2016 IL App (1st) 151532WC-U

Order filed: July 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ARMSTRONG SERVICE,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 1-15-1532WC
	)	Circuit No. 14-L-50687
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Robert Wallace, Appellees).	)	Honorable Carl Anthony Walker, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission's finding that the claimant sustained an accident that arose out of and in the course of his employment with the employer was not against the manifest weight of the evidence.

¶ 2 The claimant, Robert Wallace, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), seeking benefits for back injuries he allegedly sustained while working for respondent Armstrong Service (employer). After conducting a hearing, an arbitrator found that the claimant had failed to prove

that he sustained an accident that arose out of and in the course of his employment, and denied benefits.

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission reversed the arbitrator's decision and awarded the claimant temporary total disability (TTD) benefits and medical expenses. Commissioner Lamborn dissented.

¶ 4 The employer then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling.

¶ 5 This appeal followed.

¶ 6 FACTS

¶ 7 The claimant worked for the employer as a night shift operating engineer and boiler operator. His job duties included boiler operations, boiler readings, boiler water treatment, and extensive equipment readings and inspections. He worked the night shift from 6:00 p.m. to 6:00 a.m.

¶ 8 On the evening of April 15, 2012, the claimant relieved his supervisor, Mr. Rick Rodriguez, and began his overnight shift. The claimant testified that, during his shift that night, he injured his back while loading 40-pound bags of salt into a brine tank. He claimed that he lifted 10 bags of salt weighing 40 pounds each that night. The claimant testified that he orally reported the work accident to Rodriguez the following day, April 16, 2012. According to the claimant, he told Rodriguez that he had injured his back while loading salt. He claimed that he could not complete his shift and that Mr. Rodriguez allowed him to leave early on April 16, 2012, at 5:30 a.m.

¶ 9 The claimant testified that he later spoke with David Giere, the site supervisor, and told

Giere that he had hurt his back loading salt. When Giere asked the claimant if the claimant had hurt himself, the claimant answered in the negative. The claimant testified that he responded this way because he had misunderstood Giere's question. The claimant testified:

> "Dave [Giere] had asked me, had I done something to hurt myself? I understood the question to mean, did I do anything outside of my normal routine to have hurt myself, such as fall down or fall off the ladder? My answer to that question was, no, I did not."

During the arbitration hearing, the claimant again stated that he was performing his normal work routine when the April 16, 2012, work accident happened, and that he did not do anything outside his normal routine to hurt himself. Lifting bags in excess of 40 pounds is one of the duties listed in the claimant's job description.

¶ 10 On April 19, 2012, the claimant first sought medical treatment for his alleged work injury with Dr. Tony Nahhas, his family physician. Dr. Nahhas noted in his medical records that the claimant felt pain in his back "after lifting frequent 40 lbs. bags" on Sunday night.[1] The claimant followed up with Dr. Nahhas on April 28, 2012, and Dr. Nahhas prescribed a lumbar MRI and took the claimant off work. The MRI, which was performed on May 3, 2012, revealed disc herniations at L3-L4, L4-L5, and L5-S1.

¶ 11 On May 18, 2012, the claimant treated with Dr. Todd Sinai, a chiropractor. Dr. Sinai noted in his medical record that the claimant had injured himself while lifting 40-pound bags of salt into a tank. Dr. Sinai referred the claimant to Dr. Martin Herman, a spinal surgeon.

¶ 12 The claimant saw Dr. Herman for a neurosurgical consultation on June 26, 2012. Dr. Herman noted in his medical records that the claimant had been experiencing low back pain and

[1] April 19, 2012 was a Thursday. The previous Sunday was April 15, 2012.

right leg pain since April 15, 2012, when he was lifting heavy bags of salt into a brine tank. Dr. Herman noted that, on the morning of April 15, the claimant "woke up with mild back stiffness," which was "not atypical." According to Dr. Herman's record, the claimant went through his usual work routine on April 15, 2012, which included loading the salt bags into the brine tank. Dr. Herman recommended pain injections and physical therapy.

¶ 13 On September 24, 2012, the claimant was examined by Dr. Andrew Zelby, the employer's independent medical examiner. The claimant provided a history of injuring his back at work on April 16, 2012, when he lifted approximately ten 40-pound bags of salt into containers. The claimant told Dr. Zelby that he felt pain in his low back, which became worse throughout the remainder of his shift. Dr. Zelby reviewed the claimant's job description and his medical records.

¶ 14 Dr. Zelby testified that the claimant's lumbar spine appeared normal upon examination. The claimant experienced tenderness to palpation in the lower lumbar and upper gluteal regions even with nonphysiologic light touch. Dr. Zelby noted a normal range of motion of the lumbar spine except for modestly diminished forward flexion. He diagnosed the claimant with lumbrosacral spondylosis, a degenerative spinal condition.

¶ 15 Dr. Zelby found that the claimant exhibited inconsistent behavior, showing four out of five Waddell signs. According to Dr. Zelby, this suggested that the claimant's symptoms could be unrelated to any infirmity in his spine, and it suggested a poor outcome irrespective of treatment. Dr. Zelby opined that the claimant had engaged in significant symptom magnification and that his symptoms did not correlate with the radiographic findings.

¶ 16 Dr. Zelby opined that the claimant's lumbar condition was not caused by any alleged work injury. He stated that there was "no identifiable medical evidence to suggest that [the

claimant's] reported injury resulted in any injury to his spine or nervous system or that his reported injury has resulted in any ongoing condition of infirmity or disability." Based on the objective findings and the mechanism of injury that the claimant reported, Dr. Zelby opined that, "at the most," the claimant "might have sustained a lumbar strain and nothing more."

¶ 17 The claimant followed up with Dr. Herman on November 13, 2012. In his medical examination report of that visit, Dr. Herman opined that the claimant had failed conservative treatment measures and recommended a L4-S1 lamiforaminotomy and lumbar fusion surgery for nerve decompression and fixation.

¶ 18 Dr. Zelby disagreed with Dr. Herman's surgical recommendation. Regarding the nerve decompression recommended by Dr. Herman, Dr. Zelby opined that the claimant was "normal neurologically" with no radicular symptoms and no "convincing neural impingement" evident on the MRI. He concluded that the claimant's leg symptoms were "not radiculopathy" because they "did not follow a nerve or nerve root distribution." Dr. Zelby concluded that "it's difficult to decompress nerves that aren't being compressed." Regarding the lumbar fusion surgery that Dr. Herman had recommended, Dr. Zelby opined that the claimant had "very mild" degenerative disc disease which was "not likely to benefit" from surgical fusion, particularly considering that the claimant was obese and a smoker.

¶ 19 Dr. Herman subsequently testified by way of an evidence deposition. In his deposition, Dr. Herman opined that the claimant's MRI findings were consistent with a traumatic injury because disc herniations can be caused by traumatic injuries and foraminal stenosis can be exacerbated by such injuries. Dr. Herman also opined that the claimant's disc herniation and back and leg pain (and his need for surgery to correct those conditions) were "due to" the claimant's April 2012 work injury. Dr. Herman also noted that, when he examined the claimant,

the claimant did not exhibit pain upon superficial touching or any of the other "inconsistent" behaviors noted by Dr. Zelby.

¶ 20 During the arbitration hearing, the claimant testified that, although he attempted to return to work after Dr. Zelby issued his IME report, he failed the employer's fitness examination on December 27, 2012. The claimant has not worked since that date. The claimant stated that he had experienced continuing pain in his back since the April 2012 work accident. Although he had experienced stiffness and aches in his back prior to the work accident, he had never experienced pain before the accident. The claimant testified that he had no medical history of treating for back pain prior to the work accident.

¶ 21 Giere and Rodriguez each testified on behalf of the employer. Giere testified that he spoke with the claimant by phone on April 16, 2012, at approximately 3:00 p.m. The claimant told Giere that he might be late for work that day because his back was sore. Giere then asked the claimant if he had hurt himself at work. According to Giere, the claimant responded, "no." Giere testified that he specifically asked the claimant if he had hurt his back while lifting salt bags, and the claimant answered, "no." Giere stated that it was clear that the claimant's back was hurting at the time, so he told the claimant to take a couple of days off work and they would evaluate the claimant's condition thereafter. The claimant told Giere that the pain might go away. Giere testified that the claimant's back injury did not seem "major" at that time.

¶ 22 Giere testified regarding an "ASI Crew Statement" which he prepared on June 12, 2012, in conjunction with the employer's investigation of the claimant's alleged back injury. Giere stated that it was the employer's policy that any workplace injury be reported to the corporate office and the insurance carrier within 24 hours. According to Giere, a workers' compensation injury needed immediate follow-up so that a proper accident investigation could be conducted.

The ASI Crew Statement that Giere prepared in connection with the claimant's alleged work injury states that Giere informed the claimant that, if he had suffered a workplace injury, "we need to report it within 24 hours and follow ASI policies and procedures." Giere's ASI Crew Statement also indicates that, because Giere knew that the claimant had reported "back issues" to Rodriguez during shift changes on April 15 and April 16, 2012, he asked the claimant over the phone on April 16, 2012, if his back problem was a workplace injury. According to Giere's ASI Crew Statement, the claimant "said it was not."

¶ 23 Giere agreed that the claimant's job description, which indicated that the claimant's job duties included lifting bags in excess of 40 pounds, was accurate. However, Giere testified that it would have been "very, very unusual" for an employee to add ten bags of salt into the brine tank at one time. He noted that, during almost every shift, the employees check the salt level and add a "couple of bags." It would be possible for an employee to add ten bags during a single shift if no salt was added during the previous two or three shifts. However, Giere did not recall an instance wherein someone was required to load ten bags of salt during a shift.

¶ 24 Giere testified that the first notice he received of the claimant's workers' compensation claim occurred a few months after the accident when the claimant applied for workers' compensation benefits. Before reporting the workers' compensation claim, the claimant remained off work, using vacation time and then sick days. According to Giere, the claimant did not file his workers' compensation claim until all of his sick time had been exhausted.

¶ 25 Rodriguez, the employer's chief engineer and the claimant's supervisor, testified that he worked the day shift from 6:00 a.m. to 6:00 p.m., with the claimant relieving him from 6:00 p.m. to 6:00 a.m. Rodriguez stated that, on Sunday, April 15, 2012, when the claimant came in at 5:30 p.m. to relieve Rodriguez, the claimant told Rodriguez that his back was stiff. Rodriguez

subsequently prepared a written ASI Crew Statement which stated that the claimant had mentioned that his back was stiff during the shift change on April 15, 2012. Rodriguez's ASI Crew Statement also noted that, when Rodriguez relieved the claimant during the shift change the following morning (April 16, 2012), the claimant "complained that his back was hurting, and mentioned he loaded salt into the water softener tank." When asked during the arbitration hearing why he felt compelled to include the latter statement in the written ASI report, Rodriguez responded, "[b]ecause that is what [the claimant] said." Rodriguez initially testified that, on April 16, 2012, the claimant did not tell him, specifically, that he had hurt his back *because* he was loading salt into the water softener tank; rather, the claimant told him that he had hurt his back "more," because his back was already stiff when he came in to work at the start of his shift. However, during cross-examination, Rodriguez admitted that the claimant told him during the shift change on April 16, 2012, that he had hurt his back "from lifting the bags of salt."

¶ 26 Rodriguez testified that, when the claimant left work later that morning, he was able to leave on his own without assistance and he did not say that he needed to leave early because his back was hurting. Rodriguez did not tell the claimant that he needed to report the alleged work injury.

¶ 27 Rodriguez stated that, when he completed his shift on April 15, 2012, the tanks "were at normal level" and they did not need ten bags of salt to be added. However, when asked whether the claimant "need[ed] to put ten bags of salt into those tanks" during his shift, Rodriguez responded, "I can't really say."

¶ 28 The arbitrator found that the claimant failed to prove by a preponderance of the evidence that he sustained an accident arising out of and in the course of his employment on April 16, 2012. The arbitrator stated that the claimant "was specifically asked if his back injury happened

[on] the job," and he answered this question in the negative. Although the arbitrator acknowledged the claimant's testimony that he had misunderstood the question, she found it significant that the claimant "did not initiate the employer's procedures to report a job injury" despite the fact that he had been reminded of those procedures. The arbitrator found that "no one at [the claimant's] place of employment was aware that [the claimant] was claiming a job injury until he filed an application for notice of claim with the Commission." Moreover, the arbitrator noted that the claimant admitted to Dr. Herman that he already had back stiffness prior to the beginning of his work shift on April 15, 2012. The arbitrator found Giere's and Rodriguez's testimony more credible than the claimant's testimony. Having found that the claimant failed to prove a compensable accident, the arbitrator found the remaining issues raised by the parties moot and declined to address them.

¶ 29 The claimant appealed the arbitrator's decision to the Commission. The Commission reversed the arbitrator's decision. The Commission noted that it "view[ed] the record differently" than the arbitrator. Regarding the claimant's negative response when Giere asked whether he had "done anything to hurt himself" during his work shift, the Commission was "satisfied with [the claimant's] explanation" that he had misunderstood Giere's question.

¶ 30 The Commission also "[found] it less significant than the Arbitrator that [the claimant] did not follow [the employer's] formal accident reporting procedures," and "question[ed] the arbitrator's conclusion" that the claimant failed to make the employer aware of his work injury prior to filing an Application for Adjustment of Claim. The Commission noted that Giere testified that: (1) the claimant complained of his back hurting during the April 16, 2013, shift change; and (2) Giere was told by Ricky Rodriguez that the claimant had informed him that he had loaded salt into the water softener tank. The Commission found that Giere "had sufficient

information about [the claimant's] work activities" on April 15, 2012, and April 16, 2012, to reasonably conclude "it was somehow related to [the claimant's] claim of his back hurting." Given this, the Commission concluded that there was no need for the claimant to provide formal notice before filing a claim with the Commission.

¶ 31 With respect to the issue of accident, the Commission found the claimant to be credible. The Commission noted that the claimant testified that he felt fine when he arrived to work on the evening of April 15, 2012, but that he injured his low back shortly before the end of his shift the following morning. The Commission acknowledged that the claimant told Dr. Herman that his back was stiff prior to the beginning of his work shift on April 15, 2012. However, the Commission "d[id] not necessarily find there to be a significant inconsistency between [the claimant] claiming both that his back was "fine" and "stiff" prior to commencing work on April 15, 2012." Although the claimant may have experienced some stiffness before his work shift on April 15, 2012, he did not begin to complain of pain until after that shift ended on April 16, 2012. On the basis of the claimant's "credible testimony," the Commission found that the claimant experienced an injury during his work shift on April 16, 2012, that resulted in low back pain. Accordingly, the Commission reversed the arbitrator's decision with respect to accident and found that the claimant did sustain an accidental injury that arose out of and in the course of his employment. It awarded the claimant TTD benefits and medical expenses, but denied the claimant's claim for penalties under sections 16, 19(k), and 19(l) of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2012).

¶ 32 Commissioner Lamborn dissented. Commissioner Lamborn found the arbitrator's findings to be "thorough and well reasoned." He concluded that the arbitrator's decision was "correct and should be affirmed."

¶ 33 The employer sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling. The circuit court held that the Commission's decision had "ample support in the record." The court noted that the fact that it "may have ruled a different way" did not mean the Commission's decision was against the manifest weight of the evidence.

¶ 34 This appeal followed.

¶ 35 ANALYSIS

¶ 36 The employer argues that the Commission's finding that the claimant sustained an accidental injury that arose out of and in the course of his employment on April 16, 2012, was against the manifest weight of the evidence.

¶ 37 The claimant has the burden of establishing, by a preponderance of the evidence, that his injury arose out of and in the course of his employment. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980); *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 35. 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.

¶ 38 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*, 2011 IL App (4th) 100505WC at ¶¶ 35–36. 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 v. Illinois Workers' Compensation Comm'n,* 407 Ill. App. 3d 1010, 1013 (2011).

¶ 39 Applying these standards, we cannot say that the Commission's finding that the claimant proved an accident arising out of and in the course of his employment was against the manifest weight of the evidence. First, the claimant testified that he injured his back while loading 40-pound bags of salt into a brine tank during his overnight shift from April 15, 2012, to April 16, 2012. He experienced disabling pain only after suffering that accident. The claimant's testimony was corroborated by other evidence, including the medical records and Rodriguez's testimony. The claimant sought medical treatment for his low back injury from Dr. Nahhas three days after the alleged accident. Dr. Nahhas's medical record indicates that the claimant felt pain in his back "after lifting frequent 40 lbs. bags" on "Sunday night" (April 15, 2012). Dr. Sinai's treatment record also reflects that the claimant had injured himself while lifting 40-pound bags of salt into a tank, and Dr. Herman's records note that the claimant had been experiencing low back pain and right leg pain since April 15, 2012, when he lifted heavy bags of salt into a brine tank. Thus, the medical records of three different treaters document a work accident that is consistent with the claimant's testimony.

¶ 40 The claimant's account of his work accident was also supported by Rodriguez's testimony. Rodriguez testified that, when he relieved the claimant during the shift change on April 16, 2012, the claimant "complained that his back was hurting, and mentioned he loaded salt into the water softener tank."[2] Although Rodriguez initially testified that the claimant did

[2] As noted above, Rodriguez reported the claimant's complaint in his ASI Crew Statement.

not explicitly say that he had hurt his back while he was loading salt into the water softener tank, Rodriguez admitted during cross-examination that the claimant said that he had hurt his back "from lifting the bags of salt."

¶ 41 Taken together, this evidence is sufficient to support the Commission's finding of an accident arising out of and in the course of the claimant's employment.

¶ 42 The employer argues that the Commission's finding is against the manifest weight of the evidence, for several reasons. First, the employer notes that the claimant's testimony is inconsistent with some of his prior statements and behavior. Specifically, when Giere asked the claimant on April 16, 2012, whether he had sustained a work injury, the claimant answered that he had not. Moreover, the claimant did not report the alleged accident within 24 hours, as required by the employer's policy, even though Giere had reminded the claimant of that policy fewer than 24 hours after the alleged accident. Further, the claimant did not file a workers' compensation claim for the alleged accident until more than three months after the alleged accident, after he had exhausted his allotted sick days and vacation time. During that period, the claimant collected vacation pay and submitted his medical bills through his group health plan. The employer claims that the foregoing statements and actions are inconsistent with the claimant's assertion of a work-related accident while loading salt into a brine tank on April 16, 2012.

¶ 43 We do not find these arguments persuasive. The claimant testified that he answered Giere's question whether he had hurt himself at work in the negative because he misunderstood the question. The Commission found this explanation credible. The remaining facts raised by the employer arguably cast some doubt on the claimant's testimony that he sustained a work accident while loading salt into a brine tank on April 16, 2012. However, as noted above, there

is other evidence in the record that corroborates the claimant's testimony, including the medical records and Rodriguez's testimony. Given this, we cannot say that the Commission's finding is against the manifest weight of the evidence or that an opposite conclusion is "clearly apparent."

¶ 44 The employer also notes that the claimant's testimony was impeached by other credible evidence. For example, Giere testified that, when he asked the claimant specifically whether he had hurt his back from lifting salt bags, the claimant answered, "no." Moreover, Giere testified that it would have been "very, very unusual" for an employee to have to load ten bags of salt into the brine tank during a single shift. Rodriguez testified that the brine tank levels were at a normal level when he ended his shift on April 15, 2012, and he initially testified that ten bags of salt would not have been needed. In addition, Rodriguez initially testified that the claimant never specifically stated that he injured his back from loading salt into the brine tank, and the ASCI Crew Statements do not reflect that the claimant made such a statement.

¶ 45 The employer's arguments are unavailing. As an initial matter, it is the Commission's province to assess the credibility of witnesses and to resolve conflicts in the evidence (*Sisbro*, 207 Ill. 2d at 206), and we will overturn the Commission's findings on these matters only if they are against the manifest weight of the evidence (*Shafer*, 2011 IL App (4th) 100505WC at ¶¶ 35–36). Here, the Commission found the claimant's testimony to be credible. Given the other record evidence corroborating the claimant's testimony, we cannot say that this credibility finding was against the manifest weight of the evidence. Accordingly, the Commission was entitled to resolve any conflicts between the claimant's testimony and the testimony of other witnesses in favor of the claimant. Moreover, as noted above, Rodriguez admitted during cross-examination that the claimant told him during the shift change on April 16, 2012, that he had hurt his back "from lifting the bags of salt." Further, Rodriguez's testimony on whether the claimant would

have needed to add ten bags of salt to the brine tank during his shift was equivocal; at first he suggested that no additional salt was needed, but immediately thereafter he testified that he "[couldn't] really say."

¶ 46 Finally, the employer argues that Dr. Zelby's testimony severely undermines the claimant's credibility and demonstrates that the Commission's accident finding is against the manifest weight of the evidence. Specifically, the employer notes that Dr. Zelby opined that: (1) the claimant exhibited inconsistent behavior, showing four out of five Waddell signs, as well as significant symptom magnification; (2) there was a lack of correlation between the claimant's symptoms and the radiographic findings; (3) the claimant's lumbar condition was not caused by any alleged work injury; and (4) at most, the claimant might have sustained a lumbar strain, and nothing more.

¶ 47 However, Dr. Herman disputed these opinions, and he opined that the claimant's current back and leg conditions and need for surgery to correct those conditions were causally related to his April 2012 work accident. It is the Commission's function to resolve conflicts in the evidence, particularly medial opinion evidence. *Hosteny*, 397 Ill. App. 3d at 674. Accordingly, the Commission was entitled to credit Dr. Herman's causation opinion and other medical opinions over Dr. Zelby's conflicting opinions. Dr. Zelby's opinions do not fatally undermine either the claimant's credibility or the Commission's accident finding.

¶ 48 CONCLUSION

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

¶ 50 Affirmed; cause remanded.