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NO. 3-10-0040WC

January 25, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

Workers' Compensation Commission Division

ILLINOIS CEMENT,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	LaSalle County
THE WORKERS' COMPENSATION COMMISSION)	No. 09MR133
DIVISION (Richard Casolari, Appellee),)	
Defendant-Appellee.)	Honorable
)	James A. Lanuti,
)	Judge Presiding.

PRESIDING JUSTICE McCULLOUGH delivered the judgment of the court.

Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

ORDER

Held: The Workers' Compensation Commission (Commission) correctly found an employee's last day of exposure to harmful noise levels was the appropriate date for determining when the statute of limitations began to run in cases involving hearing-loss claims. Neither the Commission's decision that employee was exposed to harmful noise levels through the date of his last day of work for the employer nor that employee's hearing loss was causally connected to his employment was against the manifest weight of the evidence.

On December 11, 2003, claimant, Richard Casolari, filed an application for adjustment of claim pursuant to the Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 through 27 (West 2002)), seeking benefits from employer, Illinois Cement, for

hearing loss in both ears. Following a hearing, the arbitrator determined the claim was barred by the statute of limitations and claimant failed to prove his injuries arose out of and in the course of his employment.

The Commission, with one commissioner dissenting, reversed, finding the claim was timely and meritorious. It awarded claimant (1) \$1,995 in medical expenses and (2) 103.14 weeks' permanent partial disability benefits for a 54.6% loss of hearing in claimant's left ear and a 48.54% loss of hearing in claimant's right ear. The circuit court of LaSalle County confirmed the Commission's decision. Employer appeals, arguing (1) claimant's hearing-loss claim was barred by the statute of limitations and (2) the Commission's decision that claimant proved his hearing loss was causally connected to his employment was against the manifest weight of the evidence. We affirm.

Evidence showed employer is a cement manufacturer. Claimant worked for employer for 31 years, retiring on March 31, 2005. The parties are familiar with the evidence and we will discuss it only to the extent necessary to put their arguments in context.

On December 29, 2006, the arbitrator issued his decision, denying claimant benefits under the Act. He first determined claimant failed to file his application for adjustment of claim within the time limits set forth in the Act. Specifically,

the arbitrator noted claimant's "hearing loss was documented as early as 1977, more than 27 years prior to his filing of his application for adjustment of claim." Additionally, he determined claimant failed to prove exposure to noise levels that would result in a compensable loss under hearing-loss guidelines. The arbitrator noted claimant wore ear protection while working for employer and evidence showed such protection would have mitigated any harmful noise level. Additionally, the arbitrator found claimant failed to prove a causal connection between his hearing loss and his work for employer.

On July 2, 2009, the Commission, with one commissioner dissenting, reversed the arbitrator's decision. Following a detailed recitation of the evidence presented, the Commission determined that, in the context of hearing-loss claims, the pertinent date for statute of limitations purposes was the last day of harmful noise exposure, not the first date of compensable hearing loss. It found claimant proved noise at employer's facility contributed to claimant's hearing loss up to his last day of work for employer. As a result, claimant's December 2003 application for adjustment of claim was timely filed. Additionally, the Commission found claimant established a causal connection between his work and his permanent hearing loss. It awarded benefits as stated.

On appeal, employer first contends claimant's hearing-

loss claim was untimely. It argues claimant filed his application for adjustment of claim long after his exposure to harmful noise levels had ended due to his use of ear protection while working for employer.

On review, the Commission's decision will not be overturned unless it is contrary to law or based on factual determinations that were against the manifest weight of the evidence. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370, 909 N.E.2d 818, 822 (2009). Questions of law are subject to *de novo* review. *Beelman*, 233 Ill. 2d at 370, 909 N.E.2d at 822. "On questions of fact, the Commission's decision is against the manifest weight of the evidence only if the record discloses that the opposite conclusion clearly is the proper result." *Beelman*, 233 Ill. 2d at 370, 909 N.E.2d at 822.

Under the Act, the right to file an application for compensation is barred if not filed within three years "after the date of the disablement" in cases where no compensation has been paid. 820 ILCS 310/6(c) (West 2002)). With respect to hearing-loss claims, section 7(f) of the Act (820 ILCS 310/7(f) (West 2002)) states:

"No claim for loss of hearing due to industrial noise shall be brought against an employer or allowed unless the employee has

been exposed for a period of time sufficient to cause permanent impairment to noise levels in excess of the following:

Sound Level DBA

Slow Response	Hours Per Day
90	8
92	6
95	4
97	3
100	2
102	1 1/2
105	1
110	1/2
115	1/4"

In finding claimant's hearing-loss claim was timely filed, the Commission relied upon this court's decision in *Wagner Castings Co. v. Industrial Comm'n*, 241 Ill. App. 3d 584, 609 N.E.2d 397 (1993). There, the arbitrator determined the claimant's hearing-loss claim was barred by the statute of limitations, finding his application for benefits was filed in May 1986, more than three years after his last day of exposure to harmful noise levels in September 1982, when he began to continuously wear hearing-loss protection at work. *Wagner*, 241 Ill. App. 3d at 593-94, 609 N.E.2d at 404. The Commission reversed,

determining the claimant's last day of exposure to harmful noise levels was his last day of work which occurred in September 1985, making his claim for benefits timely. *Wagner*, 241 Ill. App. 3d at 593-94, 609 N.E.2d at 404.

This court found the record contained support for the Commission's finding that the claimant's last day of exposure was his last day of work for the employer rather than the date he began to consistently wear ear protection. *Wagner*, 241 Ill. App. 3d at 598-99, 609 N.E.2d at 407. We noted both that the claimant's hearing loss continued "even during the period of continuous use of the ear protection" and the claimant's testimony regarding inadequacies of his ear protection. *Wagner*, 241 Ill. App. 3d at 597-99, 609 N.E.2d at 406-07.

In this case, the Commission, found "[t]he pertinent date for the running of the statute of limitations for hearing[-]loss claims under th[e] Act *** is the last day of harmful noise exposure, not the first date of compensable hearing loss." As set forth in *Wagner*, the Commission is correct and claimant's last day of exposure to harmful noise levels determines timeliness for statute of limitations purposes.

Additionally, like in *Wagner*, the record contains support for the Commission's decision that claimant was exposed to harmful noise levels up to his last day of work for employer in March 2005. Although it is "proper to infer that an employer

would not have given an employee ear protection if it did not serve the purpose indicated, that is, to eliminate excessive noise" the possibility exists that the furnished ear protection may be inadequate. *Wagner*, 241 Ill. App. 3d at 597, 609 N.E.2d at 406. "[I]t is the province of the Commission to infer whether the presence of ear protection had an effect upon the employee's subsequent loss of hearing." *Wagner*, 241 Ill. App. 3d at 598-99, 609 N.E.2d at 407.

Here, employer argues the statute of limitations began to run in at least the mid 90s when claimant admitted he started to consistently wear ear protection while working for employer. However, readings from employer's plant showed claimant frequently worked in areas ranging from 97 to 114 decibels. Although claimant acknowledged wearing ear protection from at least the mid 90s, he testified as to the inadequacies of that protection. Claimant reported the earplugs provided by employer did not stop all the sound and he could hear differences in sound when he turned his head, opened his mouth, or chewed gum. Also he was often left without protection when he had to readjust, reinsert, or replace the earplugs. On occasion, claimant was prevented from using dual protection (required in the loudest areas of employer's plant through the use of both earplugs and earmuffs) because of the work activities he was performing. Also, the record reflects Dr. Steven Horwitz acknowledged claim-

ant's hearing loss progressed even during the period of time claimant wore ear protection at work.

Claimant's last day of work for employer was in March 2005, when he retired. His application for adjustment of claim was filed in December 2003. Claimant's hearing-loss claim was timely filed.

Evidence in the record also supports the Commission's decision that claimant's hearing loss was causally connected to his work for employer. "The issue of whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be determined by the Commission." *Freeman United Coal Mining Co. v. Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 784, 901 N.E.2d 906, 912 (2008). "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." *Freeman*, 386 Ill. App. 3d at 784, 901 N.E.2d at 912.

As discussed, claimant was continuously exposed to harmful noise levels while working for employer through the date of his retirement. Claimant testified that for several years he worked for employer in very noisy areas of its facility without wearing any ear protection. Dr. Robert Eilers opined claimant "had a sensorineural hearing loss due to significant noise exposure over the 30 or 31 years in which he had worked [for employer]." He noted no other known cause for claimant's hearing

loss and that claimant was frequently exposed to in excess of 100 decibels. Dr. Eilers testified "that type of continuous noise and exposure, particularly a number of years without hearing protection and even later with some of the hearing protection can result in the sensorineural hearing loss." Even Dr. Horwitz, who examined claimant on employer's behalf testified claimant's hearing loss was, at least partially, the result of occupational noise exposure.

Employer relies heavily on the fact that it never conceded that claimant was exposed to harmful noise levels. It points out that the employer in *Wagner* did concede that the claimant was exposed to noise that exceeded statutory limits. However, the employer's concession in *Wagner* was limited to the time period before the claimant began using ear protection. *Wagner*, 241 Ill. App. 3d at 595, 609 N.E.2d at 405. Like employer in this case, the employer in *Wagner* argued the use of ear protection brought sound levels to which the claimant was exposed below the statutory threshold for compensability. *Wagner*, 241 Ill. App. 3d at 595, 609 N.E.2d at 405. Additionally, even without a concession from employer the record supports a finding that noise levels in employer's plant exceeded 90 decibels, particularly in areas where claimant routinely worked. Readings from November 2002 show claimant was exposed to areas that ranged from 97 to 114 decibels. Further, claimant testified regarding

deficiencies in the ear protection employer provided.

Finally, employer argues that the Commission erred by relying on *Wagner* rather than following its own precedent in *Frazier v. Bridgestone*, No. 94WC26336 (January 14, 2005). However, *Frazier* is not precedential authority for this court. Also, the two cases are consistent with respect to the law applied and only distinguishable based upon their facts. The facts in the case at bar are most similar to those in *Wagner* and the Commission committed no error by relying upon that case in reaching its decision.

The Commission did not err by holding the last day of exposure to harmful noise levels is the appropriate date for determining when the statute of limitations begins to run in cases involving hearing-loss claims. Its finding that claimant was exposed to harmful noise levels through the date of his last day of work for employer was not against the manifest weight of the evidence nor was its decision that claimant's hearing loss was causally connected to his work for employer.

For the reasons stated, we affirm the circuit court's judgment, confirming the Commission's decision.

Affirmed.