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Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160346WC-U

Workers' Compensation
Commission Division
Order Filed: June 7, 2017

No. 4-16-0346WC

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

HERFF JONES, INC.,	)	Appeal from the
	)	Circuit Courts of
Appellant,	)	Coles and Douglas Counties
	)	
v.	)	Nos. 2012 MR 28
	)	2015 MR 163
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*,	)	Honorable
	)	Michael G. Carroll and
(Eva Epperson, Appellee).	)	Brian J. O'Brien,
	)	Judges, 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 circuit court of Douglas County erred in reversing a decision of the Illinois Workers' Compensation Commission (Commission), which found that the claimant's fall and resulting injuries did not arise out of her employment and denying her benefits under the Workers' Compensation Act (Act) (820 ILCS 305/8(b), (d)(2) (West 2014)), as the Commission's decision is not against the manifest weight of the evidence. We, therefore, vacate the judgment of the circuit court of Coles County which confirmed the Commission's decision on remand, vacate the Commission's decision on remand, reverse the judgment of the circuit court of Douglas County, and reinstate the Commission's original decision which denied the claimant benefits under the Act.

¶ 2 Herff Jones, Inc. (Herff) appeals from: a judgment of the circuit court of Coles County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) which, on remand from the circuit court of Douglas County, awarded the claimant Eva Epperson benefits under the Workers' Compensation Act (Act) (820 ILCS 305/8(b), 8(d)(2) (West 2014)) for injuries she sustained when she fell on April 13, 2011; and from an order of the circuit court of Douglas County which reversed a decision of the Commission finding that the claimant's fall and resulting injury did not arise out of her employment and denying her benefits under the Act. For the reasons which follow, we: vacate the judgment of the circuit court of Coles County; vacate the decision of the Commission on remand; reverse the judgment of the circuit court of Douglas County; and reinstate the Commission's decision of August 1, 2012, which denied the claimant benefits under the Act, finding that her fall and resulting injuries did not arise out of her employment with Herff.

¶ 3 The following factual recitation is taken from the evidence adduced at the arbitration hearing.

¶ 4 On April 13, 2011, the claimant was employed by Herff as a customer service representative. Her working hours on that date were from 7:30 a.m. to 4:00 p.m. The claimant testified that, at approximately 2:45 p.m., she was on her afternoon break. She stated that she and a co-worker, Vicki Henry, had decided to go for a walk. As they walked out of the front door of the facility, she fell after walking only a few steps and landed on her right wrist. In describing the fall, the claimant stated that, as she turned to say something to Henry, her foot rolled, and she fell and landed on her right wrist and hip. She testified that she "has always been under the impression" that she stepped on a rock. She went on to state: "I was open to other

ideas, but, I mean, I basically always felt that it was a rock that I stepped on." After the claimant got up, she put her shoe back on, walked back into the building, and went to her supervisor's office. As she was sitting in the office, Howard Sutton, Herff's human resource manager, came in and spoke to her. According to the claimant: "I told them that I had fallen and they wanted to know what had happened. And I said well, I don't know. I felt I stepped on a rock or *** I think I mentioned the probability of being too close to the edge, but I know I was on the walk." When asked whether she saw the rock that she stepped on, the claimant stated: "I don't recall." On April 18, 2011, the claimant gave a recorded statement which had been transcribed, and a copy was offered in evidence by Herff during the arbitration hearing. The record reflects that, when the statement was offered in evidence, the arbitrator inquired as to whether there was an objection, and the claimant's attorney responded: "[N]o, I don't have any objection." The statement was then admitted in evidence. In that statement, the claimant was asked if she noticed any defects in the sidewalk where she fell, and she responded: "No." She was then asked what happened, or what she thought happened, to cause her fall, and the claimant stated:

> "I think I must have gotten too close to the, to the edge of the concrete where the flower garden, rock garden, and so forth. I don't know whether I stepped on a rock. I don't, I don't really know what happened. All of a sudden I was going down."

The claimant admitted in her testimony before the arbitrator that she gave the statement, but testified: "I told her I do believe that I felt I had stepped on a rock." When asked whether her memory was better on April 18, 2011, than it was while testifying, the claimant responded: "No, because I was on drugs on April 18."

¶ 5 Henry testified that, as she and the claimant started to walk out of the building, she saw the claimant begin falling and tried to grab her. She stated that after the claimant fell, she reached to pick up the claimant's shoe which had come off and saw a few rocks on the sidewalk. However she admitted that she did not see the claimant step on a rock, she only saw her fall.

¶ 6 Sutton testified that he spoke to the claimant immediately after her fall, and she told him that she was not sure exactly what happened; she rolled her ankle and went down. According to Sutton, after he spoke to the claimant, he went outside and inspected the area where the claimant fell and saw no foreign substances on the sidewalk. Sutton identified photographs of the area where the claimant fell which were taken on May 16, 2011. The photographs were admitted in evidence without objection. Sutton testified that he had taken photographs of the scene on the date of the incident, but stated that, other than a single hard copy which has no date on it, the photographss are "[g]one forever." On cross-examination, Sutton admitted that he still had a single hard copy of a photograph which he took on April 13, 2011, but that he did not bring it to the hearing because it was undated. He did, however, testify that the photograph is very similar to the photographs which were entered in evidence and that the condition of the pavement is identical.

¶ 7 Following the incident, the claimant was taken to the Occupational Health Department at Sarah Bush Lincoln where x-rays were taken of her hand and wrist. The x-rays revealed a fracture and a widening of the scapholunate joint. As instructed, the claimant returned to Sarah Bush Lincoln on the following day and was seen by Dr. Sandercock, an orthopedic surgeon. The claimant testified that Dr. Sandercock told her that she had a torn ligament and that she would have to see a hand surgeon.

¶ 8 On April 22, 2011, the claimant was seen by Dr. Clifford Johnson who diagnosed a torn ligament and a fracture. On April 26, 2011, Dr. Johnson operated on the claimant and repaired her right wrist fracture. However, he made no attempt to repair the ligament tear. In his operative report, Dr. Johnson noted that he found a completely torn scapholunate ligament which had the appearance of a chronic degenerative tear. He found no evidence of an acute tear of the ligament. Following surgery, the claimant underwent physical therapy and was ultimately returned to full-duty work.

¶ 9 Following the arbitration hearing, the arbitrator issued a decision on December 23, 2011, finding that the claimant's fall, which resulted in her injury, did not arise out of her employment with Herff, and, as a consequence, denied her benefits under the Act. The arbitrator found that the claimant's testimony was inconsistent as to the cause of her fall. He found that neither the claimant nor any other witness testified with certainty that there were rocks on the sidewalk prior to the claimant's fall, and noted that Henry testified that it was reasonable to assume that the rocks which she saw on the sidewalk after the claimant fell were kicked on to the sidewalk by the claimant as she fell. The arbitrator found persuasive Sutton's testimony that he inspected the area where the claimant fell approximately 10 minutes after the fall and found no foreign objects on the sidewalk. In addition, the arbitrator noted that the pictures which were admitted in evidence did not show any defect in the sidewalk where the claimant fell.

¶ 10 The claimant sought a review of the arbitrator's decision before the Commission. In a unanimous decision dated August 1, 2012, the Commission affirmed and adopted the decision of the arbitrator.

¶ 11 The claimant filed a petition for judicial review of the Commission's August 1, 2012, decision in the circuit court of Douglas County. On August 30, 2013, Judge Michael G. Carroll

entered an order finding that the Commission's decision of August 1, 2012, is against the manifest weight of the evidence. He reversed the Commission and remanded the matter "for hearing on award of damages." In his letter ruling, Judge Carroll found that "there are disputed facts; namely what caused the fall [and] [t]his allows the court to consider this a question of law." The ruling goes on to state: "In this case, it is clear to this court that whether or not the [claimant] employee tripped on a rock is immaterial. The fact is that she was on an official break during her employment and remained on the premises. Thus, her accident arose out of and was in the course of her employment."

¶ 12 On remand, the Commission issued a unanimous decision on June 17, 2015. The Commission's decision states that it found, "[b]ased on the circuit court's findings," that the claimant sustained an accident arising out of and in the course of her employment with Herff on April 13, 2011, and that her right wrist fracture is causally related to her fall at work on that date. The Commission awarded the claimant 3 6/7 weeks of temporary total disability (TTD) benefits under section 8(b) of the Act (820 ILCS 305/8(b) (West 2014)); 71.75 weeks of permanent partial disability (PPD) benefits for 35% loss of use of her right hand pursuant to section 8(e) of the Act (820 ILCS 305/8(e) (West 2014)); and $27,391.87 for medical expenses under section 8(a) of the Act (820 ILCS 305/8(a) (West 2014)), subject to the medical fee schedule in section 8.2 (820 ILCS 305/8.2 (West 2014)). The Commission specifically found, based upon Dr. Johnson's operative report, that the claimant's ligament tear was not causally related to her fall on April 13, 2011.

¶ 13 Herff filed a petition for judicial review of the Commission's June 17, 2015, decision in the circuit court of Coles County. On April 12, 2016, Judge Brian J. O'Brien entered an order confirming the Commission's decision of June 17, 2015. This appeal followed.

¶ 14 Where, as in this case, the circuit court reverses the Commission's initial decision and the Commission enters a new decision on remand, this court must first decide the propriety of the Commission's initial decision before addressing its decision on remand. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 785-86 (2005); *Inter-City Products Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 185, 196 (2001). Herff argues that the Commission's initial decision of August 1, 2012, is not against the manifest weight of the evidence and should be reinstated. We agree.

¶ 15 Relying upon Sutton's testimony that there were no foreign substances on the sidewalk where the claimant fell when he examined the area 10 minutes after the fall and finding that the claimant's testimony as to the cause of her fall was inconsistent, the arbitrator held that the claimant failed to prove that her fall was caused by any risk associated with her employment and denied her benefits under the Act. The Commission adopted the arbitrator's decision. The claimant argues that the Commission erred in its original decision by not drawing an inference adverse to Herff by reason of its failure to produce the single hard copy of the photograph that was taken on the day of the her fall; a photo in the possession of Sutton. However, the claimant never raised the issue before the arbitrator. Following Sutton's testimony, the claimant never requested that the arbitrator draw an adverse inference by reason of Herff's failure to produce the photograph. The claimant did raise the issue in her Statement of Exceptions filed with the Commission, but by failing raise the issue before the arbitrator, she forfeited the issue. *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 336 (1980) (issues not raised before the arbitrator are waived).

¶ 16 The issue before this court is whether, based upon the evidence adduced at the arbitration hearing, the Commission's determination in its original decision that the claimant failed to prove that her fall was caused by a risk associated with her employment is against the manifest weight

of the evidence. Although we review the Commission's decision and not the reasoning of the circuit court (*Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 543-44 (2010)), we comment briefly upon the circuit court's reasoning in support of its order reversing the Commission's original decision.

¶ 17 The circuit court was correct in stating that the cause of the claimant's fall was a disputed question of fact. But that did not justify the circuit court considering the issue "as a question of law." It is the Commission that resolves disputed issues of fact (*O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980)), not courts on review of its decisions. The Commission's resolution of a factual issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). Compounding the error was the circuit court's conclusion that, simply because the claimant was on a scheduled work break and on Herff's premises when she fell, her injury arose out of her employment and "automatic liability applies." The circuit court seems to have adopted positional risk whenever an employee is on the employer's premises and engaging in activities of personal comfort. The positional risk doctrine has been rejected in this State as being inconsistent with the requirements of the Act, and specifically the requirement that to be compensable an employee's injury must arise out of her employment. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 552 (1991). Although we reject the reasoning employed by the circuit court, our review focuses upon the Commission's decision.

¶ 18 A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of the employment. 820 ILCS 305/2 (West 2010). Both elements must be present in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). "In the course of the employment" refers to the

time, place, and circumstances under which the claimant was injured. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366 (1977). In this case, the claimant fell on Herff's premises, during her working hours, and at a place where she might reasonably have been while on an authorized work break. Clearly, the claimant was injured in the course of her employment as the Commission found. See *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). The issue is whether the Commission's finding in its original decision that the claimant's injury did not arise out of her employment was against the manifest weight of the evidence.

¶ 19 Arising out of the employment pertains to the origin or cause of a claimant's injury. *Id*. 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 that a causal connection exists between the employment and the injury for which recovery is sought. *Id.*; see also *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). In order to determine whether a claimant's injury arose out of her employment, we first categorize the risk to which she was exposed. In such an analysis, risks are categorized into three groups: (1) those which are distinctly associated with employment; (2) those which are personal to the employee, such as idiopathic falls; and (3) neutral risks that have no particular employment or personal characteristics. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 352 (2000) (Rakowski, J., specially concurring).

¶ 20 In this case, there is no evidence that the claimant suffered from a physical condition that caused her to fall and, therefore, her risk of falling on the sidewalk as she exited Herff's building was not a personal risk. An injury resulting from a neutral risk, that is, one to which the general public is equally exposed, does not arise out of the employment. *Caterpillar Tractor Co.*, 129 Ill. 2d at 59. By itself, the act of merely walking across a sidewalk does not establish a risk greater than that faced by the general public. *Illinois Consolidated Telephone Co.*, 314 Ill. App.

3d at 353 (Rakowski, J., specially concurring). As a consequence, for the injuries suffered by the claimant in this case to have arisen out of her employment, her fall must have been the result of a risk associated with her employment. See *Builders Square, Inc. v. Industrial Comm'n*, 339 Ill. App. 3d 1006, 1010 (2003).

¶ 21 Employment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed such as the risk of tripping on a defect on the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling. See *Illinois Consolidated Telephone Co.*, 314 Ill. App. 3d at 352 (Rakowski, J., specially concurring); *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App. 3d 1103, 1107 (1994). As the arbitrator noted in his decision, which the Commission adopted in its original decision, there was no evidence that the claimant was on any company business or carrying any objects in furtherance of Herff's business at the time of her fall. Consequently, in order for the claimant's fall to be the result of an employment risk it must have been caused by some condition on Herff's property.

¶ 22 The claimant admitted that she saw no defects in the sidewalk where she fell. Rather, she based her right to benefits under the Act on the theory that she fell after stepping on a rock located on the sidewalk as she exited Herff's building. However, by adopting the arbitrator's decision, the Commission found that the claimant's testimony as to the cause of her fall was inconsistent; a conclusion which is supported by the record. The claimant testified that it was her "impression" that she stepped on a rock, but she was "open to other ideas." First she admitted that she told Sutton that she did not know what happened, and in the same answer, stated that she told him that she felt that she stepped on a rock or mentioned the probability of being too close to the edge of the sidewalk. And, when asked whether she saw the rock that she

stepped on, the claimant stated: "I don't recall." In the statement, which she gave on April 18, 2011, the claimant stated that she did not know whether she stepped on a rock and did not "really know what happened."

¶ 23 Henry testified that she saw the claimant fall, but admitted that she did not see what caused the claimant to fall. Sutton testified that when he inspected the area where the claimant fell about 10 minutes after he spoke to her, he saw no foreign substances on the sidewalk. The Commission found Sutton's testimony to be "most persuasive."

¶ 24 Whether a causal relationship exists between the claimant's employment and her injury is a question of fact to be resolved by the Commission. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). In resolving the issue, it was the function of the Commission to judge the credibility of the witnesses, determine the weight to be accorded to their testimony, and resolve conflicts in 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. *Vogel*, 354 Ill. App. 3d at 786. 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 supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 25 It was the function of the Commission to determine the credibility of the claimant's assertions that she stepped on a rock which caused her to fall and fracture her wrist. The Commission resolved the issue against the claimant and, in its original decision, found that she failed to prove that her fall was caused by any risk associated with her employment. Based on the record before us, we are unable to conclude that the Commission's original decision is against

the manifest weight of the evidence, and it is for this reason that we reverse the order of the circuit court of Douglas County which reversed the Commission's original decision denying the claimant benefits under the Act. Our resolution of this issue makes it unnecessary for us to address Herff's additional argument that the Commission erred when, on remand, it awarded the claimant medical expenses related to her torn ligament.

¶ 26 Based upon the foregoing analysis, we: reverse the August 30, 2013, order of the circuit court of Douglas County which reversed the Commission's original decision of August 1, 2012; vacate the April 12, 2016, order of the circuit court of Coles County which confirmed the Commission's June 17, 2015, decision on remand; vacate the Commission's June 17, 2015, decision; and reinstate the Commission's original decision of August 1, 2012.

¶ 27 Judgment of the circuit court of Douglas County reversed; judgment of the circuit court of Coles County vacated; Commission decision of June 17, 2015, vacated; and Commission decision of August 1, 2012, reinstated.