

Workers' Compensation  
Commission Division  
Filed: December 23, 2013

No. 1-13-0256WC

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT  
WORKERS' COMPENSATION COMMISSION DIVISION

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NATIONAL FREIGHT INDUSTRIES,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	
	)	No. 12-L-50830
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, <i>et al.</i> ,	)	
(Richard Brooks,	)	Honorable
	)	Margaret Brennan,
Appellee).	)	Judge Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Presiding Justice Holdridge and Justices Hudson, Harris, and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* The decision of the Workers' Compensation Commission finding, that the claimant's condition of ill-being was caused by the workplace accident, was not against the manifest weight of the evidence.

¶ 2 National Freight Industries (National) appeals from the circuit court's order confirming the decision of the Illinois Workers' Compensation Commission (Commission) which awarded benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) to the claimant, Richard Brooks, for a neck injury he suffered while in National's employ. For the reasons that

follow, we conclude that the Commission's decision that the claimant's current condition of ill-being was caused by the workplace accident is not against the manifest weight of the evidence. We therefore affirm the judgment of the circuit court and remand the matter to the Commission for further proceedings.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing of July 19, 2011.

¶ 4 The claimant, a truck driver for National, testified that, on October 23, 2007, he fell about three feet to the ground when he missed the first step while exiting his truck. At the time, he was in Rochester Hills, Michigan, where he was delivering goods to a Trader Joe's store. He landed in a sitting position, jerked back, hit his head on the ground, and temporarily lost consciousness. After he regained consciousness, he went inside the store and an employee drove him to the emergency room at Crittenden Hospital, where he was admitted and treated for three days. The emergency room physician's report, dated October 24, 2007, states that the claimant complained of blurry vision and "discomfort into his neck and his upper back." The report further states that he had "mild discomfort to palpation of his cervical spine and that is paraspinal but not midline along with upper thoracic area." Cervical spine x-rays showed no fracture or significant cervical spine abnormality. Dr. Das Kareti examined the claimant during his hospital stay and reported that he had tightness and spasms "involving posterior cervical muscles" and that his "cervical movements [were] slightly limited."

¶ 5 After returning home, the claimant first saw Dr. Armita Bijari on November 15, 2007, for a neurological evaluation. Dr. Bijari noted that the claimant complained of persistent neck pain, headache, and dizziness upon bending. Dr. Bijari ordered an MRI exam and told the claimant not

to work, drive, or climb ladders until she received his test results. The MRI, dated November 21, 2007, revealed a disc herniation at C6-C7 with narrowing of the right aspect of the central canal and a small disc herniation at C5-C6. After the MRI, the claimant saw Dr. Bijari several more times and underwent physical therapy treatment beginning on November 30, 2007.

¶ 6 On December 10, 2007, Dr. Bijari noted that the claimant had returned to work and now reported worsening low back pain in addition to his neck pain. She ordered an MRI of his lumbar spine and advised that he continue physical therapy. A December 18, 2007, physical therapist's report states that the claimant reported less frequent headaches and less dizziness but that he still demonstrated "restricted soft tissue mobility in his cervical spine \*\*\* and decreased scapular and shoulder stability in addition to pain." The therapist recommended that the claimant continue with physical therapy treatment. On December 26, 2007, Dr. Bijari saw the claimant and recommended that he continue with physical therapy and referred him for a pain management evaluation.

¶ 7 On January 8, 2008, the claimant saw Dr. Antoine Chami, who recommended steroid injections to treat his neck pain. On January 26, 2008, the claimant received a cervical steroid injection from Dr. Neeraj Jain. In a follow-up report, physician assistant Bethany Stork wrote that the claimant reported about a 50% improvement in his neck pain after the first injection. Dr. Jain administered a second injection on March 5, 2008. The claimant testified that the steroid injections provided him with "minor" relief for approximately five days, but that his neck pain worsened over time. He also developed additional symptoms, including numbness traveling from his neck down into his hands.

¶ 8 On March 6, 2008, Dr. Bijari saw the claimant and noted that the steroid injections provided

temporary relief of his symptoms. She wrote that she recommended that the claimant continue with physical therapy and follow-up with Dr. Jain for a possible third injection. On March 20, 2008, Stork saw the claimant and noted that the claimant reported that the second injection provided about 80% pain relief, but the relief lasted only for about 7 to 14 days.

¶ 9 On March 29, 2008, the claimant's physical therapist noted that he completed his last session on February 21, that he had not met his therapy goals, and that he was being discharged because his insurer refused to cover additional sessions.

¶ 10 On April 7, 2008, the claimant saw Dr. Bijari, who recommended additional physical therapy and additional steroid injections. She also referred him to Dr. Sean Salehi for a neurosurgical evaluation.

¶ 11 On April 17, 2008, the claimant saw Dr. Salehi. Dr. Salehi noted that the claimant had neck pain and bilateral forearm and hand tingling with soreness, which was temporarily relieved with the steroid injections. After examining the claimant and reviewing his previous tests, Dr. Salehi noted that the claimant's neck pain "can be due to multilevel cervical foraminal stenosis and the right C6-7 disk bulge/herniation." He also wrote that the "reported accident exacerbated such a diffuse spondylitic disease of the cervical spine to the point that now it is symptomatic and possibly caused the C6-7 herniated disk." Dr. Salehi ordered an EMG exam and a repeat MRI and restricted the claimant from lifting anything heavier than 35 pounds.

¶ 12 An April 21, 2008, MRI exam noted a disc bulging at the C5-C6 level.

¶ 13 On May 1, 2008, the claimant had an EMG test, which revealed a "moderately severe right sided C4 to C6 radiculopathy with ongoing denervation of the paraspinal muscles on that side,

worse at the C6 level." The test also revealed that the claimant had bilateral mild carpal tunnel syndrome in each wrist.

¶ 14 On May 19, 2008, the claimant saw Dr. Avi Bernstein, an orthopedic surgeon. Dr. Bernstein observed that the claimant had a good of range of motion in his cervical spine and some mild tenderness to palpation. He reviewed the claimant's previous medical history and determined that he had "chronic discogenic neck pain." He recommended that the claimant have a discogram to help determine whether fusion surgery may be an option to alleviate his pain. However, the claimant testified that National denied coverage for the discogram.

¶ 15 On June 23, 2008, the claimant saw Dr. Mark Levin at the request of National. Dr. Levin testified that he diagnosed the claimant with chronic cervical spondylitic changes, which were asymptomatic before the October 23, 2007, accident. He stated that the claimant showed normal functioning on objective tests, but he complained of pain and decreased sensation on the pinprick test. In his written report, Dr. Levin wrote that "if the [claimant] was asymptomatic prior to [the workplace accident], then it would appear that that occurrence could have given him an aggravation of a pre-existing condition." Dr. Levin wrote that the claimant might consider a discogram study to determine if surgery would be an option.

¶ 16 On December 22, 2008, the claimant saw Dr. Levin for a second exam at the request of National. Dr. Levin wrote that the claimant required further tests, including an MRI and possibly a discogram to determine whether surgical intervention was necessary to treat his pain. He further wrote that the claimant "was asymptomatic prior to his injury dating back to October of 2007 and remained symptomatic since that time. Therefore, the need for the further work-up [appeared]

related to his work injury." Dr. Levin also wrote that "the causation is based on an aggravation of a pre-existing condition which has not resolved."

¶ 17 On July 10, 2009, Dr. Levin reported that he was given the claimant's May 28, 2009, MRI exam to review, which showed multi-level cervical spondylolytic changes at C3-4, C4-5, and C5-6 and disk osteophyte complex most noted at C4-5. Dr. Levin testified that he observed no changes in the claimant's condition based on that exam. (The May 28, 2009, MRI report is not contained in the record.) Dr. Levin wrote in his report that he had not examined the claimant since December 2008, but if he continued to be symptomatic, further testing should be done. Dr. Levin wrote that he recommended that the claimant be reexamined.

¶ 18 On August 24, 2009, the claimant saw Dr. Levin for a third exam at the request of National. Dr. Levin testified that the claimant tested normal on all objective tests, but he still reported subjective complaints of pain and numbness. In his written report, he stated that the claimant had "chronic spondylolytic changes which would have been present irrespective of his reported injury dating back to October of 2007," and that surgical intervention was not warranted because of the work accident. He testified that he had not examined the claimant since August 24, 2009, but he reviewed the claimant's EMG study and Dr. Bernstein's records. Dr. Levin testified that the claimant's condition predated the accident and was not aggravated by the accident. He explained that the claimant's subjective pain complaints are not supported by the objective findings.

¶ 19 On October 15, 2009, the claimant saw Dr. Bernstein, complaining that his pain had progressively worsened. The claimant told Dr. Bernstein that he had tried to live with his pain because National refused to approve any additional treatment. Upon examination, Dr. Bernstein

noted that the claimant guarded and grimaced during range-of-motion testing and had tenderness. He again recommended that the discogram be performed.

¶ 20 Dr. Abusharif performed a discogram on the claimant on November 12, 2009. The claimant testified that he paid for the test because he wanted to proceed with surgery to relieve his pain.

¶ 21 On December 10, 2009, Dr. Bernstein noted that he reviewed the discogram study, which showed "positive concordant findings associated with annular tears at C5-6 and at C6-7." On examination, he noted that the claimant continued to "demonstrate guarded ROM and tenderness to palpation." He recommended a two-level anterior cervical decompression and fusion surgery. Dr. Bernstein testified consistently with his written reports and opined that he did not believe the claimant had any non-surgical options left to alleviate his pain. He was of the opinion that the claimant's workplace accident caused the injury to his cervical spine. He stated that the surgery would likely require a two-night hospital stay and an approximately 12-week recovery period, which includes six weeks of physical therapy.

¶ 22 On cross-examination, Dr. Bernstein admitted that annular tears may develop idiopathically as a person ages, but it is impossible to determine the age of such tears. He also agreed that the claimant showed degenerative changes and likely had such changes for many years. However, he explained that, even if the claimant had such fibers before the work accident, he would not have needed surgery because he was asymptomatic. He believed that the claimant could continue working without restrictions.

¶ 23 Dr. Bernstein testified that he performs approximately 100 cervical spine surgeries per year, owns six surgical patents, and has authored numerous publications and textbooks on cervical spine

surgeries.

¶ 24 Dr. Levin reviewed the claimant's discogram study before testifying. He said that the results of the discogram were consistent with the claimant's chronic condition. He testified that chronic disc changes have annular tears, and acute changes show "different signal[s] in the MRI's annulus area." He opined that "if [the claimant] is symptomatic, one could recommend surgical intervention." However, he reiterated that he did not believe that the workplace accident caused the claimant's condition. Dr. Levin testified that "[w]ith the degenerative changes he had even dating back to the first MRI, he would have been a candidate for potential disc surgery even prior to that if he reports that he's having symptoms."

¶ 25 On cross-examination, Dr. Levin admitted that surgery was not the likely course of treatment for an asymptomatic patient. He also admitted that there is no record of the claimant reporting neck pain before the October 23, 2007, workplace accident.

¶ 26 The claimant testified that, before the accident, he had never sustained any back or neck injuries and never had headaches or tingling in his arms. Now, he has pain in his neck while driving, sitting, and while unloading his truck. He testified that he has continued to work, typically 10 hours per day, despite the pain because he needs the income to support his family.

¶ 27 Following a hearing, the arbitrator found that the claimant's current state of ill-being was causally connected to the workplace accident of October 23, 2007, and ordered National to pay reasonable and necessary medical services of \$8,653 for the claimant's discogram and future costs for cervical spine surgery pursuant to sections 8(a) and 8.2 of the Act (820 ILCS 305/8(a), 305/8.2 (West 2006)). The arbitrator noted that there was no evidence in the record that the claimant had any

cervical spine symptoms before his accident and that the discogram and the surgery were reasonable and necessary medical services to treat his current condition. The arbitrator found the testimony of Dr. Levin unconvincing because he inexplicably changed his opinion regarding causation. He found Dr. Bernstein to be more convincing and more qualified than Dr. Levin based on his extensive research and surgical experience with the cervical spine. The arbitrator stated that, even excluding Dr. Levin's change of opinion, he found Dr. Bernstein's opinions carried more weight based on his credibility and expertise.

¶ 28 National sought review of this decision before the Commission. On May 17, 2012, the Commission issued an order affirming and adopting the arbitrator's decision.

¶ 29 National sought judicial review of the Commission's decision in the circuit court of Cook County. On December 13, 2012, the circuit court confirmed the Commission's decision. National now appeals.

¶ 30 National argues that the Commission's finding, that the claimant's current condition of ill-being was causally related to the October 23, 2007, accident, is against the manifest weight of the evidence. We disagree.

¶ 31 An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 2010). The "arising out of" component addresses the causal connection between a work-related injury and the claimant's condition of ill-being. *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807 (2005). A claimant need prove only that some act or phase of his or her employment was a causative factor in the ensuing injury. *Id.* A work-related injury need not be the sole or principal causative factor, as long as it was a causative

factor in the resulting condition of ill-being. *Id.* The claimant has the burden of proving, by a preponderance of the evidence, some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63, 541 N.E.2d 665 (1989).

¶ 32 Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244, 461 N.E.2d 954 (1984). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980). The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992). Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence when no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175 (1996). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440 N.E.2d 90 (1982).

¶ 33 Here, there was ample evidence that the claimant's current condition of ill-being was at least in part caused by the October 23, 2007, workplace accident. First, it was undisputed that the

claimant did not have a history of any cervical spine complaints before the accident. Following his fall, he immediately reported neck pain in the emergency room and continued to report neck pain to his physicians despite physical therapy and steroid injections. Second, the claimant's medical tests, including his MRI, EMG and discogram exams, objectively demonstrated the existence of a herniation, radiculopathy, and annular tears in his cervical spine. Third, Dr. Bernstein testified that the workplace accident caused the claimant's neck pain and that, because more conservative therapies had failed, surgery was reasonable and necessary to treat his pain. The fact that Dr. Levin offered an opposing opinion regarding causation and the need for surgery does not require this court to disturb the Commission's decision. It is the function of the Commission to judge the credibility of witnesses and resolve conflicting evidence. *O'Dette*, 79 Ill. 2d at 253. Here, the Commission, exercising its function, found Dr. Bernstein more credible given his expertise and given that Dr. Levin inexplicably changed his opinion regarding causation. Accordingly, we do not find that the Commission's determination, that the claimant's condition of ill-being was causally connected to his workplace accident and requires the recommended surgery, is against the manifest weight of the evidence.

¶ 34 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County which confirmed the decision of the Commission and remand the matter to the Commission for further proceedings.

¶ 35 Affirmed and remanded.