2017 IL App (5th) 160466WC-U
No. 5-16-0466WC
Order filed November 8, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

L&M SUPERVAC,	)	Appeal from the Circuit Court
	)	of Madison County
Appellant,	)	
	)	
v.	)	No. 16-MR-152
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	John B. Barberis, Jr.,
(Walter Barber, Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The decision of the Illinois Workers' Compensation Commission ordering prospective surgery was not contrary to the manifest weight of the evidence where—though conflicting evidence existed—there was expert medical testimony supporting the decision and claimant testified credibly; Commission properly determined which doctors constituted second and third choices made by claimant and appropriately ordered respondent to pay medical expenses consistent with these findings.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, L&M Supervac, appeals an order of the circuit court of Madison County confirming a decision of the Illinois Workers' Compensation Commission (Commission) granting certain benefits to claimant, Walter Barber, pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2010)). The Commission found that claimant proved that his ongoing condition of ill-being was causally related to an at-work accident. It also determined that claimant exceeded his choice of two doctors when he voluntarily sought care from an independent medical examiner to which respondent had initially sent him. For the reasons that follow, we affirm and remand.

¶ 4 II. BACKGROUND[1]

¶ 5 Claimant first testified on his own behalf. In 2011, he was an employee of respondent and had been working for respondent for a year, except over the summer when he worked for another company for three months. He also worked for another company during this period. He suffered an injury at work on November 23, 2011. His position with respondent entailed using a sweeper truck to clean parking lots, "blow out corners, blow sidewalks[,] and dump garbage cans." To empty a garbage can, claimant had to "throw [it] up in the truck." He explained, "You have to sling them back and forth sometimes if they're real heavy just to get them eight, seven

[1]Claimant's counsel frequently cites large sections of the record in support of relatively simple propositions. For example, at one point in claimant's brief, claimant cites pages 114-126 of the record in support of a direct quote. The quote was not, in fact, 12 pages long. Such citations are not helpful; presumably counsel was looking at some particular page of the record when that quote was copied into the brief. Citations should be made to the page or pages of the record where the relied-upon material actually appears.

foot [*sic*] up in the air." Claimant testified that he had to pass physicals for the two other companies he worked for in the year leading up to his injury.

¶ 6 In November 23, 2011, claimant was cleaning a parking lot at a strip mall. There is a bar in the strip mall. One garbage can was "real heavy." It was near the bar and there was a lot of liquid in it. He removed a bag from the can and threw it up into the truck. He noted "[r]eal sharp pains" in his left shoulder. Claimant called his supervisor, whom he identified as "Keith." His supervisor told claimant he might have pulled something and that claimant should "just try to take it easy [and] see what happens." Claimant had conversations about his injury with Mike and Keith (Mike owns the company, Keith is Mike's son). Mike told claimant he would pay claimant's medical expenses out of pocket because he did not want his insurance premium to increase.

¶ 7 Claimant worked three or four more days; however, he was experiencing sharp pains and was vomiting. He sought medical care at Memorial Hospital. The hospital referred him to a specialist, Dr. Weimer. Claimant spoke with Mike following his trip to the hospital. Mike stated that he could give claimant $250 to see Weimer and that he would take it out of claimant's vacation pay. Claimant was examined by Weimer. Weimer recommended an MRI and imposed work restrictions. Mike and Keith offered to pay for the MRI. After a few days, nothing had happened, so claimant hired an attorney. Claimant testified that he was then fired and told he could not have his last pay check.

¶ 8 Claimant continued to treat with Weimer. After an MRI, Weimer recommended physical therapy and injections. This seemed to help; however, eventually, Weimer recommended surgery. Claimant also was examined by Dr. King on respondent's behalf. King also recommended surgery. King believed that claimant might need his labrum repaired.

¶ 9 Claimant underwent surgery, which was performed by Weimer, in July 2012. Following the surgery, claimant underwent more physical therapy. Claimant felt somewhat better after the surgery, but he still experienced "some sharp pains." Claimant was later diagnosed with frozen shoulder. There was a delay in authorizing the treatment; however, a second MRI was eventually performed. Claimant saw King a second time, and King opined that claimant needed another surgery involving his biceps tendon and labrum. However, respondent's insurance carrier was going through a bankruptcy, so the surgery was delayed and claimant did not receive temporary total disability (TTD) from March 2013 until December 2013. Weimer performed a second surgery, which claimant stated resulted in some progress, though he continued to experience "sharp pains and stiffness."

¶ 10 In the second surgery, according to claimant, Weimer did not operate on the labrum and instead focused on claimant's bicep. Claimant returned to physical therapy. Claimant continued to seek treatment from Weimer; however, "nothing was approved." Weimer released claimant on July 28, 2014.

¶ 11 Following his release from Weimer, claimant sought care from Dr. Nathan Mall. Mall was recommended by one of claimant's friends. Mall believed a surgery on the labrum was appropriate. After receiving Mall's opinion regarding surgery, claimant returned to King on his own volition. King agreed with Mall. Respondent has not paid any TTD to claimant since Weimer released him. Claimant wished to undergo the surgery recommended by Mall.

¶ 12 On cross-examination, claimant agreed that he saw King on two occasions on his own. Claimant denied ever working as a tree trimmer or helping any one out with trimming a tree. He did recall that there was a bad storm in his area in November, 2011. Since Weimer released him,

claimant has attempted to go back to work. He continues to experience sharp pains in his shoulder.

¶ 13 Respondent then called Keith Kannerwurf to testify. Kannerwurf stated that he owns KLM Commercial Sweeping. Prior to owning KLM, Kannerwurf worked for respondent for 18 years. He was claimant's immediate supervisor. Kannerwurf stated that sometime around November 2011, he had a conversation with claimant about his injured shoulder. According to Kannerwurf, claimant stated that he had borrowed a chainsaw to remove a tree that had fallen onto his house. Claimant told Kannerwurf that he had hurt his shoulder and did not know if it was injured at work or while cutting down the tree. Subsequently, Kannerwurf was contacted by claimant's attorney. Claimant then told Kannerwurf that claimant believed he had hurt his shoulder at work. This was the first time claimant had expressed that he thought the injury was work-related.

¶ 14 On cross-examination, Kannerwurf acknowledged that his father owns respondent. Kannerwurf loaned claimant the chainsaw. Further, Kannerwurf stated that he sold claimant a car and he believes that claimant still owes him money.

¶ 15 Claimant testified in rebuttal. He stated that he did borrow a chainsaw from Kannerwurf, but it was in August or September of 2011, before he injured himself. Moreover, a neighbor actually used the saw rather than claimant. He did not injure himself at this time.

¶ 16 After he initially sought care at the Memorial Hospital emergency room, claimant was referred to Dr. Donald Weimer. Weimer first examined claimant on December 5, 2011. Weimer ordered an MR arthrogram and imposed work restrictions. A radiologist noted, *inter alia*, a posterior labral tear. Weimer eventually performed—as claimant's first surgery—an arthroscopic procedure, which included a bursectomy, a subacromial decompression, and a repair

of a partial thickness tear of the posterior supraspinatus. Weimer attributed claimant's continuing problems following his first surgery to adhesive capsulitis. He did not favor surgery at that time. Claimant underwent another MR arthrogram on December 26, 2013. The radiologist noted a small posterior labral tear. Weimer believed claimant's symptoms indicated a problem with, *inter alia*, the biceps tendon, and, on January 28, 2014, he performed a surgery designed to address such a condition.

¶ 17 Claimant underwent an MRI on August 5, 2014. According to the radiologist, it showed rotator cuff tendinosis and peritendinitis, a small effusion of the subacromial bursa, biceps tenodesis and a posterior labral tear.

¶ 18 Claimant submitted the evidence deposition of Dr. David King. King testified that he first examined claimant on May 31, 2012. At that time, he was acting on respondent's behalf. He reviewed claimant's medical records and performed a physical examination. He believed claimant had "partial thickness rotator cuff pathology." He also believed a labral tear was "part of [claimant's] pain profile." He opined that surgery was appropriate.

¶ 19 King next saw claimant on January 10, 2013, again at respondent's behest. Weimer had performed a "left shoulder arthroscopy with a repair of partial thickness rotator cuff tear, subacromial decompression, [and] debridement of a bursal surface rotator cuff tendonitis." However, claimant was still experiencing pain. King diagnosed "[i]mpingement syndrome, AC arthritis, biceps tenosynovitis, and a labral tear." As he had noted the labral pathology during his first examination of claimant, he believed it was work-related.

¶ 20 King saw claimant again on September 19, 2014. Claimant had seen Dr. Nathan Mall prior to this visit. Mall diagnosed "shoulder pain due to and [a] possible labral tear." Mall recommended an arthroscopy. King performed a physical examination. In addition to Mall's

diagnoses, he believed claimant also suffered from "left shoulder residual proximal biceps pain." King believed claimant should be further evaluated for surgical intervention.

¶ 21 King saw claimant a final time on January 8, 2015. Claimant described his shoulder as "unstable." He continued to experience pain. At this point, Dr. Weimer had performed two surgeries and Mall was recommending a third surgery. Claimant still showed signs of a labral tear. The labrum was not addressed in Weimer's surgeries. King did not "believe that any additional non-operative treatments would resolve his symptoms." King opined that surgery was reasonable, given claimant "had a labral tear from the very beginning, [he] has not had that specifically addressed, and [he is] still in pain."

¶ 22 On cross-examination, King stated that if claimant's surgeon had observed a labral tear during surgery, he would "like to think he would have performed a labral repair." Claimant never mentioned tree removal when he spoke with King. However, King agreed that such work could cause a shoulder injury.

¶ 23 Dr. Nathan Mall first examined claimant on September 3, 2014. Medical records from claimant's visits to Mall were submitted into evidence. Claimant told Mall that he was injured when he was slinging an 80-pound trash bag. Mall noted what he termed a "mild irregularity of the posterior labrum" in the MRI performed in August 2014. He diagnosed a "Kim lesion" of the posterior labrum, which, he explained, can often be missed. Mall believed that claimant should first try injections and, if his pain returned, "an AC joint resection and posterior labral repair" surgery. He further opined that claimant's current condition of ill-being is causally related to his at-work accident of November 23, 2011.

¶ 24 Claimant was also examined by Dr. Mitchell Rotman on respondent's behalf. Rotman authored a report detailing his examination and conclusions. Claimant related to Rotman that he

injured his shoulder while "slinging trash bags at work." In the August 2014 MRI, Rotman noted "some minor posterior labrum irregularities." Rotman stated that he did "not see a major problem with [claimant's] shoulder at this time." He added, "Presently, I would recommend no further treatment." He did not believe a problem with claimant's labrum caused his present symptoms. He stated he agreed with Weimer's opinions and that claimant was at maximum-medical improvement (MMI). He explained that while claimant's shoulder was tender in response to various maneuvers, the finding was "nonspecific" and did not indicate a need for labrum repair.

¶ 25 The arbitrator first found that claimant suffered a compensable accident on November 23, 2011. She expressly found claimant credible, noting that the medical records consistently document claimant's reports of injury. She also found Kannerwurf to lack credibility. She found Kannerwurf biased in that he believes that claimant owes him money. The arbitrator also found timely notice had been given to respondent.

¶ 26 She then found that claimant's condition of ill-being was causally related to his at-work accident. She specifically cited "[claimant's] credible testimony, the medical records, [the] chain of events, and the opinions of Dr. King and Dr. Mall." She found it significant that all physicians agreed as to the mechanism of injury ("slinging/throwing trash bags overhead") and its causal relationship to the first surgery. She found Rotman's opinion that claimant's second surgery was not related to the accident to be unsupported by the medical records. Moreover, Weimer's second surgery resulted in less complaints of pain after he repaired claimant's biceps tendon. The arbitrator expressly found the opinions of Weimer, Mall, and King persuasive regarding the second surgery. She then found the opinions of Mall, King, and the two radiologists that reviewed the MRIs concerning the labrum tear persuasive. She found the fact

that Weimer released claimant from treatment to have little probative value, since Weimer had not examined claimant for months due to respondent's refusal to authorize further treatment. Further, she noted that Mall explained that a Kim lesion to the labrum is "often time missed." Accordingly, she found claimant's ongoing complaints to be causally related to the accident of November 23, 2011. She found medical services reasonable and necessary and that claimant had not yet reached MMI.

¶ 27 Finally, the arbitrator found that claimant did not exceed his two choices of doctors by seeking treatment from Mall. She found that claimant was referred to Weimer by the emergency room he visited and that such referrals do not constitute a choice. Thus, Mall was claimant's first choice. Though King initially examined claimant on respondent's behalf, claimant continued to see him voluntarily, which made King his second choice.

¶ 28 The Commission adopted the decision of the arbitrator, with certain modifications. It agreed with the arbitrator's findings concerning, *inter alia*, accident, causation, and TTD (awarding 175 weeks). It further ordered respondent to pay for a third surgery to claimant's shoulder, as proposed by Mall. The Commission disagreed that claimant was referred to Weimer by the Memorial Hospital emergency room. It noted that the emergency room records state that claimant had previously been seen by "his doctor." It concluded that this was a reference to Weimer. This made Weimer his first choice and Mall his second choice. When claimant sought care from King on his own volition, this was his third choice, which exceeded the number of choices allowed by the Act. Therefore, the Commission vacated that portion of the award of medical expenses representing claimant's visits to King. It remanded in accordance with *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980). The circuit court confirmed, and this appeal followed.

¶ 29 III. ANALYSIS

¶ 30 On appeal, respondent raises two primary issues. First, it argues that the Commission's decision to award prospective medical expenses was erroneous as was the portion of the TTD award attributable to claimant's ongoing condition after his release from Weimer's care. Second, it contends that Mall actually represented claimant's third choice of a physician and expenses attributable to his care should not have been awarded to claimant.

¶ 31 A. PROSPECTIVE CARE AND TTD

¶ 32 Respondent's first argument implicates causation. Respondent contends that there is no causal connection between claimant's ongoing condition and need for surgery and his work-related accident of November 23, 2011. In essence, respondent asks that we reweigh the medical evidence presented in the proceedings below.

¶ 33 A claimant bears the burden of proving causation. *Morin Erection Co. v. Industrial Comm'n*, 81 Ill. 2d 72, 75 (1980). Causation presents a question of fact. *Payne v. Industrial Comm'n*, 61 Ill. 2d 66, 69 (1975). Therefore, we apply the manifest-weight standard of review and will reverse only if an opposite conclusion is clearly apparent. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786 (2005). Evaluating the credibility of witnesses, assigning weight to evidence, resolving conflicts in testimony, and drawing inferences from the record are matters primarily for the Commission in the first instance. *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 741 (1994). Furthermore, we owe particular deference to the Commission regarding its resolution of medical issues, as its expertise on such matters is well recognized. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979).

¶ 34 Here, there is ample evidence supporting the Commission's decision. Claimant's current condition and need for surgery stems from the condition of his labrum. Mall opined that

claimant's current condition of ill-being is causally related to his at-work accident. He diagnosed posterior labral flattening and/or a Kim lesion. Further, he explained that Kim lesions are easily missed. King concurred with Mall. Thus, two doctors' opinions supported the Commission's decision. The Commission (adopting the arbitrator's decision) expressly found Mall and King persuasive. Moreover, the Commission noted that two radiologists who reviewed imaging studies of claimant's shoulder observed tears of the labrum. It found the fact that Weimer released claimant from treatment to be entitled to little weight, as respondent was refusing to authorize further treatment. It also found Rotman's opinion to be inconsistent with the medical records. Moreover, even Rotman noted "some minor posterior labrum irregularities." Thus, the Commission expressly evaluated and weighed the testimony of four doctors in coming to its ultimate conclusion.

¶ 35 Respondent would now have us re-evaluate the medical evidence and substitute our judgment for the Commission. It contends that the Commission should have attributed more weight to Weimer's opinion in that he was the only physician that actually operated on claimant and observed his labrum first hand. While this certainly would seem to add weight to Weimer's opinion, we note that Mall explained that a Kim lesion is often missed. As such, this merely created a conflict in the evidence for the Commission to resolve. Respondent argues that the Commission should have rejected Mall's opinion "as he is the only physician who is of the opinion [claimant's] arthroscopic surgical photos show an acute type lesion." This ignores the fact that two radiologists observed a lesion in imaging studies.

¶ 36 In sum, while there is some evidence favorable to respondent in the record, it is not so compelling that we could say an opposite conclusion to the Commission's is clearly apparent.

Indeed, the Commission articulated sound reasons for accepting some evidence and rejecting other evidence in reaching its conclusions.

¶ 37 B. CHOICES OF DOCTORS

¶ 38 Respondent next argues that claimant exceeded his statutorily-authorized two choices of treating doctors. See 820 ILCS 305/8(a)(3) (West 2010). In fact, the Commission found that King was claimant's third choice of doctors and that respondent was not liable for expenses incurred by claimant after he began seeing King voluntarily (King was initially an independent medical examiner (IME) for respondent). Respondent argues that Mall should have been deemed claimant's third choice and King his second. We review this issue using the manifest-weight standard. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 468-69 (2011). Thus, we will reverse only if an opposite conclusion to the Commission's is clearly apparent. *Vogel*, 354 Ill. App. 3d at 786.

¶ 39 Respondent asserts that King first examined claimant on May 31, 2012; however, this was while King was functioning as an IME. Claimant first sought care from King on his own on September 19, 2014. The record indicates that Mall first examined claimant on September 3, 2014. As such, Mall was second and King was third. Thus, an opposite conclusion to the Commission's is not clearly apparent.

¶ 40 IV. CONCLUSION

¶ 41 In light of the foregoing, the order of the circuit court of Madison County confirming the decision of the Commission is affirmed. This cause is remanded in accordance with *Thomas*, 78 Ill. 2d 327.

¶ 42 Affirmed and remanded.