2013 IL App (3d) 120470WC-U

NO. 3-12-0470WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

DONALD FRENCH,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	LaSalle County.
	)	
	)	
v.	)	No. 11-MR-166
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, (Oak State Products),	)	Honorable
	)	Eugene P. Daugherity,
Appellees.	)	Judge, Presiding.

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

ORDER

¶ *1* *Held*: The Commission's finding that the claimant failed to prove

> that the conditions of his cervical spine were causally related to the September 21, 2007, workplace accident is not contrary to the manifest weight of the evidence, and the Commission correctly calculated the claimant's average weekly wage.

¶ 2 The parties agree that the claimant, Donald French, was involved in a workplace accident while working for the employer, Oak State Products, on September 21, 2007. The claimant filed a claim under the Illinois Workers' Compensation Act (the Act), 820 ILCS 305/1 to 30 (West 2010), and sought benefits for injuries to his left shoulder and cervical spine. The matter proceeded to an expedited arbitration hearing under section 19(b) of the Act (820 ILCS 305/19(b) (West 2010)). The arbitrator found that the claimant's left shoulder injury was causally connected to the workplace accident, but that the conditions of the claimant's cervical spine were not causally related to the accident. The claimant appealed to the Commission, and the Commission unanimously affirmed and adopted the arbitrator's decision with respect to the issue of causation, but modified the arbitrator's average weekly wage calculation. The circuit court confirmed the Commission's decision. This appeal ensued. The claimant's primary argument on appeal is that the Commission's finding that he failed to prove that the conditions of his cervical spine were causally related to the September 21, 2007, workplace accident is contrary to the manifest weight of the evidence. The claimant also argues that the Commission incorrectly calculated his average weekly wage.

¶ 3 BACKGROUND

¶ 4 The claimant was employed as a machine operator in the employer's cookie packaging facility. On the day of the accident, September 21, 2007, one of the packaging

lines became backed up. The claimant went over to help, and he ran into an I-beam. He twisted his ankle, cut his upper left shoulder, had pain in his right hip and left shoulder, and tore his pants. In addition, he had some complaints of pain in his neck. The accident occurred on a Friday evening. He rested over the weekend but experienced pain and numbness in his shoulder and neck. On September 25, 2007, he sought treatment at an occupational health center where x-rays were taken, and he was placed on light duty. The claimant had never had any problems or received any treatments for his left shoulder or neck prior to the accident.

¶ 5 The claimant followed up with his family physician, Dr. Arnold Faber. Dr. Faber ordered an MRI of the claimant's left shoulder and cervical spine. The MRI of the cervical spine showed disc bulging at C2-C3, C3-C4, and C6-C7, as well as more focal posterolateral protrusion on the right at C5-C6 and minimally on the left at the same level. Dr. Faber took the claimant completely off work on September 27, 2007, and released him to work light duty on November 4, 2007. The employer provided light-duty work for the claimant from November 5, 2007, until January 27, 2008. During this time, the claimant continued to treat with Dr. Faber and went to physical therapy.

¶ 6 In January 2008, Dr. Faber referred the claimant to Dr. Li, who took the claimant off work on January 27, 2008. Dr. Li testified at the arbitration hearing by way of an evidence deposition. He testified that he initially treated the claimant conservatively. His diagnosis was impingement syndrome of the left shoulder and rotator cuff tendinopathy. Dr. Li's

treatments of the claimant were related only to the conditions of his left shoulder.

¶ 7 On February 18, 2008, at the request of the employer, Dr. Michael J. Cohen authored a report based on his independent medical examination (IME) of the claimant and a review of the claimant's medical records. He concluded that the claimant suffered from "a contusion to the shoulder, impingement syndrome, and some early AC arthritis." Dr. Cohen recommended continuing another month of therapy along with icing and anti-inflammatories, and if that did not cure the claimant's symptomatology, then he suggested that "the surgical direction would be appropriate."

¶ 8 On April 15, 2008, Dr. Li performed a rotator cuff repair on the claimant's left shoulder, an arthroscopic subacromial decompression, and debridement of the labral tear. After the surgery, the claimant received conservative care and an MRI. He developed frozen shoulder syndrome.

¶ 9 In May 2008, Dr. Faber referred the claimant to Dr. Howard, a pain management specialist, for treatment of his cervical spine. At that time, the claimant was experiencing neck pain, headaches, and numbness running down his arm. Dr. Howard administered epidural steroid injections into his cervical spine for his numbness and tingling. An EMG done in June 2008 showed bilateral ulnar neuropathies at the elbow with denervation on the left and a C7 nerve root irritability consistent with a more proximal C7 nerve root irritation. On August 27, 2008, Dr. Howard noted that the claimant had no prior history of neck pain or headaches and that he attributed his neck pain and headaches to the workplace accident.

The arbitrator made a finding, which was adopted by the Commission, that this "general statement" was not a "causation opinion."

¶ 10 On October 26, 2008, at the request of the employer, the claimant submitted to an IME conducted by Dr. Steven Delheimer. Dr. Delheimer concluded that the workplace accident resulted in an injury to the claimant's left shoulder "and at most, the mechanism of injury might have caused a soft tissue injury to the left cervical area." The doctor believed that "[a]ny soft tissue injury to the cervical area would have long since resolved." He wrote in his report that the claimant's current complaints were not consistent with any objective findings related to cervical radiculopathy. He further opined as follows:

> "In my opinion, [the claimant] has residual post-operative left shoulder pain which is currently being managed by Dr. Li. His cubital tunnel tingling and numbness is degenerative in nature and is unrelated to the incident of September 21, 2007. There are no objective findings suggestive of cervical radiculopathy. The subjective complaints of pain at the base of the skull, do not correlate with trauma to the anterior left shoulder and there was no report of any head injury that occurred on September 21, 2007."

¶ 11 In December 2008, the claimant underwent a second surgical procedure performed by Dr. Li to treat his frozen shoulder syndrome. Dr. Li released the claimant to return to work beginning January 20, 2009, with the following restrictions: no lifting with left arm and no over chest work with either arm. On April 15, 2009, Dr. Li restricted the claimant from

lifting over 20 pounds with his left arm and no lifting above chest level.

¶ 12 The claimant submitted to a functional capacity evaluation on April 16, 2009. The therapist who conducted the evaluation concluded that the results indicate "self-limiting efforts." She wrote as follows: "[The claimant]'s demonstrated abilities during today's evaluation were limited by subjective complaints of left shoulder pain and not by objective limitations or changes in mechanics or heart rate." Based on the claimant's efforts during the evaluation, the evaluation results indicated that the claimant could return to work full time with a 20-pound lifting restriction. The therapist added, however, that "the results of today's FEC, at best, indicate [the claimant]'s minimum work capacity. Because of this, it is recommended that today's FCE not solely be used to determine return to work status."

¶ 13 On June 24, 2009, at the request of the employer, the claimant submitted to another IME conducted by Dr. Cohen. In his report, Dr. Cohen wrote that the claimant had done "quite nicely" since his two surgeries and that it appeared that his left rotator cuff had healed. He believed that the treatment of his left shoulder was successful and that he was at maximum medical improvement (MMI) concerning his left shoulder. Dr. Cohen further noted that, at that time, the claimant's subjective complaints of pain were related to his cervical spine, not his left shoulder. The claimant was awaiting a cervical decompression and fusion to take place in August. Dr. Cohen did not recommend any further diagnostic testing, imaging, medications, or treatments for the left shoulder as the shoulder symptoms had resolved. He described the outcome with respect to the left shoulder as "excellent."

¶ 14 Dr. Cohen believed that the claimant could return to his work activities "from the standpoint of his left shoulder." However, the claimant was being treated for significant cervical issues "unrelated to his work activities." He wrote: "Any restrictions of work at this time would be related to the cervical spine issues and should be issued by Dr. Mulconrey who is treating him for his cervical spine and are unrelated to any work-related etiology."

¶ 15 With respect to the claimant's cervical spine, Dr. Howard referred the claimant to Dr. Mulconrey. On August 13, 2009, Dr. Mulconrey performed a cervical fusion. The doctor's pre-operative and post-operative diagnoses were cervical spondylosis, upper extremity radiculopathy, and axial neck pain. The claimant submitted Dr. Mulconrey's medical records, and they indicate that the claimant reported to Dr. Mulconrey that his cervical spine complaints were related to the September 21, 2007, workplace accident. However, the Commission noted that the doctor did not express any opinions concerning causation between the workplace accident and the conditions of the claimant's cervical spine anywhere within the medical records.

¶ 16 The claimant submitted the deposition testimony of Dr. Eilers, who conducted an IME of the claimant on November 17, 2009. Dr. Eilers expressed an opinion that the cervical fusion was related to the claimant's work activities on September 21, 2007. In his report, Dr. Eilers noted that the claimant continued to have neck pain and had not improved with conservative physical therapy and injections. With respect to causation, the doctor opined that the workplace accident aggravated his underlying cervical arthritis and probably resulted

in significant exacerbation of his arthritic condition and probably resulted in the disk protrusion in the cervical level, particularly at C5-C6. He concluded that the claimant's surgeries were a direct result of the workplace accident "which aggravated preexisting conditions and caused new injuries."

¶ 17 Dr. Li saw the claimant again on October 20, 2009. At that time, the claimant had undergone the cervical spine surgery. He believed that the claimant was at maximum medical improvement for his shoulder. He testified at the arbitration hearing that he restricted the claimant from lifting more than 10 to 15 pounds with no overhead use of the left arm. On cross-examination, he testified that these restrictions took into consideration his cervical problems as well as the left shoulder. He stated: "I felt that these restrictions would be safe for his shoulder as well as cervical spine surgery until he's fully recovered and can [undergo a functional capacity evaluation]." On redirect-examination, he testified that the cervical condition only factored into the restriction to the extent that if he did not have the cervical condition, he would have the claimant under a FCE, but such restrictions were appropriate for the left shoulder injury in and of itself. He testified that the claimant's submaximal efforts at the previous FCE's could be attributed to his ongoing cervical problems.

¶ 18 At the conclusion of the arbitration hearing, the arbitrator concluded that, with respect to the claimant's left shoulder, the claimant "is capable of full duty work without restrictions as of June 24, 2009, the date of the evaluation with Dr. Cohen since, based on Dr. Li's

testimony, it appears to be virtually impossible to determine [the claimant]'s appropriate return to work restrictions as a result of an FCE based upon the effect of his shoulder condition only." The arbitrator concluded "that [the claimant] on September 21, 2007[,] injured his left shoulder as a result of a causally related work injury which necessitated two shoulder surgeries," that the employer had "paid all medical bills and all lost time for that injury," and that the claimant had "reached [MMI] and needs no further medical care for the left shoulder."

¶ 19 With respect to the claimant's cervical spine, the arbitrator found as follows: "based on the testimony of Dr. Cohen, Dr. Delheimer, and the lack of causation opinions from Dr. Howard and Dr. Mulconrey, [I] conclude[] that the [claimant] has failed to prove that there is any causal connection between the cervical fusion and the accident of September 21, 2007."

¶ 20 The arbitrator denied the claimant's request for an award for medical expenses related to the conditions of his cervical spine including expenses for the cervical fusion surgery. The arbitrator also denied any temporary total disability (TTD) benefits after June 24, 2009, the date that Dr. Cohen released him to return to work with respect to the left shoulder. The arbitrator found that any lost time after that date "would pertain or would relate to the cervical condition."

¶ 21 The claimant appealed the arbitrator's decision to the Commission. The Commission modified the arbitrator's decision with respect to the calculation of the claimant's average

weekly wage, finding that the arbitrator used an improper formula in his calculation. The Commission otherwise unanimously affirmed and adopted the arbitrator's decision. The claimant appealed the Commission's decision to the circuit court. The circuit court confirmed the Commission's decision, finding that the decision "is not against the manifest weight of the evidence." This appeal ensued.

¶ 22 ANALYSIS

¶ 23 On appeal, the claimant challenges the Commission's finding that he failed to prove that the conditions of his cervical spine were causally connected to the September 21, 2007, workplace accident.

¶ 24 A workers' compensation claimant has the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment. 820 ILCS 305/2 (West 2010). Whether an injury arises out of the claimant's employment is a question of fact to be resolved by the Commission, and its decision in this regard will not be disturbed unless it is against the manifest weight of the evidence. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 164, 731 N.E.2d 795, 808 (2000). "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009).

¶ 25 In evaluating whether a finding of the Commission is against the manifest weight of

the evidence, "[a] reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). The appropriate test is not whether this court might have reached the same conclusion, but whether the record contains sufficient evidence to support the Commission's determination. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010). In addition, "[i]n resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). Resolution of conflicts in medical testimony is also within the province of the Commission. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003).

¶ 26 Applying this standard in the present case, we cannot conclude that the Commission's findings with respect to causation of the claimant's cervical spine conditions are against the manifest weight of the evidence. We cannot say that an opposite conclusion is clearly apparent from the record.

¶ 27 As noted above, both Drs. Cohen and Delheimer opined that the conditions of the claimant's cervical spine were unrelated to the job-related accident. Dr. Delheimer specifically opined that the mechanism of the claimant's injury might have caused a soft

tissue injury to the left cervical area, but that the soft tissue injury would have resolved some time prior to his examination of the claimant, which took place on October 26, 2008. Dr. Delheimer also believed that the claimant's "subjective complaints at the base of the skull, do not correlate with trauma to the anterior left shoulder and there was no report of any head injury that occurred on September 21, 2007." In reaching his opinions, Dr. Delheimer examined the claimant and reviewed medical records of Dr. Faber, Dr. Li, Dr. Howard, and Dr. Russo. The records he reviewed included the MRI of the claimant's cervical spine taken on November 7, 2007, and an EMG and nerve conduction study report done on June 3, 2008, by Dr. Russo. Dr. Delheimer's testimony alone, if found to be credible by the Commission, was sufficient for it to find that the claimant's cervical spine condition was not causally connected to the workplace accident. In addition, in finding that the claimant failed to carry his burden of proving causation, the Commission also found it significant that the two doctors who treated the claimant's cervical spine did not offer any opinions with respect to causation.

¶ 28 The claimant argues that he had no complaints of neck pain and had not received any treatments for neck conditions prior to the workplace accident. In addition, he points out that the medical records show that immediately after the accident and continuing throughout his treatment, the claimant complained of symptoms in his cervical spine. The claimant further argues that Dr. Cohen's specialty involved upper extremities, particularly hands and shoulders. He argues that Dr. Cohen did not offer an independent substantive opinion that

the cervical spine condition was unrelated to the workplace accident but was only "mimicking Dr. Delheimer's opinion." With respect to Dr. Delheimer's opinion, the claimant argues that "he is well known in the workers' compensation arena as a hired gun by insurance companies in rendering opinions opposing causal connection. Therefore, his opinions need to be considered in that context." The claimant concludes that the Commission erred by placing too much weight on the opinions of Dr. Cohen and Dr. Delheimer on the issue of causation.

¶ 29 At best, the claimant has established that the Commission was faced with conflicting medical opinions and could have drawn other reasonable inferences from the evidence presented. As noted above, however, the interpretation of medical testimony is particularly the function of the Commission. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 286 Ill. App. 3d 1098, 1103, 677 N.E.2d 1005, 1008 (1997). "It is also well settled that the determination of how much weight to assign to a particular piece of evidence is a matter for the Commission, and a reviewing court will not reweigh the evidence and substitute its opinion for that of the Commission's." *ABB C-E Services v. Industrial Comm'n*, 316 Ill. App. 3d 745, 750, 737 N.E.2d 682, 686 (2000). The Commission weighed the conflicting medical evidence and assigned weight to the conflicting evidence. Nothing in the record conclusively establishes that the Commission was required to discredit the opinions of Drs. Cohen and Delheimer. Accordingly, we cannot say that its decision was against the manifest weight of the evidence; an opposite conclusion is not clearly apparent.

Accordingly, we must affirm the Commission's finding that the claimant failed to carry his burden of proving causation with respect to the conditions of his cervical spine.

¶ 30 The claimant also challenges the Commission's denial of TTD benefits after June 24, 2009, and the denial of medical expenses related to his cervical spine surgery and treatments. These arguments, however, are based on the Commission's finding of a lack of proof of causation concerning the claimant's cervical spine. Because we affirm the Commission's findings with respect to causation, we also affirm the Commission's award of TTD benefits and medical expenses.

¶ 31 Finally, the claimant argues that the Commission incorrectly calculated his average weekly wage.

¶ 32 In a workers' compensation case, the claimant has the burden of establishing his or her average weekly wage. *Cook v. Industrial Comm'n*, 231 Ill. App. 3d 729, 731, 596 N.E.2d 746, 748 (1992). The determination of an employee's average weekly wage is a question of fact for the Commission, which will not be disturbed on review unless it is against the manifest weight of the evidence. *Ogle v. Industrial Comm'n*, 284 Ill. App. 3d 1093, 1096, 673 N.E.2d 706, 708-09 (1996).

¶ 33 With respect to the calculation of a worker's average weekly wage, section 10 of the Act provides four alternative ways to calculate average weekly wage as follows:

> "[1] The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he

was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; [2] but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. [3] *Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed*. [4] Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer." (Emphasis added.) 820 ILCS 305/10 (West 2010).

¶ 34 In the present case, the Commission disagreed with the arbitrator's calculation of the claimant's average weekly wage and recalculated the average weekly wage by using the third method. We agree with the Commission's calculation.

¶ 35 The employer hired the claimant on February 12, 2007. The claimant's accident occurred on September 21, 2007, which was approximately thirty weeks after the claimant began working for the employer. Therefore, we agree with the Commission that the proper formula for calculating the claimant's average weekly wage is the third method above and is calculated by dividing his earnings during the period worked by the number of weeks and parts thereof during which the employee actually earned wages.

¶ 36 The Commission correctly noted that the claimant's pay records admitted into evidence showed only the total number of hours that he worked for a given week. Therefore, the number of weeks are known, but the "parts thereof" cannot be determined from the claimant's pay records. The Commission found that the only method to precisely determine the claimant's average weekly wage was to divide the claimant's earnings by the number of weeks he worked for the employer. The claimant's total earnings, including overtime, totaled $16,019.51. The Commission divided the total earnings by 30 weeks and determined that the claimant's average weekly wage was $533.98. We believe that the Commission properly calculated the claimant's average weekly wage.

¶ 37 For example, in *Cook*, the claimant worked during 24 different weeks during the preceding year and had earned $10,266.42. There was no indication in the record regarding how many days he worked during those weeks or how many hours per day he worked. The court held that the claimant's average weekly wage is properly calculated by dividing $10,266.42 by 24 for an average weekly wage of $427.77. *Cook*, 231 Ill. App. 3d at 729-30,

596 N.E.2d at 746-47.

¶ 38 "[T]he claimant has the burden of proving by a preponderance of the evidence the elements of his claim." *Id*. at 731, 596 N.E.2d at 748. In the present case, the only evidence in the record concerning the claimant's average weekly wage are wage statements which show only the total amount of hours that he worked on any given week. There is no evidence in the record to establish that the claimant's usual and customary work hours were eight hours per day, 40 hours per week. "The only recourse to the Commission, based strictly upon the evidence before it, was to divide claimant's total wages by the number of weeks claimant worked, as reflected in the evidence." *Id*. at 731-32, 596 N.E.2d at 748. Accordingly, in the present case, the Commission correctly determined that "the only method to precisely determine [the claimant]'s average weekly wage is to divide his earnings by the number of weeks that he worked for [the employer]."

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, we affirm the circuit court's judgment that confirmed the Commission's decision.

¶ 41 Affirmed.