St. Mary's in her own vehicle, and petitioner followed in her vehicle. Although petitioner's shift had ended and Flanders no longer was paying petitioner for her time, Flanders was paying Sanchez for her time in going to St. Mary's for petitioner's follow-up appointment and providing translation services for her. On the way to St. Mary's, petitioner got in a traffic accident, in her own car.

¶ 24 Petitioner's attorney asked Sanchez:

> "Q. Had you instructed [petitioner] to follow you in proceeding to St. Mary's on December 1st?
>
> A. Yes.
>
> Q. Of course, [petitioner] was in the auto accident[,] and you were in front of her[,] I assume?
>
> A. Yes.
>
> Q. So[,] you weren't involved in the auto accident yourself?
>
> A. Correct."

¶ 25 4. *The Testimony of Amy Hizer*

¶ 26 Amy Hizer, the human resources manager at Flanders, testified that when an employee was injured on the job, she, Hizer, lacked authority to either approve or deny medical treatment. She likewise lacked authority to decide which medical facility the employee visited. That was entirely up to the employee. Hizer testified:

"A. The choice is it's [*sic*] up to the employee. Basically[,] we tell them or ask them if they have their own doctor that they prefer to go to. If they don't, we tell them the other facilities that are around that are available[,] and the choice is up to them."

Hizer explained that by "other facilities that are around," she did not mean "the choices limited by Flanders'[s] company policy"; there was no such limitation or company policy. Instead, she meant medical facilities "in the geographical area." Flanders had no company-preferred facility, and Hizer did not choose for employees what medical facility they should visit.

¶ 27 Hizer had nothing to do with follow-up medical appointments, either. That was a matter between the employee and Flanders's workers' compensation carrier, Sedgwick Claims Management Services. Hizer denied mandating either the follow-up appointment of December 1, 2014, or the initial visit to St. Mary's.

¶ 28 When asked to recount her conversation with petitioner as specifically as she could, Hizer testified that on November 24, 2014, petitioner came into the human resources department and that Sanchez was translating. Petitioner said she wanted medical treatment for her injured elbow. Hizer continued:

"A. From there what I remember is I asked her if she had her own doctor. She said no. I asked her was there a place she preferred to go. She kind of looked at me with a blank look on her face[,] and I suggested, if I remember correctly, there is [*sic*] all kinds of facilities around the area.

There is [*sic*] a lot of people that prefer to use [St. Mary's;] if she wished to go there, she could make an appointment to go there. I think at that time, if I

remember correctly, she said that she would like to go there, and that's really all I remember of the conversation."

Then either Sanchez or Martinez would have telephoned St. Mary's, with petitioner standing nearby so that petitioner could choose the time and date of her initial appointment.

¶ 29 On cross-examination, petitioner's attorney asked Hizer:

"Q. So[,] you suggested that [petitioner] can go to St. Mary's[,] and she indicated that that would be okay with her?

A. Yes. I suggested that, yes."

¶ 30 On redirect examination, respondent's attorney asked Hizer:

"Q. Counsel asked you whether you suggested that [petitioner] go to [St. Mary's], and you said yes.

When you say [']suggested,['] did you tell her that she should go to that facility over any other facility that was available to her?

A. No, I did not.

* * *

Q. Is there any reason why she—at that point in the conversation[,] were you mandating that she go to some sort of medical facility[,] or was that her choice?

A. I was not mandating it. She was asking.

Q. ***

Did you have any involvement in terms of making sure that she followed up or that she was mandated or obligated to go to this follow-up?

A. No, I was not involved in that."

¶ 31 On recross-examination, petitioner's attorney asked Hizer: "Just so I understand, if your testimony is correct, *** [petitioner] was kind of looking *** at you blankly for direction *** about where she could go, your impression?" Hizer answered:

> "THE WITNESS: That was my impression, yes, but I never make them go anywhere. I reiterated to her again[,] ['I]t's totally up to you where you want to go,[']and if she had any other suggestions where she wanted to go[,] that was up to her.
>
> ***
>
> Q. But she didn't say she had any other suggestions?
>
> A. Correct."

¶ 32 C. The Commission's Decision, Which the Circuit Court Upheld

¶ 33 The arbitrator found as follows. Petitioner was free to choose a medical provider. Respondent never directed her to go to St. Mary's. By heading to the follow-up medical appointment at St. Mary's, petitioner was not performing an act incidental to any assigned duty of her employment. She had no duty, statutory or otherwise, to attend the follow-up appointment, and respondent had not agreed to compensate her for doing so. Just because respondent sent a translator to accompany petitioner to the follow-up appointment, it did not follow that attending the appointment was a condition of petitioner's employment or that respondent had required her to attend the appointment. Therefore, on the authority of *Lee v. Industrial Comm'n*, 167 Ill. 2d 77 (1995), the arbitrator concluded that the "motor vehicle accident on December 1, 2014[,] was not an accident arising out of and in the course of [p]etitioner's employment with [r]espondent."

¶ 34 The Commission affirmed and adopted the arbitrator's decision, petitioner sought judicial review, and the circuit court affirmed the Commission's decision. Petitioner then filed

this present appeal.

¶ 35 II. ANALYSIS

¶ 36 A. *Lee*

¶ 37 This case turns on the correct interpretation and application of *Lee*. The circuit court concluded that, under *Lee*, the Commission's decision was not against the manifest weight of the evidence. Petitioner maintains that not only is *Lee* factually distinguishable but, under the supreme court's rationale in *Lee*, she deserves workers' compensation benefits for the injuries she sustained in the automobile accident of December 1, 2014.

¶ 38 In *Lee*, the employee injured his thumb in a work-related accident. *Id.* at 79. Although the employee did not file a workers' compensation claim for the thumb injury, the employer paid the medical expense for that injury. *Id.*

¶ 39 One day, after his shift ended, the employee left the workplace "to go to the employer-approved medical clinic for follow-up treatment for his *** thumb injury." *Id.* After receiving the follow-up treatment, he left the clinic, and as he was crossing the street to board a bus, an automobile struck him, injuring his knee. *Id.*

¶ 40 The employee filed a workers' compensation claim for the knee injury. *Id.* An arbitrator denied the claim, finding that (1) the work-related thumb injury had not contributed to the knee injury and (2) the knee injury had "not arise[n] from the course and scope of" the employee's employment. *Id.* The Commission affirmed the denial of compensation (*id.*), the circuit court affirmed the Commission's decision (*id.* at 80), and the appellate court affirmed the circuit court's judgment but issued a certificate of importance pursuant to Illinois Supreme Court Rule 316 (eff. Feb. 1, 1994) (*id.*).

¶ 41 The issue, as the supreme court framed it, was whether the knee injury "ar[o]se

out of and in the course of employment." *Id.*; see also 820 ILCS 305/1(d) (West 2014) ("To obtain compensation under this Act, an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment"). An accidental injury was compensable under the Act only if both of those elements coexisted: the injury "ar[o]se out of" *and* "in the course of" the employment. *Lee*, 167 Ill. 2d at 80.

¶ 42 An injury (the supreme court explained in *Lee*) arose *out of* the employment if there was a "causal relationship between the employment and the injury." *Id.* at 81. A claimant might establish such a causal relationship by proving that he or she sustained the injury while (1) acting under the employer's direction, (2) performing an act reasonably incident to an assigned duty of employment, or (3) acting pursuant to a statutory or common law duty while performing duties imposed by the employer. *Id.*

¶ 43 An injury arose *in the course of* employment if the employee sustained the injury within the time, place, and circumstances of the employment. *Id.* Generally, injuries that employees sustained outside the workplace, when traveling to and from work, were not compensable. *Id.* There was an exception, however, for employees whose employment duties required them to travel away from the worksite, provided that the employee was acting reasonably when he or she sustained the injury and the risk of injury was foreseeable to the employer. *Id.*

¶ 44 The employee in *Lee* was not at a worksite and was not on the clock when the automobile struck him. The supreme court observed:

> "In the instant case, [the employee] was not compelled, as a condition of his employment, to obtain medical treatment on the date and time he chose. Both the

> [employee's] supervisor and the company nurse testified that the [employee] was neither authorized nor obligated to keep this particular appointment at the clinic. As a result, [his] travel to the medical clinic was not a required duty of his employment." *Id.* at 83.

The employee was not performing any job duty when the automobile struck him. He was away from work, away from the Tootsie Roll factory. His shift had ended. While crossing the street to catch the bus, he was on his own time. He was not on an employer-mandated errand. Thus, he did not sustain the knee injury in the course of his employment.

¶ 45 The knee injury did not arise out of his employment, either. The Commission had found that in going to the follow-up appointment at the clinic, the employee was neither "acting under the direction of his employer at the time of the accident" nor "performing an act reasonably incident to an assigned duty of his employment." *Id.* at 82-83. The supreme court saw no reason to overturn that finding. *Id.* at 83. Although the Act imposed a duty on employers to provide medical treatment " 'reasonably required to cure or relieve the effects of' " an employee's work-related injury, the Act did not "require an employee to accept such medical treatment as a term or condition of employment." *Id.* at 85 (quoting 820 ILCS 305/8(a) (West 1992)). The only statutory consequence of failing to submit to employer-provided medical treatment was a suspension of workers' compensation benefits or a reduction in the amount of such benefits; the statutory consequence was not getting fired. *Lee*, 167 Ill. 2d at 85 (citing 820 ILCS 305/12, 19(a) (West 1992)).

¶ 46 If the employer authorizes an employee, while on the clock, to go to a clinic for a work-related injury and, instead of going to the clinic, the employee goes somewhere else, on a personal errand that has nothing to do with the job, the employer might well fire the employee—

because the pass was conditional on going to the clinic and going elsewhere—while on the employer's dime—would be not only an unexcused absence but a theft of company time. Perhaps, in that circumstance, one could justifiably say that "travel to the medical clinic was *** a required duty of employment." *Id.* at 83. Apparently to rule out that circumstance, the supreme court noted in *Lee*:

> "[The employee] testified before the Commission that he was authorized by his employer to visit the employer-approved clinic for treatment when his knee injury occurred on December 10, 1984. However, [the employee's] testimony was contradicted by his supervisor, who testified that he had no prior knowledge of and did not authorize [the employee's] December 10, 1984, visit to the clinic. The company nurse also testified that she did not *issue a pass* for the [employee] to visit the clinic on that day. In denying compensation to the [employee], the Commission did not accept [his] version of the events." (Emphasis added.) *Id*. at 82.

In this context, "authorizing a visit to the clinic" must mean authorizing a visit on company time. The employee would not have needed his employer's authorization—he would not have needed a pass from the company nurse—to seek medical treatment on his own time. Doing so on his own time was not the performance of a job duty.

¶ 47 The supreme court stated: "While there are times when employee travel to medical treatment for work-related injuries may be compensable under the Act, the facts before us do not present such a case." *Id.* at 87. Then the supreme court described a circumstance when an injury sustained during travel to medical treatment for a work-related injury would be compensable:

"We agree with the appellate court's conclusion in this case:

> 'In sum, we agree that an employee injured en route to medical treatment immediately after an injury is entitled to compensation. This result is not altered by the fact that the injury occurred after regular working hours. Beyond that point, however, each case must be decided on an individual basis.' " *Id.* at 88 (quoting *Lee v. Industrial Comm'n*, 262 Ill. App. 3d 1108, 1113 (1994)).

Neither the supreme court nor the appellate court in *Lee* explains the rationale for that *dictum*.

Anyway, in the present case, we need not explore that question, because when petitioner sustained injuries in the traffic accident, she was not " 'en route to medical treatment *immediately after* an injury.' " (Emphasis added.) *Lee*, 167 Ill. 2d at 88 (quoting *Lee*, 262 Ill. App. 3d at 1113). Rather, she was seeking follow-up medical treatment for her elbow injury 11 days after sustaining that injury.

¶ 48 B. Petitioner's Argument That *Lee* Is Distinguishable

¶ 49 For essentially three reasons, petitioner maintains that *Lee* is distinguishable from her case. First, she observes that, instead of being unaware of the follow-up medical appointment, respondent helped petitioner make the follow-up appointment and, indeed, was leading her to the appointment at the time of the traffic accident. Second, petitioner quotes Hizer's testimony that she "suggested" that petitioner go to St. Mary's for medical treatment—a suggestion that, petitioner argues, could only be interpreted as a command. Third, petitioner quotes Sanchez's testimony that she "instructed" petitioner to follow her to St. Mary's, and petitioner points out that she merely was complying with that instruction when the traffic accident happened.

¶ 50 1. *Respondent's Awareness of the Follow-Up Medical Appointment*

¶ 51 Petitioner calls attention to the following language in *Lee*: "[The employee's] testimony was contradicted by his supervisor, who testified that he *had no prior knowledge of* and did not authorize claimant's December 10, 1984, visit to the clinic." (Emphasis added.) *Lee*, 167 Ill. 2d at 82. Petitioner notes that not only did respondent, by contrast, have prior knowledge of the follow-up medical appointment of December 1, 2014, but respondent had helped her make the appointment and even was guiding her to the appointment when petitioner was injured in the head-on collision.

¶ 52 Granted, in the sentence of *Lee* that petitioner quotes, the supreme court remarked that the supervisor was unaware of the follow-up appointment. See *id.* But the supreme court never elevated that remark to a criterion of liability under the Act. The supreme court never suggested that an injury the employee sustained when going to or coming from a follow-up medical appointment would be, simply by virtue of the employer's awareness of the appointment, an injury arising out of the employment. Instead, the test that the supreme court repeated over and over again in *Lee* was whether the employer had required the employee to attend the medical appointment. The supreme court stated: "In the instant case, [the employee] was not compelled, as a condition of his employment, to obtain medical treatment on the date and time he chose." *Id.* at 83. And again the supreme court stated: "[The employee's] travel to the medical clinic was not a required duty of his employment." *Id.* And yet again the supreme court stated: "[The employee's] knee injury *** was not an injury sustained incident to a duty of employment." *Id.*

¶ 53 To be sure, it was a condition of *Sanchez's* employment to accompany petitioner to the follow-up appointment at St. Mary's and to provide translation services for her when they

arrived. But the record appears to contain no evidence that it was a condition of *petitioner's* employment to go to the follow-up appointment. Nor did petitioner have to accept Sanchez's assistance. It would make no sense to penalize respondent with liability under the Act for helpfully providing translation services, which employees were free to accept or decline.

¶ 54 2. *Hizer's "Suggestion" of St. Mary's*

¶ 55 Petitioner argues that when the head of human resources "suggests" to an employee that she go to a certain clinic for medical treatment, that "suggestion" should be understood as a polite command. This argument is unconvincing. Normally, when someone makes a "suggestion"—using that word—they are understood as putting forward an idea for consideration, not making a command. Nothing about the conversation between Hizer and petitioner could reasonably support an interpretation that by suggesting St. Mary's to petitioner as a place of treatment—after petitioner seemed at a loss as to where to go—Hizer expressed to her an ironically understated command (like the pseudo-suggestion "I suggest that you arrive at work on time tomorrow"). Hizer testified: "I reiterated to [petitioner] again[,] ['I]t's totally up to you where you want to go,[']and if she had any other suggestions where she wanted to go[,] that was up to her." Even if we disregarded the apparent lack of evidence that Hizer had authority to order petitioner to do anything, let alone tell her where to seek medical treatment, her suggestion to petitioner was, by all appearances, nothing more than that: a suggestion, which petitioner was perfectly free to take or leave.

¶ 56 3. *Sanchez's "Instruction" to Follow Her to St. Mary's*

¶ 57 Petitioner's attorney asked Sanchez: "Had you instructed [petitioner] to follow you in proceeding to St. Mary's on December 1st?," and Sanchez answered: "Yes." Petitioner reads a lot into that question and answer. She argues that she "obeyed the instructions of her

superior, Sanchez, *to wit*: Petitioner followed Sanchez's vehicle to the December 1 appointment, and, in the course of doing so, was involved in a head-on collision with a truck."

¶ 58 Actually, the record appears to lack evidence that Sanchez, a human resources assistant, was petitioner's superior or that she had any supervisory authority over her. Also, the record appears to lack evidence that declining to follow Sanchez's vehicle would have resulted in any adverse employment action against petitioner. Just because Sanchez "instructed" petitioner to tail her vehicle, it does not follow that complying with that instruction was a condition of petitioner's employment. See *id.* One could ask a stranger on the street where the post office is, and if the stranger replied, "Follow me," the reply would indeed be an instruction, but the only "or else" would be not finding the post office.

¶ 59 III. CONCLUSION

¶ 60 For the foregoing reasons, we affirm the circuit court's judgment confirming the Commission's decision.

¶ 61 Affirmed.