*2007 Ill. Wrk. Comp. LEXIS 1713, *; 7 IWCC 1483*

CLINTON D. DWYER, PETITIONER, v. **CIRCUIT CITY,** RESPONDENT,

NO. 05WC 12173

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCHENRY

2007 Ill. Wrk. Comp. LEXIS 1713; 7 IWCC 1483

November 14, 2007

CORE TERMS: machine, comfort, arbitrator, vending machine, temporary total disability, hang, hip, co-employee, shook, accrue, outrageous, customers, femoral, jostle, neck, drop, loss of use, right leg, notice, Workmen's Compensation Act, conclusion of law, matter of law, lunch break, convenience, incidental, discharged, purchasing, acquiesced, assisting, surgery

JUDGES: James F. DeMnno; David L. Gore

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident (arising out of/in the course of), medical (reasonableness of the charges), and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 28, 2006 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 74,200.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefore and deposited with the Office of the Secretary **[*2]** of the Commission.

DATED: NOV 14 2007

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable George Andros, arbitrator of the Industrial Commission, in the city of Woodstock, on 6/8/2006. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues underlined and in bold below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for Temporary Total Disability?
L. What is the nature and extent of the injury?
M Should penalties or fees be imposed upon the respondent?

FINDINGS

. On 3/6/2005, the respondent **Circuit City** was operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship did exist between the petitioner and respondent.

. On **[*3]** this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned $ 13,696.36; the average weekly wage was $ 273.93

. At the time of injury, the petitioner was 21 years of age, single with -0- children under 18.

. Necessary medical services have not been provided by the respondent.

. To date, $ -o- has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ 182. 62/week for 12 4/7 weeks, from 3/6/2005 through 6/1/2005, which is the period of temporary total disability which compensation is payable.

. The respondent shall pay the petitioner the sum of $ 164.36/week for a further period of 70 weeks, as provided in Section 8(e)12 of the Act, because the injuries sustained caused 35% loss of use of the right leg.

. The respondent shall pay the petitioner compensation that has accrued from 3/6/2005 through 6/8/2006, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay to the Petitioner **[*4]** the further sum of $ 60,306.83 for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ 0 in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ 0 in penalties, as provided in Section 19(1) of the Act.

. The respondent shall pay $ 0 in attorneys' fees, as provided in Section 16 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4.81% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

01 Arbitrator George J. Andros

Sept 22nd, 06

Date

FINDING OF FACTS AND CONCLUSIONS OF LAW:

On March 6, 2005 the Petitioner had been working in the installation bay. His co-worker, Jessica Hubner, was using the vending machine next to the break room. She placed her money in the machine. The product **[*5]** she was purchasing did not drop. She shook the machine but the product did not drop. She then went to the Petitioner for help. The Petitioner shook the machine to no avail. He then jarred the machine from the side. The product did not drop. He then moved back and then moved forward putting his right shoulder into the front of the machine. His right hip followed. The product dropped and was eventually retired. In the aftermath of this endeavor, on behalf to the co-employee, the Petitioner was taken directly to Northern Illinois Medical Center's emergency room. There the history was that he "body checked" a vending machine and felt his right hip pop. (Px 4 pg. 14). X-rays revealed a right femoral neck fracture (Px.4 pg.24). He was then transferred to Dr. Virkus at Rush Presbyterian St. Lukes Hospital (Rush) (Px. 4 pg. 14). He was admitted to Rush. The history of injury was "he was trying to bang some snack out of a machine with his shoulder, and struck his hip on the machine" Px. 1 pg.39). On March 7, 2005, he had surgery to the right hip which included open reduction, internal fixation of the right femoral neck, curettage and bone grafting right femoral neck cyst. The surgery was performed **[*6]** by Dr. Virkus with the assistance of Dr. Goldberg and Wysocki (Px.1 pg. 42-44). He was discharged on March 9, 2005. On April 20, 2005 he was released for sedentary duty (Px. 1 pg.4) but the respondent did not have work within his restrictions. On May 27, 2005, the Petitioner saw Dr. Virkus and advised the doctor that he thought he could do his job. Dr. Virkus released him to return to work. The parties have stipulated that the Petitioner's period of temporary total disability was 3/6/05 through 6/1/05. The Arbitrator will not turn aside this stipulation because to do otherwise-would be to place the Petitioner at a disadvantage as he was not required to address the issue at the time of trial. The respondent's only dispute as to temporary total disability is liability in that his injury did not "arise out of and "in the course of the employment. The Petitioner was discharged without restrictions. His subjective complaints include but are not limited to pain if he attempts to run, discomfort, on occasion while sleeping and pain with certain movements of the right hip.

Jennifer Ritter testified that she was the store director for the Respondent. She was aware that two customers had product **[*7]** hang up in the vending machine. She gave those customers their money back. She was aware that the Respondent's employees used the vending machine for their personal comfort and convenience. They would purchase product and then go into the adjacent break room for their break. Ms. Ritter testified that the Petitioner allegedly violated company policy when he shook the machine but on cross examination admitted that he Petitioner did not receive a verbal warning, written warning or any reprimand. There was no evidence that the Petitioner was even made aware of the allegation that he violated a company policy or rule.

The true issue is whether the "personal comfort doctrine" applies to the facts of this case. The "personal comfort doctrine" was outlined and defined in Eagle Discount Supermarket v Industrial Commission 82 Ill.2d 331, 412 N.E.2d 492, 45 Ill.Dec. 141:

> "where the employee sustains an injury during the lunch break and is still on the employer's premises, the act of procuring lunch has been held to be reasonably incidental to the employment. (Mt. Olive & Staunton Coal Co. v. Industrial Com. (1934), 355 Ill. 222., **[*8]** Humphrey v. Industrial Com. (1918), 285 Ill. 372, 120 N.E. 816.) (See I. Greenfield, Injuries Arising Out of and in the Course of the Employment, 1957 U.Ill.L.F. 191, 206-08.) This rule remains true even where the injury was not actually caused by a hazard of the employment. (See F. Wiedner, The Workmen's Compensation Act, 1967 U.Ill.L.F. 21, 36-37.) The rule is also unchanged by the fact that the employee receives no pay for the lunch break and is not under the employer's control, being free to leave the premises. (1A A. Larson, Workmen's

Compensation sec. **497 ***146 21.21(a), at 5-5 (1979); F. Wiedner, The Workmen's Compensation Act, 1967 U.Ill.L.F. 21, 36-37.) See generally Comment, Workmen's Compensation: The Personal Comfort Doctrine, 1960 Wis.L.Rev. 91, 91-98; Note, Workmen's Compensation: Personal Comfort in Practical Perspective, 1917 Law and Soc.Ord. 823, 829-30.

[81][9][10] Since eating is deemed to be an act of personal comfort, the personal comfort doctrine has been applied to cases involving lunchtime injuries. **[*9]** Under the personal comfort doctrine, the course of employment is not considered broken by certain acts relating to the personal comfort of the employee. (See generally, IA A. Larson, Workmen's Compensation secs. 21.00 to 21.84, at 5-4 *340 through 5-70 (1979).) Other acts during a break time in the employment besides the act of eating have also been held to be acts of personal comfort. (See, e.g., Sparks Milling Co. v. Industrial Com. (1920), 293 Ill. 350, 127 N.E. 737 (getting fresh air); Union Starch v. Industrial Com. (1974), 56 Ill.2d 272, 307 N.E.2d 118 (seeking relief from heat); Scheffler Greenhouses, Inc. v. Industrial Com. (1977), 66 Ill.2d 361, 5 Ill.Dec. 854, 362 N.E.2d 325 (seeking relief from heat and humidity); Chicago Extruded Metals v. Industrial Com. (1979), 77 Ill.2d 81, 32 Ill.Dec. 339, 395 N.E.2d 569 (showering in locker room provided by employer).) However, if the employee voluntarily and in an unexpected manner exposes himself to a risk outside **[*10]** any reasonable exercise of his duties, the resultant injury will not be deemed to have occurred within the course of the employment. (Segler v. Industrial Com. (1979), 81 Ill.2d 125, 128, 40 Ill.Dec. 536, 406 N.E.2d 542.

The employer may, nevertheless, still be held liable for injuries resulting from an unreasonable and unnecessary risk if the employer has knowledge of or has acquiesced in the practice or custom. Union Starch v. Industrial Com. (1974), 56 Ill.2d 272, 277, 307 N.E.2d 118

See also Illinois Consolidated Telephone Company v Industrial Commission 314 Ill.App.3d 347, 732 N.E.2d 49, 247 Ill.Dec. 333 which states that:

"According to the personal-comfort doctrine, an employee, while engaged in the work of his or her employer, may do those things that are necessary to his or her health and comfort, even though personal to himself or herself, and such acts will be considered incidental to the employment. See *Hunter Packing Co. v. Industrial Comm'n*, 1 Ill.2d 99, 104, 115 N.E.2d 236, 239 (1953); **[*11]** see also *Union Starch*, 56 Ill.2d at 277, 307 N.E.2d at 121"

In the case before this Arbitrator, the facts do not squarely fit within the "personal comfort doctrine" because the Petitioner was not seeking refreshment for his own personal comfort but that of a co-employee. Further, the Petitioner was not on break. There was no testimony that employees were prohibited from assisting co-employees in helping them for their own personal comfort. Also, while Ms. Ritter testified that the Petitioner violated an unstated policy in that he was not to jostle product out of the vending machine, she was aware that there was a problem with the vending machine in that she admitted that customers had product hang up in the machine. No formal work rule violation was underscored by the witness.

When making findings of fact, common sense and life experience are part of the decision making process. It is not unusual or outrageous that an individual, while looking at a product teetering or the edge of a spindle, would not shake or jostle the machine in order to procure what they set out to buy. In this case at bar, it was proved that the co-employee, **[*12]** Jessica Hubner, shook the vending machine prior to asking the Petitioner for help. It was proved that the Respondent had notice that there was a problem with the vending machine in that other people had their product hang up in the machine. It was proved that the machine was there for the personal comfort and convenience of the employees of this Respondent. It is the finding of the Arbitrator that the action of the Petitioner was not so outrageous or unusual in that people, who encounter vending machines that hang up the desired product, jostle the machine to get the product.

The Arbitrator adopts the above findings of material facts in support of his conclusion of law as follows: Based upon long standing Illinois Appellate Court case law the Arbitrator concludes as a matter of law and fact that the Petitioner's injuries of March 6, 2005 "arose out of and "in the course of" his employment.

Having found that the injuries "arose out of and "in the course of the Petitioner's employment, the Arbitrator finds that the Petitioner shall to receive from the Respondent temporary total disability benefits of $ 182.62/week for 12 4/7 weeks, from 3/6/2005 through 6/1/2005, which is the period **[*13]** of temporary total disability which compensation is payable. Further the Respondent disputed medical expenses based upon the argument that he injury did not "arise out of and "in the course of the Petitioner's employment with the Respondent. Having found that the Petitioner's injuries "arose out of and "in the course of' the Petitioner's employment, the Arbitrator orders the Respondent shall pay to the Petitioner the further sum of $ 60,306.83 for necessary medical services, as provided in Section 8(a) of the Act.

The Arbitrator adopts the testimony of the Petitioner and the objective findings contained in Petitioner's exhibits 1 through 5 in support of his conclusion of law as follows: the Arbitrator finds that the Petitioner sustained 35% loss of use of the right leg under section 8 of the Act. The respondent shall pay the petitioner the sum of $ 164.36/week for a further period of 70 weeks, as provided in Section 8(e)12 of the Act, because the injuries sustained caused 35% loss of use of the right leg.

Respondent offered testimony that the Respondent was aware that the product in the vending machine was for the personal comfort of the Respondent's employees, that the Respondent **[*14]** was aware and had knowledge that product would hang up in the vending machine and that the Respondent acquiesced in the jostling of the machine in that the Petitioner never even received a verbal warning that what he did was outrageous or against company policy. Given the facts in this case including the general area of dispute involving what is and what is not under the personal comfort doctrine, the Respondent's placement in issue of "arising out of" and "in the course of" the Petitioner's employment is neither unreasonable nor did the respondent raise a vexatious or frivolous defense. Section 19 penalties are denied as a matter of material fact and as a matter of law in this specific set of facts in the case at bar.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change **[*15]** or a decrease in this award, interest shall not accrue.

DISSENTBY: MARIO BASURTO

DISSENT: I respectfully dissent with the opinion of the majority. The record does not support a finding of accident arising out of Petitioner's employment. The personal comfort doctrine is intended for the petitioner's personal comfort. In this instance, the petitioner was not on break, nor was he purchasing an item from the vending machine. He was helping a coworker retrieve chips from the machine. It was not his personal comfort. Therefore, in order to find this compensable, the personal comfort doctrine must be extended to encompass the personal comfort of third parties.

Assuming, that one makes that leap, his actions were unreasonable and unforeseeable. The coworker he was assisting, Jessica Hubner, testified that "he took a few steps back and kind of jumped a little bit into the machine with his side to try and shake it loose." If one does extend the personal comfort doctrine to third parties, one must still examine how he got hurt. He didn't get injured tapping the machine. He didn't get injured shaking the machine. According to the person, he was getting the chips for, "he took a few steps back and kind of jumped". **[*16]** I cannot see how his employer could foresee an employee taking a leap into the machine. The vending machine was in an area accessible to the public and petitioner testified that he was aware of respondent's policy of giving refunds for giving refunds for money lost in the machine. Based on those facts, the Petitioner's actions were neither reasonable, nor foreseeable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: **clinton and "circuit city"** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Friday, September 4, 2009 - 8:14 AM EDT

IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

CIRCUIT CITY STORES, INC.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	CASE NO.: 07 MR 360
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION AND CLINTON DWYER,	)	
	)	
Defendants.	)	

ORDER ON JUDICIAL REVIEW

This cause has been under advisement on Judicial Review of a Decision of the Illinois Workers' Compensation Commission.

The Judicial Review proceeding was initiated by Plaintiff-Respondent, Circuit City Stores, Inc., hereinafter referred to as "Circuit City" or "Employer" The Plaintiff, Circuit City requests that the Decision of the Workers' Compensation Commission be reversed.

The Court has reviewed and considered the Record of Proceedings before the Illinois Workers' Compensation Commission, which record included the transcript of the testimony of Defendant Clinton D. Dwyer, and witnesses Jessica Hubner and Jennifer Ritter. The Court has reviewed and considered the written submissions by the parties and has heard oral arguments of counsel. The Court has also reviewed the legal authorities cited by the parties.

STANDARD OF REVIEW

In determining whether the Decision of the Industrial Commission is against the manifest weight of the evidence, the reviewing Court assesses whether there was sufficient factual evidence in the record to support the Decision. *Cassens Transport Company, Inc.* v. *Industrial Commission*, 262 Ill. App. 3d 324 (1994). In order for the Court to find a Decision against the manifest weight of the evidence, the opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Commission*, 238 Ill. App. 3d 288 (1992).

FACTS

On March 6, 2005, Defendant, Clinton Dwyer, age 21 was employed at Circuit City as a mobile installer. His duties consisted of installing car stereos and other electronic equipment in vehicles owned by customers. His work was performed in an installation bay. Between the installation bay and the break room, there were two vending machines for use by the employees and by the public. One vending machine contained food items and the other contained liquid refreshments. Within the same hallway where the vending machines were located were washrooms for employee and public use and the store director's office.

On the morning of March 6th, at approximately 9:00 am Jessica Hubner, a co employee was getting chips from one of the vending machines. She requested Defendant's assistance because the bag of chips was lodged in the machine. Defendant testified that he had previously purchased chips from this machine and had shaken the machine in the past when the chips got stuck. Defendant agreed to assist Ms. Hubner in retrieving the chips. Defendant was not on break at the time.

Initially, the Defendant shook the machine pushing upwards on the glass front. He then grabbed the top of the machine with both hands and attempted to lift the front feet of the machine off the ground and bring it back down. That effort to dislodge the chips did not work. He then went to the side of the machine and attempted the same maneuver without success. On the third attempt to dislodge the chips, he hit his shoulder against the side of the machine and his hip was injured. Defendant testified that the entry in the hospital record indicating that "This morning he was trying to bang snacks out of the machine with his shoulder and struck his hip on the machine" was accurate. (R59, R136,137) The hospital records also indicate that he was "body checking" the vending machine with his right hip and felt a pop and fell. (R339) Defendant testified that he took either a ½ step or a step before he made contact with the machine.

Defendant testified that he had prior problems with food getting stuck in the machine and that he had struck the machine causing the chips to dislodge. He did not testify as to how often this happened to him even though he used the machine two to three times a week. He did testify that approximately once a month he saw people shake the machine. He did not describe what actions that shaking consisted of. He did not recall the names of any of these persons. He was aware of his employer's policy that if he lost money, he could report it and be reimbursed. He never lost money in the machine.

Jessica Hubner, the co employee for whom Defendant was attempting to retrieve the chips was employed by Circuit City in the same capacity as Defendant. At 9:00 am on March 6th, she attempted to purchase a bag of Fritos from the vending machine located in hallway near the break room. It is unknown whether she was on break. She asked the Defendant to assist her in getting the chips which were stuck in the machine. According to Ms. Hubner, Defendant may have hit the machine one or two times with his hand, but the chips did not come

free. He then took two or three steps back and "kind of leaped" into the side of the machine to try and give it a good nudge. (R77) It was after this maneuver that Defendant fell to the ground. At the time of the accident, Ms. Hubner, worked for Circuit City for two to three months and continued to work there for one to two months following the accident. There was no indication that Ms. Hubner had any prior problems with the machine.

Jennifer Ritter, who was the store director on the date of the accident in question, testified on behalf of the employer. She verified Defendant's start of employment as March, 2004. Ms. Ritter testified that there had been two prior occasions when customers had placed money in the vending machine and food became stuck. These customers were given refunds of their money. Ms. Ritter testified that she was not aware of any instance where any employee had experienced a problem with the machine. She had never witnessed an employee pounding, shaking, physically moving or attempting to move the machine. No employee had complained about the machine. She had never been advised that any employees were shaking or striking the machine. The vending company replaces the food goods in the machine once a week or every other week depending on usage. As of the date of hearing before the commission the vending machine is still in place in the store. Ms. Ritter testified that she never implicitly or explicitly encouraged, condoned, endorsed, allowed or acquiesced in the removal of food from the vending machine in the manner used by Defendant.

ISSUE FOR REVIEW

In this case the only issue presented by the Plaintiff, Circuit City is whether the Commission's finding that the Defendant's injury arose out of and in the course of his employment is against the manifest weight of the evidence. Findings of the Industrial

Commission will not be disturbed on review unless they are against the manifest weight of the evidence and this includes the issue as to whether there was an accidental injury arising out of and in the course of employment. *Gano Electric Contracting v. Industrial Commission*, 260 Ill. App. 3d 92 (1994), citing *Ferrin Cooperative Equity Exchange v. Industrial Commission*, 64 Ill. 2d. 445 (1976).

In order for an injury to be compensable under the Act, the Defendant must show that the injuries arose out of and in the course of his employment. In the course of employment refers to the time, place and circumstances under which an accident occurs. *Illinois Consolidated Telephone Co. v. Industrial Commission*, 314 Ill. App. 3d (2000). In the instant case, it appears that the Commission found that the injury was in the course of employment based on the applicability of the personal comfort doctrine. According to the personal comfort doctrine, an employee, while engaged in the work of his employer, may do those things that are necessary to his or her health and comfort, even though personal to himself and those acts will be considered incidental to employment and therefore, in the course of employment. *Illinois Consolidated Telephone Co. supra*. However, incidental or non essential acts, such as seeking personal comfort, may not be within the course of employment if done in an unusual, unreasonable or unexpected manner. *Segler v. Industrial Commission*, 81 Ill. 2d 125 (1980) "If an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, any injury incurred as a result will not be within the course of employment". *Union Starch v. Industrial Commission*, 56 Ill. 2d 272 (1974)

In the case at bar, the evidence establishes that Defendant was not engaging in an activity necessary to his health and comfort. He was not on break and was not performing any of his primary work duties. There is no case on point where the personal comfort doctrine extended

liability of an employer to cover injuries where an employee is not engaged in activities for his own comfort, but rather for another employee. The Defendant was not seeking refreshment for his own personal comfort. The finding by the commission that the personal comfort doctrine applied is against the manifest weight of the evidence.

Assuming arguendo, that the personal comfort doctrine would apply to circumstances similar to those shown by the evidence in this case, the Defendant here must not voluntarily expose himself to a risk outside the any reasonable exercise of his duties and such incidental acts for personal comfort should not be done an unusual, unreasonable or unexpected manner. *Union Starch, supra* and *Bradway v. Industrial Commission*, 124 Ill. App. 3d (1984) However, an employer may be held liable for injuries resulting from an unreasonable or unnecessary risk if the employer had knowledge of or has acquiesced in the practice or custom. *Eagle Discount Supermarket v. Industrial Commission*, 82 Ill. 2d 331 (1980)

There is no evidence in this case that Circuit City was aware of anyone retrieving or attempting to retrieve goods from the vending the machine in the manner employed by the Defendant. Ms. Ritter testified that she was not aware of any such instances. She further testified that she never acquiesced or condoned anyone striking, shaking or moving the machine in attempt to free food from the vending machine. The only time she was aware of goods getting stuck in the machine is when two customers reported the problem with their food being stuck in the machine. In each of those instances, she refunded their money.

Ms. Hubner did not recall any instances that she was aware of prior to the day in question where employees of Circuit City shook the machine to dislodge food. (R79) She slightly shook the machine that day before seeking Defendant's assistance. (R 61,62) The Defendant may have struck the machine in the past, but there is no evidence that he previously "body checked" the

machine or hit the machine as he did on the date of the accident. He never reported to the employer any problem he had with the machine and did not indicate that any other employee complained about the machine. Rather he testified that he knew he could get a refund of money lost in the machine from his employer.

As previously stated in order for employer to be liable for an injury to an employee, the employee must establish that his injury arose out of the employment as well as in the course of employment. For an injury to arise out of the employment: "The risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment...An injury is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment." *Orsini v. Industrial Commission*, 117 Ill. 2d 38, at 45 (1987) See also *Karastamatis v. Industrial Commission*, 306 Ill. App. 3d 206 (1999) An injury does not arise out of the employment where an employee voluntarily exposes himself to an unnecessary personal danger solely for his own convenience. Even if the employer acquiesces or allows the conduct, this alone will not convert a personal risk into an employment risk. *Orsini*, 117 Ill. 2nd at 47 In the case at bar, the evidence does not support a finding that the Defendant's risk was increased by any condition of his employment or the employment premises. The Defendant's injuries were caused by Defendant voluntarily hitting the machine or body checking the machine, thus exposing himself to an unnecessary danger entirely separate and apart from any of his work responsibilities. The evidence further establishes that Defendant's injuries resulted from exposure to an increased personal risk. He chose to hit and body check the vending machine instead of reporting the problem to the employer when he knew that if Ms. Hubner's money was lost, the employer would reimburse her.

Based on the foregoing and the Court's consideration of all of the materials and arguments presented, this Court finds that the Decision of the Illinois Workers' Compensation Commission that Defendant, Clint Dwyer's injuries arose out of and in the course of employment is against the manifest weight of the evidence.

IT IS THEREOFRE ORDERED that the Decision of review filed by the Workers' Compensation Commission is set aside, reversed and the case is dismissed.

DATED: July 10, 2008 ENTER: Maureen McIntyre

MAUREEN P. McINTYRE
CIRCUIT COURT JUDGE

Service: Get by LEXSEE®
Citation: 2009 Ill. App. LEXIS 728

*391 Ill. App. 3d 913, *; 2009 Ill. App. LEXIS 728, **

CIRCUIT CITY STORES, INC., Appellee, v. ILLINOIS WORKERS' COMPENSATION COMMISSION (Clinton Dwyer, Appellant).

No. 2-08-0722WC

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, ILLINOIS WORKERS' COMPENSATION COMMISSION DIVISION

391 Ill. App. 3d 913; 2009 Ill. App. LEXIS 728

July 14, 2009, Decided

NOTICE:

THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD.

PRIOR HISTORY: [1]**
Appeal from the Circuit Court of McHenry County. No. 07-MR-360. Honorable Maureen P. McIntyre Judge, Presiding.
Circuit City Stores, Inc. v. Ill. Workers' Comp. Comm'n, 909 N.E.2d 983, 2009 Ill. App. LEXIS 647, 330 Ill. Dec. 961 (Ill. App. Ct. 2d Dist., 2009)

DISPOSITION: Circuit court judgment reversed; Commission decision reinstated.

CASE SUMMARY

PROCEDURAL POSTURE: Appellee employer brought an action seeking review of a decision of the Illinois Workers' Compensation Commission (commission), which adopted an arbitrator's decision which found that appellant employee's injury was compensable under the Workers' Compensation Act, 820 ILCS 305/1 et seq. (2006). The Circuit Court of McHenry County (Illinois) reversed. The employee appealed.

OVERVIEW: The employee was injured when he tried to help a co-worker dislodge a product which the co-worker had bought from a vending machine. The trial court found that the commission erred in finding that the personal comfort doctrine applied. The appellate court found, however, that the commission's finding that the injury arose out of and in the course of employment was not contrary to law. Three witnesses described separate instances where products got stuck instead of being dispensed upon purchase. This defect precipitated the injury by creating a need for action to dislodge the product. However, the injury did not qualify under the personal comfort doctrine because that doctrine applied to employees who sustained injuries while seeking their own personal comfort. Here, the employee was injured while helping a co-worker. In any event, the good Samaritan doctrine applied instead. The commission's finding that the employee's conduct while coming to the co-worker's aid was reasonably foreseeable was not against the manifest weight of the evidence. It was also reasonably foreseeable that a worker might have resorted to butting the machine with his or her shoulder.

OUTCOME: The judgment of the trial court was reversed and the commission's decision was reinstated.

CORE TERMS: machine, comfort, arbitrator, stuck, hip, vending machine, shook, shoulder, shake, pain, bag, coworker, fracture, dislodge, happened, co-employee, femoral, shaking, neck, manifest, protocol, loose, hit, reasonably foreseeable, compensable, incidental, hallway, chips, course of employment, foreseeable

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time

HN1 An accidental injury is compensable under the Workers' Compensation Act (Act), 820 ILCS 305/1 et seq. (2006), only if it arises out of and in the course of the claimant's employment. Since the elements are conjunctive, both must be present at the time of injury. 820 ILCS 305/2 (2006). The "arising out of" requirement pertains to the origin and cause of the injury. 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. The "in the course of" requirement speaks to the time, place, and circumstances of the injury. An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort

HN2 Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort

HN3 The Supreme Court of Illinois has adopted the personal comfort doctrine. More Like This Headnote

Workers' Compensation & SSDI > Compensability > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort
HN4 The personal comfort doctrine does not answer the whole question of compensability because it addresses only the "in the course of" requirement; the "arising out of" requirement must be met independently. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Evidence > Procedural Considerations > Weight & Sufficiency
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Substantial Evidence
HN5 An appellate court will not reverse a decision of the Illinois Workers' Compensation Commission unless it is contrary to law or its factual determinations are against the manifest weight of the evidence. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Evidence > Procedural Considerations > Weight & Sufficiency
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Substantial Evidence
HN6 A factual determination is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent, meaning no rational trier of fact could have agreed with the Illinois Workers' Compensation Commission. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort
HN7 By its own terms, the personal comfort doctrine applies to employees who sustain injuries while seeking their own personal comfort. The doctrine has never been applied, and does not apply, to injuries sustained by an employee while assisting a coworker who is seeking personal comfort. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
HN8 When an employee leaves his or her work duties to render aid to a third party, the "in the course of" determination hinges on whether the employee's departure was reasonably foreseeable. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
HN9 An appellate court can uphold a decision of the Illinois Workers' Compensation Commission on any legal basis supported by the record. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
HN10 Urgency is just one possible indicator of foreseeability regarding the good Samaritan doctrine. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
HN11 The linchpin of the "in the course of" requirement in the context of application of the good Samaritan doctrine is foreseeability, not emergency. More Like This Headnote

JUDGES: JUSTICE HOLDRIDGE delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, HUDSON, and DONOVAN, JJ., concurring.

OPINION BY: HOLDRIDGE

OPINION

[*914] Modified Upon Denial of Rehearing

JUSTICE HOLDRIDGE delivered the opinion of the court:

Clinton Dwyer filed an application for adjustment of claim against his employer, Circuit City Stores, Inc., seeking workers' compensation benefits for an injury to his right leg. The matter proceeded to an arbitration hearing, where the arbitrator found that Dwyer's injury was compensable under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)). Accordingly, the arbitrator issued the following awards: medical expenses totaling $ 60,306.83; temporary total disability benefits of $ 182.62 per week for 12 4/7 weeks (March 6 through June 1, 2005); and permanent partial disability benefits of $ 164.36 per week for 70 weeks (representing 35% loss of use of the right leg). The arbitrator denied Dwyer's request for penalties and attorney fees.

Circuit City appealed to the Illinois **[**2]** Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision, with one member dissenting. Circuit City then appealed to the McHenry County circuit court, which reversed the Commission's decision. According to the court, the Commission erred in finding that the "personal comfort doctrine" applied to the instant facts and that Dwyer's injury was compensable under the Act. Dwyer responded by filing the instant appeal. He claims: (1) the personal comfort doctrine applies to the instant facts, as found by the arbitrator and the Commission; (2) the doctrine should be extended, as a matter of law, to cover an employee who is injured while coming to the aid of a coworker seeking personal comfort; and (3) the Commission did not err in finding that his injuries arose out of and in the course of his employment. We reverse the circuit court's judgment and reinstate the Commission's decision.

BACKGROUND

A medical report from Doctor Walter Virkus dated June 11, 2003, reads: "Clint Dwyer is an 18-year-old male who approximately one week ago began having pain in the right groin. He relates this to being after he pitched a game of baseball. He has had no prior complaints **[**3]** of pain in this hip. The pain also seems to be activity related." X-rays showed a lesion in the right femoral neck with no evidence of acute fracture or stress fracture. A magnetic resonance imaging study showed a corresponding lesion with no

evidence of stress fracture. Doctor Virkus attributed the lesion to a unicameral bone cyst that must have been present for a number of years but was "just now becoming symptomatic." He observed, "This may be related to the fact that the patient recently began his summer job in landscaping and basically spends all day pushing a lawnmower." Recognizing a **[*915]** possible need for curettage and grafting, Doctor Virkus prescribed a short trial of rest because the lesion had previously been asymptomatic. The trial period included two weeks on crutches, another four weeks with no baseball or landscaping work, and then resumption of regular activities.

During a follow-up visit on July 30, 2003, Dwyer reported feeling fine except for a recent episode of pain that resolved after one day. He had no pain at the time of the visit. Doctor Virkus's examination revealed full range of motion and no tenderness to stress with internal and external rotation. His report from **[**4]** the visit reads:

> "If he [Dwyer] is asymptomatic I do not think this needs to be curettaged and grafted. I informed him that this could be done at any time if he decided he wanted to stop worrying about it. I stringently cautioned both him and his mother that if he were to ignore persistent symptoms of pain in the hip that he would likely have a stress fracture through the femoral neck, and this would be a potentially disastrous situation considering his age. He indicated to me that he had absolutely no interest in having surgery and that he would address his activities appropriately."

Dwyer testified that, per Doctor Virkus's permission, he resumed normal activities (including baseball and work) and performed those activities without returning for medical care until March 6, 2005--the date of accident in the instant case.

At the time in question, Dwyer was employed by Circuit City installing car stereos and other equipment. He performed his duties in an installation bay, which was connected to an employee break room by a hallway. The hallway contained a snack vending machine and a soda machine. There were also four rooms off the hallway: two management offices, a men's washroom, and a **[**5]** women's washroom. The washrooms were open to the public. Dwyer testified that the snack vending machine was fairly large with a glass front and metal sides. He used the machine two or three times per week and had experienced some problems with products getting stuck. When a product got stuck, he either shook the machine to dislodge it or simply purchased it again. He had occasionally seen other employees shake the machine as well, but he could not recall their names. To the best of Dwyer's knowledge, no employee was reprimanded for shaking the machine. No rules were posted near the machine explaining a protocol if a product got stuck; nor did Circuit City have any written forms or policies covering this situation. If an employee simply lost money in the machine, however, the store had a protocol for the employee to submit a form to management. Dwyer had never lost money in the machine.

[*916] Regarding his accident, Dwyer testified that on March 6, 2005, he was working in the installation bay when a coworker named Jessica Hubner asked him for help dislodging a bag of chips she had purchased from the vending machine. Dwyer went with Hubner to the hallway and saw the bag stuck in the machine. **[**6]** He shook the machine from the front, but to no avail. He then shook it from the side, again to no avail. As to what happened next, the transcript of his testimony reads:

> "Q. Can you stand up and show--Would you stand up and show the Arbitrator, please, what you did next ***.
>
> * * *
>
> A. I was facing the side of the machine this way and I pretty much stood right here and I took one step forward and I hit the machine with my shoulder and it did not move and my hip followed and I pretty much fell to the ground. (Indicating.)
>
> THE ARBITRATOR: Let the record reflect that the petitioner is indicating basically that he was assuming what I would call a fencing or even a self-defense posture with his right arm at mid chest level and indicating he stepped towards and apparently made contact with the machine. And I infer that he made contact with his shoulder and I infer that his hip moved forward, but I couldn't make any other inferences as to what happened with the hip that he referenced."

The matter was revisited on cross-examination as follows:

> "Q. *** So you only shook it once from the front and then you shook it again from the side and then you hit it with your shoulder?
>
> A. Yes.
>
> Q. *** How many steps **[**7]** did you take before you struck the machine with your shoulder?
>
> A. Like half a step. It wasn't even a full step."

Counsel for Circuit City then read the following statement from a medical report: "This morning he was trying to bang some snacks out of a machine with his shoulder and struck his hip on the machine." Dwyer agreed that the statement accurately described what happened. The following colloquy shortly ensued:

> "Q. Clint, this accident occurred when you were attempting to forcefully remove potato chips from the machine, correct?
>
> A. Yes.
>
> * * *
>
> Q. Would it be accurate to state that you took a running start towards the machine?
>
> A. No.
>
> Q. You took one step?
>
> A. Yes."

[*917] Dwyer testified that, upon falling to the floor, he felt "a very high level of pain" in his right hip unlike any he had felt before. Hubner promptly notified the store manager, whereupon an ambulance was called and Dwyer was taken to Centegra Northern Illinois Medical Center. X-rays revealed an impacted, slightly displaced fracture through the right femoral neck. Dwyer was then sent to Rush University Medical Center for immediate treatment by Doctor Virkus, who performed surgery that day (March 6, 2005).

The operative report states: **[**8]** "The patient is a 21-year-old man, who had a know[n] cyst in the femoral neck. He suffered an impact to the hip and suffered immediate fracture. *** X-rays revealed a displaced fracture of the femoral neck through the cyst. *** Please note that this procedure was done urgently due to the patient's young age and the displaced femoral neck fracture." The procedure involved open reduction and internal fixation of the right femoral neck with curettage of the cyst and bone grafting. Dwyer remained in the hospital through March 9, 2005, when he was discharged on crutches with a leg brace and prescriptions for medication.

Doctor Virkus administered follow-up care and kept Dwyer off work until May 10, 2005, when he allowed resumption of work with crutches, a 10-pound lifting restriction, and frequent rest. Circuit City did not provide work within these restrictions, and Dwyer consequently returned to Doctor Virkus's clinic requesting a full-duty release. A physician at the clinic obliged, and Dwyer resumed his regular job on June 2, 2005. He next returned to Doctor Virkus on April 6, 2006, and was advised that he did not need additional care.

Regarding his physical condition at the time of arbitration, **[**9]** Dwyer testified that he experienced problems with his right hip after sitting on a hard surface or crouching for a couple of hours. He could not cross his right leg to sit cross-legged. Weather changes and high humidity caused discomfort, and he experienced numbness and pain in the area of his surgical scar. Prior to the injury of March 6, 2005, he played baseball and jogged about a mile for exercise without incident. By comparison, he tried to run a half mile shortly before the arbitration hearing and felt pain in his right hip the following day.

Pursuant to subpoena by Circuit City, Jessica Hubner testified that she and Dwyer were both working in the store on March 6, 2005. Like Dwyer, Hubner worked as an installer of "stereo systems, remote starts, things like that." Shortly after beginning her shift, she put money into the vending machine and purchased a bag of Fritos, but the bag got stuck and did not fall. She unsuccessfully tried to dislodge the bag by shaking the machine and then asked Dwyer for help because he was the nearest coworker. Regarding Dwyer's actions **[*918]** toward the machine, the following colloquy occurred on direct examination:

> "Q. Prior to hitting it from the side, did **[**10]** he strike it at all?
>
> A. I think so. I'm not positive. I don't remember exactly. He may have hit it once or twice with his hand, but it didn't come out.
>
> Q. Describe what happened when he hit it from the side.
>
> A. He took a few steps back and *** kind of jumped a little bit into the machine with his side to try and shake it loose. And that is when it came loose.
>
> * * *
>
> Q. You said he took a few steps back. Do you recall specifically how many steps back he took?
>
> A. Two or three, maybe.
>
> Q. Did he run towards the machine or walk?
>
> A. I would say he just walked. He didn't--There wasn't enough room in between him and the machine that he would have ran at it. He just kind of leaped into it to try and give it a good nudge.
>
> Q. He left his feet?
>
> A. Yes."

When asked on cross-examination how she knew to shake the machine before seeking Dwyer's assistance, Hubner replied: "Logically, in my mind, something was stuck right there, so I shook it a little bit to try to shake it loose." She agreed that shaking the machine was a "first logical reaction to get the product." No one at Circuit City ever told her not to shake or bump the machine if a product got stuck, and no one ever told her what should be done in that **[**11]** situation. Hubner testified that the machine was for store employees. At the time in question, neither the money in the machine nor the Fritos belonged to Dwyer; "his involvement was simply to assist a co-employee." The accident occurred during his work hours.

Jennifer Ritter, Circuit City store director, testified that on March 6, 2005, Jessica Hubner approached her on the sales floor advising that Dwyer was hurt and needed an ambulance. Based on subsequent discussions with Hubner and Dwyer about the incident, Ritter described Dwyer's manner of attempting to remove the chips as "improper." Ritter acknowledged instances where customers had purchased bags of chips that got stuck in the machine. When asked if the store had a protocol for such instances, she replied: "Yes. I would give them the money to get another bag of chips out." She said the same protocol was conveyed to employees "with respect to what happened when money got stuck." As to products getting stuck, however, no employee had ever brought such an instance to her attention. Neither had she seen any employee shake or strike the machine, **[*919]** reprimanded any employee for doing so, or even heard of an employee doing so.

Ritter acknowledged **[**12]** on cross-examination that, if individuals had been able to dislodge products by shaking the machine, she would not have been contacted about the problem (meaning there would be no reason for her to know the practice was occurring). The store had no policy prohibiting employees from shaking the machine to dislodge products. Ritter said the machine was for customers and "the convenience and comfort of employees." However, since Dwyer was not on break at the time in question, Ritter said he violated company protocol by going to the machine. Ritter acknowledged that, despite being responsible for enforcing

company protocol, she did not discipline Dwyer for the violation.

After proofs were closed, the arbitrator issued a written decision outlining certain facts and then stating:

> "The true issue is whether the 'personal comfort doctrine' applies to the facts of this case. ***
>
> * * *
>
> In the case before this Arbitrator, the facts do not squarely fit within the 'personal comfort doctrine' because the Petitioner [Dwyer] was not seeking refreshment for his own personal comfort but that of a co-employee. Further, the Petitioner was not on break. There was no testimony that employees were prohibited **[**13]** from assisting co-employees in helping them for their own personal comfort. Also, while Ms. Ritter testified that the Petitioner violated an unstated policy in that he was not to jostle product out of the vending machine, she was aware that there was a problem with the vending machine in that she admitted that customers had product hang up in the machine. No formal work rule violation was underscored by the witness.
>
> When making findings of fact, common sense and life experience are part of the decision making process. It is not unusual or outrageous that an individual, while looking at a product teetering o[n] the edge of a spindle, would *** shake or jostle the machine in order to procure what they set out to buy. In this case at bar, it was proved that the co-employee, Jessica Hubner, shook the vending machine prior to asking the Petitioner for help. It was proved that the Respondent [Circuit City] had notice that there was a problem with the vending machine in that other people had their product hang up in the machine. It was proved that the machine was there for the personal comfort and convenience of the employees of this Respondent. It is the finding of the Arbitrator that the **[**14]** action of the Petitioner was not so outrageous or unusual in that people, who encounter vending machines that hang up the desired product, jostle the machine to get the product.
>
> **[*920]** The Arbitrator adopts the above findings of material facts in support of his conclusion of law as follows: Based upon long standing Illinois Appellate Court case law the Arbitrator concludes as a matter of law and fact that the Petitioner's injuries of March 6, 2005 'arose out of' and 'in the course of' his employment."

Accordingly, the arbitrator found a compensable accident. The Commission affirmed the arbitrator's decision, with one member dissenting. The dissenting commissioner argued that the personal comfort doctrine did not apply because: (1) Dwyer was not on break and not seeking his own comfort; and (2) even assuming, *arguendo*, that the doctrine covers third parties, Dwyer's actions were unreasonable and unforeseeable. Circuit City appealed to the McHenry County circuit court, which agreed with the dissenting commissioner's points and thus reversed the Commission's decision. Dwyer then filed the instant appeal.

DISCUSSION

HN1 An accidental injury is compensable under the Act only if it arises out of *and* in **[**15]** the course of the claimant's employment. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987) (noting that, since the elements are conjunctive, both must be present at the time of injury); see 820 ILCS 305/2 (West 2006). The "arising out of" requirement pertains to the origin and cause of the injury. *Orsini*, 117 Ill. 2d at 45. "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." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989). The "in the course of" requirement speaks to the time, place, and circumstances of the injury. *Orsini*, 117 Ill. 2d at 44. "An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto." *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 367, 362 N.E.2d 325, 5 Ill. Dec. 854 (1977).

Professor Larson's treatise on workers' compensation law articulates the personal comfort doctrine as follows:

> HN2 "Employees **[**16]** who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the *** method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment." 2 A. Larson & L. Larson, Workers' Compensation Law §21, at 21-1 (2008).

HN3 The Illinois Supreme Court has adopted this doctrine. See, *e.g.*, *Hunter Packing Co. v. Industrial Comm'n*, 1 Ill. 2d 99, 104, 115 N.E.2d 236 (1953) ("an **[*921]** employee, while engaged in the work of his employer, may do those things which are necessary to his health and comfort, even though they are personal to himself, and such acts will be considered incidental to the employment"); *Chicago Extruded Metals v. Industrial Comm'n*, 77 Ill. 2d 81, 84, 395 N.E.2d 569, 32 Ill. Dec. 339 (1979) ("injuries sustained by an employee while in the performance of reasonably necessary acts of personal comfort may be found to have occurred 'in the course of' his employment, since they are incidental to the employment"); *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 339-40, 412 N.E.2d 492, 45 Ill. Dec. 141 (1980) ("the course of employment is not considered broken by certain acts relating to the personal comfort of the **[**17]** employee," but, "if the employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, the resultant injury will not be deemed to have occurred within the course of the employment").

As these authorities suggest, HN4 the personal comfort doctrine does not answer the whole question of compensability because it addresses only the "in the course of" requirement; the "arising out of" requirement must be met independently. See also *Union Starch, Division of Miles Laboratories, Inc. v. Industrial Comm'n*, 56 Ill. 2d 272, 277, 307 N.E.2d 118 (1974) (describing a personal comfort issue as "[t]he more difficult question" after finding sufficient evidence to support an "arising out of" determination). Along these lines, we have observed that application of the personal comfort doctrine "would only establish that [the] claimant is considered to be in the course of his employment" and thus would not obviate an "arising out of" analysis. *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 211, 713 N.E.2d 161, 238 Ill. Dec. 915 (1999).

In the instant case, the Commission found that Dwyer's injury arose out of and in the course of his employment. HN5 We will not reverse the Commission's decision **[**18]** unless it is contrary to law or its factual determinations are against the manifest weight of

the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 308 Ill. Dec. 715 (2006). HN6 A factual determination is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent (meaning no rational trier of fact could have agreed with the Commission). *Durand*, 224 Ill. 2d at 64.

The Commission's finding that Dwyer's injury arose out of his employment is not contrary to law. Regarding the manifest weight of the evidence, there is no question that Circuit City provided the vending machine for use by its employees. Jessica Hubner testified that the machine was for employees, while Jennifer Ritter testified that it was for customers and "the convenience and comfort of employees." There is also no question that the machine had a defect. All three witnesses **[*922]** described separate instances where products got stuck instead of being dispensed upon purchase. This defect precipitated Dwyer's injury by creating a need for action to dislodge the bag of Fritos. Under these circumstances, a rational trier of fact could have found that the injury originated in a risk incidental to his employment--thus **[**19]** creating the requisite causal connection. Accordingly, the Commission's finding on this matter is not against the manifest weight of the evidence.

As for the "in the course of" requirement, the Commission found that Dwyer's injury qualified under the personal comfort doctrine. That finding is contrary to law. HN7 By its own terms, the personal comfort doctrine applies to employees who sustain injuries while seeking their own personal comfort (Jessica Hubner in the instant case, not Dwyer). The doctrine has never been applied, and does not apply, to injuries sustained by an employee while assisting a coworker who is seeking personal comfort. We need not belabor this point because a separate doctrine, the so-called "good Samaritan doctrine," is applicable instead.

In *Ace Pest Control, Inc. v. Industrial Comm'n*, 32 Ill. 2d 386, 205 N.E.2d 453 (1965), the employee, Raymond Burns, was driving to Peoria from a service call in Bloomington when he noticed a vehicle parked beside the highway. It was near dusk and the temperature was below freezing. Burns stopped his work truck to offer assistance and discovered Mrs. Richard Kuntz and her four young children inside the vehicle. Kuntz had run out of gas. When Burns **[**20]** offered to take her to the nearest service station, she said her farmhouse was actually closer. Burns thus drove Mrs. Kuntz and the children home, a distance of about two miles, whereupon Mr. Kuntz obtained a can of gasoline and rode back to the stranded vehicle with Burns in the work truck. Burns exited the truck beside the highway and, while walking around to remove the can of gasoline, was struck and killed by a passing vehicle.

The evidence showed that Burns's employer had no definite policy on stopping to help stranded motorists, leaving the decision to each employee. The company's president testified that he had stopped to render assistance on prior occasions and that the work truck was like a mobile billboard because it bore the company's name.

Observing that Burns was not acting under express instructions from his employer, and was not under any legal duty to stop and render aid, the Illinois Supreme Court explained: "The issue thus narrows to whether the giving of such aid could have been reasonably expected or foreseen." *Ace Pest Control*, 32 Ill. 2d at 388. The court answered this question in the affirmative, specifically rejecting the employer's claim that Burns's assistance **[**21]** involved too much deviation from his regular duties to be foreseeable. See also *Metropolitan Water Reclamation* **[*923]** *District of Greater Chicago v. Industrial Comm'n*, 272 Ill. App. 3d 732, 650 N.E.2d 671, 208 Ill. Dec. 977 (1995) (when a lock master on the Chicago River was injured while attempting to rescue someone who fell into Lake Michigan, his actions were not outside the scope of his employment); *Johnson v. Industrial Comm'n*, 278 Ill. App. 3d 59, 662 N.E.2d 156, 214 Ill. Dec. 802 (1996) (when an administrative assistant was injured on a Mexican yacht cruise while trying to protect her boss's niece from roughhousing by her boss's sons, the protective action was reasonable and foreseeable, thus falling within the scope of her employment).

In discussing *Ace Pest Control*, we have observed that Burns's fatal injury was compensable because his "'good samaritan' act was deemed foreseeable." *Metropolitan Water Reclamation District of Greater Chicago*, 272 Ill. App. 3d at 737. Accordingly, HN8 when an employee leaves his or her work duties to render aid to a third party, the "in the course of" determination hinges on whether the employee's departure was reasonably foreseeable. In the instant case, the Commission found that Dwyer's conduct while coming to Hubner's aid **[**22]** was reasonably foreseeable. This factual finding is germane to the good Samaritan doctrine [1] and not against the manifest weight of the evidence.

FOOTNOTES

1 Although the Commission decided the case on other grounds, HN9 we can uphold its decision on any legal basis supported by the record. See *General Motors Corp., Central Foundry Division v. Industrial Comm'n*, 179 Ill. App. 3d 683, 695, 534 N.E.2d 992, 128 Ill. Dec. 547 (1989).

In each of the above-cited cases, the cause for rendering aid was admittedly more urgent than in the instant case. However, none of those cases involved a request for assistance by a coworker, let alone a coworker stationed in the claimant's own department. What the instant case lacks in urgency (HN10 urgency being just one possible indicator of foreseeability), it makes up for in collegiality. There is no question that the vending machine was provided for the use and comfort of Circuit City's employees and that products were known to get stuck in the machine. Ritter's testimony established such knowledge at the management level. Moreover, the record contains evidence that employees shook the machine to dislodge products. Dwyer testified to occasions where he and other employees had done so. Even Hubner personally **[**23]** shook the machine before seeking help from Dwyer. When questioned in this regard, she testified: "Logically, in my mind, something was stuck right there, so I shook it a little bit to try to shake it loose." She agreed that shaking the machine was a "first logical reaction to get the product."

[*924] In light of this evidence, it was reasonably foreseeable that an employee might ask a coworker for assistance to dislodge a product from the machine. It was also reasonably foreseeable that the coworker would come to the aid of a fellow employee. [2] The remaining question, then, is whether Dwyer's manner of rendering aid crossed the line of foreseeability and thus took him outside the scope of his employment.

FOOTNOTES

2 These observations, and the principles of law behind them, illustrate how Circuit City misses the mark in arguing the absence of imminent danger or exigent circumstances. HN11 The linchpin of the "in the course of" requirement in this context is foreseeability, not emergency. Circuit City's argument replaces the end with a means.

In a similar vein, Circuit City cites Professor Larson's treatise for the proposition that when an employee renders aid to a co-employee, "[i]f the aid takes the form of **[**24]** merely helping the co-employee with some matter entirely personal to the co-employee, it is outside the course of employment, unless the deviation involved is insubstantial." 2 A. Larson & L. Larson, Workers' Compensation Law §27, at 27-7 (2008). Immediately following this passage in the treatise, Professor Larson lists several cases where compensation was denied. The factual difference between the instant case and those cases is telling. In all but one (*Bivens v. Marshall R. Young Drilling Co.*, 251 Miss. 261, 169 So. 2d 446 (1964)), the employee was not even injured during work hours. In *Bivens*, moreover, the employee left his employer's premises at work time to participate in a squirrel hunting expedition with two other employees who were off work, injuring himself in the process. The instant facts fall on the insubstantial, foreseeable side of the line.

Dwyer testified that he went with Hubner to the hallway and saw her bag of Fritos stuck in the vending machine. He shook the machine from the front, but to no avail. He then shook it from the side, again to no avail. As to what happened next, he said: "I was facing the side of the machine *** and I took one step forward and I hit **[**25]** the machine with my shoulder and it did not move and my hip followed and I pretty much fell to the ground." The arbitrator then commented:

> "Let the record reflect that the petitioner is indicating basically that he was assuming what I would call a fencing or even a self-defense posture with his right arm at mid chest level and indicating he stepped towards and apparently made contact with the machine. And I infer that he made contact with his shoulder and I infer that his hip moved forward, but I couldn't make any other inferences as to what happened with the hip that he referenced."

When asked how many steps he took toward the machine before striking it with his shoulder, he responded: "Like half a step. It wasn't even a full step." When asked if he took a running start, he said, "No."

[*925] During Hubner's testimony, the following colloquy occurred on direct examination by counsel for Circuit City:

> "Q. Describe what happened when he hit it from the side.
>
> A. He took a few steps back and *** kind of jumped a little bit into the machine with his side to try and shake it loose. And that is when it came loose.
>
> * * *
>
> Q. You said he took a few steps back. Do you recall specifically how many steps back **[**26]** he took?
>
> A. Two or three, maybe.
>
> Q. Did he run towards the machine or walk?
>
> A. I would say he just walked. He didn't--There wasn't enough room in between him and the machine that he would have ran at it. He just kind of leaped into it to try and give it a good nudge.
>
> Q. He left his feet?
>
> A. Yes."

It is reasonably foreseeable that, after unsuccessfully shaking the machine to dislodge a product, an employee might resort to butting the machine with his or her shoulder. According to Dwyer's testimony, he did nothing more. Hubner's testimony, which adds detail, is amenable to a construction consistent with Dwyer's description of the event. For instance, she said he "kind of jumped or leaped into the machine "a little" just to "give it a good nudge." Even though he "maybe" took two or three steps back, Hubner unequivocally testified that he did not run at the machine but "just walked." Under these circumstances, the Commission could have reasonably found that Dwyer's manner of assisting Hubner did not cross the line of foreseeability so as to take him outside the scope of his employment. Accordingly, the Commission's decision is not against the manifest weight of the evidence.

CONCLUSION

For the **[**27]** foregoing reasons, we reverse the judgment of the McHenry County circuit court and reinstate the Commission's decision.

Circuit court judgment reversed; Commission decision reinstated.

McCULLOUGH, P.J., and HOFFMAN, HUDSON, and DONOVAN, JJ., concurring.