

Workers' Compensation
Commission Division
Filed: June 25, 2012

No. 1-11-1730WC

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
FIRST JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

ROADWAY EXPRESS, INC,)	Appeal from the
)	Circuit Court of
Appellant,)	Cook County
)	
v.)	
)	No. 10 L 51567
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	
(Mary Key,)	Honorable
)	James C. Murray, Jr.,
Appellee).)	Judge Presiding.

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

ORDER

Held: The Commission's original determination that the claimant's injury did not arise out of and in the course of her employment was not against the manifest weight of the evidence, and the circuit court, therefore, erred in reversing that decision.

¶ 1 Roadway Express, Inc. (Roadway), appeals from a judgment of the Circuit Court of Cook County confirming a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Mary Key, both temporary total disability (TTD) and permanent partial

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disability (PPD) benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2006)), for injuries that the claimant allegedly receive while in the employ of Roadway. For the reasons which follow, we reverse the judgment of the circuit court, vacate the decision of the Commission on remand, and reinstate the Commission's original decision which denied he claimant benefits under the Act.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearings.

¶ 3 The claimant testified that she began working for Roadway as a sales secretary in 1995 or 1996. She said that, on August 5, 1999, she was working at her desk in the basement of a two-story building. At approximately 3:00 p.m., she was walking up the stairs carrying a legal-size folder in her left hand and holding the stairway railing with her right hand. As she attempted to climb from a landing to the second set of stairs to take herself to the upper floor, her open-toed sandal "caught on the lip part of the stairs," and she fell forward onto her left hand. That fall led to injuries to her right foot and left arm. The claimant testified that she used the stairs between the two floors every day in her work, to transport paperwork or to use the restroom or time clock.

¶ 4 According to the claimant, at the time of her fall, one light above the stairwell had been "out for several weeks." She said that the light bulb would have helped light the area of her fall. However, on cross examination, she agreed that the non-working light bulb was at the bottom of the stairwell and that she fell between the first and second landing of the stairway. She agreed that there was functional lighting at both the first and second stair landings.

¶ 5 When she was asked whether her holding a folder contributed to her fall, the claimant responded that she believed that, without the folder, she "probably would have been able to put [her] hand out" to brace herself or catch herself. She agreed, however, that there was nothing about the folder that caused her foot or sandal to catch on the lip of the stair.

¶ 6 At the conclusion of the hearing, the arbitrator found that the claimant's injury did not

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arise out of her employment with Roadway. The arbitrator reasoned that the claimant had done nothing to establish that the stairs were defective or that her work contributed in any way to her fall.

¶ 7 The claimant sought review of the arbitrator's decision before the Commission, which adopted and affirmed the arbitrator's decision. Thereafter, the claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On October 1, 2009, the circuit court reversed the Commission's ruling that the claimant's injury did not arise out of her employment, and it remanded the case to the Commission for further proceedings.

¶ 8 Before the Commission issued its decision on remand, Roadway appealed the circuit court's ruling reversing the Commission's original decision. We dismissed that appeal as premature. See *Key v. Illinois Workers' Compensation Comm'n*, No. 1-09-2702WC (unpublished pursuant to Supreme Court Rule 23).

¶ 9 On remand from the circuit court, the Commission awarded the claimant 28 5/7 weeks of TTD benefits, as well as PTD benefits for her injury.

¶ 10 Both parties sought judicial review of the Commission's decision in the circuit court of Cook County. During the circuit court proceedings, Roadway submitted a document titled "Defendant's Submission of Current Issues." In that document, Roadway stated that it "plan[ned] to argue to the Appellate Court that the Circuit Court's original decision *** was erroneous." The next paragraph of that document stated as follows:

"As far as what is before this Court at this time, however, [Roadway] asserts that the findings of the [Commission] in its most recent decision *** is not erroneous ***. [Roadway], however, preserves its right to contest the Commission's finding consistent with the Circuit Court's *** order that the [claimant's] injuries arose out of her employment with [Roadway]."

Roadway further explained in a response to the claimant's brief that it would not address the

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"arising out of" issue before the circuit court, because the court had "already issued a decision finding that the claimant proved accident."

¶ 11 On May 19, 2011, the circuit court confirmed the Commission's decision, and Roadway has appealed. In its notice of appeal, Roadway indicated its intent to challenge the circuit court's initial ruling that the claimant's injury arose out of her employment.

¶ 12 Roadway's sole contention on appeal is that the circuit court erred in entering its October 1, 2009, order reversing the Commission's original determination that her injury did not arise out of her employment. When, as in this case, the Commission's original decision is reversed as against the manifest weight of the evidence, we consider the propriety of the Commission's original decision in any appeal from a final order confirming the Commission's decision on remand. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979 (2001).

¶ 13 As a threshold matter, the claimant contends that Roadway has waived its argument, because it failed to assert this "arising out of" issue when the case returned to the circuit court. However, Roadway has consistently indicated its intent to continue to argue the "arising out of" issue. In fact, although it noted that it was not offering extended argument to the circuit court only because the circuit court had already ruled against it on the issue, Roadway unequivocally stated its intent to preserve the "arising out of" issue. We therefore reject the claimant's contention that Roadway has waived its "arising out of" argument, and we consider the argument on its merits.

¶ 14 An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 1998). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603 (1989). A claimant has the burden of establishing, by a preponderance of the evidence, that her injury arose out of and in the course of

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her employment. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980). Roadway does not dispute that the claimant's injury in this case occurred in the course of her employment, so we focus our analysis on whether the injury arose out of her employment.

¶ 15 Arising out of the employment refers to the origin or cause of the claimant's injury. As the Supreme Court held in *Caterpillar Tractor Co.*, 129 Ill. 2d at 58:

"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 accidental injury. [Citations.] 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 he 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. [Citation.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. [Citations.]"

In addition, an injury arises out of the employment if the claimant was exposed to a risk of harm beyond that to which the general public is exposed. *Brady v. L. Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548, 578 N.E.2d 921 (1991).

¶ 16 The question of whether an employee's injury arose out of her employment is generally one of fact, and the Commission's determination of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to

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support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440 N.E.2d 90 (1982).

¶ 17 In order to determine whether the claimant's injury arose out of her employment, we must first categorize the risk to which she was exposed. Risks are categorized into three groups: risks distinctly associated with the employment, such as the risk of tripping on a defect at the employer's premises; risks personal to the employee, such as idiopathic falls; and neutral risks that have no particular employment or personal characteristics and to which the general public is equally exposed. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105-06, 853 N.E.2d 799 (2006); *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 352-53 (2000) (Rakowski, J., concurring). Injuries resulting from exposure to neutral risks or personal risks unrelated to a worker's employment do not "arise out of" the employment. *First Cash Financial Services*, 367 Ill. App. 3d at 105.

¶ 18 In this case, the Commission originally determined that the claimant did not demonstrate any connection between a defect in the stairway and her fall. The only defect the claimant identified in the stairwell was a problem with the lighting, but her description of the lighting defect revealed that the area in which she fell did not suffer from any lighting problems. Further, she offered no testimony to explain how the lighting problems contributed to her fall, or affected her in any way. The claimant identified no other possible stairway defects during her testimony. Although the claimant testified that she worked in the basement and often needed to traverse the stairs to reach the first floor, she did not offer clear testimony that her employment caused her to use the stairs markedly more frequently than would a member of the general public. See *Illinois Consolidated Telephone Co.*, 314 Ill. App. 3d at 353 (Rakowski, J., concurring) (stating that a risk may become employment-related if the workplace increases the frequency of an employee's exposure to a common risk). The claimant also rejected the possibility that her carrying a folder for work distracted her or otherwise caused her to trip. For these reasons, we agree with the

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Commission's original finding that the claimant failed to prove by a preponderance of the evidence that her fall was related to a risk distinct to her employment.

¶ 19 After rejecting the conclusion that the claimant's fall was caused by a risk associated with her employment, the Commission found that her injury was personal in nature, because it was caused by her wearing open-toed sandals that caught on a stair. However, we agree with the circuit court that there is nothing in the claimant's testimony to suggest that her shoe was the reason her foot caught on the stair. We are left, then, with the conclusion that the claimant's fall was the result of her exposure to a neutral risk.

¶ 20 In reversing the Commission's original finding that the claimant's injury did not arise out of her employment, the circuit court emphasized the fact that the claimant was carrying a folder at the time of her fall. That folder, the court reasoned, "occupied [her] free hand, and deprived her of the ability to break her fall." The court's reasoning finds support in the claimant's testimony that, if not for the folder, she "probably would have been able to put [her] hand out" to brace herself or catch herself during the fall. The claimant's opinion, however, did not bind the Commission, which was free to assess the evidence and draw its own conclusions. As Roadway notes in its brief, the claimant testified that the folders occupied only her left hand. She testified that she used her free right hand to grasp a handrail. The Commission could have relied on this testimony, as well as on the nature of the claimant's fall, to find that she failed to prove by a preponderance of the evidence that she would not have suffered her injury if both of her hands were free, instead of only one. Because this evidence, and the inferences fairly drawn therefrom, lend support to the Commission's finding that the claimant's injury did not arise out of her employment, and we conclude that the Commission's original finding on that point was not against the manifest weight of the evidence.

¶ 21 Based upon the foregoing analysis, we everse the circuit court's May 19, 2011, order, vacate the Commission's decision on remand, reverse the circuit court's October 1, 2009, order,

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and reinstate the Commission's original decision.

¶ 22 Circuit court reversed, Commission decision on remand vacated and original decision reinstated.