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2017 IL App (1st) 163425WC-U

Order filed: September 29, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

MEYER STEEL DRUM, INC.,	)	Appeal from the Circuit Court
	)	of Cook County Illinois
	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 1-16-3425WC
	)	Circuit No. 16-L-50288
	)	
ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION, *et al.*, (Auturo Escobar,	)	Carl A. Walker,
Appellees).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission's determination that the claimant suffered an accidental injury arising out of and in the scope of his employment was not against the manifest weight of the evidence. The Commission's award of benefits based upon that determination was, likewise not against the manifest weight of the evidence. The decision of the Commission is affirmed and the matter remanded pursuant to *Thomas v. Industrial Comm'n,* 78 Ill. 2d 327 (1980).

¶ 2 The claimant, Arturo Escobar, filed an application under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for low back and spine injuries, allegedly incurred as the result of an industrial accident occurring on February 16, 2011. The application maintained that the claimant was injured while working with 40-60

pound steel drums/barrels as a laborer for Myer Steel Drum, Inc. (the employer). The claimant subsequently filed an application alleging the same back injury and date of accident, but under a repetitive trauma theory. The two claims were consolidated and a hearing was held on both claims before Arbitrator Ketki Steffen on December 11, 2014, February 2, 2015, and March 2, 2015. The arbitrator determined that the claimant's injury to his low back and lumbar spine was causally related to an industrial accident on February 16, 2011. The arbitrator awarded the claimant temporary total disability (TTD) benefits covering 164 6/7 weeks (March 2, 2011, through March 14, 2011, and August 8, 2011, through September 21, 2014) at the rate of $330 per week. The arbitrator also awarded temporary partial disability (TPD) benefits totaling $2,346.16. The arbitrator further ordered the employer to pay all reasonable and necessary medical expenses totaling $290,200.43 and ordered the employer to authorize certain recommended surgical procedures.

¶ 3 The employer sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the decision of the arbitrator without modification. The employer then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision, finding that the decision of the Commission was not against the manifest weight of the evidence. The employer then filed this timely appeal.

¶ 4 The employer raises the following issues on appeal: (1) whether the Commission's finding that the claimant suffered an industrial accident arising out of and in the course of his employment on February 16, 2011, was against the manifest weight of the evidence. The employer raises three additional issues, all of which are dependent upon a finding that that Commission's decision regarding accidental injury was erroneous: 1) whether the Commission's determination that the claimant's current state of ill-being was causally related to an industrial

accident was against the manifest weight of the evidence; 2) whether the Commission's finding that the claimant was entitled to TTD and TPD benefits was against the manifest weight of the evidence; and 3) whether the Commission's decision to award current and future medical expenses was against the manifest weight of the evidence.

¶ 5 BACKGROUND

¶ 6 The following factual recitation is from the evidence presented at the arbitration hearings. The claimant testified that on February 16, 2011, he was working for the employer as a laborer on a reconditioning production line; a position he had held for approximately five years. The employer is in the business of reconditioning metal drum/barrels. The claimant testified that these drums are four feet tall, two and half to three feet in diameter and varying in weight from forty to sixty pounds. He testified that it was his responsibility to straighten out dented drums with the use of a machine. According to the claimant, the drums arrived at his station atop a conveyor line that was approximately one foot above the ground. The claimant would bring the drum down off the conveyor line by bending over, slightly bending his knees and placing his left hand below and the right hand atop as he brought the drum down toward the ground. Once on the ground, the claimant would roll the bottom edge of the drum two to three feet to the straightening machine. The claimant would then tilt and pick up one end of the drum to "feed it into" the straightening machine, a process that took approximately twenty seconds for each drum. After the machine had completed processing the drum, the claimant would then remove it from the machine and place it back on the conveyor line. The claimant estimated that he processed a drum two to three times per minute. He further testified that he repeated this process throughout his entire eight-hour shift. In addition to his drum straightening duties, the claimant occasionally attached metal seals to the drums. He testified that he used similar lifting body mechanics when completing that task.

¶ 7 The claimant testified that prior to February 16, 2011, he had never sought treatment for low back pain, nor had he ever missed work due to back, leg or hip pain of any kind. He further testified that prior to that, he had never experienced low back pain. The claimant testified that he was 33 years of age on February 16, 2011.

¶ 8 On Wednesday, February 16, 2011, the claimant reported to work at 5:30 a.m., his usual starting time. While performing his duties as previously described, the claimant noticed a strong right sided low back pain, which he had never experienced before. He reported the pain to his supervisor, Francisco Calderas, at about noon that same day. The claimant testified that Calderas told him that he complained too much and that he had low back pain because he was fat. The claimant continued working, but noticed that the pain increased as he continued his work and completed his shift. He reported to work the following Thursday, Friday, and Monday. The claimant testified that as he continued working, the pain stayed the same or increased. On Tuesday, February 22, 2011, the claimant reported to work but was unable to complete his shift due to increased pain. He once again discussed the pain with Calderas who told him to speak with the employer's human resource manager, Ornela Joyner. The claimant testified that he did not to file a written accident report because he hoped the pain would improve. After a subsequent conversation with Joyner, she instructed the claimant to seek treatment at Concentra Medical Centre, the employer's occupational healthcare provider.

¶ 9 The claimant presented for treatment at Concentra as instructed by Joyner, where he was examined by Dr. Stephen Bunting. Dr. Bunting's treatment notes indicated that the claimant gave a history of back injury while at work on February 16, 2011. Dr. Bunting recorded the claimant's statement of "lifting heavy containers, I felt pain in my lower back." The report further reported "the mechanism of injury was lifting of many 40-50 pound barrels in a day and he noticed his back begin hurting almost a week ago. He thought the pain would get better but did not."

¶ 10 Dr. Bunting gave a diagnosis of low back sprain, prescribed pain medication and physical therapy, and placed the claimant on a restriction of no lifting greater than 10 pounds.

¶ 11 The claimant testified that he did not attend physical therapy because Joyner told him that it was not necessary. Dr. Bunting's treatment notes included a notation: "OJ called and asked if PT was necessary. I indicated I thought it would aid him and speed recovery, but she requested he just take it easy and maybe get a day off. I told her I would re-evaluate him on Friday and place him on light duty." The claimant testified that he did not received permission to attend physical therapy and continued to work with gradually increasing low back pain.

¶ 12 On February 25, 2011, the claimant again treated with Dr. Bunting. Treatment notes from that appointment documented increased pain symptoms with bending, squatting, lifting, carrying and twisting. Without explanation, however, Dr. Bunting replaced the 10-pound restriction with a 25-pound restriction. The claimant testified that he never followed up with Dr. Bunting or Concentra Medical after that second appointment. He testified that he decided to seek a second opinion because he was frightened when he noticed his feet and legs started to feel asleep and numb.

¶ 13 On March 2, 2011, the claimant sought treatment with Dr. Ruben Bermudez at Herron Medical Center in Chicago. Dr. Bermudez reported the claimant's complaints of low back pain that travelled down both legs with some tingling and numbness. The claimant gave a history of low back pain after repetitive lifting of steel drums weighing 40 to 50 pounds. Dr. Bermudez requested an MRI of the low back and instructed claimant to remain off work. The MRI was performed that day, and was subsequently read to identify a grade I anterior spondylolisthesis at L5-S1, with disc dehydration and moderate bilateral foraminal stenosis at the same location. Dr. Bermudez referred the claimant to Dr. Suneela Harsoor, a board certified pain management specialist.

¶ 14 On March 10, 2011, Dr. Harsoor examined the claimant and reviewed the MRI films. She concurred in Dr. Bermudez's conclusions and added an additional diagnosis of mild arthritis. Her clinical examination revealed right lateral flexion pain, anterior flexion pain, and left lateral flexion pain. Dr. Harsoor prescribed physical therapy and epidural steroid injections at L5-S1, which took place on March 22, 2011.

¶ 15 The claimant underwent four weeks of physical therapy at New Life Medical Center in Chicago. He testified that he then returned to work with restrictions while under the care of Dr. Harsoor.

¶ 16 On April 7, 2011, the claimant received a pain injection. He reported mild relief of pain immediately following the injection, however, the pain returned after a week. On April 19, 2011, Dr. Harsoor administered a lumbar facet joint block to address the pain. The claimant once again reported mild relief with the procedure. On May 3, 2011, Dr. Harsoor's treatment notes indicated that the claimant reported worsening pain while at work on April 29, 2011. On June 14, 2011, Dr. Harsoor administered epidural steroid injection at L5/S1. The claimant reported mild relief, with pain at a 7 on a 10 scale and continued numbness down both legs. Dr. Harsoor allowed the claimant to continue working with restrictions and referred him to a surgeon for further evaluation.

¶ 17 On July 18, 2011, the claimant was examined by Dr. Ronald Michael, a board certified orthopedic surgeon at the Illinois Nuerospine Institute. Dr. Michael's treatment notes documented the claimant's history of a work accident followed by low back pain and bilateral leg pain with numbness and tingling. Dr. Michael reviewed the MRI scan and noted a disc herniation at L5-S1 with possible small extruded fragments.

¶ 18 On August 15, 2011, Dr. Michael again examined the claimant. He diagnosed a herniated nucleus pulposus at L5-S1 with an annular tear, grade I spondylolisthesis at L5-S1, and bilateral

L5 spondylosis. Dr. Michael reported in his treatment notes: “There is clearly a causal relationship between his current condition of ill-being and the work related injury described previously. The patient did not have low back problems prior to this. Indeed, he used to carry heavy weight with no problems whatsoever” Dr. Michael instructed the claimant to remain off work and advised him that he could either live with the pain or consider a lumbar fusion. The claimant stated that he wished to move forward with surgery because he was in a lot of pain and felt he was unable to do anything.

¶ 19 On November 7, 2011, the claimant was examined at the request of the employer by Dr. Jesse Butler, a board certified orthopedic surgeon. Following his examination of the claimant, a review of all diagnostic tests, and the treatment notes of Dr. Harsoor and Dr. Michael, Dr. Butler concurred in the diagnosis of spondylolisthesis at L5-S1. He opined that the follow-up pain injections were not warranted because the first did not provide much relief. He also disputed the necessity of the discogram and the pain block performed by Dr. Harsoor. Dr. Butler opined that the claimant was a candidate for spinal fusion surgery due to the failure of conservative care. He suggested that the claimant should remain off work for six months after surgery. Dr. Butler withheld his causation opinion because he had not been provided the initial clinic notes from Concentra Medical Center.

¶ 20 On February 23, 2012, after receiving treatment records from Dr. Bermudez, Dr. Butler issued a second report in which he stated that the treatment records supported the existence of a causal connection, and "unless the Concentra records contradicted this report of Dr. Bermudez, there appears to be a causal connection."

¶ 21 On May 16, 2012, Karen Collier from Alternative Risk Management (ARM), the employer's group insurance carrier, sent a communication to Dr. Michael indicating the proposed lumbar fusion would be covered by ARM at in-network or out-of-network rates and deductibles.

On May 18, 2012, the claimant sent an email correspondence to the employer's counsel requesting confirmation that the employer would cover the deductible. Surgery was set for September 5, 2012.

¶ 22 Dr. Michael performed a L5-S1 Posterolateral discectomy and fusion on September 5, 2012. On October 16, 2012, the claimant reported 50% improvement to Dr. Michael. On November 27, 2012, Dr. Michael prescribed post-operative physical therapy.

¶ 23 On December 17, 2012, Dr. Butler examined the claimant for a second time. At the time of this examination, Dr. Butler had the initial treatment records from Concentra. Dr. Butler disavowed his prior statements regarding causation and opined that there was no causal connection between the claimant's work activity and a specific incident that caused an injury. Instead, Dr. Butler opined that there was a gradual deterioration and symptom manifestation and that the claimant's pain complaints seemed to reflect the natural history in a morbidly obese and de-conditioned man of the claimant's age. Dr. Butler also opined that the claimant could return to work with a 25-pound lifting restriction.

¶ 24 The claimant continued his post-operative treatment with Dr. Michael. On January 22, 2013, following eight weeks of physical therapy, the claimant reported minimal low back pain with only occasional right leg pain. He reported an overall 60% improvement. Dr. Michael instructed the claimant to remain off work until he completed an additional course of physical therapy.

¶ 25 On February 18, 2013, at the request of the employer, Dr. Butler authored a final report in which he opined that the records depicted vague if not conflicting descriptions of an injury. He further opined that the claimant had pre-existing spondylolisthesis that pre-dated the accident date. In finding no causal relationship between the claimant's employment and his condition of ill-being, Dr. Butler opined that “[i]n order to establish causality, there needs to be an event or

series of events that led to an aggravation of [the claimant's] condition." The arbitrator observed that Dr. Butler's statement was more a legal than a medical definition of causation.

¶ 26 On April 26, 2013, the claimant completed another round of physical therapy. On July 12, 2013, the claimant underwent a functional capacity examination (FCE) which found the claimant to be able to return to work at a light physical demand level.

¶ 27 On July 24, 2013, Dr. Michael opined that the claimant had reached maximum medical improvement (MMI) and released him to work with restrictions consistent with the FCE, including a five-pound lifting restriction and avoidance of bending, twisting, and lifting to the extent reasonably possible.

¶ 28 The claimant testified that he attempted to return to work with the employer, but was told that there was no work available for him. The claimant testified to a job search including contacting over 30 potential employers between July 29, 2013, and October 17, 2013, and an additional 80 to 90 employers from October 2013 through September 2014. In September 2014, the claimant found employment as a laborer with a temporary employment agency. He was working at that job at the time of the hearing.

¶ 29 Although the claimant was discharged with permanent restrictions, the claimant continued to treat with Dr. Michael regarding pain management. On August 26, 2014, Dr. Michael noted possible post-operative pathology and the need for possible future surgical intervention.

¶ 30 Francisco Calderas, the claimant's supervisor testified on the employer's behalf. He confirmed that the claimant had worked as a line laborer for five years. Calderas testified that, as a supervisor, he was familiar with the claimant's work activities. He further testified that the claimant worked on the platform fixing drums that arrived at the claimant's station atop roller conveyor belt. According to Calderas, the claimant would pull the drum off the roller, roll the

drum to the straightening machine and then slide the drum into a machine that was a foot off the ground by tilting the drum and using force to push the drum in an upward motion. Calderas confirmed the claimant's testimony that prior to February 16, 2011, the claimant had always completed his work duties without any complaints of low back pain. Calderas also confirmed that the claimant reported the accident on February 16, 2011, and continued working until February 22, 2011, when the claimant told Calderas that he could no longer stand the pain.

¶ 31 The arbitrator found that the claimant had established, by a preponderance of the evidence, that he sustained an accidental injury to his low back arising out of and in the course of his employment. In so doing, the arbitrator found the claimant to be a credible witness. The arbitrator observed that prior to February 16, 2011, the claimant had no history of low back pain and had worked at same job for five years. She noted that the claimant credibly testified to the onset of low back pain while involved in a job that involved repetitive movement of 40 to 50 pound objects. The arbitrator further noted that the claimant credibly testified to the physical movements and physical demands immediately prior to the onset of pain and that he began to experience low back pain while performing his work tasks; a pain that was non-existent prior to that date. The arbitrator further noted that the claimant reported the pain to his supervisor, but continued working while hoping the pain would subside, and that the supervisor's testimony corroborated the fact that the claimant reported the accident and continued working. The arbitrator further noted that the claimant gave a consistent history of the mechanics of the injury to all medical treating physicians.

¶ 32 The arbitrator noted, but rejected Dr. Butler's opinion that the claimant did not sustain a work accident on the date in question. She observed that: 1) the claimant credibly testified as to the time, place, and biomechanical circumstances immediately prior to the onset of his low back pain: 2) the claimant immediately reported the injury to a supervisor; and 3) the claimant's report

of the mechanism of injury remained consistent throughout the record. Based upon these factors, the arbitrator found that the claimant had sustained his burden of proving by a preponderance of the evidence that he sustained a work accident on February 16, 2011, that arose out of and in the course of employment.

¶ 33 Regarding the causal connection between the claimant's work accident and his current condition of ill-being, the arbitrator determined that evidence of the claimant's good health prior to the accident and the onset of ill-being following and continuing after the injury was sufficient to establish the requisite causal connection under *Navistar International Transportation Corp. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1206 (2000). In addition, the arbitrator noted that the medical opinion testimony regarding causation favored the claimant. The arbitrator noted that Dr. Michael, relying upon the claimant's credible description of his work and the onset of his low back pain, opined that the claimant's injuries were caused by his work activities on February 16, 2011. The arbitrator further noted that Dr. Bermudez's treatment notes documented the claimant's history of onset of pain while engaging in work activities on February 16, 2011. Moreover, the arbitrator gave little weight to the employer's expert, Dr. Butler, noting that he gave a tentative opinion in support of a causal connection and only change that opinion after deciding that the claimant's injuries were gradual rather than traumatic. In rejecting Dr. Butler's opinion, the arbitrator noted that even if the claimant's underlying condition was the result of gradual deterioration, the claimant's onset of low back pain was traceable to a specific time and place wherein the claimant was engaged in work activities. This, the arbitrator determined, was sufficient to establish that the claimant' work was a causative factor of the claimant's low back injuries.

¶ 34 After finding that the claimant incurred injuries causally related to an industrial accident occurring on February 16, 2011, the arbitrator found that the claimant had proven entitlement to

temporary benefits and past and future medical expenses. The employer sought review of the arbitrator's award before the Commission, which unanimously affirmed and adopted the award. The circuit court of Cook County confirmed the Commission, and this appeal followed.

¶ 35 ANALYSIS

¶ 36 On appeal, the employer's primary argument is that the Commission erred in finding that the claimant had sufficiently established that he suffered an industrial accident on February 16, 2011. In support of its argument, the employer maintains: 1) the claimant's description of his job duties incorrectly stated that he "lifted" the drums off the conveyor rather than allowing the machine to "tilt" and "roll" the drums off the belt as described by Calderas; 2) the claimant made a statement to Calderas that even though the pain occurred at work, he did not know how it occurred; 3) the claimant's conflicting claims under both a traumatic and repetitive trauma theory established that the claimant did not know how his injury occurred; 4) the claimant's testimony at the hearing established that he did not know how is injury occurred; and 5) Dr. Butler's opinion that claimant's low back condition was not causally related to his employment "contradicted" the finding that the claimant suffered an industrial accident on February 16, 2011.

¶ 37 In a worker's compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). One such element is the occurrence of a work-related accident. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 188 (1999). As with any factual determination regarding a workers' compensation claim, whether a work-related accident occurred is within the purview of the Commission and its decision on that issue will not be overturned on appeal unless it is against the manifest weight of the evidence. *Id.* A factual finding of the Commission is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent from the record. *Efremidis v. Industrial Comm'n*, 308 Ill. App. 3d 414, 422 (1999). Moreover, it

is the exclusive purview of the Commission to judge the credibility of witnesses and weigh conflicting medical testimony. *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999).

¶ 38 We begin our analysis by addressing the employer's argument regarding the claimant's alternative theories of recovery. A specific trauma theory requires the claimant to establish that his injuries are traceable to a definite time, place and cause occurring within the course of employment. *International Harvester v. Industrial Comm'n*, 303 Ill. App. 3d 185, 188 (1999). A repetitive trauma theory requires the claimant to establish that a bodily structure has eroded over an extended period of time as the result of repetitive motions related to his job duties. *Peoria County Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524 (1987). However, even though a repetitive trauma is not traceable to a specific time, place or cause, it is still essential that a claimant establish a specific date on which the injury is deemed to have occurred. *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47 (1989) ("An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident.").

¶ 39 In the instant matter, while the record established that the claimant advanced both specific injury and repetitive trauma theories of recovery, the Commission found that the claimant established that a specific industrial accident occurred on February 16, 2011. Moreover, there is little or no discussion of repetitive trauma analysis in the Commission's decision, thus it is clear that the Commission addressed the claim under a specific injury theory, not a repetitive trauma theory. We will therefore address the propriety of the Commission's finding that the claimant suffered a specific industrial accident on February 16, 2011. In so doing, we note that there is nothing inherently contradictory in pursuing specific and repetitive trauma theories simultaneously. See *Butler Manufacturing Co. v. Industrial Comm'n*, 140 Ill. App. 3d 729, 732-36 (1986).

¶ 40 Turning to the employer's argument that the Commission erred in finding that the claimant suffered an industrial accident on February 16, 2011, we find that the Commission's determination was not against the manifest weight of the evidence. The employer's argument that the claimant's testimony regarding the "mechanism of injury" was not credible when compared to the testimony of his supervisor, Calderas, is quintessentially a question of credibility best left to the arbitrator and the Commission. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). Viewing the conflicting testimony between the two witnesses, we cannot say that the Commission's decision to give the claimant more credibility in the description of the mechanics and occurrence of his injury than Calderas was against the manifest weight of the evidence.

¶ 41 Likewise, the employer's argument that the claimant's statements to Calderas and his testimony that he did not know the cause of his injury do not establish that the Commission's finding is erroneous. The conflicting nature of the evidence required the Commission to assess credibility and weigh competing evidence. Viewing the record as a whole, we cannot say that the Commission's determination that the claimant's testimony and his consistent description of his injuries given to medical personnel outweighed other evidence regarding how the injuries occurred was against the manifest weight of the evidence.

¶ 42 Finally, the employer's reference to Dr. Butler's opinion is misplaced. Dr. Butler's opinion addressed causation, and was rejected by the Commission. To the extent that Dr. Butler's opinion supported the employer's version of whether an accident occurred on February 16, 2011, the Commission was free to accept or reject any opinion advanced by Dr. Butler or inferences to be made from that opinion. Moreover, since we find nothing in the record to support an argument that the Commission erred in rejecting Dr. Butler's opinion as to causation in favor of Dr. Michael's opinion as to causation, we find no error in the Commission's rejection of Dr. Butler's

opinion as it relates to the mechanism of the claimant's injury. After reviewing the record, we cannot say that the Commission's finding that the claimant suffered a specific accident on February 16, 2011, which gave rise to his low back injury was against the manifest weight of the evidence.

¶ 43 The employer raises three other issues regarding causation, temporary benefits and medical expenses, both current and prospective. Each of these arguments is predicated on an argument that the Commission erred in finding that the claimant suffered an accidental injury on February 16, 2011. Since we are affirming the Commission's finding that the claimant met his burden on the issue of accident, we need not address the employer's remaining issues. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 44 CONCLUSION

¶ 45 The judgment of the circuit court of Cook County, which confirmed the decision of the Commission is affirmed. The matter is remanded to the Commission pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 46 Judgment affirmed; cause remanded.