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2015 IL App (1st) 130361WC-U

Order filed: August 14, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

KADEEM GRAHAM,)	Appeal from the Circuit Court
)	of Cook County, Illinois.
Plaintiff-Appellant,)	
)	
v.)	Appeal No. 1-13-0361WC
)	Circuit No. 12-L-50971
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> , (Intercon Solutions,)	Honorable
Defendant-Appellee).)	Margaret Brennan,
)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment.

ORDER

- ¶ 1 *Held:* The Commission's determination that the claimant's injuries did not arise out of and in the course of his employment was correct as a matter of law.
- ¶ 2 The claimant, Kadeem Graham, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries to his left knee and leg suffered on January 4, 2011, while he was playing basketball

during an unpaid lunch break while employed by Intercon Solutions (employer). A section 19(b) hearing was held on April 20, 2011, before Arbitrator Gregory Dollison at which the employer disputed whether the claimant's injuries arose out of and in the course of his employment. The arbitrator found that the claimant's injuries resulting from his voluntary participation in the basketball game during his unpaid lunch break did not arise out of and in the course of his employment. 820 ILCS 305/11 (West 2008). In denying the claim under section 11 of the Act, the arbitrator also rejected the claimant's argument that his injuries were compensable under the "personal comfort doctrine." *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 331 (1980). The claimant sought review before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision with one dissenting commissioner. The dissenting commissioner (Thomas J. Tyrell) would have found that the claimant's injuries were compensable under the personal comfort doctrine. The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the decision of the Commission. The claimant then filed a timely appeal with this court.

¶ 3

FACTS

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on April 20, 2011.

¶ 5 On January 4, 2011, the claimant was employed as a general laborer by the employer, a position he had held since he began his employment with the employer on July 21, 2010. The claimant testified that he injured his left knee and leg while playing basketball during his lunch break. The injury occurred at approximately 12:40 p.m., almost immediately after the claimant finished eating his lunch. He testified that employees ate lunch in the warehouse facility and that a basketball court was located on the opposite end of the warehouse from where employees ate

lunch. According to the claimant, the area also contained a pool table, ping pong table, and dartboard for employee use during lunch breaks.

¶ 6 The claimant testified that while playing basketball, he went up for a jump shot and came down on some water that had accumulated on the floor. His right leg slipped on the water and his left leg twisted underneath him. The claimant testified that he was not sure how the water came to be on the basketball court area, and he did not know the floor was wet when he started playing the game. He had never seen water on the floor before. He speculated that the water may have come from area adjacent to the basketball court where car washing sometimes occurred. The claimant immediately reported the accident to his supervisor, Damario Walker.

¶ 7 The claimant testified that playing basketball was a voluntary activity played for his own personal benefit and enjoyment. He acknowledged that the employer did not require employees to play basketball, did not encourage employees to play basketball, and did not encourage employees to play any of the other recreational activities. He also acknowledged that the employer did not require employees to maintain any level of physical fitness. He further acknowledged that the employer did not encourage or require employees to stay on company premises during lunch breaks, indicating that lunch breaks were unpaid and employees were free to go wherever they chose. The claimant testified that the employer did not have an official intermural basketball team or an official or unofficial interdepartmental basketball program. He also acknowledged that the employer allowed employees to use the basketball and gymnasium area after work.

¶ 8 The claimant also acknowledged signing a document titled “Limited Liability – Intercon Solutions Gymnasium Facility” which was entered into evidence as an employer exhibit. The document contained the following provision: “My use of the Gym is a voluntary activity in all respects and I assume all risks of injury and illness that may result for such use.”

¶ 9 Medical evidence established that the claimant suffered two ligament tears in the left knee. The claimant was placed on a sedentary work restriction and underwent a program of physical therapy. The claimant's treating physician has recommended surgical repair, but at the time of the hearing, the surgery had not been scheduled. The claimant remained on sedentary work restriction and had not returned to employment as of the date of the hearing.

¶ 10 Warehouse manager Damario Walker testified for the employer. He testified that he lives on the premises. On January 4, 2011, Walker left his residential area at approximately 1:05 p.m. and observed a crowd standing around the claimant near the basketball court. Walker spoke to the claimant who informed him that he had fallen while playing basketball. Walker testified that the claimant did not say anything about water on the court. Walker further testified that he did not see water or any other defect or obstruction on the court. He also testified that he had never observed water on the floor in the basketball court area, nor had he ever observed any pipe or roof leaks or any other occurrence which might cause water to accumulate on the warehouse floor.

¶ 11 Walker testified that the employer did not require or encourage employees to stay on the premises during lunch, nor did the employer require or encourage use of the basketball court or any of the other recreational opportunities on site. He further testified that the employer did not exercise any control or supervision over the basketball court and that use of the court was completely voluntary. He testified that the basketball court was not locked and that employees were free to use it at any time, even after work or on their days off. Walker further testified that the employer did not have any fitness requirements for employees and that the job requirements for employees did not mandate any particular level of physical fitness.

¶ 12 The claimant maintained that he sustained a compensable injury as a result of a defect in on the employer's premises, *i.e.*, water accumulated on the basketball court, and his injury was compensable under the "personal comfort doctrine."

¶ 13 The arbitrator found that the claimant had failed to establish that his injury arose out of and in the course of his employment. First, he found that the claimant failed to prove that a defect existed on the premises which gave rise to his injury. Specifically, the arbitrator found that the claimant's testimony that water was present on the floor was not credible and Walker's testimony that no water was present was credible. Second, the arbitrator found that the claimant's voluntary participation in a recreational activity during an unpaid lunch break was not compensable under section 11 of the Act. 820 ILCS 305/11 (West 2008). The arbitrator rejected the claimant's contention that his injury was compensable under the "personal comfort doctrine" finding that, under section 11 of the Act, the dispositive question was whether the claimant's participation in the basketball game was "voluntary." Finding that the claimant's participation was, unquestionably, voluntary, the arbitrator found that the claimant's injuries were not compensable. The claimant sought review of the arbitrator's decision before the Commission, which affirmed and adopted the arbitrator's decision, with one dissent. The dissenting commissioner would have found that the "pick-up" basketball game in which the claimant was participating at the time of his injury was not a "voluntary recreational program" as encompassed by section 11 of the Act. 820 ILCS 305/11 (West 2008). The dissenting commissioner would have found that the claimant was engaged in an activity meant to "refresh" him before returning to work, and thus his injuries were compensable under the "personal comfort doctrine." *Eagle Discount*, 82 Ill. 2d at 212. The claimant sought judicial review of the Commission's decision in the circuit court of Cook County which confirmed the decision of the Commission. The claimant now appeals.

¶ 14

ANALYSIS

¶ 15 The claimant maintains that the Commission erred as a matter of law in not considering his claim under the “personal comfort doctrine” and instead denying his claim under section 11 of the Act, which precludes compensation for injuries sustained in recreational activities unless the employer assigns or directs the claimant to participate in those activities. 820 ILCS 305/11 (West 2008). As both parties acknowledge, the appropriate standard of review here is *de novo*, as we must consider which principle of law is applicable to the undisputed facts. *Elmhurst Park District v. Workers’ Compensation Comm’n*, 395 Ill. App. 3d 404, 408 (2009) (applying *de novo* standard of review to determine whether wallyball game was “recreational” under section 11 of the Act).

¶ 16 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 “arising out of” component refers to a 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 2008). An exception contained in section 11 of the Act 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 2008). This provision has been consistently interpreted to mean that “[e]xcept to the extent that 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 [otherwise] said they arise out of and in the course of employment.” *Kozak v. Industrial Comm’n*, 219 Ill. App. 3d 629, 633 (1991). In other words, if the claimant was injured while “participating in a voluntary recreational program” section 11 of the Act bars compensation and it does not matter that compensation may have been appropriate under some other theory such as the “personal comfort doctrine.” *Id.* Since it is undisputed that the claimant’s participation in the activity which gave rise to his injury was voluntary, the dispositive question is whether the activity he was participating in was a *recreational program* covered by section 11 of the Act.

¶ 17 Section 11 of the Act does not define “recreational programs,” although it provides general examples of such: athletic events, parties, picnics. In *Elmhurst Park District*, the court observed that, using the plain and ordinary meaning of the concept “recreation,” section 11 of the Act encompassed any “act of recreating or the state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY.” *Elmhurst Park District*, 395 Ill. App. 3d at 395. Thus, the *recreational* nature of the activity (refreshing strength and spirit, diversion, play) and not the location or frequency of that activity will determine whether an activity constitutes a “recreational program” under section 11 of the Act. *Id.* The extent to which the employer benefits from an employee’s participation in the activity, the extent to which the employer actively organizes and runs the recreational event, and the extent to which the employer sponsors or compels attendance in the event are legitimate inquiries, but 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 encompassed under section 11 of the Act. *Kozak*, 219 Ill. App. 3d at 633. Here there is no question that the claimant’s participation in the activity which gave rise to his injuries was voluntary.

¶ 18 At issue, therefore, is whether a “pick-up” basketball game is a “recreational program” for which section 11 of the Act precludes compensation. We find that it is. Although there was little evidence regarding the specifics of the game to be found in the record, we can surmise that the game involved nothing more than an *ad hoc* group of individuals who chose to occupy several minutes of time by running up and down a basketball court “tossing an inflated ball through one of the raised nets at each end of a rectangular court.” *Merriam-Webster Dictionary*, 2d edition. The claimant’s reason for doing so was undoubtedly to refresh his strength and spirit, and for diversion and play, there being nothing in the record to the contrary. As such, we find that the claimant was engaged, by commonly accepted definition, in a recreational activity excluded from compensation under section 11 of the Act.

¶ 19 The claimant asks this court to find that the claimant’s participation in the basketball game was compensable under the personal comfort doctrine notwithstanding any prohibition under section 11 of the Act. He suggests that playing in a pick-up game of basketball during his lunch hour should be compensated under the general rule that any reasonable activity during the employee’s lunch hour should be compensable under the personal comfort doctrine. *Eagle Discount*, 82 Ill. 2d at 339. Similarly, he maintains that playing basketball is a form of personal comfort similar to going up on the roof to get fresh air as relief from a hot, muggy factory. See, *Union Starch Division of Miles Laboratories, Inc. v. Industrial Comm’n*, 56 Ill. 2d 272 (1974). In essence, he suggests we can determine whether the claimant’s actions were for his personal comfort without reference to section 11 of the Act. We disagree. We note, as did the Commission in the instant matter, that *Eagle Discount* and *Union Starch* were decided before the enactment of section 11 of the Act. To the extent that the activities engaged in by employees in those and similar cases were “recreational programs” now covered by section 11 of the Act,

those precedents are no longer authoritative. See *Kozak*, 219 Ill. App. 3d at 633 (following amendment of section 11 in 1980, older cases have questionable relevance).

¶ 20 Under the current Act, the first question to be determined is whether the claimant was engaged in a voluntary recreational program or activity. If so, then the injuries resulting from those activities are not compensable, regardless of any other theory of compensation. *Id.* Here, having found that the claimant was engaged in a voluntary recreational program as encompassed under section 11 of the Act, we find that the claimant is, as a matter of law, precluded from receiving compensation for his injuries.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court which confirmed the decision of Commission is affirmed.

¶ 23 Affirmed.