2019 IL App (2d) 180702WC-U
No. 2-18-0702WC
Order filed July 17, 2019

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IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

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| PINE LANDSCAPING, INC., | ) | Appeal from the Circuit Court |
| | ) | of Du Page County. |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 18-MR-157 |
| | ) | |
| THE ILLINOIS WORKERS' | ) | |
| COMPENSATION COMMISSION *et al.* | ) | |
| | ) | Honorable |
| | ) | Bonnie M. Wheaton, |
| (Cosimo Barabba, Appellee). | ) | Judge, Presiding. |

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

**ORDER**

¶ 1 *Held*: The Commission's finding that claimant sufficiently proved a causal connection between his work-related injury and his current condition of ill being was against the manifest weight of the evidence and it committed error in awarding claimant compensation under the Act.

¶ 2 On September 14, 2010, claimant, Cosimo Barabba, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), seeking benefits from respondent, his employer, Pine Landscaping, Inc. (Pine Landscaping).

Claimant alleged he sustained a work-related injury to his face, neck, right arm, and right hand on July 2, 2009, when he missed a step exiting his work truck and fell. He claimed he struck the right side of his face on the truck and landed on the right side of his body.

¶ 3 Following a hearing, the arbitrator determined claimant had suffered a work-related accident but he was unable to prove that his current condition of ill-being was caused by the accident. The arbitrator denied claimant benefits under the Act. On review, the Illinois Workers' Compensation Commission (Commission) modified the arbitrator's decision with respect to causal connection, awarded claimant 1-2/7 weeks of temporary total disability (TTD), and ordered Pine Landscaping to pay certain medical expenses, certain prospective medical expenses, and interest under section 19(n) of the Act, if any. The Commission otherwise affirmed and adopted the arbitrator's decision, including the findings of fact. On judicial review, the circuit court of Du Page County confirmed the Commission. We reverse.

¶ 4 I. BACKGROUND

¶ 5 On August 11, 2015, the arbitrator heard evidence on claimant's petition. Claimant testified he had been employed as a salesman and foreman for Pine Landscaping since 1990. On the morning of July 2, 2009, sometime between 8 and 10 a.m., claimant said he "fell out of [his] truck, missed a bumper on [his] truck, and [he] hit [his] face" on the right side. He said he immediately felt "just a little dizzy and then [he]—hours later just a lot of pain coming on to [him]." He testified he reported his injury to his employer the same day but continued working. He did not seek emergency or other immediate medical treatment. The following exchange occurred:

"Q. Did you seek medical attention for that problem?

A. Yes.

Q. If the records indicate that your initial intervention was with Dr. Glenn Scheive *** on July 15, would that be correct?

A. Yes."

¶ 6 Claimant testified he saw Dr. Glenn Scheive on July 15, 2009. After meeting with Dr. Scheive, claimant met with approximately 20 treating professionals. He also received treatment at the emergency rooms at Alexian Brothers Medical Center and Central Du Page Hospital. Overall, he incurred a total of $92,486.62 in medical bills. He testified he was off work between January 17, 2011, and January 26, 2011.

¶ 7 Claimant's primary complaint was the pain in his jaw area below his right ear. He sought treatment from various providers, including a neurologist; an ear, nose, and throat specialist; a physical therapist; a massage therapist; specialty dentists; oral surgeons; and pain specialists. None of the providers could pinpoint a diagnosis associated with claimant's pain. Some providers believed relief would come from injections and nerve blocks, while others believed implants and dental surgery would help, while still others believed neurosurgery would be the only answer. They all agreed that claimant suffered from a subjective unspecified pain syndrome.

¶ 8 The medical records introduced as evidence indicated claimant complained of pain on the "right side of face" *before* the accident. That is, claimant complained of similar pain in June 2009 to his regular dentist Dr. Anthony Romano and to the emergency room personnel at Alexian Brothers Medical Center. When claimant visited Dr. Romano on July 2, 3, and 7, 2009, it does not appear that he told Dr. Romano about his fall. Dr. Romano's records from July 2009, including July 2, 3, and 7, 2009, do not mention any fall or accident.

¶ 9 It is important to note that claimant did not testify about his pre-accident treatment with Dr. Romano, which according to the dentist's records included claimant's complaints of right side jaw pain (suspected temporomandibular joint (TMJ) disorder), root canals, and the removal of teeth dating back to at least December 2006. In fact, on June 30, 2009, Dr. Romano's records indicate claimant had a root canal on the #13 tooth (left side) and had "persistent" pain in the #30 tooth (right side molar). On July 3, 2009, Dr. Romano indicated he extracted the #13 tooth due to pain after the root canal procedure. At a presumed follow-up appointment on July 7, 2009, Dr. Romano noted right TMJ pain with an unknown cause. Again, there was no mention of a fall, trauma, or accident. On August 7, 2009, Dr. Romano noted claimant's continued trouble with the #30 tooth.

¶ 10 Nevertheless, on July 15, 2009, claimant sought treatment from a different dentist, Dr. Scheive, who noted claimant's reported July 2, 2009, accident. Dr. Scheive wrote that "[s]ince [claimant's accident,] his jaw joint hurts a lot mostly on his right jaw joint, earaches, [and] back of his head. He feels like he loss [*sic*] balance. He started having the clicking and popping on the right side but it went away."

¶ 11 After Dr. Scheive, claimant began his journey from provider to provider seeking relief for his reported facial and neck pain. Of the voluminous records from the numerous medical, dental, chiropractic, and therapeutic providers, the only diagnosis mentioned was an "unspecified pain syndrome most likely nerve related." Treatment recommendations generally included injections and medication.

¶ 12 Dr. Richard Noren, a pain management specialist, conducted an independent medical examination (IME) in December 2011 at the request of Pine Landscaping. At the time, claimant complained of "pain over the right side of his face, including the nose, and it extended above his

eye to include the whole right side of his face as well as the right neck radiating down to his shoulder. He also reported some numbness in his arm involving the fingers and the lateral portion of the hand." Dr. Noren reviewed records from Dr. Cacioppo, Dr. Petruzzelli, ATI Physical Therapy, Rush Pain Center (Dr. Lubenow), Dr. Dallas-Prunskis, Dr. Linden, Robert Sierszulski, D.C., Dr. Mokarry, Dr. Morris, Dr. Rumack, Dr. Scheive, Dr. Cinto, Dr. Lavacca, and Alexian Brothers Medical Center, including a magnetic resonance imaging (MRI) scan of the cervical spine. Notably absent was Dr. Noren's review of Dr. Romano's notes and records.

¶ 13 In Dr. Noren's opinion, claimant "does not fit any clear specific diagnosis." He said the most likely diagnosis was Eagle syndrome based on claimant's described pain symptoms. He said claimant's pain symptoms were "probably consistent" with the syndrome, which he described as a "poorly defined" "facial pain syndrome" generally associated with the glossopharyngeal nerve, a fracture of the nearby stylohyoid bone, and/or aggravation of the ninth cranial nerve. He said there was no specific recognized treatment for the syndrome since there was no specific diagnostic criteria. He said treatment was based on a patient's subjective pain complaints.

¶ 14 Upon his physical examination of claimant, Dr. Noren found that diagnostically, claimant only showed a "decreased sensation in the middle branch of the cranial nerve called the V2 branch of the facial nerve[.]" He explained that this nerve (the fifth cranial nerve) is generally not associated with Eagle syndrome. He diagnosed claimant with "atypical facial pain." Dr. Noren said claimant's described history of dental procedures "could potentially explain all of this." He said claimant, however, "relates it specifically to the trauma of his date of injury."

¶ 15 In Dr. Noren's opinion, injections served only temporary relief and over time claimant would become resistant to the benefit of those injections. If, though, claimant has neuralgia of

the glossopharyngeal nerve (a/k/a Eagle syndrome) and he undergoes a radiofrequency ablation procedure, his pain may be relieved. To a reasonable degree of medical certainty, in Dr. Noren's opinion, there was no medical evidence to support a correlation between claimant hitting his face on the door in his work-related accident and "this type of pain syndrome."

¶ 16 At the hearing, claimant had indicated he wished to treat in accordance with the recommendation of two providers: Anthony LaVacca, D.M.D., a prosthodontist, and Timothy Lubenow, M.D., a pain specialist. Dr. LaVacca recommended "splint therapy" because claimant lacked "posterior support bilaterally" in his mouth. As Dr. LaVacca explained in his deposition, this meant claimant lacked bone structure in the back of his mouth due to the removal of posterior implants. Typically, the posterior teeth provide support for the jaw bone at the base of the skull. Because claimant had the implants removed prior to July 2, 2009, it was possible that during his fall, the condyle (a rounded protusion of bone) was driven into the base of the skull, which could have damaged "those structures." The "splint therapy" would prevent claimant's teeth from touching each other, thereby holding the teeth and jaw in place. This suspension would give the strained muscles time to heal, alleviating claimant's pain. After the pain subsides, the dentist would insert new implants. Dr. LaVacca thought the entire process could be completed in two-and-a-half years, during which time claimant could work without restriction. In Dr. LaVacca's opinion, to a reasonable degree of dental certainty, claimant's current condition of ill-being "could be related to that event," referring to claimant's July 2, 2009, work-related accident. But, he believed it could have also been due to the lack of posterior support in his jaw area.

¶ 17 Claimant's other requested treatment provider, Dr. Lubenow, recommended additional Botox injections. He said claimant had responded very well to a prior series of such injections, in

that he saw an 80% improvement of his pain symptoms. Dr. Lubenow diagnosed claimant with Eagle syndrome and cervical radiculopathy. The doctor surmised that claimant suffered nerve damage to his face when he fell. However, he said, he did not recall that claimant's history included dental treatment at the time of the fall.

¶ 18 Other medical records of note indicated that in August 2009, claimant sought out Dr. David Cinto, D.D.S., for treatment of "dental pain, facial pain." Dr. Cinto considered claimant's complaint of "increasing intermittent pain to teeth UR, LR, UL; occasional numbness, tingling in teeth; clicking in rt. Jaw; occasional rt. neck pain.." He noted claimant's July 2, 2009, accident and wrote "no doctor visits yet. Waiting to get better." Dr. Cinto also wrote "may have predisposed joint problems—implants for # 13, 30 in process." Dr. Cinto advised claimant of possible nerve damage sustained during fall. He suggested physical, chiropractic, or massage therapy. Also, in February 2010, Dr. Scheive extracted #3 tooth (upper right) and an implant at #30 tooth (lower right) due to claimant's complaint of significant pain. Thereafter, claimant reported a decrease in his pain.

¶ 19 Dr. Victor Mokarry, an ear, nose, and throat specialist, ordered a computed tomography (CT) scan of claimant's sinuses, which showed no abnormalities. In September 2009, claimant saw Dr. Daniel Cacioppo, a neurologist, who found claimant neurologically intact after physical examination, a normal brain MRI, and a normal neck CT.

¶ 20 On July 14, 2016, after considering the voluminous medical records, evidentiary depositions, and claimant's testimony, the arbitrator issued his decision. He denied claimant's claim for benefits on the basis that claimant had failed to establish that his current conditions of ill-being were causally related to his work-related accident of July 2, 2009. The arbitrator found claimant and Dr. Romano "not credible." He found claimant "clearly experienced right-sided

facial pain and dental problems shortly before the accident" despite Dr. Romano's representation in a letter dated March 8, 2011, that the July 2, 2009, *caused* claimant to suffer "a multitude of complex dental problems and subsequent treatment, among which included the need to extract several teeth[.]"

¶ 21 The arbitrator further found the causation opinions of Drs. Lubenow, LaVacca, Noren, and DiVerde "defective" because it was unclear whether they had reviewed the records of Alexian Brothers Medical Center, particularly a record from a June 29, 2009, where claimant complained of right face pain, or Dr. Romano's records. Further, the arbitrator found it was not until November 11, 2010, at a visit with Dr. Lubenow that claimant first included in his description of his work-related July 2, 2009, fall that he hit the concrete on his outstretched right arm. After cumulative criticisms of the medical records and claimant's testimony, the arbitrator found claimant's fall was not the cause of claimant's current condition of pain in his jaw, neck, and arm. The arbitrator denied benefits.

¶ 22 On January 8, 2018, the Commission, in a 2-1 decision, affirmed and adopted the arbitrator's decision in part and reversed in part. The Commission affirmed the arbitrator's finding that claimant suffered a work-related accident. However, the Commission reversed the arbitrator's decision related to causation and instead awarded claimant benefits. On August 7, 2018, the circuit court of DuPage County confirmed the Commission.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, Pine Landscaping argues that the Commission's findings that (1) claimant had sufficiently proved causation and (2) he was entitled to benefits were against the manifest weight

of the evidence. In the alternative, Pine Landscaping argues that the exclusion of an IME physician's second deposition was not harmless error as the Commission had found.

¶ 26 First, Pine Landscaping asserts that claimant failed to sustain his burden of proving that a work-related accident actually occurred on July 2, 2009. However, the arbitrator and the Commission both found that an accident *had* occurred. The Commission relied on claimant's testimony as well as the medical records that documented claimant's description of the event to the various providers. Because there were no witnesses who saw claimant fall, the findings were based solely upon claimant's credibility. Claimant testified he informed his supervisor, the owner of the company, about his mishap on the day it occurred. Pine Landscaping presented no evidence to contradict claimant. As the primary judge of witness credibility, the Commission found claimant credible and determined he, in fact, suffered injuries during a work-related fall. Because the manifest weight of the evidence does not suggest that an opposite conclusion is clearly apparent, we will not disturb the Commission's determination that an accident in fact occurred within the scope of claimant's employment. See *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005).

¶ 27 To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). An accidental injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc., v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence. *Hosteny v. Illinois Workers' Compensation*

*Comm'n*, 397 Ill. App. 3d 665, 674 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). We will overturn the Commission's causation finding only when it is against the manifest weight of the evidence. A factual finding is against the manifest weight of the evidence if the opposite conclusion is "clearly apparent." *Swartz*, 359 Ill. App. 3d at 1086. The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 28 "Where the work injury causes a subsequent injury, *** the chain of causation is not broken" (*International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245 (1970)), even if the work injury causes the subsequent injury (or disease) by aggravating or accelerating a preexisting condition (*Sisbro*, 207 Ill. 2d at 205; *Par Electric v. Illinois Workers' Compensation Comm'n*, 2018 IL App (3d) 170656WC, ¶ 56; *Lasley Construction, Inc., v. Industrial Comm'n*, 274 Ill. App. 3d 890, 893 (1995)).

¶ 29 Applying this standard, we find the Commission's conclusion that claimant's current condition is causally connected to his July 2, 2009, work accident was against the manifest weight of the evidence. The medical records clearly demonstrate claimant had pain on the right side of his face and jaw prior to the accident. He was seeing Dr. Romano for extensive dental treatment and had visited the emergency room just days prior to the accident complaining of right side facial and jaw pain. In fact, he saw Dr. Romano on the day of the accident and twice within days following the accident. However, there was no indication from claimant's testimony or from Dr. Romano's notes that claimant mentioned his fall. Claimant specifically testified that he first sought treatment related to his fall when he visited Dr. Scheive on July 15, 2009. The first mention of claimant's fall by Dr. Romano is not until October 2009 when he refers claimant

to an unknown "colleague" for evaluation and treatment of claimant's "right facial pain and right dentition hypersensitivity" following July 2009 trauma to claimant's face. Dr. Romano also authored a March 2011 letter to an unknown addressee essentially blaming claimant's July 2, 2009, accident for the "multitude of complex dental problems and subsequent treatment, among which included the need to extract several teeth[.]" Dr. Romano's own records clearly demonstrate that these "complex dental problems," including an unidentified source for TMJ, the root canals, the dental implants, and various tooth extractions, were present well before July 2, 2009.

¶ 30 After seeing these two dentists (Drs. Romano and Scheive), claimant visited numerous providers, including other dentists, specialty dentists, specialty medical doctors, therapists, chiropractors, and the emergency room. As claimant professed during his testimony, he decided to embark on "various investigative approaches to different doctors" at his own expense with the hope that someone could diagnose and treat his pain. According to claimant (and the medical records), the doctors were "stumped" about how to "fix it." They also disagreed about the origin and cause of claimant's pain.

¶ 31 Other than claimant's subjective complaints to the numerous providers that he experienced pain only after the accident, nothing in the record substantiates this causation. At claimant's visit to the Alexian Brothers Medical Center's emergency room for chest pain days before the accident, he indicated he experienced pain on "right side of face." His then-treating dentist noted nothing about claimant sustaining a fall. The IME physicians, Drs. Noren and DiVerde, opined that claimant's fall was not the cause of his facial and jaw pain. Instead, the pain was most likely caused by claimant's history of dental procedures. Specifically, Dr. Noren testified he found no evidence to suggest that claimant's accident would result in the type of pain

syndrome claimant described. In his report dated April 5, 2012, Dr. DiVerde stated: "The dental condition and it's [*sic*] restoration is [*sic*] not causally related to the [July 2, 2009], incident."

¶ 32 We find the manifest weight of the evidence clearly indicates claimant suffered right facial and jaw pain prior to his July 2, 2009, fall. The cause of his pain may have been a mystery to Dr. Romano in June 2009, but it was obviously not the fall that happened days later. The majority of claimant's treating clinicians were unable to pinpoint a diagnosis for claimant, and most of the clinicians referred to his symptoms as unspecified pain syndrome. It was obvious from the medical records, testimony, and depositions that claimant suffered from a multitude of dental problems and right side facial pain before he fell. As a result, we conclude the Commission's finding of a causal connection between claimant's current condition of ill-being and his work-related fall was against the manifest weight of the evidence. Because we find no causal connection, we need not address Pine Landscaping's other claims raised in this appeal.

¶ 33 In claimant's brief, he requested the award of temporary partial disability benefits. The Commission did not address this issue. In order for this court to consider such a request, claimant was required to file a cross-appeal. Without a cross-appeal, claimant has forfeited the issue. See *Ruff v. Industrial Comm'n*, 149 Ill. App. 3d 73, 79 (1986) ("If the appellee fails to file the cross-appeal, the reviewing court is confined to only those issues raised by the appellant ***.").

¶ 34 CONCLUSION

¶ 35 For the reasons stated, we reverse the circuit court's judgment, which confirmed the Commission's decision, and reinstate the arbitrator's decision.

¶ 36 Reversed.