

NOTICE  
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2013 IL App (3d) 120665WC-U

NO. 3-12-0665WC

IN THE

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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MICHAEL W. MIGLIO,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	LaSalle County.
	)	
v.	)	No. 12-MR-41
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, (United Parcel Service, Inc.),	)	Honorable
	)	R. James Lannon, Jr.,
Appellees.	)	Judge, Presiding.

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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 correctly determined that the claimant suffered two separate workplace accidents and that the second accident was barred by the applicable statute of limitations. The Commission's denial of TTD benefits is not against the manifest weight of the evidence. With respect to the Commission's award of PPD benefits, the Commission finding that the claimant lost 18% of the use of each leg as a result of the first accident was not against the manifest weight of the evidence.

¶ 2 The claimant, Michael W. Miglio, worked as a delivery driver for the employer, United Parcel Service, Inc., for over 20 years. The claimant was involved in two accidents while working for the employer. The first accident occurred on December 2, 2004, when the claimant fell in a hole, and the second accident occurred on August 29, 2005, when he slipped on oil inside his delivery truck. The December 2, 2004, accident resulted in injuries to the claimant's left and right knees. The claimant maintained that the second accident aggravated the work-related injury to his right knee.

¶ 3 On November 16, 2007, the claimant filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (the Act), 820 ILCS 305/1 *et seq.* (West 2006). The claimant's application for adjustment of claim alleged that the claimant suffered injuries to his left and right knees and that the date of the accident was December 2, 2004. The claimant did not file an application for an adjustment of claim with respect to the second accident that occurred on August 29, 2005. At the arbitration hearing that was held on October 28, 2010, the claimant made an oral motion to amend the application for adjustment of claim to add August 29, 2005, as an additional date of accident for a subsequent aggravation of the conditions of his right knee. The arbitrator denied the claimant's oral motion to amend and denied any benefits related to the August 29, 2005, accident.

¶ 4 At the conclusion of the arbitration hearing, the arbitrator found in favor of the claimant with respect to the December 2, 2004, accident. The arbitrator awarded the claimant permanent partial disability (PPD) benefits as a result of the accident, finding that

the accident "caused the permanent partial loss of use of the [claimant]'s right and left legs to the extent of eighteen percent (18%) each thereof." The arbitrator also denied the claimant's request for temporary total disability (TTD) benefits.

¶ 5 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission), and the Commission unanimously affirmed and adopted the arbitrator's decision. The claimant then appealed to the circuit court, and the circuit court entered a judgment confirming the Commission's decision. The claimant now appeals the circuit court's judgment.

¶ 6 **BACKGROUND**

¶ 7 The claimant's job duties as a delivery driver required him to move packages ranging between one and 150 pounds. In addition, he had to step up and down several steps to get into and out of his delivery vehicle. The December 2, 2004, work-related accident occurred just after he made his final delivery that day. The claimant was returning to his truck when he stepped on some rotten boards that covered a hole. The boards gave way, and the claimant fell into the hole, injuring his left and right knees. The fall caused painful conditions in the claimant's knees, but he continued to work and eventually sought medical attention on December 28, 2004, when he went to see Dr. Robert Mitchell, an orthopedic surgeon.

¶ 8 An MRI of the claimant's left knee revealed a lateral meniscal tear, joint effusion, and evidence of chondromalacia patella. An MRI of the claimant's right knee revealed a Grade

IV osteochondral injury to the lateral femoral condyle, complex tearing of the lateral meniscus, evidence of bursitis, and evidence of chondromalacia patella. Dr. Mitchell conducted arthroscopic surgery on the claimant's right knee in January 2005, and on the left knee in February 2005. After the surgeries and a course of physical therapy, the claimant returned to light duty on April 11, 2005, and returned to full duty with no restrictions on April 25, 2005. Dr. Mitchell believed that the claimant progressed "quite well" during his physical therapy.

¶ 9 The claimant returned to Dr. Mitchell on July 21, 2005, with complaints of pain in his right knee. The claimant was experiencing pain with kneeling and stair climbing. Dr. Mitchell diagnosed him with chondromalacia patella and prescribed Lodine and strength exercises. On August 23, 2005, he recommended Cortisone injections, but the claimant wanted to proceed with conservative treatment.

¶ 10 On August 29, 2005, the claimant slipped on some oil that had leaked onto his delivery truck's floor, and he hyperextended his right knee. He went back to Dr. Mitchell on September 6, 2005. Another MRI of the right knee showed a re-tearing of the lateral meniscus, contusion of the lateral femoral condyle and lateral tibial plateau, and evidence of degenerative changes of the lateral compartment. Dr. Mitchell performed a second arthroscopic surgery on the claimant's right knee in January 2006. The claimant again followed the surgery with physical therapy and strengthening, and Dr. Mitchell believed that the claimant again "progressed quite nicely." The claimant went back to work full duty with

no restrictions on March 27, 2006, and he was to continue with a home exercise program.

¶ 11 When the claimant filed his application for adjustment of claim on November 19, 2007, he listed December 2, 2004, as the date of the accident and stated the accident occurred as follows: "Repetitive trauma; ingress/egress from delivery of UPS package/express mail". He did not file a separate application for adjustment of claim for the August 29, 2005, occurrence. The claimant maintained, however, that the second occurrence merely aggravated the previous injury that occurred on December 2, 2004.

¶ 12 At the beginning of the arbitration hearing, the attorney for the claimant told the arbitrator that the parties' request for hearing should have two separate dates for the date of the injuries because the claimant was claiming injury to the left and right legs. He requested leave to amend to show the second accident date. The arbitrator, however, indicated that if there were two different accident dates, then both accident dates should have been included on the original application for adjustment of claim or a subsequent application should have been filed. The arbitrator took the claimant's request to amend under advisement and proceeded with the arbitration hearing.

¶ 13 At the arbitration hearing, the claimant testified that his knees hurt every day and that he was limited to what he could do because of his knees. Kneeling and walking aggravated the conditions of his knees. When the claimant returned to work after the second right knee surgery, he worked full duty except for the time during which he was off work for a hernia operation. He testified, however, that he retired in May 2007 because of the condition of

his knees. After he retired, the claimant experienced a third incident in October 2008 with respect to his right knee that resulted in a third right knee surgery on November 5, 2008. The third incident occurred while he was walking in Menards. He felt a popping sensation and pain, and the knee swelled. Dr. Mitchell diagnosed the claimant as having a right knee lateral meniscal tear with osteoarthritis and hemarthrosis and performed a right knee arthroscopy with partial lateral meniscectomy and debridement. At the time of the arbitration hearing, the claimant did not have any surgeries scheduled with respect to his right knee.

¶ 14 On August 21, 2008, Dr. Mitchell authored a report in which he opined as follows:

"I believe that his work injuries were causally related to his arthroscopic findings in his knee. To a reasonable degree of medical certainty, I believe his work injuries caused his meniscal tears. I believe that they are related to his increasing degenerative changes within his knees.

\* \* \*

I believe the meniscal tears that he sustained from his work related injuries and subsequent partial lateral meniscectomies will accelerate his degenerative changes within his knees. Eventually he may need to undergo joint replacement surgery."

¶ 15 In a report dated October 19, 2010, Dr. Mitchell wrote as follows:

"It is well known within the medical literature that people that undergo partial meniscectomies will have accelerated degenerative changes within their knees. I believe beyond a reasonable degree of medical certainty that [the claimant] will need

to have knee replacement surgery within each knee at some point in the future. I believe the current degenerative changes that he has in his knees will continue to progress and will progress faster than usual secondary to the meniscectomies, which were required for his meniscal tears and were causally related to his work related injury as a UPS driver."

¶ 16 At the conclusion of the arbitration hearing, the arbitrator found that the claimant suffered a work-related injury on December 2, 2004, which required meniscal tear surgeries, but that he had a good recovery and returned to work full duty. The arbitrator found that this accident resulted in the "permanent partial loss of use of the claimant's right and left legs to the extent of eighteen percent (18%) each thereof."

¶ 17 The arbitrator denied the claimant any benefits as a result of the August 29, 2005, accident. The arbitrator noted that the December 2004 accident and the August 2005 accident are two separate accidents, but the claimant's application for adjustment of claim only refers to the December 2, 2004, accident. The arbitrator denied the claimant's request to amend the application for adjustment of claim to add the August 29, 2005, accident because the claimant was asking "to add a completely new cause of action to his existing Workers' Compensation application." The arbitrator acknowledged that amendments to pleadings are allowed to conform with the proofs, but the claimant was not "asking that the date of loss be changed to conform with the evidence at trial or that additional defendants be added." Instead, the claimant was asking "to add a new cause of action outside the Statute

of Limitations."

¶ 18 The arbitrator also concluded that the claimant's oral motion to add August 29, 2005, as an additional date of loss "would violate the Rules of Practice limiting an application to one accident and or claim with one date of accident." The arbitrator ruled that "[a] separate application for the 8/29/2005 accident should have been filed before the hearing on the merits of the case" and that the claimant had not established why the statute of limitations should not apply.

¶ 19 Because the arbitrator denied the motion to amend the application for adjustment of claim, he held that the claimant failed to prove that the 8/29/2005 accident "arose out of and in the course of his employment."

¶ 20 The claimant had also requested TTD benefits for the period beginning in June 2007, (when he began retirement) through October 28, 2010 (the date of the arbitration hearing). The arbitrator, however, held that the claimant's last "full duty discharge was in March of 2006." The claimant retired in May of 2007, and prior to his retirement, he worked full duty without any restrictions for approximately 14 months. The arbitrator, therefore, found that there was "no indication in the medical records that the [claimant] could not work full duty until his retirement." The arbitrator concluded that the claimant's "assertion that he was forced to retire because of his work related compensable knee condition is not supported by the medical records in this case."

¶ 21 The claimant appealed the arbitrator's decision to the Commission, and the

Commission unanimously affirmed and adopted the arbitrator's decision. The claimant appealed to the circuit court. The circuit court entered a judgment that confirmed the Commission's decision. The claimant now appeals the circuit court's judgment.

¶ 22

#### ANALYSIS

¶ 23 The first issue we address on appeal is the arbitrator's denial of the claimant's oral request to amend the application for adjustment of claim to add August 29, 2005, as a second date of loss. We believe that the Commission ruled correctly in adopting that portion of the arbitrator's decision.

¶ 24 In *Lake State Engineering Co. v. Industrial Comm'n*, 31 Ill. 2d 440, 202 N.E.2d 18 (1964), the employee fell on his back at work on July 15, 1959. He saw a physician, was off work for three days, and then continued to work, but suffered pain in his back and legs. Later, on February 12 the following year, he felt severe pain in his back when he was lifting an object while working for the same employer. He quit working on March 16, 1960, and underwent back surgery on April 1, 1960. The claimant filed an application for adjustment of claim alleging July 15, 1959, as the date of the accident.

¶ 25 When the claimant appeared before the arbitrator for a hearing, he moved for leave to amend the application for adjustment of claim. Over the employer's objection, the claimant was allowed to amend the application by substituting February 12, 1960, as the date of the accident. The Commission affirmed the arbitrator, but the supreme court reversed the Commission.

¶ 26 The supreme court noted that section 6(c) of the Act at that time provided that unless an application for adjustment of claim is filed within a year after the date of accident, the right to file such application is barred. *Id.* at 442, 202 N.E.2d at 19, citing Ill. Rev. Stat. 1963, ch. 48, sec. 138.6(c). The employee argued that the February 12 accident merely aggravated the preexisting injury that he sustained on July 15, 1959, but the employer argued that the injury on February 12 arose from a separate and different accident from the one described in the original application for adjustment of claim. *Id.* at 445-46, 202 N.E.2d at 21. The supreme court agreed with the employer and held that the February 12 occurrence was a new injury arising out of a "wholly different accident" that was barred by the statute of limitations contained within the Act. *Id.* at 446, 202 N.E.2d at 21. The court, therefore, reversed the Commission's award and stated that "the application is dismissed as barred by the provisions of the Workmen's Compensation Act." *Id.* at 446, 202 N.E.2d at 22.

¶ 27 Likewise, in the present case, section 6(d) of the Act requires a claimant to file an application for compensation "within 3 years after the date of the accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later." 820 ILCS 305/6(d) (West 2006). If an application is not timely filed, "the right to file such application shall be barred." *Id.*

¶ 28 The claimant filed his application for adjustment of claim on November 16, 2007. However, the application listed only the December 2, 2004, occurrence as the date of the

accident. The application did not include the August 29, 2005, occurrence, and the claimant did not file a separate application with respect to the August 29 occurrence. The arbitration hearing took place on October 28, 2010, and the claimant made his oral motion to amend the application to include the August 29 occurrence at the hearing. However, the employer objected on the basis that the claimant was beyond the statute of limitations provided in section 6(d). In denying the claimant's request to amend, the arbitrator noted that the claimant did not establish a reason why the statute of limitations should not apply to the August 29 occurrence.

¶ 29 Similar to the employee in *Lake State Engineering Co.*, the claimant in the present case argues that the amendment should have been allowed because the August 29 occurrence merely aggravated the preexisting work-related injury. We disagree. The medical evidence presented at the hearing established that the August 29 occurrence was a wholly separate accident and was barred under the court's reasoning in *Lake State Engineering Co.*

¶ 30 After the claimant had his first accident on December 4, 2004, he underwent surgery on both of his knees. The injuries to his right knee included a tearing of the lateral meniscus. After the surgeries, the claimant underwent a course of physical therapy, and his doctor noted that he progressed "quite well" during the physical therapy. The claimant returned to light duty on April 11, 2005, and returned to full duty on April 25, 2005, and worked at that point full duty and without any restrictions.

¶ 31 The medical evidence further established that when the claimant slipped and hyper

extended his right knee on August 29, 2005, the accident resulted in a "re-tearing" of the lateral meniscus as well as a contusion of the lateral femoral condyle and lateral tibial plateau. This evidence established that the August 29, 2005, occurrence was a separate accident that resulted in new injuries. Accordingly, the claimant was required to file an application for adjustment of claim with respect to this accident within the time limits provided in section 6(d) of the Act, but he failed to do so. Therefore, the claim was barred by the Act's statute of limitations, and the claimant's application for adjustment of claim could not be amended to include the barred claim over the employer's objection.

¶ 32 The claimant cites section 7020.20(e) of the Rules Governing Practice before the Industrial Commission (50 Ill. Adm. Code § 7020.20 (1995)) which allows a claimant to amend an application for adjustment of claim. He argues that the Commission should allow an amendment to his application to add the second accident under the relation back doctrine.

¶ 33 The claimant correctly notes that the courts have applied the relation back doctrine embodied in section 2-616 of the Code of Civil Procedure (735 ILCS 5/2-616 (West 2010)) to proceedings under the Act and that section 7020.20 allows amendments to an application in situations where the relation back doctrine is applicable. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d 149,154-55, 731 N.E.2d 795, 800-01 (2000). The facts of the present case, however, do not meet the requirements for applying the relation back doctrine.

¶ 34 Section 2-616(b) of the Code of Civil Procedure provides that a cause of action in a

proposed amended pleading is not barred by a lapse of time under any statute if, in part, "it shall appear from the original and amended pleadings that the cause of action asserted \*\*\* in the amended pleading grew out of the same transaction or occurrence set up in the original pleading \*\*\*." 735 ILCS 5/2-616(b) (West 2010). "An amendment which states a distinct claim that is based on a different set of facts than the claim in the timely filed complaint will not relate back." *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 899, 929 N.E.2d 114, 120 (2010). There must be a "sufficiently-close-relationship" between the old and new allegations such that the new events must be "close in time and subject matter and led to the same injury." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 360, 882 N.E.2d 583, 593 (2008).

¶ 35 Under the "sufficiently-close-relationship" test, the December 2, 2004, incident and the August 29, 2005, incident were not from the same occurrence, and the relation back doctrine does not apply. The claimant recovered from the December 2, 2004, accident and had returned to work full duty without any restrictions when the second accident occurred. The second accident resulted in a new tear to the claimant's lateral meniscus in his right knee. The two incidents were not connected in time or location and resulted in different injuries. "[A]n amendment is considered distinct from the original pleading and will not relate back where (1) the original and amended set of facts are separated by a significant lapse of time, or (2) the two sets of facts are different in character, \* \* \* or (3) the two sets of facts lead to arguably different injuries." *Porter*, 227 Ill. 2d at 359, 882 N.E.2d at 592, citing *In re*

*Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370, 1372 (N.D. Ill. 1985).

¶ 36 Under the facts of the present case, the claimant's proposed amendment to his application for adjustment of claim could not relate back to the original application for purposes of the Act's statute of limitation. Therefore, the Commission correctly denied the claimant's request to amend his application for adjustment of claim.

¶ 37 The claimant also challenges the Commission's denial of TTD benefits. An employee is totally disabled when he cannot perform any service except those for which no reasonably stable labor market exists. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 627 (1990). The time period of TTD is a question of fact for the Commission, and its decision should not be disturbed unless it is against the manifest weight of the evidence. *Id.* at 118-19, 561 N.E.2d at 627-28.

¶ 38 The arbitrator found that the claimant was discharged to work full duty in March 2006, and the claimant continued to work full duty after that time until he retired approximately 14 months later. The only work he missed related to a hernia injury and some sick days. There are no medical records that indicate that the claimant sought any medical treatments for his knees after he returned to work full duty in March 2006. Although the claimant testified that he had to retire because of the condition of his knees, the claimant did not present any medical testimony or medical records to establish that he could not perform his job duties when he retired. The Commission's denial of TTD benefits is not against the manifest weight of the evidence.

¶ 39 Finally, the claimant argues that the Commission's award of PPD benefits in the amount of only 18% of the use of each leg was against the manifest weight of the evidence. We disagree.

¶ 40 "It is well-settled that because of the Commission's expertise in the area of workers' compensation, its findings on the question of the nature and extent of permanent disability should be given substantial deference." *Mobile Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 624, 722 N.E.2d 703, 709 (2000). Accordingly, the nature and extent of a claimant's permanent disability is a question of fact to be resolved by the Commission, whose finding will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 278-79, 947 N.E.2d 856, 860 (2011).

¶ 41 In the present case, the Commission's award of PPD benefits is based on the permanent partial disability caused by the accident that occurred on December 2, 2004. The arbitrator's decision adopted by the Commission found that the claimant recovered from the December 2004 accident and returned to work full duty. The physician who performed the arthroscopic procedures on both knees following the accident noted that the claimant had a good recovery following the surgeries. The claimant testified that he had ongoing knee problems, but the Commission noted that the claimant sustained non-compensable, intervening accidents that likely contributed to the claimant's present condition of ill-being. Based on our review of the record on appeal, we cannot conclude that the Commission's

award of PPD benefits was against the manifest weight of the evidence.

¶ 42

#### CONCLUSION

¶ 43 For the foregoing reasons, we affirm the Circuit Court's judgment that confirmed the Commission's decision.

¶ 44 Affirmed.