

NOTICE
Decision filed 04/18/11. 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.

Workers' Compensation
Commission Division
FILED: April 18, 2011

1-10-0872WC

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MARY ANN NICKERSON,)	Appeal from the Circuit Court
)	of Cook County, Illinois
Appellant,)	
)	
v.)	No. 09--L--50052
)	
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (St. James Hospital and)	Elmer J. Tolmaire, III,
Medical Center, Appellee).)	Judge, Presiding

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justices McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

Held: The Commission's finding that the claimant failed to prove that she sustained a compensable injury arising out of and in the course of her employment was not against the manifest weight of the evidence.

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The claimant, Mary Ann Nickerson (claimant), filed an application for adjustment of claim against her employer, St. James Hospital and Medical Center (employer), seeking workers' compensation benefits for injuries to her lower back on October 28, 2000. The matter proceeded to an arbitration hearing where the arbitrator found that the claimant had failed to prove that she sustained a compensable injury arising out of and in the course of her employment on that date. The claimant appealed to the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision.¹ The claimant then appealed to the Cook County circuit court, which confirmed the decision of the Commission. The claimant now appeals to this court.

BACKGROUND

The claimant became a registered nurse in 1978 and began working that year for a hospital located in Olympia Fields, Illinois. The hospital was purchased by the employer in

¹ The arbitrator's decision erroneously stated the date of the alleged accident as April 14, 1998. The Commission corrected the error to indicate October 28, 2000, as the appropriate date of the alleged accident. The error resulted from the fact that the claim at issue herein was consolidated with another claim (No. 99 WC 7730) which alleged an injury date of April 14, 1998. Although the claims were consolidated for hearing, a separate decision was issued in No. 99 WC 7730 that awarded the claimant a permanency award equal to 10% loss of the person as a whole. Initially, the claimant sought review of that decision. However, the parties subsequently entered into a settlement agreement. The claim for injuries resulting from the April 14, 1998, accident is not part of this appeal.

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2000, and the claimant began her employment with the employer at that time. On April 14, 1998, the claimant was injured while pushing a patient in a wheel chair. The claimant treated with Dr. Michel Malek, who ordered an MRI which was performed on April 28, 1998. From the MRI, Dr. Malek diagnosed a lumbar disc herniation at L5-S1. Dr. Malek opined that surgery might ultimately be necessary. A workers' compensation claim was filed against the prior owner of the hospital, Olympia Fields Osteopathic Hospital. That claim was docketed as No. 99 WC 7330. That claim was still pending when the notice of adjustment of claim was filed in the instant matter (No. 01 WC 31823). Both claims were consolidated for hearing. However, separate arbitration decisions were issued.

Following conservative treatment for the April 1998 injury, the claimant returned to her regular work duties as an emergency room nurse. Upon her return to work, the claimant was under a 20-pound lifting restriction, was told to limit bending and not to transfer patients. She continued to work within those restrictions and received limited and sporadic treatment until June 2000. The claimant reported to Dr. Malek a temporary aggravation of her back due to her schedule which included long days in the emergency room.

On or about June 23, 2000, the claimant sneezed while at home and suffered an acute onset of pain in the lower back with pain radiating down the left leg. She treated with Dr. Malek in response to the sneezing injury. She reported to Dr. Malek that the pain in her lower back was so severe after sneezing that it brought her to tears. On July 13, 2000, Dr. Malek ordered an MRI which revealed the previously diagnosed herniation at L5-S1, as well as an additional herniation at L2-L3 that had not been present on the 1998 MRI. On July 19, 2000, Dr. Malek administered

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an epidural steroid injection as an alternative to surgery. On July 26, 2000, Dr. Malek released the claimant to return to work with reduced hours for one week to be followed by a resumption of her regular 36-hour per week schedule thereafter. The record contains no indication that the claimant was specifically restricted to no more than 12 hours per day.

The claimant testified that she was scheduled to work three 12-hour shifts the week ending October 28, 2000. A handwritten schedule purporting to show the claimant's schedule for the month of October 2000 was entered into evidence. The claimant confirmed that the exhibit was not an accurate representation of the schedule she actually worked that week, but was a copy of the schedule initially posted in September 2000 and did not reflect the subsequent amendments and alterations to the schedule. Payroll records entered into evidence by the employer established that the claimant worked a total of 38.5 hours in the two weeks ending October 28, 2000, and also took 36 hours of sick leave.

The claimant testified that her work on October 28, 2000, was particularly taxing and strenuous due to a staffing shortage. She testified that she was in pain throughout the day and that by the end of her shift her pain was severe. She went home without seeking treatment or completing an injury report. She testified that she told a coworker that she was in pain but could not provide the name of that individual. She also testified that she called in once she got home from work to advise the charge nurse that she was in pain and would not be returning the following day.

The claimant's supervisor on October 28, 2000, testified that the claimant never reported any type of injury to her on that date.

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Valerie Murray, one of the claimant's coworkers on October 28, 2000, testified for the claimant. She testified that she recalled working with the claimant in the emergency room on October 28, 2000, but she could not recall the specific events of that day. She testified that she did recall that one nurse was absent and they had to work with one fewer nurse than was scheduled. However, the remaining staff handled the work load without significant difficulty. She also testified that she worked side by side with the claimant and would have been present to assist the claimant whenever necessary.

On November 1, 2000, the claimant was examined by Dr. Malek. He reported the claimant's complaints of back pain after bending, lifting and twisting during recent 12-hour work shifts. On November 8, 2000, Dr. Malek noted the claimant's wish to proceed with surgery. The claimant continued to treat with Dr. Malek through the summer of 2001 while awaiting authorization for surgery.

On July 20, 2001, a new MRI was administered which, according to Dr. Malek, showed no significant changes from the MRI that was administered on July 13, 2000.

On October 18, 2001, the claimant was examined at the request of the employer by Dr. Richard Shermer. In addition to examining the claimant, Dr. Shermer reviewed the July 13, 2000, MRI and the July 20, 2001, MRI and noted no additional injury or change in condition. Based upon his comparison of the two MRI screens, Dr. Shermer opined that nothing had occurred on October 28, 2000, which changed or exacerbated the claimant's condition of ill-being.

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On July 10, 2006, the claimant was examined at her attorney's request by Dr. Charles Slack. Subsequently, Dr. Slack became the claimant's treating physician. Dr. Slack opined that the claimant's current condition of ill-being was causally related to difficult work and extra duties performed by the claimant between the beginning of October 2000 through October 28, 2000. He further opined that the claimant's sneeze incident in June 2000 did not significantly impact her condition of ill-being. Dr. Slack's opinion was rendered without reviewing Dr. Malek's treatment records, in which it had been reported that the low back pain induced by the sneeze had brought the claimant to tears. Additionally, Dr. Slack confirmed that the MRIs of July 13, 2000, and July 20, 2001, were essentially identical. He conceded that his opinion as to causation was based solely upon the claimant's subjective complaints and descriptions of her work duties on and immediately before October 28, 2000, and he did not take into account the objective findings of the two MRIs. The arbitrator rejected Dr. Slack's opinion.

The arbitrator determined that the claimant had failed to establish that she had sustained a repetitive trauma injury to her back or an aggravation of her previous injury. The arbitrator noted that the claimant had suffered a significant injury on April 14, 1998, and a second injury on June 23, 2000, when she sneezed at home. The arbitrator found, however, that there was nothing in the record to establish that the claimant's work on October 28, 2000, changed or affected her condition of ill-being. The arbitrator noted that the claimant's description of her job activities in the weeks up to and including October 28, 2000, consisted of various activities, such as standard patient care, charting, and communicating with physicians, none of which would support a

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conclusion that she had engaged in physically strenuous or repetitive activities which might have caused a new injury or an aggravation of her existing condition.

The Commission affirmed and adopted the arbitrator's findings. The claimant sought review in the Cook County circuit court, which confirmed the decision of the Commission. The claimant then appealed to this court.

DISCUSSION

As a preliminary matter we note that the appellant's brief does not contain a table of contents to the record on appeal in the appendix in violation of Supreme Court Rule 342. Ill. S. Ct. R. 342 (eff. Jan. 1, 2005). The employer seeks dismissal of the appeal as a sanction. *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 292-293 (1991). We note, as the employer acknowledges, that this court has the discretion to strike the brief and dismiss the appeal as a sanction for a violation of Rule 342, but we need not do so where the court can utilize the record on appeal without a proper table of contents. *Alderson v. Southern Co.*, 321 Ill. App. 3d 382 (2001). We admonish the claimant for the failure to comply with the rule; however, we see no need to employ the drastic measure of dismissing the appeal as a sanction.²

² The employer also maintains that the record on appeal has been dismantled and shuffled and put back together in a manner which had pages out of order, making it difficult to review and properly cite in preparation of its brief. The claimant maintains that the record was properly delivered to the employer and to this court. We note that the record on appeal was in proper order when it was reviewed by this court. We point out to both parties that the record must be maintained in accordance with Supreme Court Rule 324. Ill. S. Ct. R. 324 (eff. May 30,

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As a further preliminary matter, the employer asks this court to strike an item included in the claimant's appendix to her brief as an exhibit (Exhibit 10 for identification). The exhibit purports to be a report from Dr. Malek which imposed additional work restrictions on the claimant above those otherwise found in the record. The claimant cites to this exhibit extensively in her argument that her job duties in October 2008 were beyond those which were within her limitations and consequently established that her work in that month caused new injuries or aggravated her previous condition. The exhibit was offered in evidence at the arbitration hearing by was rejected by the arbitrator due to a lack of foundation. The exhibit was offered by the claimant without any foundation as to its authenticity, whether it met any hearsay exceptions, or whether it had been communicated to the employer at the time it was purportedly drafted.

It is well settled that an appellate court may not consider any material outside the certified record. See *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894, 898 (2000) (striking interrogatory answers which were attached to the brief but were not part of the certified record on appeal); *Jones v. The Police Board of the City of Chicago*, 297 Ill. App. 3d 922, 930 (1998) (appellate court struck supplemental appendix containing transcripts of hearing which were not part of the certified record on appeal). We find that the non-record material contained in the claimant's appendix to her appellate brief as Exhibit 10 must be stricken and that any argument based upon the stricken materials will be ignored.

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Regarding the stricken exhibit, the claimant maintains on appeal that the arbitrator and the Commission erred in striking the exhibit. We find the argument has been forfeited. There is nothing in the record to indicate that the claimant objected to the arbitrator's rejection of her proposed Exhibit 10 in her statement of exceptions addressed to the Commission. We have thoroughly reviewed the record on appeal and, other than a mere recitation of the fact that the proffered exhibit was rejected, the claimant made no argument in her exceptions to the Commission as to why the arbitrator's rejection of her exhibit was improper. The record established that the issue was raised for the first time on petition for review before the circuit court. It is well settled that matters not raised before the Commission are waived on appeal in workers' compensation appeals. *R. D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. App. 3d 397 (2005); *Anders v. Industrial Comm'n*, 332 Ill. App. 3d 501, 509 (2002) (employer waived issues on appeal which had not been raised before the Commission). Here, the claimant may not raise on appeal to this court the evidentiary ruling excluding admission of her exhibit based upon lack of proper foundation.

The only substantive issue before this court is whether the Commission erred in finding that the claimant's current condition of ill-being was not causally related to an industrial accident on October 28, 2000. Whether a current condition of ill-being is causally related to an industrial accident is a question of fact for the Commission to determine. *Jewel Food Co. v. Industrial Comm'n*, 256 Ill. App. 3d 525 (1993). The Commission's factual findings will not be overturned on appeal unless they are against the manifest weight of the evidence. *Childress v. Industrial Comm'n*, 98 Ill. App. 3d 144 (1982). A factual finding by the Commission is not against the

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manifest weight of the evidence unless the opposite conclusion is clearly apparent. *Jewel Food Co.*, 256 Ill. App. 3d at 528.

Here, it cannot be said that the Commission's finding that the claimant's condition of ill-being was not causally related to her work activities on October 28, 2000, was against the manifest weight of the evidence. The medical evidence, particularly the MRIs performed on July 13, 2000, and July 20, 2001, showed no worsening of the claimant's condition during that year, which covered October 28, 2000. Those MRIs, when compared to each other, supported a conclusion that the claimant's condition had not changed since July 2000. Thus, it was reasonable for the Commission to find that nothing the claimant did on or about October 28, 2000, aggravated her preexisting condition or created a new injury. The record supported the Commission's conclusion that the claimant's job duties on October 28, 2000, were not particularly strenuous or repetitive in nature, such that she suffered a new injury or an aggravation of her preexisting condition. The Commission determined that the claimant was in pain, but the pain was the result of her April 14, 1998, accident and the June 23, 2000, sneezing incident. Based upon the record, it cannot be said that the Commission's conclusion was against the manifest weight of the evidence.

CONCLUSION

The judgment of the Cook County circuit court, which confirmed the decision of the Commission is affirmed.

Affirmed.