2013 Il App (1st) 121418WC-U

Workers' Compensation
Commission Division
Filed: June 3, 2013

No. 1-12-1418WC

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

VIACOM OUTDOOR, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, et al., (Donna Cramer, Appellee).	)))))))))))	Appeal from the Circuit Court of Cook County No. 09 L 51521 Honorable Sanjay Taylor, 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 findings of the Illinois Workers' Compensation Commission in its original decision that the claimant was injured as the result of a voluntary recreational activity and is, as a consequence, not entitled to benefits pursuant to the Workers' Compensation Act are not against the manifest weight of the evidence.

¶ 2 Viacom Outdoor (Viacom) appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Donna Cramer, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2004)), for injuries she sustained while participating in a Viacom sponsored charity event on September 30, 2004. For the reasons which follow, we

reverse the judgment of the circuit court and reinstate the Commission's original decision denying the claimant benefits pursuant to the Act.

¶ 3 The following factual scenario is taken from the evidence adduced at the arbitration hearing held on May 8 and May 18, 2008.

¶ 4 The claimant was a 60 year-old sales assistant at Viacom's Chicago office at the time her injury occurred. On August 17, 2004, Viacom's president, Wally Kelly, sent an email informing Viacom's employees of its charitable bowling event. The memorandum stated:

> "This year Viacom Outdoor will be participating in Viacommunity Day, which will be held on September 30, 2004! Like last year, we are encouraging all employees to join in and support the company's efforts to fight HIV/AIDS by participating in our Bowl-A-Thon. Your Human Resource Representative is in the process of setting up this event for your market. Come out, have fun, support, and give back to your surrounding communities."

¶ 5 The next day, on August 18, 2004, Elizabeth Martinez, a Human Resources Assistant for Viacom in Phoenix, AZ, wrote an email to a select few Viacom employees, including the Chicago Office Manager, Sharon Anderson. This email explained how to organize Viacommunity Day and "encourage[d]" the recipients to "take pictures and/or recordings of the event" and later submit them to Martinez.

¶ 6 Shortly after, Sharon Anderson and Kathryn Graham (another Viacom employee) sent an email memorandum to the Chicago employees regarding Viacommunity Day. It stated that the office would "close" at 2:00pm on Thursday, September 30, 2004; the Bowl-A-Thon would take place at a bowling alley from 3:00-5:00pm; Viacom would cover costs for bowling and shoe rentals; participants would be required to make a $15 donation "to a designated AIDS organization" and sign a Volunteer Waiver of Liability Form; "employees not wishing to participate [would] be required to work their normal day"; "everyone [was] strongly encouraged

to participate"; and that "a prize [would] be awarded to the market with the highest percentage of participation." The employees were asked to give their R.S.V.P by August 19, 2004.

¶ 7 On September 10, 2004, Wally Kelly sent Viacom employees another email memorandum regarding the Bowl-A-Thon for Viacommunity Day. It stated:

> "Viacommunity Day is a great tradition at Viacom, a dedicated day of service that brings Viacom employees together to give back to the communities in which we live and work. This year, we are focusing our efforts on projects that help youth at risk as well as those who have been afflicted with HIV/AIDS. As you know, many of the ongoing philanthropic programs throughout the company focus on these areas
>
> ***
>
> Employees throughout the United States and United Kingdom will be participating in Viacommunity Day this year and I encourage each and every one of you to join them. The event speaks volumes about our culture-highlighting the enthusiasm, creativity and teamwork that Viacom employees bring to making a difference every day
>
> ***
>
> Let's make this our biggest year ever."

¶ 8 The Viacom employees who wished to participate in the Bowl-A-Thon were not required to take a personal or sick day; their time at the event counted toward their normal work hours. However, prior to the Bowl-A-Thon, employees who wished to attend the event had to sign a Volunteer Waiver of Liability Form, which stated:

> "I further irrevocably grant to Viacom Outdoor, its assigns and successors, my consent and full right to use my name, photograph, likeness, image, voice, and biography in any and all media, publications, advertising, and publicity, in connection with my participation hereunder."

¶ 9 On Thursday, September 30, 2004, 31 of Viacom's employees attended the Bowl-A-Thon

at the Diversey River Bowl; six employees chose not to participate and remained at work. Two Viacom employees attended the event but did not bowl. At the event, pictures were taken of the employees, and the employees raised $965 for Better Existence with HIV.

¶ 10 The claimant attended the event and participated in bowling. While bowling, she slipped into one of the lanes and fell onto her left arm. A co-employee drove the claimant to the Northwestern Hospital Emergency Room, where she was treated. At the emergency room, the claimant was informed that she had broken her left wrist and fractured her left humorous and shoulder. On October 12, 2004, Dr. Peter Hoepfner, an orthopedic surgeon at Northwestern Hospital, performed surgery on the claimant's wrist whereby he inserted a permanent titanium plate and metal screws and pins.

¶ 11 The parties have stipulated that the claimant was temporarily and totally disabled and did not attend work from October 1, 2004, through November 22, 2004, because of her injury. During this period, the claimant received temporary total disability (TTD) benefits from Viacom in the amount of $423.33 per week. The claimant participated in physical therapy from September 2004 through May 2005. Her medical bills totaled $47,910.00. In September 2005, Viacom had another Bowl-a-Thon for Viacommunity Day, and the claimant attended but did not bowl.

¶ 12 Sometime after September 2005, the claimant terminated her employment with Viacom. According to the claimant's testimony, because of her injury, she has a limited range of motion in her left wrist; cannot lift more than a gallon of milk with her left arm; cannot put her arm behind her back (which affects her ability to dress herself); and experiences pain in her fingers, arm, and shoulder when she wakes up in the morning. The claimant does not take medication for pain relief. Additionally, the claimant's doctors informed her that she will likely develop arthritis in her arm and fingers in the future.

¶ 13 At the arbitration hearing, the following exchange took place between the claimant and

her attorney:

"BY MR. COGHLAN:

Q. Why did you go to the bowling alley on September 30, 2004?

A. I felt it was something I had to do.

Q. And why do you say that?

A. I felt that there was pressure to participate because if we didn't, no one would be participating and it was a corporate event."

¶ 14 On cross-examination, the claimant and Viacom's counsel had the following exchange:

"Q. Were you present in September 2005, working for Viacom?

A. Yes, I was.

Q. At that time was there another bowling event?

A. There was.

Q. You did not attend?

A. I did, but I did not participate. I went there.

Q. Did you feel obligated to attend in 2005?

A. Yes.

Q. Did anyone tell you that you must attend?

A. I don't recall hearing 'must'."

¶ 15 On redirect examination, the claimant and her attorney had the following colloquy:

"Q. And when you went back, you testified you felt you had to attend this bowling event, even the subsequent year, 2005?

A. Yes.

Q. Why did you feel you had to attend it again in 2005?

A. Because they were again looking for participation, as much participation as possible."

¶ 16 In her testimony, Anderson, the Viacom Chicago office manager, stated that Viacom employees were not required to attend the Bowl-A-Thon event. On cross-examination, Anderson acknowledged that the memorandum sent to employees indicated Viacom's interest in having them attend.

¶ 17 Following the hearing, the arbitrator found that the claimant was not eligible for benefits because the event was voluntary and recreational, and thus her injury did not arise out of and in the course of her employment. The claimant sought review of the arbitrator's decision before the Commission. On October 26, 2009, the Commission affirmed and adopted the arbitrator's decision. The claimant then filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. On May 27, 2010, the circuit court set aside the Commission's decision and held that the charity event was not voluntary and recreational and that the claimant's injury therefore did arise out of and in the course of her employment. The court remanded the case to the Commission to determine the appropriate compensation amount.

¶ 18 On remand, the Commission entered a decision on July 29, 2011, finding that the claimant was entitled to TTD benefits of $423.33 per week for 7-4/7 weeks; $381.00 per week for 94 weeks for 40% loss of use of her left arm; $381.00 per week for 57 weeks for 30% loss of use of her left hand; $47,910.00 for medical expenses; and all interest expenses (if any). Following the Commission decision on remand, Viacom filed a petition for review in the circuit court. On April 12, 2012, the circuit court confirmed the Commission's decision.

¶ 19 Viacom now appeals, arguing that the circuit court erred in setting aside the Commission's original, October 29, 2009, decision finding that the claimant's injury did not arise out of and in the course of her employment.

¶ 20 The parties disagree regarding our standard of review. The claimant argues that we should apply de novo review, because the facts are undisputed and our only question is whether these facts bring this case within the general rule of section 11. See Baumgardner v. Illinois

Workers' Comp. Comm'n, 409 Ill. App. 3d 274, 279, 947 N.E.2d 856 (2011) (a reviewing court should apply the de novo standard when only a single inference can be drawn from the undisputed facts). Viacom, on the other hand, argues that we should employ the manifest weight of the evidence standard, because the parties ask us to evaluate inferences the Commission drew from the facts. See Baumgardner, 409 Ill. App. 3d 274, 279 (even when the facts of a case are undisputed, this Court must review Commission decisions under the manifest weight of the evidence standard "if more than one reasonable inference might be drawn from the facts"). We agree with Viacom and apply the manifest weight standard of review.

¶ 21 A claimant may recover under the Act only if she proves by a preponderance of the evidence that her injury arose out of and in the course of her employment. Elmhurst Park Dist. v. Illinois Workers' Comp. Comm'n, 395 Ill. App. 3d 404, 407, 917 N.E.2d 1052 (2009). An injury arises out of employment if its origin "is in some risk connected with, or incidental to, the employment so that there is a causal connection between the employment and the accidental injury." Id. An injury takes place "in the course of employment" if it occurs during work hours, while the employee was carrying out a task for the employer, and in a location that is typically associated with employment duties. Id. at 407-08. Under Section 11 of the Act, "[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 2004).

¶ 22 Section 11 "applies if an employee is injured while participating in a voluntary recreational activity regardless of the purpose of the activity" and even if the employer benefits from the activity. Kozak v. Indus. Comm'n, 219 Ill. App. 3d 629, 632, 579 N.E.2d 921 (1991). The parties cannot seriously dispute that the claimant in this case was injured while participating in a recreational program. See Elmhurst Park Dist., 395 Ill. App. 3d 404, 411; Kozak, 219 Ill. App. 3d 629, 632 (although the Bowl-A-Thon may have benefitted Viacom, the event was

recreational for the purposes of section 11 because bowling was not inherent in the claimant's position as a sales assistant). Rather, they disagree as to whether her participation was voluntary, so that the exclusion in section 11 of the Act should apply.

¶ 23 A claimant's participation is "voluntary" if the claimant's employer has not "ordered or assigned" her to participate. Pickett v. Indus. Comm'n, 252 Ill. App. 3d 355, 359, 625 N.E.2d 69 (1993). "Assigned" is defined as "[t]o set apart for a particular purpose; designate," "[t]o select for a duty or office; appoint," or "[t]o give out as a task; allot." Gooden v. Indus. Comm'n, 366 Ill. App. 3d 1064, 1066, 853 N.E.2d 37 (2006) (quoting the American Heritage Dictionary of the English Language 79 (1969)).

¶ 24 The claimant argues that her injury arose out of and in the course of her employment with Viacom because her participation in the Bowl-A-Thon was ordered, assigned, and not voluntary. In so arguing, she points out that she felt obligated to attend, as Viacom strongly encouraged employee participation and benefited from high attendance. We reject the claimant's argument based on our reasoning in Gooden v. Indus. Comm'n, 366 Ill. App. 3d 1064, 853 N.E.2d 37 (2006).

¶ 25 In Gooden, the claimant sustained a back injury while playing volleyball at a company picnic. Gooden, 366 Ill. App. 3d at 1065. On the day of the injury, the claimant had the option of performing his regular work duties all day or attending the company picnic for first half the day and working for the second half. Id. The claimant chose the latter. Id. His employer encouraged employees' participation, but picnic attendance was not mandatory and employees who chose not to attend did not suffer "any punishment or repercussion." Id. at 1065-66. Although the claimant attended the picnic, he was paid his regular salary (i.e. he was not required to take a personal or sick day in order to attend). Id. at 1065. Additionally, his employer provided all the "materials and equipment" for the event. Id.

¶ 26 The claimant argued that he was entitled to compensation because his injury arose out of

and in the course of his employment, but the Commission denied him benefits pursuant to Section 11 of the Act. Gooden, 366 Ill. App. 3d at 1064-66. On appeal, this court agreed that, pursuant to section 11 of the Act, the claimant was not entitled to compensation, because his employer had not ordered or assigned him to attend the company picnic. Id. This court determined that the claimant's choice to attend the picnic was voluntary because the claimant's employer "merely made the picnic an option or alternative" to his regular workday and "the claimant did not face the prospect of losing pay or a personal/vacation day as a consequence of foregoing the picnic." Gooden, 366 Ill. App. 3d at 1067.

¶ 27 Like the recreational picnic in Gooden, the Bowl-A-Thon in this case was an option or alternative to the claimant's regular workday, and the claimant would not have suffered any repercussion if she chose not to attend. See generally Gooden, 366 Ill. App. 3d 1064. Also like Gooden, Viacom provided or paid for all of the materials and equipment for the Bowl-A-Thon, and the claimant did not lose pay and was not required to use a personal/vacation day to attend. Id. Further, although Viacom encouraged employee participation, it did not order the claimant's attendance. Accordingly, under Gooden, the claimant's injury did not arise out of and in the course of her employment with Viacom, because her participation in the recreational Bowl-A-Thon was voluntary under section 11 of the Act.

¶ 28 For these reasons, we agree with Viacom that the circuit court decision setting aside the Commission's original, October 26, 2009, ruling that the claimant's injury did not arise out of and in the course of her employment is against the manifest weight of the evidence. Therefore, we: reverse the circuit court's May 27, 2010, decision, which set aside the Commission's October 26, 2009, decision; vacate the Commission's July 29, 2011, decision on remand; vacate the circuit court's April 12, 2012, decision confirming the Commission's July 29, 2011, decision; and reinstate the Commission's October 26, 2009, decision denying the claimant benefits under the Act.

¶ 29 Circuit court's May 27, 2010, judgment is reversed; Commission's July 29, 2011, decision is vacated; the circuit court's April 12, 2012, decision is vacated; the Commission's October 26, 2009, decision is reinstated.