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2013 IL App (1st) 113277WC-U

Order Filed: February 4, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

TOMASZ WOREK,)	Appeal from the Circuit Court
)	of Cook County, Illinois
Appellant,)	
)	
v.)	Appeal No. 1-11-3277WC
)	Circuit No. 10-L-51662
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Mission Control Systems,)	Sanjay T. Tailor
Appellee).)	Judge, Presiding

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, and Turner concurred in the judgment.
Justice Stewart specially concurred.

ORDER

¶ 1 *Held:* The Commission's finding that the claimant failed to establish that he suffered injuries arising out of and in the course of his employment was not against the manifest weight of the evidence. The Commission's evidentiary and procedural rulings were not contrary to law.

¶ 2 The claimant, Tomasz Worek, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2002)) seeking benefits for injuries he claimed to have sustained on August 3, 2009, while working as an electrical technician for Mission Control Systems (employer). Following a section 19(b) hearing requested

by the employer, the arbitrator found that the claimant had failed to establish by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment on August 3, 2009. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission affirmed and adopted the arbitrator's decision with additional comments regarding the lack of credibility of the claimant. The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

¶ 3 The claimant raises the following issues on appeal: (1) whether the Commission's finding that the claimant failed to establish that he suffered an accidental injury arising out of and in the course of his employment on August 3, 2009, was against the manifest weight of the evidence; (2) whether the employer's stipulation that the claimant's current condition of ill-being was causally connected to an accident on August 3, 2009, barred the Commission's finding to the contrary; (3) Whether the employer's claims adjuster, Monica Schooler, made statements regarding the claimant's alleged accident on August 3, 2009, which constituted admissions by the employer; and (4) whether the Commission's decision to permit the employer to proceed first at the hearing impermissibly prejudiced the claimant.

¶ 4 **FACTS**

¶ 5 This case was heard on the employer's "reverse" 19(b) petition and claimant's petition of penalties and attorney fees. The employer, going forward with its case, called James Palumbo, who testified that he had been employed by the employer for four years. Palumbo testified that on August 3, 2009, he worked in the control panel shop. The claimant arrived at work around 9 a.m. Palumbo and the claimant worked together on that day installing control panels in

machinery. Palumbo testified that he and the claimant would lift a panel, he on one side of the panel and the claimant on the other side. He testified that the panels each weighed approximately 100 to 150 pounds and that he and the claimant lifted several panels that morning without incident. Specifically, Palumbo testified that he did not observe the claimant give any indication that he injured himself while lifting the panels. He did not see the claimant wince in pain, stumble, or fall. He did not see any object strike the claimant, nor did he hear the claimant complain about any pain. Palumbo acknowledged that he did not watch the claimant all day long.

¶ 6 Palumbo also testified that several months after August 3, 2009, he was approached by claimant at the shop. The conversation was brief but, during the conversation, the claimant said to Palumbo: "I'm going to need you on this one." On cross-examination, Palumbo acknowledged that the phrase "I'm going to need you on this one" was subject to several interpretations and that it did not specifically indicate that the claimant was asking him to lie about his compensation claim.

¶ 7 The claimant testified on direct examination as an adverse witness. He testified that he sustained an injury to his lower back on the morning of August 3, 2009, while installing control panels with Palumbo. He testified that he reported the incident immediately to his supervisor, Arthur Chin. The claimant further testified that on August 3, 2009, he arrived for work at 9 a.m., approximately two hours late. Shortly after starting work, he asked Palumbo to help him lift a box from the floor onto a tabletop. When they lifted the box, he felt excruciating pain that shot from his lower back down through his left leg. He testified that he did not mention the pain to Palumbo, but he reported it to Chin immediately after they broke for lunch at noon. Claimant

told Chin that he injured himself at work and that he could not stand the pain, so he was going to go home. He left work around 2 p.m. that afternoon.

¶ 8 The claimant was questioned about any injuries to his lower back prior to August 3, 2009. He testified that he treated with a chiropractor approximately six years previously for back pain. He had also received treatment for back pain approximately two years prior from Dr. Michael Zindrick at Hinsdale Orthopedic Associates. He did not remember any specifics regarding Dr. Zindrick's treatment, only that he sought treatment for "minor back pain." The claimant was questioned regarding his completing medical history documentation for the employer's group medical insurance and the fact that he had not listed any of his prior treatment for low back pain in his medical history. He testified that, at the time he filled out the history, he was feeling fine and did not believe it was necessary to report his prior minor back pain.

¶ 9 Medical records from Dr. Zindrick were admitted into evidence. Those records established that the claimant had significant discogenic cervical and lumbar pain that the claimant reported as ongoing for the previous five years. The records further indicate that Dr. Zindrick prescribed a program of physical therapy and sought a diagnostic MRI. The record does not indicate whether the claimant complied with these recommendations.

¶ 10 The claimant testified that he called work the following day, but he did not recall to whom he spoke. The following day, he called again and spoke to Scott Medford, the owner of the business. He did not seek treatment until August 6, 2009, when he sought treatment from Dr. Victor Forys. He delayed in seeking treatment because he thought the pain would subside if he did nothing. The claimant testified that Dr. Forys gave a diagnosis of disc herniation. The claimant then sought treatment from Dr. Jesse Butler and Dr. Bruce Montella. The claimant

testified that Drs. Butler and Montella had been suggested to him by his attorney. He later changed his testimony to indicate that Dr. Forsys had referred him to Drs. Butler and Montella. Neither Dr. Butler's nor Dr. Montella's medical records were entered into evidence.

¶ 11 Arthur Chin testified that he was the claimant's supervisor on August 3, 2009. He testified that the claimant did not report to him that he had suffered any type of accident on that day or any other day. Chin testified that the claimant left work early on August 3, 2009, but did not give any reason for leaving early. Chin testified that the claimant often arrived late or left early and that the employer was very lenient about when employees arrived or departed work. Chin further testified that, although he was present in the room where the claimant was working, he did not witness the claimant suffering an accident, nor did any of the claimant's coworkers report witnessing the claimant suffer any injury. Chin testified that he only learned several days later that the claimant maintained that he had injured himself at work.

¶ 12 Jimmy Toland, a coworker, testified that several days prior to August 3, 2009, the claimant had questioned him regarding his apparent back injury. Toland told the claimant that he had injured his back in a nonwork-related injury that resulted in a herniated disc. Toland testified that, upon hearing this, the claimant shook his head, smiled and left. Toland thought that the claimant's conduct was peculiar since he and the claimant were not friends. He also found it peculiar that the claimant then claimed to be injured at work shortly after the conversation. On cross-examination, Toland admitted that the conversation and the claimant's subsequent injury claim may have been a mere coincidence.

¶ 13 Monica Schooler, claims adjustor for the employer's insurance carrier, the Hartford Insurance Company of Illinois, testified that she was the adjustor assigned to the claimant's case.

She testified that she initially approved payment of TTD and medical benefits but, as she gathered additional information, she determined that the claim required further investigation. She learned of the claimant's prior history of back pain and treatment, including the possibility that he may have undergone some type of low back surgery approximately two years prior to being employed by the employer. The record indicated that the claimant, in fact, had not undergone low back surgery. At Schooler's recommendation, TTD benefits continued to be paid up to the date of the arbitration hearing.

¶ 14 The record indicates that the claimant was examined at the request of the employer by Dr. Avi Bernstein. However, the record does not contain documentation regarding Dr. Bernstein's examination of the claimant. Schooler testified that Dr. Bernstein opined that the claimant suffered from a preexisting low back condition.

¶ 15 The arbitrator found that the claimant had failed to establish by a preponderance of the evidence that an accidental injury arising out of and in the course of the claimant's employment had occurred on August 3, 2009. Specifically, the arbitrator concluded that the claimant most likely had a preexisting back injury which resulted in a herniated disc. However, the claimant had failed to establish the "work-related" nature of that condition and that his condition of ill-being was related to a specific accident occurring on August 3, 2009. The arbitrator found that the claimant was not truthful in describing the events of August 3, 2009. The arbitrator noted that the claimant's description of the events of that day were directly contradicted by the testimony of Palumbo and Chin. The arbitrator found the testimony of those two witnesses to be credible and the claimant to not be credible. Commenting on the claimant's lack of credibility, the arbitrator made note of the fact that the claimant failed to report his previous medical

treatment on his insurance application and his description of his prior condition as "minor back pain" despite the lengthy treatment for "severe cervical and lumbar pain" reported by Dr. Zindrick. Additionally, the arbitrator found it likely that the claimant had, in fact, suggested to Palumbo that he lie regarding the events of August 3, 2009, when he stated "I'm going to need you on this one." Similarly, the arbitrator found that the claimant's conversation with Toland regarding his back injury was "quite suspicious." Finally, the arbitrator noted that he found the claimant's mannerisms and demeanor while testifying to be indicative of a lack of truthfulness.

¶ 16 The claimant appealed the arbitrator's decision to the Commission. The Commission affirmed and adopted the decision of the arbitrator, deferring to the arbitrator's assessment of the claimant's credibility and noting additional evidence undermining his claim. Specifically, the Commission noted that the claimant provided no testimony to establish that he was pain or symptom free when he arrived for work on the morning of August 3, 2009, nor did he provide any testimony regarding his activities during the weekend immediately preceding that date. Regarding the claimant's lack of credibility, the Commission also made note of the fact that the claimant contacted his attorney on August 4, 2009, and did not contact a physician until the following day. The Commission commented that "[t]his circumstance is not necessarily inherently suspicious but, in this case, is not explained."

¶ 17 The Commission also rejected the claimant's argument that, because the respondent had stipulated to causation, it was precluded from challenging causation at the hearing. The Commission "acknowledge[d] that [employer] stipulated to causation but finds this stipulation to be without significance, given that [employer] clearly placed accident in dispute" in the request for hearing entered as Arbitration Exhibit 1.

¶ 18 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

¶ 19 ANALYSIS

¶ 20 1. Accident and Causation

¶ 21 The claimant argues that the Commission's finding that he failed to prove a causal connection between the August 3, 2009, alleged work accident and his current condition of his lower back was against the manifest weight of the evidence. To establish causation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Moreover, an accidental injury must be traceable to a definite time, place, and cause. *Interlake Steel Co. v. Industrial Comm'n*, 136 Ill. App. 3d 740, 743 (1985). Thus, even before there can be a consideration of whether an accidental injury arose out of and in the course of a claimant's employment, the claimant must first prove that there was a work-related accident, *i.e.*, a specific unforeseen event connected to his or her employment which gave rise to the injury. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 188 (1999). Whether a causal connection exists between a claimant's condition of ill-being and a specific work-related accident is an issue of fact to be decided by the Commission. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434 (2011).

¶ 22 In determining questions of accident and causation, 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, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07 (1984); *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). A reviewing court may not substitute its judgment for that of the Commission on these issues merely because other inferences may be drawn from the evidence. *Berry*, 99 Ill. 2d at 407. The Commission's findings will not be overturned unless they are against the manifest weight of the evidence (*Tower Automotive*, 407 Ill. App. 3d at 434), *i.e.*, unless the record discloses that an opposite conclusion is "clearly apparent." *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992); see also *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729-30 (2000).

¶ 23 The claimant maintains, correctly, that his own testimony alone may be sufficient to establish that an industrial accident occurred. *Old Ben Coal v. Industrial Comm'n*, 198 Ill. App. 3d 485, 492 (1990). However, in order for the claimant's testimony to establish that an accident occurred, that testimony must be found to be credible. *Greater Peoria Mass Transit District v. Industrial Comm'n*, 81 Ill. 2d 38, 41 (1980). Here, the Commission found the claimant to be particularly lacking in credibility. Recognizing that credibility is a determination uniquely within the province of the Commission, we cannot say that the Commission's finding that the claimant was not credible was against the manifest weight of the evidence.

¶ 24 2. Stipulations

¶ 25 The claimant next maintains that the Commission's finding that he failed to establish that his injuries were caused by an industrial accident occurring on August 3, 2009, is against the manifest weight of the evidence because the employer stipulated to causation. The claimant maintains that the Commission does not have the power to issue a decision that contradicts binding stipulations agreed to by the parties. See *Walker v. Industrial Comm'n*, 345 Ill. App. 3d

1084, 1088 (2004). At issue in this matter is whether the employer entered into a binding stipulation that prevented the Commission from finding that the claimant failed to establish that he sustained an accidental injury arising out of and in the course of his employment. We find that the Commission was not prevented from adjudicating this question.

¶ 26 The request for hearing form entered into evidence as Arbitration Exhibit 1 contained the following preprinted statement: "2. Petitioner claims that, on the above date, he or she sustained accidental injuries or was last exposed to an occupational disease that arose out of and in the course of employment." Immediately below that statement, the form indicated a space for the employer to agree or dispute that statement, along with a blank to provide a reason if the employer disputed the statement. On the exhibit at issue herein, the employer marked the space indicating that it disputed the above statement, with the reason for the dispute given as "coworker witness testimony." The form next contained the following: "3. Petitioner claims his or her condition of ill-being is causally connected to this injury or exposure." Immediately below that statement, the form indicated a space for the employer to agree or dispute that statement. On the exhibit at issue herein, the employer marked the space indicating that it agreed with the previous statement.

¶ 27 We find the claimant's argument to be without merit. We agree with the Commission's finding that the request for hearing form at issue indicates that the employer disputed whether an industrial accident occurred on August 3, 2009, and that it intended to introduce coworker eyewitness testimony to dispute the claim. The stipulations can be reasonably read to indicate that the employer disputed whether an accident occurred on August 3, 2009, but, if the Commission found otherwise, the employer would not challenge the allegation that the claimant's

current condition of ill-being was causally connected to "this injury or exposure." The Commission interpreted the stipulations to indicate that the employer disputed the claimant's contention that he suffered an accidental injury on August 3, 2009. We find that Commission's interpretation of the evidence was not erroneous.

¶ 28 3. Judicial Admissions

¶ 29 The claimant next maintains that the Commission's determination was erroneous because it failed to give consideration to certain admission allegedly made by Monica Schooler. Whether a statement given by a party or its agent in an adjudicatory proceeding constitutes a judicial admission is a question to be reviewed *de novo*. *Elliott*, 303 Ill. App. 3d at 187. Reviewing the matter *de novo*, we find no error by the Commission.

¶ 30 A judicial admission is defined as a deliberate, clear, unequivocal statement by a party about a concrete fact within the party's knowledge. *Crittenden and Jimmy's Place v. Cook County Comm'n on Human Rights*, 2012 IL App (1st) 112437 ¶ 45. Here, we find none of the criteria for a judicial admission are present. First, Schooler's statements regarding whether an accident occurred were neither clear nor unequivocal. The record established that Schooler testified that she authorized payment of benefits while she continued to investigate the claim, not because she was convinced the claim was valid, but because she believed that benefits should be provided while the claim was being investigated. Second, to the extent that Schooler made statements regarding whether the claimant's injuries could be attributed to an accident on August 3, 2009, her statements were her opinions or conclusions, not statements of concrete fact within a party's direct knowledge. Finally, there is no evidence that Schooler, as an employee of the employer's insurance carrier, was a party to the proceedings. The claimant has provided no

authority to support his contention that a claims adjuster for an employer's insurance carrier is an agent of the employer for purposes of establishing that the adjuster's statements constitute judicial admissions. We find no support for the claimant's contention that the Commission erred in failing to consider Schooler's statements to be judicial admissions against the employer.

¶ 31 Similarly, we must reject the claimant's contention that Schooler's statements constituted evidentiary admissions. See *International Harvester Co. v. Industrial Comm'n*, 169 Ill. App. 3d 809, 812 (1988). Assuming, *arrguendo*, that any of Schooler's statements could be considered evidentiary admissions, the weight to be accorded any evidence and the inferences therefrom are within the purview of the Commission. *Id.* Given the record at issue herein, it cannot be said that the Commission's weighing of the content of Schooler's testimony and the inferences drawn therefrom were against the manifest weight of the evidence such that the opposite conclusion was clearly apparent.

¶ 32 4. Order of Proceeding

¶ 33 The claimant last maintains that the Commission erred in permitting the employer to proceed first at the arbitration hearing. The claimant maintains that, as the party with the burden of proof, he had an absolute right to proceed first. *National Bank of Aledo v. Olson*, 143 Ill. App. 3d 965, 969 (1986); *Liptak v. Security Benefit Ass'n*, 350 Ill. 614 (1932). He also cites Supreme Court Rule 233 which provides in relevant part: "The parties shall proceed at all stages of the trial *** in the order in which they appear in the pleadings unless otherwise agreed by all parties or ordered by the court." (Ill S. Ct. Rule 233 (eff. July 1, 1975)) . Rule 233 further provides: "In consolidated cases, third party proceedings, and all other cases not otherwise provided for, the court shall designate the order." *Id.*

¶ 34 The claimant maintains that he was unduly prejudiced by the arbitrator allowing the employer to proceed first at the hearing as it made it easier for the employer to attack his credibility. We find no error in the Commission's allowing the employer to proceed first at the arbitration hearing. The matter was brought for hearing before the Commission on the employer's motion pursuant to section 19(b) of the Act, wherein the employer sought an adjudication of its continuing obligation to pay benefits. As the moving party, the employer had the burden of going forward with evidence in support of its motion. However, the ultimate burden of proving entitlement to benefits under the Act must always remain with the claimant. *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 530 (2006).

¶ 35 The record reveals that the parties discussed which party should proceed first and, after this discussion, the arbitrator determined that the employer should proceed first. The record indicates that the claimant did not object to the arbitrator's order. We find that the arbitrator's order comports with the provisions of Rule 233 that allow the court to order the order of the proceeding. Moreover, we must reject the claimant's contention that the order of the proceedings prejudiced him by making it more difficult for him to appear to be testifying credibly. We can find nothing in the record to indicate that the Commission's perception of the claimant's credibility was influenced by the order the evidence was presented.

¶ 36 CONCLUSION

¶ 37 The judgment of the Cook County circuit court, which confirmed the Commission's decision, is affirmed.

¶ 38 Affirmed.

¶ 39 JUSTICE STEWART, specially concurring:

¶ 40 I concur in the result reached by the majority, but write separately on the issue of whether the Commission erred by allowing the employer to present its evidence first at the reverse 19(b) hearing in this case. I agree with the majority that the claimant waived the issue in this case by not objecting to this procedure at arbitration, and I concur on that basis. However, in my view, since the claimant has the burden of proof, the appropriate order of proceeding would allow him to present his evidence first, regardless of which party initiated the proceeding.

¶ 41 Notably, the parties disputed who has the burden of proof. The employer argued in its brief that in a reverse 19(b) hearing it is the employer's burden to prove that the claimant is not entitled to benefits under the Act. The claimant argued that he had the burden of proving that he is entitled to benefits and should have been allowed to present his evidence first. Curiously, the majority holds that the claimant has the burden of proof, but that the employer has the burden of going forward with the evidence. I am at a loss to understand why the employer would have the burden of going forward with the evidence if it has no burden of proof. What is the point of requiring or allowing the employer to present evidence first if it has no evidentiary obligation to meet before the claimant must prove his case?

¶ 42 It should be noted that this is an unpublished decision with no precedential value. However, since it will be available on the supreme court's website, I am concerned that it

will cause arbitrators to adopt a procedure always allowing the employer to proceed first in a reverse 19(b) hearing. In my view, in the absence of agreement or waiver, this would be error.