

NOTICE

Decision filed 09/28/11. 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.

2011 IL App (5th) 110024WC-U

NO. 5-11-0024WC

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

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).

Illinois Workers' Compensation Commission Division

OLIN CORPORATION,  
Appellant,

v.

WORKERS' COMPENSATION COMM. *et al.*  
(Robert Gusoskey, Appellee).

) Appeal from the  
) Circuit Court of  
) Madison County.  
) No. 10-MR-178  
)  
) Honorable  
) Clarence W. Harrison II,  
) Judge, Presiding.

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 decision setting the date of the accident on October 30, 2008, was not against the manifest weight of the evidence; and the Workers' Compensation Commission's determination that employer received adequate and timely notice of claimant's injury was not against the manifest weight of the evidence.

¶ 2 On November 7, 2008, claimant, Robert Gusoskey, 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, Olin Corporation, for repetitive trauma injuries suffered to his hands and right arm on October 30, 2008.

¶ 3 Following a hearing, an arbitrator found claimant proved he sustained repetitive trauma injuries arising out of and in the course of his employment with employer on October 30, 2008.

The arbitrator awarded claimant temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits.

¶ 4 On review, the Workers' Compensation Commission (Commission) modified the arbitrator's decision by finding claimant suffered 20% loss of use of the right arm. The Commission awarded claimant TTD benefits in the amount of \$779.31 for a period of 10 and 6/7 weeks and PPD benefits in the amount of \$643.82 for a period of 183.20 weeks, representing 20% loss of use of each hand, 20% loss of use of the left arm, and 20% loss of use of the right arm. In all other respects, the Commission affirmed the arbitrator's decision.

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

¶ 6 On appeal, employer argues the Commission's (1) decision setting the date of the accident on October 30, 2008, was against the manifest weight of the evidence and (2) determination that employer received adequate and timely notice of claimant's injury was against the manifest weight of the evidence. We affirm.

¶ 7 The parties are aware of the facts taken from the evidence presented at the arbitration hearing on May 26, 2009, and they will not be reviewed in detail. Following the hearing, the arbitrator found claimant proved he sustained "work-related repetitive/accumulative trauma injuries" on October 30, 2008, and awarded claimant TTD benefits and PPD benefits. In support of his finding, the arbitrator stated:

"This is the date that Petitioner was told that his carpal tunnel was work related by a physician. Earlier he had been informed by his physician that he did not know what his condition

was. Petitioner is diabetic. Petitioner continued working and his condition worsened. Dr. Shepperson did not conclusively diagnosis Petitioner's condition or share that diagnosis with Petitioner until October 30, 2008. Causation is not in dispute. Accident date is disputed."

¶ 8 Employer filed a petition for review of the arbitrator's decisions before the Commission. The Commission modified the arbitrator's decision by finding claimant suffered 20% loss of use of the right arm. The Commission awarded claimant TTD benefits in the amount of \$779.31 for a period of 10 and 6/7 weeks and PPD benefits in the amount of \$643.82 for a period of 183.20 weeks, representing 20% loss of use of each hand, 20% loss of use of the left arm, and 20% loss of use of the right arm. In all other respects, the Commission affirmed the arbitrator's decision.

¶ 9 Thereafter, employer filed a petition seeking judicial review in the circuit court of Madison County. The circuit court confirmed the Commission's decision and this appeal followed.

¶ 10 Employer argues the Commission's decision setting the date of the accident on October 30, 2008, is against the manifest weight of the evidence. We disagree.

¶ 11 Simply because claimant's injury was not sudden does not deprive claimant of the Act's coverage. "Requiring complete collapse in a case like the instant one would not be beneficial to the employee or the employer because it might force employees needing the protection of the Act to push their bodies to a precise moment of collapse." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529, 505 N.E.2d 1026, 1028

(1987). Simply because an employee's work-related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits. *Peoria County Belwood*, 115 Ill. 2d at 529, 505 N.E.2d at 1028. The Act was intended to compensate workers who have been injured as a result of their employment. *Peoria County Belwood*, 115 Ill. 2d at 529-30, 505 N.E.2d at 1028. "To deny an employee benefits for a work-related injury that is not the result of a sudden mishap or completely disabling penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Peoria County Belwood*, 115 Ill. 2d at 530, 505 N.E.2d at 1028.

¶ 12 A claimant seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a claimant alleging a single, definable accident. *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47, 556 N.E.2d 261, 264 (1989). A claimant must prove a precise, identifiable date when the accidental injury manifested itself. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264. "Manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264. The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264. A reviewing court may overturn the Commission's factual determinations only when they are against the manifest weight of the evidence. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264.

¶ 13 Employer argues the true date of injury was August 13, 2008, the date claimant

sought treatment with Dr. Shepperson. In making this argument, employer asserts that claimant "unquestionably associated his upper extremity problems with his employment duties" on August 13, 2008.

¶ 14 In *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App. 3d 607, 531 N.E.2d 174 (1988), a case in which the claimant suffered from carpal tunnel syndrome, this court reinstated a Commission factual finding that the date the claimant's injury manifested itself was the claimant's last day of work. Although the claimant in *Oscar Mayer* clearly knew of his injury well prior to his last date of employment, having been examined and diagnosed by the employer's physician, the opinion does not relate any affirmative statement or knowledge on the part of the claimant that the injury was caused by his employment. This court held that the Commission's finding that the claimant's date of injury was his last day of work (and the day before he underwent surgery for his condition) was not against the manifest weight of the evidence. *Oscar Mayer*, 176 Ill. App. 3d at 612, 531 N.E.2d at 177. We also observed:

"Nothing we say here should be interpreted as establishing an inflexible rule. Just as we reject respondent's contention the date of discovery of the condition and its relation to the employment necessarily fixes the date of accident, we reject any interpretation of this opinion which would permit the employee to always establish the date of accident in a repetitive-trauma case by

reference to last date of work." *Oscar Mayer*, 176 Ill. App. 3d at 612, 531 N.E.2d at 177.

¶ 15 In *Peoria County Belwood*, the claimant worked on October 4, 1976, and experienced the symptoms of her injury. On October 5, 1976, she sought medical treatment and was told that her injury and its causal connection was caused by her job-related activities. The supreme court held the October 4, 1976, date was the last day the claimant worked before the fact of her injury and its causal connection became apparent to her. *Peoria County Belwood*, 115 Ill. 2d at 531, 505 N.E.2d at 1029. The supreme court reached this conclusion despite the fact that the claimant continued to work for over 10 months after October 1976. *Peoria County Belwood*, 115 Ill. 2d at 528, 505 N.E.2d at 1027. In *Three "D"*, this court found the claimant's injury manifested itself before claimant's last day of work, which was the date upon which the Commission had fixed claimant's accidental injury. *Three "D"*, 198 Ill. App. 3d at 48, 556 N.E.2d at 265. It is thus clear that a claimant's last day of exposure to repetitive trauma is not, in and of itself, the day of accident for the purposes of repetitive injury cases.

¶ 16 We note, moreover, that all of the cases discussed above showed deference to the Commission's determination of the issue. In *Peoria County Belwood*, the Commission's determination was affirmed by both the supreme and appellate courts. In *Oscar Mayer*, this court reversed the circuit court's order which had set aside the Commission's finding. In *Three "D"*, while this court found that claimant's injury manifested itself one month earlier than the Commission had, it nonetheless affirmed the Commission's award of benefits to the claimant.

¶ 17 In the instant case, claimant sought medical treatment with Dr. Shepperson on August 13, 2008, complaining of a gradual onset of bilateral wrist pain for three months and a popping in the right elbow. Claimant testified that Dr. Shepperson did not provide him with a specific diagnosis on August 13, 2008. Dr. Shepperson advised claimant that he would not be able to identify the problem until he received the EMG results. Dr. Shepperson's notes reflect that he thought diabetes was causing the carpal tunnel syndrome.

¶ 18 Claimant continued working and his symptoms continued to worsen. Claimant again sought treatment with Dr. Shepperson on October 22, 2008. An EMG/NCV test revealed bilateral carpal and cubital tunnel syndromes. On October 30, 2008, Dr. Shepperson diagnosed bilateral carpal tunnel and bilateral cubital tunnel as well as right medial epicondylitis. Claimant testified that this was the first time he was advised of the diagnoses and that they were work-related injuries. Claimant immediately advised employer of Dr. Shepperson's diagnosis, and that he had been scheduled for bilateral upper extremity surgery on November 10, 2008. Claimant also advised employer that the injuries were work-related.

¶ 19 Claimant testified that prior to his initial visit with Dr. Shepperson on August 13, 2008, he associated his upper extremity problems with his employment but was not sure. He stated that Dr. Shepperson told him on August 13, 2008, that he would not know what claimant's condition was until after the EMG study on October 22, 2008.

¶ 20 In further support, when claimant filed his application for adjustment of claim on November 7, 2008, he alleged an accident date of October 30, 2008, the date on which Dr. Shepperson diagnosed bilateral carpal tunnel and bilateral cubital tunnel as well as right medial epicondylitis, and opined that the conditions were work-related. The Commission's finding that

the manifestation date was October 30, 2008, was not against the manifest weight of the evidence.

¶ 21 Under the applicable statute, claimant was required to provide notice of the accident to employer not later than 45 days after the accident. See 820 ILCS 305/6(c) (West 2006). Claimant provided proper notice of the October 30, 2008, accident/manifestation date to employer on October 30, 2008.

¶ 22 Accordingly, the Commission's determination of the date of accidental injury in the instant case is not against the manifest weight of the evidence. Further, the Commission's determination that employer received adequate and timely notice of claimant's injury is not against the manifest weight of the evidence.

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

¶ 24 Affirmed.