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2011 IL App (3rd) 100860WC-U

Order filed December 19, 2011

NO. 3-10-0860WC

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

Workers' Compensation Commission Division

R.A. CULLINAN & SONS, INC.,	)	Appeal from
Appellant,	)	Circuit Court of
v.	)	Tazewell County
THE ILLINOIS WORKERS' COMPENSATION	)	No. 10MR9
COMMISSION *et al*. (Ruth Lynn Keith, Appellee).	)	
	)	Honorable
	)	Richard E. Grawey,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Workers' Compensation Commission's finding that claimant sustained an accident arising out of and in the course of her employment was not against the manifest weight of the evidence; and the Workers' Compensation Commission's finding that claimant provided timely notice was not against the manifest weight of the evidence.

¶ 2 On May 29, 2007, claimant, Ruth Lynn Keith, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 through 30 (West 2006)), seeking benefits from employer, R.A. Cullinan & Sons, Inc., for repetitive trauma injuries suffered to both hands and arms on August 1, 2005. Following a hearing, an arbitrator

found claimant proved she sustained injuries arising out of and in the course of her employment with employer on August 1, 2005. The arbitrator awarded claimant total temporary disability (TTD) benefits in the amount of $804.03 per week for a period of 85 1/7 weeks; and medical expenses in the amount of $31,204.34. Additionally, the arbitrator awarded claimant $591.77 per week for a period of 250 weeks, "as provided in [s]ection 8(d)(2) of the Act, because the injury sustained caused the permanent disability to the Petitioner's whole person to the extent of 50% thereof." 820 ILCS 305/8(d)(2) (West 2006).

¶ 3 On review, the Workers' Compensation Commission (Commission) amended claimant's application for adjustment of claim on its face to allege an accident date of July 28, 2006, the accident date identified on Illinois Form 45: Employer's First Report of Injury. Further, the Commission modified the arbitrator's decision "by finding that Petitioner's reporting as memorialized in the Form 45, constituted timely notice." Next, the Commission corrected a single sentence in the arbitrator's decision referencing the year claimant began working for employer. In all other respects, the Commission affirmed and adopted the arbitrator's decision.

¶ 4 Employer filed a petition for judicial review of the Commission's decision in the circuit court of Tazewell County. The circuit court confirmed the Commission's decision.

¶ 5 Employer appeals, arguing the Commission's (1) finding that claimant sustained an accident arising out of and in the course of her employment on July 28, 2006, is against the manifest weight of the evidence, (2) finding that claimant's current condition of ill-being is causally related to her accident date of July 28, 2006, is against the manifest weight of the evidence, (3) award of TTD benefits is against the manifest weight of the evidence, (4) award of

medical expenses is against the manifest weight of the evidence, (5) finding that claimant provided timely notice is against the manifest weight of the evidence, and (6) award of permanent disability benefits is against the manifest weight of the evidence. We disagree and affirm.

¶ 6 The parties are aware of the facts taken from the evidence presented at the arbitration hearing on March 27, 2009, and they will not be set forth in detail.

¶ 7 Employer argues the Commission's finding that claimant suffered an accident arising out of and in the course of her employment on July 28, 2006, and its finding that the bilateral carpel tunnel and bilateral ulnar cubital syndrome are causally connected to any such accident are against the manifest weight of the evidence. Employer argues that claimant failed to prove a compensable "repetitive trauma" injury.

¶ 8 An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 2006). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 605 (1989). "Arising out of the employment" refers to the origin or cause of the claimant's injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989). "In the course of the 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, 362 N.E.2d 325, 327 (1977). Additionally, an injury arises out of the employment if the claimant was exposed to a risk of harm beyond that to which the general public is exposed. *Brady v. L. Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548, 578 N.E.2d 92, 923 (1991). The question of whether an employee's injury arose out of and in the course of his employment is one of fact, and the

Commission's resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Johnson Outboards v. Industrial Comm'n*, 77 Ill. 2d 67, 70–71, 394 N.E.2d 1176, 1178 (1979).

¶ 9 An employee who suffers a repetitive-trauma injury may apply for benefits under the Act, but must meet the same standard of proof as an employee who suffers a sudden injury. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 65, 862 N.E.2d 918, 925-26 (2006).

¶ 10 Whether a causal connection exists between a claimant's condition of ill-being and his employment is a factual issue to be decided by the Commission, and unless contrary to the manifest weight of the evidence, the Commission's resolution of such issues will not be set aside on review. *Sisbro, Inc.*, 207 Ill. 2d at 205, 797 N.E.2d at 673; *Certi–Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244, 461 N.E.2d 954, 958 (1984).

¶ 11 For a finding of fact made by the Commission to be found to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086, 837 N.E.2d 937, 940 (2005). Whether this court might have reached 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, 93 (1982).

¶ 12 In the case at bar, there was sufficient evidence to support the Commission's finding that claimant's injuries arose out of and in the course of her employment with employer. Claimant testified that she began operating a rubber-tracked paving machine in 2003. Claimant testified that the rubber-tracked paving machine was difficult to operate and produced "a

constant vibration." The rubber-tracked paving machine had a "swing console" that claimant moved to accommodate the job. The "swing console" weighed approximately 60 pounds. While operating the rubber-tracked machine in a parking lot, claimant moved the "swing console" approximately 20-30 times. Claimant manipulated numerous buttons and toggle switches while operating the paving machine.

¶ 13 Bruce Bennet and Jack Horner gave testimony that was substantially similar to claimant's testimony. Bennett characterized the steering system of the rubber-tracked paving machine as "sensitive." The manufacturer sent mechanics to "soften the steering wheel" and employer's mechanics also attempted to repair the steering system. Claimant and Horner experienced frustration while operating the paving machine.

¶ 14 Horner testified that he has operated eight to ten different paving machines while working for employer. The rubber-tracked paving machine was the toughest paving machine he had operated. He characterized the steering system of the rubber-tracked paving machine as "white knuckle" driving and has experienced tenderness in his fingertips and hands from gripping the steering wheel.

¶ 15 Claimant worked approximately 9 1/2 hours or more each day. There was no lunch break. Claimant ate on the run. Most of claimant's days required overtime. Claimant testified that she worked more hours in 2005 than any other year.

¶ 16 Claimant testified that when a truck backed up to the paving machine, it locked onto the paving machine. The paving machine pushed the truck forward but if the truck drifted, it took the paving machine with it making the paving machine more difficult to steer. Claimant could not let go of the steering wheel because the paving machine would immediately veer off

course. Claimant firmly grasped the steering wheel to keep the paving machine on a straight line.

¶ 17 Claimant testified that she began experiencing pain in both arms in the summer of 2005. Claimant sought treatment with the Tremont Medical Clinic complaining of increasing pain in her arms. Claimant underwent an EMG on June 26, 2006. Dr. Xuan Truong found the findings compatible with bilateral carpel tunnel and bilateral ulnar cubital syndrome.

¶ 18 Despite the foregoing, employer argues that claimant failed to prove a repetitive trauma injury because the evidence in this case demonstrates that claimant's work was "not of a repetitive and varied nature." Although the evidence in this case shows that claimant's work was not repetitive in the sense that she worked on an assembly line and performed the same task over and over again, claimant's work was repetitive enough to support the finding that claimant suffered a repetitive trauma injury that arose out of and in the course of her employment with employer. Further, the medical evidence also supported the finding that claimant's work was repetitive in nature. It is the function of the Commission to judge the credibility of witnesses and resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223-24 (1980).

¶ 19 Based upon the record before us, the Commission's conclusion that claimant's current condition of ill-being arose out of and in the course of her employment on July 28, 2006, is not against the manifest weight of the evidence, as an opposite conclusion is not clearly apparent.

¶ 20 Next, employer argues that the Commission's finding that claimant provided timely notice is against the manifest weight of the evidence. The purpose of the notice require-

ment of the Act is to enable an employer to investigate an alleged accident. *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 95, 411 N.E.2d 249, 252 (1980). Compliance with the requirement is accomplished by placing the employer in possession of the known facts related to the accident within the statutory period, namely 45 days. *Seiber*, 82 Ill. 2d at 95, 411 N.E.2d at 252. A claim is barred only if no notice whatsoever has been given. *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96, 631 N.E.2d 724, 727 (1994). Because the legislature has mandated a liberal construction on the issue of notice (*Atlantic & Pacific Tea Co. v. Industrial Comm'n*, 67 Ill. 2d 137, 143, 364 N.E.2d 83, 86 (1977)), if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced. *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 727.

¶ 21 Here, the Commission amended claimant's application for adjustment of claim on its face to allege a date of accident of July 28, 2006, the date of accident identified on Illinois Form 45: Employer's First Report of Injury. Further, the Commission modified the arbitrator's decision "by finding that Petitioner's reporting as memorialized in the Form 45, constituted timely notice." The evidence supports this determination. The Commission stated:

> "While Petitioner testified that she became symptomatic in the summer of 2005, it was not until July 27, 2006[,] that Dr. Conner provided her with a written opinion linking her condition with her work duties. Respondent's Form 45 [], dated July 29, 2006, reflects that Petitioner reported an accident of July 28, 2006. It is the reporting on July 29, 2006[,] of an accident of July 28, 2006[,] that prompted Respondent's carrier to take Petitioner's recorded state-

ment on August 1, 2006."

The Commission's findings with respect to the issue of notice are not contrary to the manifest weight of the evidence.

¶ 22 Employer further argues that the Commission's awards of TTD benefits, permanent disability benefits (820 ILCS 305/8(d)(2) (West 2006)), and reimbursement for medical expenses are also against the manifest weight of the evidence. However, since these arguments are based solely upon the premise that the Commission's causation finding is erroneous, a premise we have already rejected, we also reject these contentions without further analysis.

¶ 23 We affirm the judgment of the circuit court confirming the Commission's decision.

¶ 24 Affirmed.