2016 IL App (5th) 150102WC-U
No. 5-15-0102WC
Order filed: April 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

AIRTEX PRODUCTS, INC.,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Wayne County.
	)	
v.	)	No. 14-MR-16
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISION, *et al.*	)	Honorable
	)	David K. Overstreet,
(Beverly Thomason, Appellee).	)	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 award of benefits was not contrary to the manifest weight of the evidence; the Commission's decisions found ample evidentiary support in the record and, though evidence was conflicting on some issues, the Commission was the proper tribunal to resolve those conflicts.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, Airtex Products, Inc., appeals the judgment of the circuit court of Wayne County confirming a series of decisions (now consolidated) of the Illinois Workers'

Compensation Commission (Commission) granting benefits to claimant, Beverly Thomason, under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)). The instant action involves three distinct accidents. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 The instant appeal involves injuries that were the result of three separate accidents. First, the Commission found that, on December 18, 2007, claimant slipped on ice and hit a steel post with her right knee. She subsequently had right knee replacement surgery. Respondent contends that the knee replacement was not caused by the slip and fall. Second, the Commission further found that claimant sustained injuries to her left upper extremity and hands on May 7, 2010–specifically repetitive trauma injuries in the form of carpal and cubital tunnel syndrome. Respondent contends that claimant failed to carry her burden of proof on this claim. Third, the Commission determined that claimant sustained a work-related injury to her right shoulder on July 27, 2011, when she attempted to jerk a stuck pallet jack in an attempt to free it. Again, respondent argues that claimant did not carry her burden of proof with respect to this claim. The Commission's findings were confirmed by the circuit court of Wayne County, and this appeal followed. The parties are aware of the evidence presented in the proceedings below. As the facts pertaining to each claim are discrete, we will discuss them as we analyze the parties' arguments.

¶ 6 III. ANALYSIS

¶ 7 As all of respondent's arguments concern factual matters, we conduct review using the manifest-weight standard. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). A decision is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Id.* It is not the role of a reviewing court to reweigh the evidence and reject reasonable

inferences drawn by the Commission, simply because other reasonable inferences are possible. *Id*. Resolving conflicts in the evidence, assigning weight to evidence, assessing credibility, and drawing inferences are matters primarily for the Commission. *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 847 (1996). We owe great deference to the Commission's decisions on factual issues, and this is particularly true of medical matters, where its expertise is well recognized. *Bennett Auto Rebuilders v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655 (2015); *Long v Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). Before the Commission, claimant bore the burden of proving by a preponderance of the evidence each element of her claims. *Parro v. Industrial Comm'n*, 260 Ill. App. 3d 551, 553 (1993). Here, on appeal, it is respondent's burden, as the appellant, to establish error in the proceedings below. 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 respondent's arguments.

¶ 8 A. The Knee Injury

¶ 9 Respondent first contends that the Commission erred in finding that the knee replacement surgery claimant underwent on February 11, 2009, was causally related to her at-work accident of December 17, 2007. It is undisputed that claimant sustained an injury on that date when she slipped on ice and hit a steel post with her right knee. She underwent an arthroscopic right knee repair on February 21, 2008, and subsequently, the knee replacement.

¶ 10 Claimant testified that prior to this accident, she had not received any medical attention on her right knee. At the time of the injury, she was not experiencing any problems with her knee. Claimant's initial knee repair was performed by Dr. Heshmatpour. Heshmatpour observed degenerative changes and believed that claimant might have to undergo a complete replacement in the future. On March 6, 2008, claimant contacted Heshmatpour, complaining of swelling and

pain. He advised her to go to the emergency room. On March 31, Heshmatpour allowed claimant to return to work with a cane. On April 29, 2008, claimant reported she was doing great.

¶ 11 Claimant was also examined by Dr. Christopher Kotsman on respondent's behalf. Kotsman examined claimant on two occasions. Kotsman opined that claimant's injury was work related and that the need for her arthroscopy was caused by the accident. However, he opined that the knee replacement was solely related to various degenerative conditions.

¶ 12 Claimant sought treatment from Dr. Peter Bonutti on November 11, 2008, as she continued to experience pain in her knee. After her arthroscopy, the rear side of her knee stopped hurting, but the front side continued to be painful. Bonutti recommended a total knee replacement, which he performed on February 11, 2009. In a follow up on February 16, 2010, Bonutti stated that the claimant had excellent results.

¶ 13 Claimant was also evaluated by Dr. Corey Solman. Solman noted that claimant had preexisting osteoarthritis and chondromalacia. He opined that her at-work fall could have accelerated these conditions and led to the need for the knee replacement. Further, claimant was experiencing pain in the retropatellar region, which is common among people who have had knee replacements.

¶ 14 The Commission found that claimant's condition of ill-being necessitating the knee replacement was causally related to the accident of December 17, 2007. It noted that there was no dispute that the accident was work related or that the arthroscopy was causally related to that accident. It then noted that claimant was in good health prior to the accident and that after the accident she "consistently had pain in her knee." This pain was not relieved by the arthroscopy. The Commission (adopting the arbitrator's decision) then stated that it was "persuaded by the

opinion of Dr. Kotsman [*sic*] that [claimant's] pre-existing condition of chondromalacia and osteoarthritis in her right knee was aggravated by her injury when she struck her knee on a steel pole."[1] It then found that the need for the knee replacement was caused by the accident.

¶ 15 Respondent contends that the Commission's decision is against the manifest weight of the evidence. It first points out that Heshmatpour evaluated claimant in April 2008 and stated she was doing great. Claimant herself stated she "felt pretty good" in May 2008 and that the pain in the back of her knee resolved. Kotsman placed claimant at maximum medical improvement (MMI) with respect to the accident of December 18, 2007, prior to the knee replacement. While all of this appears in the record, conflicting evidence is also present. Notably, despite stating she was doing well, claimant continued to experience and complain of pain on a regular basis between the arthroscopy and the knee replacement. On March 6, 2008, she complained of swelling and pain. She reported residual pain to Heshmatpour in April 2008. She told Kotsman of swelling and a popping sensation as well. In May 2008, she told Locey, a physician's assistant, that she was experiencing swelling and pain. A June 2008 MRI revealed significant edema. In November, she sought treatment from Bonutti and reported her knee was hurting constantly.

¶ 16 Furthermore, Solman evaluated claimant and opined that the December 18, 2007, accident could have aggravated her preexisting chondromalacia and osteoarthritis. Respondent states, "[T]he opinions of Dr. Kotsman are more credible on the issue of causation and

[1]It appears to us that the Commission mistakenly stated it was relying on Kotsman's opinion. Kotsman offered no opinion to this effect; instead, it was Solman who offered such an opinion. It is apparent to us that the Commission meant to state it was relying on Solman's opinion.

reasonableness and necessity of treatment." In support, it states that Solman only saw claimant on one occasion and offered a somewhat equivocal opinion (we note Kotsman only saw claimant on two occasions). The Commission was aware of these matters and found Solman credible. We owe great deference to the Commission's resolution of conflicts in medical opinions. *General Tire & Rubber Co. v. Industrial Comm'n*, 221 Ill. App. 3d 641, 647 (1991) ("In the presence of conflicting medical opinions, the Commission's determination is given substantial deference."). These alleged deficiencies are not so significant that the Commission was required to reject Solman's opinion. Moreover, respondent asks, in essence, that we reevaluate the testimony of Solman and Kotsman and substitute our judgment for that of the Commission. That is something we cannot do. *Lefebvre v. Industrial Comm'n*, 276 Ill. App. 3d 791, 798 (1995). ("Again, it is the responsibility of the Commission to judge the credibility of witnesses and we cannot substitute our judgment for that of the Commission merely because different or conflicting inferences may also be drawn from the same facts.").

¶ 17 In sum, we see nothing so lacking in the evidence upon which the Commission relied in finding that the need for claimant's knee replacement was causally related to the accident of December 18, 2007, that we could find it to be contrary to the manifest weight of the evidence.

¶ 18 B. Carpal Tunnel

¶ 19 Respondent next contends that claimant did not prove entitlement to benefits for her alleged carpal tunnel syndrome. Respondent makes two arguments to this effect: that claimant did not prove her injuries manifested on the date alleged and that claimant did not prove the condition of ill-being of her hands and left elbow were caused by her employment. Claimant had suffered from bilateral carpal tunnel syndrome in 2000 and had successfully pursued a workers' compensation claim on this basis.

¶ 20 Claimant alleged that she sustained an accident on May 7, 2010. However, on March 3, 2010, claimant sought treatment from Dr. Kosierkiewicz, complaining of a "funny feeling" in her left forearm. She told Kosierkiewicz that her job involved manipulating many small parts. Kosierkiewicz ordered electrical studies, which he interpreted as showing carpal tunnel syndrome, more pronounced on the left side.

¶ 21 It is axiomatic that a claimant alleging a repetitive trauma injury must "meet the same standard of proof as a petitioner alleging a single, definable accident." *Three D Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47 (1989). Thus, the claimant "must prove a precise, identifiable date when the accidental injury manifested itself." *Id*. An injury manifests itself when the causal relationship between the injury and employment would have become apparent to a reasonable person. *Id*. Here, claimant has offered no evidence to establish that her injury manifested itself on May 7, 2010.

¶ 22 Indeed, the only reference to that date in the evidence presented at the arbitrator hearing occurred when her attorney asked claimant, "Now, you're alleging you had an injury on May 7, 2010 to your hands and elbow?" Claimant responded affirmatively, but provided no other testimony regarding what occurred on that date. Respondent devotes an entire section of its brief to this deficiency, and claimant does not even acknowledge the argument. Further, the arbitrator's decision (which was adopted by the Commission) makes no express findings concerning the date of the accident.

¶ 23 This is not surprising. In the "disputed issues" section of the arbitrator's decision, the box adjacent to "What was the date of the accident?" is not checked. Moreover, at the start of the arbitration hearing, the arbitrator asked, regarding the repetitive trauma claim, the following:

"Moving to Arbitrator's Exhibit Number 2, we have the Request for Hearing form ***; and in that case, according to this form, the issues in dispute are accident, causal connection, medical expenses, TTD, and permanency.

Does that correctly state the issues in that case?"

Both claimant's and respondent's attorneys responded, "Yes, it does." Generally, the failure to raise an issue before the arbitrator results in its forfeiture. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020 (2005).

¶ 24 Thus, the date that claimant's injury manifested itself was not in dispute. As such, the Commission did not err in failing to rule on the issue, and the fact that claimant offered no evidence on this issue does not provide a basis for us to disturb the Commission's decision.

¶ 25 Respondent also challenges the causal connection between claimant's condition of ill-being and her employment. Only two physicians offered opinions as to causation. Dr. Crandall, who was acting on respondents behalf, opined that there was no causal link while Dr. Solman, who examined claimant at the request of claimant's attorney, opined that such a link existed.

¶ 26 The Commission found that claimant had established causation. It noted that the bulk of claimant's work required frequent movement of the hands and the use of tools in a repetitive manner. It expressly rejected Crandall's opinion that claimant's carpal tunnel was entirely residual of her earlier experience with carpal tunnel in 2000. It explained, "His conclusion *** ignores the fact that [claimant] returned to her job following her surgical releases and worked at a job which required frequent gripping and repetitive hand motions for sixteen years before she again began to experience symptoms from carpal tunnel syndrome." Instead, it found Solman persuasive that claimant's employment contributed to the carpal tunnel in her wrists and the cubital tunnel syndrome in her elbow.

¶ 27 Respondent now asks that we substitute our judgment for the Commission's and find Crandall more credible than Solman. Respondent argues:

> "In discarding Dr. Crandall's conclusions, the Commission stated Dr. Crandall 'ignores the fact that [claimant] returned to her job following her surgical releases and worked at a job which required frequent gripping and repetitive hand motions for sixteen years before she again began to experience symptoms from carpal tunnel syndrome.' However, [respondent] respectfully submits is [*sic*] instead the Commission which ignored the weight provided by the Record [*sic*] to Dr. Crandall's opinions. Unlike Dr. Solman, Dr. Crandall was aware of Employee's job duties, and was provided the opportunity to review twenty-five years of [claimant's] treatment records."

Undoubtedly, respondent has identified a basis upon which the Commission *could have* found Crandall's opinion more persuasive. However, the Commission–with its expertise in medical matters (*Long*, 76 Ill. 2d at 566)–determined that Crandall's opinion was flawed in that he believed claimant's condition was residual to a condition that had not manifested itself for 16 years while claimant worked a repetitive job. This certainly is a reasonable finding by the Commission.

¶ 28 In other words, the evidence was conflicting. Resolving conflicts in the evidence is primarily for the Commission. *Ghere*, 278 Ill. App. 3d at 847. Moreover, we owe great deference to the Commission's resolution of such issues. *Bennett Auto Rebuilders*, 306 Ill. App. 3d at 655. Since the Commission's rejection of Crandall's opinion in favor of Solman's was based on a reasonable consideration, we cannot say that an opposite conclusion to the Commission's is clearly apparent.

¶ 29 C. Right Shoulder Injury

¶ 30 Finally, respondent challenges the Commission's award of benefits to claimant for an injury to her right shoulder she sustained while attempting to free a stuck pallet jack by jerking on its handle. Respondent challenges both the occurrence of the accident and the causal relationship between claimant's injury and her employment.

¶ 31 In 2000, claimant had a surgical repair done to her right rotator cuff. It resolved all problems she was having at the time. In 2011, she began experiencing pain in her right shoulder, which radiated down her arm. She sought treatment from Dr. Lee, who ordered an arthrogram. Two cortisone injections were administered, but they provided only limited relief. Claimant testified that on July 27, 2011, she was at work, "moving skids" with a pallet jack. The jack became stuck in a skid. She jerked the jack and felt her shoulder "pop." It "started hurting worse." She saw Lee the next day, who took her off work and recommended surgery. Surgery was performed on August 12, 2011. She attempted to return to work in November 2011 and December 2011; however, her shoulder continued to hurt and claimant retired.

¶ 32 Claimant was evaluated by Dr. Terry Mirkin on respondent's behalf on August 8, 2011. Mirkin diagnosed claimant with degenerative shoulder pain following a strain injury. He believed claimant could continue working without restrictions. Dr. Solman evaluated claimant at her attorney's request. Solman opined that claimant had torn her rotator cuff as a result of repetitive work. He further opined that the incident where claimant attempted to dislodge the pallet jack had resulted in an injury to claimant's shoulder.

¶ 33 The Commission found that claimant's testimony was corroborated by Lee's records. Prior to the July 27, 2011, accident, claimant declined to have surgery and after the incident, she decided to proceed with surgery. It expressly rejected the testimony of respondent's workers'

compensation manager that claimant had attempted to reopen an old claim on her shoulder earlier in the day, noting that an investigation of the incident with the pallet jack had been performed that day, which was inconsistent with the assertion that claimant had not reported an accident until later. It was perfectly reasonable for the Commission to conclude that an accident would not be investigated until after it is reported. Moreover, according to the Commission, records from Lee's office corroborate claimant's version of events. The Commission then found that claimant had suffered an accident in the course of and arising out of her employment with respondent.

¶ 34 On the issue of causation, the Commission found that Lee's records indicated that claimant's symptoms worsened after the accident. Notably, prior to the accident, claimant declined surgery, while after the accident, she decided to have surgery. The Commission also cited the opinion of Solman in support of its finding that claimant's condition of ill-being was causally related to the July 27, 2011, accident.

¶ 35 Respondent first attacks the Commission's decision regarding accident. It begins by pointing out that claimant was experiencing problems with her shoulder prior to July 27, 2011. This is not in dispute; indeed, the Commission made extensive findings regarding the problems claimant was having prior to that date as well as the treatment she received. It then questions the Commission's findings that claimant had "consistently demurred" when offered surgery prior to July 27. It asserts that Lee's records do not state that claimant had been offered surgery, only that she expressed a desire to avoid it. It also notes that claimant was undergoing a series of injections, which ultimately proved ineffectual. It then argues:

> "These records are not demonstrative of a patient demurring surgery, but rather of a patient exhausting her options before proceeding with the surgery she was willing to

consider. Thus, one of the bases for the Commission's findings on the issue of accident is without any support."

Respondent grossly overstates the import of the content of Lee's records. Quite simply, claimant expressed a desire to avoid surgery prior to the accident, and then swiftly proceeded to have surgery after her accident. Whether this constitutes a "persistent demurral" may be debated, but to say this provides no support for the Commission's decision defies credulity. The Commission could rationally infer that it was the accident that caused claimant to no longer wish to avoid surgery rather than the exhaustion of conservative options. This, in turn, allows an inference that the accident occurred at the time claimant testified it did.

¶ 36 Respondent also takes issue with the Commission's rejection of its workers' compensation manager's testimony. Respondent provides a detailed account of both the manager's and claimant's testimony regarding their interaction on the day of the accident. It then states, in a conclusory fashion, that only their manager's "testimony provides a full and credible explanation of the events of July 27, 2011." It is not immediately apparent to us *why* the manager's testimony is more credible, or, more importantly, why the Commission was not entitled to rely on the fact that the accident was actually investigated on the day it occurred in finding that claimant reported it that day. In effect, the Commission concluded that claimant had to have reported the accident if it was, in fact, investigated. In any event, the Commission is the primary judge of credibility. *Ghere*, 278 Ill. App. 3d at 847. Given that it had a sound reason for crediting claimant's testimony over that of the manager, we cannot say that this decision is contrary to the manifest weight of the evidence. Respondent also seeks to draw a number of inferences in its favor from Lee's records; however, the Commission did not draw them, and we cannot say that

any are so persuasive as to render the Commission's decision against the manifest weight of the evidence.

¶ 37 Finally, we note one point of agreement we have with respondent. The Commission noted that respondent did not call two other employees who were involved in the events of July 27, 2011, and apparently drew an adverse inference from respondent's failing to do so. Drawing such an inference requires more of a foundation than the mere fact that a party did not call a witness. Specifically, it requires the party seeking to draw the inference to set forth the following foundation:

> "(1) the missing witness was under the control of the party against whom the inference is drawn, (2) the witness could have been produced in the exercise of reasonable diligence, (3) the witness was not equally available to the party in whose favor the inference is drawn, (4) a reasonably prudent person would have produced the witness if the party believed the testimony would be favorable, and (5) no reasonable excuse for the failure to produce the witness is shown." *Board of Education, City of Peoria School District No. 150 v. Illinois Educational Labor Relations Board*, 318 Ill. App. 3d 144, 148 (2000).

As the Commission made no ruling as to the existence of these foundational requirements, it should not have drawn an adverse inference from respondent's failure to call the other employees. However, this was a relatively insignificant point, and the evidence was otherwise adequate to support the Commission's decision on this issue. We certainly could not say that absent this inference, an opposite conclusion to the Commission's is clearly apparent.

¶ 38 Respondent also contends that the condition of ill-being of claimant's shoulder was not causally related to her at-work accident. Much of this argument is a rehash of earlier points respondent raised. For example, respondent again argues claimant was not declining surgery

prior to the accident. We have previously discussed and rejected this assertion and find it no more persuasive here. Respondent states, "[Respondent] submits it is an error for the Commission to assert a decision to undergo surgery after failed conservative treatment of a longstanding condition is somehow synonymous with a causal relationship between that condition and an alleged accident." We would point out that it would be a great coincidence indeed if this so-called failure of conservative treatment happened to coincide with the occurrence of an accident and the accident had no relationship to the progression of the condition. In any event, the Commission could certainly reasonably conclude, based on the timing of the accident and the need for surgery, that they were related. *Cf. Kawa v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120469WC, ¶ 88 (relying on sequence of accident and resulting condition of ill-being in finding causation).

¶ 39 Respondent again asks that we reassess the credibility of its examining physician and Solman and substitute our judgment for the Commission on this issue. Again, this is something we cannot do. *Lefebvre*, 276 Ill. App. 3d at 798. Without explanation, respondent characterizes as mere speculation Solman's statement that "she did re-injure the shoulder pulling on a skid."

¶ 40 In short, we find none of respondent's contentions persuasive. Respondent has not carried its burden on appeal of showing that an opposite conclusion to the Commission's is clearly apparent.

¶ 41 IV. CONCLUSION

¶ 42 In light of the foregoing, the judgment of the circuit court of Wayne County is affirmed.

¶ 43 Affirmed.