2016 IL App (2d) 150365WC-U
No. 2-15-0365WC
Order filed February 26, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

TIMOTHY HENRY, Plaintiff-Appellant, v. ILLINOIS WORKERS COMPENSATION COMMISION and SODEXHO, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Lake County No. 14-MR-538 Honorable Thomas M. Schippers, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission's denial of benefits was not contrary to the manifest weight of the evidence in that opposite conclusions to the Commission's regarding notice and accident were not clearly evident where Commission implicitly drew adverse inferences about claimant's credibility and its decisions were otherwise supported by competent evidence.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Timothy Henry, appeals the judgment of the circuit court of Lake County confirming a decision of the Illinois Workers' Compensation Commission (Commission)

denying him benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2006)). For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Claimant filed an application for adjustment of claim on May 2, 2007, alleging an injury to his right knee occurring on June 1, 2006, while in the employ of respondent (Case No. 07-WC-19686). Claimant filed a second application for adjustment of claim on the same day alleging a repetitive trauma injury to his right knee manifesting on March 27, 2007, also while working for respondent (Case No. 07-WC-19769). At the close of claimant's testimony, claimant moved to amend the second claim to conform to the proofs and encompass an injury to his left shoulder. Claimant voluntarily dismissed a third claim (No. 07-WC-19685) involving his shoulder. The two remaining claims were consolidated. Regarding the first claim, the Commission—reversing the decision of the arbitrator—found that claimant failed to prove he suffered an accidental injury that occurred in the course of and arose out of his employment with respondent; failed to prove he gave timely notice to respondent; and failed to prove that a causal relationship existed between his condition of ill-being and his employment. As for the second claim, the Commission—affirming the arbitrator's decision—found claimant again failed to prove accident, notice, and causation. Accordingly, both claims were denied. The following factual summary of the arbitration hearing will be limited to material relevant to the issues of accident and notice.

¶ 6 At the arbitration hearing, claimant testified that he had worked in respondent's maintenance department for about four years. His main supervisor was Bruce Davis. Claimant worked at the Stevenson High School location. On June 1, 2006, he was working for respondent at the school. He was in the back of a truck. Davis was operating a fork lift, and, as he

attempted to pick up a roll of carpeting, he pinned claimant's right leg between two such rolls. Claimant testified that he was in "a lot of pain." Jim Manago, another employee who was often put in charge when no actual supervisor was present, arrived shortly after the alleged incident, and claimant told him what had happened. Claimant found a place to rest and did not do anything else for the rest of his shift. He was limping. Claimant testified that he also informed Calvin Carter, the night supervisor, of the incident. He then went home. The next day, claimant came to work and "took it real slow." Claimant requested vacation from the end of July to August to allow him to rest his knee. While on vacation, his knee started to feel better, and he thought the problem would pass.

¶ 7 He returned to work following his vacation and worked until March 26, 2007. During this time, claimant testified, he "was pretty much on [his] own to do what [he] wanted." He was vacuuming and cleaning as well as working on drinking fountains. Sometimes he would feel better and attempt some heavier work, but then his leg and arm would start hurting. On March 26, 2007, claimant was removing carpeting from a building. This involved jamming a shovel under the carpeting to break the bond between it and the floor. At the end of the day, claimant was in so much pain that he could not help carry rolls of carpet out of the building he had been working in. The next day, claimant tried to work; however, he had to quit after a short time due to the pain. He told Bruce Davis that he needed to see a doctor for the pain in his arm and leg, and Davis told him to go.

¶ 8 Claimant called his doctor, but he was on vacation, so claimant had to wait until the doctor returned to get an appointment. On April 3, 2007, claimant saw Dr. Young. Young ordered an X-ray. Young also imposed restrictions, which claimant communicated to respondent. Claimant was told not to return to work until the restrictions were lifted. On April

18, 2007, claimant underwent an MRI, and Young subsequently recommended surgery. Claimant was terminated by respondent on July 11, 2007. Surgery was performed on November 17, 2007. Following a functional capacity examination (FCE) on February 22, 2008, it was determined that claimant could return to work with some restrictions. Respondent did not offer claimant a job within the parameters of the FCE.

¶ 9 Claimant also testified that he was required to carry his own tools. His tool bag weighed 10 pounds, approximately. He had been carrying it on his left shoulder for over four years. He began to experience pain in his left shoulder, so he obtained a cart to transport his tools.

¶ 10 During cross-examination, claimant acknowledged that he had not seen a doctor for his knee in four years. He further acknowledged that he was terminated after failing to complete a form—as instructed by respondent—requesting leave pursuant to the Family and Medical Leave Act (29 U.S.C. ¶ 2601 *et seq.* (2006)). Respondent called a witness to testify about claimant's job search, and the parties submitted documentary evidence.

¶ 11 Claimant submitted the evidence deposition of Dr. Michael Young, claimant's treating physician. Young is a board-certified orthopedic surgeon. He first saw claimant on April 3, 2007. Claimant related to Young that he had injured his knee when it became pinned between two rolls of carpet. He also reported a shoulder problem going back a year, which predated the knee injury. Claimant told Young that he had been using a scraper to remove carpeting and that he had to wear a tool belt that hung on his shoulder at work. Young restricted claimant from lifting in excess of 50 pounds. He ordered an MRI, and, based on that, believed knee surgery was appropriate. He performed the surgery on November 30, 2007. Claimant's shoulder continued to be problematic. An MRI of the shoulder performed on December 4, 2007, showed

irritation to claimant's rotator cuff, an os acromiale, and mild degenerative changes. Young did not believe shoulder surgery was necessary.

¶ 12 Young testified that carrying the tool bag would aggravate claimant's shoulder. He noted the carpet removal work performed by claimant constituted heavy work. He opined that claimant's work activities aggravated his shoulder and that the origin of such an injury would most likely be repetitive in nature. He also opined that the condition of claimant's knee was the result of his work activities.

¶ 13 Respondent submitted the evidence deposition of Dr. Paul Papierski, who examined claimant on respondent's behalf. He testified that he is board certified in orthopedic surgery, in hand surgery, and as an independent medical examiner. He specializes in the "upper extremity." He also has extensive experience in performing knee surgeries.

¶ 14 Papierski examined claimant on two occasions, the first examination occurring in February 2009. Outside of a "little bit of tenderness" and "a little bit of crepitation," the strength and range of motion of claimant's shoulder was normal. Papierski diagnosed "left shoulder rotator cuff syndrome with an os acromiale and acromioclavicular joint degenerative joint disease." He opined that claimant's work activities did not put claimant at risk for rotator cuff syndrome, the os acromiale is congenital, and the acromioclavicular joint joint disease is degenerative in nature. Papierski also diagnosed right knee chondromalacia. He opined that the condition of claimant's knee probably pre-existed his at-work accident; however, he further opined that the accident probably aggravated the condition. He later flatly opined that claimant's work activities did not cause the condition of his left shoulder.

¶ 15 During the second examination, which took place on January 28, 2011, Papierski noted crepitation and tenderness in claimant's right knee. Claimant's left shoulder "had a little bit of

occasional crepitation with movement." Claimant "had full range of motion of the shoulder and normal strength." Papierski did not believe that any medical restrictions regarding work were warranted regarding claimant's knee. He opined claimant could return to work as a laborer.

¶ 16 On cross-examination, Papierski explained that acromioclavicular joint degenerative joint disease is, essentially, osteoarthritis. He acknowledged that prior to September 2005, there did not appear to be any indications that claimant was experiencing shoulder pain. He testified that he was not aware of any medical literature that would indicate that acromioclavicular joint degenerative joint disease could be aggravated by work activities. However, he did agree that repeated use of the shoulder could aggravate an asymptomatic rotator cuff. Regarding the knee, continuing to work while experiencing pain and chondromalacia could cause it to remain symptomatic. Papierski agreed that a degenerative disease could be aggravated by trauma.

¶ 17 Regarding claimant's first claim (Case No. 07-WC-19686), the arbitrator found claimant's testimony sufficiently credible and "essentially corroborated" regarding the occurrence of an accident. He also found that claimant's testimony about his reporting the accident was uncontradicted. As to the second claim (Case No. 07-WC-19769), the arbitrator found that there was "no mention of any accident, injury, or incident on March 27, 2007 contained in the initial treating records and the Patient History Form completed and signed by [claimant]." Further, claimant's own testimony indicated that he was experiencing medical problems with his knee and shoulder prior to this date, and neither claimant's treating physician nor respondent's examining physician related any of claimant's problems to that date. Moreover, claimant's statement to Davis that he could not "take it anymore" was insufficient to constitute notice. Both parties appealed

¶ 18 The Commission reversed the arbitrator's findings regarding claim No. 07-WC-19686 and found that claimant had failed to prove accident, notice, and causation. It affirmed the arbitrator's decision in claim No. 07-WC-19769 that claimant failed to prove accident, notice, and causation. As such, it denied all benefits under the Act.

¶ 19 The Commission stated, "[B]ased on the record as a whole," it was reversing the decision of the arbitrator regarding claim No. 07-WC-19686. It first noted that no one witnessed the accident alleged to have occurred on June 1, 2006. Further, claimant did not seek treatment for his knee for 10 months. Rather, he continued to work and performed the same duties he had previously performed. While claimant told Dr. Young that he had not reported the accident because his boss was involved, he nevertheless claimed to have reported it to Manago and Carter. No accident paperwork was completed. Finally, the treating physician's and examining physician's findings of a causal relationship between the incident and claimant's condition of ill being were based on claimant's reports of an accident.

¶ 20 As to the second claim, the Commission found a "total lack of proof for the left shoulder claim." No evidence indicated an accident occurred on March 27, 2007, and claimant failed to provide any detail to support a repetitive-trauma theory. The Commission noted that claimant only generally asserted that he had to carry a 10-pound tool bag on his shoulder. The Commission agreed with the arbitrator that claimant's statement to Davis that he he could not "take it anymore" was insufficient to constitute notice. The circuit court of Lake County confirmed the Commission's decision. Claimant now appeals.

¶ 21 III. ANALYSIS

¶ 22 We will confine our review to the issues of notice and accident. Indeed, the Commission's findings on either issue would be sufficient to deny claimant compensation. Both

involve questions of fact, so the manifest-weight standard applies. *Zion-Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill. App. 3d 109, 114-15 (1998) (notice); *Ferrin Co-op Equity Exchange v. Industrial Comm'n*, 64 Ill. 2d 445, 449-50 (1976) (accident). A finding is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Elmhurst-Chicago Stone Co. v. Industrial Comm'n*, 269 Ill. App. 3d 902, 906 (1995). Moreover, it is primarily for the Commission to resolve conflicts in the record, evaluate the credibility of witnesses, and draw inferences from and assign weight to evidence. *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 847 (1996). Moreover, we note that the burden was on claimant to prove all elements of his claim by a preponderance of the evidence. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 867 (2010). On appeal, it is now his burden to demonstrate error. See *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008). With these standards in mind, we turn to the issues that control this appeal.

¶ 23 Claimant argues that the clearly erroneous standard of review used in other areas of administrative law should govern this appeal. He asserts that "the facts and law are established; therefore, the question is how the Commission applied the facts to the law." We disagree. The Commission clearly questioned claimant's credibility, for example, pointing out that the alleged accident of June 1, 2006 was unwitnessed and that his statement to Young regarding not reporting the incident was inconsistent with his testimony that he told Manago and Carter. Thus, the veracity of claimant's account was at issue, so the facts were not established. In other words, the Commission engaged in fact-finding in rendering its decision. Of course, the manifest-weight standard applies to questions of fact. See *McRae v. Industrial Comm'n*, 285 Ill. App. 3d 448, 451 (1996).

¶ 24 1. NOTICE

¶ 25 We first turn to the issue of notice. Pursuant to section 6(c) of the Act, a claimant is required to give notice to his or her employer within 45 days of a work-related accident. 820 ILCS 305/6(c) (West 2006) ("Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident."). The failure to give the statutorily required notice is a bar to recovery under the Act. *Silica Sand Transport, Inc. v. Industrial Comm'n*, 197 Ill. App. 3d 640, 651 (1990). Giving notice of an injury is insufficient if the employer is not apprised that the injury is work related. See *White v. Illinois Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 911 (2007) ("Although Freeman United knew White was injured before the date in question, the record does not show appraisal of *industrial* injuries." (Emphasis in original.)).

¶ 26 Given the state of the record, we cannot say that an opposite conclusion to the Commission's is clearly apparent regarding either claim. As for the first claim (No. 07-WC-19686), the Commission found that claimant had failed to prove he gave notice of his accident despite his testimony that he told two of his supervisors (Manago and Carter) of the incident. In so doing, the Commission relied on claimant's statement to Young that he did not report the incident to his employer and the fact that no paperwork was filled out regarding the accident. Thus, the evidence was conflicting, and, though it did not explicitly say so, the Commission clearly rejected claimant's testimony on this issue. Given the evidence supporting the Commission's decision, we cannot say that an opposite conclusion is clearly apparent. It is simply not our function to reweigh this conflicting evidence and substitute our judgment for that of the Commission. *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055 (2004).

¶ 27 Claimant complains of the Commission's observation that he did not call Manago, Carter, or Davis to corroborate his testimony. We agree with claimant that this is not a proper basis for drawing an inference against him. The missing-witness rule allows an adverse inference where a witness under control of the party against whom the inference is to be drawn is not produced; it is not permissible if the witness is equally available to either party. See *Shvartsman ex rel. Shvartsman v. Septran, Inc.*, 304 Ill. App. 3d 900, 903-04 (1999). Here, there is no indication that these witnesses were under claimant's control or not equally available to respondent. Thus, the Commission should not have relied upon claimant's failure to call these witnesses in finding against him. However, we note that the Commission rejected claimant's testimony for other reasons that were more than adequate. Accordingly, the Commission's misstep was harmless. See *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 538 (2007) ("As such, we find that even without Dr. Levin's report, the Commission would have reached the same conclusion regarding causation.").

¶ 28 Claimant also contends that his statement to Young was not inconsistent with his testimony in that it indicated that he did not report the accident to his "employer," and Manago and Carter were not his "employer." Rather, they were his "supervisors." Of course, as employees and supervisors, these individuals were agents of the employer. Thus, notice given to them would constitute notice to the employer. See *McLean Trucking Co. v. Industrial Comm'n*, 72 Ill. 2d 350, 354 (1978) ("While the employer here was not notified of the cause of death, which was then unknown, the decedent's son phoned McLean and informed a supervisor of his father's death within a few hours after the decedent had completed his tour of duty. Thus, McLean was given notice of all facts then known to the claimant."). As such, the Commission was entitled to interpret claimant's statement to Young and his testimony as being inconsistent.

¶ 29 Claimant asserts that his testimony that he gave notice to Manago and Carter was unrebutted. Initially, we note that the Commission is not required to accept even unrebutted testimony. *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1042 (1999). Moreover, the Commission cited two factors that contradicted this testimony—that no accident report was filled out and that claimant made a contrary statement to his doctor. Thus, claimant's characterization of this testimony as unrebutted is not well founded.

Regarding the second claim (07-WC-19769), the Commission correctly held that claimant's statement that he could not "take it anymore" was insufficient to constitute notice. In *White v. Industrial Comm'n*, 374 Ill. App. 3d 907 (2007), the court held that mere notice to an employer of some type of injury is insufficient; it is also necessary that the employer be put on notice that the injury is in some way work-related. See *White*, 374 Ill. App. 3d at 911. This is consistent with the plain language of section 6(c) of the Act, which requires notice of an accident rather than of an injury. 820 ILCS 305/6(c) (West 2000) ("Notice of the *accident* shall be given to the employer as soon as practicable" (Emphasis added.)). Thus, the Commission correctly determined that claimant's statement was insufficient to put respondent on notice that the condition that he could not "take [] anymore" resulted from his employment.

¶ 30 The Commission again drew an inference against claimant for failing to call Davis to testify. As explained above, this was improper. However, even crediting claimant's testimony as to what he told Davis (that he could not take it anymore), he failed to establish notice for reasons explained in the previous paragraph, *i.e.*, what he told Davis did not constitute notice as contemplated by the Act.

¶ 31 Claimant relies on *S & H Floor Coverings v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 259 (2007), in arguing that a different result should obtain (we advise claimant's

counsel that pinpoint citation to the pages upon which he intended to rely would have been helpful here). In that case, the court held that although the claimant did not explicitly inform his employer that his injury was work related, the employer could infer from the nature of the injury and the nature of claimant's occupation that the injury was work related. *Id*. at 265-66. Here, claimant does not explain how the nature of his job and injury would have allowed respondent to draw a similar inference. Indeed, claimant's job duties varied on a daily basis, which would have made it more difficult to relate his duties to his injury. More fundamentally, in *S & H Floor Coverings*, 373 Ill. App. 3d at 266, the reviewing court was upholding a finding by the Commission that the circumstances of that case allowed the employer to infer that the claimant's injury was work related. Thus, the reviewing court was giving deference to the Commission on a factual finding. Here, the Commission drew the opposite inference, and we would have to abandon the usual deference with which we treat the Commission's factual determinations to grant claimant the relief he seeks. Given the different procedural posture of the case, *S & H Floor Coverings* is of limited guidance here.

¶ 32 Finally, claimant asserts that respondent never established it was prejudiced by claimant's failure to provide it with the statutorily required notice. However, that is required only in the case of imperfect notice. *White*, 374 Ill. App. 3d at 910. Here, claimant's failure to relate his injury to his employment with respondent constituted no notice whatsoever. *Id*. at 911.

¶ 33 In sum, neither of claimant's arguments convince us that the Commission's decisions regarding notice are contrary to the manifest weight of the evidence.

¶ 34 2. ACCIDENT

¶ 35 Claimant's claim fails for a second reason: the Commission's findings that he failed to prove the occurrence of an industrial accident are also not against the manifest weight of the

evidence. To be compensable, an injury must arise out of and occur in the course of employment. *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill. App. 3d 486, 489 (2004). The former element requires that the injury's origin be connected with a claimant's employment; the latter refers to the time, place, and circumstances under which a claimant was injured. *Id*. at 489-90.

¶ 36 The Commission found (implicitly) that claimant's testimony about the origin of his injury was not credible. It expressly noted that claimant's testimony concerned an *unwitnessed* accident. It then observed that claimant did not seek medical treatment for 10 months and that he continued to work full duty. By citing these inconsistencies, the Commission was obviously questioning the veracity of claimant's testimony. Thus, its rejection of claimant's claim was based on a credibility determination. We owe substantial deference to the Commission on such matters. *Ghere*, 278 Ill. App. 3d at 847. Since the Commission's reasons for doubting claimant's credibility are supported by the record, we cannot say that an opposite conclusion to the Commission's is clearly apparent.

¶ 37 Claimant's argument on this issue is brief. After spending two paragraphs setting forth the applicable law, claimant makes his entire argument in a single, short paragraph. In essence, claimant contends that his testimony was undisputed and corroborated by his medical records (claimant does not cite the record here, so we assume he refers to his self-reported histories to his medical providers). While it is true that no countervailing testimony was presented, it is also true, as explained in the preceding paragraph, that there were reasons to doubt claimant's credibility. The Commission is not required to accept even the uncontradicted testimony of a witness. *Fickas*, 308 Ill. App. 3d at 1042. As the Commission relied on sound reasons in rejecting claimant's testimony, its decision is not contrary to the manifest weight of the evidence.

¶ 38 Finally, claimant argues that the Commission's determination that he failed to prove a repetitive-trauma injury to his knee and shoulder is against the manifest weight of the evidence. An employee advancing a repetitive-trauma claim must meet the same standards as an employee seeking recovery on an acute-trauma theory. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 313 (2009). Such a claimant must therefore show that the injury arose out of and occurred in the course of employment. *Id*.

¶ 39 Here, the Commission determined that claimant had failed to meet that burden of proof, basing its decision on the sufficiency of the evidence proffered by claimant. It stated that there was a "total lack of proof for the left shoulder claim." The evidence set forth by claimant in support of this claim is that, while at work, he carried a 10-pound bag on his shoulder for 4½ years and he worked for one day scraping carpet that was glued to the floor. The Commission observed that claimant "generally argued repetitive trauma in carrying a tool bag on his left shoulder for 4-1/2 years, but did not testify to any details." Our review of the record indicates that this observation is well founded.

¶ 40 We further note that the medical evidence on this issue was conflicting—Young opined claimant's work caused the condition of his shoulder, Papierski opined to the contrary. Of course, resolving conflicts in the evidence is an issue for the Commission in the first instance. *Ghere*, 278 Ill. App. 3d at 847. Moreover, the Commission's expertise in medical matters is well recognized. *Long v Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). Hence, we owe substantial deference to the Commission in this area. See *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Given that claimant offered only general testimony on the issue and that Papierski opined that claimant's injury was not related to his employment, we cannot say that an opposite conclusion to the Commission's is clearly apparent.

¶ 41 Claimant contends that the "unrebutted evidence is that [claimant] suffered a repetitive trauma injury to his left shoulder from constantly carrying a 10 pound bag for 4.5 years." (Emphasis omitted.) Claimant also asserts that his use of the scraper to remove carpet must have been related to his knee and shoulder injury. As noted above, Papierski's opinion regarding claimant's shoulder provided a basis for the Commission to conclude that claimant's work activities were unrelated to the condition of his shoulder. As such, claimant's assertion that the evidence in his favor was "unrebutted" is simply not accurate. Further, claimant only spent one day removing carpet. We cannot say that this limited exposure to the purported source of claimant's injury was so obviously related to the injury that the Commission's decision is contrary to the manifest weight of the evidence.

¶ 42 Claimant intimates that the Commission conflated the concepts of accident and notice. The Commission explained it ruling, in part, as follows:

> "[Claimant] reported he had symptoms in his left shoulder and elbow for about one year. [Claimant] did not testify that he had notified anyone at [r]espondent about those symptoms during that period."

As we read this passage, the Commission was questioning the veracity of claimant's report that he had symptoms for a year because, it concluded, a person experiencing such symptoms typically would report them to his or her employer. We see nothing unreasonable about this inference. Furthermore, it does not appear to us that the Commission was speaking of notice in the legal sense; rather, it was simply making an observation about how it inferred a person would behave under the circumstances experienced by claimant and noting that claimant did not act in that manner.

¶ 43 In short, claimant has not carried his burden on appeal (see *TSP-Hope, Inc., LLC*, 382 Ill. App. 3d at 1173) of establishing that the Commission erred.

¶ 44 IV. CONCLUSION

¶ 45 In light of the foregoing, the judgment of the circuit court of Lake County confirming the decision of the Commission is affirmed.

¶ 46 Affirmed.