

NOTICE

Decision filed 07/11/11. 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: July 11, 2011

2011 IL App (1st) 102147WC-U

No. 1-10-2147WC

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

JACK MILEWSKI,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 09-L-1788
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION and CHICAGOLAND QUAD)	
CITY EXPRESS,)	Honorable
)	Elmer James Tolmaire, III,
Defendants-Appellees_____)	Judge, Presiding.

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

ORDER

Held: The decision of the Workers' Compensation Commission finding claimant's action barred due to lack of notice to his employer is not contrary to the manifest weight of the evidence, and the Workers' Compensation Commission made no error of law in the course of so ruling by relying on *White v. Industrial Comm'n*, 374 Ill. App. 3d 907 (2007).

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¶ 1 Claimant, Jack Milewski, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2000)) seeking benefits from respondent, Chicagoland Quad City Express. The arbitrator agreed with claimant and awarded benefits under the Act. The Workers' Compensation Commission (Commission), however, denied claimant's application, finding that claimant did not provide respondent with timely notice of his work-related accident. The circuit court of Cook County confirmed the Commission's decision, and this appeal followed. For the reasons that follow, we affirm.

¶ 2 Before turning to the merits of this appeal, we will briefly address a glaring deficiency in claimant's brief. Claimant failed to include any appendix whatsoever, which needlessly hampered our review in this case. Particularly troubling is the absence of the decisions of the arbitrator, Commission, and trial court. Supreme Court Rule 342(a) states, in pertinent part: "The appellant's brief shall include, as an appendix, a table of contents to the appendix, *a copy of the judgment appealed from, any opinion, memorandum, or findings of fact filed or entered by the trial judge or by any administrative agency or its officers*, any pleadings or other materials from the record which are the basis of the appeal or pertinent to it, the notice of appeal, and a complete table of contents, with page references, of the record on appeal." (Emphasis added.) The rules of our supreme court are not mere suggestions. *Bailey v. Illinois Human Rights Comm'n*, 247 Ill. App. 3d 853, 856 (1993). Claimant's counsel would be well-advised to follow them in the future.

¶ 3 The sole issue in this appeal is whether the Commission properly denied claimant benefits under the Act due to his failure to provide respondent with notice of his accident. The issue is thus narrow, and the relevant facts are few. Claimant was employed by respondent as a truck driver. He alleged a repetitive-trauma injury to both legs that necessitated both of his knees being replaced. He

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initially alleged June 11, 2002, as the date of the accident, but later, on the advice of counsel, he changed the manifestation date of his injury to December 1, 2000. Respondent's vice president, Joe Spina, testified that he was unaware that claimant had suffered an at-work injury until he received a copy of claimant's application for adjustment of claim on May 1, 2003. He noted that no accident-report form had been completed with regard to claimant's condition, though claimant had filled out such forms in that past regarding other conditions. Spina admitted observing claimant limping at work; however, he believed this was due to a condition claimant suffers from known as Addison's disease (as a side-effect to the treatment for that disease, which includes taking steroids, claimant had experienced significant weight gain).

¶ 4 Claimant testified that he had a conversation with Jim Vavrck on November 30, 2000. Vavrck, now deceased, was respondent's owner and president at the time. Claimant testified as follows regarding the conversation: "I told him that I could not take the pain no more. Something ain't right. My knees are swollen. They are both swelling up. I just cannot go on like this, the pain is too intense." Claimant showed Vavrck his knees, and Vavrck stated: "[O]h my god. They are swollen up like hell." Vavrck, who had had one of his legs amputated, told claimant that he better see a doctor before claimant ended up like him. Claimant subsequently gave Vavrck updates about his condition. Claimant relies upon this conversation to establish notice to respondent.

¶ 5 Regarding notice, the Act requires the following:

"Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. Provided:

(1) In case of the legal disability of the employee or any dependent of a deceased employee who may be entitled to compensation under the provisions of this

Act, the limitations of time by this Act provided do not begin to run against such person under legal disability until a guardian has been appointed.

(2) In cases of injuries sustained by exposure to radiological materials or equipment, notice shall be given to the employer within 90 days subsequent to the time that the employee knows or suspects that he has received an excessive dose of radiation.

No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy.

Notice of the accident shall give the approximate date and place of the accident, if known, and may be given orally or in writing.” 820 ILCS 305/6(c) (West 2000).

Claimant contends that the conversation he had with Vavrck constituted sufficient notice to respondent such that respondent should have been required to show it was prejudiced to warrant denial of his claim. See *Gano Electric Contracting v. Industrial Comm’n*, 260 Ill. App. 3d 92, 96 (1994) (“Because the legislature has mandated a liberal construction on the issue of notice [citation] if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced”). Whether a claimant has given a respondent sufficient notice is a question we review using the manifest-weight standard. *Zion-Benton Township High School District 126 v. Industrial Comm’n*, 242 Ill. App. 3d 109, 114-15 (1993). A decision is contrary to the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *Elmhurst-Chicago Stone Co. v. Industrial Comm’n*, 269 Ill. App. 3d 902, 906 (1995). It is primarily

the role of the Commission to assign weight to evidence, assess the credibility of witnesses, and resolve conflicts in the record. *O’Dette v. Industrial Comm’n*, 79 Ill. 2d 249, 253 (1980).

¶ 6 The Commission—reversing the decision of the arbitrator—found claimant had given respondent no notice of his accident. It explained:

“[T]he Commission finds that [claimant’s] testimony was vague and failed to establish that timely notice of the accident, as required by the Act, was given. [Claimant] initially testified that the first time he noticed pain in his knees was six months before he told Mr. [Vavrick]. [Claimant] testified he believed that was in July 2001. [Claimant] was then shown [his doctor’s] initial office visit note dated December 1, 2000. That evidence prompted [claimant’s] testimony that he first felt pain in July 2000, six months before he saw [his doctor]. [Citation.] [Claimant] testified that his knees progressively worsened between July 2000 and December 1, 2000, and he would be exhausted by the end of the day. It got to the point that he had to tell Jim [Vavrick] he had to see a doctor. [Citation.] He told Jim he was having knee pain the day before he saw [his doctor] on November 30, 2002. [Sic] [Claimant] even showed Mr. [Vavrick] his swollen knees. [Claimant] had subsequent conversations with Jim giving him updates, [claimant] testified that to his knowledge, Jim was aware of his condition.

In the Commission’s view, [claimant] never testified on direct examination that he told Jim [Vavrick] he sustained an accidental injury at work due to repetitive trauma, and [claimant] failed to notify [r]espondent that the performance of his job duties was affecting his knees. [Claimant] simply testified he told Mr. [Vavrick] about the condition of his knees. It was only upon cross-examination, when [claimant] was pressed by questioning, that he

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testified he told Mr. [Vavrick] that his knee pain was related to work. [Citation.] Even then, [claimant] failed to offer any details about what he told Jim [Vavrick]. In the Commission's view, it is not possible to infer even defective notice from [claimant's] testimony.”

The Commission then expressly found Spina's testimony credible and noted that, given claimant's other conditions, the mere fact that claimant was observed limping did not “impart notice” to respondent. Additionally, the Commission found that claimant was not credible, noting that his “testimony about his job duties appear[ed] embellished” and that he was ultimately “terminated for certain falsehoods about [his] license endorsement to carry hazardous materials.”

¶ 7 The Commission expressly relied on *White v. Industrial Comm'n*, 374 Ill. App. 3d 907 (2007). *White* stands for the proposition that mere notice to an employer of some type of injury is insufficient; it is also necessary that the employer be put on notice that the injury is in some way work-related. See *White*, 374 Ill. App. 3d at 911. We note that this comports with the plain language of section 6(c) of the Act, which requires notice of an accident rather than of an injury. 820 ILCS 305/6(c) (West 2000) (“Notice of the *accident* shall be given to the employer as soon as practicable” (emphasis added)). The Commission held that claimant's conversation with Vavrick was “insufficient to prove notice of an accident.”

¶ 8 We hold that the Commission properly applied *White* to deny claimant's claim. In that case, this court held:

“Although [respondent] Freeman United knew White was injured before the date in question, the record does not show appraisal of *industrial* injuries. In fact the record tends to show the opposite. In July of 2000, Doctor D'Andrea said she did not know if White's shoulder problem was work related. White received sickness and accident benefits

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during his time off work instead of filing a workers' compensation claim and seeking temporary total disability benefits. Moreover, in May of 2001 he completed a sickness/accident form on which a box was checked stating that his back and upper extremity conditions were *not* work related. He also acknowledged that although he had filed accident reports in the past, he never filed one for his alleged accident of July 17, 2000. The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. Under the instant facts, however, Freeman United had no basis for knowing that any such accident existed to investigate.” (Emphasis in original.) *White*, 374 Ill. App. 3d at 911.

Similarly, claimant’s conversation with Vavrck—while describing claimant’s condition in detail—did not address the etiology of that condition. Thus, respondent had no reason to know that there was any tie between claimant’s condition and his employment for it to investigate. We note that the mere fact that claimant was limping could reasonably have been seen by respondent as a consequence of claimant’s Addison’s disease. Since claimant failed to provide notice, respondent was excused from showing that it was prejudiced to prevail on the notice issue. *White*, 374 Ill. App. 3d at 911.

¶ 9 Claimant attempts to distinguish *White* by pointing out that he never indicated that his condition was not work related, as the claimant in *White* did. While true, we fail to see how this meaningfully distinguishes *White*. The relevant consideration is what claimant did to put respondent on notice of an industrial accident. That claimant did nothing to dissuade respondent from learning that there had been such an accident does nothing to put respondent on notice of the work-related nature of claimant’s injury. Section 6(c) places an affirmative duty on claimant to give notice to

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respondent. 820 ILCS 320/6(c) (West 2000). Not misleading respondent does not fulfill that duty. See *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 95 (1980) (“Compliance with the [notice] requirement is accomplished by placing the employer in possession of the known facts related to the accident within the statutory period”). While a claimant who actively misleads an employer will certainly have a more difficult time proving notice, the lesson of *White* is that a claimant must “show appraisal of *industrial* injuries.” (Emphasis in original.) *White*, 374 Ill. App. 3d at 911.

¶ 10 Claimant’s protestations notwithstanding, *White* does not require a claimant to use any “magic language” to put an employer on notice of an accident. Claimant intimates that unless a claimant uses the term “industrial,” notice will be deemed inadequate. We perceive no such requirement in *White*. *White* simply holds that a claimant must apprise an employer of the industrial nature of how his or her condition developed; it does not state how that is to be accomplished. *White*, 374 Ill. App. 3d at 911. In this case, statements by claimant to the effect of “climbing in and out of that truck is getting to my knees” clearly would have sufficed. In other words, claimant’s contention that *White* requires an employer to receive “perfect notice” is ill founded.

¶ 11 Finally, claimant compares the 45-day period in which a claimant must provide notice to that limitations periods for products liability and medical malpractice cases (two years after discovery (735 ILCS 5/13—213(d) (West 2000); *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 82 (1995)). Claimant asserts that “a repetitive trauma claim has been made more difficult to file than a products liability claim or a medical malpractice claim.” Perhaps so; however, the 45-day notice period is a creature of the legislature. As it is contained in a statute, we, as a court, are powerless to change it. *In re M.M.*, 156 Ill. 2d 53, 69 (1993) (“Any alteration to the statute, regardless of any perceived benefit or danger, must necessarily be sought from the legislature”).

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Such concerns are best directed to the legislature.

¶ 12 In light of the foregoing, the decision of the circuit court of Cook County confirming the decision of the Commission is affirmed.

¶ 13 Affirmed.