2013 IL App (5th) 110518WC-U

NO. 5-11-0518WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BEN BARNHART, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*, (Korte & Luitjohan, Appellees).	)	Appeal from the Circuit Court of Madison County. No. 11-MR-67 Honorable Clarence W. Harrison II, Judge, presiding.

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

ORDER

¶ 1 *Held*: The Commission's finding that the claimant failed to prove that his injury arose out of and in the course of his employment is not contrary to law and is not against the manifest weight of the evidence.

¶ 2 The claimant, Ben Barnhart, worked as a concrete finisher for the employer, Korte & Luitjohan. The claimant was injured during his lunch hour while he assisted a coworker in starting the coworker's truck so they could leave to eat lunch. The accident occurred after the claimant left the job site and on a parking lot that was not under the control of the employer. The claimant filed a claim under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 to 30 (West 2010)). After an expedited hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2010)), the arbitrator found that the claimant "did not sustain the burden of proving an accident [that] arose out of and in the course of his

employment" because the claimant "did not demonstrate that the accident was in any way connected with his work." The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission), and the Commission affirmed the arbitrator's decision, with one commissioner dissenting. The claimant appealed the Commission's decision to the circuit court, and the circuit court entered a judgment confirming the Commission's decision. The claimant now appeals the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 On Saturday, December 19, 2009, the claimant worked at a job site for the employer pouring pavement for a sidewalk outside a new addition to a hospital. The claimant had worked at the job site for three or four months. Workers at the job site had a parking lot that was available to them. The claimant and his coworkers, however, often parked their vehicles in a public parking lot that was located closer to the job site, just across the street, particularly on Saturdays when more spaces were available in the parking lot. The parking lot was available for use by the general public. The claimant's supervisor, Kenny Kincaid, was aware that workers parked their vehicles in the lot across the street.

¶ 5 Around noon on the date of the accident, December 19, 2009, the claimant and two of his coworkers, Jeremy Green and Travis Bivins, left the employer's job site to take their lunch. Green was going to drive them to lunch; therefore, they walked to the public parking lot across the street where Green had parked his truck. Green's truck would not start. The claimant opened the hood and jiggled the truck's battery cables until they made a connection and the truck started. When the truck started, Green's foot came off of the truck's clutch, causing the truck to strike the claimant while he was standing in front of it. Kincaid watched from his own vehicle as the claimant attempted to jump-start Green's truck and saw the accident happen. He testified that workers were free to take their lunch period however and

wherever they chose and that he was not permitted to tell them where to eat.

¶ 6 Green and Bivins helped the claimant into the truck, and they went to eat lunch. At the restaurant, however, the claimant did not get out of the truck and did not eat. When they returned to the job site, the claimant could not get out of the truck and told his supervisor that he should go home. The claimant left the job site with a sore knee and shoulder. Three days later, the claimant sought medical attention. The claimant's treating physicians determined that he had suffered injuries to his knee and shoulder as a result of the accident. At the time of the arbitration hearing, the claimant had undergone shoulder surgery, was in physical therapy for his right shoulder, and complained of knee pain. His treating physicians had deferred any knee surgery until he completed his shoulder treatment.

¶ 7 At the conclusion of the arbitration hearing, the arbitrator found that the claimant did not prove that the December 19, 2009, accident arose out of and in the course of the claimant's employment. The arbitrator noted that, generally, unless the claimant is injured in an accident somehow connected with his employment, the injury is not compensable. "Here, [the claimant] was on his own unpaid lunch, he is not instructed where to eat, he was not hit by his employer's vehicle[,] and he was not on any type of errand for his employer." The incident that caused the injury, the arbitrator concluded, was not a result of a risk inherent to cement finishers, but was a personal risk.

¶ 8 On appeal, the Commission adopted the arbitrator's decision except that it modified the decision by providing additional support for the denial of benefits. The Commission rejected the claimant's arguments under the "personal comfort doctrine" and the "good Samaritan doctrine."

¶ 9 In rejecting the claimant's argument under the "personal comfort doctrine," the Commission stated that "[the claimant]'s act of jumpstarting a co-employee's vehicle was, arguably, for the personal comfort of the co-employee but, certainly not, for the personal

comfort of [the claimant]."

¶ 10 In rejecting the argument under the "good Samaritan doctrine," the Commission noted that there was "no evidence in the record that [the employer] had knowledge of employees jump-starting other employees' vehicles while on their lunch break or that [the employer] had acquiesced to such practices." In addition, the Commission stated that there was no urgency or collegiality as seen in other cases that have applied the doctrine.

¶ 11 The Commission concluded that the claimant's actions were unreasonable, unsafe, and had nothing to do with his employment. In addition, it noted that the claimant's injury resulted from his coworker's actions and not from any risk connected to his employment.

¶ 12 One commissioner dissented. The dissenting commissioner found it significant that Kincaid watched the claimant assist in jump starting Green's truck on the public parking lot, but did not intercede. In addition, the dissenter noted that the employer did not have a policy that prohibited employees from rendering such assistance. The dissenter believed that the employer should be held liable because it had knowledge of the activity giving rise to the injury.

¶ 13 The claimant appealed the Commission's decision to the circuit court, and the circuit court confirmed the Commission's decision. This appeal ensued.

¶ 14 ANALYSIS

¶ 15 On appeal, the claimant argues that the Commission incorrectly determined that he failed to carry his burden of proving that his accident arose out of and in the course of his employment. We disagree.

¶ 16 A workers' compensation claimant has the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment. 820 ILCS 305/2 (West 2010). Both elements must be present in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 605 (1989).

¶ 17 Whether an injury arises out of a claimant's employment is normally 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, 808 (2000). "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009).

¶ 18 The claimant argues that, in the present case, the facts are uncontroverted and that the issue should be reviewed as a legal issue under the *de novo* standard of review. See *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 279, 947 N.E.2d 856, 860 (2011) ("It is only in those cases where the undisputed facts are susceptible to but a single inference that the inquiry becomes one of law and subject to *de novo* review."). Under either standard of review, however, we must affirm the Commission's decision.

¶ 19 The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 1008 (1987). "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, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 21, 956 N.E.2d 543. "That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003).

¶ 20 The "arising out of" component addresses the causal connection between a

work-related injury and the claimant's condition of ill-being. *Id*. at 203, 797 N.E.2d 672. 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. *Id*.

¶ 21 The supreme court has repeatedly held that an accident is not compensable under the Act if it occurs off the employer's premises while the employee is traveling to or from work. *Illinois Bell Telephone Co.*, 131 Ill. 2d at 483-84, 546 N.E.2d at 605. However, an exception to this rule has been recognized "for off-premises injuries incurred by an employee when the employee's presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons." *Id.* at 484, 546 N.E.2d 605. In addition, "[r]ecovery has also been permitted for injuries sustained by an employee in a parking lot provided by and under the control of an employer." *Id*. at 484, 546 N.E.2d at 606.

¶ 22 In the present case, the claimant was on his unpaid lunch hour and was helping a coworker start his personal vehicle when the accident occurred. There was no evidence presented that the employer had control over the parking lot where the accident occurred. It was a public parking lot that was available for anyone to use, including the general public. The claimant and his coworkers used the public lot because it was more convenient than the parking area that the employer provided. The evidence established that the claimant was not required to leave the construction site during his lunch break, and his supervisor did not direct him to leave the work area for lunch. In fact, Kincaid testified that workers, including the claimant, were free to take their lunch period however and wherever they chose and that he was not permitted to tell them where to eat.

¶ 23 Accordingly, the claimant failed to prove that he was required to be in the place where the accident occurred (the public parking lot), nor did he prove that he was injured in a place

that was controlled by his employer or while performing tasks that were mandated by his job (jiggling Green's truck battery cables so they could go to lunch). Therefore, the claimant failed to prove that his injuries arose out and in the course of his employment.

¶ 24 On appeal, the claimant advances three alternative theories under which, he argues, his accident is compensable: the personal comfort doctrine, the good Samaritan doctrine, and a "traveling employee" theory.

¶ 25 I.

¶ 26 The Personal Comfort Doctrine

¶ 27 The personal comfort doctrine is relevant to the determination of whether an employee's injury occurred "in the course of" his employment. *Circuit City Stores, Inc. v. Illinois Workers' Compensation Comm'n*, 391 Ill. App. 3d 913, 921, 909 N.E.2d 983, 990 (2009). "According to the personal-comfort doctrine, an employee, while engaged in the work of his or her employer, may do those things that are necessary to his or her health and comfort, even though personal to himself or herself, and such acts will be considered incidental to the employment." *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 350, 732 N.E.2d 49, 52 (2000). "If the injury occurs within the time 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 doing something incidental thereto, the injury is deemed to have occurred in the course of employment." *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 338, 412 N.E.2d 492, 496 (1980).

¶ 28 In the present case, the claimant was injured over his lunch hour, and Illinois courts have recognized eating as an act of personal comfort. *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 211, 713 N.E.2d 161, 165 (1999). The supreme court has noted, however, that in lunch hour cases, "the most critical factor in determining whether the

accident arose out of and in the course of employment is the location of the occurrence." *Eagle Discount Supermarket*, 82 Ill. 2d at 339, 412 N.E.2d at 496. In addition, if the employee "voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, the resultant injury will not be deemed to have occurred within the course of the employment." *Id*. at 340, 412 N.E.2d 497.

¶ 29 Injuries are not compensable if they are sustained while an employee is on a break away from the employer's premises and is not engaged in an employment-related activity. *Lynch Special Services v. Industrial Comm'n*, 76 Ill. 2d 81, 389 N.E.2d 1146 (1979) (slip and fall while returning to work after a break to buy coffee and donuts from a restaurant); *Ealy v. Industrial Comm'n*, 189 Ill. App. 3d 76, 544 N.E.2d 1159 (1989) (slip and fall during break and on the way to restaurant). In the present case, the employer had no input concerning whether the claimant left the job site for lunch or how he spent his time over his lunch hour off of the premises under its control.

¶ 30 The Commission found, and we agree, that the claimant's actions were unsafe and had nothing to do with his employment. His injuries were not caused by any object or structure owned or controlled by the employer, and his actions were not occasioned by the demands of his employment. The record establishes that he could have eaten his lunch at the job site or he could have driven his own vehicle to a restaurant. Under such circumstances, the act of jump-starting a coworker's vehicle cannot be considered an act incidental to the claimant's employment under the personal comfort doctrine. See *Lynch Special Services*, 76 Ill. 2d at 91-92, 389 N.E.2d at 1150 ("Here *** claimant knew his working hours when he left home; he could have brought his food and eaten at his station as guards ordinarily did. That he chose instead to go to the restaurant neither benefited nor accommodated his employer.").

¶ 31 II.

¶ 32 The Good Samaritan Doctrine

¶ 33 The supreme court applied the good Samaritan doctrine in *Ace Pest Control, Inc. v. Industrial Comm'n*, 32 Ill. 2d 386, 205 N.E.2d 453 (1965). In that case, the employee was driving on a highway in the employer's truck on a service call for the employer when he saw a vehicle stopped on the side of the road. The employee stopped to offer assistance and drove the stranded driver and her children to their nearby home. He returned to the stranded vehicle with the driver's husband and a gas can. As the employee walked beside his truck to retrieve the gas can, a passing vehicle struck and killed him.

¶ 34 The employer had no definite policy concerning its employees stopping and helping stranded motorists while driving its trucks, and it left the decision to each employee. In determining whether the employee's death was compensable under the Act, the supreme court noted that the employee was not acting under the employer's instructions. Therefore, it held that the issue is determined based on "whether the giving of such aid could have been reasonably expected or foreseen." *Ace Pest Control, Inc.*, 32 Ill. 2d at 388, 205 N.E.2d at 455. In discussing the supreme court's holding in *Ace Pest Control, Inc.*, the appellate court has stated that the employee's death in that case was compensable because his "good samaritan" act was deemed foreseeable. *Circuit City Stores, Inc.*, 391 Ill. App. 3d at 923, 909 N.E.2d at 991.

¶ 35 In *Circuit City Stores, Inc.*, the court applied the good Samaritan doctrine under facts where there was no urgency for rendering aide, but there was a "collegiality" among coworkers which made it foreseeable that an employee might ask a coworker for help in dislodging a product from a vending machine. *Id*. at 923-24, 909 N.E.2d 992. In that case, the employer furnished a snack vending machine, and workers experienced problems with products getting stuck after a purchase. When this occurred, the employees shook the

machine to dislodge the product. The employer never reprimanded an employee for shaking the machine and did not have any policies covering the situation. The claimant in that case was injured when he assisted a coworker in dislodging a bag of chips from the machine.

¶ 36 In affirming the Commission's finding that the claimant's accident arose "in the course of" his employment, the *Circuit City Stores, Inc.* court applied the good Samaritan doctrine because the claimant's actions in coming to the aid of his coworker with respect to the vending machine were foreseeable. The court found that the claimant shaking the vending machine was foreseeable because the vending machine was provided by the employer for the use and comfort of the employees, and the employer's management had knowledge that products were known to get stuck inside the machine after purchase. *Id*. In addition, the court found that the manner in which the claimant rendered aid did not cross "the line of foreseeability and thus [did not take] him outside the scope of his employment." *Id.* at 924-25, 909 N.E.2d at 970-71.

¶ 37 We believe that both *Ace Pest Control, Inc.* and *Circuit City Stores, Inc.* are distinguishable from the facts of the present case, and we agree with the Commission that the good Samaritan doctrine does not apply. Unlike the vending machine in *Circuit City Stores, Inc.*, Green's defective truck was not furnished by the employer for its employees' use and comfort, and it was not located or operated on property that the employer controlled at the time of the accident. In addition, unlike *Ace Pest Control, Inc.*, the claimant was not operating the employer's vehicle and or other equipment for the purpose of rendering aid to others, and he was not faced with a foreseeable emergency situation. Assisting a coworker with his personal vehicle to facilitate a trip to McDonald's over the lunch hour cannot be equated with using the employer's equipment to assist a mother and her children who were stranded along the side of the road in below-freezing weather.

¶ 38 The employer in the present case had no authority to tell the claimant where to eat,

where he could spend his lunch hour, or how he traveled off the job site to his chosen location for lunch. It did not furnish any of the objects that resulted in his injuries (truck or tools) and was not in control of the parking lot where the accident occurred. The claimant was not employed as a mechanic for the employer and was not furthering any aspect of his employment when he was injured. He was engaged in an activity that was completely removed and unrelated to his employment duties. Under such facts, the good Samaritan doctrine is inapplicable.

¶ 39 III.

¶ 40 Traveling Employee

¶ 41 The claimant's final theory in support of his claim is based on a "traveling employee" theory. A "traveling employee" is one who is required to travel away from his employer's premises in order to perform his job. *Jensen v. Industrial Comm'n*, 305 Ill. App. 3d 274, 278, 468, 711 N.E.2d 1129, 1132 (1999). Generally, a traveling employee is deemed to be in the course of his employment from the time the employee leaves home until he or she returns. *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 545, 941 N.E.2d 961, 965 (2010). "Whether an injury to a traveling employee arises out of and in the course of employment depends upon the reasonableness of the specific conduct and whether it might normally be anticipated or foreseen by the employer." *Jensen*, 305 Ill. App. 3d at 278, 711 N.E.2d at 1133.

¶ 42 We have reviewed both the claimant's statement of exceptions and supporting brief filed with the Commission and his brief in support of appeal filed with the circuit court. Neither one of these pleadings raise a "traveling employee" theory. The issue is raised for the first time in this appeal. It is a well-settled rule that the failure to raise an issue before the Commission results in its waiver. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020, 832 N.E.2d 331, 348 (2005). Therefore, the claimant waived this issue by failing to

raise it before the Commission.

¶ 43 Based on the record presented, the Commission's decision that the accident resulting in the claimant's injuries did not arise out of and in the course of his employment is not contrary to law and, alternatively, is not against the manifest weight of the evidence. Therefore, we affirm the judgment of the circuit court which confirmed the Commission's decision denying the claimant's application for benefits under either the manifest weight of the evidence standard or the *de novo* standard of review.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, we affirm the circuit court's judgment that confirmed the Commission's decision.

¶ 46 Affirmed.