

NOTICE

Decision filed 10/31/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 Il App (1st) 102722WC-U

Workers' Compensation
Commission Division
Filed: October 31, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No. 1-10-2722WC

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

OSVALDO PENA,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Appellant,)	COOK COUNTY
)	
v.)	No. 10 L 50208
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	
(MIKE HAGGERTY PONTIAC, BUICK)	
& GMC,)	HONORABLE
)	SANJAY T. TAYLOR,
Appellees).)	JUDGE PRESIDING.

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

ORDER

HELD: The decision of the Workers' Compensation Commission to deny the claimant benefits for injuries he allegedly sustained while in the employ of Mike Haggerty Pontiac, Buick & GMC is not against the manifest weight of the evidence.

¶ 1 The claimant, Osvaldo Pena, appeals from an order of the Circuit Court of Cook County

No. 1-10-2722WC

which confirmed a decision of the Illinois Workers' Compensation (Commission), denying him benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)) for injuries he alleged that he received while working for Mike Haggerty Pontiac, Buick & GMC (Haggerty). For the reasons which follow, we affirm the judgement of the circuit court.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on February 13, 2009.

¶ 3 The claimant, who worked as a salesperson for Haggerty's car dealership, filed three applications for adjustment of claim seeking benefits under the Act for injuries sustained or manifesting on August 13, 2004; September 13, 2004; and November 16, 2004. He testified that he often helped push automobiles into the dealership showroom when he was a salesperson; he estimated that he pushed cars four days per week, and five to seven cars per session. The claimant also explained that his job required him to shovel snow and to get into and out of cars many times per day.

¶ 4 The claimant recalled that, on August 13, 2004, he slipped while trying to get into a car and noticed pain in his lower back. He denied having had any serious back problems prior to the August 13 incident. The claimant said that he reported the incident to his supervisor and left work early that day, but that he continued to work after that date.

¶ 5 The claimant testified that, on September 13, 2004, he slipped while pushing a car and felt a pain that prompted him to report the incident to his superiors and seek medical treatment with his family physician, Dr. Ramon Pla.

¶ 6 The claimant said that he returned to work with pain medication from Dr. Pla but that he felt pain while working. He testified that, on November 16, 2004, he slipped while at work, and one of the company owners saw the fall and helped him up. A November 22 MRI of the claimant's back revealed that the claimant suffered from a disc protrusion and herniation.

¶ 7 The claimant thereafter sought additional treatment for his back. A December 14, 2004,

No. 1-10-2722WC

note regarding his treatment includes a history that the claimant had "had pain on and off for the past two years but had increased pain about three months ago." The claimant underwent back surgery in December 2004, and, after the surgery, an MRI of the claimant's back showed two "degenerative bulging discs."

¶ 8 In February 2005, the claimant returned to work at Haggerty but continued to experience pain getting into and out of cars. By October 2006, the claimant said, he could no longer tolerate the pain and sought a sedentary position. His later medical records for his continuing treatment of his back include a form in which he indicated that his problems began after work falls on November 13 and November 23.

¶ 9 After complaining that he could not continue his duties at Haggerty, the claimant obtained a position at another dealership, but, when that dealership was sold in August 2007, he did not continue to work.

¶ 10 On cross-examination, the claimant explained that he remembered the date of his August 13 accident because it occurred near the time of his August 3 birthday, and that he remembered the date of the November incident because his son's birthday was in October. However, the claimant could not recall the date he first consulted an attorney but agreed it was probably close to August 11, 2006, the date on which his first applications for adjustment of claim were filed. The claimant agreed that he had experienced some minor problems with his back prior to his alleged workplace accidents, but he stated that the pain he suffered after the workplace accidents was different and much more severe.

¶ 11 William Haggerty, Haggerty's general manager at the time of the claimant's alleged injuries, testified that cars were moved into the dealership showroom perhaps five times per month and that salespeople sometimes helped push the cars. William said that the claimant never mentioned any workplace accident to him until several months after William was aware of the claimant's back problem.

¶ 12 Daniel Fontana, a Haggerty salesperson, estimated in his testimony that he helped move one to two cars per month. Ron Schultz, another Haggerty salesperson, estimated that he helped move three or four cars per month.

¶ 13 Dr. Michael Gross, who testified by evidence deposition on the claimant's behalf, opined that the claimant had pre-existing lumbar spine arthritis and further back changes due to his workplace accidents. Dr. Gross further opined that the claimant's condition of ill-being was causally related to a workplace injury and could have been the result of either a discrete injury or the repetitive trauma of pushing cars for Haggerty. On cross-examination, Dr. Gross explained that his conclusion was not disturbed by medical records indicating that the claimant had experienced back pain for two years prior to the alleged workplace accidents, because he attributed the claimant's problem to repetitive trauma.

¶ 14 Dr. Alexander Ghanayem, who testified by evidence deposition on Haggerty's behalf, opined that the claimant's condition of ill-being was not related to any workplace accident. Dr. Ghanayem cited the claimant's "long history of low back pain that predated his work injury," as well as discrepancies in the record as to when the purported accidents actually occurred. Dr. Ghanayem also dismissed the possibility of a repetitive trauma injury caused by pushing cars, by opining that, if that activity were to injure someone, "it's going to cause an acute injury," not a repetitive injury.

¶ 15 After the conclusion of the hearing which was held pursuant to section 19(b) of the Act (820 ILCS 301/19(b) (West 2008)), the arbitrator found that the claimant sustained injuries arising out of and in the course of his employment with Haggerty and awarded him benefits under the Act. Haggerty sought a review of the arbitrator's decision before the Commission. The Commission concluded that the claimant had not sustained accidental injuries arising out of and in the course of his employment and denied him benefits under the Act. The Commission found that the claimant's testimony was not credible, citing discrepancies in his reports and dates

No. 1-10-2722WC

of his injuries, as well as the fact that some medical records indicated that he had reported back problems for several years prior to his claimed accidents. The Commission found that "[w]ith respect to the allegations of repetitive trauma, *** [the claimant] pushed cars occasionally, not repetitively, and [the Commission] adopts Dr. Ghanayem's opinion that any injury from pushing a car would have been acute."

¶ 16 The claimant filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 17 The claimant argues that the Commission erred in concluding that he did not sustain an injury as a result of an accident arising out of and in the course of his employment, a prerequisite to recovery under the Act. See 820 ILCS 305/2 (West 2004); *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603 (1989). He attacks the Commission's finding on two grounds.

¶ 18 First, the claimant argues that the Commission erroneously concluded that his pushing of cars did not constitute a repetitive trauma injury. He argues that we should apply a *de novo* standard of review to this question, because the Commission's decision amounted to a legal conclusion that a claimant must bear a higher burden of proof to establish that an "occasional" activity led to a repetitive trauma. We disagree. The Commission's decision on this point rests very plainly on a factual finding that the particular activities in which the claimant engaged could not have caused a repetitive trauma injury.

¶ 19 The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 89 (1992). Whether a reviewing court might

reach the same conclusion is not the test of whether the Commission's determination of a question of fact is against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440 N.E.2d 90 (1982).

¶ 20 Here, Dr. Ghanayem testified that, in his expert opinion, the activities that the claimant described could not lead to a repetitive trauma injury. That testimony provided the Commission with a sufficient basis to make a corresponding finding.

¶ 21 The claimant's second challenge to the Commission's finding is his argument that the Commission erred in concluding that he did not suffer any discrete or acute workplace accidents leading to his condition of ill-being. Again, this is an issue of fact, and we will not disturb the Commission's findings of fact unless they are against the manifest weight of the evidence.

¶ 22 To argue that the Commission erred, the claimant highlights, among other things, evidence that he reported workplace accidents to his supervisors, as well as excerpts of medical records in which the claimant's history includes his descriptions of workplace accidents. However, the Commission was also presented evidence that the claimant reported incidents on varying dates and that his back problems predated any alleged workplace accident. The Commission also determined, as was its prerogative, that the claimant was not a credible witness. See *Martinez v. Industrial Comm'n*, 242 Ill. App. 3d 981, 984, 611 N.E.2d 545 (1993) (explaining that it is the role of the Commission to judge the credibility of witnesses, to determine the weight to be given the evidence, and to draw reasonable inferences therefrom). Given the deference we owe to the Commission's fact-finding prerogative, we cannot say that a Commission finding based on those parts of the record contravenes the manifest weight of the evidence, even in light of the evidence the claimant cites.

¶ 23 We affirm the circuit court's decision to confirm the Commission's denial of benefits.

¶ 24 Affirmed.