

Workers' Compensation
Commission Division
Filed: December 17, 2013

No. 2-12-1338WC

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

| | | |
|--------------------------------|---|--------------------|
| ROSS BRENZA, |) | Appeal from the |
| |) | Circuit Court of |
| Appellee, |) | Du Page County |
| |) | |
| v. |) | |
| |) | No. 12 MR 264 |
| ILLINOIS WORKERS' COMPENSATION |) | |
| COMMISSION, <i>et al.</i> , |) | |
| (Village of Westmont, |) | Honorable |
| |) | Bonnie M. Wheaton, |
| Appellants). |) | Judge Presiding. |

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 judgment of the circuit court which set aside the decision of the Workers' Compensation Commission that the claimant's condition of ill-being was not caused by the workplace accident and reinstated the arbitrator's award was affirmed where the Commission's decision was against the manifest weight of the evidence.

¶ 2 The Village of Westmont (Village) appeals from the circuit court's order which set aside the decision of the Illinois Workers' Compensation Commission (Commission) to deny temporary total disability (TTD) benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) to the claimant, Ross Brenza, for a lumbar spine injury he suffered while in the

Village's employ. For the reasons that follow, we conclude that the Commission's decision, that the claimant's current condition of ill-being was not causally connected to the workplace accident, is against the manifest weight of the evidence. We, therefore, affirm the judgment of the circuit court which set aside the Commission's decision and reinstated the arbitrator's award of TTD benefits.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on September 20, 2010.

¶ 4 The claimant testified that, on March 3, 2006, he was working as a patrol sergeant for the Westmont Police Department. On that date, the claimant responded to a domestic dispute call and fell to the ground while effectuating an arrest. He testified that he immediately felt pain in his lower back which radiated from his buttocks to his right leg. The pain was severe enough that another officer had to assist in restraining the individual. After the arrest, the claimant completed an incident report. Before the March 3 accident, the claimant testified that he felt "very good" and performed his duties without any restrictions, but he acknowledged that he had previously been diagnosed with a herniated disc in his lower back.

¶ 5 On August 2, 2005, the claimant saw Dr. Jean Garbolski for treatment of his low back pain. An MRI, dated August 12, 2005, revealed a disc protrusion at his L5-S1 level abutting the right S1 nerve root. The claimant proceeded with physical therapy treatment in August 2005. On September 12, 2005, he saw Dr. Garbolski and reported to her that the physical therapy was helping his back pain. The claimant testified that he was "having good days and bad days, but [he] felt much better" than before. He continued to work as a police sergeant without any restrictions to his duties.

¶ 6 On December 19, 2005, the claimant saw an orthopedic surgeon, Dr. William Earman, who ordered a second MRI. The MRI, dated December 20, 2005, revealed a disc protrusion at the L5-S1 level exerting mass effect on the right S1 nerve root. On January 3, 2006, Dr. Earman wrote that he

recommended a lumbar microdiscectomy to repair the herniated disc, noting that the claimant was in significant pain and showing little improvement. The claimant testified that Dr. Earman recommended surgery but also offered alternative treatment options, including physical therapy and epidural shots. The claimant testified that he sought a second opinion from Dr. Anis Mekhail, who believed that epidural shots would help him. He admitted that, on December 28, 2005, he sent his chief a memorandum advising that he was planning to have surgery on his back. Dr. Earman testified that the claimant had concerns about surgery and decided to proceed with epidural steroid injections, a decision which he supported.

¶ 7 On January 17, 2006, the claimant saw Dr. Thomas Valente, who administered an epidural steroid injection. He received a second injection from Dr. Valente on January 30. The claimant testified that his pain "greatly subsided" after the two injections. On February 14, 2006, he saw Dr. Valente for a follow-up. Dr. Valente wrote in his report that the claimant had an "impressive response to the two epidural cortisone injections," reporting about an "85% resolution of discomfort." The claimant testified that, at that point in time, no doctor was recommending surgery and he had no restrictions on his work duties.

¶ 8 After the March 3 accident, the claimant returned to Dr. Valente, complaining of extreme pain. He testified that he felt more pain than he had ever before experienced and that the pain continued down his right leg. He also experienced weakness in his right leg which affected the use of the leg. The claimant testified that he could not use his right leg to drive, forcing him to use his left foot to control the pedals. Because he was still working at the time, the claimant tried to avoid driving as much as he could. In a March 9 report, Dr. Valente wrote that the claimant returned with pain "as severe as it was prior" to his initial injections and that his injury was exacerbated by a severe altercation with a criminal. Dr. Valente wrote that the claimant complained of pain in the buttock

radiating down the posterior thigh to the posterior calf and leg weakness. He wrote that, upon physical examination, the claimant "was very guarded to the right-hand side. (*sic*) Unchanged from previous visits, but the leg was far more tender especially noted upon straight leg raises." His notes state that the claimant suffered a "[r]e-exacerbation of lumbar radiculopathy secondary to herniated disk at L5 S1." Dr. Valente administered another steroid injection on that date.

¶ 9 On March 28, 2006, the claimant had a third MRI, which showed that, "[c]ompared with August 12, 2005, there has been interval worsening from the previous ***disc herniation to the current *** disc extrusion" and an "[i]nterval increase in the thecal sac stenosis which is now moderate on the right, with increased mass-effect on the right S1 nerve root which is now moderately displaced posteriorly." The claimant was prescribed anti-inflammatory medications and Vicodin to control his pain.

¶ 10 On April 10, 2006, the claimant had another epidural injection, which was administered by Dr. Randolph Chang. Dr. Chang noted that the claimant reported no improvement with the last injection and that the most recent MRI showed that the herniation had worsened after the March 3 incident. The claimant testified that these two injections, March 9 and April 10, did not result in any improvement. He stated that he continued to work but could not ambulate normally and dragged his right leg to get around. However, in Dr. Chang's April 24 follow-up report, he wrote that the claimant said he had "at least 70% improvement in his pain" and had stopped taking his Norco. Dr. Chang wrote that the claimant's treatment plan was to resume physical therapy, take Lyrica and Aleve, and to follow-up in one month for another injection, if necessary. In a May 22, 2006, report, Dr. Chang wrote that the claimant was "even more improved now to the point" that he "forgets to take the Lyrica." Because the claimant was still working as a police officer, Dr. Chang recommended that he use a lumbar support in the car and to go to "back school" to learn how to

prevent future injuries. He advised the claimant to continue taking the Lyrica for one month and then as needed after that; he recommended that the claimant also take Aleve as needed. He further advised that if the pain worsened, the claimant could return for another injection.

¶ 11 In July 2006, the claimant admitted that he was picking up articles of clothing to put them into the washer or dryer when he felt his pain worsen. In a July 6 report, Dr. Chang wrote that the claimant was doing well until a week earlier when he noticed the pain returning while lifting some laundry. Although the pain was not as bad as before, the claimant reported to Dr. Chang that it was gradually worsening. Dr. Chang administered another steroid injection, which the claimant testified provided some relief.

¶ 12 In a July 27 report, Dr. Chang wrote that the claimant had a very good response to the July 6 injection, reporting a 90% improvement. However, the claimant noticed the pain, which was radiating down his leg, returned while driving back from the Wisconsin Dells. Dr. Chang noted that the claimant had a "very large extruded disc since the second injury back in March." He administered another steroid injection that day, which the claimant testified provided him some relief. The claimant admitted that he traveled 2 ½ hours with his family to the Wisconsin Dells. On the return trip, the claimant noticed that his pain worsened, but he denied doing anything physical while at the recreation park.

¶ 13 On August 7, 2006, the claimant saw Dr. Earman, who wrote that the claimant complained of significant pain down his right lower leg and that the claimant had a "positive straight leg raise and a decreased S1 reflex on the right." Dr. Earman testified that the claimant had not shown a decreased S1 reflex in December 2005. Dr. Earman wrote that he recommended a microdiscectomy. According to Dr. Earman, the March 2006 MRI showed that the disc herniation had changed and worsened. He testified that, although the MRI reports from March 2006 and December 2005 were

similar, the claimant's clinical symptoms were worse after the March 3 work accident. Dr. Earman testified that, after the March 3 accident, surgery was necessary because the claimant's symptoms were not improving with conservative treatment options. Regarding the laundry and the Wisconsin Dells incidents, Dr. Earman testified that these incidents showed that the claimant's herniated disc was interfering with his daily activities. In his opinion, the March 3 accident was the cause of the claimant's need for surgery.

¶ 14 On August 24, 2006, Dr. Earman operated on the claimant's herniated disc. According to the claimant, this was his first day off of work. He followed-up with Dr. Earman on September 2 and September 22 and underwent physical therapy treatment. He next saw Dr. Earman on October 16, 2006, at which time he was cleared to return to work without restriction. The claimant last saw Dr. Earman on December 29, 2006. Dr. Earman reported that, on that date that, the claimant complained of increasing back discomfort and pain radiating into his right posterior thigh and buttocks while sitting. Dr. Earman reviewed the December 2005 MRI and the March 2006 MRI, noting both showed a herniated disc but no overall change in the size of the disc herniation. He wrote that he ordered Naprosyn for the pain and considered the possibility of a repeat MRI.

¶ 15 Based on the claimant's history, physical exams, and medical tests, Dr. Earman opined that the claimant's injury was causally connected to the March 3 accident. He also testified that the claimant's herniated disc at L5-S1 was exacerbated during the March 3 accident, requiring his surgery. Dr. Earman testified that he did not think that the claimant's current minor back complaints would be permanent but should resolve over time. The claimant testified that he currently has "good days and bad days" and that he has accepted that he will always feel some discomfort in his back as a result of the injury and surgery.

¶ 16 Dr. Thomas Gleason testified that, on January 8, 2008, he examined the claimant at the request of the Village. His physical exam of the claimant suggested no evidence of any spinal cord pathology. Upon reviewing the claimant's medical records and history, Dr. Gleason stated that the claimant had a lumbar laminectomy on the right side at L5-S1 to repair a disc herniation and had healed well. Dr. Gleason was of the opinion that the claimant's surgery was unrelated to the March 3 accident. He testified that the March 3 incident resulted in a temporary exacerbation of a preexisting condition. According to Dr. Gleason, the August 2005 and December 2005 MRI's both showed a herniation for which Dr. Earman recommended surgery to repair in January 2006. The claimant, however, opted to receive steroid injections instead of surgery, which Dr. Gleason noted successfully treated his condition. As of May 22, 2006, the claimant was able to continue working as a police officer. Dr. Gleason opined that the laundry and Wisconsin Dells incidents re-exacerbated the claimant's preexisting condition.

¶ 17 On cross-examination, Dr. Gleason admitted that the March 2006 MRI stated the claimant's herniation had worsened. He also admitted that Dr. Earman noted a decreased S1 flexion for the first time in August 2006.

¶ 18 Randy King, deputy chief of the Westmont Police Department at the time of the claimant's accident, testified that the claimant informed him that he believed his injury was work-related on August 23, 2006, when they completed a worker's compensation form. However, King admitted that he was aware that the claimant aggravated his back condition during the March 3, 2006, arrest episode. King was also aware that the claimant had trouble with his back when driving at times, but he was unaware that he had problems with his right leg or that he was driving his patrol car with his left leg. He further stated that that he was unaware of any restrictions placed on the claimant and denied that the claimant ever missed work due to any injury.

¶ 19 Following a hearing, the arbitrator found that the claimant was entitled to TTD benefits and permanent partial disability (PPD) benefits for 100 weeks, because the back injury caused a 20% loss of the person as a whole as provided in section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)).

¶ 20 The Village sought review before the Commission, arguing that the claimant failed to prove that his current condition of ill-being was causally connected to the work accident. On January 31, 2012, the Commission, with one commissioner dissenting, issued a decision vacating the arbitrator's award of TTD benefits and reducing the PPD award to a term of 25 weeks for a 5% loss of use of the person as a whole. The Commission determined that the claimant's accident arose out of and in the course of his employment, but it found that he sustained a temporary aggravation of a preexisting condition, which resolved itself by May 22, 2006.

¶ 21 The claimant sought judicial review of the Commission's decision in the circuit court of Du Page County. On November 5, 2012, without comment, the circuit court reversed the Commission's decision and reinstated the decision of the arbitrator. The Village now appeals.

¶ 22 In this appeal, the Village argues that the Commission correctly found that the claimant failed to prove a causal connection between the March 3 work accident and his current condition of ill-being. The Commission determined that the claimant's aggravation of his preexisting condition was resolved by May 22, 2006, and that his current condition of ill-being was exacerbated by his normal daily activities of laundry and driving to the Wisconsin Dells. The claimant counters that the circuit court properly set aside the Commission's decision because the medical evidence demonstrated that the work accident exacerbated his preexisting condition and his condition was not resolved by May 22, 2006. We agree with the claimant.

¶ 23 Whether a claimant's injury is attributable solely to a preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the Commission. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 673 (2003). 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. *Freeman United Coal Min. Co. v. Indus. Comm'n*, 317 Ill. App. 3d 497, 504, 739 N.E.2d 1009 (2000). Whether we might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's finding. *Id.*

¶ 24 To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Sisbro*, 207 Ill. 2d at 203. In preexisting condition cases, “recovery will depend on the claimant's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the claimant’s current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition.” *Id.* at 204-05. This is so because the “employers take their employees as they find them,” and when the worker’s body, diseased or healthy, is injured under the stress of their usual duties, the law views it as an accident arising out of and in the course of employment. *Id.* at 205. Thus, even though a claimant has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Id.* Furthermore, the accidental injury need not be the sole or primary causative factor as long as it was a causative factor in the resulting condition of ill-being. *Id.*

¶ 25 In this case, the Commission stated that it was "struck" by Dr. Valente's assessment that the claimant's physical examination on March 9 was "unchanged from previous visits even though [the claimant] complained of increased leg tenderness." We find, however, that the record does not support the Commission's characterization of Dr. Valente's March 9, 2006, report. Dr. Valente indicated that the claimant was guarded to the right-hand side, which was unchanged from previous visits, "but the leg was far more tender especially noted upon straight leg raises."

¶ 26 The Commission also pointed to Dr. Earman's note that the December 2005 and March 2006 MRI's did not show a significant change in the claimant's herniation and that the herniation had worsened between the August 2005 MRI and the December 2005 MRI. The Commission disregarded the March 2006 MRI report in which the radiologist stated the herniation worsened, because the radiologist had compared the March MRI to the August 2005 MRI with no reference to the December 2005 MRI. We note that the record again does not support the Commission's characterization of Dr. Earman's reports and testimony. While Dr. Earman testified that the December 2005 and the March 2006 MRI results "were similar," he testified that the claimant's symptoms had worsened and, upon physical examination in August 2006, he showed a decreased S1 reflex which he did not exhibit in December 2005. Further, Dr. Earman testified with a reasonable degree of medical certainty that the claimant's work accident of March 3 exacerbated his back condition, necessitating the surgery.

¶ 27 Finally, the Commission found that the temporary aggravation of the claimant's preexisting condition had resolved as of May 22, 2006, when he reported to Dr. Chang that the steroid injections had provided significant relief. However, in a May 22 report, Dr. Chang wrote that the claimant reported that he felt 70% improved after the steroid injection he received on April 10. Dr. Chang also wrote that he advised the claimant to continue taking Lyrica for one more month and then take

it as needed, along with Aleve as needed. He advised the claimant to return for a repeat injection if the pain returned, indicating the claimant's condition had not necessarily permanently resolved.

¶ 28 Whether the laundry incident or Wisconsin Dells car trip further exacerbated the claimant's back injury is also irrelevant. As *Sisbro* explained, the work accident need not be the sole or primary causative factor in the claimant's current condition of ill-being; it need only be *one* of the causes. *Sisbro*, 207 Ill. 2d at 205. In this case, the medical experts do not dispute that the March 3 arrest incident was one causative factor in the claimant's current condition of ill-being. Because the evidence does not support the Commission's conclusion that the March 3 accident was not a causative factor in the claimant's current-condition of ill-being, its decision to deny TTD benefits is against the manifest weight of the evidence.

¶ 29 Regarding the Commission's determination that the claimant's injury caused him permanent partial disability equivalent to 5% loss of use of the person as a whole for 25 weeks as provided in section 8(d)(2) of the Act, the Village makes no specific argument that the Commission was correct in its decision to reduce the arbitrator's award of 20% loss of use for 100 weeks. Because the Village failed to raise the issue, it has forfeited this argument on appeal. See, Ill. S.Ct. R. 341(h)(7) (eff. July 1, 2008); *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill.App.3d 191, 208, 328 Ill.Dec. 612, 904 N.E.2d 1122, 1137 (2009) (arguments on appeal are forfeited when a party fails to support them with citation to authority).¹

¶ 30 Based on the foregoing reasons, we affirm the judgment of the circuit court which (1) set aside the decision of the Commission that vacated the arbitrator's award of TTD benefits to the claimant and reduced his award of PPD benefits, and (2) reinstated the arbitrator's decision.

¹ We note that the Commission's PPD award is inconsistent with its finding that the claimant was not eligible for TTD benefits.

¶ 31 Affirmed.