2019 IL App (5th) 180368WC-U
No. 5-18-0368WC
Order filed May 9, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

DONALD LEARNED, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Mike Frerichs, State Treasurer and *Ex-Officio* Custodian of the Rate Adjustment Fund, and Tri-County Coal, LLC, Appellees).	)	Appeal from the Circuit Court of Montgomery County. No. 17-MR-120 Honorable Douglas L. Jarman, 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's decision that claimant did not suffer from an occupational disease was not contrary to the manifest weight of the evidence in that the record contained a conflict in the opinions of medical experts and resolving that conflict was primarily a matter for the Commission; reviewing court could not hold that an opposite conclusion to the Commission's was clearly apparent.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Donald Learned, appeals a decision of the Illinois Workers' Compensation Commission (Commission) denying his claim for benefits in accordance with the Illinois Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 *et seq*. (West 2012)). Claimant, a coal miner, alleged he suffered injuries to his lungs and heart resulting from his employment with respondent, Tri-County Coal, LLC. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 An arbitration hearing was held on September 27, 2016. Claimant first testified that he was married and 69 years old. He graduated high school and completed three tours of duty in Vietnam. He worked in coal mines for 25 years, all of it underground (except for three days). During his employment, he was exposed to coal dust, silica dust, fumes from roof bolting glue, diesel fumes, and epoxy fumes ("Trowel On"). His last day working in a mine was June 3, 2013. He was working for respondent at that time at the Crown III mine at Farmersville as a "ram car operator" (also referred to as a "hauler" or a "shuttle car operator"). He retired at that time because he "[g]ot tired of working." He explained that the mine was 150 miles from his home. He first worked in a mine on October 9, 1978, for Freeman. He was laid off several times over the years, and he worked various positions, including roof bolter. He worked as a truck driver from 1993 to 2000. He returned to Freeman in 2000. He remained there for 13 years until he retired. During that period, "Freeman kind of turned into Tri-County." He worked primarily as a shuttle car operator, but sometimes he would work as a roof bolter if the need arose. The glue used as a roof bolter had a strong odor.

¶ 6 Since he left mining, his breathing has "[n]ot been bad." He testified that there are two hills near his house that he used to be able to walk in 8 1/2 minutes and now it takes him 11 minutes. He does not take any breathing medications.

¶ 7 Dr. Glennon Paul testified via evidence deposition. He examined claimant on October 22, 2013. As a result, he diagnosed claimant with "simple coal workers pneumoconiosis" (CWP). Claimant served in Vietnam and had malaria. Paul's physical examination found claimant's chest to be normal. Pulmonary function testing was normal, and a methacholine challenge test was negative. However, Paul found claimant's chest X ray to be "definitely" positive for CWP. Paul testified that it was "very common" for a person to have CWP, yet still have a normal physical examination and testing. Paul opined to a reasonable degree of medical certainty, claimant had CWP. It was caused by "[i]nhalation of coal dust and the coal mine environment." Further, "by definition," if a person has CWP, there is some impairment in lung function. Paul explained that because spirometry measures global functioning, it is possible to have a local impairment yet still have results within a normal range. Moreover, being within the normal range for the population "doesn't tell you anything about what the prior position of the specific miner was" (that is, a miner could have a deterioration from a higher point in the normal range to a lower point in the normal range). To assess an individual, one would need a prior measurement. A person can have "radiographically significant" CWP without accompanying shortness of breath. Such a person could also have normal pulmonary function testing, normal blood gasses, and a normal physical examination.

¶ 8 Paul testified that CWP was a progressive disease. It can be life threatening. There is no cure for CWP. The disease can progress even after a coal worker ends his exposure to coal dust. There is no way to stop the progression, if the disease is progressing. Further exposure to coal

dust can increase the progression of the disease. Other exposures in a coal mine can injure the lungs, including silica dust, diesel fumes, fumes from other petroleum products, high-sulfur coal fires, electrical-cable fires, welding fumes, and fumes from roof-bolting glue.

¶ 9 Paul further testified that COPD (chronic obstructive pulmonary disorder) is an "umbrella term" that encompasses a number of diseases, such as emphysema, asthma, and chronic bronchitis. It is possible to have chronic bronchitis and have a normal physical examination, without positive testing results. It can be a progressive disease. Paul opined that claimant could not be further exposed to coal dust without endangering his health. Paul admitted that he is not a B reader; however, he reads "[p]robably a hundred" X rays per week. Paul has read a number of X rays sent to him by claimant's attorney over the years, and, in a majority of them, he has failed to find CWP. Paul stated that it was "well known" that CWP is often found on pathology or autopsy where it had not previously been detected by an X ray.

¶ 10 On cross-examination, Paul stated that claimant is not one of his patients. He examined claimant on one occasion only at the request of claimant's counsel. Paul testified, regarding claimant's CWP, "It's less likely than [*sic*] it not progressing." Paul testified that "the lower lung zones" of claimant's lungs were "more involved." He acknowledged that he was neither an A reader nor a B reader.

¶ 11 Claimant's chest X rays were evaluated, at the request of his attorney, by Dr. Henry K. Smith. Smith, a B reader, found "interstitial fibrosis of classification p/p, bilateral mid and lower zones involved, of a profusion 1/0." Additionally, he noted "no chest wall plaques or calcifications." However, there were "thickened interlobar fissures." His "impression" was "[s]imple coal-workers' pneumoconiosis with small opacities, primary p, secondary p, mid and

lower zones bilaterally." Smith evaluated the X rays to be of grade 1 quality (the highest quality).

¶ 12 Dr. Michael S. Alexander evaluated claimant's chest X rays as well. He is a B reader. He agreed with Smith that "[t]he film quality is 1." He noted, "Small round opacities are present bilaterally, consistent with pneumoconiosis, category p/p, 1/0." He noted no chest wall thickening or pleural calcifications. His "impression" was "coal workers' pneumoconiosis, category p/p, 1/0."

¶ 13 Dr. Cristopher Meyer examined claimant on respondent's behalf. He is a B reader. He testified (via deposition) that he is a radiologist. Meyer explained that CWP "is typically an upper zone predominant process." He stated, "We expect coal workers' pneumoconiosis and silicosis early in the disease process to be an upper zone predominant disease." He examined X rays of claimant's chest. He opined that they were underexposed, which "will actually bring out background noise in the image and make the examination look as if it has more interstitial lung disease than it necessarily does." That is, if "the film is underexposed, it will bring out the graininess that's actually the film itself." This also "tend[s] to accentuate the pulmonary vasculature," which, Meyer stated, tends to be linear and "mimic[s] fibrosis more than CWP." Meyer opined that claimant's X rays indicated "no findings of coal workers' pneumoconiosis."

¶ 14 On cross-examination, Meyer agreed that CT scans are sometimes "referred to for coal workers' pneumoconiosis." However, they are more expensive and expose patients to more radiation. CT scans are not accepted by the National Institute for Occupational Safety and Health (NIOSH) "for the purpose of making B-readings." However, he agreed that it would be possible for a person to recognize the existence of CWP that "wasn't quite as readily apparent on a standard analog chest X ray." Meyer also agreed that pathology would be the "gold standard"

for determining the existence of a lung disease. Meyer agreed that CWP could be a progressive disease and that it could progress even after a miner leaves the coal-mine environment. CWP typically would first manifest radiographically or pathologically and later "manifest itself in pulmonary function abnormalities."

¶ 15 Meyer testified that silica dust comes from the rock that is intermixed with the coal that is being mined. Certain activities in a coal mine might lead to more exposure to silica dust. He agreed with the characterization of simple CWP as "a very slow and insidious disease." Typically, a miner with this condition probably will not complain of it. Pleural plaque is associated with asbestosis. Meyer stated that it was possible that a coal miner would not develop CWP until the end of his career, or shortly thereafter. Overexposure of a film would make it more difficult to identify CWP. It is possible to find CWP in the mid and lower lung zones. "Very rarely," it can be found in the mid and lower regions while not manifesting in the upper lung zones. Meyer agreed that the mere fact that he found an X ray negative would not necessarily rule out CWP.

¶ 16 On cross-examination, Meyer testified that simple CWP typically does not progress after exposure to the coal-mine environment ceases. Meyer did not note any opacities in the X rays of claimant's lungs.

¶ 17 Dr. James Castle, a pulmonologist and B reader, examined claimant's medical records and films. Based on the physiological studies performed on claimant, Castle opined that claimant was capable of heavy manual labor. Claimant did not suffer from COPD, emphysema, chronic bronchitis, or asthma. He noted no pathological evidence of CWP. It is less likely that simple CWP will progress after exposure ceases. Castle opined that there was no evidence that

claimant suffered any pulmonary disease or impairment resulting from his exposure to coal dust. Physiologic studies were within normal limits.

¶ 18 On cross-examination, Castle agreed that claimant did have sufficient exposure to the environment of a coal mine to cause CWP. Claimant's treatment records did not rule out CWP. He agreed that one could have CWP and still have a chest X ray that was negative for it. A biopsy could possibly find some minimal pathological evidence of CWP in claimant's lungs. CWP can be a latent and progressive disease. Castle further agreed that regardless of what he saw in claimant's X rays, evidence of CWP could possibly be found pathologically or in an autopsy. CWP is "trapped coal dust in a part of the lung which ends up wrapped in scar tissue and can be accompanied by emphysema around it." The affected tissue cannot perform the function of healthy lung tissue. CWP is "insidious in its onset." It is possible to have radiographically significant CWP but still have normal pulmonary function in all areas. While it is possible for CWP to progress after a miner stops mining, it is "very uncommon." Silica is toxic to surrounding lung tissues and is more fibrogenic than coal dust.

¶ 19 Castle testified that pulmonary function testing will tell you the severity of an abnormality, but not its cause. A person could "lose an entire lobe of the lung" and still have normal test results. It was possible for a person who has lost a third of their lung capacity to have test results in the normal range. Simply being in the normal range does not mean one's lungs are damage free. The heart and lungs work together as a system, and chronic lung disease can burden the heart.

¶ 20 Respondent also submitted NIOSH records of claimant's chest X rays taken during his employment. All were taken before claimant left coal mining, and all were negative.

¶ 21 The arbitrator found claimant suffered from CWP and that it arose out of and in the course of his employment with respondent. He expressly found claimant a credible witness. He noted that a positive X ray along with a history of exposure to coal dust can result in a diagnosis of CWP; however, a negative X ray cannot rule it out. In essence, three witnesses testified claimant's X rays indicated he had CWP while two testified they could not rule it out. The arbitrator found that the X rays taken for the NIOSH program three years prior to when claimant ceased mining were not probative of claimant's condition at the time he retired.

¶ 22 A majority of the Commission reversed the decision of the arbitrator. It noted that claimant's pulmonary function tests were normal. Further, not all miners react to having coal dust in their lungs. No pathological evidence was presented in the arbitration hearing. It cited Meyer's testimony that typically CWP appears in the upper lung zones and that Paul stated that claimant's lower lung zones were more involved. Moreover, claimant testified that his breathing was not that bad. Accordingly, the Commission found that claimant had failed to prove his claim and reversed the arbitrator. One commissioner dissented, simply stating that he would have affirmed the arbitrator's "well reasoned decision in its entirety." The circuit court of Montgomery County affirmed, and this appeal followed.

¶ 23 III. ANALYSIS

¶ 24 On appeal,[1] claimant raises one primary issue: whether the Commission's decision that he did not suffer an occupational disease is contrary to the manifest weight of the evidence.

[1]In contravention of Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018) (stating that a brief shall contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities *and the pages of the record relied on*" (emphasis added)), both parties fail to substantiate factual claims in the argument sections of

Whether a claimant suffers from a work-related occupational disease presents a factual question. *Gross v. Illinois Workers' Compensation Comm'n,* 2011 IL App (4th) 100615WC, ¶ 21. We conduct review using the manifest-weight standard. *Id.* Hence, we will reverse only if an opposite conclusion is clearly apparent. *Id.* Resolving conflicts in the record, judging the credibility of witnesses, assigning weight to evidence, and drawing reasonable inferences from the evidence are matters primarily within the purview of the Commission. *Beattie v. Industrial Comm'n,* 276 Ill. App. 3d 446, 449 (1995). We owe substantial deference to the Commission's resolution of medical questions, as its expertise in this realm has long been recognized. *Long v. Industrial Comm'n,* 76 Ill. 2d 561, 566 (1979). It is the burden of a claimant to establish before the Commission each and every element of his or her claim by a preponderance of the evidence. *Navistar International Transportation Corp. v. Industrial Comm'n,* 315 Ill. App. 3d 1197, 1202 (2000). It is well-established that employment need only be a cause, not the main or only cause, of a condition for recovery to be had under the Act. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 596 (2005). We review the result at which the Commission arrived, rather than its reasoning, and we may affirm on any basis apparent in the record. *General Motors Corp. v. Industrial Comm'n,* 179 Ill. App. 3d 683, 695 (1989). Finally, on review, it is claimant's burden, as the appellant, to establish error in the proceedings below. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008).

¶ 25 Claimant engages in a careful, paragraph by paragraph, exegesis of the Commission's decision. He begins by correctly noting that the first six paragraphs of the decision chronicle his

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their briefs with citation to the pages of the record relied upon. This needlessly complicates our review and would have justified us striking both briefs. *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12.

work history. Pertinent here, this history established claimant's exposure to the coal-mine environment. Paragraph 7 simply recounts claimant's testimony that since leaving mining, his breathing has not been bad. Claimant correctly points out that there was ample, undisputed testimony from experts offered by both parties that this would not rule out the presence of CWP. Paragraph 8 notes that X rays taken for NIOSH examinations were all negative for CWP and that the last one was taken in April 2013 (claimant ceased mining on June 3, 2013). Claimant points out that CWP would be compensable if it developed up to two years after the last exposure to the coal-mine environment. Further, all experts agreed that a negative X ray could not rule out CWP. We agree with claimant that this fact provides little support for the Commission's ultimate determination. In paragraph 9, the Commission notes that claimant testified that he walks four to five times weekly on steep hills for 45 minutes and that claimant stated that he feels that he is in good health. In essence, this is a reiteration of information similar to that contained in paragraph 7. Claimant concedes that it would be relevant to assessing the level of functional impairment, but that it is not relevant to the question of whether claimant has some level of CWP. We agree with this observation.

¶ 26 Paragraph 10 cites Dr. Paul's examination in October 2013, in which pulmonary functioning tests yielded normal results. Claimant points to "universal" expert testimony that this does not rule out CWP. Further, the Commission noted Paul's opinion that claimant's X rays showed CWP and that it was caused by the inhalation of coal dust in the coal-mine environment. Paragraph 11 continues that Paul is neither an A reader nor a B reader, that he did not "keep track of opacities" or give the "film a profusion rating" (as a B reader would), and that he found "the lower lung zone to be more involved." It is true, as claimant points out, that despite the fact that Paul was not an A reader or a B reader, he had extensive experience treating

and diagnosing CWP. While true, the effect of such facts on the weight of Paul's testimony is a matter best addressed by the Commission (see *Snelson v. Kamm*, 204 Ill. 2d 1, 27 (2003) ("Indeed, the weight to be assigned to an expert opinion is for the jury to determine in light of the expert's credentials and the factual basis of his opinion.")), with its well-recognized medical expertise (*Long*, 76 Ill. 2d at 566).

¶ 27 In paragraph 12, the Commission notes that Dr. Meyer is a B reader, that he opined claimant's "lungs were clear with no findings of pneumoconiosis," and that he testified that CWP "is typically an upper lung zone process." Claimant points out that Paul testified that the lower zone was *more* involved, not *exclusively* involved. Further, Meyer "did not say that CWP is 'always' an upper long zone process." Claimant continues, "There is nothing in the Commission's notation of the testimony of Dr. Paul and Dr. Meyer regarding the theoretical location of the abnormalities of CWP that would prove that claimant could not have CWP." Claimant seems to have forgotten that both here (*TSP-Hope, Inc.*, 382 Ill. App. 3d at 1173) and before the Commission (*Navistar International Transportation Corp.*, 315 Ill. App. 3d at 1202), the burden is on him to establish his entitlement to compensation. While we agree with claimant that nothing here bears on the weight to which Paul's testimony is entitled, we further point out that this is not the only factor affecting that weight.

¶ 28 In paragraph 13, the Commission discusses Dr. Castle's testimony. It notes his credentials and that he reviewed claimant's medical records. Claimant points out that Meyer testified that it is better for a B reader not to have information outside of the film to be assessed to mitigate the chance of bias. However, claimant's implication that Castle was, in fact, biased is nothing more than speculation, as claimant has done nothing beyond identifying a possible source of bias without identifying anything to concretely suggest that such bias took hold. *Cf.*

United Airlines, Inc. v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 121136WC, ¶ 29 ("[The witness's] projections were speculative, because she could not predict changes in future union contracts and [the respondent's] future performance, and the Commission could have discounted such speculative evidence when determining the amount of the claimant's award."). The Commission also noted Castle's opinion that claimant was capable of heavy manual labor and that there was no pathological evidence of pneumoconiosis.

¶ 29 The Commission notes, in paragraph 14, that in September 2010, claimant "was negative for cough dyspnea and wheezing, and his lungs were clear to auscultation and percussion." In paragraphs 15 and 16, the Commission observes that other testing in 2011 and 2013 revealed no respiratory problems. Claimant correctly points out that the "universal testimony" indicates that none of these results would rule out CWP; of course, they do nothing to establish that claimant has CWP either.

¶ 30 Claimant then concludes, "To the extent that the Commission relied on this accurate recitation of the record it was in error, and without basis to find that Claimant does not have CWP." Again, claimant appears to misapprehend the burden of proof. It was up to claimant to prove his case. Indeed, the Commission did not find he did not have CWP. Rather, it ultimately concluded as follows: "Based on the totality of testimony and evidence presented, the Commission finds that [claimant] failed to prove his claim of occupational disease."

¶ 31 Claimant notes Meyer's testimony that as many as 50% of miners who never had a chest X ray are found to have CWP at autopsy. To this, claimant adds, based on Meyer's testimony that 20% to 30% of the X rays he evaluates are positive for CWP (claimant here assumes, without substantiating, the proposition that the sample of miners examined by Meyer is representative of miners at large). Claimant continues that any given long-term coal miner

would thus have a 70% to 80% chance of having CWP. Claimant then concludes, "[A]t the beginning of this claim, it would be fair to say that it is more likely than not that Claimant would have CWP on pathologic exam at autopsy." Claimant cites no case where such statistical evidence was accepted as satisfying a party's burden of proof. See *People v. Collins*, 438 P.2d 33, 41 (Cal. 1968) ("In any event, we think that under the circumstances the 'trial by mathematics' so distorted the role of the jury and so disadvantaged counsel for the defense, as to constitute in itself a miscarriage of justice."). Absent some authority supporting claimant's method, we are not inclined to accept it here and, indeed, deem it forfeited. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208 (2009).

¶ 32 As for evidence indicating that this particular claimant has CWP, as opposed to miners generally, claimant points only to the opinions of the experts that testified in his behalf (claimant's attacks on the Commission's reasoning do not affirmatively establish that he has CWP). He also states that respondent's experts could not rule out CWP, though they did testify that claimant's X rays provided no evidence of CWP. At its core, this case turns on the resolution of the conflict between these doctors as to whether claimant's X rays show CWP. Though it is true that X rays cannot rule out CWP, if one does not accept the interpretations of claimant's experts, there is no evidence that claimant himself has CWP. While Castle and Meyer do not rule out CWP, their opinions provide a reason for the Commission to doubt the opinions of Paul, Smith, and Alexander. Under such circumstances, we cannot say that an opposite conclusion to the Commission's is clearly apparent. Parenthetically, we also note that the mere fact that claimant mustered more experts does not mean that the Commission's decision is against the manifest weight of the evidence. See *Monark Battery Co. v. Industrial Comm'n*, 354 Ill. 494, 500 (1933) ("It cannot be said that, where three expert witnesses testify in contradiction

of two other expert witnesses, that fact alone shows that a finding in accordance with the opinion of the lesser number is manifestly against the weight of the evidence.").

¶ 33 In sum, the Commission's decision that claimant failed to carry his burden of proof is not contrary to the manifest weight of the evidence.

¶ 34 IV. CONCLUSION

¶ 35 In light of the foregoing, the judgment of the circuit court of Montgomery County confirming the decision of the Commission is affirmed.

¶ 36 Affirmed.