2015 IL App (3d) 140018WC-U

Order filed March 27, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| ANTHONY SEMINARY, | ) | Appeal from the Circuit Court |
| | ) | of the Twelfth Judicial Circuit |
| | ) | Will County, Illinois |
| Appellant, | ) | |
| | ) | |
| v. | ) | Appeal No. 3-14-0018WC |
| | ) | Circuit No. 12-MR-2417 |
| | ) | |
| ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (ABF Freight, Inc., Appellee). | ) | Honorable Barbara Petrungaro, Judge, Presiding. |

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

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**ORDER**

¶ 1 *Held*: The Commission's finding that the claimant failed to prove he sustained an accident arising out of and in the course of his employment was not against the manifest weight of the evidence.

¶ 2 The claimant, Anthony Seminary, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits for back injuries he allegedly sustained while he was working for ABF Freight, Inc. (employer).

After conducting a hearing, an arbitrator found that the claimant had failed to prove that he sustained an accident arising out of and in the course of this employment. Accordingly, the arbitrator rejected the claimant's claim that his current condition of ill-being was causally related to his employment and denied medical expenses and temporary total disability (TTD) benefits. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Will County, which confirmed the Commission's ruling. This appeal followed.

¶ 3 FACTS

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on December 8, 2011.

¶ 5 The claimant worked for the employer as a dockman and driver. His job duties included loading and unloading tractor trailers along with driving over the road. The claimant testified that, on June 14, 2011, he was attempting to help two other employees load a skid onto a trailer at the employer's Indianapolis facility. As he was stepping onto the trailer while trying to lift the skid, he felt what he described as a "minor twinge" in his lower back. The sensation was fleeting and the claimant felt only minimal residual back pain that day. The claimant continued working without having to stop to rest or to obtain immediate medical care. He did not report an injury to a supervisor or to any of his coworkers that day, and he was able to continue loading and unloading trailers and to drive from Indianapolis to the employer's Aurora, Illinois facility later that afternoon. He did not report any injury to anyone at the Aurora facility. However,

according the claimant, the pain worsened over the following days and he began experiencing pain in his leg as well. The claimant testified that the delayed onset of the back pain led him to believe that it was not a serious or lasting injury that required medical attention.

¶ 6 On June 17, 2011, three days after the alleged work accident, the claimant saw his family doctor, Dr. Charles Comfort, for unrelated medical issues. During that visit, the claimant reported that he was experiencing leg pain. The claimant testified that he told Dr. Comfort about the June 14, 2011, work injury. However, Dr. Comfort's June 17, 2011, medical record makes no mention of that alleged accident or injury. Dr. Comfort ordered an x-ray of the claimant's back, which was performed four days later.

¶ 7 Approximately two weeks later, the claimant drove to Michigan to visit his son. During the drive, the claimant's pain became so severe that he had to stop every 15 to 20 minutes to stretch. The claimant stated that the pain he experienced at that time was far greater than the minor pain he felt at the time of the alleged work accident. The claimant immediately called Dr. Comfort, who prescribed an MRI.

¶ 8 The MRI was performed on July 2, 2011. It showed a prominent left paracentral disc extrusion at L4-L5 causing compression of the origin of the left L5 nerve root. There was also a left foraminal disc protrusion at L3-L4 causing an impingement of the existing left L3 nerve root.

¶ 9 When the claimant returned to Dr. Comfort on July 11, 2011, the doctor diagnosed the claimant with a disc herniation and referred him to Dr. Ronald Michael, a neurosurgeon. Dr. Comfort's July 11, 2011, medical record references a prior work accident that the claimant had sustained in 2007 when he was hit by a forklift. The claimant testified that he referenced both the 2007 work accident and the alleged June 14, 2011, work accident when discussing his lower back injury with Dr. Comfort during that visit. However, Dr. Comfort's medical records make

no mention of the alleged June 14, 2011, accident.

¶ 10 The claimant testified that his 2007 work accident caused a lower back injury which resulted in similar symptoms, including radicular pain into his legs. Records from Will County Medical Associates indicate that the claimant received treatment for sciatica down his legs in June 2007. After his 2007 work injury, the claimant underwent an MRI which revealed L4-L5 disc pathology. The claimant testified that he had fully recovered from the 2007 injury and had no lingering symptoms leading up to the alleged June 14, 2011, work accident. He filed a workers' compensation claim for the 2007 injury which was settled in May 2011.

¶ 11 The claimant testified that, from June 14, 2011, through July 11, 2011, he continued working his regular, full duty job without restrictions and did not report any accidental injuries to anyone working for the employer. He did not have any difficulty performing his regular duties during that time period. On July 12, 2011, after learning of the seriousness of his back condition, the claimant reported his back injury and the alleged June 14, 2011, work accident to Robert Garza, a terminal manager at the employer's Aurora facility.

¶ 12 Garza instructed the claimant to go to the Dreyer Medical Clinic, where the claimant saw Dr. Jon Christofersen. Dr. Christofersen diagnosed a lumbosacral strain with radiculopathy and herniated disc and imposed work restrictions of modified duty with alternating sitting and standing. He also barred the claimant from doing any floor-level lifting and from lifting anything over 20 pounds, and he limited the claimant to only occasional climbing, bending, or stooping. The claimant returned to the Dreyer Medical Clinic on July 15, 2011, at which time he was taken off work through July 18, 2011.

¶ 13 On July 18, 2011, the claimant saw Dr. Michael pursuant to Dr. Comfort's referral. After examining the claimant, Dr. Michael recommended that the claimant undergo a lumbar

discectomy (*i.e.*, the surgical removal of herniated disc material that presses on a nerve root or on the spinal cord in the lumbar spine). In a letter he wrote to Dr. Comfort explaining his opinion, Dr. Michael stated that the claimant had "suffered a work-related injury on June, 14, 2011." Dr. Michael recommended that the claimant remain off work.

¶ 14 Ten days later, the claimant returned to the Dreyer Clinic where he saw Dr. William Johnston. Dr. Johnston agreed with Dr. Michael's surgical recommendation and also with Dr. Michael's opinion that the claimant should remain off work.

¶ 15 On August 3, 2011, Dr. Michael performed back surgery on the claimant, which included a left L4-L5 laminotomy (*i.e.*, the removal of part of a lamina of the vertebral arch in order to decompress the corresponding spinal cord and/or spinal nerve root), discectomy, and foraminotomy (*i.e.* a surgical procedure to relieve pressure on nerves that are being compressed by the passages through the bones of the vertebrae that pass nerve bundles to the body from the spinal cord). During a postoperative check-up on August 15, 2011, Dr. Michael noted that the claimant's strength was much improved, told the claimant to continue taking Vicodin, and prescribed other pain medication. However, when the claimant returned to Dr. Michael on September 12, 2011, he complained of occasional left leg pain and intermittent, shooting pain in his left hip. Dr. Michael prescribed physical therapy.

¶ 16 Two weeks later, the claimant returned to Dr. Michael complaining of pain in his left buttock and left leg. His condition was worsening and the claimant felt that the physical therapy was the cause. Dr. Michael discontinued the physical therapy and prescribed additional pain medication. On October 10, 2011, the claimant returned to Dr. Michael complaining of left lateral thigh and lateral calf pain. Dr. Michael prescribed three lumbar epidural steroid injections, which were performed in October and November of 2011.

¶ 17 During the December 8, 2011, arbitration hearing, the claimant testified that his condition was worsening and he was experiencing low back pain which he never had before. He stated that Dr. Michael had told him that, if the conservative treatment did not work, he would have to undergo spinal fusion surgery. However, Dr. Michael had not recommended that procedure at the time of the arbitration hearing. The claimant was off work from July 15, 2011, through the date of the arbitration hearing.

¶ 18 Deborah McCoy, an operations supervisor at the employer's Aurora facility, testified on behalf of the employer by evidence deposition. McCoy testified that the claimant did not report an accident of June 14, 2011, nor did he appear to be in pain or discomfort while performing his job duties in the weeks following the alleged accident.

¶ 19 William Furr, another operations supervisor for the employer, also testified on the employer's behalf by evidence deposition. Furr testified that he would see the claimant daily and stated that the claimant made no accident report or indication of an injury to him around the alleged date of the accident. He also testified that the claimant continued to work full duty for approximately one month after the alleged date of accident without any outward sign of impairment and without reporting any injury until July 12, 2011. During cross-examination, Furr acknowledged that he does not hold a medical degree or license and would not know the signs or symptoms of the claimant's condition.

¶ 20 Brian Chmielewski, another operations supervisor for the employer, testified on the employer's behalf during the arbitration hearing. Chmielewski testified that that the claimant made no injury or accident report on or around June 14, 2011. Chmielewski stated that he saw the claimant every day for approximately 5-10 minutes, and at no time during the one-month period between the alleged accident and the claimant's report of the accident did the claimant

appear to have any physical disability or ask for assistance in performing his job. On cross-examination, Chmielewski acknowledged that he does not have a medical license.

¶ 21 Joshua Sabolcik, an employee at the employer's Indianapolis facility, submitted a sworn affidavit that was signed and notarized. In the affidavit, Sabolcik swore that he conducted an investigation into the claimant's claim of injury. In the course of his investigation, Sabolcik interviewed four individuals who work at the employer's Indianapolis facility. None of these employees had any knowledge of any injury sustained by the claimant on or around June 14, 2011.

¶ 22 The arbitrator found that the claimant had failed to prove that he sustained accidental injuries which arose out of and in the course of his employment on June 14, 2011. The arbitrator noted that there was no dispute that the claimant suffered from a herniated disc in his lumbar spine which required surgery; the question was "whether that herniated disc was caused by an injury which allegedly occurred on June 14, 2011 in Indianapolis." The arbitrator found that there was "nothing to corroborate" the claimant's testimony that he experienced a "minor twinge" in his lower back on June 14, 2011, "either from other witnesses or histories of injury recorded by medical providers." The arbitrator noted that, to the contrary, "all other testimony in this matter refutes the account of a work injury by the claimant." For example, the arbitrator observed that "[t]he initial medical treatment records *** contradict any claims that an accident occurred on June 14, 2011, and when seen by Dr. Comfort three days after the alleged accident, the claimant made no mention of it according to the history that Dr. Comfort recorded." The arbitrator observed that the only work accident referenced in Dr. Comfort's records was the prior 2007 work accident during which the claimant was struck by a forklift.

¶ 23 Based on this evidence, the arbitrator found that: (1) the claimant had "failed to prove by

credible evidence" that he sustained an accidental injury that arose out of and in the course of his employment on June 14, 2011; and (2) the claimant's current condition of ill-being to his lumbar spine was not causally related to a work-related accidental injury. Accordingly, the arbitrator denied all of the claimant's claims for benefits, including TTD benefits and medical expenses.

¶ 24 The claimant appealed the arbitrator's decision to the Commission, which unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Will County, which confirmed the Commission's ruling. This appeal followed.

¶ 25 ANALYSIS

¶ 26 An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" his employment. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (2006); *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416 (2000). A claimant bears the burden of proving both of these elements by a preponderance of the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980); *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 477 (2011). The phrase "in the course of" refers to the time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (2000). Injuries sustained on an employer's premises, or at a place where the employee might reasonably have been while performing his or her duties, and while the employee is at work, are generally deemed to have been received "in the course of" one's employment. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013–14 (2011). For an injury to "arise out of" one's employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the

employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989).

¶ 27 Whether an injury arose out of and in the course of one's employment is a question of fact. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, determine the weight that their testimony is to be given, and resolve conflicts in the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206 (2003); *O'Dette*, 79 Ill. 2d at 253. The Commission's credibility determinations and other factual findings will not be disturbed on review unless they are against the manifest weight of the evidence. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶¶ 35-36.

¶ 28 For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be "clearly apparent." *Id.* at ¶ 35; see also *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). The appropriate test is whether the record contains sufficient evidence to support the Commission's decision, not whether this court might have reached the same conclusion. *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1013. "We cannot reject or disregard permissible inferences drawn by the Commission simply because different or conflicting inferences might also reasonably be drawn from the same facts, nor can we substitute our judgment for that of the Commission on such matters unless its findings are contrary to the manifest weight of the evidence." *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, ¶ 26 (quoting *Zion–Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill. App. 3d 109, 113 (1993)).

¶ 29 Applying these deferential standards, we cannot conclude that the Commission's finding that the claimant failed to prove that he sustained a work-related accident on June 14, 2011, is against the manifest weight of the evidence. No one witnessed the alleged accident. Although the claimant testified that he felt a minor "twinge" in his back on June 14, 2011, while helping two coworkers load a skid onto a trailer, he did not tell either of these coworkers about the incident. Instead, he continued working without seeking rest or medical attention. He was able to continue loading and unloading trailers that day, and he drove from the employer's Indianapolis facility to its Aurora facility that afternoon without incident. By his own admission, the claimant did not report the alleged June 14, 2011, accident to any supervisor or coworker for approximately a month. Moreover, the claimant concedes that, during that time, he had no difficulty performing his regular job duties and continued working his regular, full duty job without restrictions or accommodations. He did not report the alleged June 14, 2011, accident to the employer until after he experienced severe back pain[1] while driving to visit his son in Michigan and after he subsequently learned that he had a serious back condition that required surgical treatment. These facts undermine the credibility of the claimant's account of the alleged June 14, 2011, work accident.

¶ 30 The initial treatment records cast further doubt on the claimant's claim. The claimant saw Dr. Comfort on June 17, 2011, three days after the alleged work accident. However, Dr. Comfort's record of that visit makes no reference to any alleged work accident on June 14, 2011. After his trip to Michigan, the claimant returned to Dr. Comfort on July 11, 2011, complaining of severe lower back pain. Although Dr. Comfort's record of that visit specifically references the

[1] The claimant testified that the back pain he experienced while driving to Michigan was "far greater" than the back pain he allegedly experienced after the June 14, 2011, accident.

claimant's 2007 work accident, it makes no mention of an additional work accident on June 14, 2011. The claimant asserts that he told Dr. Comfort about both work accidents during both the June 17, 2011, and July 11, 2011, visits. However, the claimant cannot explain why Dr. Comfort failed to record the June 14, 2011, accident in his notes of either visit, and he did not seek to resolve this alleged discrepancy by deposing Dr. Comfort.[2] Moreover, the suggestion that Dr. Comfort would reference a four-year-old work accident in connection with the claimant's current back complaints but fail to record the claimant's reference to a subsequent accident that occurred less than one month prior to the visit strains credulity, particularly if, as the claimant contends, the latter accident produced immediate back pain. The lack of any mention of the alleged June 14, 2011, work accident in Dr. Comfort's initial treatment records supports a reasonable inference that the claimant did not mention any such accident to Dr. Comfort during the June 17, 2011, and July 11, 2011, doctor visits.

¶ 31 The first reference to a June 14, 2011, accident in the medical records occurs in a letter that Dr. Michael wrote to Dr. Comfort on July 18, 2011. That letter was written more than one week after the claimant was diagnosed with disc herniation and shortly after Dr. Michael recommended that the claimant undergo back surgery. It was also written approximately one week after the claimant experienced dramatic back symptoms while driving to visit his son in Michigan, and approximately two months after the claimant settled his workers' compensation claim for the 2007 work accident. Based on all of this evidence (including the claimant's own

[2] The claimant suggests that an "illegible scribble" in Dr. Comfort's July 11, 2011, medical record might be a reference to the June 14, 2011, accident. That is pure speculation. The claimant could have attempted to illuminate the meaning of the "illegible scribble" by deposing Dr. Comfort, but he failed to do so.

testimony about his initial failure to report the accident and Dr. Comfort's initial treatment records), the Commission could have reasonably inferred that the June 14, 2011, accident never occurred. The Commission's finding that the claimant failed to prove work-related accident on June 14, 2011, was not against the manifest weight of the evidence.[3]

¶ 32 The claimant raises several arguments in support of his claim that his current condition of ill-being is causally related to the June 14, 2011, work accident. However, because we affirm the Commission's finding that the claimant failed to prove that he sustained a work-related accident, we need not address these arguments. The claimant cannot establish causation without proving he sustained a work-related accident. Our finding of no accident disposes of all of the claimant's claims for benefits.

¶ 33 However, we note that, even if we were to address the claimant's causation arguments, we would reject them. In particular, the claimant's attempt to prove causation under a theory of repetitive trauma for the first time on appeal fails because he never raised that theory before the Commission. *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 414 (2005) ("Arguments not raised before the Commission are waived on appeal."). Throughout these proceedings, the claimant has asserted that he sustained a discrete, traumatic work-related injury on June 14, 2011. As noted above, the Commission properly rejected that claim. The claimant may not switch theories on appeal in an attempt to obtain a better result.

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[3] The claimant argues that the lay testimony presented by the claimant's supervisors and coworkers was unreliable in various respects. We do not need to address this argument because we conclude that there is sufficient evidence to support the Commission's finding of no accident even without considering any such testimony.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Will County, which confirmed the Commission's decision.

¶ 36 Affirmed.