

in the course of his employment and that his condition of ill-being was causally related to the injury. The arbitrator awarded the claimant temporary total disability benefits for 20 and 6/7 weeks, awarded permanent partial disability benefits for a loss of 50% use of the man as a whole, and ordered the employer to pay \$148,433.71 for necessary medical services.

¶ 4 The employer appealed to the Illinois Workers' Compensation Commission (Commission), which modified the arbitrator's decision by decreasing the permanent partial disability award from 50% to 40% loss of use of the man as a whole pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)) and otherwise affirmed and adopted the arbitrator's decision. One commissioner dissented. The employer filed a timely petition for review in the circuit court of Christian County. The circuit court confirmed the Commission's decision, and the employer appealed.

¶ 5 **BACKGROUND**

¶ 6 The claimant testified that he started working for the employer as an iron worker around January 5, 2007. On May 4, 2007, he was working on a job at Tate & Lyle in West Lafayette, Indiana. He reported to work at 6:30 a.m. and attended a meeting to discuss work plans for the day and safety issues. He stated that after he left the meeting, he retrieved his tools and a radio, talked to the crane operator, and then went up to the roof of the hammer mill and opened the toolbox for the other employees. He testified that it was 50 to 60 feet to the roof of the hammer mill and that he was working about 20 to 30 feet above that.

¶ 7 The claimant testified that he worked with Mariano Mejia, Chad Hall, and a crane operator. Their first task involved unfastening all the iron that had been incorrectly installed the day before. They worked on this task until between 9 and 9:30 a.m., and then they started putting up new iron. The claimant testified that the first piece he tried to bolt to the beam he was working on would not fit. He stated that Mr. Mejia put his side in first, and it fit, but when he went to put his side in, the two holes would not line up. The claimant described the

connection problem:

"Yeah, because point A there is one hole and point B is two holes. You can slide any piece of iron around anywhere you want on point A and make the bolt fit. On connection B that's when you have to make it fit because sometimes it's fabricated wrong, sometimes the beams you are trying to hook it to is off, unadjacent, so you have got to fight and use your muscle and pull and pull and pull with your sleever bar, a bar with a point on it to make it line up to drop your bolt for the connection."

¶ 8 At that time, the claimant suggested they take a break. They took a 15- to 20-minute break.

¶ 9 The claimant testified that when they returned from break Mr. Mejia came to his side to look at the iron piece. Mr. Mejia agreed that the piece did not fit. The claimant stated that he told Mr. Hall that the piece would not fit because Mr. Hall was reading the blueprints incorrectly and he had the wrong piece. The two men had a verbal confrontation. Mr. Hall was on the mezzanine deck, 6 to 10 feet below the claimant. Mr. Hall told the claimant that he was coming up to look at the pieces. The claimant testified that he stood up to turn around on the I-beam, lost his footing, and fell. He said the top of the I-beam was wet because it was raining and drizzly that day. He stated that he started the day with a plastic trenchcoat but took it off when he went on break. He stated he did not put the rain gear back on because he had gotten wet underneath the gear earlier.

¶ 10 The claimant testified that he fell from the beam to the handrail located on the concrete deck below, broke his hand and ribs, and felt as though he could not breathe. He testified that his left hand was folded in an abnormal manner. He said his body was suspended over the handrail. He stated that he unhooked his safety harness because he "panicked." He stated: I couldn't breathe. I just knew I needed to get down. I was hurt." The claimant testified that he tried to climb back down the handrail. He said he tried to use

his left hand and

"when I did that everything came out and I just fell, and I believe there was a pipe 18 to 24 inches, so many feet below me and I hit that with my stomach and I tried to hold on but it was wet and I was wet and I couldn't hold on. I literally slid off like a bear hug motion. Once I got to where my body was off of it my arm was broke I couldn't hang on and that's when I fell onto the concrete."

¶ 11 He stated that he fell approximately 20 to 30 feet in total. He stated that Mr. Hall and Mr. Mejia both came down to where he had fallen. He tried to get up to walk it off, but Mr. Hall told him not to move. He stated that his accident occurred about 15 minutes after the break.

¶ 12 The claimant testified that when the paramedics arrived they took blood and then gave him a shot of pain medication. The medication made him drift in and out of consciousness. The claimant was taken to St. Elizabeth Hospital in Lafayette, Indiana, where he received emergency medical treatment. The claimant testified that he was then taken by helicopter to Methodist Hospital in Indianapolis. Once in Indianapolis, he had surgery on his hip. The claimant stated he remained in the hospital for three weeks to one month. The claimant testified that he broke his hand, broke ribs on his left side, shattered his pelvis on one side, dislocated it on the other side, and broke it in the middle, broke his back in four places, punctured a lung, and had cuts requiring stitches. The claimant stated that his recovery took several months.

¶ 13 On the St. Elizabeth Medical Center emergency department evaluation form, Dr. Keith Hughes listed the claimant's injuries as a severely comminuted fracture of the left wing of the ilium, L1 and L2 fractures, a metallic foreign body in the proximal ulnar of the left arm, compression fractures at T3, T4, and T9, fractures of the left first, ninth, tenth, and eleventh ribs, and a fracture of the fifth metacarpal of the left hand. The claimant was

transferred by helicopter to Methodist Hospital in Indianapolis. The admitting note written by Dr. Timothy Pohlman at Methodist Hospital assessed the claimant as having multiple left-sided rib fractures, a small left anterior pneumothorax, a small left hemothorax, a right anterior column acetabular fracture, a right zone II sacral fracture, bilateral superior and inferior pubic rami fractures, compression fractures at T3, T4, T9, and possibly T12, and a fifth metacarpal base extra-articular fracture with displacement. At Methodist Hospital, the claimant underwent left hand surgery and surgery on his pelvis including the placement of screw fixation devices.

¶ 14 Chad Hall testified that on the date of the accident, he worked for the employer as a steel worker, and that he was working with the claimant. He stated that he was the lead man and was in charge of the prints to connect the hammer mill steel.

¶ 15 Mr. Hall testified that the claimant and Mr. Mejia were connecting cross bracing. He stated that Mr. Mejia made his connection but that the claimant was having difficulty making his connection because his piece "come up short so he was trying to sleever it in and he was having problems with it." Mr. Hall testified that "some of the steel was laid off—the way they had it sitting you couldn't make some of the connections because they had gusset plates welded in it and they had to be trimmed out so the steel could be set." He stated that he and the claimant had an argument about whether or not he was reading the prints correctly. Mr. Hall told the claimant to get down because he knew it was the right piece and he was coming up to make the connection. Mr. Hall testified that he turned around to get his tool belt and when he turned back around he saw that the claimant had fallen and hit the handrail and then he slipped off and fell to the top of the feed house. Mr. Hall did not know whether or not the claimant disconnected his harness.

¶ 16 Brian Edwards testified that he has worked as an iron worker for 21 years and that he had worked with the claimant on and off for 6 to 7 years. On the date of the accident he was

working for the employer and was filling in for the acting foreman. He stated that he had to supervise work between three different cranes and a flash dryer. Mr. Edwards testified that work started at 6:30 a.m. that day. They started with a toolbox meeting where everyone received a production goal for the day and safety issues were discussed.

¶ 17 Mr. Edwards testified that he saw the claimant working about one hour prior to his fall, and he was doing his job. He stated that at one point in the morning Mr. Hall called him on the radio to tell him that the iron was not "jiving." He did not identify who was having a problem with the iron. He discussed the problem with Mr. Hall and "figured it was a mis fab on where they welded the knife lugs on and just told him to fix it." He went on to explain that he later learned that Mr. Hall was misreading the prints at the time.

¶ 18 Mr. Hall denied that Mr. Edwards was the acting foreman that day and stated that he never spoke to Mr. Edwards that day. The claimant testified that Mr. Edwards ran the toolbox meeting, came to his work area at least once that morning, and came to the accident site.

¶ 19 Mr. Edwards testified that at around 11 a.m. he heard "man in the hole" on his radio. He stated that he then went to the scene and saw the claimant lying on the roof of the hammer mill. He told the claimant not to move. The claimant told Mr. Edwards that "he hurt."

¶ 20 Eric Allen testified that he worked for the employer as a regional safety manager. He stated that when an incident occurs, the supervisor has to fill out a first report of injury to notify the safety department that something happened. Mr. Allen testified that he conducted an investigation of the accident.

¶ 21 The first report of injury completed by Eric Shively, project manager, on May 5, 2007, lists the outside temperature and conditions on the date of the accident as 72 degrees and dry. The claimant testified that, on the day of the accident, it was raining and that the iron was

wet. Mr. Edwards testified that it was overcast and drizzly with light rains throughout the morning. He stated that some of the workers were wearing rain gear that day. Mr. Edwards stated that the iron beams were wet. Mr. Hall testified that it was overcast, but he could not remember if it was raining.

¶ 22 A drug screen performed on May 4, 2007, at St. Elizabeth Hospital showed that the claimant tested positive for cocaine and cannabinoids and negative for opiates. A second drug screen performed at Methodist Hospital on May 4, 2007, showed that the claimant tested positive for cocaine and opiates but tested negative for cannabinoids.

¶ 23 The claimant admitted to drinking a couple of beers and ingesting cocaine the day before the accident, but denied using cocaine on the day of the accident. He stated that each day that an employee works, he has to sign a job hazard assessment. The form states "all team members state below I am fit for duty." The claimant testified that he signed the document on the day of the accident. He stated that if he was not fit to work, he would have called in sick because he would not "put myself in jeopardy where they might notice where I would have been intoxicated or under the influence." He stated that, on the morning of the accident, he did not think he was intoxicated, he felt that there was nothing about his physical condition that would cause a danger to anybody else, and he had no problem performing his job in a safe manner. The claimant further testified that, prior to the accident, he had regular contact with Mr. Hall, Mr. Mejia, and the crane operator, and none of them commented that they thought he had any impairment problems or issues.

¶ 24 Mr. Hall testified that he had worked with the claimant all morning prior to the fall and had no reason to believe that he was intoxicated. He further stated that if he thought the claimant was intoxicated he would have told somebody or told him to leave because it was a dangerous job and an impaired employee could be a danger to himself and others. He testified that he never observed anything that day which would have led him to believe that

the claimant was under the influence of any drug or substance.

¶ 25 Mr. Edwards testified that he spoke to the claimant at the toolbox meeting and he did not notice anything unusual about the way he walked or talked, or that would lead him to believe that the claimant was intoxicated. He stated that he also spoke to the claimant when he was on break and that the claimant did not appear in any way, shape, or form to be intoxicated. During the course of the break, no one complained to him about the claimant or his condition. Mr. Edwards stated that there was nothing that day that led him to believe that the claimant may have been intoxicated. He testified that in the 21 years he had worked as an iron worker, he had had coworkers show up for work intoxicated. When that occurred, he refused to work with them, and if he had the ability to change anything, he would not let anyone else work with them. He stated, "You don't want somebody up there all jacked up or drunk or anything that can get somebody hurt because it only takes one mistake and it may not only injure yourself but you can injure somebody else doing that." Mr. Edwards went on to explain that, when a person is high, their demeanor changes. He stated that he had known the claimant long enough to be able to tell if he was on drugs. He testified that no one complained to him, as acting foreman, about the claimant.

¶ 26 Mr. Allen testified that no one on the job site complained that the claimant was intoxicated before his accident. Additionally, he did not find any evidence during his investigation to suggest that the claimant was intoxicated.

¶ 27 On June 7, 2007, Dr. Ernest Chiodo wrote a letter stating that he had reviewed the accident report, the first report of employee injury, and various hospital records including a urine drug screen dated May 4, 2007. He wrote that the drug screen was positive for cocaine with a cut-off of 300 ng/ml and positive for opiates with a cut-off of 300 ng/ml. He wrote that "the positive drug screen for cocaine is strong evidence of intoxication at the time of the accident on the same date of the drug screen." He further wrote, "[I]t is my opinion based

upon the records that I have reviewed that [the claimant] was intoxicated at the time of his injury on May 4, 2007." On June 22, 2007, Dr. Chiodo wrote another letter in which he stated that he reviewed additional information and concluded that the documentation "indicates a level of intoxication sufficient to have caused the accident." He further found that "the physical manifestations that would objectively have resulted at this level of intoxication would have included impaired reflexes as well as judgment that, in my opinion, must be presumed as a cause of the accident."

¶ 28 On May 27, 2009, the arbitrator issued her decision finding that the claimant sustained injuries that arose out of and in the course of employment. The arbitrator ordered the employer to pay the claimant temporary total disability benefits of \$789.52 per week from May 5, 2007, through September 28, 2007. The arbitrator further ordered the employer to pay the claimant permanent partial disability benefits in the amount of \$619.97 per week for 250 weeks because the injuries sustained caused a loss of 50% use of the person as a whole. Finally, the arbitrator ordered the employer to pay \$148,433.71 for necessary medical services.

¶ 29 The employer sought a review of the arbitrator's decision. On August 10, 2010, the Commission filed its decision and opinion on review modifying the arbitrator's decision by decreasing the claimant's permanent partial disability award from 50% to 40% loss of use of the man as a whole and affirming and adopting the remainder of the arbitrator's decision. One Commissioner dissented on the ground that the claimant's use of an illegal drug impaired his performance of a dangerous job and should bar recovery. The employer appealed the Commission's decision, and on February 8, 2011, the circuit court entered an order confirming the Commission's decision. The employer filed a timely notice of appeal.

¶ 30

ANALYSIS

¶ 31 The employer argues that, as a matter of law, the claimant's accidental injuries did not

arise out of or in the course of his employment. It alleges that the claimant was so intoxicated that he was incapable of performing his job and, as such, he abandoned his job and departed from his employment.

¶ 32 For compensation to be denied on the basis of intoxication, the evidence must show that the injury arose out of the intoxication rather than out of employment, or that intoxication is of a sufficient degree to be viewed as an abandonment of or departure from employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 481, 548 N.E.2d 1033, 1039 (1989). While, for the intoxication defense to succeed, the ultimate conclusion must appear as a matter of law, such a decision will depend on a variety of factual predicates. *Paganelis*, 132 Ill. 2d at 484, 548 N.E.2d at 1040. There were a number of factual disputes raised by the parties, and conflicting inferences could have been drawn from the evidence presented. Among the contested issues were questions relating to the degree of the claimant's intoxication and his ability to continue carrying out his employment. Thus, the sole issue for review is whether the decision of the Commission is against the manifest weight of the evidence.

¶ 33 An injury is compensable under the Act only if it arises out of and in the course of one's employment. 820 ILCS 305/2 (West 2008). Whether an injury arose out of and in the course of one's employment is generally a question of fact. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). "Resolving disputes in the evidence and drawing reasonable inferences and conclusions therefrom is the responsibility of the Industrial Commission." *Riley v. Industrial Comm'n*, 212 Ill. App. 3d 62, 65, 570 N.E.2d 887, 889 (1991). A reviewing court will not overturn the decision of the Commission regarding whether an injury arose out of and in the course of employment unless the Commission's decision is contrary to the manifest weight of the evidence. *Hosteny*, 397 Ill. App. 3d at 674, 928 N.E.2d at 482. A finding of fact is contrary to the

manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 203, 904 N.E.2d 1122, 1133 (2009). "[A] reviewing court must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003).

¶ 34 The employer argues that the drug screen testing and medical opinion of Dr. Chiodo document that the claimant was intoxicated at the time of the accident and would have had impaired reflexes and judgment. It further asserts that Dr. Chiodo's conclusions are supported by several facts and circumstances surrounding the accident. Specifically, the employer argues that the claimant had difficulty making the connection on his first new piece of iron, while his coworker had no difficulty connecting his piece.

¶ 35 "An injured employee's intoxication will bar recovery under the Act if the intoxication is the sole cause of the accident or is so excessive that it constitutes a departure from employment." *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 657 N.E.2d 882, 885 (1995). "Intoxication which does not incapacitate a claimant from performing his work-related duties is not sufficient to defeat recovery of compensation under the Act although the intoxication may be a contributing cause of his injury." *McKernin Exhibits, Inc. v. Industrial Comm'n*, 361 Ill. App. 3d 666, 671, 838 N.E.2d 47, 52 (2005).

¶ 36 Dr. Chiodo wrote, in a letter dated June 22, 2007, that the claimant's cocaine use may have been *a* cause of his accident. Dr. Chiodo never stated that the claimant's use of cocaine was the sole cause of his accident or that his intoxication would be so excessive that it would constitute a departure from his employment. Thus, even if we adopt Dr. Chiodo's report, the claimant is not barred from recovering under the Act.

¶ 37 The claimant admitted ingesting cocaine the day before his accident but testified that, if he felt he had been intoxicated on the day of the accident, he would not have come to work. He stated that on the morning of the accident, he had regular contact with the crane operator, Mr. Mejia, and Mr. Hall, and none of them commented that they thought he was impaired.

¶ 38 Mr. Hall testified that he worked with the claimant all morning prior to the fall and did not observe anything which would have led him to believe that the claimant was under the influence of any drug or substance. He stated that if he thought that the claimant was intoxicated, he would have told him or told someone to have him stop working because of the dangers involved in the job.

¶ 39 Mr. Edwards testified that he spoke to the claimant on the morning of the accident at the 6:30 a.m. toolbox meeting and that there was nothing that led him to believe that the claimant was intoxicated. He said he spoke with the claimant again around 10 a.m. when the claimant was on break and he did not appear intoxicated. He stated that, as acting foreman, he did not receive any complaints from other employees about the claimant or his condition. Mr. Edwards testified that, during the course of his career, he had seen employees show up for work intoxicated, and he has refused to work with them. He further testified that he has seen people on drugs and that he knew the claimant well enough to tell if he was on drugs. Mr. Allen testified that no one on the job site on the day of the accident complained that the claimant was intoxicated.

¶ 40 The claimant disputes that his ability to perform his job was impaired by his use of cocaine the day before the accident. He admits that he had trouble connecting the first piece of iron. He testified that Mr. Mejia was able to put his piece in easily because it had only one hole that had to connect. In contrast, the claimant stated his side had two holes that had to connect and the holes did not line up. The claimant testified that sometimes the pieces do

not fit because they are fabricated incorrectly. He also stated that he believed Mr. Hall was reading the blueprints incorrectly. Mr Hall testified that the claimant was having problems connecting his piece because it "come up short." He also testified that some of the steel would not connect because it had gusset plates welded in that had to be trimmed out so the steel could be set. Mr. Edwards testified that Mr. Hall called him on the radio on the morning of the accident to tell him that "stuff wasn't jiving." He stated that he "figured it was a mis fab." Mr. Edwards testified that he went up briefly to see why the pieces were not fitting properly. He testified, "I went through it with [Mr. Hall] and I was under the impression that he knew what was going on at the time, and I am not here to knock anybody, but he had—he was misreading the prints at the time and I didn't know that."

¶ 41 In the instant case, the claimant had worked for more than two hours before his accident. There was no evidence presented that he was unable to pay attention at the safety meeting, that he was unable to communicate with the crane operator, or that he was unable to unfasten the iron that had been installed incorrectly on a previous day. The employer argues that the claimant was unable to perform his job due to his intoxication because he had difficulty connecting one piece of iron. Evidence was presented that the claimant was unable to connect his piece of iron because it was either made incorrectly or the wrong piece. Mr. Hall and Mr. Edwards both testified that they did not observe anything that would lead them to believe the claimant was intoxicated. Further, both men stated that, due to the dangerous nature of the job, they would refuse to work with someone they thought was intoxicated. Mr. Allen testified that no one on the job site on the day of the accident complained that the claimant was intoxicated before he fell. The Commission weighed the evidence presented regarding whether the claimant was intoxicated on the day of his accident and whether his intoxication prevented him from being able to perform his job, and it determined that even if the claimant was intoxicated, that intoxication was not of a sufficient degree to be viewed

as an abandonment of his employment. An opposite conclusion is not clearly apparent.

¶ 42 The employer argues that the most convincing evidence of the claimant's impairment was that he unhooked his safety harness while suspended in the air causing him to fall the remaining distance to the ground and resulting in far more serious injuries. It asserts that had he been unimpaired he would have used his fall protections and training to be rescued while suspended. The claimant testified that he unhooked his harness because he panicked because he could not breathe. He stated, and the medical records confirm, that he punctured a lung during the fall. The claimant testified that had he known then what he knew now, he would not have untied his harness, but his lack of ability to breathe properly caused him to panic. It was not unreasonable for the Commission to believe that the punctured lung caused the claimant to feel as though he could not breathe and caused him to panic and unhook his safety harness.

¶ 43 It is the function of the Commission to judge the credibility of the witnesses and to determine the weight to be given their testimony. *McKernin Exhibits, Inc.*, 361 Ill. App. 3d at 672, 838 N.E.2d at 52. The Commission found that the accident arose out of and in the course of the claimant's employment because he was in the performance of his duties at a place where he should have been at the time his injury was sustained. It further found that the claimant never departed from his employment and that even if he was intoxicated, that intoxication was not the sole cause of his injury. The claimant testified that the beam he was working on was wet and that he lost his footing and fell. Mr. Edwards testified that it had been raining and the iron was wet. The Commission chose to believe the witnesses who testified that there was no evidence that the claimant was intoxicated while performing his job duties. Under the instant circumstances, we find that the Commission could reasonably conclude that the claimant was able to perform his work properly and was carrying out his employment responsibilities when he fell. Although there was evidence that the claimant

tested positive for cocaine, we cannot say, as a matter of law, that the Commission erred in determining that the claimant's injuries arose out of his employment, or that its determination in this regard is against the manifest weight of the evidence.

¶ 44

CONCLUSION

¶ 45 For the foregoing reasons, the judgment of the circuit court of Christian County confirming the decision of the Commission is affirmed.

¶ 46 Affirmed.