

NOTICE
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2012 IL App (5th) 110287WC-U

NO. 5-11-0287WC

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).

WORKERS' COMPENSATION COMMISSION DIVISION

ESTATE OF MILDRED BURNS,) Appeal from
Appellant,) Circuit Court of
v.) Franklin County
WORKERS' COMPENSATION COMM., <i>et al.</i>) No. 10MR42
(Consolidation Coal Co., Appellee).)
) Honorable
) Melissa A. Drew,
) Judge Presiding.

PRESIDING JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held:* (1) The Commission's finding with respect to the issue of notice was not against the manifest weight of the evidence and (2) the Commission's award of benefits was not against the manifest weight of the evidence.

¶ 2 On March 22, 2005, Mildred Burns, the surviving spouse of Thomas Burns, filed an application for adjustment of claim pursuant to the Workers' Occupational Diseases Act (Diseases Act) (820 ILCS 310/1 to 27 (West 2004)), seeking benefits from decedent's employer, Consolidation Coal Company. Mildred Burns died on January 18, 2006.

¶ 3 After a hearing on August 12, 2009, an arbitrator found claimant, the estate of Mildred Burns, proved decedent suffered from coal workers' pneumoconiosis (CWP) and chronic obstructive pulmonary disease (COPD), including emphysema, arising out of and in the course of

his employment with employer. The arbitrator awarded claimant benefits in the amount of \$496.24 per week "until \$250,000 has been paid or 20 years have passed, whichever is greater" and burial expenses.

¶ 4 Employer filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On review, a majority of the Commission affirmed and adopted the arbitrator's decision.

¶ 5 Thereafter, employer filed a petition seeking judicial review in the circuit court of Franklin County. On July 1, 2011, the circuit court vacated the award finding claimant failed to provide notice to employer within 45 days after the death of decedent on June 7, 2002, as required by the Workers' Compensation Act (Compensation Act) (820 ILCS 305/6 (West 2004)). The court remanded to the Commission "to enter a decision consistent with these findings."

¶ 6 This appeal followed.

¶ 7 The issues are: (1) whether the 45-day notice provision of the Compensation Act governs the instant claim filed pursuant to the Diseases Act and (2) whether the award was against the manifest weight of the evidence.

¶ 8 In a decision filed with the Commission on October 7, 2009, the arbitrator found Dr. Cohen to be a credible witness. Further, the arbitrator found Dr. Perper's findings more consistent with the autopsy report. The arbitrator concluded that claimant suffered from CWP and occupationally related COPD, including emphysema. Decedent's occupational lung diseases were a causative factor in his death. With regard to notice, the arbitrator found claimant provided employer proper notice of decedent's death on March 22, 2005, stating:

"The materials submitted from the federal claim indicate litigation

was ongoing prior to death. No prejudice has been shown by any delay. Dr. Tuteur examined Mr. Burns and pathology and records were available."

¶ 9 Employer filed a petition for review of the arbitrator's decision before the Commission. A majority of the Commission affirmed and adopted the arbitrator's decision. In support of the arbitrator's finding regarding notice, the Commission stated:

"The Arbitrator found that Respondent received notice of this coal workers' pneumoconiosis (CWP) death claim via the Application, which was filed pursuant to the Occupational Diseases Act on March 22, 2005. The Arbitrator also found that Respondent was not prejudiced by the timing of this filing. In making these findings, the Arbitrator correctly noted that the materials relating to the federal Black Lung claim showed that 'litigation was ongoing' prior to the decedent's death on June 7, 2002. Respondent's pulmonologist and internist, Dr. Tuteur, examined the decedent and conducted pulmonary function testing on October 13, 2000. It is difficult to see how Respondent could claim prejudice based on the timing of the death claim when it was afforded an opportunity to fully explore the decedent's claimed CWP well in advance of his death. *** The Commission also notes that Dr. Naeye, the pathologist on whom Respondent relied in defending this claim, reported his findings concerning the autopsy tissue slides to

Respondent's counsel on April 20, 2003, less than a year after the decedent's death.

Respondent argues that the 45-day notice provision of the Illinois Workers' Compensation Act governs this claim but has cited no case law in support of this argument. The argument ignores the legislature's clear intent to treat the issue of notice more liberally in occupational disease claims than in injury claims."

¶ 10 Thereafter, employer filed a petition seeking judicial review in the circuit court of Franklin County. On July 1, 2011, the circuit court vacated the award finding the Compensation Act required claimant to provide notice to employer within 45 days after the death of decedent on June 7, 2002.

¶ 11 We first address whether the 45-day notice provision of the Compensation Act governs the instant claim filed pursuant to the Diseases Act. Employer argues there is no specific provision of the Diseases Act requiring a surviving spouse to provide notice of a worker's death to the employer. Therefore, employer argues section 7 of the Diseases Act (820 ILCS 310/7 (West 2004)) mandates the application of section 6 of the Compensation Act (820 ILCS 305/6 (West 2004)), requiring notice of an accident to employer within 45 days after the accident.

¶ 12 A reviewing court may overturn a Commission decision only if it finds that the decision was contrary to law or that the fact determinations made in rendering the decision were against the manifest weight of the evidence. *Hamilton v. Industrial Comm'n*, 203 Ill. 2d 250, 254, 785 N.E.2d 839, 841 (2003). The first issue before us is one of pure statutory interpretation and our

review proceeds *de novo*. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 232, 756 N.E.2d 822, 827 (2001).

¶ 13 The fundamental rule of statutory interpretation is to ascertain and effectuate the legislature's intent. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503-04, 732 N.E.2d 528, 535 (2000). Because statutory language, given its plain and ordinary meaning, is the best indication of this intent, we turn to the Diseases Act. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 342, 770 N.E.2d 177, 189 (2002).

¶ 14 Section 7 of the Diseases Act is titled "Compensation and benefits as provided by the Workers' Compensation Act" and states, in part:

"If any employee sustains any disablement, impairment, or disfigurement, or dies and his or her disability, impairment, disfigurement or death is caused by a disease aggravated by an exposure of the employment or by an occupational disease arising out of and in the course of his or her employment, such employee or such employee's dependents, as the case may be, shall be entitled to compensation, medical, surgical, hospital and rehabilitation care, prosthesis, burial costs, and all other benefits, rights and remedies, in the same manner, to the same extent and subject to the same terms, conditions and limitations, except as herein otherwise provided, as are now or may hereafter be provided by the 'Workers' Compensation Act' for accidental injuries sustained by employees arising out of and in the course of their

employment (except that the amount of compensation which shall be paid for loss of hearing of one ear is 100 weeks) and for this purpose the disablement, disfigurement or death of an employee by reason of an occupational disease, arising out of and in the course of his or her employment, shall be treated as the happening of an accidental injury." 820 ILCS 310/7 (West 2004).

Employer argues that the language of section 7 means that where there is no specific provision of the Diseases Act requiring a surviving spouse to provide notice of a worker's death to the employer, claimant is subject to "the same terms, conditions and limitations *** as are now or may hereafter be provided by the 'Workers' Compensation Act'." This argument ignores the context of the above quoted language. Section 7 of the Diseases Act stands for the narrow proposition that an employee injured under the Diseases Act will receive the same compensation as a worker injured accidentally under the Compensation Act. The legislature did not relist all the possible injuries and their corresponding awards in the Diseases Act but simply referenced the Compensation Act within section 7 of the Diseases Act. Accordingly, the language in section 7 of the Diseases Act (820 ILCS 310/7 (West 2004)) does not mandate the application of section 6 of the Compensation Act (820 ILCS 305/6 (West 2004)), requiring notice of an accident to employer within 45 days after an accident.

¶ 15 Further, section 6 of the Diseases Act (820 ILCS 310/6 (West 2004)) specifically addresses (1) notice and (2) time limitations for filing an application for compensation under the Diseases Act. Section 6 states, in part:

"There shall be given notice to the employer of disablement

arising from an occupational disease as soon as practicable after the date of the disablement. If the Commission shall find that the failure to give such notice substantially prejudices the rights of the employer the Commission in its discretion may order that the right of the employee to proceed under this Act shall be barred.

In case of 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 in this Section of this Act provided shall not begin to run against such person who is under legal disability until a conservator or guardian has been appointed. 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 or she is unduly prejudiced in such proceedings by such defect or inaccuracy. Notice of the disabling disease may be given orally or in writing. In any case, other than injury or death caused by exposure to radiological materials or equipment or asbestos, unless application for compensation is filed with the Commission within 3 years after the date of the disablement, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred. If the

occupational disease results in death, application for compensation for death may be filed with the Commission within 3 years after the date of death where no compensation has been paid, or within 3 years after the last payment of compensation, where any has been paid, whichever is later, but not thereafter." 820 ILCS 310/6 (West 2004).

¶ 16 The plain language of section 6 requires notice to an employer of *disablement* arising from an occupational disease as soon as practicable after the date of the disablement. In the instant case, claimant did not file an application for compensation based on disablement but for compensation based on decedent's death. See *Owens Corning Fiberglas Corp. v. Industrial Comm'n*, 198 Ill. App. 3d 605, 613-14, 555 N.E.2d 1233, 1238 (1990) (claimant had an independent cause of action for decedent's work-related death under the Diseases Act). Section 6 of the Diseases Act directs that an "application for compensation for death may be filed with the Commission within 3 years after the date of death where no compensation has been paid, or within 3 years after the last payment of compensation, where any has been paid, whichever is later, but not thereafter." 820 ILCS 310/6 (West 2004). We will not depart from the plain statutory language by reading into it exceptions, limitations, or conditions not expressed by the legislature. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 212, 909 N.E.2d 783, 802 (2009).

¶ 17 Mildred Burns filed her application for compensation for death on March 22, 2005, after the death of decedent on June 7, 2002. Given the plain language of the statute, claimant satisfied the requirements for filing an application for compensation for occupational disease resulting in death.

¶ 18 While the claim in the instant case is not a claim pursuant to the Compensation Act, we find our discussion in *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 731 N.E.2d 795 (2000), helpful to our analysis. In *Illinois Institute of Technology*, the decedent was killed by a stray bullet while working. *Illinois Institute of Technology*, 314 Ill. App. 3d at 152, 731 N.E.2d at 798. His widow filed an application for adjustment of claim for death benefits pursuant to the Compensation Act. *Illinois Institute of Technology*, 314 Ill. App. 3d at 152, 731 N.E.2d at 797-98. The claimant initially filed her application on behalf of her husband but was allowed to amend the application at arbitration to state her claim as a widow. *Illinois Institute of Technology*, 314 Ill. App. 3d at 153, 731 N.E.2d at 799. The employer argued the application was barred because the claimant failed to amend the application or file a claim on her own behalf within the applicable statute of limitations period. *Illinois Institute of Technology*, 314 Ill. App. 3d at 159, 731 N.E.2d at 804. This court found the employer "clearly received notice" on the date the claimant filed her application. *Illinois Institute of Technology*, 314 Ill. App. 3d at 159, 731 N.E.2d at 804. The employer knew the claimant's husband was dead and further, "employer is presumed to be aware of workers' compensation laws and to know claimant was seeking death benefits." *Illinois Institute of Technology*, 314 Ill. App. 3d at 159, 731 N.E.2d at 804. Further, the court found "the date of the accident and how it occurred were all in the application and within employer's knowledge." The employer had all the information necessary to apprise it of the nature of the claim, the bases for the claim, and to defend the claim. *Illinois Institute of Technology*, 314 Ill. App. 3d at 159, 731 N.E.2d at 804. This court concluded:

"[D]efendant had all the information available to research,

investigate, and defend the claim filed by claimant. *** Employer had notice of the claim and, in fact, had been defending it for several years." *Illinois Institute of Technology*, 314 Ill. App. 3d at 160, 731 N.E.2d at 804-05.

¶ 19 In the instant case, Mildred Burns filed her application for compensation for death on March 22, 2005, after the death of decedent on June 7, 2002. Employer clearly received notice on the date claimant filed her application. The application furnished employer all the information necessary for employer to prepare a defense to the claim. The Commission's finding that employer received notice of the instant claim "via the Application, which was filed pursuant to the Occupational Diseases Act on March 22, 2005" was not against the manifest weight of the evidence. See *S&H Floor Covering, Inc. v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 259, 264, 870 N.E.2d 821, 825 (2007) ("The findings of the Commission regarding notice will not be disturbed on review unless they are against the manifest weight of the evidence").

¶ 20 Claimant next argues the Commission's finding that decedent suffered an occupational disease is not against the manifest weight of the evidence. We agree.

¶ 21 "[I]t is the province of the *** Commission to weigh the evidence and draw reasonable inferences therefrom in the first instance, and we will not overturn its findings simply because a different inference could be drawn." *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245 (1981). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972). "Before a reviewing court may overturn a decision of the *** Commission, it must find that the award was contrary to law or that the Commission's

factual determinations were against the manifest weight of the evidence." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 188 Ill. 2d 243, 245, 720 N.E.2d 1063, 1065 (1999).

¶ 22 In this case, the Commission affirmed and adopted the arbitrator's decision. The arbitrator noted that although decedent's heart condition "was definitely a serious health concern," the medical testimony established that the heart and lungs worked together. Dr. Cohen opined that decedent suffered from emphysema and CWP of sufficient severity to cause reductions in his pulmonary function and significantly contribute to his death. Dr. Cohen's opinion was in accord with the statutory presumption found in the Act. See 820 ILCS 310/1(d) (West 2004). Dr. Perper found (1) CWP simple, moderate to severe with micronodules and macronodules, mixed coal dust and silicotic types and birefringent silica crystals; (2) centrilobular emphysema, moderate to severe; (3) sclerosis of intra-pulmonary blood vessel consistent with pulmonary hypertension and cor pulmonale; and (4) acute bronchopneumonia. On November 23, 1999, Dr. Sanjabi found decedent's chest x-ray positive for CWP. Further, the arbitrator did not find the opinions of employer's experts "to be consistent with each other, persuasive, or consistent with treater opinions or the medical authorities on the topic." Based on the record before us, the Commission's finding that decedent suffered an occupational disease is not against the manifest weight of the evidence.

¶ 23 Claimant argues that the Commission's finding that claimant proved decedent suffered disablement within two years after the last day of the last exposure to the hazards of the occupational disease is not against the manifest weight of the evidence. See 820 ILCS 310/1(f) (West 2004). Whether a claimant has provided sufficient evidence of disablement is a question of fact for the Commission, and its decision in this regard will not be reversed unless it is against

the manifest weight of the evidence. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 263 Ill. App. 3d 478, 486, 636 N.E.2d 77, 82 (1994).

¶ 24 Decedent was last exposed to coal-mine dust on November 30, 1985, and he died on June 7, 2002. The death certificate listed right lower lobe pneumonia and pneumoconiosis as the causes of death. The final anatomic diagnosis was CWP, right lower lobe pneumonic consolidation, bilateral marked pleural adhesions, and severe COPD. Dr. Westerfield interpreted a chest film from 1986 as positive for CWP category 1/1, with abnormalities in the mid and upper lung zones. Dr. Sanjabi saw decedent on November 23, 1999, noting cough with sputum production for at least 15 years. Dr. Cohen found decedent suffered symptoms consistent with chronic lung disease including cough, sputum production, dyspnea, and wheezing beginning in the early 1980s. Further, physical examinations beginning in 1986 consistently showed signs of chronic lung disease. Dr. Cohen believed CWP and emphysema were present in decedent when he left mining. The evidence supports the Commission's conclusion that decedent's disablement occurred within the statutory two-year period.

¶ 25 For the reasons stated, we reverse the judgment of the Franklin County circuit court and reinstate the decision of the Commission.

¶ 26 Circuit court judgment reversed; Commission decision reinstated.