FILED
May 7, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 180525WC-U

No. 4-18-0525WC

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

GARY JONES, Plaintiff-Appellant, v. BRIAN MOREMAN d/b/a MOREMAN'S HOME IMPROVEMENT, ILLINOIS WORKERS' COMPENSATION COMMISSION and INJURED WORKERS' BENEFIT FUND, Defendants-Appellees.	)	Appeal from the Circuit Court of Vermilion County. No. 17-MR-370 Honorable Karen Wall, Judge, Presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court's order confirming the Commission's decision that the claimant's injuries did not arise out of and in the course of employment, and the claimant was not a traveling employee at the time of the accident.

¶ 2 The claimant, Gary Jones, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)) against his employer, Brian Moreman (Brian), the sole owner and operator of Moreman's Home Improvement (Moreman's Improvement), seeking workers' compensation benefits for injuries to his neck and low back following a car accident on September 30, 2011. On appeal, the claimant argues that the Illinois Workers' Compensation Commission (Commission) erred in finding that (1) his neck and low back injuries did not arise out of and in the course of his employment, and (2) he was not a traveling employee at the time of the accident. For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 On August 20, 2015, the claimant filed an application for adjustment of claim pursuant to the Act (820 ILCS 305/1 *et seq.* (West 2012)) against his employer, Brian, the sole owner and operator of Moreman's Improvement, seeking workers' compensation benefits for injuries to his neck and low back following a car accident on September 30, 2011. In response, Brian filed a written letter asserting that the claimant did not suffer a work-related injury. In particular, Brian argued that, at the time of the accident, the company van was being utilized for personal reasons, and the claimant was not performing duties or services for Moreman's Improvement. Subsequently, the claimant amended his application to include an additional respondent, the Illinois State Treasurer, as *ex officio* custodian of the Injured Workers' Benefit Fund (Treasurer), because Moreman's Improvement did not have workers' compensation insurance.

¶ 5 The following evidence was adduced at the arbitration hearing on August 20, 2015. The claimant testified to the following. On Friday, September 30, 2011, the claimant worked for Moreman's Improvement removing and replacing a roof on a residence in Danville, Illinois. Because the claimant did not have a valid driver's license, his "girlfriend dropped [him] off at the gas station every morning on Georgetown Road and *** Brian showed up and we went in the van." After work, Brian drove the claimant to the gas station.

¶ 6 On the morning of September 30, 2011, Brian drove the claimant to the job site in the company van. After work, the claimant rode in the van with Brian and two other employees, Todd, the driver, and Derek, when a car accident took place. The claimant was seated on a tool box directly behind the driver's seat, and was not wearing a seat belt. Following the accident, the claimant informed Brian that he was experiencing neck and low back pain. Although the claimant presented to the hospital complaining of such pain, he returned to work on Monday, October 3, 2011. After October 3, 2011, however, the claimant did not work due to pain, stiffness and cramping in his neck and low back. The claimant never received medical attention for his neck or low back before the accident.

¶ 7 On cross examination, the claimant did not recall drinking beer after work on September 30, 2011, before the van left the job site. He denied that he asked Brian for a ride to the gas station on the date of the accident. Instead, the claimant testified that, at all times, Brian drove him to and from the gas station on workdays. Roughly 10 to 15 minutes after the accident, the claimant experienced neck and low back pain, even though he refused medical treatment by ambulance personnel. The claimant indicated that "[m]y

neck was hurting, but I didn't think it was that bad to go in the ambulance, but I did go to the hospital afterwards." Roughly one hour after the car accident, the claimant rode in the company van to Brian's home.

¶ 8 Next, Brian testified to the following. Brian was the sole owner of Moreman's Improvement located at 105 Maple Street, Danville, Illinois. On September 30, 2011, Brian employed a four-person crew roofing a residential home on the date of the accident. The claimant arrived at the job site with another employee, John Gerling, at approximately 7:20 a.m., roughly 20 minutes after Brian. At 3:30 p.m., while Brian and Todd loaded the company van with equipment, the claimant, Derek and the homeowner drank beer in the garage. Prior to the van departing, the claimant asked Brian and Todd if "he could catch a ride with us. He said his girlfriend's car was overheating and wouldn't make it across town and asked if we would drop him at the gas station." Brian indicated that he "occasionally" drove the claimant to and from work.

¶ 9 While driving to the gas station, Todd, an employee of Moreman's Improvement, was entering a ramp on Interstate 74 when a Jeep swerved out to pass the van. After passing the van, the Jeep "went out in front of two trucks that had no where [sic] to go and they pushed him back towards us." Following the accident, the claimant indicated that he was not injured, and refused medical treatment by ambulance personnel roughly 10 minutes later. Approximately one hour later, the claimant attempted, by himself, to straighten out the fender on the trailer with a piece of wood. Specifically, the claimant shoved a 2x6 board, weighing 16 to 38 pounds, "in between the fender and the wheel and

lifted up on it and pried" for approximately 15 minutes. At no point did the claimant complain of pain or injury.

¶ 10 After the police investigation ended, the claimant rode in the van to Brian's home. While the claimant waited for his girlfriend to pick him up, he helped Brian unbend the tongue of the trailer for nearly 30 minutes. The claimant did not complain of injuries or pain at that time. Despite this, the claimant presented to the emergency room that evening where he received pain medication. The claimant returned to work on Monday, October 3, 2011, and worked a full day "carr[ying] bundles of shingles and shingled most of the day, and then at the end of the day he helped [Brian] set *** 6 by 6 spindle posts on a porch." The claimant never returned to work after October 3, 2011, because it was "the last project of the season for us, so I didn't really have any more roofing after that."

¶ 11 On October 15, 2015, the arbitrator denied the claimant compensation because the claimant did not sustain an accidental injury on September 30, 2011, arising out of and in the course of his employment with Moreman's Improvement. Additionally, the arbitrator determined that the claimant was not a traveling employee. The claimant filed a timely petition for review with the Commission.

¶ 12 On September 27, 2017, the Commission, with one member specially concurring, affirmed and adopted the arbitrator's decision. The Commission determined that the claimant did not sustain an accidental injury arising out of and in the course of his employment because, at the time of the accident, the claimant had completed his workday and was not performing any work tasks for Moreman's Improvement. Moreover, the Commission determined that the claimant was not a traveling employee because he was

not required to travel away from his employer's premises. The Commission concluded that Brian had agreed to provide transportation to the claimant, as a favor, only after the claimant asked him at the end of the workday.

¶ 13 The specially concurring member agreed with the majority's decision to affirm the arbitrator's denial of benefits because the claimant had failed to prove a causal relationship between the accident and his current condition of ill-being. The special concurrence, however, found the claimant was a traveling employee and that the car accident was a reasonable and foreseeable occurrence. As such, the claimant sustained an accidental injury that arose out of and in the course of his employment on September 30, 2011.

¶ 14 The claimant sought judicial review of the Commission's decision in the Circuit Court of Vermilion County. On June 7, 2018, the circuit court confirmed the Commission's decision. The claimant filed a timely notice of appeal on June 29, 2018.

¶ 15 II. Analysis

¶ 16 On appeal, the claimant argues that the Commission erred in finding that (1) his neck and low back injuries did not arise out of and in the course of his employment, and (2) he was not a traveling employee at the time of the accident. In response, Moreman's Improvement and the Treasurer assert that the Commission's decision was not against the manifest weight of the evidence. We agree with Moreman's Improvement and the Treasurer.

¶ 17 An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203

(2003). A claimant has the burden of proving all elements of the claim by a preponderance of the evidence (*O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980)), including a causal relationship between the work accident and condition of ill-being. *Sisbro*, 207 Ill. 2d at 203. The Commission is the ultimate decision maker and is not bound by any decision made by the arbitrator. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 63 (2006) (citing *Cushing v. Industrial Comm'n*, 50 Ill. 2d 179, 181-82 (1971)). The Commission must weigh the evidence that was presented at the arbitration hearing and determine where the preponderance of that evidence lies. *Durand*, 224 Ill. 2d at 64. In resolving factual matters, it is the function of the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). Reviewing courts will not reverse the Commission's decision unless it is contrary to the law or its fact determinations are against the manifest weight of the evidence. *Durand*, 224 Ill. 2d at 64.

¶ 18 An injury "arises out of" employment if it had its "origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 203. "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he or she was instructed to perform by the employer, acts which he or she had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his or her assigned duties." *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, ¶ 18.

¶ 19 An injury "in the course of employment" refers to the time, place and circumstances under which the claimant is injured. *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 66 Ill. 2d 361, 366-67 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro Inc.*, 207 Ill. 2d at 203 (citing 1 A. Larson, Worker's Compensation Law § 12.01 (2002)). Injuries sustained on an employer's premises, or at a place where a claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of employment. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 57, 62 (1989).

¶ 20 " 'The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable.' " *Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n,* 2013 IL 115728, ¶ 16 (quoting *Commonwealth Edison Co. v. Industrial Comm'n,* 86 Ill. 2d 534, 537 (1981)). Courts have explained this rule, stating that " 'the employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest.' " *Sjostrom v. Sproule*, 33 Ill. 2d 40, 43 (1965). An exception exists, however, "when the employer provides a means of transportation to or from work or affirmatively supplies an employee with something in connection with going to or coming from work." *Xiao Ling Peng v. Nardi*, 2017 IL App (1st) 170155, ¶ 10 (citing

Hall v. DeFalco, 178 Ill. App. 3d 408, 413 (1988) (citing *Hindle v. Dillbeck,* 68 Ill. 2d 309, 320 (1977) and *Sjostrom,* 33 Ill. 2d at 40).

¶ 21 Prior to addressing the merits of this appeal, we must first determine the appropriate standard of review. The claimant argues that the issues presented in this appeal present undisputed facts that are susceptible to but a single inference, thus, review involves only the application of law to the undisputed facts. As such, the claimant asserts that the appropriate standard of review is *de novo.* If facts are truly undisputed and subject to but a single inference, the *de novo* standard of review applies. *Johnson v. Illinois Workers' Compensation Comm'n,* 2011 IL App (2d) 100418WC, ¶ 17 (citing *Uphold v. Illinois Workers' Compensation Comm'n,* 385 Ill. App 3d 567, 571-72 (2008)).

¶ 22 Contrary to the claimant's argument, the facts of the case are in dispute, that is, how the claimant got to work and whether the claimant sustained injuries on September 30, 2011, that arose out of and in the course of his employment. First, the claimant denied that he asked Brian for a ride to the gas station after work on September 30, 2011. Instead, the claimant testified that the driving arrangement was essentially understood, given that, at all times, Brian picked him up and dropped him off at the gas station before and after work. In contrast, Brian testified that he occasionally drove the claimant, and that he only drove the claimant after work on September 30, 2011, because the claimant's girlfriend was unable to pick him up. Second, the claimant testified that Brian drove him to the job site on the date of the accident. In direct contrast, Brian testified that the claimant arrived with John 20 minutes after him. Thus, the facts were not undisputed, as the claimant asserts.

¶ 23 Moreover, with respect to the narrow issue of whether the claimant was a traveling employee, we do not agree that the *de novo* standard of review is appropriate. Here, the claimant disputes the accuracy of the Commission's factual findings, asserting that his "travel to and from the multiple job sites was an essential element of Plaintiff's job," even though he was in the construction and remodeling business. The manifest-weight standard is therefore the appropriate standard to apply here. *Durand*, 224 Ill. 2d at 64.

¶ 24 First, the claimant argues that the Commission erred in determining that his injuries did not arise out of and in the course of his employment with Moreman's Improvement. For support, the claimant cites to *Xiao Ling Peng*, 2017 IL App (1st) 170155, which relied on *Hindle*, 68 Ill. 2d at 309, asserting that, because Brian "performed an affirmative act in providing its employees with a means of transportation to and from work," Moreman's Improvement is liable and the claimant's injuries, as a result of the car accident, arose out of and in the course of his employment. We disagree.

¶ 25 In *Xiao Ling Peng*, 2017 IL App (1st) 170155, ¶ 3, Peng was injured in a multi-vehicle accident while riding to work in a 15-seat passenger van. The van was driven by a co-employee and owned by the employer. *Id.* ¶ 3. Although Peng was not compensated for her commute time or mandated to use the company owned van, the court determined that she had "relinquished control over her conditions of transportation when she climbed into a vehicle owned by her employer and driven by her coemployee under the employer's direction." *Id.* ¶ 25 (citing *Johnson v. Farmer*, 537 N.W.2d 770, 772 (1995)). More specifically, the court considered the van to be an extension of her work site or a " 'a small ambulatory portion of the [employer's] premises.' " *Id.* ¶ 25. The court

determined that the employer exposed itself to liability for its employees' injuries during the commute because the employer controlled the conditions and the risks of transportation. *Id.* ¶ 26 (citing *Hall,* 178 Ill. App. 3d at 413).

¶ 26 Moreover, the court in *Xiao Ling Peng* determined that, in order to receive compensation through the workers' compensation system, it made no difference whether an employee was not physically present at a job site, not performing any job-related tasks and not being compensated for his or her time. *Id.* ¶ 27. Rather, the "dispositive facts for purposes of compensation are that the vehicle was an employer-controlled conveyance for employee travel." *Id*. Thus, the employer was liable for Peng's injuries because the employer provided the van and driver, and thus, had control over the conditions of Peng's commute. *Id.*

¶ 27 Similar to *Xiao Ling Peng*, *Hindle* also involved an accident that occurred in an employer-controlled vehicle that transported employees to and/or from the job site. 68 Ill. 2d at 309. Specifically, in *Hindle*, the employer required the crew leader to supervise and transport team members from the cornfields to the nearest town. *Id*. at 309.

¶ 28 We find *Xiao Ling Peng* and *Hindle* distinguishable to the present case. The key distinguishing fact, here, as compared to the cases cited by the claimant, is that Moreman's Improvement's van was not a conveyance for employee travel that was provided by the employer and driven by a co-employee tasked with such responsibility. See *Xiao Ling Peng*, 2017 IL App (1st) 170155, ¶ 26; *Hindle*, 68 Ill. 2d at 309; see also *Hall,* 178 Ill. App. 3d at 410, 413-14 (1988) (Although a McDonald's manager was not driving a company vehicle, one of the manager's regular work duties involved

transporting employees to the local train station after their shift had ended. Thus, the manager's actions were in furtherance of McDonald's interests.).

¶ 29 Here, Brian's testimony revealed that the claimant arrived at the job site at 7:20 a.m. on September 30, 2011, with another employee. Next, after the workday had ended, the claimant asked Brian for a ride to the gas station because "his girlfriend's car was overheating and wouldn't make it across town ***." As such, Brian's testimony tended to diminish the claimant's testimony that Brian drove the claimant to and from work every day, which the Commission relied on in ruling in favor of Moreman's Improvement. Specifically, the Commission determined that Brian's testimony was more credible where it concluded that it was "at Petitioner's request that Respondent provided transportation to/from the worksite," and not an occurrence that occurred virtually every day.

¶ 30 As stated earlier, it is the function of the Commission to assess the credibility of witnesses, and we will not reverse unless the Commission's findings are against the manifest weight of the evidence. See *Hosteny,* 397 Ill. App. 3d at 674. Upon review of the evidence, we cannot say that the Commission's finding was against the manifest weight of the evidence.

¶ 31 We next address whether the claimant was a traveling employee. The claimant asserts that the Commission erred in finding that he was not a traveling employee at the time of the accident because he did not "work at a fixed job site" but was required to "travel to and from *** multiple job sites ***" to perform his job duties. Specifically, to support his claim, the claimant cites to *Cox v. Illinois Workers' Compensation Comm'n,* 406 Ill. App. 3d 541, 545 (2010); *Kertis v. Illinois Workers' Compensation Comm'n,*

2013 IL App (2d) 120252WC; and *Mlynarczyk v. Illinois Workers' Compensation Comm'n,* 2013 IL App (3d) 120411WC. As such, the claimant contends that travel was an essential element of his employment. We disagree.

¶ 32 A traveling employee is one who is required to travel away from his employer's premises to perform his job. *Cox,* 406 Ill. App. 3d at 545. As a general rule, a traveling employee is held to be in the course of his employment from the time he leaves home until he returns. *Id.* at 545 (citing *Urban v. Industrial Comm'n,* 34 Ill. 2d 159, 162-63 (1966)). In order to qualify as a traveling employee, "the work-related travel at issue must be more than a regular commute from the employee's home to the employer's premises." *Pryor v. Illinois Workers' Compensation Comm'n,* 2015 IL App (2d) 130874WC, ¶ 22. Otherwise, the exception for traveling employees would swallow the rule barring recovery for injuries incurred while traveling to and from work, and every employee who commuted from his home to a fixed workplace would be deemed a traveling employee. *Pryor,* 2015 IL App (2d) 130874WC ¶ 22.

¶ 33 Employees whose duties require them to travel away from their employer's premises are treated differently from other employees when considering whether an injury arose out of and in the course of employment. *Venture—Newberg-Perini, Stone & Webster*, 2013 IL 115728, ¶ 17; *Cox,* 406 Ill. App. 3d at 545. An injury sustained by a traveling employee arises out of and in the course of employment if claimant was injured while engaging in conduct that was reasonable and foreseeable, *i.e.*, conduct that " 'might normally be anticipated or foreseen by the employer.' " *Pryor,* 2015 IL App (2d)

130874WC, ¶ 20 (quoting *Robinson v. Industrial Comm'n,* 96 Ill. 2d 87, 92 (1983); *Kertis,* 2013 IL App (2d) 120252WC, ¶ 16; see also *Cox,* 406 Ill. App. 3d at 545-46).

¶ 34 In *Cox,* 406 Ill. App. 3d at 542, the Commission denied claimant, an excavating and sewer contractor, benefits. While driving a company vehicle he drove to and from work and had in his possession 24 hours a day, claimant stopped at a bank to make a personal withdrawal on his regular route home from work. *Id.* at 542-43. After he completed the errand, claimant was involved in a car accident. *Id.* at 543. The court determined that the facts of the case "establish without question" that claimant was a traveling employee. *Id.* at 546. Thus, the court's analysis focused on claimant's decision to venture to the bank, determining that his "deviation from the least circuitous route to his home in order to go to the bank for personal reasons appears to be insubstantial." *Id.* at 547. As such, the claimant was a traveling employee within his scope of employment at the time of the accident. *Id.*

¶ 35 In *Kertis,* 2013 IL App (2d) 120252WC, ¶ 5, the undisputed facts indicated that the branch manager's regular job duties required him to travel between two branch locations. In fact, the branch manager traveled back and forth between the two branch offices several times per day, and there were "rarely (if ever) any days that he was not required to travel between the two locations." *Id.* ¶ 18. Although claimant was not provided a company car or a designated parking spot when he traveled, travel was an essential component of his job. *Id.*

¶ 36 Lastly, in *Mlynarczyk,* 2013 IL App (3d) 120411WC, ¶ 5, the employer operated a cleaning service business. The court determined claimant was a traveling employee

because her job duties required her to travel to various locations, such as churches, homes and offices, throughout the Chicagoland area in any given workday to complete her work. *Id.* ¶ 16.

¶ 37 Here, the claimant did not work at a fixed job site but performed his job duties as a roofer at locations contracted with and specified by Moreman's Improvement. Despite this, we cannot conclude, based on the facts, that the claimant's travel was more than a regular commute from the employee's home to the employer's premises. Based on the record, it is unclear whether the claimant was commuting to multiple locations every workday, each week or during the workday, which, based on the cases cited by the claimant, is a distinguishing fact. The only thing that is clear from the record is that the claimant never worked at Moreman's Improvement's business address, which is implied by the nature of his work.

¶ 38 In particular, unlike the claimant in *Mlynarczyk*, here, there was no evidence that the claimant left a job site to perform subsequent work-related travel to perform his required job duties. Moreover, the claimant was not injured during a trip to a distant work location to perform further work-related job duties, as seen in *Kertis,* where travel to and from the branch locations during the workday was required of the branch manager to perform his work-related functions. Furthermore, the claimant was not injured in a vehicle assigned to him by Moreman's Improvement during a trip from a remote job site to his home, as seen in *Cox*, where the claimant was injured while operating a company vehicle on his regular route home from a distant job site. As such, unlike the facts in the present case, there was a requirement, in all three cases cited by the claimant, to travel

from one job site to the next job site in order to fulfill each claimant's job duties. Accordingly, we cannot conclude that the Commission's decision was against the manifest weight of the evidence in finding that the claimant was not a traveling employee.

¶ 39 III. Conclusion

¶ 40 For the foregoing reasons, we affirm the circuit court's judgment confirming the Commission's decision.

¶ 41 Affirmed.