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2014 IL App (5th) 130210WC-U

Order filed June 20, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

BRIAN HOLMES,)	Appeal from the Circuit Court
)	of Williamson County, Illinois.
)	
Appellant,)	
)	
v.)	Appeal No. 5-13-0210WC
)	Circuit No. 12-MR-205
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> , (Harris Roofing,)	Honorable
Appellee).)	Brad K. Bleyer,
)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, and Harris concurred in the judgment.
Justice Goldenhersh dissented.

ORDER

¶ 1 *Held:* The Commission did not abuse its discretion in excluding hearsay evidence and its finding that the claimant's injuries did not arise out of and in the course of his employment was not against the manifest weight of the evidence.

¶ 2 The claimant, Brian Holmes, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits for severe injuries, including brain damage, suffered as a result of an automobile accident occurring on June 23, 2008, while the claimant was a passenger in his supervisor's personal vehicle. After

a section 19(b) hearing, the arbitrator found that the claimant's current condition of ill-being did not arise out of and in the course of his employment. The arbitrator, therefore, denied the claim for benefits. The claimant sought review before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Williamson County, which confirmed the Commission's decision. The claimant then filed a timely appeal with this court.

¶ 3 The claimant raises two issues on appeal: (1) whether the Commission's finding that the claimant's injuries did not arise out of and in the course of his employment was against the manifest weight of the evidence; and (2) whether the Commission abused its discretion in excluding certain evidence.

¶ 4 **FACTS**

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on August 9, 2011.

¶ 6 The claimant sustained severe injuries on the early morning on June 23, 2008, when a personal pickup truck driven by his supervisor, Jimmy Russell, collided with a train locomotive, while the two were on their way to the shop to report for work. Russell was killed. The claimant survived, but with substantial loss of memory of the incident.

¶ 7 The claimant testified that on the morning of the accident, Russell picked him up at his residence to give him a ride to work. The claimant also testified that Russell arrived at his residence earlier in the morning than the claimant would have normally left home if had been going to work by himself. The claimant, however, was unable to offer any evidence that he and Russell performed any type of work function or were going to perform a work function prior to the accident.

¶ 8 The claimant testified that he had no memory of the accident and no memory of the day prior to the accident. He had no recollection of asking Russell to drive him to work on the date of the accident. He testified that he would, on occasion, have co-workers drive him home from work, if his wife dropped him off. He admitted that Russell had done this in the past.

¶ 9 Amber Holmes, the claimant's wife, testified that the claimant would typically drive himself to work, or she would take him to work. She testified that occasionally, the claimant's boss, Jimmy Russell, would pick the claimant up in his pickup truck and take him to work. She testified that Russell and the claimant were not social friends and she denied that Russell and the claimant would do things together outside of work. It was her testimony that if Russell picked up the claimant in the morning, it would be to perform a work-related task prior to the normal time the claimant reported for work.

¶ 10 Ms. Holmes attempted to testify that on the evening before the accident Russell stopped by their house to tell the claimant that he would pick him up for work a half hour early because he needed help with something at work. The employer objected to the admission of this testimony as inadmissible hearsay and excluded under the Dead-Man's Act (735 ILCS 5/8-201 (West 2010)). The arbitrator sustained the objection and an offer of proof was made for the record.

¶ 11 Ms. Holmes testified that on the date of the accident she saw Russell pick up the claimant for work about 30 minutes earlier than normal. She heard about the accident approximately an hour and a half later. She testified that Paul Hasse informed her about the accident shortly after she was informed on the phone by the hospital. She testified that she was hysterical and out of control at the time.

¶ 12 Steve Harris testified that he was the owner and president of Harris Roofing, the employer. He testified that Jimmy Russell was a supervisor with the company and that the

claimant had worked there for 3 or 4 years. Harris testified that typically the workers would meet at the shop in the mornings and then would all travel to the job site together. He testified that they would stop at the same gas station each morning to get refreshments and he would fill up the generators and compressors with fuel.

¶ 13 Harris also testified that the day prior to the accident, the claimant, Russell and Paul Hasse worked together on a small side job. Harris testified that he spoke with all three men at the shop. Harris was certain that he did not tell Russell or the claimant that any work needed to be done early the next morning or that the two should ride together to work. Harris testified that Russell would not go to a job site prior to reporting for work in the morning without first getting instructions from him.

¶ 14 Harris also testified that he was aware that Paul Hasse occasionally drove the claimant to work in the morning. He was also aware that a co-worker, Bill Vudrovich, would occasionally drive the claimant to work as well. He testified that Russell began driving the claimant to work about one month before the accident, which coincided with the claimant getting a motorcycle. Harris testified that Russell and the claimant would occasionally do side jobs together if their work for the employer ended early. Harris also testified that he took no part in setting up how the employees got to work in the morning.

¶ 15 Harris testified that on the morning of the accident he and Paul Hasse waited for the claimant and Russell to arrive for work. When they failed to arrive on time, Harris made some calls trying to find them. Eventually he heard from the hospital and learned of the accident.

¶ 16 Paul Hasse testified that he was waiting at the shop for Russell that morning, because Russell was his supervisor and he could not begin work until Russell arrived. Hasse further testified that Harris was present at the shop waiting for Russell. At that time neither Hasse nor Harris knew that the claimant and Russell were riding together. Hasse testified that he did not

know of any work-related activity that Russell and the claimant would have been performing on the morning of the accident. Hasse testified that it was not uncommon for Russell and the claimant to ride to work together. Hasse testified that Russell and the claimant would do side jobs together and that they were friends. Hasse testified that on the date of the accident both the claimant and Russell had their tool belts at the company truck/trailer and not in Russell's truck. Hasse testified that he informed Ms. Holmes in person about the accident. He testified that Ms. Holmes appeared to have just woken up when he arrived and did not seem frantic or hysterical, until after he told her of the accident. He testified that she then asked if the petitioner had taken his motorcycle to work that day. She asked Hasse to see if the motorcycle was still at the residence. Hasse also testified that Harris had no input into how the employees traveled to work in the morning.

¶ 17 Following the hearing, the arbitrator found that the claimant had failed to establish that his injuries arose out of and in the course of his employment. The arbitrator noted that generally an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment. The arbitrator found that the claimant was riding to work with his supervisor in the supervisor's personal truck when the accident occurred on a public roadway.

¶ 18 The claimant sought review before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's findings. The claimant then sought judicial review of the Commission's decision in the circuit court of Williamson County, which confirmed the Commission's decision. The claimant now appeals, arguing that the Commission's decision was against the manifest weight of the evidence.

¶ 19

ANALYSIS

¶ 20

1. Evidentiary Rulings

¶ 21 The claimant first maintains that the Commission erred in adopting the arbitrator's evidentiary ruling excluding Ms. Holmes's testimony that she overheard Russell tell the claimant that he would pick him up for work early the next morning because he needed some help at work. The record indicates that the arbitrator sustained an objection based upon both hearsay and the Dead-Man's Act (735 ILCS 5/8-201 (West 2010)). Evidentiary rulings are reviewed for an abuse of discretion. *Coriell v. Industrial Comm'n*, 83 Ill. 2d 105, 110 (1980).

¶ 22 The Dead-Man's Act protects a decedent's estate from fraudulent claims against it by barring evidence that the deceased could have refuted. *In re Estate of Goffinet*, 318 Ill. App. 3d 152, 156 (2001). The Act provides:

"In the trial of any action in which *any party sues or defends as the representative of a deceased person* or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability." (Emphasis added.) 735 ILCS 5/8-201 (West 2010).

¶ 23 In the instant matter, Russell's estate was not a party to the proceeding, therefore, it was error to exclude the testimony under the Dead-Man's Act. However, the Commission also accepted the employer's hearsay objection regarding the proffered testimony.

¶ 24 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement and is inadmissible unless it falls under one of the recognized exceptions to the rule. *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). Any statement made out of court by a party to an action or attributable to a party to an action, which tends to establish or disprove any material fact in a case, is admissible as an exception to the rule against hearsay and can be

admitted against that party. *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1064 (2001). However, the mere fact that the declarant is an employee does not mean that all statements made in the course of employment are admissions of the employer. *Id.* Statements by an employee are attributable to the employer only if the statements were specifically authorized by the employer or the statements concerned matters within the scope of the declarant's employment. *Id.*

¶ 25 Here, it cannot be said that the Commission abused its discretion in sustaining a hearsay objection to Ms. Holmes's testimony regarding Russell's statement the evening before the accident. There is no evidence to support a conclusion that Russell was specifically authorized by Harris to state that he would give the claimant a ride to work the next morning. Likewise, there is no evidence supporting a finding that it would have been within the scope of Russell's employment to instruct the claimant to ride with him to work the next morning. Without any evidence to support a finding that Russell's statement was either authorized by Harris or was within the scope of Russell's employment, it cannot be said that the Commission erred in excluding the testimony.

¶ 26 2. Compensability

¶ 27 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). An employee's injury is compensable only if it arises out of and in the course of his employment. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Whether a claimant's injury arose out of and in the course of his employment is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve

conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent.

Caterpillar, Inc. v. Industrial Comm'n, 228 Ill. App. 3d 288, 291 (1992).

¶ 28 Here, the claimant maintains that he suffered injuries arising out of and in the course of his employment while riding in his supervisor's truck on the way to work. The general rule is that an injury incurred by an employee in going to or returning from his place of employment does not arise out of or in the course of the employment. *Commonwealth Edison Co. v. Industrial Comm'n*, 86 Ill. 2d 534 (1981). However, an exception to this general rule exists where the employer, for its own benefit, provides the employee with the means of transportation to and from work. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 450 (1995). "In such situations, the transportation is considered to expand the 'in the course of' element while apparently providing a risk incidental to the exigencies of employment that satisfies the 'arising out of' element." *Becker v. Industrial Comm'n*, 308 Ill. App. 3d 278, 282 (1999).

¶ 29 The claimant maintains that the Commission erred when it did not find that the ride he received that morning from Russell was provided by the employer for its own benefit. He maintains that all the credible evidence supported a finding that Russell provided the claimant a ride to work so that he could help Russell with a job task prior to their regular start time that morning. The claimant's testimony, corroborated by his wife's testimony, was that he was not accustomed to riding with Russell to work unless Russell required his assistance on a work-related project requiring his presence. The claimant suggests that, since he was riding in Russell's truck on the way into work when the accident occurred, the only logical reason for his doing so was that Russell required the claimant to ride with him. Thus, the claimant maintains, he must have been riding in Russell's truck at the direction of the employer for the employer's benefit.

¶ 30 The claimant's argument fails since the evidence equally supports a conclusion that he accepted the ride from Russell as part of a pattern of accepting rides to work from co-workers. Harris and Hasse each testified from personal knowledge that on several occasions the claimant accepted a ride to work from Russell, Vudrovich, and others. Moreover, Harris credibly testified that he never ordered or required any of his employees to travel to and from work in any particular manner. Harris also credibly testified that he had no knowledge of any work-related project that Russell and the claimant would have been en route to on the morning of the accident. Harris further testified that Russell and the claimant would perform a work-related project prior to arriving at work only if he had specifically instructed them to do so. Based upon the testimony of Harris and Hasse, the Commission's determination that the claimant's injuries did not arise out of and in the course of his employment was not against the manifest weight of the evidence.

¶ 31 The Commission's finding that the claimant's injuries did not arise out of and in the course of his employment was not against the manifest weight of the evidence.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the Williamson County circuit court, which confirmed the Commission's decision.

¶ 34 Affirmed.

¶ 35 JUSTICE GOLDENHERSH, dissenting:

¶ 36 I respectfully dissent. I agree with the majority's analysis concerning the Dead-Man's Act. However, in my view, the Commission erred concerning hearsay.

¶ 37 As the majority stated, citing *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1064 (2001), "the mere fact that the declarant is an employee does not mean that all statements made in the course of employment are admissions of the employer. *Id.* Statements by an employee are

attributable to the employer only if the statements were specifically authorized by the employer or the statements concerned matters within the scope of the declarant's employment. *Id.*"

(Emphasis added.) *Supra* ¶ 24.

¶ 38 The barred testimony fell under the exception mentioned by the majority, citing *Pavlik*, namely "matters within the scope of the declarant's employment." The substance of the statement was that Russell had told the claimant that he would pick him up at 4:30 a.m. (earlier than his normal departure time of 5 a.m.) because Russell needed help with a work project. Exclusion of this testimony meant that the arbitrator, the Commission, in adopting the arbitrator's decision, the circuit court, and this court, were precluded from considering admissible evidence concerning the claimant's claimed exception to the general rule that an injury sustained by an employee, either going to or returning from employment, is not an injury that arises out of and in the course of employment.

¶ 39 It is not disputed in the record that Russell was the claimant's immediate supervisor or superior. While the record indicated no specific authorization by Harris Roofing to Russell to give a ride to the claimant the morning of the accident, this does not change the existence of the statement by Russell, the claimant's immediate supervisor, that he would be picking him up earlier the next morning to finish a job because he needed help with a matter at work. The weight to be given this statement was for the Commission, but its exclusion was error.

¶ 40 As a result, the majority's analysis concerning compensability, while accurate as to relevant case law, is based on the faulty foundation of the Commission's exclusion of the evidence noted above as an exception to the hearsay rule. I would hold that the Commission's determination that the claimant's injuries did not arise out of and in the course of employment was against the manifest weight of the evidence because admissible evidence was excluded from the Commission's consideration by a hearsay ruling that was an abuse of discretion.

¶ 41 Accordingly, I would reverse and remand to the Commission.