2012 IL App (4th) 110532WC-U

Order filed September 19, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| DONALD KLINGELE, | ) | Appeal from the Circuit Court |
| | ) | of the 8th Judicial Circuit, |
| Appellant, | ) | Adams County, Illinois |
| | ) | |
| | ) | Appeal No. 4-11-0532WC |
| v. | ) | Circuit No. 10-MR-142 |
| | ) | |
| THE ILLINOIS WORKERS' COMPENSATION | ) | Honorable |
| COMMISSION *et al*. (Fierge Auto Parts, | ) | Thomas J. Ortbal, |
| Appellees). | ) | Judge, Presiding. |

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JUSTICE HOLDRIDGE delivered the judgment of the court.

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

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**ORDER**

¶ 1 *Held*: The Commission's determination that the claimant was entitled only to a permanent partial disability benefit equal to the loss of 2% of the person as a whole resulting from an accidental injury arising out of and in the course of his employment on December 20, 2003, was not against the manifest weight of the evidence.

¶ 2 The claimant, Donald Klingele, filed four separate applications for adjustment of a claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)) seeking

benefits for injuries he alleged to have sustained arising out of and in the course of his employment as an automobile mechanic while employed by the respondent, Fierge Auto Parts. The four applications listed accident dates of December 20, 2003, April 11, 2006, May 16, 2006, and June 21, 2007. The four claims were consolidated for a single hearing, following which the arbitrator found that the claimant sustained a soft tissue injury arising out of and in the course of his employment on December 20, 2003, and awarded medical expenses incurred between December 20, 2003, and February 5, 2004, and a permanent partial disability (PPD) benefit equal to the loss of use of 2% of the person as a whole. The arbitrator found that the claimant had failed to meet his burden on the issues of causal connection and notice as to the other three claims. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission), which unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Adams County, which reversed the Commission's findings as to notice but confirmed the Commission's ruling as to all other issues. The claimant then brought this appeal.

¶ 3 The sole issue on appeal is whether the Commission's decision that the claimant failed to carry his burden of proof as to date of accident, causation, and nature and extent of injury was against the manifest weight of the evidence and contrary to law.

¶ 4 The employer is represented by two different law firms. The firm of Brady, Connolly & Masuda, P.C. maintains that the Commission's finding that the December 20, 2003, accidental injury resulting in only a 2% loss of use of the person as a whole was not against the manifest weight of the evidence. The firm of Livingstone, Mueller, O'Brien & Davlin, P.C. maintains that

the Commission's entire award is neither contrary to law nor against the manifest weight of the evidence.

¶ 5 FACTS

¶ 6 The claimant, a 33-year-old auto mechanic, testified that he had been employed since March 26, 2001, by Fierge Auto Parts, a used car dealer. The claimant's job duties included the general tasks of an auto mechanic. The claimant testified that he was injured while working underneath a Ford Expedition on December 20, 2003. The claimant was lying underneath the vehicle on a creeper, attempting to hook up a 140-pound transfer case when the case slipped off of the jack and fell toward him.[1] The claimant testified that the transfer case struck him with a glancing blow to the left side of his body. He also testified that he notified his supervisor immediately of the accident.

¶ 7 The claimant first sought treatment at Vance Chiropractic on December 22, 2003. He followed up at Vance on December 30, 2003, with complaints of thoracic pain. He then sought treatment on December 31, 2003, at Quincy Medical Group, where he was examined by Dr. Timothy Jacobs. Dr. Jacobs diagnosed thoracic strain and muscle spasms, prescribed anti-inflammatory and pain medication, and ordered the claimant off work for two days. Dr. Jacobs then referred the claimant to Dr. Philip Wilson, an occupational medicine specialist at Quincy Medical Group. Dr. Wilson diagnosed thoracic strain, continued pain and anti-inflammatory medication, and allowed the claimant to return to work with a 45-pound lifting restriction.

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[1] A "transfer case" is part of a four-wheel-drive or all-wheel-drive system that connects the transmission to the front and rear axles by means of two drive shafts. It is also referred to as a "transfer gear case," "transfer gearbox" or "jockey box."

During a follow-up examination on February 5, 2004, Dr. Wilson noted that the claimant was completely asymptomatic and released him to return to full duty without restrictions. Dr. Wilson advised the claimant to return for examination if necessary. The claimant returned to his regular job as an auto mechanic.

¶ 8 On August 3, 2004, the claimant returned to Dr. Jacobs with complaints of middle back pain. The claimant told Dr. Jacobs that he must have injured his middle back while being bounced around at a water park the week before. Dr. Jacobs diagnosed thoracic somatic dysfunction and prescribed anti-inflammatory medication and instructed the claimant to follow up if needed.

¶ 9 On September 3, 2004, the claimant sought treatment with Dr. David Arndt, also a practitioner at Quincy Medical Group. Dr. Arndt's treatment notes show the claimant told him he injured his back while putting up insulation over the weekend. The claimant told Dr. Arndt that he "wanted to figure out why his back kept going out on him." Dr. Arndt ordered X-rays of claimant's thoracic spine, which appeared to Dr. Arndt to be normal. Dr. Arndt prescribed anti-inflammatory medication and suggested that the claimant follow up with his primary care physician or a chiropractor if the pain persisted.

¶ 10 On January 24, 2005, the claimant sought treatment at Vance Chiropractic where he was examined by Dr. Scott Stiffey. Dr. Stiffey's treatment notes indicate that the claimant gave a history of lumbar pain while lifting some heavy objects the previous Saturday. The treatment records also indicate that the claimant sought chiropractic treatment on a weekly basis until April 4, 2005. During this time, the claimant reported right hip, right leg, and lumbar pain to Dr. Stiffey.

¶ 11 On April 13, 2005, the claimant sought treatment from Dr. Paul Smucker of the Orthopedic Center of Illinois. Dr. Smucker's treatment notes establish that the claimant reported developing pain in the thoracic lumbar region approximately six months prior. Dr. Smucker diagnosed thoracic lumbar pain and suspected possible right leg radiculopathy. He prescribed anti-inflammatory medication and physical therapy and ordered an MRI. The claimant attended physical therapy from April 18, 2005, through June 2, 2005.

¶ 12 On November 2, 2005, the claimant returned to Dr. Arndt with complaints of continued middle back pain. Dr. Arndt continued anti-inflammatory medication and ordered a second round of physical therapy. The claimant underwent this second round of physical therapy from November 3, 2005, through January 17, 2006.

¶ 13 On December 1, 2005, the claimant was examined by Dr. Richard Noble, a primary care physician at Quincy Medical Group. Dr. Noble diagnosed low thoracic spine pain and ordered an MRI of the lower spine, which he interpreted as unremarkable. The claimant treated again with Dr. Noble on December 23, 2005, at which time he diagnosed intermittent thoracic/lumbar back pain, prescribed anti-inflammatory and pain medication as needed, and suggested a six-month follow up. On March 9, 2006, Dr. Noble prescribed hydrocodone for pain.

¶ 14 On March 29, 2006, according to Quincy Medical Group treatment notes, the claimant had an appointment with Jane Peterson, a nurse practitioner. At that appointment, the claimant reported severe right hip pain commencing approximately one week prior. An MRI of the right hip was secured at that time, but the results were interpreted as unremarkable.

¶ 15 On April 11, 2006, the claimant was examined by Dr. George Crickard, III, an orthopedic surgeon at Quincy Medical Group. Dr. Crickard suspected that the claimant's current back and

right hip pains might be originating in the lumbar region and ordered an MRI at that location. He subsequently interpreted the MRI as demonstrating a disc protrusion at L4-L5 that was compressing the nerve root at L5. Dr. Crickard then referred the claimant to Dr. Arden Reynolds, a fellow orthopedic surgeon at Quincy Medical Group, for a surgical consultation. The claimant's attorney, Mr. Boshardy, subsequently filed an application for adjustment of claim, maintaining that this examination by Dr. Crickard on April 11, 2006, was the date of manifestation of the claimant's repetitive trauma claim.

¶ 16 Dr. Reynolds initially examined the claimant on April 26, 2006, at which time he diagnosed L4-L5 radiculopathy and stenosis due to a large disc protrusion. He recommended a neural foraminal block. On May 4, 2006, the claimant saw Dr. Reynold's nurse practitioner, Kim Matticks, and gave her a history that included a description of the December 20, 2003, incident.

¶ 17 On May 16, 2006, the claimant contacted Deborah Dougherty, the employer's office manager, and reported that his diagnosed radiculopathy, stenosis, and disc protrusion were the result of his December 20, 2003, accident. Dougherty filled out an accident report with May 16, 2006, as the date of accident notification and a date of accident as January 4, 2004, not December 20, 2003, as the claimant maintained he verbally reported to Dougherty. Mr. Boshardy subsequently filed an application for adjustment of claim on the claimant's behalf, maintaining that May 16, 2006, was a date of manifestation of a repetitive trauma injury.

¶ 18 On May 25, 2006, the claimant sought a second opinion from Dr. Kenneth Smith, a neurosurgeon at St. Louis University School of Medicine. Dr. Smith recommended discectomy without fusion.

¶ 19 The claimant returned to Dr. Reynolds who performed the fusion surgery on July 28, 2006. On August 17, 2006, the employer's insurance adjuster secured a recorded statement from the claimant in which he stated that he had consistently experienced low back pain following the December 20, 2003, incident. He indicated that, because he was treating with so many physicians simultaneously, it took the professionals over two years to determine what was causing his low back pain. He also told the adjuster that he had right leg tingling prior to meeting with nurse practitioner Peterson in March 2006. He told the adjuster he believed that the disc surgery was related to the December 20, 2003, accident.

¶ 20 Following an unremarkable recovery period after surgery, Dr. Reynolds released the claimant to return to work with a permanent 50-pound push/pull restriction. Based upon these restrictions, it was determined that the claimant was no longer able to work as a auto mechanic. The claimant reported that he found another job a few months later.

¶ 21 The claimant testified that, in performing his job duties as a mechanic, he was required to bend and twist in various positions throughout his work day. He also testified that his job duties required him to constantly use hand tools such as wrenches, sockets, and ratchets in a repetitive, twisting motion. The job also required the lifting of various amounts of weight.

¶ 22 Dr. Reynolds opined that claimant's surgery was not causally related to the December 20, 2003, accident. However, he did opine that the disc hernia which resulted in the need for surgery was causally related to the repetitive nature of the claimant's employment. Dr. Reynolds was asked a hypothetical question in which he was to assume that "over the next couple of years [the claimant] had had periods of upper back pain but no mention of any low back pain and that the first mention of any lower back pain and hip pain was on March 29, 2006, when he complained

of right hip pain, and was diagnosed with a right hip osteoarthritis, and that on April 11, 2006, he presented to Dr. Crickland with right leg and lower back pain." Given those assumptions, Dr. Reynolds testified that the repetitive aspects of the claimant's work activities as an auto mechanic could have aggravated a cynovial cyst and caused the L4-L5 herniation.

¶ 23 The opinion of Dr. Reynolds was impeached when he acknowledged that he had not reviewed any prior medical records and that his causation opinion was based ultimately on a three-minute conversation with the claimant's attorney regarding the claimant's job duties.

¶ 24 On June 21, 2007, the claimant discharged his prior attorney and retained John Boshardy. The claimant testified that the first time he became aware that his current condition of ill-being of his lower back could be due to work-related activities was when he met with Mr. Boshardy on June 21, 2007. Bohsardy filed another application for adjustment of claim in which it was alleged that June 21, 2007, was the date of manifestation of a repetitive trauma claim.

¶ 25 On December 18, 2007, at the request of the employer's insurance carrier responsible for the December 20, 2003, claim, the claimant was examined by Dr. Daniel Kitchens, a board-certified neurosurgeon. After examining the claimant, taking a complete history from the claimant, and reviewing the claimant's complete medical records, Dr. Kitchens opined that, as a result of the December 20, 2003, work injury, the claimant suffered a soft tissue injury to his thoracic spine. Dr. Kitchens further opined that the most likely cause of the claimant's disc herniation was not related to repetitive trauma but rather to the specific lifting incident that occurred in January 2005, which correlated with the onset of the claimant's right hip and leg complaints.

¶ 26 At the request of the employer's insurance carrier responsible for the three later claims, the claimant was examined by Dr. Stephen Delheimer, a board-certified neurosurgeon. Dr. Delheimer concurred in Dr. Kitchen's opinion that the December 20, 2003, work accident had resulted in a soft tissue injury. Dr. Delheimer further opined that the effects of the December 20, 2003, accident had completely resolved by February 4, 2004. He also opined that there was no causal relationship between the claimant's employment and his herniated disc and resulting surgery. It was Dr. Delheimer's conclusion that the claimant's hernieated disc was the result of degenerative disc disease completely unrelated to his employment and was not related to any repetitive trauma.

¶ 27 The arbitrator found that, as a result of the December 20, 2003, accident, the claimant had sustained a soft tissue injury which completely resolved after a month of conservative treatment. The arbitrator found that the claimant had suffered a permanent loss of 2% of the use of the person as a whole as a result of that accident. The arbitrator further found that the claimant's symptoms of pain due to radiculopathy and herniation only began following the January 2005 lifting incident. Adopting the causation opinions of Drs. Kitchens and Delheimer, the arbitrator found no causal connection between the claimant radiculopathy and disc herniation, either as a result of the December 20, 2003, accident or as the result of any repetitive trauma causation as opined by Dr. Reynolds. The arbitrator also found, without any elaboration or discussion, that the claimant had failed to provide sufficient notice of a repetitive trauma claim.

¶ 28 The Commission affirmed and adopted the arbitrator's decision. The circuit court found that the claimant had provided sufficient notice of a repetitive trauma claim but nonetheless found that the Commission's determination that the claimant failed to establish that his current

condition of ill-being was causally related to his employment was not against the manifest weight of the evidence. The claimant then filed the instant appeal.

¶ 29 ANALYSIS

¶ 30 1. Causation Under a Repetitive Trauma Claim

¶ 31 The claimant maintains that the Commission erred in its conclusion that he had failed to establish he sustained a compensable repetitive trauma injury. The claimant argues the repetitive nature of his work duties aggravated a preexisting degenerative disc condition and was a causative factor of his lumbar disc bulging and his need for disc surgery. A claimant bears the burden of showing that a preexisting condition was aggravated by his employment and that the aggravation occurred as a result of an accident which arose out of and in the course of his employment. *Lawless v. Industrial Comm'n*, 96 Ill. 2d 260, 269 (1983). It is for the Commission to determine, as a matter of fact, whether a preexisting condition has been aggravated, and that determination will not be overturned unless it is against the manifest weight of the evidence. *General Electric v. Industrial Comm'n*, 89 Ill. 2d 432, 438 (1982). Even under a repetitive trauma concept, the claimant must establish that the injury was related to his employment. *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 476 (1987).

¶ 32 Repetitive trauma claims generally rely upon medical testimony to establish the causal connection between the work performed and the claimant's disability. *Nunn*, 157 Ill. App. 3d at 477. In cases where the repetitive trauma is alleged to aggravate a preexisting condition, medical opinion testimony is particularly crucial to the question of causation since the ultimate question is whether the claimant's work activities have adversely effected an already deteriorated physical condition. *Nunn*, 157 Ill. App. 3d at 478.

¶ 33 The claimant maintains that his treating physician, Dr. Reynolds, provided sufficient medical opinion testimony to establish that the repetitive nature of his job duties aggravated his preexisting degenerative disc disease and was a causative factor in his need for disc surgery. He maintains that the hypothetical posed to Dr. Reynolds, and his response thereto, was more than sufficient to establish causation. Moreover, he maintains that the Commission's rejection of Dr. Reynolds's opinion based upon his cursory understanding of the claimant's job duties was an inappropriate inference from the record. He claims that the Commission arbitrarily rejected Dr. Reynold's testimony based upon a finding that his knowledge of the claimant's job duties was based upon a short three minute-conversation with the claimant's attorney. He maintains further that both Drs. Kitchens and Delheimer had opinions that were based upon an equally incomplete understanding of the claimant's job duties and, thus, their opinions should not have been greater weight by the Commission.

¶ 34 A review of the record, however, establishes that the Commission's determination that the claimant's current condition of ill-being was not the result of repetitive trauma was not against the manifest weight of the evidence. Ultimately, the conflict here is between two competing medical opinions as to causation, with Dr. Reynolds opining that a causal connection existed between the claimant's lumbar back disc herniation and his employment, while Drs. Kitchens and Delheimer opined otherwise. Both opinions as to causation had some weight. Dr. Reynolds was the claimant's treating physician and had extensive knowledge of the claimant's medical history. His answer to the hypothetical question contained sufficient facts to support his causation determination. His understanding of the claimant's job duties was called into question, but it does not appear that the Commission arbitrarily rejected his opinion solely on that basis. Drs.

Kitchens and Delheimer were called upon by the employer specifically to render an opinion as to causation. Both were given a complete and extensive medical history and were aware, at least to some extent, of the claimant's job duties. Both were aware of the claimant's degenerative disc condition and both were specifically asked if the claimant's herniation was causally related to his employment. Both opined that the claimant's condition was not the result of work-related repetitive trauma. Both particularly noted the timing of the onset of the claimant's radiculopathy immediately after an episode of heavy lifting in January 2005. Both opined that the cause of the claimant's current condition of ill-being was traceable to the January 2005 incident.

¶ 35 It is the function of the Commission alone to determine the weight to be accorded to evidence, to weigh competing medical opinions, and to draw reasonable inferences from the evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 411 (1984). When different reasonable inferences can be drawn from the facts, the inferences drawn by the Commission will be accepted unless they are against the manifest weight of the evidence. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182 (2001). Here, the Commission exercised its proper function and simply found the opinions of Drs. Kitchens and Delheimer to be more persuasive on the issue of causation than the opinion of Dr. Reynolds. It appears that the Commission was persuaded, as were Drs. Kitchens and Delheimer, by the timing of the manifestation of the claimant's hip, leg, and low back pain only after the non-work related lifting incident in 2005. There is nothing in the record which would lead to a conclusion that the Commission's findings and inferences were against the manifest weight of the evidence or in any way contrary to law.

¶ 36 2. Permanent Partial Disability

¶ 37 The claimant seems to maintains that the Commission's award of PPD benefits of 2% of the person as a whole following the December 20, 2003, injury was erroneous as it failed to take into account his current lumbar spine condition. There are conflicting indications in the record as to whether the claimant challenged the Commission's findings regarding the December 20, 2003, injury. During the hearing, the claimant testified that he believed his current condition was causally related to the December 20, 2003, accident. However, the record indicates that, in addition to Drs. Kitchens and Delheimer, Dr. Reynolds also opined that the December 20, 2003, accident was not responsible for the claimant's current condition.

¶ 38 The employer has filed a brief supporting the Commission's finding that the claimant suffered a thoracic sprain resulting in a finding that he suffered a permanent partial disability equal to 2% of the person as a whole. The employer points out that a determination as to the nature and extent of a claimant's disability is a question of fact, and the Commission's findings on those issues will not be set aside on appeal unless they are against the manifest weight of the evidence. *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353 (1978).

¶ 39 Here, the overwhelming weight of the evidence supports the Commission's conclusion that the claimant suffered a soft tissue injury to his thoracic spine on December 20, 2003. No physician opined that the December 20, 2003, injury had any relationship to the claimant's condition of ill-being as it existed after February 4, 2004. The Commission's finding was supported by the reports of Drs. Kitchens and Delheimer, as well as the claimant's treating physician, Dr. Reynolds, all of whom reported that the December 20, 2003, incident had no bearing on the claimant's subsequent low back problems. Based upon the extensive evidence in

support of the Commission's determination, it cannot be said that the determination to award the claimant 2% of the person as a whole in compensation for the injury sustained on December 20, 2003, was against the manifest weight of the evidence.

¶ 40 3. Notice of Repetitive Trauma Injury

¶ 41 The Commission determined that the claimant had failed to give adequate notice of his repetitive trauma claim to the employer. The circuit court held that the Commission's finding as to notice was contrary to the manifest weight of the evidence. Neither party has addressed this issue in its briefs to this court. We note, however, that since the Commission's determination that the claimant had failed to establish that he was entitled to benefits under a repetitive trauma theory, the issue of notice of a repetitive trauma claim is moot. *Hartsfield v. Industrial Comm'n*, 241 Ill. App. 3d 1055, 1065 (1993).

¶ 42 CONCLUSION

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

¶ 44 Affirmed.