2012 IL App (2d) 101166WC-U
No. 2-10-1166WC
Order filed January 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JULIE PFOHL, surviving spouse of LEONARD PFOHL, deceased,	)	Appeal from the Circuit Court of Jo Daviess County.
Plaintiff-Appellee,	)	
v.	)	No. 10-MR-11
ILLINOIS WORKERS' COMPENSATION COMMISSION and MONICA SWALLEY, d/b/a THE GOLD ROOM,	)	Honorable William A. Kelly,
Defendants-Appellants.	)	Judge, Presiding

JUSTICE HUDSON delivered the judgment of the court.

Presiding Justice McCullough and Justices Hoffman, Holdridge, and Stewart concurred in the judgment.

ORDER

Held: Trial court's decision to set aside Commission's finding that employer proved intoxication defense would be reversed where evidence established that deceased employee's level of intoxication rendered him unable to perform the duties of his employment and therefore constituted a departure from his employment.

¶ 1 Leonard Pfohl (decedent) died after falling down a flight of stairs on the premises of The Gold Room, a tavern where he was employed as a cook. Claimant, Julie Pfohl, as decedent's surviving spouse, filed an application for adjustment of claim seeking benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2004)). Following a hearing, an arbitrator found that decedent was intoxicated at the time of the fall and that there was no evidence that he was capable of safely performing his job duties as a cook after he became intoxicated. As such, the arbitrator concluded that the injuries resulting in decedent's death did not arise out of and in the course of his employment. On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the decision of the arbitrator. Claimant then appealed to the circuit court of Jo Daviess County, which set aside the decision of the Commission and entered an award for benefits. Thereafter, respondent, Monica Swalley, d/b/a The Gold Room, filed the present appeal. For the reasons set forth below, we reverse the judgment of the circuit court and reinstate the decision of the Commission.

¶ 2 I. BACKGROUND

¶ 3 The following relevant facts were established by the testimony presented and the exhibits admitted into evidence at the arbitration hearing, which was held on May 14, 2008. Swalley is the owner of The Gold Room, a tavern located in Galena, Illinois. Prior to the accident at issue, decedent had worked as a breakfast cook for The Gold Room for 15½ years. Decedent's shift ran from 4:30 a.m. until 10 a.m. on weekdays and from 4:30 a.m. until noon on weekends. In addition to his regular hours, decedent was compensated for 30 minutes of "flex" time each workday. The compensation for "flex" time was intended to cover additional work decedent would do outside of his normal shift that could not be done during regular work hours.

¶ 4 Decedent's duties as a cook included operating the grill, a meat slicer, and a meat grinder; cooking potatoes in a roaster; and working with boiling water. The Gold Room's cooking area consisted of an 18 inch by 30 inch grill located behind the bar. Due to the confined space, many supplies and some of the equipment used for cooking were stored in the tavern's basement. This required decedent to go up and down the basement stairs several times a day to complete his tasks.

¶ 5 In addition to his position at The Gold Room, decedent was employed at a local cemetery. According to several witnesses who testified at the arbitration hearing, it was not uncommon for decedent to finish his shift at The Gold Room and go to the cemetery to perform maintenance on the grounds. The witnesses also indicated that decedent sometimes returned to The Gold Room after working at the cemetery to complete some of the preparation work for the next morning's breakfast.

¶ 6 On December 31, 2004, decedent arrived at The Gold Room at his usual time and he finished his shift sometime after 1 p.m. After his shift was over, decedent stayed at The Gold Room to visit with some friends. Decedent played euchre and shuffleboard during this time. He also drank beer, although the exact number of drinks that decedent consumed is not known. Around 7:30 or 8 p.m., decedent went to the basement staircase. After closing the door behind him, decedent fell down the stairs. An ambulance transported decedent to Galena-Stauss Hospital, where he was pronounced dead at 8:40 p.m. During questioning, the arbitrator sustained as hearsay respondent's objections to testimony about statements decedent made to witnesses regarding why he was going to the basement.

¶ 7 An autopsy was performed on decedent on January 3, 2005. The autopsy report noted that decedent was 74 inches tall and weighed 310 pounds. The report also found that decedent's blood-alcohol level was 0.185% and his vitreous-ethanol level was 0.204%. The autopsy listed the cause

of death as acute craniocerebral trauma due to a closed-head injury resulting from a fall down stairs. In addition, acute ethanolism was found to have contributed to the death. The coroner's death certificate also listed the cause of decedent's death as acute craniocerebral trauma due to a closed-head injury resulting from a fall down stairs with acute ethanolism as a significant condition contributing to the death.

¶ 8 At the arbitration hearing, claimant called several individuals who interacted with decedent at The Gold Room on December 31, 2004. Donald Bennett testified that he was "good friends" with decedent, having known him for 45 years. Bennett testified that he arrived at The Gold Room at 3 p.m. on December 31, 2004, and played euchre with decedent, John Reitz, and a fourth individual. After playing euchre for about 90 minutes, Bennett played shuffleboard with decedent, Reitz, and Swalley for about an hour and a half. Upon completing the shuffleboard game, the participants sat at the bar. About 20 or 30 minutes later, decedent got up to go to the basement. Shortly later, Bennett heard a "thump," which he learned was the sound of decedent falling down the basement stairs. Bennett testified that, during his time at The Gold Room, he did not observe decedent slurring his words or having any balance problems such as staggering or acting tipsy. Bennett also testified that he was familiar with the basement steps, having helped Swalley on occasion. Bennett characterized the steps as "[s]teep" and recounted that Swalley had previously fallen down the stairs. Although Bennett originally testified that he only had four beers between the time he arrived at The Gold Room and the time decedent fell, he changed his testimony on cross-examination to indicate that he may have consumed six beers during that time.

¶ 9 John Reitz testified that he had been familiar with The Gold Room for approximately 32 years and that he had known decedent and been friends with him for more than 30 years. Reitz

arrived at The Gold Room at around 2 p.m. on December 31, 2004. Reitz believed that decedent had just finished his shift because decedent had already finished making breakfast and a bartender had arrived. Reitz also testified that he played both euchre and shuffleboard with decedent and others while he was at The Gold Room. Reitz stated that at the conclusion of the shuffleboard game, several individuals, including decedent, chatted at the bar for awhile. Shortly later, decedent got up to go downstairs. Reitz stated that he heard a "big thump" and a person at the bar stated that someone had fallen. Reitz testified that while he was at The Gold Room with decedent, he did not observe decedent slurring his speech or having balance problems.

¶ 10 Reitz further testified that he occasionally tended bar at The Gold Room and was familiar with the stairs leading to the basement. Reitz was not aware of any reason for decedent to go down the basement steps other than for a work-related task. Reitz characterized the stairs as "steep" and noted that they did not have a handrail. He did not, however, notice anything on the stairs when decedent fell. Reitz also testified that he slipped on the stairs while working at The Gold Room. On cross-examination, Reitz testified that on the day of the accident he drank five or six beers between the time he arrived at The Gold Room and the time decedent fell.

¶ 11 Glen Harris testified that he had known decedent for about 10 years. Harris testified that he and his wife went to The Gold Room between 7 and 7:30 p.m. on December 31, 2004, to speak with decedent and claimant about a vacation the couples had planned. When Harris arrived, decedent was playing shuffleboard. Harris testified that after talking for a while, decedent walked over to the basement and shut the door behind him. Someone then yelled that decedent had fallen. Harris testified that he could tell that decedent was drinking because he had a beer in front of him. According to Harris, however, the alcohol did not seem to affect decedent, and Harris did not

observe decedent slurring his speech or having any balance problems. Harris also testified that on prior occasions he had helped carry things to the tavern's basement. He described the steps as "normal steps, a little steeper than average" with "a little wear to the center of the boards." Harris went down the steps after decedent fell, but did not notice any substances or foreign objects on them. On cross-examination, Harris testified that he did not have any alcoholic beverages on the day of the accident.

¶ 12 Swalley testified that she was friends with decedent and the other witnesses who testified at the arbitration hearing. She described decedent as an honest, dependable, hardworking, and trustworthy employee. Swalley was unable to recall when she arrived at The Gold Room on the day of the accident other than that it was in the late afternoon. After her arrival, Swalley played shuffleboard with decedent. Following the shuffleboard game, Swalley went into the basement to get some fish batter. At that time, Swalley did not notice any foreign objects on the steps. Although Swalley was in the basement at the time decedent fell, she did not observe the accident. Swalley related that she had consumed fewer than five beers on the day of the accident.

¶ 13 Swalley testified that in addition to owning The Gold Room for 25 years, she also tends bar at the establishment. As a bartender, Swalley testified that she can tell if a patron needs to be "cut off" because he or she is too intoxicated. Swalley testified that she would not have "cut off" decedent on the day of the accident. According to Swalley, decedent's speech was not slurred and he was "standing fine," "walking fine," and "making good shots" during the shuffleboard game. Swalley added that while all of the job duties claimant performed as a cook had some risk of injury and danger, decedent would not have operated the slicer or grinder if he felt impaired. In addition, she opined that claimant was still capable of doing his work.

¶ 14 Swalley testified that, as a general rule, The Gold Room's basement was accessible only to employees, non-employees who are helping an employee, and vendors. According to Swalley, none of the vendors have complained that the stairs were dangerous. In fact, Swalley testified that some of the vendors had commented that they wished the steps at other establishments were as "good" and "wide" as those at The Gold Room. Swalley acknowledged that she fell down the tavern's stairs the night of her 40th birthday. Swalley testified that she was intoxicated at the time. Other than the incident with her and decedent, Swalley was unaware of anyone else falling down the basement stairs. Swalley testified that after decedent fell, she "physically was having trouble" going down the basement steps. As a result, her son changed out the top two steps. She noted, however, that the insurance company had inspected the stairs and did not suggest that any changes needed to be made to the steps.

¶ 15 Swalley was not aware of any reason for decedent to have gone down the basement stairs when he fell other than for a work-related task. Swalley noted that decedent was scheduled to work the following day, January 1, 2005. She stated that New Year's Day is "a big day for breakfast" at The Gold Room. As such, she expected it would be necessary for decedent to make sure before he left on December 31, 2004, that everything was ready to go for the next morning.

¶ 16 Claimant testified that she was married to decedent at the time of his death. Claimant went to The Gold Room on December 31, 2004, after she left work. When she arrived, decedent was sitting at the bar talking to others. Claimant acknowledged that decedent was drinking beer on the night of the accident. Nevertheless, she thought decedent was "fine." She stated that decedent's speech was not slurred, that he was able to carry on a conversation, and that he did not stumble, stagger, or sway. She also testified that while playing shuffleboard, decedent was "right on his

shots." Claimant further testified that the stairs to The Gold Room's basement do not have a handrail and that they are "steep" and "wobbly." Claimant opined that there was no reason for decedent to go to the basement other than to prepare for the next day's breakfast.

¶ 17 Admitted into evidence without objection from claimant were two letters authored by Dr. Jerrold Leikin, the director of medical toxicology for Evanston Northwestern Healthcare. Dr. Leikin's February 4, 2008, letter notes that decedent's post-mortem blood- and vitreous-alcohol levels were 0.185% and 0.204%, respectively. Dr. Leikin noted that if the death was virtually instantaneous, then it is likely that these were also the alcohol levels at the time decedent passed away. Dr. Leikin wrote that neurobehavioral abnormalities associated with alcohol levels of this magnitude include impaired judgment, increased reaction time, perceptual abnormalities, and incoordination. Dr. Leikin opined that this level of alcohol "can affect the ability to ambulate or descend stairs." Dr. Leikin further opined that decedent "was at increased risk for falling and thus impaired due to alcohol intoxication." The second letter, dated March 14, 2008, reiterated the findings of decedent's alcohol level, but also added that "it is unlikely that [decedent] would be able to perform his duties as a cook in a safe manner." Dr. Leikin also proffered in the March 14, 2008, letter, that alcohol intoxication "was a significant contributing factor in [decedent's] accident."

¶ 18 Based on the foregoing evidence, the arbitrator determined that claimant failed to prove that the injuries resulting in decedent's death arose out of and in the course of his employment. The arbitrator found that at the time of the accident, decedent was "clearly intoxicated, nearly 2½ times the legal limit." The arbitrator also found that from the time that decedent completed his shift until the time he fell, there was no evidence that he performed or was capable of safely performing his job duties as a cook. The arbitrator acknowledged that claimant produced witnesses who testified that

they did not observe any conduct on decedent's behalf that would indicate that decedent was intoxicated. However, the arbitrator found that the witnesses were "clearly biased as they were very good friends of the [decedent] for many years prior to the incident." The arbitrator also noted that at least two of the witnesses (Bennett and Reitz) had been drinking for several hours at the time the accident occurred and that a third witness (Harris) had only been at The Gold Room a short period of time before decedent fell.

¶ 19 The arbitrator further indicated that even if decedent had gone into the basement to perform his duties as a cook, there was no testimony that the stairs were defective or that decedent was carrying anything at the time he fell. Rather, the arbitrator concluded that decedent was so intoxicated that he could not complete one of his required duties, *i.e.*, descending a set of stairs in a safe manner. Citing *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 480-81 (1989), the arbitrator noted that voluntary intoxication which renders an employee incapable of performing his work is a departure from the course of one's employment. The Commission "expand[ed]" upon the arbitrator's evidentiary rulings regarding the exclusion of decedent's statements about why he was going to the basement, but otherwise affirmed and adopted the decision of the arbitrator.

¶ 20 Upon judicial review, the circuit court of Jo Daviess County set aside the decision of the Commission and awarded benefits. Initially, the court determined that the Commission erred in upholding the arbitrator's exclusion of statements decedent made regarding why he was going to the basement. The court determined that decedent's statements constituted an exception to the rule against hearsay in that they went to decedent's state of mind or intent. The court then determined that the Commission erred in concluding that decedent's death did not arise out of and in the course of his employment. The court further ruled that respondent failed to establish the affirmative defense

of intoxication. The court acknowledged Dr. Leikin's opinion that it was unlikely that a person with decedent's blood-alcohol level would be capable of performing his or her duties as a cook. However, the court noted that there were five "occurrence witnesses" who testified that decedent's speech was not slurred and that decedent seemed in control of his physical movements. The court explained:

> "[A]s we all know, there are some people that because of regular consumption of libations get to a point where they can function pretty well and so it's like the 18 year old who goes to the wedding reception and he never had anything to drink before and he drinks six beers, he's probably extremely dangerous on the highway compared to somebody who's got a .185 and does it every day. They're probably safer on the highway because they're used to doing it and so I think we have to take that number (that .185) and tie it into what the occurrence witnesses say and I'm troubled that the arbitrator, on the basis that these are people who are acquaintances, spouse of, so forth; that their sworn testimony should be discounted on the basis that they would misstate (that each one would consistently misstate) what they saw and what they heard and so I think that the decision of the arbitrator was against the manifest weight of the evidence with regard to the issue of intoxication."

The court awarded claimant benefits of $497.54 per week for up to 20 years (see 820 ILCS 305/7(a), 8(b)(4.2) (West 2004)) and $4,200 for burial expenses (see 820 ILCS 305/7(f) (West 2004)). This appeal by respondent ensued.

¶ 21 II. ANALYSIS

¶ 22 On appeal, respondent argues that the trial court erred in setting aside the Commission's decision to deny benefits. According to respondent, it presented sufficient evidence to support an

intoxication defense. As such, respondent insists that the Commission's finding that the injuries resulting in decedent's death did not arise out of and in the course of his employment is not against the manifest weight of the evidence.

¶ 23 In a workers' compensation case, the claimant has the burden of establishing by a preponderance of the evidence that his injury arose out of and in the course of the employment. 820 ILCS 305/2 (West 2004); *McKernin Exhibits, Inc. v. Industrial Comm'n*, 361 Ill. App. 3d 666, 670 (2005). For an injury to "arise out of" one's employment, if must have an origin in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the injury. *Riley v. Industrial Comm'n*, 212 Ill. App. 3d 62, 64 (1991). Typically, an injury "arises out of" one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which the employee had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). An injury occurs "in the course of" one's employment when it occurs within the period of employment at a place where the employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or something incidental thereto. *Riley*, 212 Ill. App. 3d at 64.

¶ 24 Intoxication is not a *per se* bar to workers' compensation benefits. *Riley*, 212 Ill. App. 3d at 65. In *Paganelis*, 132 Ill. 2d at 481, the supreme court explained that the defense of intoxication could succeed if the employer could show that either (1) the intoxication was the sole cause of the employee's injury or (2) the intoxication was so excessive as to constitute a departure from the course of the employment. In assessing the second intoxication defense set forth in *Paganelis*, courts

have examined whether the employee is capable of properly performing his duties. See *Parro v. Industrial Comm'n*, 260 Ill. App. 3d 551, 555 (1993) (finding that after consuming alcohol, the claimant was unable to successfully descend stairs at her place of employment, a duty she was expected to perform); *Lock 26 Constructors v. Industrial Comm'n*, 243 Ill. App. 3d 882, 887-88 (1993) (upholding award where the claimant introduced evidence that he was able to perform his work after consuming alcohol); *Riley*, 212 Ill. App. 3d at 65 (finding that the Commission could reasonably conclude that the claimant was unable to perform his work after consuming alcohol where he fell asleep at the wheel and struck a utility pole while attempting to make a delivery to a customer); *County of Cook v. Industrial Comm'n*, 177 Ill. App. 3d 264, 271-72 (1988) (concluding that the claimant was entitled to benefits where the evidence did not show that he was unable to perform his required tasks after consuming alcohol). The *Paganelis* court explained that while prior case law indicated that "the ultimate conclusion must appear as a matter of law for the intoxication defense to succeed," such a decision actually depends on a variety of factual predicates. *Paganelis*, 132 Ill. 2d at 484. With respect to factual issues, it is within the province of the Commission to judge the credibility of the witnesses, to draw reasonable inferences from each witness's testimony, and to determine the weight to be given to the testimony of the witnesses. *Paganelis*, 132 Ill. 2d at 484; *McKernin Exhibits, Inc.*, 361 Ill. App. 3d at 672. The decision of the Commission on a factual matter will not be overturned on appeal unless it is against the manifest weight of the evidence. *Paganelis*, 132 Ill. 2d at 484. A decision is against the manifest weight of the evidence only if the 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).

¶ 25 In the present case, respondent contends that it established an intoxication defense based on the second method set forth in *Paganelis*. As noted above, under the second intoxication defense, the employer must show that the employee's intoxication was so excessive as to constitute a departure from the course of the employment. *Paganelis*, 132 Ill. 2d at 481. With respect to the magnitude of intoxication, we note that there is no established level for finding that an employee's blood-alcohol level precludes recovery. See *District 141, International Association of Machinists & Aerospace Workers v. Industrial Comm'n*, 79 Ill. 2d 544, 556-58 (1980) (upholding award of benefits where the decedent's blood-alcohol level was 0.186%); *Parro*, 260 Ill. App. 3d at 554-56 (affirming denial of benefits where the claimant's blood-alcohol level was 0.288%); *Lock 26 Constructors*, 243 Ill. App. 3d at 887-88 (concluding that the claimant had not departed from the course of his employment despite a blood-alcohol level of 0.290%); *Riley*, 212 Ill. App. 3d at 64-65 (denying benefits where the claimant's blood-alcohol level was 0.220%); *County of Cook*, 177 Ill. App. 3d at 271 (rejecting notion that legal presumption of intoxication under the Illinois Vehicle Code was standard to assess intoxication for purposes of intoxication defense under the Act); *Freeman United Coal Mining Co. v. Industrial Comm'n*, 160 Ill. App. 3d 524, 527-29 (upholding award of benefits where the decedent's blood-alcohol level was 0.155%). Nevertheless, we find the evidence in this case sufficient to support the Commission's finding that decedent was intoxicated.

¶ 26 It was undisputed that decedent was drinking beer just prior to the accident at issue. Although the exact number of beers that claimant consumed is not known, the evidence suggests that decedent began socializing when his shift ended, shortly after 1 p.m. The fall occurred sometime between 7:30 p.m. and 8 p.m. The autopsy report found that decedent's blood-alcohol level was 0.185% and his vitreous-ethanol level was 0.204%. Dr. Leikin noted that if death was virtually

instantaneous, then it is likely that these were also the alcohol levels at the time decedent passed away. Moreover, Dr. Leikin stated that neurobehavioral abnormalities associated with alcohol levels of the magnitude found in decedent include impaired judgment, increased reaction time, perceptual abnormalities, and incoordination.

¶ 27 Claimant did not present any medical opinion evidence to contradict the autopsy report or Dr. Leikin's findings. Instead, claimant offered her own testimony and the testimony of Bennett, Reitz, Harris, and Swalley that decedent did not appear to be intoxicated. However, as noted above, it is within the province of the Commission to to judge the credibility of the witnesses and to determine the weight to be given to their testimony. *McKernin Exhibits, Inc.*, 361 Ill. App. 3d at 672. We note that claimant was decedent's wife and that the remainder of the witnesses who testified that decedent did not show any indication of intoxication were all friends of decedent. As such, the Commission could have reasonably inferred that these witnesses were biased. See *Parro*, 260 Ill. App. 3d at 554. We also point out that at least three of the witnesses (Bennett, Reitz, and Swalley) personally acknowledged that they had been drinking beer on the evening of the accident. Thus, the Commission could have questioned their ability to assess decedent's condition. Moreover, the Commission could have concluded that Harris did not have sufficient time to assess decedent's state as he had arrived only a half hour before decedent fell. See *Parro*, 260 Ill. App. 3d at 554. For these reasons, we cannot say that the Commission's reliance on the opinion of Dr. Leikin over that of claimant and her witnesses on the issue of intoxication is against the manifest weight of the evidence.

¶ 28 Additionally, we find that the Commission could reasonably have concluded that decedent's intoxication was so excessive as to constitute a departure from the course of the employment on the

basis that decedent was unable to properly perform his duties. While the Commission upheld the arbitrator's decision to exclude testimony regarding why decedent went to the basement on the evening of the accident, we will assume, for purposes of this appeal, that it was to perform a work-related task. At the hearing, the evidence established that decedent's position as a cook involved various tasks, including operating a grill, a meat slicer, and a meat grinder. In addition, decedent was required to go up and down the basement stairs several times a day to complete certain tasks. Thus, descending the stairs were part of decedent's duties. Yet, once decedent began his course of his employment prior to the fall, there was no evidence that decedent performed or was capable of performing his job duties as a cook. To the contrary, Dr. Leikin opined that the level of alcohol measured in decedent's blood "can affect the ability to ambulate or descend stairs" and that, as a result, decedent "was at increased risk for falling and thus impaired due to alcohol intoxication." Dr. Leikin further opined that given his level of intoxication, "it is unlikely that [decedent] would be able to perform his duties as a cook in a safe manner." In fact, decedent was unable to do the first task he attempted to do upon returning to his employment--navigating the stairs to the basement of The Gold Room. Claimant points out that Swalley did opine that claimant was still capable of doing his work. However, she did not actually observe him performing any task related to his employment, and, as noted above, decedent was unable to successfully descend the stairs. Thus, at best, Swalley's testimony created a conflict regarding decedent's ability to perform the duties of his job. The Commission resolved this conflict against claimant, as was within its province to do. *McKernin Exhibits, Inc.*, 361 Ill. App. 3d at 672.

¶ 29 We also point out that there was no evidence that the condition of the stairs contributed to the fall. Swalley went down the stairs shortly before decedent, and she did not indicate that there

was any foreign object or a foreign substance on the stairs. Harris went down the steps after decedent fell and did not notice any substances or foreign objects on them. Further, while some of the witnesses noted that the stairs had no handrail and were steep, Swalley testified that some of the vendors who used the stairs commented that the stairs were better than some of the other establishments that they serviced and her insurer did not suggest any changes to the stairs when it inspected them. Finally, we note that the only other person known to have fallen down The Gold Room's basement stairs was Swalley, who was admittedly intoxicated at the time of her accident. Because the evidence establishes that decedent was not capable of performing the duties of his position at his level of intoxication, we cannot say that the Commission's finding that decedent's intoxication was so excessive as to constitute a departure from the course of the employment is against the manifest weight of the evidence.

¶ 30 Before concluding, we find that the cases cited by claimant to uphold the trial court's decision are distinguishable. In *County of Cook*, there was evidence that despite the employee's alleged intoxication, he was able to perform the functions of his position which involved placing stone on the shoulder of a roadway. *County of Cook*, 177 Ill. App. 3d 271-72. *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, 396 Ill. App. 3d 597 (2009), involved marijuana rather than alcohol. Moreover, the claimant in *Lenny Szarek, Inc.*, demonstrated that he was able to perform the duties of his job in a safe manner prior to his accident. *Lenny Szarek, Inc.*, 396 Ill. App. 3d at 610 ("The statements of two of respondent's employees regarding claimant's condition prior to the accident-which the Commission expressly relied upon-clearly established that claimant was performing his job prior to and at the time of his injuries"). As such, this case law does not compel affirmance of the trial court's decision.

¶ 31 III. CONCLUSION

¶ 32 In sum, the Commission's findings that decedent was intoxicated at the time of his fall and that he was not able to safely perform the functions of his job at his level of intoxication are not against the manifest weight of the evidence. As such, we conclude that the trial court erred as a matter of law in rejecting respondent's intoxication defense. We therefore reverse the judgment of the circuit court of Jo Daviess County which set aside the decision of the Commission. The decision of the Commission is reinstated.

¶ 33 Reversed; Commission decision reinstated.