2018 IL App (1st) 180101WC-U
No. 1-18-0101WC
Order filed January 11, 2019

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

FRANK MIONI,	)	Appeal from the Circuit Court
	)	of Cook County
Appellant,	)	
	)	
v.	)	No. 16-L-50697
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and F.E. MORAN FIRE	)	
PROTECTION,	)	Honorable
	)	Carl Anthony Walker,
Defendants-Appellees.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission erred in considering bad acts that were otherwise unrelated to the proceedings in assessing claimant's credibility; other issues raised by respondent were moot.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Frank Mioni, appeals the judgment of the circuit court of Cook County confirming a decision of a majority of the Illinois Workers' Compensation Commission

(Commission) in favor of respondent, F.E. Moran Fire Protection. On appeal, claimant raises the following issues: (1) he contends that the Commission erroneously considered the fact that he did not report the accident at issue to respondent in accordance with an internal company policy; (2) he argues that the Commission erred in considering evidence of certain bad acts that were not relevant to the issues before it; and (3) he asserts that the Commission erred in finding him incredible and that its ultimate decision was contrary to the manifest weight of the evidence. We agree with claimant's second point, and, as explained below, need not address the other two issues raised by claimant. For the reasons that follow, we reverse the circuit court's judgment, vacate the Commission's decision, and remand for further proceedings.

¶ 4 II. BACKGROUND

¶ 5 The following evidence was presented at the arbitration hearing. Claimant testified that he is employed by respondent. At the time of the hearing, he had been working for respondent for four years. He is a member of the sprinkler fitters' union. As a sprinkler fitter, his job is to install overhead fire protection systems. His title is job foreman. As a foreman, he was trusted to make decisions regarding things like "safety, job changes and things like that." He would oversee both the job and the other employees.

¶ 6 Claimant would use a variety of equipment and hand tools. He worked with sprinkler pipe, valves, and pumps, among other things. Materials weighed between 5 and 900 pounds. Tools could weigh up to 15 pounds. Claimant identified a document that provided a job description for his position. Claimant is right handed.

¶ 7 On January 22, 2013, claimant was installing pipe at Abbott Laboratories. He was working alone that day, which he did about half of the time. He was not experiencing any problems with his right shoulder. He was out of the size of pipe he needed, so he contacted the

office to request a delivery. He was told that there was pipe in another building in the Abbott Laboratories complex and that he should obtain some there. He replied that he did not have a company vehicle. He was then told to walk the pipe over to his job. He went to the other building and obtained two pieces of inch-and-a-half pipe. The pieces were ten-and-a-half feet long. As he returned to his job with the pipe, he slipped and fell. Claimant extended his arm to break his fall. He "felt a jerk in [his] shoulder." After the fall, claimant experienced pain in his right shoulder. He did not finish work that day.

¶ 8 Claimant did not immediately seek treatment. He explained that he was not anticipating working "for a couple days," and hoped the pain would resolve. At some point (his testimony is not precise regarding when), he called and informed respondent that he would be off work. He saw a doctor for the first time on January 29. He went to see his general physician, Dr. Dragisic. Claimant testified that he told Dragisic that he was injured at work. Dragisic prescribed some medication and ordered an MRI. The MRI was not performed (an X ray showed a "metal anchor" in claimant's shoulder). He also ordered a CT scan, which was done on February 6, 2013. Dragisic referred claimant for physical therapy.

¶ 9 Claimant testified that he called Scott Acred, his acting superintendent, and informed Acred that he had been injured while working at Abbott Laboratories. He told Acred he was put on a five-pound lifting restriction. He did not actually speak with Acred, and instead "left a message on his recorder" (a voice mail).

¶ 10 Claimant began physical therapy on February 19, 2013, and he saw Dragisic again on February 25, 2013. Dragisic referred claimant to an orthopedic specialist, Dr. Perez-Sanz. He first saw Perez-Sanz on April 12, 2013. Perez-Sanz prescribed a cortisone injection in claimant's right shoulder. He ordered an MRI and instructed claimant to remain off work. Respondent was

never able to accommodate claimant's light-duty restrictions. This MRI was performed on April 16, 2013. After reviewing the results of the MRI, Perez-Sanz recommended that claimant continue with physical therapy. However, in June, Perez-Sanz recommended surgery, which was performed on July 2, 2013. On September 11, 2013, Perez-Sanz ordered further physical therapy. On November 11, 2013, Perez-Sanz prescribed a work-hardening program.

¶ 11 Claimant was scheduled to see Perez-Sanz on January 6, 2014. However, the office informed claimant that they would not continue to treat him until he paid the balance he owed. Dragisic continued claimant's medications (Vicodin and Ibuprofen). At the time of the arbitration hearing, claimant continued to experience pain in his shoulder. He was scheduled to see Dragisic in March 2014.

¶ 12 Claimant acknowledged that he had had surgery on his right shoulder in 1988. Since that surgery, he had returned to full-duty work. At the time of the accident, his right shoulder was not causing him any problems, and he had not been receiving any treatment regarding it.

¶ 13 On cross-examination, claimant agreed that he never spoke directly with Acred when he reported his accident until February 12, 2013. He agreed that it was his "testimony that the next day is when [he] left him a voice mail." Claimant did not believe anyone witnessed his accident. Claimant slipped on ice and fell backwards. By January 25, Acred had not returned claimant's call, and claimant did not leave another message. On his first visit to Dragisic, claimant told him that he was injured at work. As a foreman, claimant was familiar with respondent's safety policies. He was aware that, as a foreman, he was supposed to file an accident report within 24 hours of the occurrence of an accident. Claimant acknowledged that he did not do so in this case.

¶ 14 On redirect-examination, claimant testified that it was common to sustain injuries, such as “bumps and bruises,” in the course of his employment. He did not inform respondent every time he got a “strain or sprain or bump or bruise.” He first contacted Dragisic because his pain did not go away after a few days.

¶ 15 Respondent then called Scott Acred. Acred testified that he is a field superintendent and that he had worked for respondent for 18 years. It was company policy that a foreman report an accident on the day it happened, “[t]ypically immediately.” He had “construed those [policies to claimant] over the years.” An accident report is to be filed within 24 hours. Acred testified that he never received a voice mail from claimant regarding the accident. In January 2013, Acred was claimant’s direct supervisor. Claimant never reported an accident to him. Claimant never presented a light-duty slip to Acred.

¶ 16 On cross-examination, Acred agreed that he had sustained “[b]umps, bruises, strains, [and] sprains” on the job. He acknowledged that he did not notify his employer if “it was something minor.” Having a bump or bruise was not an uncommon occurrence. As a foreman, claimant ran the job at a work site. Respondent trusted claimant to run jobs on its behalf. If claimant had not been injured, Acred would have sent claimant to another job when one was available.

¶ 17 Respondent also called Jeff Smith, who works as a superintendent for respondent. When he was a foreman, he worked with claimant. As a foreman, Smith was aware of respondent’s policies regarding reporting accidents. Accidents are to be reported on the day they occur, and a written report is to be filed within 24 hours. Smith observed claimant riding a motorcycle in June 2013. Claimant did not appear to be in any distress.

¶ 18 On cross-examination, Smith agreed that respondent trusted claimant to be its representative on a jobsite. Smith testified that he would not always notify respondent when he suffered a bump or bruise, but he would in the event of a strain or sprain. Prior to the accident, Smith did not observe claimant having any problems with his shoulder.

¶ 19 Respondent next called Steve Melville, a private investigator. Melville observed and videotaped claimant. The recording showed claimant's activities at a picnic. It also showed him taking out the garbage, using his left hand, on the day after the picnic. On cross-examination, Melville acknowledged that there were times at which he could have recorded claimant, but did not.

¶ 20 Respondent recalled Jeff Smith in rebuttal. Claimant objected, citing relevancy. The Commission found that Smith's additional testimony was "not explicitly relevant to the issues addressed here," but that it was "relevant regarding the determination of his overall credibility." Smith testified that following the conclusion of his earlier testimony, he went down the hall and sat at a table. Acred was also present. Claimant approached them and asked why Smith had "brought up the motorcycle incident." Smith answered that he was asked about it and replied truthfully. Claimant stated that his attorney has a relative in their local union named Tom Collins. He added: "He's got your names down on the list. He has got your names down so don't worry about it. It will be taken care of." On cross-examination, Smith acknowledged that respondent was paying him while he was present testifying at the hearing. He was not under subpoena. Smith agreed that neither claimant nor his counsel spoke with Smith about his testimony prior to the hearing. Claimant never attempted to threaten or intimidate Smith before he testified.

¶ 21 Acred then testified, with claimant interposing the same objection as to Smith's additional testimony (as noted above, the Commission found such testimony relevant to claimant's credibility). He stated that following his testimony, he was waiting down the hall with Smith. Claimant approached and asked Smith why he brought up the motorcycle incident. He also said his lawyer had their names and knew who they were. Claimant further stated his attorney had a relative in the union. On cross-examination, Acred acknowledged that he was being paid by respondent while testifying.

¶ 22 Claimant also testified in rebuttal. He testified that following the initial hearing in the case, he was approached by Smith and Acred. They attempted to apologize for testifying against him. They said, "Listen, we're sorry we testified, but we have family to worry about and houses." Claimant replied, "What about my family." He told them, "Don't ever confuse us as being friends or union brothers." He added that he was upset and might have said other things, but he never threatened them. Moreover, the local they are in is not a hiring hall (it does not place individuals in jobs). On cross-examination, claimant acknowledged that the local did nevertheless provide assistance to members seeking jobs.

¶ 23 Dr. Peter Dragisic testified via evidence deposition. He is a board-certified family-practice physician. In the course of his practice, he treats patients with shoulder injuries. Claimant is one of his patients. On April 23, 2012, claimant complained of right shoulder pain during an examination. However, Dragisic did not find any abnormalities with claimant's shoulder, did not diagnose a problem, and prescribed no treatment. He did not see claimant again until January 29, 2013. Dragisic noted "significant impingement [of the] right shoulder." Dragisic order an X ray and an MRI. However, the X ray showed a "metal anchor" in claimant's

shoulder, so a CT scan was performed instead of an MRI. After reviewing the test results, Dragisic recommended physical therapy.

¶ 24 Dragisic stated he "somewhat" recalled claimant telling him the injury was work related, but he was not absolutely certain. He added that at about the time of claimant's first visit concerning this injury, his office was implementing a new electronic records system "and the fact that it wasn't in there doesn't mean he didn't say it."

¶ 25 Dragisic next saw claimant on February 25, 2013. Claimant was still showing signs of impingement. He referred claimant to Dr. Perez-Sanz, an orthopedic surgeon. Perez-Sanz ordered a cortisone shot and an MRI. Surgery was performed on July 7, 2013. During the surgery, Perez-Sanz observed "impingement with anterior laxity and some degenerative changes." Dragisic testified that he was familiar with claimant's job duties. He opined that claimant's job was causally related to the degenerative changes observed during the surgery.

¶ 26 On cross-examination, Dragisic agreed that he was not an orthopedic surgeon. When he saw claimant on April 23, 2012, he did not actually examine claimant's shoulder. There is no mention of claimant's accident occurring at work in the note generated during claimant's second visit after the accident. Dragisic stated, "That typically wouldn't be on this note."

¶ 27 On redirect-examination, Dragisic testified that it would be fair to say that claimant talked "to [him] about a work injury that occurred but it didn't make it into [his] note." He opined that claimant's work contributed to the degenerative changes in his shoulder. Moreover, prior to January 2013, any degenerative changes in claimant's shoulder were asymptomatic.

¶ 28 Respondent presented the deposition of Dr. Ryon M. Hennessy. Hennessy examined claimant's medical records on respondent's behalf. He is a board-certified orthopedic surgeon. Hennessy never actually examined claimant. Hennessy observed that claimant had had a rotator

cuff repaired "in the early 1990s." He noted that early records concerning claimant's treatment for his current injury do not mention a workplace accident. Hennessy typically includes such information in his records. He agreed that the surgery performed by Perez-Sanz was appropriate. Hennessy diagnosed "subacromial bursitis, humeral head chondromalacia, and acromial spur." He opined that these conditions were not related to claimant's work activities on January 22, 2013. Observations made during claimant's MRI and on arthroscopy during the surgery "were not consistent with a fall on the shoulder or traumatic event." He also relied on the fact that "the medical records themselves did not cite any type of sentinel event." Moreover, that claimant complained of right shoulder pain during an examination in April 2012 further indicated that claimant's shoulder condition was chronic in nature (as opposed to traumatic).

¶ 29 On cross-examination, Hennessy acknowledged that he had not read Dragisic's deposition. Moreover, he had not personally reviewed the actual films from claimant's MRI or CT scan. He had not seen any intraoperative photographs. Hennessy never spoke with claimant about "the facts and circumstances surrounding his injury." Claimant's degenerative changes were not symptomatic prior to January 2013 with the exception of the pain he reported to Dragisic in April 2012.

¶ 30 Hennessy agreed that it was possible for a fall to cause asymptomatic degenerative changes to become symptomatic. He testified that if claimant had, in fact, "fallen at work and injured his shoulder," "it would have a significant bearing on [his] opinion." If claimant had informed his treating physician of a fall during his initial visit, his opinion would change such that claimant's condition of ill-being was "casually connected to his work activities on January 22nd, 2013." Hennessy reiterated that his opinion was based on claimant's failure to report an accident to his doctor. After reviewing the job description for claimant's position, Hennessy

agreed that the sorts of activities claimant was engaged in could have caused the degenerative changes in his shoulder.

¶ 31 The arbitrator found that claimant sustained an accident in the course of and arising out of his employment. He further found that claimant's condition of ill-being was related to his employment with respondent. The arbitrator credited claimant's testimony, finding that he "answered forthrightly." He added, "Despite [claimant's] sometimes strange and seemingly childish behavior in the courtroom and his possible anger issue with another witness for disagreeing with him, the Arbitrator accepts his testimony regarding the actual facts of the accident." The arbitrator further noted that claimant suffered a deterioration in physical condition following the fall. He found the video-recording submitted by respondent "useless." He also credited the opinions of claimant's treating doctors. The arbitrator expressly found that claimant did report the accident to Dragisic and that the reason it was not recorded was Dragisic's unfamiliarity with his then-new electronic recording equipment.

¶ 32 A majority of the Commission reversed. It stated that claimant's credibility was "the critical issue here." It then noted that there were inconsistencies between claimant's testimony and his medical records as well as some internal inconsistencies in his testimony. It therefore found claimant to lack credibility. It specifically cited claimant's failure to comply with company policy regarding reporting accidents, though he was a foreman. It added, "Although there was timely statutory notice, the lack of compliance with procedures certainly affects the credulity [*sic*] of his testimony." The majority noted that claimant testified that he informed Acred of a five-pound lifting restriction when he left a message informing Acred about the accident despite the fact that he did not see a doctor until after the time he testified that he left the message.

¶ 33 The Commission then noted the testimony of Acred and Smith about their encounter with claimant after they testified. It stated:

> "In addition, the Commission cites [claimant's] testimony regarding the encounter with the other witnesses after their testimony. Although that encounter is not explicitly relevant to the issues addressed here, [claimant's] testimony about that incident is clearly relevant regarding the determination of his overall credibility. [Claimant] basically claimed that the witnesses apologized for their testimony but he told them not to worry because they were still 'union brothers.' However, he then admitted he could have said 'something else' as well because he 'was pretty upset.' [Claimant's] testimony about the encounter is internally inconsistent, simply does not make sense intuitively, and is completely contradicted by the credible testimony of the other witnesses involved in the incident."

Thus, the Commission relied on an incident that occurred after Acred and Smith were done testifying—an event the Commission found bore no relevance to any of the issues (other than credibility) raised at the hearing—to draw an adverse inference about claimant's credibility.

¶ 34 The majority of the commissioners also found that Dragisic's testimony regarding why there was no mention of a work-place accident, "while conceivable, is not very persuasive." Further, Dragisic's office note from September 23, 2013, states that this was the first time claimant could raise his arm over his head in three years. This suggests, according to the Commission, the claimant suffered from an ongoing condition. Moreover, the medical records consistently refer to claimant's condition as degenerative rather than traumatic. The Commission found as follows regarding claimant's credibility:

> "Accordingly, because [claimant] did not report his accident in a manner prescribed by company policy of which as foreman he was clearly aware, because there is no indication in the record that he made any mention of an alleged work accident until his initial physical therapy session almost a month after the alleged accident, because there is no indication in the medical records that [claimant's] pathology was anything but degenerative in nature, and because of discrepancies and inconsistencies in [claimant's] testimony, the Commission concludes that [claimant's] testimony was not credible."

It then found claimant failed to sustain his burden of proving he suffered a work-related accident on January 22, 2013.

¶ 35 One commissioner dissented. He observed that the arbitrator noted the "inappropriateness of [claimant's] apparent behavior regarding other witnesses." However, he further observed that the majority had conceded that this "encounter was completely irrelevant to the fundamental issues regarding accident and causation." As for claimant's failure to report the injury "immediately as required under company policy," the arbitrator pointed out that "there was testimony that not every minor injury is reported as required by that policy." The dissenting commissioner would have affirmed the arbitrator's decision.

¶ 36 The circuit court of Cook County confirmed the Commission's majority, and this appeal followed.

¶ 37 III. ANALYSIS

¶ 38 On appeal, claimant raises two main issues. First, he complains of the Commission's reliance on evidence regarding his interaction with Acred and Smith following the conclusion of their testimony. Second, he asserts that the Commission's decision regarding accident is contrary to the manifest weight of the evidence. We note that claimant's brief also contains a

section titled "Notice was given"; however, since the Commission did expressly find that "there was timely statutory notice," this issue is therefore not in dispute and we need not address it further. Moreover, given our resolution of claimant's first issue, we need not address his contention that the Commission's decision is contrary to the manifest weight of the evidence. We now turn to the dispositive issue in this appeal.

¶ 39 Claimant contends that respondent should not have been allowed to present the testimony of Acred and Smith concerning the encounter they had with claimant after the conclusion of their testimony. We agree. As set forth above, their testimony indicated that claimant told them they would be retaliated against for having testified against him. The Commission found this testimony to be "clearly relevant" to assessing claimant's credibility. Generally, the rules of evidence apply to workers' compensation proceedings. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010 (2005). Hence, we will disturb a decision of the Commission regarding an evidentiary matter only if the Commission abuses its discretion. *Id.* An abuse of discretion occurs only if no reasonable person could agree with the Commission. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947 (2006).

¶ 40 Claimant correctly points out that this interaction occurred after Acred and Smith had completed their testimony. Thus, it was not relevant to assessing *their* testimony in any way. Moreover, claimant points out that, with certain exceptions not pertinent here, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ill. R. Evid. 404(3)(b) (eff. January 1, 2011). That is, evidence should not be admitted if its purpose is solely to show that a party or witness is a bad person. See *People v. Brown*, 319 Ill. App. 3d 89, 96 (2001); *cf. People v. Kliner*, 185 Ill. 2d 81, 147 (1998) ("Evidence of other crimes cannot be admitted to enhance the credibility of a witness.").

Here, it is not apparent to us how the Commission could have considered this evidence as bearing on claimant's credibility other than to take it as evidence that he is a bad person and prone to be dishonest. We further note that impeachment on a collateral matter is generally improper. *Adams Truck Lines v. Industrial Comm'n*, 193 Ill. App. 3d 814, 819 (1990). As such, the Commission erred in considering this evidence, because, as the Commission found, it bore no relevance to anything at issue and was used by the Commission simply to conclude that claimant was likely to testify dishonestly.

¶ 41 Furthermore, we cannot find that this error was harmless. Generally, "[w]hen erroneously admitted evidence is cumulative and does not otherwise prejudice the objecting party, error in its admission is harmless." *Greaney*, 358 Ill. App. 3d at 1013. In other words, where the admission of the evidence at issue would not have affected the outcome of the proceedings, any error in its admission is harmless. *People v. Brothers*, 2015 IL App (4th) 130644, ¶ 97. Here, the Commission itself stated that this evidence "is clearly relevant to the determination of [claimant's] overall credibility." Moreover, it found that "the critical issue here is [claimant's] fundamental credibility." Quite simply, the erroneous admission of evidence the trier of fact considered "clearly relevant" to the "fundamental" issue in the case cannot be harmless (indeed, respondent never argues in its brief that this error was harmless). Given the state of the law and the record, we fail to see how a reasonable person could agree with the Commission. As such, an abuse of discretion occurred. Hence, the Commission's decision, grounded on such an error, cannot stand.

¶ 42 IV. CONCLUSION

¶ 43 In light of the following, we reverse the circuit court's judgment, vacate the Commission's decision, and remand so that the Commission may reconsider its decision while

taking into account only appropriate evidence. *Cf.*, *Jackson Park Hospital v. Illinois Workers' Compensation Commission*, 2016 IL App (1st) 142431WC, ¶ 49 (vacating and remanding for a "proper hearing" where the Commission failed to consider all relevant evidence). On remand, the Commission shall reconsider all issues, as appropriate. However, it shall not take into account evidence of the encounter among claimant, Acred, and Smith after they had testified.

¶ 44 Circuit court's judgment reversed; Commission's decision vacated; cause remanded with directions.