

NOTICE
Decision filed 01/24/11. 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: January 24, 2011

No. 1-09-3387WC

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 JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

ANTONIO SANTAMARIA,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Appellant,)	COOK COUNTY
)	
v.)	No. 09 L 050591
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <u>et al.</u> ,)	
(BROLITE PRODUCTS, INC.,)	HONORABLE
)	LAWRENCE O'GARA,
Appellee).)	JUDGE PRESIDING.

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

O R D E R

HELD: The decision of the Illinois Workers' Compensation Commission awarding the claimant, Antonio Santamaria, permanent partial disability benefits, as opposed to permanent total disability benefits, is not against the manifest weight of the evidence.

The claimant, Antonio Santamaria, appeals from an order of the Circuit Court of Cook County, confirming a decision of the Illinois Workers' Compensation Commission (Commission) which

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awarded him, amongst other relief, 375 weeks of permanent partial disability (PPD) benefits pursuant to the Occupational Diseases Act (Act) (820 ILCS 310/1 et seq. (West 2006)) by reason of obstructive airway disease from which the claimant suffers that is causally related to his employment with Brolite Products, Inc. The claimant argues that the evidence of record establishes his entitlement to permanent total disability benefits under an odd-lot theory. For the reasons which follow, we affirm the judgment of the circuit court.

Neither party has taken issue with the facts of this case as outlined by the arbitrator and adopted by the Commission. The following is a summary of the evidence adduced at the arbitration hearing.

The claimant began working for Brolite in 1999. His duties included mixing and bagging flour products. In that process, he was exposed to flour dust.

As a result of his exposure to flour dust, the claimant contracted severe obstructive airways disease. His symptoms began in October 1999. The claimant first sought medical treatment on December 1, 1999, when he visited Dr. Ronald Pawlowski, who diagnosed bronchitis.

Throughout December 1999, and January 2000, the claimant continued under the care of Dr. Pawlowski. He also sought care from Dr. Kanakmal Jain. Dr. Jain diagnosed bronchitis.

On referral from Dr. Pawlowski, Dr. Elizabeth Schupp, a

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respiratory specialist, performed a pulmonary function test (PFT) upon the claimant on February 16, 2000. The test revealed a "severe obstructing lung defect." The claimant remained under the care of Dr. Schupp through May 3, 2000. During that period, Dr. Schupp prescribed medication and conducted a second PFT which revealed moderately severe lung obstruction. Additionally, Dr. Schupp referred the claimant to the Cook County Hospital's Occupational Medicine Clinic (Cook County Hospital) to investigate the link between the claimant's employment and his breathing problems.

On March 7, 2000, Dr. Ann Krantz of the Cook County Hospital completed her evaluation of the relationship of the claimant's occupational exposure to flour and his pulmonary condition. As a result of that evaluation, Dr. Krantz imposed the following restrictions on the claimant's work activities: no exposure to flour dust, airborne irritants such as cleaning agents, or nuisance dust from sweeping or dusting activities; no exertion greater than intermittent slow walking; and no climbing of stairs. On the advice of Dr. Krantz, the claimant stopped working for Brolite on March 13, 2000, and he never returned.

On May 22, 2000, the claimant underwent a CAT scan of his chest. The radiologist's report of that scan notes findings "compatible with a mosaic type perfusion lung pattern with evidence of air trapping." The report contains a differential diagnosis of obliterative bronchiolitis and chronic

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bronchiolitis; less likely asthma.

The claimant underwent a lung biopsy procedure which was performed by Dr. William H. Warren at the Cook County Hospital on July 21, 2000. The samples taken were evaluated on July 26, 2000, by Dr. Ponni Arun Kumar. In his report, Dr. Kumar wrote that the specimen taken from the claimant's right upper lobe was positive for "granulomatous bronchiolitis and peribronchiolitis with surrounding desquamative interstitial pneumonia, chronic inflammation and focal intrabronchial and peribronchial abscess formation." The specimen tested negative for fungal, pneumocystis and acid fast organisms with special strains, and there was no evidence of vasculitis. The specimen taken from the claimant's right middle lobe was positive for desquamative interstitial pneumonia changes with increases perivascular and pleural fibrosis. The specimen tested negative for fungal and acid fast organisms with special strains, and no inflammation was identified.

The claimant came under the care of Dr. Robert Cohen, a pulmonologist at Cook County Hospital. Dr. Cohen's working diagnosis was granulomatous bronchiolitis.

The claimant testified that, on January 14, 2001, he had difficulty breathing, experienced pain in his chest, and was running a fever. As a consequence, he went to the emergency room at St. Alexis Medical Center. Following that visit, the claimant continued under the care of Dr. Cohen.

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At Dr. Cohen's request, the biopsy samples taken from the claimant's lung and samples of flour taken from Brolite were sent to the Calgary Laboratory where they were examined by Dr. Francis Green. On April 25, 2001, Dr. Green issued an extensive report of his analysis of those samples. He diagnosed bronchocentric granulomatosis that was positive for aspergillus and peribronchial granulomatous response consistent with mixed dust pneumoconiosis. According to the report, the aspergillus organisms detected are responsible for the bronchocentric granulomatosis. The report states that the silicates found in the biopsy samples, together with some silica and other minerals found in the samples, is compatible with a diagnosis of mixed dust pneumoconiosis. However, the absence of a correlation with the dusts found in the flour samples from Brolite does not exclude an occupational exposure. Dr. Green did note, however, that the claimant came from a rural area in Mexico and had been employed in farming which has been associated with a significant accumulation of silicate minerals in the lung. Dr. Green also noted that the dusty environment in which the claimant worked "may have set up a non-specific inflammatory response with mucus production that favored the colonization with the aspergillus." He concluded, therefore, that "it seems reasonable to ascribe the development of bronchocentric granulomatosis to factors in [the claimant's] work place environment."

On July 17, 2001, Dr. Cohen authorized the claimant to work

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with certain restrictions at a hair salon. Thereafter, the claimant began work at the Salon De Belleza Mayra in Elgin, Illinois.

At the request of Brolite, the claimant was examined by Dr. Terrence C. Moisan on August 13, 2001. Dr. Moisan's note of his review of the x-rays taken of the claimant's lungs on that date states that the lung fields were generally clear. The radiologists report of those x-rays states that, other than post-surgical changes in the mid-right lung, the claimant's lungs were otherwise clear. The radiologist noted no active pulmonary disease. In a report dated August 15, 2001, Dr. Moisan opined that the claimant has bronchiolar disease with presumptive bronchocentric granulomatosis changes and severe airway obstruction. According to the report, one of the bronchiolar diseases afflicting the claimant could "remotely represent hypersensitivity pneummonitis" (HP). Based upon his findings, Dr. Moisan opined that the only work related disorder which would require exclusion is HP. He wrote that, if the disorder is not HP, he did not believe that there was any evidence of a work related aggravation of a preexisting condition. Although Dr. Moisan found that the claimant is not capable of performing his regular job duties, he opined that the claimant is capable of sedentary to light tasks. Finally, Dr. Moisan opined that the claimant had reached maximum medical improvement (MMI)

Dr. Vivian J. Renta, of Cook County Hospital's Department of

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Pathology, sent the claimant's biopsy samples for analysis to Dr. Kevin O. Leslie, a professor of pathology at the Mayo Clinic. In a letter dated November 27, 2001, Dr. Leslie wrote that he agreed with Dr. Green's observations and that he believed that the claimant has bronchocentric granulomatosis. Dr. Leslie's specific diagnosis was "[n]odular airway associated granulomas with necrosis most consistent with bronchocentric granulomatosis [and] [t]here is evidence of small airway disease and peribronchiolas mixed-dust deposition of uncertain significance."

Afer having reviewed both Dr. Green's report and Dr. Leslie's report, Dr. Moisan authored a letter dated December 10, 2001, in which he stated that the major pathophysiology affecting the claimant's health is bronchiolar obstruction from the bronchocentric granulomatosis and that it would be impossible to exclude environmental exposure to aspergillus as a possible etiology in the disorder. As of that date, however, Dr. Moisan was not clear as to whether the claimant had reached MMI, as his clinicians may wish to try other forms of therapy.

When the claimant saw Dr. Cohen on November 14, 2003, he reported an increased shortness of breath and a cough when he was exposed to cold air. Dr. Cohen continued to diagnose advanced COPD due to bronchiolitis which was occupationally induced.

The claimant testified that his condition was worsening due to the chemicals and sprays he was using at work and the fact that he was required to stand for long periods of time. As a

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consequence, he stopped working at the hair salon on December 6, 2003, and went to Mexico for a visit.

Following his return from Mexico, the claimant saw Dr. Cohen on March 9, 2004. The doctor's notes of that visit state that the claimant reported that he had been feeling "fairly well since his return to Chicago." As of that date, Dr. Cohen found the claimant's bronchiolitis to be stable.

The claimant next saw Dr. Cohen on April 20, 2004. On that date, Dr. Cohen wrote a clinical note in which he stated that the claimant has "severe disabling obstructive lung disease due to bronchocentric bronchiolitis" and that his most recent lung function tests revealed levels that barely enable the claimant to carry out the basic activities of daily living. The note states that the claimant is totally disabled and may not work. Dr. Cohen also noted that the claimant may require a lung transplant in the future.

The claimant was again examined by Dr. Moisan on July 27, 2004. In a report dated that same date, Dr. Moisan wrote that the claimant's improvement since his last examination suggests that his disease manifestation is not progressive. However, Dr. Moisan again acknowledged that the claimant has a severe functional impairment, but is, nevertheless, able to function at a sedentary level in an environment free of significant irritants or allergens, including desk duties, occasional standing, minimal walking and keyboarding. Dr. Moisan did not believe that a lung

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transplantation appeared imminent.

The claimant testified that on November 14, 2004, he had trouble breathing, was running a fever, felt nauseous, began coughing up a large quantity of phlegm, and was vomiting. As a consequence, he went to the emergency room at St. Alexis Medical Center. The claimant was admitted into the hospital from the emergency room and remained in the hospital until November 18, 2004. During that time, he was treated with parenteral antibiotics and an inhaler.

The claimant continued under the care of Dr. Cohen, who noted that he was improving but still could not perform work which required exertion. On December 20, 2004, Dr. Cohen again authored a clinical note in which he stated that the claimant has "severe disabling obstructive lung disease due to bronchocentric bronchiolitis" and that his most recent lung function tests revealed levels that barely enable the claimant to carry out the basic activities of daily living. The note again states that the claimant is totally disabled, that he may not work, and that he may require a lung transplant in the future.

At the request of his attorneys, the claimant underwent a vocational evaluation on January 17, 2005. In a report of that evaluation, David Patsavas, a vocational rehabilitation consultant, ruled out the possibility of the claimant ever returning to his prior employment with Brolite or his employment as a beautician. Based upon the claimant's age, education, work

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history, limited understanding of English, and physical limitations, Patsavas opined that there is no viable and stable labor market available to the claimant.

At the request of Brolite, Janis Flaherty, a senior vocational consultant, issued a labor market survey report on March 1, 2005, in which she outlined the claimant's education, work history, understanding of English, and physical limitations. Flaherty concluded that the claimant was qualified to perform the duties of a cashier and a security guard.

In his notes of the claimant's visits in April, August, and December of 2005, Dr. Cohen recorded the claimant's progress. On January 12, 2006, Dr. Cohen again noted that the claimant was totally disabled and could not work.

On February 20, 2006, Robert Boccaccio Jr, a colleague of Flaherty's and the director of vocational services for Medical Management Services, Inc., met with the claimant at Brolite's request. In his report of that visit, Boccaccio recommended that the claimant again be evaluated by Dr. Moisan to assess his functional abilities.

At the request of Dr. Cohen, the claimant underwent pulmonary function tests at Cook County Hospital on May 9, 2006. The results of those tests were interpreted by Dr. Charles Ojielo. In his report, Dr. Ojielo recorded an impression of severe obstructive defect and stated that there had been no significant acute response to bronchodilators.

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Dr. Moisan again examined the claimant on July 31, 2006. In his report of that visit, Dr. Moisan outlined the extent of his physical examination of the claimant and the records which he reviewed. He noted that the claimant's disease remained stable with no further deterioration. Dr. Moisan concluded that the claimant's condition would not significantly deteriorate in the future. He restated his earlier opinion that, although the claimant has a severe functional impairment, he is, nevertheless, able to function at a sedentary level in an environment free of significant irritants, allergens, or significant weather changes. Dr. Moisan noted that most office or light assembly work would seem to suffice.

In a report dated December 5, 2006, Dr. Cohen noted that the claimant had been progressing well from August until late November when he developed an increasing cough, sputum, and shortness of breath.

On June 12, 2007, Dr. Cohen administered pulmonary function tests and, in a report dated that same day, concluded that the claimant exhibited suboptimal pulmonary function consistent with a severe obstructive ventilatory defect. However, he did note significant improvement when compared to the studies performed on May 9, 2006.

When he examined the claimant on September 25, 2007, Dr. Cohen noted that, although the claimant had done well over the summer months, he had a mild exacerbation of symptoms in the

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prior several weeks. The claimant's cough worsened, and he developed green sputum.

After reviewing Dr. Moisan's report of July 31, 2006, Boccaccio issued an updated vocational report on September 26, 2007, in which he concluded that the claimant was capable of performing the duties of a counter person, cashier, or food preparer, and bench assembly, packaging and inspection work. In formulating his opinion, Boccaccio referenced Dr. Moisan's opinion that the claimant could function at sedentary to light work capacities. He also acknowledged that Dr. Moisan had restricted the claimant to working in environments free of significant irritants, allergens, or significant weather changes. In his report, Boccaccio also noted that the jobs which he found the claimant capable of performing "do exist in the greater Chicagoland area."

On February 5, 2008, Dr. Cohen noted that the claimant was walking three to four blocks without difficulty and is capable of climbing one to two flights of stairs.

At the arbitration hearing on February 27, 2008, the claimant testified that he feels fine when at home and not exerting himself. However, he experiences shortness of breath whenever he is required to carry anything. He testified that he always experiences shortness of breath and begins coughing when he wakes up. During the day he feels tired and has a pain in his lungs. According to the claimant, on a good day, he can walk

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three to four blocks at a normal pace. He testified that he can no longer run or play soccer.

Following the hearing, the arbitrator found that the claimant sustained injuries arising out of and in the course of his employment with Brolite, and awarded him 70 4/7 weeks of temporary total disability (TTD) benefits and 350 weeks of permanent partial disability (PPD) benefits for a 70% loss of use of his person as a whole. In addition, the arbitrator ordered Brolite to pay \$22,240.49 for necessary medical expenses incurred by the claimant.

The claimant filed a petition for review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission modified the arbitrator's decision and awarded the claimant 375 weeks of PPD benefits for a 75% loss of use of his person as a whole, and otherwise affirmed and adopted the arbitrator's decision.

Thereafter, 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.

Before addressing the issues raised by the claimant, we again find it necessary to comment upon a brief that fails to comply with the Supreme Court Rules. Supreme Court Rule 342 provides that an appellant's brief is to include an appendix containing, inter alia, a complete table of contents, with page

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references, of the record on appeal. That table of contents is to state, among other things: the nature of each document, order, or exhibit and is to state the names of all witnesses and the pages on which their direct examination, cross-examination, and redirect examination begin. 210 Ill. 2d R. 342. In this case, the bulk of the evidentiary material necessary to a resolution of this appeal is located between pages 24 and 506 of the record. However, instead of following the requirements of Rule 342, the claimant merely labeled these 482 pages of material as "Transcript of Proceedings on Arbitration of February 27, 2008" and "Transcript of Proceedings on Arbitration of May 22, 2008" with no further description of the testimony or documents contained therein. The claimant's table of contents of the record was thus rendered functionally useless. We again remind a litigant that Supreme Court Rules are not advisory suggestions; they are rules to be followed.

Turning to the issues raised by the claimant, he argues that he is totally and permanently disabled under an "odd-lot" theory and the Commission erred in limiting him to PPD benefits for a 75% loss of use of his person as a whole. We disagree.

In a workers' compensation case, the claimant has the burden of establishing, by a preponderance of the evidence, the extent and permanency of his injury. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843, 635 N.E.2d 770 (1994). The nature and extent of a claimant's disability is a

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question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256, 402 N.E.2d 607 (1980).

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 894 (1992). Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence when no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175 (1996).

Relying upon the opinions of his treating physician, Dr. Cohen, and his vocational rehabilitation expert, Patsavas, the claimant contends that he is entitled to permanent total disability benefits under an "odd-lot" theory. He asserts that the Commission's award of PPD benefits based upon a 75% loss of use of his person as a whole is against the manifest weight of the evidence as it is predicated upon opinions which were based upon an incorrect work-level exertion restriction or a total failure to consider his restriction against environmental exposure.

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In *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842, the supreme court held that:

"[A]n employee is totally and permanently disabled when he 'is unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations]. The claimant need not, however, be reduced to total physical incapacity before a total permanent disability award may be granted. [Citations]. Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonable stable market. [Citation]. Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. [Citation]. In determining a claimant's employment potential, his age, training, education, and experience should be taken into account. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, (1979), 77 Ill. 2d 482, 489; *E.R. Moore Co. v. Industrial Comm'n.*, (1978), 71 Ill. 2d 353, 362.

In considering the propriety of a permanent and total disability award, this court has recently stated:

'Under *A.M.T.C.*, if the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the "odd-lot" category (one who, though not altogether incapacitated for work, is

so handicapped that he will not be employed regularly in any well-known branch of the labor market [citation]), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant [citation]. [Citations]." (Emphasis removed.)

In this case, there is no disputing the fact that the claimant suffers from severe bronchocentric granulomatosis and severe airway obstruction which render him incapable of performing the duties of his employment with Brolite. Dr. Cohen was of the opinion that the claimant is totally disabled and may not work. Dr. Moisan, Brolite's examining expert, was of the opinion that, although the claimant could no longer perform the duties of his job with Brolite, he is capable of performing sedentary to light tasks, such as office or light assembly work, in an environment free of significant irritants, allergens or significant climate changes. Flaherty, one of Brolite's vocational rehabilitation experts, opined that the claimant was capable of performing a number of available jobs that she identified and which fell within the limitations outlined by Dr. Moisan. She specifically identified a cashier's job in an environment with no irritants and a security guard position in an office building "which would be free of fumes, irritants, and the like." Boccaccio, Flaherty's colleague, opined that the claimant could perform a variety of jobs which complied with the restrictions articulated by Dr. Moisan. Contrary to the

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claimant's assertion, Dr. Moisan did state that the claimant could function at sedentary or light duty capabilities. The statement can be found in Dr. Moisan's letter of July 31, 2006, which appears in the record as Brolite's Exhibit No. 6.

It was the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980). In that portion of his decision which the Commission affirmed and adopted, the arbitrator relied upon the opinions of Brolite's experts in determining that the claimant suffered a permanent partial disability as opposed to the permanent total disability advocated by his experts. Whether we might have reached the same conclusion had we acted as the trier of fact is not the test of whether the Commission's determination of the nature and extent of the claimant's disability is against the manifest weight of the evidence. Rather, the appropriate test dictates that we affirm where 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).

We believe that the reports of Brolite's experts provide more than sufficient evidence to support the Commission's decision to award the claimant permanent partial disability benefits, and contrary to the claimant's assertions, we do not find that the opinions expressed by those are premised upon incorrect work-level exertion restrictions or a total failure to

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consider his restriction against working in an environment exposing him to significant environmental irritants. For these reasons, we affirm the judgment of the circuit court, confirming the Commission's decision.

Affirmed.