2013 IL App (1st) 122348WC-U
No. 1-12-2348WC
Order Filed: JUNE 10, 2013

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

95TH STREET PRODUCE MARKET,	)	Appeal from the Circuit Court
	)	of Cook County.
Appellant,	)	
	)	
v.	)	No. 11-L-51175
	)	
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION, *et al*.,	)	Honorable
	)	Margaret Brennan,
(Elizabeth Margaritis, Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* Commission's finding that claimant sustained injuries "arising out of" her employment because the location where she performed her job duties exposed her to a greater risk of injury compared to the general public is against the manifest weight of the evidence.

¶ 2 Claimant, Elizabeth Margaritis, was employed by respondent, 95th Street Produce Market, as a cashier. On December 29, 2008, claimant was severely injured when a vehicle struck her after crashing into the store where claimant was employed by respondent. Claimant sought benefits for

her injuries pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)). Following a hearing, the arbitrator denied benefits, finding that claimant failed to satisfy her burden of establishing that her injuries "arose out of" her employment with respondent. A majority of the Illinois Workers' Compensation Commission (Commission) reversed the decision of the arbitrator. The Commission concluded that the location in the store where claimant performed her job duties exposed her to a greater risk of injury compared to the general public. The circuit court of Cook County confirmed the decision of the Commission. Respondent then sought review before this court. We find that the Commission's conclusion that claimant's injuries arose out of her employment is against the manifest weight of the evidence as claimant did not establish that the location of the store and the structure of the building where she worked created an increased risk of injury from being struck by a car. Accordingly, we reverse.

¶ 3 I. BACKGROUND

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing held on March 8, 2010, and April 5, 2010. Respondent operates a grocery store on 95th Street in Hickory Hills, Illinois, where claimant was employed as a cashier. At the time of the events in question, claimant had been employed by respondent for about 13 years. In addition to performing the functions of a cashier, claimant's duties included stocking candy and straightening up the register area. Claimant's normal work shift was from 7 a.m. to 4 p.m.

¶ 5 Claimant testified that respondent's store has a bank of five cash registers. The registers are located at the front of the store behind large windows. Photographs of the exterior of respondent's store were admitted into evidence. The photographs show a sidewalk and an asphalt surface on the

exterior side of the storefront between the building and 95th street. Concrete parking blocks are situated on each end of the asphalt surface, perpendicular to the building. According to claimant, the parking blocks are not "bolted down," and move if struck by a vehicle. Claimant testified that individuals occasionally drive their cars onto this asphalt surface, thinking they can leave the parking lot by way of this route. Claimant testified, however, that the area does not lead to an exit and that while some drivers proceed over a grassy area onto the street, other drivers "go forward, back up, forward, back up, so they can turned [*sic*] around to go back where they got in through."

¶ 6 Claimant testified that at approximately 3:45 p.m. on December 29, 2008, she was checking out a customer at the second register. The customer left the register area momentarily to retrieve an item. As claimant was standing behind the cash register waiting for the customer to return, she was struck by a vehicle that crashed through the glass storefront. Claimant described the accident as follows:

> "I was waiting for my customer and then I heard a noise and I kind of turned but I didn't really pay attention because, you know, they've done it before, backing in and everything, so–I mean I turned, and I'm like what is he doing there, and I'm like–and then I turned facing my register waiting for my customer to come back, and then I heard a revving of an engine and then all of a sudden glass [was] everywhere. He was in the store. I don't–I might have lost consciousness. I don't remember."

Claimant testified that at the time of the accident, she was positioned behind the cash register in an area to which the general public is not allowed access. She also stated that she could not leave her location because she was waiting for the customer to return and her drawer "wasn't cashed out."

¶ 7 The driver was identified as a delivery person who brings Polish-language newspapers to respondent's store five days a week and who had made a delivery to the store shortly before the accident. Admitted into evidence was a report of the accident prepared by the Hickory Hills police department. The report indicates that the driver had exited respondent's parking lot and was traveling eastbound on 95th Street when he lost control of the vehicle, veered to the right onto the asphalt surface adjacent to the storefront, and struck the building. Four other individuals in the store were injured during the accident, including one of claimant's co-workers and three customers.

¶ 8 An ambulance transported claimant to Christ Medical Center. Claimant sustained injuries to her ribs, head, left arm, left hip, left leg, tailbone, and two front teeth. Claimant treated with various medical professionals, including Dr. Howard Freedberg (an orthopaedic surgeon), Dr. George Papadopolous (a chiropractor), Dr. Sandeep Jejurikar (a plastic surgeon), and Dr. Gregory Schubert (a dentist). Claimant noted that in December 2009, Dr. Freedberg had released her to return to light duty, but respondent told her that it had no work available within her restrictions. In January 2010, Dr. Freedberg released claimant to return to work full duty, but respondent did not allow claimant to return to work. At the time of the arbitration hearing, claimant remained under treatment for her injuries and had yet to begin working again.

¶ 9 The arbitrator determined that claimant failed to prove by a preponderance of the evidence that her accidental injuries arose out of her employment. In particular, the arbitrator, citing *Brady v. Louis Ruffalo & Sons Construction Co.*, 143 Ill. 2d 542 (1991), concluded that claimant did not establish that the risk of injury "was incidental to her employment or that the work environment increased the risk so that she would be subject to such an accident to a greater degree than that to

which other persons on the premises were exposed."

¶ 10 A majority of the Commission reversed the decision of the arbitrator. The Commission explained:

> "[Claimant] indicated that her job duties as a cashier required her to spend virtually the entire workday in the front of the store. Indeed, at the time of the accident, [claimant] was at her register, waiting for a customer to return. We find that the location within the store where [claimant] performed her job duties, namely, in front of the store and in close proximity to large glass windows facing Respondent's parking lot, exposed her to a greater risk of injury compared to the general public."

The Commission awarded claimant 53-3/7 weeks of temporary total disability benefits (see 820 ILCS 305/8(b) (West 2008)) and ordered respondent to pay claimant's medical expenses (see 820 ILCS 305/8(a), 8.2 (West 2008)). In addition, the Commission remanded the matter to the arbitrator for a determination of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980), and for a determination of any further temporary total compensation or medical benefits. Commissioner Lindsay dissented. She would have corrected the arbitrator's decision to substitute "the general public" for the phrase "other persons on the premises," but otherwise would have affirmed and adopted the decision of the arbitrator. Noting that four other individuals were hurt in the accident, Commissioner Lindsay reasoned that the risk of injury was common to the general public. The circuit court of Cook County confirmed the decision of the Commission. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, respondent challenges the Commission's finding that claimant sustained a compensable accident. The purpose of the Act is to protect an employee from risks and hazards which are peculiar to the nature of the work he is employed to do. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). For an injury to be compensable, however, more is required than the fact of an occurrence at an employee's place of work. *Greater Peoria Mass Transit District v. Industrial Comm'n*, 81 Ill. 2d 38, 43 (1980). An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" one's employment. 820 ILCS 305/2 (West 2008); *Orsini*, 117 Ill. 2d at 44. It is the burden of the employee to establish by a preponderance of the evidence that both elements were present at the time of the accident's occurrence. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989); *Rodin v. Industrial Comm'n*, 316 Ill. App. 3d 1224, 1226 (2000). Whether an injury arose out of and in the course of one's employment is a factual matter for the Commission to resolve and its finding in that regard will not be set aside on appeal unless it is against the manifest weight of the evidence. *Knox County YMCA v. Industrial Comm'n*, 311 Ill. App. 3d 880, 885 (2000). A finding of fact is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 13 The phrase "in the course of" refers to the time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (2000). "Injuries sustained on an employer's premises or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received in the course of the employment." *Restaurant Development Group*

v. Hee Suk Oh, 392 Ill. App. 3d 415, 420 (2009). In this case, claimant was on respondent's premises during her normal work shift assisting a customer at her assigned cash register when the accident occurred. Thus, there can be no dispute that claimant was "in the course of" her employment at the time she sustained the injuries for which she seeks compensation. Accordingly, our focus is on whether claimant's injury "arose out of" her employment with respondent.

¶ 14 "For an injury to arise out of the employment, 'the risk of injury must be a risk peculiar to the work *or* a risk to which the employee is exposed to a greater degree than the general public by reason of his employment.' " (Emphasis in original.) *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162 (quoting *Orsini*, 117 Ill. 2d at 45.). There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162. Employment risks include the obvious kinds of industrial injuries and are universally compensated. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162. Personal risks include nonoccupational diseases, injuries caused by personal infirmities, and injuries caused by personal enemies. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162-63. Although generally noncompensable, personal risks may be compensable where conditions of the employment increase the risk of injury. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163, n.1. Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombings, and hurricanes. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163. 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 Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011).

¶ 15 In this case, claimant was injured when she was struck by a vehicle that crashed through a storefront as she was assisting a customer. The parties dispute the type of risk presented by this scenario. Respondent asserts that it constitutes a neutral risk. Claimant, on the other hand, suggests that it presents an employment risk, reasoning that the accident was "caused by the negligence of a vendor coming to 95th Produce Market on the store's behalf." Although the driver of the vehicle that caused the accident was a vendor, he had left respondent's premises and entered the stream of traffic on a public road shortly before the accident. Therefore, he was no different than any other driver on 95th Street. As such, we find that the risk of injury presented in this case is not distinctly associated with claimant's employment. Rather, we agree with respondent that the risk at issue in this case is neutral in nature.

¶ 16 Given that the risk presented is neutral, respondent contends that the Commission's finding that claimant's injuries "arose out of" her employment was incorrect as a matter of law. According to respondent, in finding claimant's injuries compensable, the Commission applied the positional-risk doctrine. The positional-risk doctrine provides that an injury arises out of one's employment if it would not have occurred but for the fact that the conditions or obligations of the employment placed the employee in the position where he was injured by a "neutral force," *i.e.*, a force neither personal to the employee nor distinctly associated with the employment. *Brady*, 143 Ill. 2d at 552. As respondent points out, however, our supreme court has declined to adopt the positional-risk

doctrine on the basis that it would not be consistent with the requirements expressed by the legislature in the Act. *Brady*, 143 Ill. 2d at 552-53; see also *Decatur-Macon County Fair Ass'n v. Industrial Comm'n*, 69 Ill. 2d 262, 268 (1977) ("We believe our interpretation of the 'arising out of and in the course of' employment requirement is more consistent with the intent of the Act to compensate only for those injuries the risk of which is increased by the employment beyond that to which other members of the public are exposed."). Alternatively, respondent argues that the Commission's finding that claimant's injuries arose out of her employment is against the manifest weight of the evidence. In this regard, respondent reasons that, claimant failed to establish that she was subject to the risk of injury from a neutral risk to a greater degree than the general public. In light of *Brady*, we find persuasive respondent's latter argument.

¶ 17 In *Brady*, the claimant was severely injured when a truck carrying a load of gravel left an adjacent highway and crashed into the building where he was employed by the respondent. The building was situated 47 feet from the edge of the highway. The exterior walls of the building consisted of corrugated metal about 1/8-inch thick, and the interior walls of the claimant's office consisted of plywood affixed to wooden studs. The claimant did most of his work at a drafting table that was attached to a wall in his office. The force of the truck crashing through the building caused the drafting table to puncture the claimant's abdomen. On these facts, the Commission denied compensation, finding that the claimant's injuries did not arise out of his employment because the evidence did not demonstrate that the employment environment exposed the claimant to an increased risk beyond that to which the general public is subjected. The Commission's decision was confirmed by the trial court and upheld by this court. The claimant then appealed the matter to our

supreme court.

¶ 18 Before the supreme court, the claimant insisted that the conditions of his employment environment increased the risk that he would be injured by a vehicle leaving the adjacent highway. In support of his position, the claimant noted that he was required to work eight hours a day, five days a week in a thin-walled sheet-metal structure located less than fifty feet from a heavily traveled highway. The supreme court declined to disturb the Commission's decision, explaining that "the Commission could properly infer that the structural integrity and location of the work site did not increase the risk that [the] claimant would be subject to an accident, to any greater degree than that to which other persons along the same route were exposed to the same hazard." *Brady*, 143 Ill. 2d at 551. The supreme court stated the only way in which it could find the claimant's injuries compensable would be to adopt the positional-risk doctrine. *Brady*, 143 Ill. 2d at 552. As noted above, however, the *Brady* court found that the positional-risk doctrine was inconsistent with the intent of the Act. *Brady*, 143 Ill. 2d at 552; *Decatur-Macon County Fair Ass'n*, 69 Ill. 2d at 268.

¶ 19 The facts in this case are similar to those in *Brady*. As in *Brady*, claimant in this case was working at a designated location within respondent's building when a third-party driver lost control of his vehicle and struck the building. In *Brady*, the court found that there was no evidence to demonstrate that the employment environment exposed the employee to an increased risk beyond that to which the general public is subjected. *Brady*, 143 Ill. 2d at 550-51. Likewise, in this case, claimant did not present any evidence that her employment environment exposed her to an increased risk of injury under the circumstances presented. For instance, claimant did not produce any evidence to establish that the structural integrity of respondent's building or its location increased

her risk of injury. Similarly, claimant failed to present any evidence to establish that the presence of large windows at the front of the store increased her risk of injury from a vehicle crashing into the building. While we are reluctant to conclude that a factual determination of the Commission is against the manifest weight of the evidence, we will not hesitate to do so when the clearly evident, plain, and undisputable weight of the evidence compels an opposite conclusion. *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill. App. 3d 486, 491 (2004). For the reasons set forth herein, we find this to be such a case.

¶ 20 We note that in those cases in which this court has found that the employee was subject to the risk of injury from a neutral risk to a greater degree than the general public, the employee has introduced evidence to support that conclusion. For instance, in *Illinois Institute of Technology Research Institute*, the employee was killed when he was struck by a stray bullet while inside his place of employment, 20 feet behind floor-to-ceiling glass windows. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 152, 165. The employee introduced the testimony of a detective with knowledge of area crime rates who testified to recent increases in criminal activity in the area surrounding the job site. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 152, 165. There was also testimony that bullets had previously struck and entered the building where the employee worked. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 153, 165. Similarly, in *Restaurant Development Group*, the employee was injured by a stray bullet while standing next to the bar in the restaurant where he worked. *Restaurant Development Group*, 392 Ill. App. 3d at 417. The employee presented evidence of a police sergeant who was familiar with crime in the area where the restaurant was located. The police sergeant testified that the district

in which the restaurant was located had a large collection of multiple gangs and that violent crimes increased in the area during the hours in which the restaurant was open. *Restaurant Development Group*, 392 Ill. App. 3d at 418-19, 421. In contrast to *Illinois Research Institute* and *Restaurant Development Group*, claimant in this case failed to introduce any testimony to establish that she was subject to the risk of injury from a neutral risk to a greater degree than the general public. For instance, as noted in the preceding paragraph, claimant presented no evidence that the location of the store or the structure of the building increased the risk of injury of being struck by a car to a greater degree compared to the general public.

¶ 21 The Commission nevertheless concluded that claimant's injuries arose out of her employment, reasoning that "the location within the store where [claimant] performed her job duties, namely, in front of the store and in close proximity to large glass windows facing Respondent's parking lot, exposed her to a greater risk of injury compared to the general public." The mere fact that an employee was present at the place of injury because of her employment, however, is insufficient, by itself, to establish that the injury arose out of the employment. *Brady*, 143 Ill. 2d at 550; see also *Greater Peoria Mass Transit District*, 81 Ill. 2d at 43. Adopting the Commission's decision would require us to depart from existing authority and invoke the positional-risk doctrine. Given the supreme court's clear disavowal of the positional-risk doctrine in *Brady*, however, we are foreclosed from applying that doctrine here.

¶ 22 Claimant maintains that she presented evidence to establish that her work environment subjected her to a greater risk than the general public of an injury from a driver crashing into respondent's building. Initially, she argues that the link between her injuries and her employment

stems from "the risks working in a store located beside a busy section of 95th Street." However, claimant presented no evidence that the traffic patterns on 95th Street, the number of motor-vehicle accidents along the stretch of 95th Street adjacent to respondent's premises, or the location of the store in relation to the street increased the risk that she would be subject to an accident to any greater degree than that to which other persons were exposed to the same hazard. See *Brady*, 143 Ill. 2d at 551. Claimant claims that she may have been in a different location in the store when the vehicle struck had she not been assisting a customer at her register. Thus, she suggests, she was at an increased risk of injury because respondent required her to stand behind the counter at her cash register. However, this presents a classic example of the positional-risk scenario, *i.e.*, claimant's injury would not have occurred but for the fact that the conditions or obligations of her employment placed her in a position where she was injured by a neutral force. See *Brady*, 143 Ill. 2d at 552. Moreover, claimant does not explain how this requirement subjected her to a greater risk of injury from an accident than the general public. In this regard, we note that claimant was working at the cash register to which she was assigned just as the employee in *Brady* was working at the drafting table where he did most of his work. In *Brady*, the court rejected the notion that the employee's injuries "arose out of" his employment. *Brady*, 143 Ill. 2d at 550-51.

¶ 23 Claimant also contends that she was at an increased risk because the driver who caused the accident, a delivery person who had previously been in the store to deliver newspapers, was not a "random [driver] coming off the street." Rather, she insists, he was a "business invitee." However, the police report indicates that the vendor had left respondent's premises and was traveling eastbound on 95th Street at the time that he lost control of the vehicle. Thus, as noted previously,

at the time of the accident, he was indistinguishable from any other driver on 95th Street.

¶ 24 Claimant suggests that the existence of the asphalt surface between the building's storefront and 95th Street created an increased risk of a vehicle driving through the front of respondent's building. Claimant testified that although concrete parking blocks are situated on either end of the asphalt surface, drivers would nevertheless enter this area and then have to turn around after realizing that it does not lead to an exit from the parking lot. As such, claimant insists that respondent was on notice of the risk posed by vehicles attempting to use the area immediately in front of the store as a turn-around area. However, there was no evidence that the driver who crashed into the building was attempting to turn around on the asphalt surface when the accident occurred. To the contrary, the police report clearly indicates that the driver exited respondent's parking lot and had entered the stream of traffic on 95th Street prior to veering into respondent's building.

¶ 25 III. CONCLUSION

¶ 26 In sum, we conclude that the Commission's finding that claimant sustained injuries "arising out of her employment" because the location where she performed her job duties exposed her to a greater risk of injury compared to the general public is against the manifest weight of the evidence. Accordingly, we reverse the judgment of the circuit court of Cook County, which confirmed the decision of the Commission.

¶ 27 Reversed.