2014 IL App (1st) 131669WC-U
No. 1-13-1669WC
Order filed June 30, 2014



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| RUTH SASAKI, Surviving Spouse of Willy Sasaki, Deceased, | ) | Appeal from the Circuit Court of Cook County. |
| Plaintiff-Appellant, | ) | |
| v. | ) | No. 12-L-51173 |
| THE ILLINOIS WORKERS' COMPENSATION COMMISSION and ROSECO AUTO REBUILDERS, | ) | Honorable Patrick J. Sherlock, |
| Defendants-Appellees. | ) | 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 failed to sustain her burden of establishing that decedent's injuries arose out of his employment with respondent is not against the manifest weight of the evidence.

¶ 2 Claimant, Ruth Sasaki, the surviving spouse of Willy Sasaki (decedent), appeals from the judgment of the circuit court of Cook County, which confirmed a decision of the Illinois

Workers' Compensation Commission (Commission) denying her application for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2006)).[1] We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 7, 2008, decedent filed a *pro se* application for adjustment of claim alleging that he sustained an injury on October 12, 2007, while in the employ of respondent, Roseco Auto Rebuilders. Decedent subsequently passed away from causes unrelated to the event of October 12, 2007. On January 31, 2011, decedent's spouse filed an amended application for adjustment of claim to substitute herself as claimant. The matter proceeded to an arbitration hearing on June 10, 2011, at which the following relevant evidence was presented.

¶ 5 Decedent founded respondent's business in 1946 and continued to work for respondent since that time. On October 12, 2007, the date of the alleged accident, decedent was 90 years old. At that time, decedent's duties included paying bills, counting money, and making deposits. Decedent typically opened the business in the morning between 7 and 7:30 a.m. and worked four hours per day.

¶ 6 Decedent's office had a desk and a four-wheel chair. Photographs of decedent's office were admitted into evidence. The flooring in decedent's office was composed of concrete covered with vinyl tile. Claimant testified that the tile was in good condition. However, decedent's son, James Sasaki (James), testified that the tile was "lifting" off the concrete. The photographs of decedent's office showed tape on the tile. According to James, the tape was

[1] Decedent's name is spelled two different ways in the record. For the sake of consistency, we adopt the spelling "Willy," which is used in both claimant's original and amended applications for adjustment of claim.

applied shortly after October 12, 2007. Both claimant and James agreed that a chair with wheels, like decedent's chair, rolled easily over the floor.

¶ 7 On October 12, 2007, claimant drove decedent to work in the morning. Andres Jimenez, one of respondent's employees, arrived at work that morning between 6:30 and 7 a.m. Jimenez testified that he was about 25 feet from decedent when he heard decedent call his name. Jimenez approached decedent's work area and found him on the ground. Decedent told Jimenez that he had fallen off his chair. Another employee, Bob Siegel, entered decedent's office and called the paramedics. An ambulance transported decedent to the emergency room at Ingalls Memorial Hospital.

¶ 8 At the emergency room, decedent told medical personnel that he "tripped and fell to [the] floor." Decedent was diagnosed with a broken hip and came under the care of Dr. Carl DiLella, an orthopaedist. Dr. DiLella's records note that claimant's injury occurred as claimant "was attempting to sit down in an office chair when it rolled away from him and he fell onto the floor of his work place." On October 14, 2007, decedent underwent surgery to insert a rod into his hip. Decedent followed up with Dr. DiLella on five occasions between November 16, 2007, and July 20, 2009. Claimant testified that decedent did not have any prior accidents involving his hip.

¶ 9 On November 15, 2010, decedent presented to Dr. Albert Mitsos, pursuant to the request of his attorney. Dr. Mitsos's report notes that decedent "reached for his desk chair, which was on wheels and slid away, causing [decedent] to fall on his right hip on the concrete floor." Dr. Mitsos's diagnosis was consistent with that of Dr. DiLella.

¶ 10 Claimant offered into evidence two transcribed statements produced by respondent. These statements, dated October 29, 2007, and November 12, 2007, were taken by an

investigator on behalf of respondent's workers' compensation carrier. The arbitrator concluded that both statements were hearsay and therefore inadmissible. Claimant also offered into evidence a statement typed by claimant on January 2, 2008, and attached to decedent's *pro se* application for adjustment of claim. The statement purported to describe the events of October 12, 2007. Respondent objected on hearsay grounds. The arbitrator sustained respondent's objection and rejected the exhibit.

¶ 11 On August 9, 2011, the arbitrator issued his decision. The arbitrator accepted that decedent's injuries occurred when he fell after his chair slid away as he was attempting to sit down. According to the arbitrator, however, claimant did not introduce any evidence "to prove that chairs with wheels or casters (of the type that [decedent] used) are exclusively found in the workplace." Consequently, the arbitrator found that claimant failed to establish that decedent's injuries arose out of his employment. The Commission affirmed the decision of the arbitrator, but determined that the arbitrator applied the wrong legal standard. The Commission explained:

> "The Commission finds that the Arbitrator applied an incorrect legal standard, of whether [decedent] was subjected to something 'exclusively' found in the workplace, in determining if [decedent's] accident arose out of his employment. The Commission finds that the proper legal standard is whether [decedent's] employment subjected him to a greater risk of injury than that to which a member of the general public would have to deal with on a daily basis. Having applied the proper legal standard to the evidence in this claim, the Commission affirms the Arbitrator's decision."

On April 30, 2013, the circuit court of Cook County entered an order confirming the decision of the arbitrator. On May 21, 2013, claimant filed a notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, claimant argues that the Commission erred in concluding that she failed to sustain her burden of proving that decedent's injuries arose out of his employment with respondent. We disagree.

¶ 14 An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" the employment. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (2006); *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416 (2000). A claimant bears the burden of proving by a preponderance of the evidence both of these elements. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 477 (2011); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006).

¶ 15 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 employee might reasonably have been while performing his or her duties, and while the employee is at work are generally deemed to have been received "in the course of" one's employment. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013-14 (2011). In this case, it is not disputed that decedent's injuries were sustained in the course of his employment. Indeed, the record establishes that the accident occurred on respondent's premises during decedent's regular work hours. See *Baldwin*, 409 Ill. App. 3d at 477-78. Thus, we turn to whether claimant sustained her burden of establishing that decedent's injuries also "arose out of" his employment with respondent.

¶ 16 As a general rule, the question of whether an employee's injury arose out of his employment is one of fact. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). With

respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded to the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). A reviewing court will not disturb the Commission's determination on a factual matter unless it is against the manifest weight of the evidence. *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶ 15. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Elgin Board of Education School District U-46 v. Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 949 (2011). Claimant, nevertheless, urges us to conduct *de novo* review of the Commission's finding because "[t]he undisputed facts permit only one reasonable inference." We agree that *de novo* review is appropriate if the facts are undisputed and susceptible to only a single reasonable inference. *First Cash Financial Services*, 367 Ill. App. 3d at 104-05. In this case, however, there were a number of factual disputes raised by the parties, including questions relating to the circumstances surrounding decedent's accident and the degree to which claimant was exposed to the risk at issue. Accordingly, this appeal presents questions of fact, and we will apply the manifest-weight-of-the-evidence standard.

¶ 17 For an injury to "arise out of" one's 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 accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). To determine whether a claimant's injury "arose out of" his or her employment, we must first categorize the risk to which he or she was exposed. *First Cash Financial Services*, 367 Ill. App. 3d at 105. Illinois courts categorize the risks to which an employee may be exposed into three general groups: (1) risks distinctly associated with the employment; (2) risks

personal to the employee; and (3) neutral risks that have no particular employment or personal characteristics. *Baldwin*, 409 Ill. App. 3d at 478; *First Cash Financial Services*, 367 Ill. App. 3d at 105; *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162.

¶ 18 Employment risks are "inherent in one's employment" and "include the obvious kinds of industrial injuries and occupational diseases and are universally compensated." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162. In this case, decedent fell when the chair he was attempting to sit on slid away from him. There is no evidence that the risk of this type of injury is distinctly associated with claimant's employment with respondent. As such, we are not presented with an employment risk. Likewise, this case does not involve a personal risk. Personal risks include exposure to elements that cause nonoccupational diseases, personal defects, or weaknesses. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 352 (2000) (Rakowski, J., specially concurring); see also *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. In this case, there was no evidence that decedent's fall was the result of any personal defect or weakness. Indeed, the evidence presented to the arbitrator shows that decedent had not experienced any hip problems prior to the accident at issue.

¶ 19 Having eliminated the first two types of risks, we find that decedent's fall may be properly categorized as resulting from a neutral risk. See *Illinois Consolidated Telephone Co.*, 314 Ill. App. 3d at 353 (Rakowski, J., specially concurring). Injuries 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*, 407 Ill. App. 3d at 1014. Accordingly, resolution of this appeal centers on whether claimant presented evidence that decedent was exposed to a risk greater than that of the general public.

¶ 20 Claimant insists that, for various reasons, decedent was exposed to a greater risk of falling than the general public. For instance, claimant cites the condition of decedent's chair, which she describes as an "ancient," "unstable," and "armless rolling chair." Claimant also cites the "slick" and "worn" floor in decedent's office and the frequency with which claimant was required to sit down. However, claimant presented no evidence that the chair was defective. See *First Cash Financial Services*, 367 Ill. App. 3d at 106 ("Employment 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"). Moreover, although there was evidence that the vinyl tile in decedent's office was peeling away from the surface, there was no evidence that this condition contributed to the accident. Similarly, claimant presented no evidence regarding the frequency with which decedent sat down. Quite simply, decedent fell as he was attempting to sit down and the chair slid away from him. By itself, the act of sitting at the employer's place of business does not establish a risk greater than that faced by the general public. See *First Cash Financial Services*, 367 Ill. App. 3d at 105 (holding that walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public).

¶ 21 In so holding, we reject claimant's argument that the Commission "simply adopted the Arbitrator's flawed reasoning." To be sure, the Commission reached the same conclusion as the arbitrator, but the Commission did so on a basis independent of the arbitrator's reasoning. Claimant also argues that the Commission did not make any factual findings relative to the

correct legal standard. Again, we disagree. The Commission found that the proper legal standard is whether decedent's employment subjected him to a greater risk of injury than a member of the general public. The Commission then applied the proper legal standard and affirmed. As noted above, this finding was not against the manifest weight of the evidence.

¶ 22 Claimant also suggests that decedent's injury is compensable under the personal-comfort doctrine. However, it does not appear from the record that claimant raised this argument before the Commission. As such, it has been forfeited. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 110807WC, ¶ 40. Even absent forfeiture, we do not find that claimant's position presents a basis for reversal.

¶ 23 The only evidence claimant cites in support of this argument comes from the statement attached to decedent's *pro se* application for adjustment of claim. According to that statement, decedent was returning to his desk after warming up his coffee in a microwave oven. However, the arbitrator ruled that the statement was hearsay and therefore inadmissible. The Commission affirmed and adopted this portion of the arbitrator's decision. Claimant nevertheless insists that decedent's statement was admissible as a recorded recollection under Illinois Rule of Evidence 803(5) (eff. Jan. 1, 2011). That rule provides:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
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> (5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the

> witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." Illinois Rule of Evidence 803(5) (eff. Jan. 1, 2011).

The rationale upon which the recorded recollection exception to the hearsay rule relies is that the proffered document contains sufficient circumstantial guarantees of trustworthiness and reliability because the recorded recollection was prepared at or near the time of the event while the witness had a clear and accurate memory of it. *Salcik v. Tassone*, 236 Ill. App. 3d 548, 554 (1992). Thus, the reliability of the evidence is perceived to outweigh the inherent testimonial infirmities of hearsay created by the inability of the opposing party to effectively cross-examine. *Salcik*, 236 Ill. App. 3d at 554. In this case, the statement was not prepared at or near the time of the event. Rather, it was prepared almost three months after decedent's accident occurred. Under these circumstances, we find that the Commission did not err in classifying the statement as inadmissible hearsay. See *Salcik*, 236 Ill. App. 3d at 554-55 (holding that trial court did not abuse its discretion in finding that statement made over three months after accident in question was not admissible as a recorded recollection). Thus, we are presented with no evidence to support application of the personal-comfort doctrine.

¶ 24 III. CONCLUSION

¶ 25 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County, which confirmed the decision of the Commission denying claimant benefits under the Act.

¶ 26 Affirmed.