2012 IL App (2d) 111021WC-U

Order filed June 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

KLOSS DISTRIBUTING, INC.,	)	Appeal from the Circuit Court
	)	of the 19h Judicial Circuit,
Appellant,	)	Lake County, Illinois
	)	
	)	Appeal No. 2-11-1021WC
v.	)	Circuit No. 11-MR-622
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al*. (Nicholas Godin,	)	Jorge L. Ortiz,
Appellee).	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.

Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's findings that the claimant sustained an accidental injury arising out of and in the course of his employment, that he was entitled to benefits under the Act, and that the employer unreasonably and vexatiously delayed payment of benefits were not against the manifest weight of the evidence.

¶ 2 The claimant, Nicholas Godin, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2008)) seeking benefits for

injuries to his lower back sustained on September 23, 2009, while working as a delivery driver employed by the respondent, Kloss Distributing, Inc. (employer). Following an immediate hearing under section 19 of the Act, the arbitrator found that the claimant sustained a work-related injury and awarded temporary partial disability (TPD) benefits from September 23, 2009, to the date of the hearing, February 9, 2010. In addition, the arbitrator found that the claimant had incurred reasonable and necessary medical expenses to the date of the hearing and was also entitled to prospective medical treatment. Additionally, the arbitrator awarded sanctions for the employer's unreasonable and vexatious delay in payment of benefits. The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission modified the wording of the decision, but otherwise affirmed and adopted the arbitrator's decision. The employer then sought judicial review of the Commission's decision in the circuit court of Lake County, which confirmed the Commission's ruling. The employer then brought this appeal.

¶ 3 The employer raises the following issues on appeal: (1) whether the Commission's finding that the claimant sustained an accidental injury arising out of and in the course of his employment was against the manifest weight of the evidence; (2) whether the Commission's findings that the claimant's current condition of ill-being is causally related to the September 23, 2009, accident was against the manifest weight of the evidence; (3) whether the Commission's decision to award past and prospective medical expenses was against the manifest weight of the evidence; (4) whether the Commission's decision to award TPD benefits was against the manifest weight of the evidence; and (5) whether the Commission's award of penalties for unreasonable and vexatious delay in payment of benefits was against the manifest weight of the evidence.

¶ 4 FACTS

¶ 5 The claimant testified that he was employed as a "Keg driver" for the employer for approximately four years. He was 22 years old at the time of the accident. His job duties included taking metal beer barrels on and off a truck at scheduled stops and to return undelivered barrels to the warehouse. He testified that he lifted approximately 80 barrels each day and that each barrel weighed approximately 170 to 175 pounds.

¶ 6 The claimant further testified that, on September 23, 2009, while putting unsold barrels into the "odd-ball" cooler, he experienced a burning sensation and a tightness in his back. He testified that this felt different from any normal aches or pains he experienced when lifting barrels. After experiencing the burning and tightness sensation, he put away the last few remaining barrels, completed some paperwork, and left for home. Approximately 20 minutes after leaving the warehouse, the claimant called a coworker, Tony McKillen, and told him that he felt pain in his back while putting barrels into the odd-ball cooler. The claimant also testified that he was unable to work out after work as was his custom. Instead, he took some Aleve and went to bed.

¶ 7 The next morning, according to the claimant's testimony, he could barely move due to back pain. He called McKillen and asked him to run his route for him that day. He then called Bob Selle, his supervisor, and told him that he injured his back the previous day while unloading barrels into the odd-ball cooler. Selle instructed the claimant to report to the warehouse to receive authorization for medical treatment at the Condell Acute Care Center (Condell) in Vernon Hills, Illinois. The claimant testified that, in accordance with Selle's instructions, he reported to the warehouse and met with Selle and Douglas Neumann, operations manager, to fill

out the accident report. Claimant noted on the accident report that he was putting barrels away on pallets when he felt his back lock up.

¶ 8 The claimant testified that he reported to Condell later that morning where a history was recorded of him reporting experiencing back pain while lifting barrels at work. He described the pain as radiating into his lower extremities. He reported that he had never experienced such symptoms prior to September 23, 2009. The clinical physician prescribed pain medication and instructed the claimant to wait 24 hours and then return to the clinic. He returned the following day, as instructed, and was placed on light duty restrictions until September 25, 2009. The restrictions included sitting only, no pushing or pulling more than five pounds, no climbing ladders or stairs, and no driving while at work. The employer provided work within those restrictions.

¶ 9 The claimant continued to work within restrictions and continued to treat at the clinic. He received an injection for pain on September 28, 2009. He participated in physical therapy. On October 2, 2009, he reported continuing pain and was prescribed additional pain medication along with a continuation of his light duty restrictions.

¶ 10 On October 6, 2009, the claimant was examined by Dr. Clarence Engstrom of the Zion Clinic, his primary care physician, who recorded a history of injury consistent with the claimant's testimony. On October 23, 2009, Dr. Engstrom ordered an MRI of the lumbar region. The MRI, which was performed on November 13, 2009, at Lake Forest Hospital, revealed a mild bulging disc at L3-L4 without stenosis, mild disc bulging and mild facet hypertrophy at L4-L5 with significant stenosis, and diffuse disc bulging at L5-S1 with mild foraminal stenosis on both sides.

¶ 11 On December 4, 2009, Dr. Engstrom referred the claimant to the Illinois Bone and Joint Clinic in Morton Grove, Illinois for further treatment. Prior to this referral, Dr. Engstrom had prescribed a serious of lumbar spine injections that the employer refused to authorize.

¶ 12 Tony McKillen testified that he was a part time floater for the employer. He stated that, although he was with the claimant when he returned to the warehouse on September 23, 2009, he parted company with the claimant and was not present at the time the claimant claimed to have experienced his injury. McKillen testified that, about 20 minutes after he left the warehouse, he received a call from the claimant telling him that he was in the odd-ball cooler and experienced pain in his lower back. McKillen also testified that he received a call the next morning from the claimant in which the claimant told him that he would probably have to run the claimant's route that day. McKillen then reported to the warehouse and, in fact, was instructed to run the claimant's route that day.

¶ 13 Mike Lullo testified that he was a field investigator for the West Bend Mutual Insurance Company, a position he had held for approximately three years. He was assigned to investigate the claimant by West Bend on October 4, 2009. On October 19, 2009, he reviewed videotapes recorded at the warehouse during the time the claimant's truck arrived until the time he left the warehouse. He testified that he then introduced himself to the claimant and spoke to Kirt Hoeckerl, one of the claimant's coworkers. On October 22, 2009, Lullo returned to the warehouse and took statements from Hoeckerl and coworkers Kyle Bryant and Dave DeKind. None of these individuals were called to testify at the hearing.

¶ 14 Lullo opined that the claimant's claim of injury was suspect because, in the videotape, the claimant appeared to walk normal and did not appear to be injured. On cross-examination, Lullo

conceded that he was not an expert in back injuries and admitted that a "heat or burning" sensation such as the claimant reported would not likely be visible on a surveillance video.

¶ 15 The surveillance video was presented at hearing. The claimant could be identified in only seven of the segments of the tape and in only one in the area of the odd-ball cooler. The arbitrator noted for the record that not all of the videotape taken of the claimant after he arrived at the warehouse was placed into evidence. The arbitrator likewise noted that the videotape failed to establish that the claimant did *not* suffer the injuries as he described.

¶ 16 Neumann testified that he was informed of the claimant's injury the day after it occurred, when Selle reported it to him. Neumann also testified that the claimant filled out an accident report which was completed on September 25, 2009. He further testified to the presence of the videotaping system which consisted of 32 motion sensor activated cameras that were connected to 2 video recording devices. Neumann also produced at the hearing his file on the claimant, which contained all the medical treatment records from Condell. In addition, he testified that the employer had been able to accommodate the claimant's job restrictions and that nothing in the claimant's file suggested that the claimant was not injured in any manner other than as he had claimed.

¶ 17 The arbitrator concluded that the claimant had sustained an accidental injury arising out of and in the course of his employment. In reaching this conclusion, the arbitrator noted that nothing in the videotape would negate the claimant's credible testimony regarding the occurrence of the accident and the medical evidence of the extent of his ill-being. The arbitrator determined that the claimant was entitled to TPD benefits based upon the fact that he was working light duty and earning less than he would have earned in his full capacity. The arbitrator also found that the

medical expenses incurred to the date of the hearing were reasonable and necessary. In addition, the arbitrator determined that the series of injections prescribed by the physicians at the Illinois Bone and Joint Clinic were reasonable and necessary, as well as continued treatment by Dr. Engstrom. The arbitrator ordered the employer to pay for such treatment. Finally, the arbitrator determined that the employer's refusal to pay for continued medical treatment for the claimant and TPD benefits was unreasonable and vexatious and ordered the employer to pay penalties pursuant to section 19(k) of the Act in the amount of $6,995.25, being 50% of the underpayment of TPD benefits and medical bills; $4,170 pursuant to section 19(l) of the Act, being $30 per day for each day such TPD benefits were unpaid; and $2,789.10 in attorney fees pursuant to section 16 of the Act.

¶ 18 The Commission affirmed and adopted the arbitrator's decision with certain additions. Specifically, the Commission elaborated upon the deficiencies in the videotape evidence. The Commission noted that the video cameras were not intended to record all movements and, in fact, only recorded intermittent views of the claimant and others who were working in or near the odd-ball cooler. Moreover, the Commission pointed out, the video did not undermine the claimant's description of the accident since the claimant did not claim that he suffered an immediate onset of disabling back pain. The tape was consistent with the claimant's testimony that he experienced a tightness and burning sensation in his lower back while lifting heavy barrels in the odd-ball cooler and that he was able to complete his work and walk out to his car without incident. It was not until the following morning, the Commission noted, that the claimant began to experience intense lower back pain. The Commission also amended the arbitrator's award regarding prospective medical treatment to require the employer to pay for

reasonable and necessary treatment by Dr. Engstrom and a specific orthopedic surgeon at Illinois Bone and Joint Clinic, Dr. Kornblatt.

¶ 19 The employer sought judicial review of the Commission's decision in the circuit court of Lake County, which affirmed the Commission's decision. This appeal followed.

¶ 20 ANALYSIS

¶ 21 1. Accident

¶ 22 The employer maintains that the Commission erred in finding that the claimant suffered an injury arising out of and in the course of his employment. The question of whether an accidental injury occurred is a question of fact for the Commission to determine, and its findings relating to the accident and its causal relationship to the claimant's injuries will not be disturbed on review unless they are against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). In order for a finding to be contrary to the manifest weight of the evidence, either an opposite conclusion must be clearly apparent, or the reviewing court must be able to determine that no rational trier of fact could concur with the Commission's determination. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563 (1993). The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002). In resolving disputed issues of fact, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999).

¶ 23 Here, the employer maintains that the only evidence that claimant injured his back while working was his own subjective testimony. Even if this were true, a claimant's declarations regarding the occurrence of an accident, particularly when given to his treating physician, can be considered evidence that the accident occurred in the manner described. *Shell Oil Co. v. Industrial Comm'n*, 2 Ill. 2d 590, 602 (1954). The claimant gave consistent descriptions of the accident when he reported it to the clinic physician at Condell and in the history he gave to Dr. Engstrom. In addition, in the instant matter, McKillen's testimony corroborates the timing of the incident, and the medical records at Condell support a conclusion that the injury occurred in the manner described by the claimant. Moreover, the claimant's description of the accident given to Dr. Engstrom remained consistent with his previous descriptions of the incident.

¶ 24 The employer maintains that the videotape evidence contradicts the claimant's description of the accident. The Commission viewed the video evidence differently, finding that the tape did not diminish the claimant's testimony regarding the accident. As the Commission specifically pointed out, nothing in the videotapes entered into evidence contradicts the claimant's testimony. Given that it is the purview of the Commission to judge credibility, there is nothing in the record to indicate that the Commission's reliance upon the claimant's description of the accident was against the manifest weight of the evidence.

¶ 25 2. Causation

¶ 26 The employer next maintains that the Commission erred in finding that the claimant's current condition of ill-being was causally related to the September 23, 2009, accident. Whether a causal connection exists is a question of fact for the Commission, and a reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence.

Navistar International Transportation Corp. v. Industrial Comm'n, 331 Ill. App. 3d 405, 415 (2002). It is the Commission's duty to resolve conflicts in the evidence, including medical opinion evidence. *Id.* For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729 (2000).

¶ 27 Specifically, the employer claims that there is no evidence linking the claimant's employment with the pathologies revealed in the MRI conducted on November 13, 2009. The employer posits that the disc bulging revealed in that MRI can only be the mild degenerative changes consistent with a physically active individual of the claimant's height, weight, and age. While this is certainly one interpretation of the medical evidence, it is not the opinion of any medical professional called to testify on behalf of the employer.

¶ 28 The medical evidence, relied upon by the Commission, established that the claimant reported to Condell with muscle tenderness and spasm, as well as a readily observable abnormal gait. The Condell treatment records also indicated that the claimant reported so much pain that he was prescribed a narcotic pain reliever, a muscle relaxant, and an anti-inflammatory. The clinical attending physician diagnosed acute lumbar strain. In addition, follow up treatment, both at Condell and with Dr. Engstrom, established that the claimant continued to suffer from extreme lumbar pain.

¶ 29 As the claimant points out, it is well recognized that one method of determining causation is by comparing the condition of a claimant prior to an accident with his condition thereafter, since proof of a state of good health prior to an injury, and a change immediately following an injury and continuing thereafter, is sufficient to establish that the claimant's current condition of

ill-being was causally related to the injury. *Kress Corp. v. Industrial Comm'n*, 190 Ill. App. 3d 72, 82 (1989). Here, the record established that the claimant suffered no lower back pain prior to the September 23, 2009, accident. The record also established that the claimant's condition of ill-being immediately followed the accident. Given the record, it cannot be said that the Commission's determination as to causation was against the manifest weight of the evidence.

¶ 30 3. Medical Expenses

¶ 31 The employer next maintains that the Commission erred in awarding past and prospective medical expenses. Whether medical expenses are reasonably required to cure or relieve the effects of a compensable injury is a question of fact for the Commission, and its decision will not be overturned unless it is against the manifest weight of the evidence. *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450 (1967). In addition, the Commission's award of prospective medical benefits will not be overturned on appeal unless the award is against the manifest weight of the evidence. *Homebrite Ace Hardware v. Industrial Comm'n*, 351 Ill. App. 3d 333, 342 (2004).

¶ 32 Here, the employer's argument against past and prospective medical expenses is based solely upon its argument that the Commission erred when it found that the claimant suffered an industrial accident and when it found that a causal connection existed between the September 23, 2009, accident and the claimant's current condition of ill-being. Since we have already affirmed the Commission's findings as to accident and causation, we reject this contention without the need for further analysis. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 33 4. TPD Benefits

¶ 34 The employer next maintains that the Commission erred in awarding TPD benefits. Section 8(a) of the Act provides in relevant part:

> "When an employee is working light duty on a part-time or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits. Temporary partial disability benefits shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of accident and the net amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working." 820 ILCS 305/8(a) (West 2008).

¶ 35 The parties stipulated to a preaccident average weekly wage of $755.42. The arbitrator found that, during the 19 6/7 weeks that the claimant had been on light duty, the difference between the average weekly amount the claimant would have been able to earn ($755.42) and the net amount which he earned in the modified light duty job ($241.87) was $513.55 and awarded TPD benefits equal to two-thirds of $513.55 or $342.37 per week. The Commission affirmed and adopted the arbitrator's award of TPD benefits in amount of $342.37 per week.

¶ 36 The employer raises two challenges to the Commission's award of TPD benefits. First, it maintains that the claimant could have worked 40 hours per week, but simply chose not to do so.

Second, it challenges the Commission's determination that the claimant earned only $241.37 per week on average. It maintains, instead, that the figure should have been $480 per week and offered time records in support of its figures.

¶ 37 The Commission rejected both of the employer's arguments. The payroll records entered into evidence showed the hours worked and the wages actually received by the claimant. These records formed the basis for the Commission's determination of the claimant's net amount earned for purposes of calculating his TPD benefit. The employer introduced time sheets which, it maintained, would have established a different net amount earned while the claimant was on light duty. The arbitrator gave little weight to those documents, finding them to be "barely legible." The weight to be accorded conflicting evidence is for the Commission to determine, and that determination will not be overturned unless it is against the manifest weight of the evidence. *Hosteny*, 397 Ill. App. 3d at 675. Here, it cannot be said that the Commission's use of the claimant's payroll records, rather than the time sheets submitted by the employer, to determine the claimant's net earnings while on light duty was against the manifest weight of the evidence.

¶ 38 As to the employer's argument that the claimant could have worked more hours than he actually did while on light duty, there was evidence indicating that the claimant incurred time off for doctor appointments, but there was no evidence to support a finding that the claimant refused any hours of work. Given the lack of support for the employer's argument that the claimant did not work all the hours he could have while on light duty, it cannot be said that the Commission's calculation of TPD benefits was against the manifest weight of the evidence.

¶ 39 5. Penalties and Attorney Fees

¶ 40 The employer last maintains that the Commission erred in awarding penalties and attorney fees. The purpose of imposing penalties and attorney fees is to expedite compensation and penalize an employer who unreasonably, or in bad faith, delays or withholds compensation due to an employee. *Continental Distribution Co. v. Industrial Comm'n*, 98 Ill. 2d 407, 456 (1983). Where delay in compensation has occurred, the employer has the burden to demonstrate that the delay was warranted. *Boker v. Industrial Comm'n*, 141 Ill. App. 3d 51 (1986). Where there has been a delay in paying compensation, the employer bears the burden of justifying the delay. *Modern Drop Forge Corp. v. Industrial Comm'n*, 284 Ill. App. 3d 259 (1996). Whether a delay is justified or not and whether penalties are therefore appropriate or not are questions of fact for the Commission, and its determinations thereof will not be disturbed upon review unless they are against the manifest weight of the evidence. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576 (1995). In reviewing the Commission's award of penalties for unreasonable and vexatious delay, the test is whether the employer's actions were objectively reasonable under the circumstances. *Consolidated Freightways, Inc. v. Industrial Comm'n*, 136 Ill. App. 3d 630 (1985).

¶ 41 Here, the employer based its decision to terminate benefits on the interpretation of the videotape by its insurance carrier. The Commission determined that reliance upon the video to justify termination of benefits was unreasonable. As the arbitrator noted, the videotape did not contradict the claimant's description of the accident. The claimant testified that, even though he experienced the burning sensation and tightness in his back while working in the cooler, it was not until the following morning that he experienced the debilitating pain. The videotape was

consistent with that testimony. Additionally, the arbitrator noted that the employer's decision was made without the benefit of any medical examination or opinion supporting the decision. Given the inconclusive nature of the videotape and the lack of any other evidence upon which to base its decision to terminate benefits, the Commission found that the employer's decision to terminate benefits unreasonable. Based upon our review of the record, it cannot be said that the Commission's finding that the employer's actions were not objectively reasonable was against the manifest weight of the evidence.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the Lake County circuit court, which confirmed the Commission’s decision.

¶ 44 Affirmed.