2017 IL App (1st) 161052WC-U

Workers' Compensation
Commission Division
Order Filed: June 30, 2017

No. 1-16-1052WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARY MITCHELL,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 15 L 50599
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*	)	Honorable
	)	Kay M. Hanlon,
(Construction Cleaning Company, Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The decision of the Illinois Workers' Compensation Commission denying the claimant benefits pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010)) is not against the manifest weight of the evidence.

¶ 2 The claimant, Mary Mitchell, appeals from an order of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) denying her claim

for benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing held on July 16, 2014.

¶ 4 The claimant was employed as a laborer for Construction Cleaning Company (Construction Cleaning) and had been so employed for four days, beginning January 25, 2011. She was assigned to work at a newly-constructed residential building at 2910 South Dearborn Street in Chicago. Although the building was in a cul-de-sac where other residential buildings were being built, Construction Cleaning was hired by Walsh Construction to clean only one of the buildings. The claimant's job duties included removing dust and debris, vacuuming carpets, washing windows and floors, and otherwise preparing residential units for occupancy. The claimant, who served as a steward for Local Union No. 4, was also responsible for verifying that the laborers working at Construction Cleaning's job site were members of the local union. She did this by "carding" them—that is, asking the workers to present their union cards.

¶ 5 On January 28, 2011, the claimant was assigned to clean the kitchens and bathrooms. After her lunch break, she received a phone call from John Joe, the business agent at Local Union No. 4, requesting that she meet him to investigate whether workers, who were working in an adjacent building, were members of a union. The claimant testified that she informed her supervisor, Trish, about Joe's request and was given permission to "go next door and take a look." The claimant stated that she met with Joe, walked to a nearby building, located the workers, and "carded" them. After verifying that the workers were members of a union, the claimant and Joe walked back toward Construction Cleaning's job site. As the claimant was walking up a "pathway to the door" of the building, she slipped on a patch of ice and struck her

left knee against the pavement. Joe and two other men helped the claimant up and sat her on a bench near the front of the building. Following a brief period of rest, the claimant entered the building and walked up "the stairs up to the site" where Trish and the other coworkers were finishing their work for the day. The claimant informed Trish about the status of the workers in the adjacent building and also told her that she injured her knee by slipping on ice outside of the building. Since the work day was almost over, the claimant did not resume work.

¶ 6 As a result of the accident, the claimant sustained a sprain and moderate joint effusion in her left knee. According to the medical records, she underwent a course of conservative treatment which included exercises, steroid injections, and taking Tylenol and Motrin for pain.

¶ 7 The claimant testified that, although her work as a union steward benefitted her local union, she believed that her actions in leaving the job site to investigate workers at another building were also beneficial to Construction Cleaning. She explained that if nonunion workers were "scabbing" or working at the adjacent building, then those workers "would have been run off the job," thereby giving Construction Cleaning an opportunity to submit a bid for that job. The claimant admitted, however, that it was not common for union stewards to leave their assigned job site to card workers at a different site. When asked on cross-examination about Trish, the claimant stated that she did not know Trish's last name, could not recall what Trish looked like, and did not know Trish's union affiliation.

¶ 8 Beata Bobowski, the president of Construction Cleaning, testified that her company is in the business of post-construction cleaning. She explained that Walsh Construction was constructing several buildings and it invited her company to submit a bid to clean the building at 2910 South Dearborn Street. After Walsh Construction awarded Construction Cleaning the job, Bobowski hired four of five laborers from Local Union No. 4, including Lukasz Siemienkiewicz

who served as the foreman. She denied having any other foremen or supervisors on the job and denied hiring any employees named Trish or Tasha. Bobowski also explained that it was the practice of Local Union No. 4 to assign a union steward to work at each job site and the claimant, who served as the steward, was responsible for carding Construction Cleaning's workers to verify that they were members of the local union. She stated, however, that it is uncommon for stewards to card workers at a different job site. Bobowski also clarified that union members do not play a role in her company and are not involved in the bidding process; rather, they are hired to do the work. On cross-examination, Bobowski testified that she did not know if the claimant's action in going to investigate the other job site would have benefited her company. She recognized, however, that if Walsh Construction did not have its own laborers to clean the building, then she would probably submit a bid if asked to do so.

¶ 9 Lukasz Siemienkiewicz testified that he was the foreman of a five-person crew that was assigned to work at a newly-constructed building. He corroborated Bobowski's testimony that Construction Cleaning did not have any other foremen or supervisors on the job and did not have any employees named Tasha, Trish, or Trisha. He also stated that it is not common for stewards to leave their assigned job site to card workers at another location. Siemienkiewicz further testified that the claimant worked a full day on January 28, 2011. He denied giving the claimant permission to leave the job site that day and did not remember seeing the claimant leave the job site. He also stated that the claimant never reported falling or injuring her knee. Siemienkiewicz testified on cross-examination that he was not paying attention to the surrounding buildings and had "nothing to do with" other job sites.

¶ 10 Following the arbitration hearing, the arbitrator found that the claimant failed to prove that her injuries arose out of and in the course of her employment. In particular, the arbitrator

found that the claimant was engaged in union business at the time of her accident and the risk of injury was not connected to her employment in any way. The arbitrator also noted that, while the claimant stated that she slipped and fell on ice on a sidewalk, "there was no further testimony regarding the details of the ice or the walk, such that a defect on [Construction Cleaning's] premises could be found." Accordingly, the arbitrator denied the claimant benefits under the Act and found all remaining issues "moot."

¶ 11 The claimant sought review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission affirmed and adopted the arbitrator's decision.

¶ 12 The claimant filed a petition for judicial review of the Commission's decision in the circuit court of Cook County. On March 15, 2016, the circuit court entered an order confirming the Commission's decision. This appeal followed.

¶ 13 The claimant's first contention on appeal is that the Commission's finding, that she failed to prove her left knee injury arose out of and in the course of her employment, is against the manifest weight of the evidence. We disagree.

¶ 14 To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that she suffered an injury which arose out of and in the course of her employment. 820 ILCS 305/2 (West 2010). 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 (1989). The "arising out of" component refers to the origin or cause of the claimant's injury. As our supreme court stated in *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989):

> "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 [she] was instructed to perform by [her] employer, acts which [she] had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to [her] 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 [her] duties. [Citations.]"

¶ 15 "[I]n the course of employment" refers to the time, place, and circumstances under which the claimant is injured. *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 338 (1980). 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 her duties and while she is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. *Caterpillar Tractor Co.*, 129 Ill. 2d at 57. In determining whether an act is one which an employee might be reasonably expected to perform incident to her assigned duties, courts consider whether the act is "reasonable" and "foreseeable." *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 200 (1985). A deviation for purely personal reasons takes an employee out of the course of her employment. *Checker Taxi Cab Co. v. Industrial Comm'n*, 45 Ill. 2d 4, 6 (1970); *Public Service Co. v. Industrial Comm'n*, 395 Ill. 238, 240 (1946).

¶ 16 The determination of whether an injury arose out of and in the course of one's employment is a question of fact and the Commission's determination on this issue will not be disturbed unless it is against the manifest weight of the evidence. *Saunders v. Industrial Comm'n*, 189 Ill. 2d 623, 631-32 (2000). "For a finding of fact to be against the manifest weight

of the evidence, an opposite conclusion must be clearly apparent ***." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009). Whether a reviewing court might reach the same conclusions is not the test of whether the Commission's determinations are against the manifest weight of the evidence. Rather, the test is whether there is sufficient evidence in the record to support the Commission's decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 17 In this case, the Commission found that, prior to slipping on the ice, the claimant was engaged in a personal deviation which took her out of the course of her employment. It is clear that, in leaving the job site to investigate workers at another location, the claimant was not acting under express instructions from Construction Cleaning or pursuant to a statutory or common-law duty. Nor could her investigation be reasonably characterized as incidental to her assigned duties; that is, cleaning kitchens and bathrooms. Rather, the claimant's own testimony establishes that she left her assigned job site as a result of a phone call she received from Joe, the local union's business agent, who asked her to investigate workers at an adjacent building. Based upon Bobowski's testimony that the union plays no role in her company (other than providing laborers to do the work), coupled with her and Siemienkiewicz's testimony that union stewards are responsible for carding the workers at their assigned job site, the Commission could have reasonably concluded that the claimant's errand to an adjacent building was not an activity that she reasonably or foreseeably could be expected to perform incident to her assigned duties. Indeed, by her own testimony, the claimant admitted that it is not common for union stewards to card workers at a different job site. Thus, the record demonstrates that the claimant embarked on a purely union-related excursion that was not required by or incidental to her employment. As such, the record contains sufficient evidence to support the Commission's determination that the

claimant was engaged in a deviation that removed her from the course of her employment with Construction Cleaning.

¶ 18 The claimant asserts, however, that even if her trip to another job site may be construed as a personal deviation, she completed her errand and resumed a course of conduct related to the business of her employer such that she could be said to have been in the course of her employment. She cites *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, in support of her argument.

¶ 19 In *Johnson*, 2011 IL App (2d) 100418WC, ¶ 5, the claimant, a deputy sheriff, left his assigned patrol area in Will County to collect his personal mail at a post office in Du Page County. The claimant testified that, as he was exiting the post office, he received a radio assignment to assist another deputy who had undertaken a traffic stop in his assigned patrol area. *Id.* ¶ 6. As the claimant was driving to the assigned location, he was involved in a motor vehicle accident approximately 1.5 miles outside of the Will County border. *Id.* ¶ 8. On appeal, this court affirmed the circuit court's reversal of the Commission's finding that the claimant failed to prove that he sustained accidental injuries arising out of and in the course of his employment. *Id.* ¶¶ 28-29. We reasoned that, although the claimant was engaged in a personal deviation, he had completed his deviation and resumed a course of conduct related to the business of his employer. *Id.* ¶ 25. We explained:

> "[T]he claimant in this case received instructions from his dispatcher, prior to his injuries, directing him to proceed to a specific location and assist a co-employee, and he was involved in the accident while in route to that location. We are of the opinion, therefore, that the only reasonable conclusion that can be drawn from the facts of this case is that, at the time of his injury, the claimant was no longer

> embarked upon a personal deviation from his employer's business but was acting in the course of his employment." *Id.*

¶ 20 Unlike in *Johnson*, there is no evidence in this case that the claimant received any instructions from Construction Cleaning, prior to her injuries, directing her to proceed to a specific location, traverse a designated pathway, or enter the building through a particular door. Rather, given the lack of evidence regarding the number of walkways and number of entrances to the building, it was reasonable for the Commission to conclude that the claimant, in a sense, chose to walk down that particular walkway. Therefore, unlike in *Johnson*, the evidence here is insufficient to establish that the claimant had resumed a course of conduct related to the business of Construction Cleaning.

¶ 21 In our view, the facts of this case more closely resemble *Checker Taxi Cab*, 45 Ill. 2d at 5. In *Checker Taxi Cab*, the claimant, a taxi driver, left his authorized work area within the City of Chicago to visit a friend at a hospital in Maywood. *Id.* Following his visit, the claimant drove his taxi toward Chicago to resume working when he was involved in a car accident outside of the city's limits. *Id.* The supreme court held that the accident did not occur within the course of his employment because he "was not acting under express instructions or pursuant to a common law or statutory duty. Nor could his visit be reasonably characterized as incidental to his assigned duties." *Id.* at 6. In rejecting the claimant's argument that he had returned to the course of his employment, the supreme court explained that "when an employee embarks upon a personal side trip, he does not return to the course of his employment until the trip is completed." *Id.* That is, the journey toward the employment destination is not enough. Since the claimant's accident occurred outside of his authorized work area, the supreme court concluded that the claimant had

not completed his personal trip and, as a consequence, had not returned to the course of his employment. *Id.* at 6-7.

¶ 22 Similarly here, the evidence reveals that the claimant had not returned to the course of her employment. The claimant testified that Construction Cleaning was hired to clean one building and that her job duties involved cleaning the kitchens and bathrooms of residential units located *inside* that building. She testified, however, that she slipped and fell on a patch of ice *outside* of the building. Because the claimant had not entered the building or walked up "the stairs to the site" to resume work, she had not completed her union-related deviation and had not returned to the course of her employment. The fact that the claimant's injury occurred while she was on her journey toward the job site is not enough. See *Public Service Co.*, 395 Ill. at 240 ("The law is settled that an employee is not in the course of his employment, even though he may be in the general area of it, if he is not engaged in the particular duties for which he was employed or in any work incidental to his employment."). Accordingly, the claimant's accident cannot be said to have been in the course of her employment as she had not completed her deviation or otherwise resumed a course of conduct related to the business of her employer.

¶ 23 In a related argument, the claimant challenges the Commission's reliance on the testimony of Bobowski and Siemienkiewicz. She maintains that its reliance on their testimony was misplaced because they did not rebut her own testimony that Trish, her supervisor, gave her permission to leave the job site.

¶ 24 The claimant's argument in this regard amounts to nothing more than an invitation to reweigh the evidence, which is not the function of this court. See *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009) (it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign the

weight to be accorded the evidence, and draw reasonable inferences from the evidence). Here, the Commission, in adopting the arbitrator's decision, determined that the claimant's testimony, that Trish gave her permission to leave the job site, was not credible. In assessing the claimant's credibility, the arbitrator found it "troubling" that the claimant could not describe what Trish looked like and did not know Trish's union affiliation, even though she was the union steward responsible for carding the workers on her job site. Instead, the arbitrator credited the testimony of Bobowski and Siemienkiewicz, who both testified that Siemienkiewicz was the foreman and that Construction Cleaning did not have any employees named Trish. Since it is the Commission's province to resolve conflicts in the evidence, we see no basis to disturb its finding that the testimony of Bobowski and Siemienkiewicz was more credible than that of the claimant.

¶ 25 In sum, the Commission's finding that the claimant was engaged in "union business" at the time of her accident is supported by sufficient evidence in the record. We conclude, therefore, that the Commission's determination that the claimant's left knee injury did not arise within the course of her employment, is not against the manifest weight of the evidence.

¶ 26 Next, the claimant maintains that the arbitrator abused his discretion when he denied her motion to reopen proofs. The record discloses that, after the arbitration hearing, but before the arbitrator issued his decision, the claimant filed a motion to reopen proofs seeking to call Katarzyna Nguyen as a rebuttal witness. In support of her motion, the claimant alleged that she was "surprised" when Construction Cleaning did not present the testimony of Trish or Tasha and was also "surprised" when it denied having any employees named Trish or Tasha. The claimant asserts that, following the hearing, she used a telephone number associated with Trish and learned that the number was registered to Katarzyna Nguyen. She also discovered that Trish and

Tasha are common nicknames for Katarzyna. Based upon this discovery, the claimant sought to call Nguyen as a witness to rebut the "surprise" testimony of Bobowski and Siemienkiewicz.

¶ 27 The decision to grant or deny a motion to reopen proofs lies within the arbitrator's discretion and will not be disturbed on appeal absent an abuse of that discretion. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 785-86 (2008). "The arbitrator may grant a continuance and extend the time for closing proofs if there is a showing of 'good cause.' " *Lefebvre v. Industrial Comm'n*, 276 Ill. App. 3d 791, 795 (1995) (quoting 50 Ill. Admin. Code §§ 7020, 7030 *et seq*. (1991)).

¶ 28 In our view, the arbitrator did not abuse his discretion in denying the claimant's motion to reopen proofs. As stated in her motion, the sole reason for requesting the proofs to be reopened was that she was "surprised" when Bobowski and Siemienkiewicz denied that anyone named Trish or Tasha worked at the job site. The claimant argues that, had she known what Bobowski's and Siemienkiewicz's testimony would be, she would have had Nguyen testify at the hearing. However, the failure to anticipate the testimony of a witness is not necessarily the type of surprise which requires the proofs to be reopened. See *University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 158 (1992) (the failure to anticipate the testimony and witnesses necessary to present one's case is not the same type of surprise that requires a continuance to present additional evidence). Moreover, the claimant fails to explain why she waited until after the arbitration hearing to investigate Trish and call her as a witness. In a workers' compensation case, the claimant bears the burden of proof and her attorney should have been aware of the evidence needed to present and support her claim. Not to mention, the claimant had Nguyen's telephone number from when they worked together and she could have investigated the matter and presented Nguyen's testimony at the arbitration hearing. See *In re Marriage of Sawicki*, 346

Ill. App. 3d 1107, 1120 (2004) (if evidence could have been produced at an earlier time, it is not an abuse of discretion for the court to deny a motion to reopen proofs). Because the claimant failed to show good cause for failing to call Nguyen as a witness at the hearing, the arbitrator did not abuse his discretion in denying her motion to reopen proofs.

¶ 29 Finally, the claimant argues that she is entitled to penalties and fees based upon Construction Cleaning's alleged failure to notify her with a written explanation of the basis for its denial of liability. We note that the claimant devotes little more than a half page of her 19-page brief in support of her argument and fails to cite relevant authority. As such, she has forfeited her argument. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 33 ("failure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument"). Forfeiture aside, even if Construction Cleaning failed to notify the claimant in writing of the basis for its denial of liability in violation of Commission Rule 7110.70(d) (50 Ill. Admin. Code § 7110.70(d) (eff. June 22, 2006)), neither section 16 nor section 19(*l*) of the Act (820 ILCS 305/16, 19(*l*) (West 2010)), require an award of penalties or attorney fees on that basis. Accordingly, the Commission's decision not to award penalties and attorney fees in this case was not against the manifest weight of the evidence.

¶ 30 Based upon the foregoing analysis, we affirm the decision of the circuit court which confirmed the Commission's decision denying the claimant benefits under the Act.

¶ 31 Affirmed.