2014 IL App (5th) 140010WC-U

Workers' Compensation Commission Division

NO. 5-14-0010WC

Order filed: October 8, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TAYLORVILLE FIRE DEPARTMENT,	)	Appeal from the Circuit Court
	)	of Christian County.
	)	
Appellant,	)	
	)	
v.	)	No. 13-MR-92
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Jeffrey Marc Kelly,
(Tom Campbell, Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The decision of the Commission that the claimant's injuries arose out of and in the course of his employment was affirmed, where the injuries occurred during a firehouse basketball game, while the claimant was on duty and unable to leave, where the claimant was asked to participate in the game by his shift supervisor, and where the employer encouraged participation in sports and fitness.

¶ 2 The employer, Taylorville Fire Department (Taylorville), appeals the order of the circuit court which confirmed decision of the Illinois Workers' Compensation Commission (Commission), finding that the right ankle injury of the claimant, Tom Campbell, arose out of and in the course of his employment, and awarding him temporary total disability (TTD) and permanent partial disability (PPD) benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/8(e) (West 2010)). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on September 20, 2012. The claimant testified that he has worked as a firefighter, an emergency medical technician and a fire investigator for Taylorville since 2004. His job duties included suppressing fires, responding to emergency calls, training activities, and maintenance of the fire station. The claimant regularly worked a 24-hour shift, which was followed by 48 hours off-duty. He testified that his work shift began at 7 a.m. and ended at 7 a.m. the following day. As part of his daily duties, the claimant loaded the fire truck with his gear and equipment and performed general maintenance chores on the trucks and firehouse equipment. After the lunch hour, the claimant performed building inspections and other inspections for commercial occupancy certificates. The claimant testified that, after 4:30 p.m., he was generally free to do anything he desired providing that he remained on the premises as he was not free to leave the premises without another firefighter to relieve him of his duties.

¶ 4 According to the claimant, the Taylorville fire station was comprised of a kitchen, training rooms, a conference room, a day room containing televisions, recliners, and a pool table, and a fitness center containing free weights and treadmills. The claimant testified that his job duties did not include participating in recreational or athletic activities and that such activities

were neither mandated nor prohibited at the fire station. He stated that firefighters often worked-out together in the weight-room and that they would often play basketball games, including "horse," "pig," or games of "two on two" or "three on three." The claimant testified that playing basketball was a normal activity at the firehouse for the past seven years of his employment, and that, while he was not required to play, he was not disciplined for doing so. He was never told of an unwritten policy against contact sports, but, regardless, he considered basketball a non-contact sport. Further, the claimant testified that his new shift commander, Andy Goodall, had suggested the firefighters play basketball together as a way "to get exercise and basically it was his idea for a team building exercise." However, he admitted that he was not subject to any repercussions for declining to participate in any specific athletic activity other than the normal grief that the firefighters would give each other in jest.

¶ 5 Taylorville Fire Chief Jeffrey Hackney testified consistently with the claimant regarding his job duties and the fact that Taylorville does not have a written exercise policy. He stated that firefighters are encouraged to exercise and play sports while on-duty for team-building and fitness purposes. However, he stated that contact sports were not encouraged and that he considered basketball a contact sport depending on how it is played. For instance, he considered a three-on-three game to involve contact, but a game of "horse" was not. According to Chief Hackney, he never formally discussed such a policy with his firefighters and admitted that he only told them to be careful. He further admitted that he never disciplined any firefighter for playing sports.

¶ 6 On May 19, 2011, the claimant, Goodall, and firefighters Matthew Adermann, Josh Reid, and possibly Cody Rogers were playing a two-on-two or three-on-three basketball game at the fire station. The claimant testified that he was asked to play by Goodall at around 4:45 p.m.

As the claimant jumped up for a rebound, he landed on his right ankle and "rolled it." The claimant was not sure if he landed on the ground or on another player's foot. He testified that he felt immediate pain in his right ankle, but he did not seek treatment until the next morning because he did not want to miss his daughter's preschool graduation.

¶ 7 On May 20, 2011, the claimant was treated by a physician assistant at his primary care provider's office. An x-ray revealed moderate soft tissue swelling on the lateral aspect of the ankle. The claimant was ordered off work and he was instructed to refrain from putting weight on his ankle for the weekend. A second x-ray, performed on May 27, 2011, showed no evidence of any fracture and some improvement in the soft tissue swelling. However, because the claimant's pain had not improved, his primary physician, Dr. Roger McClintock, placed his ankle in an air splint, instructed him to use crutches, and referred him to Dr. Benjamin Stevens.

¶ 8 On May 31, 2011, the claimant saw Dr. Stevens, who ordered additional x-rays and diagnosed him with a severe right ankle sprain, right cavovarus foot deformity and bilateral gastrocnemius equinos. He placed the claimant in a boot for comfort and ordered him to undergo physical therapy. On July 12, 2011, the claimant saw Dr. Stevens for follow-up treatment and reported that he had improved nearly 100%. Dr. Stevens recommended that the claimant continue his physical therapy exercises and wear a brace during strenuous activity. He further released the claimant from his care and released him to full-duty work. The following day, the claimant returned to work without restrictions.

¶ 9 The claimant testified that he notices his ankle swells after running long distances, but he otherwise has no ongoing symptoms.

¶ 10 Following a hearing, the arbitrator awarded benefits pursuant to section 8 of the Act (820 ILCS 305/8 (West 2010)), finding that the "personal comfort doctrine" applied to the facts of the

case and that section 11 of the Act (820 ILCS 305/11 (West 2010)) did not preclude the claimant from recovering under the Act. Specifically, the arbitrator awarded the claimant TTD benefits under section 8(b) of the Act (820 ILCS 305/8(b) (West 2010)) from May 20, 2011, through July 12, 2011, and PPD benefits under section 8(e) of the Act (820 ILCS 305/8(e) (West 2010)) for 6.68 weeks because his injuries caused a 4% loss of use of his right foot. In her decision, the arbitrator determined that the facts of the case did not invoke the voluntary recreation provision of section 11 of the Act, stating that the activity of playing basketball in this case was not a recreational activity as defined in section 11. Instead, relying on *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331 (1980), and previous Commission decisions, the arbitrator found that the personal comfort doctrine applied to the facts of this case, causing her to find that the claimant's injury was compensable as it arose out of and in the course of his employment.

¶ 11 Taylorville sought review before the Illinois Workers' Compensation Commission (Commission). On April 2, 2013, the Commission, with one commissioner dissenting, affirmed and adopted the decision of the arbitrator. The dissenting commissioner stated that he believed section 11 of the Act precluded the claimant from recovering benefits because he was neither ordered nor assigned to participate in the basketball games.

¶ 12 Taylorville then sought judicial review of the Commission's decision in the circuit court of Christian County. On December 10, 2013, the circuit court confirmed the decision of the Commission.

¶ 13 Taylorville now appeals, arguing that the Commission erred in determining that the claimant's injury arose out of and in the course of his employment because section 11 of the Act precludes recovery for recreational activities unless the employer assigned or directed the claimant to participate. In its argument, Taylorville contends the issue is one of law, subject to

de novo review, because the facts of the case are undisputed. The claimant counterargues that the manifest-weight-of-the-evidence standard of review applies to the Commission's decision, and he maintains that it correctly determined that the "personal comfort doctrine" applied and that his injury was compensable.

¶ 14 First, we agree with Taylorville's assertion that the appropriate standard of review is *de novo* where, as here, the facts are undisputed and the question of whether section 11 applies is one of law. See *Elmhurst Park District v. Workers' Compensation Comm'n*, 395 Ill. App. 3d 404, 408 (2009) (applying *de novo* review to determine whether wallyball game was "recreational" under section 11 of the Act).

¶ 15 To recover under the Act, the claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). "In the course of employment" refers to the time, place and circumstances surrounding the injury, and the "arise out of" component concerns the causal connection between the injury and the employment. *Id.* Section 11 of the Act, however, states that "[a]ccidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof." 820 ILCS 305/11 (West 2010). An exception contained in section 11 provides that the "exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program." 820 ILCS 305/11 (West 2010). Thus, "[e]xcept to the extent that an employee is ordered or assigned by the employer to participate in the program, injuries occurring during the course of recreational events are simply not

compensable irrespective of whether it may be said they arise out of and in the course of employment." *Kozak v. Industrial Comm'n*, 219 Ill. App. 3d 629, 633 (1991).

¶ 16 Taylorville contends that the Commission's reliance on *Eagle* is misplaced because that decision was issued before section 11 was amended to include the language precluding liability for recreational activities. In *Eagle*, the claimant was injured while playing Frisbee in the employer's parking lot while on his lunch break and with his employer's knowledge and consent. *Id.* at 335. The court rejected the employer's argument that the analysis applicable to recreational activities applied, and instead, it employed the doctrine applicable to personal comfort cases. *Id.* at 339. Under the personal comfort doctrine, the course of employment is not considered broken by certain acts relating to the personal comfort of the employee. *Id.* at 339-40. While noting that, if the employee "voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, the injury will not be deemed to have occurred within the course of the employment," the *Eagle* court further stated that the "employer may, nevertheless, still be held liable for injuries resulting from an unreasonable and unnecessary risk if the employer has knowledge of or has acquiesced in the practice or custom." *Id.* at 340-41; see also *Board of Education of City of Chicago v. Industrial Comm'n*, 81 Ill. 2d 17, 20-21 (1980) (affirming Commission decision that the claimant's injury while engaging in volleyball practice for a teacher-student game after work hours on school property arose out of and in the course of the employment where the employer knew of the activity and did nothing to discourage it).

¶ 17 Following the amendment to section 11 in 1980, however, cases have focused on whether the employee's activity was voluntary, regardless of the employer's knowledge of or benefit from the activity. *Kozak*, 219 Ill. App. 3d at 633. In *Kozak*, the court noted that "the extent to which an employer benefits from an employee's participation, the extent to which the employer actively

organizes and runs the recreational event, and the extent to which the employer sponsors and compels attendance in the event are still legitimate inquiries," but they are "only important insofar as a question arises as to whether the activity is voluntary," and not as to whether the activity is a recreational program as defined by the Act. *Id.* (upholding Commission's decision that the decedent's fatal injuries during voluntary participation in employer-sponsored tennis tournament were not compensable under provisions of section 11); see also *Gooden v. Industrial Comm'n*, 366 Ill. App. 3d 1064, 1067 (2006) (upholding Commission's decision that the claimant's injuries incurred during volleyball game at company picnic were not compensable where his participation was voluntary and did not result in any repercussions such as loss of salary); *Woodrum v. Industrial Comm'n*, 336 Ill. App. 3d 561, (2003) (reversing Commission's decision that the claimant's injuries incurred during basketball game at company picnic were not compensable where, as a matter of law, he was assigned to attend the function or forego his salary and therefore his participation was not voluntary); *Pickett v. Industrial Comm'n*, 252 Ill. App. 3d 355, 358-59 (1993) (finding the Commission's decision that the claimant's injury during employer-sponsored basketball game was against the manifest weight of the evidence where his participation was voluntary and no evidence suggested that the employer ordered or assigned him to play or that he faced any repercussions for declining to participate); *Cary Fire Protection District v. Industrial Comm'n*, 211 Ill. App. 3d 20, 25-26 (1991) (upholding Commission's decision that the claimant's injuries during voluntary participation of water fight tournament, which used employer's equipment and fire training skills, were not compensable under provisions of section 11).

¶ 18 Here, there is no dispute as to the voluntariness of the claimant's participation, but the Commission stated, through its adoption of the arbitrator's decision, that, "while the activity of

playing basketball may be considered a recreational activity, in this case [] it [was] not a recreational activity as defined in Section 11 of the Act." The Commission determined that section 11 is "intended to apply to situations where there are recreational programs such as employer sport teams or employer picnics where the employer may have organized or contributed to the formation of the teams or events, which is not the case here." In this case, the Commission acknowledged that the claimant was "not required to participate in sports activities, but was strongly encouraged to participate in them as a form of exercise, team building and recreation."

¶ 19 Section 11 does not define "recreational activities," although it provides several general examples of such activities. 820 ILCS 305/11 (West 2010); *Elmhurst*, 395 Ill. App. 3d at 408. In *Elmhurst*, the court interpreted section 11's use of "recreational," using the plain and ordinary meaning of the derivative "recreation." *Id.* at 409. The court found that "recreation" meant " 'the act of recreating or the state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY' " and concluded that the claimant's participation in a volleyball game was not for his own diversion, but as part of his employment at a park district facility. *Id.* (quoting Webster's Third New International Dictionary 1899 (2002)). The court noted that the claimant was a fitness supervisor, had initially declined to play because he was not feeling well, and then agreed to participate in order to prevent the game's cancellation for the employer's customers. *Id.*

¶ 20 We find the reasoning in *Elmhurst* persuasive in this case. While a basketball game may constitute a recreational activity under many circumstances, in this case, the facts are more similar to those in *Elmhurst* than in the cases relied upon by Taylorville, such as *Pickett*, *Kozak*, or *Cary Fire.* Here, the claimant was asked to participate in the basketball game by his shift supervisor and the game occurred while the claimant was on-duty and unable to leave the

premises. Further, it is undisputed that Taylorville encouraged fitness and sports activities during work hours and provided a fitness room and basketball hoops for its staff to utilize during their shifts. See also *Chicago Transit Authority v. Industrial Comm'n*, 238 Ill. App. 3d 224, 229 (1992) (upholding the Commission's decision that the claimant's injury during employer-sponsored basketball game was compensable where the evidence suggested that he was essentially assigned to play on the team, even though there was no evidence he objected to playing). The basketball game at issue was therefore not a diversion for the claimant or an act to refresh his strength and spirits after toil, but was part of his normal activities, which included fitness and sports activities, during his work shift. Under the facts and circumstances presented in this case, we agree with the Commission that the basketball game in this case was not a recreational activity as defined under section 11 of the Act.

¶ 21 We, therefore, affirm the circuit court judgment which confirmed the Commission's decision finding the claimant's condition of ill-being arose out of and in the course of his employment.

¶ 22 Affirmed.