2011 Il App (1st) 102446WC-U

Workers' Compensation
Commission Division
Filed: October 31, 2011

No. 1-10-2446WC

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

JEWEL FOOD STORES,	) APPEAL FROM THE
	) CIRCUIT COURT OF
Appellant,	) COOK COUNTY
	)
v.	) No. 09 L 51782
	)
ILLINOIS WORKERS' COMPENSATION	)
COMMISSION, *et al*.,	)
(ANDREW SILVA,	) HONORABLE
	) SANJAY TAYLOR,
Appellees).	) JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice McCullough and Justices Hudson, Holdridge and Stewart concurred in the judgment.

O R D E R

HELD: The finding of the Workers' Compensation Commission that the claimant's injuries arose out of and in the course of his employment is not against the manifest weight of the evidence.

¶ 1 Jewel Food Stores (Jewel) appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission)

awarding the claimant, Andrew Silva, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)) for injuries he sustained on December 26, 2008. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on March 12, 2009.

¶ 3 At the outset of the arbitration hearing, the parties stipulated to the following relevant facts:

> "Andrew Silva has been employed as a truck driver for [Jewel] since May 12, 1982. ***
>
> On December 26, 2008, Mr. Silva was scheduled to work at Jewel. His shift was to begin at 8:00 a.m.
>
> Mr. Silva parked his car across the street from the Jewel [t]ransportation center. The area that he parked in was approximately 20 feet east of the transportation center parking lot. The area where he parked is not owned or maintained by Jewel. It is an area that is open to the general public. Anyone can park there. Jewel employees frequently park in this location based on its convenience and short distance to enter the transportation building. Mr. Silva parked his car in this location, as he believed it was a more convenient location th[a]n the company parking lot.
>
> Jewel provides a designated parking lot that is solely for the use of employees. The lot is located North of the transportation department. It has a separate employee entrance located on the North side of the building. Mr. Silva was given a company handbook in March 2004 that indicates employee parking is restricted to designated areas on Jewel property. ***
>
> Jewel employees have never been disciplined for parking off Jewel property ***. ***

The company parking lot was owned and maintained by Jewel. It has sidewalks for employees to walk on from the parking lot into the transportation center.

The weather the morning of December 26, 2008 was extremely cold and icy. There was a coating of ice covering the street. Mr. Silva exited his car and crossed a public street east of the management parking lot. He was heading west towards the management parking lot. There is a gate and fence outside of the management parking lot. There are also several visitor parking spaces east of the fence. The entrance that Mr. Silva was heading towards is located on the South side of the building and is used by employees of Jewel and non-employees there to do business or visit.

As Mr. Silva crossed the street he walked onto the visitor parking spaces and property of Jewel. He was on the east side of the management parking lot and approximately fifteen from [*sic*] from the gate. *** At approximately 7:55 am Mr. Silva slipped at the end of the visitor space, on Jewel property, and fell to the ground striking his left arm."

¶ 4 In his testimony before the arbitrator, the claimant stated that the Jewel parking lot in which he was allowed to park normally had no clear path to the Jewel building and that he usually parked in the street because doing so provided him more convenient access to the building entrance. He also agreed on cross-examination that the visitor parking spot near the point of his fall could have been used by any visitor, including both Jewel employees and non-Jewel employees, to the facility. However, on re-direct examination, the claimant agreed that there would be "nothing there" at the Jewel building for non-Jewel employees.

¶ 5 George Selimos, another Jewel driver, testified that, at the time the claimant fell, there was no clear path from the designated employees' lot to the Jewel building, because a gate, which was usually locked, blocked the most direct path from the lot to the building entrance and forced workers to walk around the building.

¶ 6 Charles Grafton, Jewel's risk control superintendent, agreed that the area where the claimant fell was slippery and icy on the day of the claimant's fall. He also agreed that the general public would not typically use the Jewel facility at which the claimant fell.

¶ 7 After the conclusion of the hearing, which was held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)), the arbitrator found that the Jewel building was "not open for business by the general public at large" and that the visitor parking spaces near which the claimant fell were "for use by other Jewel employees who worked at other locations and had occasional business at the distribution center but did not have a card which would permit access to the parking lot." Based on that finding, and the finding that the area was slippery and icy, the arbitrator concluded that the claimant's injury was caused by a risk to which the general public was not exposed, and therefore that his injury arose out of his employment. The arbitrator awarded the claimant temporary total disability (TTD) benefits for 10 6/7 weeks and medical expenses.

¶ 8 Jewel sought review of the arbitrator's decision before the Commission, which unanimously affirmed and adopted the arbitrator's decision and remanded the cause back to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980). Thereafter, Jewel filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 9 On appeal, Jewel argues that the Commission erred in finding that the claimant's injury arose out of and in the course of his employment.

¶ 10 An employee's injury is compensable under the Act only if it arises out of and in the course of his or her employment. 820 ILCS 305/2 (West 2008). "The phrase 'in the course of' refers to the time, place and circumstances under which the accident occurred." *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603 (1989). "The words

'arising out of' refer to the origin or cause of the accident and presuppose a causal connection between the employment and the accidental injury." *Illinois Bell Telephone Co.*, 131 Ill. 2d at 483. Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co.*, 131 Ill. 2d at 483. "Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment," (*Caterpillar Tractor Co.*, 129 Ill. 2d at 57), and, indeed, the parties here do not dispute that the claimant's injuries occurred in the course of his employment. See also *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038, 804 N.E.2d 1086 (2004) ("recovery has been permitted where the employee has sustained injuries in a parking lot []provided by and under the control[] of an employer"). Instead, the parties disagree only on whether the claimant's accident "arose out of" his employment.

¶ 11 For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. "An injury sustained by an employee arises out of his employment if the employee at the time of the occurrence was performing acts he was instructed to perform by his employer, acts which he has a common law or statutory duty to perform while performing duties for his employer, or acts which the employee might be reasonably expected to perform incident to his assigned duties." *Howell Tractor & Equipment Co. v. Industrial Comm'n*, 78 Ill. 2d 567, 573, 403 N.E.2d 215 (1980). "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar Tractor Co.*, 129 Ill. 2d at 58.

¶ 12 The supreme court has held that:

> "not all parking lot injuries are compensable as 'arising out of' employment. To be compensable, the injury must have resulted from some risk connected or incidental to the employment. [Citations.] A personal deviation by an employee (e.g., spending 1 1/2 to

> two hours in a tavern) can break the necessary causal link between the injury and the employment. [Citation.] Nor is an injury compensable if it resulted from risk personal to the employee rather than incidental to the employment. [Citations.] In [such] cases, the court denied recovery where the injury claimant sustained on the employer's premises did not occur as a result of the condition of those premises. However, where the claimant's injury was sustained as a result of the condition of the employer's premises, [the supreme] court has consistently approved an award of compensation." *Archer Daniels Midlands Co. v. Industrial Comm'n*, 91 Ill. 2d 210, 215, 437 N.E.2d 609 (1982).

¶ 13 Whether an injury arises out of the claimant's employment is a question of fact to be resolved by the Commission, and its decision in this regard will not be disturbed unless it is against the manifest weight of the evidence. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 164, 731 N.E.2d 795 (2000). For a finding of fact to be against 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, 591 N.E.2d 894 (1992). A reviewing court must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665 (2003).

¶ 14 As this court has explained, "[e]mployment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work related task which contributes to the risk of falling." *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106, 853 N.E.2d 799 (2006).

¶ 15 Jewel argues here that the Commission erred in finding that the claimant's fall arose out

of his employment, because, in Jewel's view, the fall was caused by a risk to which the general public was equally exposed. Instead of challenging the Commission's finding that the Jewel facility was not used by the general public, Jewel obscures the point by asserting that, because the visitor parking area could be used by Jewel employees and non-Jewel employees alike, it was used by the general public. However, the fact that non-employees with business at the facility might use the visitor spaces does undercut the Commission's finding that the facility was not open to the general public. Accordingly, because Jewel does not directly or persuasively challenge the Commission's finding that the facility was not open to the general public, its argument, that walking at the facility was a risk borne equally by employees and the general public, necessarily fails.

¶ 16 In so stating, we distinguish *Wal-Mart Stores, Inc. v. Industrial Comm'n*, 326 Ill. App. 3d 438, 761 N.E.2d 768 (2001), a decision upon which Jewel relies heavily in its briefs. In *Wal-Mart*, the claimant, who worked at a retail location, was injured when she slipped on ice in the same parking lot used by the general public. We concluded that her injury was not compensable under the Act, because her fall "resulted from a hazard to which she and the general public were equally exposed." *Wal-Mart*, 326 Ill. App. 3d at 445. As we have said, the facility in this case, unlike the retail parking lot in *Wal-Mart*, was not open to the general public. Thus, *Wal-Mart* does not govern here.

¶ 17 Aside from its argument that the claimant was not exposed to a risk greater than that posed to the general public, Jewel also offers that the claimant's exposure was due to his personal decision to undertake the risk of parking in the street, and not due to his employment. For this argument, Jewel relies on *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572, 720 N.E.2d 275 (1999). In *Dodson*, the claimant was leaving work when she decided to depart from a paved walkway at her workplace and walk on a grassy slope instead. In concluding that she was not entitled to benefits under the Act for her resulting fall, we reasoned that the claimant's injury

was caused by a personal risk: her decision to forgo using the sidewalk and instead use a grassy slope that "unnecessarily exposed her to a danger entirely separate from her employment." *Dodson*, 308 Ill. App. 3d at 576-77.

¶ 18 Here, unlike in *Dodson*, there was evidence that Jewel's designated walkway for employees traveling between the employee parking lot and the facility entrance was often obstructed or unsafe. There was also evidence that the street parking the claimant used was closer to the facility entrance.

¶ 19 We find this case to be more similar to *Bommarito v. Industrial Comm'n*, 82 Ill. 2d 191, 412 N.E.2d 548 (1980). In *Bommarito*, the claimant was injured after falling in an alleyway on her way to work. The supreme court held that, even though the alleyway was outside the employer's premises, the fall was compensable, because the employer directed the claimant to enter the work building through a door accessible only by alleyway. Thus, the supreme court held, the "case [did] not present a situation where a claimant freely chooses to use a certain route and is injured in doing so," but rather involved a claimant who "was directed to enter through one door for the convenience of the respondent and, considering the hazardous *** condition of the alley, to the substantial detriment of the employees." *Bommarito*, 82 Ill. 2d at 196. Likewise here, there was ample evidence to support a Commission finding that Jewel's building access rules, combined with the obstructed walkway, compelled the claimant to take the path that led to his fall.

¶ 20 For these reasons, we conclude that the Commission's finding, that the claimant's injury arose out of and in the course of his employment, was not against the manifest weight of the evidence. We, therefore, affirm the the judgment of the circuit court which confirmed the Commission's award of benefits, and remand the matter back to the Commission.

¶ 21 Affirmed aand remanded to the Commission.