

2014 IL App (1st) 122148WC-U
Nos. 01-12-2148WC and 01-12-2153WC cons.
Order filed: August 18, 2014

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

MELISSA MISURACA, as Special)	Appeal from the Circuit Court
Administrator of the Estate of DONALD)	of Cook County.
J. MYCSEK, his daughter,)	
)	
Plaintiff-Appellant,)	
)	
v.)	No. 11-L-51482
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION and OWENS CORNING,)	
)	Honorable
)	Daniel T. Gillespie,
Defendants-Appellees.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The decisions of the Commission finding that claimant had failed to prove his injury was work-related on an acute-trauma basis was not contrary to law or the manifest weight of the evidence; claimant's attempt to characterize his injury as the

result of repetitive trauma was not supported by the facts of record.

¶ 2 Claimant, Donald J. Myczek, filed two applications for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), both of which alleged he sustained an injury to “both upper extremities” while in the employ of respondent, Owens Corning. The first application was based on an acute-trauma theory and the second on a repetitive-trauma theory. The Commission found that claimant failed to carry his burden of proof regarding either claim, and it also found that claimant had not proved that he provided respondent with notice with respect to the first claim. We now hold that claimant has failed to carry his burden on appeal of showing that the Commission erred; therefore, we affirm the Commission.

¶ 3 Claimant had been employed by respondent for about seven months in May 2005 as a maintenance mechanic. According to claimant, he did not have any prior injuries or accidents regarding his arms. On May 28, 2005, he was attempting to clear a jam on a palletizer (a two-story machine used to place 75-pound bundles of shingles onto a pallet). Twenty bundles were jammed in the machine. As he was removing the bundles, claimant felt a “slight pain” in his arms. Claimant finished his shift and went home. Claimant testified that he called in the next two days and reported that he was ill. Claimant initially was examined by Dr. Levy, his personal physician, on June 6, 2005, and he subsequently underwent a course of treatment, the details of which will be discussed as they are relevant to this appeal.

¶ 4 It is axiomatic that in order to be entitled to benefits under the Act, a claimant must prove, by a preponderance of the evidence, all elements necessary to justify an award. *Quality Wood Products Corp. v. Industrial Comm'n*, 97 Ill. 2d 417, 423 (1983). This includes establishing that he or she experienced an injury arising out of and occurring in the course of employment. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). In the context of an acute-trauma injury, a

claimant must show that an injury is traceable to a definite time, place, and cause. *Majercin v. Industrial Comm'n*, 167 Ill. App. 3d 894, 900 (1988). Conversely, in the case of a repetitive-trauma injury, a claimant must identify the date on which the injury manifested itself. *Darling v. Industrial Comm'n*, 176 Ill. App. 3d 186, 191 (1988). An injury manifests itself when it and its relationship to employment become plainly apparent to a reasonable person. *White v. Illinois Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 910 (2007).

¶ 5 The occurrence of a work-related accident is a question of fact. *Pryor v. Industrial Comm'n*, 201 Ill. App. 3d 1, 5 (1990). Similarly, determining the manifestation date of a repetitive-trauma injury is also an issue of fact. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 65 (2006). On such issues, we apply the manifest-weight standard and reverse only if an opposite conclusion is clearly apparent. See *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (2006). It is primarily for the Commission, as trier of fact, to assess the credibility of witnesses as well as to resolve conflicts in and attribute weight to the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). This is especially true regarding medical evidence, given the Commission's well-recognized expertise in this area. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). Underlying questions of law are reviewed *de novo*. *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 121136WC, ¶ 19. As the appellant, claimant bears the burden of establishing reversible error in the proceedings below. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App.3d 1171, 1173 (2008). Finally, we may affirm on any basis appearing in the record. *General Motors Corp. v. Industrial Comm'n*, 179 Ill. App. 3d 683, 695 (1989).

¶ 6 The Commission, adopting the decisions of the arbitrator, rejected both of claimant's theories of recovery. Regarding an acute-trauma injury, the Commission found claimant had not

carried his burden of proof. It found that claimant's medical histories were inconsistent in themselves and also with claimant's testimony. It noted that two doctor's records do not mention a specific date of accident, while another's records indicate that the onset of claimant's condition was two months prior to June 2005. It further noted that when claimant spoke with respondent's vocational rehabilitation counselor, claimant stated that he could not attribute his condition to one specific incident, instead stating that his condition arose from repetitive activities. The Commission then concluded that claimant had "failed to sustain his burden of proving an accidental injury in the course of and arising out of his employment on May 28, 2005." The Commission also found that claimant "failed to provide credible and timely notice of the alleged accident to [r]espondent within 45 days," explaining that respondent produced three witnesses who were more credible and persuasive on the notice issue than claimant on this issue.

¶ 7 As for claimant's repetitive-trauma theory, the arbitrator first noted that the injury was alleged to have occurred on June 16, 2005 (the arbitrator's analysis indicates he regarded claimant's injury to have resulted from an acute cause). He then noted that claimant acknowledged that he was "off work and receiving short-term disability benefits" on that day. He observed that claimant did not testify about an accidental injury occurring that day. Further, no medical record mentions an accidental injury on June 16, 2005. He then found that, "[a]biding by the Supreme Court's definition and application of the 'definite-time-place-and-cause' requirement, and based on the evidence in this case as analyzed above, *** [claimant] has failed to sustain his burden of proving an accidental injury in the course of and arising out of his employment on June 16, 2005." The circuit court of Cook County confirmed the Commission, and this appeal followed.

¶ 8 The Commission's factual determinations find ample support in the record. However,

before examining those findings, we must first address an issue of law raised by claimant. Claimant takes issue with the Commission's application of *International Harvester Co. v. Industrial Comm'n*, 56 Ill. 2d 84 (1973). In that case, the supreme court held, an injury results from an accident—for the purposes of the Act—when “it is traceable to a definite time, place and cause.” *Id.* at 89. *International Harvester* was decided well before the supreme court recognized in *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524 (1987), that repetitive-trauma injuries were within the scope of the Act, and claimant argues that *International Harvester's* requirement that an injury be traceable to a specific time, place, and cause did not survive *Peoria County* with respect to repetitive-trauma cases.

¶ 9 Claimant is partially correct. Notably, in *Peoria County*, 115 Ill. 2d at 530, the supreme court expressly stated, “an employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury.”¹ Thus, a repetitive-trauma claimant must still prove a specific date on which an injury is deemed to have occurred. *Id.* at 530-31; see also *Three “D” Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47 (1989) (“An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident.”). In a repetitive-trauma case, the date of the accident is the date on which the injury manifests itself. *White*, 374 Ill. App. 3d at 910. Thus, though claimant is correct that he need not prove the literal date on which the accident occurred with regard to his repetitive-trauma theory, he still must prove a manifestation date. *Id.* We note that the Commission and the arbitrator appear to have relied

¹The supreme court viewed *Peoria County* as an extension of *International Harvester*. See *Peoria County*, 115 Ill. 2d at 529.

directly on *International Harvester* in denying claimant's repetitive-trauma claim without reference to the considerations set forth in *Peoria County* and its progeny. Having clarified the applicable law, we now turn to the Commission's factual findings.

¶ 10 We begin with claimant's acute-trauma theory. The Commission found that claimant failed to prove that he suffered a work-related injury on May 28, 2005, as alleged in his application for adjustment of claim. While claimant can marshal evidence to support his position, there is also evidence supporting the Commission's decision such that we cannot say that an opposite conclusion is clearly apparent. It is, after all, primarily for the Commission to resolve conflicts in the evidence. *O'Dette*, 79 Ill. 2d at 253. A review of the record shows that the Commission's decision is clearly not contrary to the manifest weight of the evidence.

¶ 11 The Commission found that claimant's testimony was undermined by inconsistencies in his treatment records. Notably, claimant told respondent's vocational counselor (James Percic) that "he could not note one specific incident that caused the problem, noting that it was due to repetitive activities with his arm." Further, records from Dr. Seymour, an orthopedic surgeon who evaluated claimant, contain a letter dated June 16, 2005, which states, "About two months ago [claimant] developed bilateral medial elbow pain after repetitive heavy use of the arms." Obviously, this would predate that May 28, 2005, alleged accident date. Moreover, as the Commission observed, neither Levy's nor Dr. Iftikhar's records mention May 28, 2005, when they record the history of claimant's condition. In addition to these specific facts relied on by the Commission, we note that, on a short-term disability form completed by claimant, claimant indicated that his injury was not "the result of an accident." Carlos Rivas, respondent's maintenance manager, and Josephine Malecki, respondent's human resources manager at the time

of claimant's accident, both testified that short-term disability is for nonoccupational injuries.² Finally, Dr. Kevin Walsh, who examined claimant on respondent's behalf, noted that "[i]t is not at all likely the patient would have developed a simultaneous onset of right and left medial epicondylitis as a result of a single work-related event."

¶ 12 Claimant argues that an opposite conclusion is clearly apparent. He relies primarily on his own testimony, which he asserts, is "overwhelmingly corroborated by the medical records submitted into evidence." Indeed, claimant did generally report to his medical providers that he was injured when he was lifting or pulling shingles or a heavy object. However, the records of Seymour (claimant's orthopedic surgeon) were not consistent in that claimant told Seymour that the onset of his elbow pain was two months prior to June 2005. Claimant attempts to minimize this inconsistency, stating Seymour's "statement is in conflict with all of the remaining medical documentation." While this may be true, it was for the Commission, as trier of fact, to determine what effect this inconsistency had on claimant's credibility and the weight to which his testimony was entitled. *Kawa v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120469WC, ¶ 78; see also *Divittorio v. Industrial Comm'n*, 299 Ill. App. 3d 662, 673 (1998). We cannot say this discrepancy was so minor that the Commission was required to ignore it. Moreover, while

²In providing citation to the record to substantiate the testimony of these witnesses, respondent sets forth only the first and last page on which their testimony begins and ends (*i.e.*, "R. 219-277") and leaves it to the court to identify the precise testimony respondent relies on. This is not helpful and violates Illinois Supreme Court Rule 341(h)(7) (eff. February 6, 2013), which requires "Reference *** to the pages of the record *** where evidence may be found." Counsel would be well advised to provide more specific citations in the future.

not a medical record *per se*, we note that claimant's reports to his medical providers are also inconsistent with his statement to Percic that "he could not note one specific incident that caused the problem."

¶ 13 Claimant seeks to invoke the principle that a trier of fact may draw a negative inference from a party's failure to produce evidence. See *Dollison v. Chicago, Rock Island & Pacific R.R. Co.*, 42 Ill. App. 3d 267, 277-78 (1976). Specifically, claimant points to respondent's failure to call two of its employees, Jill Wirz and Marie Young. This presumption has two conditions upon which it depends: that the claimant has set forth a *prima facie* case and that the evidence is within the control of the party against whom the presumption is to be drawn. *Id.* at 277. Claimant does not explain why he could not have called these witnesses, so it is not apparent to us how they can be said to be within the control of respondent. As such, the presumption does not apply here. Moreover, even if it did, we note that the inference is merely permissive and the Commission was not required to draw it. See *People v. Henderson*, 329 Ill. App. 3d 810, 820 (2002).

¶ 14 Finally, we remind claimant that he had the burden of proof in the proceedings before the Commission. *Quality Wood Products Corp.*, 97 Ill. 2d at 423. Regardless of whether we would reach the same result, given the state of the record, we cannot say that an opposite conclusion to the Commission's determination that the evidence set forth by claimant was insufficient to carry this burden is clearly apparent. As such, the Commission's decision regarding the alleged May 28 accident is not contrary to the manifest weight of the evidence. See *University of Illinois*, 365 Ill. App. 3d at 910.

¶ 15 Before moving to claimant's claim of a repetitive-trauma injury, we briefly note that we could not disturb the Commission's alternate basis for denying claimant benefits under the Act. The Commission found claimant did not prove he provided notice to respondent. Respondent

proffered three witnesses (whom the Commission expressly found credible) who testified that claimant never informed them about the alleged accident. Conversely, claimant testified that he left several messages on an answering service and received telephone calls from respondent's personnel. Given such conflicting evidence, we cannot say that the Commission's decision is against the manifest weight of the evidence. Moreover, we note that claimant's assertion that respondent was not prejudiced by the lack of notice is not on point, as prejudice is a pertinent consideration only where defective notice has been given. See *Luckenbill v. Industrial Comm'n*, 155 Ill. App. 3d 106, 114 (1987) ("The supreme court has held that the giving of the notice within 45 days of the accident is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. [Citation.] However, this rule applies where no notice is given to the employer. [Citation.] Where some notice is given but a defect or inaccuracy exists, *** the employer must prove he is unduly prejudiced. [Citation.]"). Here, the Commission found no notice was given, mooted the question of prejudice. In sum, even if we were persuaded by claimant's initial argument, we would still affirm the Commission's denial of benefits based on the notice issue.

¶ 16 We now turn to claimant's argument concerning a repetitive-trauma injury. Claimant set forth June 16, 2005, as the date of this accident. The Commission noted that claimant "provided no testimony whatsoever that he sustained an accidental injury while employed with [r]espondent on June 16, 2005." It then observed that claimant was off-work and receiving short-term disability benefits on that date. It also stated that none of the medical records support petitioner's contention. It then denied claimant's request for benefits under the Act, explaining, that claimant had not carried his "burden of proving an accidental injury in the course of and arising out of his employment on June 16, 2005." The Commission expressly cited *International Harvester Co.*, 56 Ill. 2d 84 and "the Supreme Court's 'definite-time-place-and-cause' requirement." It never

mentioned *Peoria County*, 115 Ill. 2d 524, or its progeny, mention the term “manifestation date,” or analyzed claimant’s claim in the usual manner in which we deal with repetitive-trauma injuries. See, e.g., *White*, 374 Ill. App. 3d 907. Claimant contends that the Commission erred by not analyzing this claim as a repetitive-trauma injury; claimant is correct only if this claim actually advances a repetitive-trauma theory. In any event, it is well settled that we review the result to which the Commission came rather than its reasoning (*Boaden v. Department of Law Enforcement*, 267 Ill. App. 3d 645, 652 (1994) (“Because we review the order entered, not the reasoning underlying it, we may affirm the decision of an administrative agency when justified in law for any reason.”)) and we may affirm on any basis supported by the record (*General Motors Corp.*, 179 Ill. App. 3d at 695). Here, claimant has not identified any repetitive-trauma—as defined by the case law—as a cause of his condition of ill-being. Claimant points only to his allegation that he removed 20 bundles of shingles that were jammed in the palletizer.

¶ 17 In *Peoria County*, 115 Ill. 2d at 529, the supreme court deemed it proper to allow compensation under the Act in cases “where an injury has been shown to be caused by the performance of the claimant’s job and has developed gradually over a period of time.” In that case, the claimant had worked in a laundry room for six years, carrying bags of laundry, sorting the laundry, and loading it into machines. *Id.* at 527-28. In *Three “D” Discount Store*, 198 Ill. App. 3d at 47, the claimant worked buffing floors for a year. The claimant in *City of Springfield v. Illinois Workers’ Compensation Comm’n*, 388 Ill. App. 3d 297, 313-14 (2009), used “vibratory tools” for five hours per day over a period of eight years. In *Oscar Mayer & Co. v. Industrial Comm’n*, 176 Ill. App. 3d 607, 611 (1988), this court stated, “By their very nature, repetitive-trauma injuries may take years to develop to a point of severity precluding the employee from performing in the workplace.” In *Edward Hines Precision Components v. Industrial*

Comm'n, 356 Ill. App. 3d 186, 188, 193-96 (2005), recovery was allowed where the claimant performed a repetitive task for five years, albeit for a small portion of the day. The court distinguished acute-trauma injuries, explaining, “The Commission often categorizes compensable injuries into two types—those arising from a single identifiable event and those caused by repetitive trauma.” *Id.* at 194.

¶ 18 Indeed, the very notion of a repetitive-trauma injury is one that is not “traceable to a definite time, place and cause.” *Peoria County*, 115 Ill. 2d at 527; see also *Louisiana Pacific Corp. v. Harcus*, 774 So. 751, 757 (Fla. App. 2000) (holding that a repetitive-trauma injury “gradually occurs following a cumulative series of incidents over an extended time frame”). Professor Larson has explained, “In cases involving repetitive motion injuries, the duration of the cause is necessarily drawn out in time.” Larson’s Workers’ Compensation Law, § 50.02 (2010). Hence, in *Butler Manufacturing Co. v. Industrial Comm’n*, 140 Ill. App. 3d 729, 733-34 (1986), this court determined that the Commission erred by awarding benefits on a repetitive-trauma theory, as that required a showing “that a bodily structure has eroded over time to the point of uselessness as a result of employment.” *Id.* at 734. Instead, we found that claimant was entitled to benefits on an acute-trauma theory. *Id.* In that case, the claimant could not recall precisely what he was doing when he first experienced back pain, but was engaged in his “usual employment duties.” *Id.* at 735. This included picking up parts “used to construct steel buildings.” *Id.* at 735-36. Obviously, there is repetitive element to picking up parts (in the ordinary sense); however, we found the injury properly classified as the result of acute trauma, as the injury was traceable to a specific time and place. *Id.* at 736.

¶ 19 Nevertheless, claimant argues: “It is clear that [he] was performing a repetitive activity when he removed 20 bundles of shingles from the pallitizer. [*sic*] The repetitive removal of

shingles from the machine constitutes a repetitive-trauma accident.” However, claimant does not cite a single case where a repetitive-trauma injury has been found to occur as the result of a single incident on a single day, and our research has failed to unearth one. Moreover, like the injury in *Butler Manufacturing*, claimant’s injury, as alleged, was traceable to the actions he engaged in to clear the jam in the palletizer. This is not repetitive trauma, even if the actions claimant took during this discrete period of time were repetitive in some aspect. See *Butler Manufacturing Co.*, 140 Ill. App. 3d at 732-36.

¶ 20 Additionally, respondent points out that Dr. Iftikhar testified that the history he took reflected a “single incident of trauma” and did “not reference any repetitive work activities.” Claimant contends that respondent is taking this statement out of context, as Iftikhar later explained that the single incident he was referring to was the accident on May 28, 2005, as described by claimant, which involved pulling and lifting several bundles of shingles. Claimant asserts that this shows that Iftikhar was actually referring to an event that involved repetitive activity. Claimant’s point is not well taken. Clearly, Iftikhar understood that claimant removed several bundles from the palletizer. However, he did not regard such activity as repetitive—at least within the meaning of a repetitive-trauma injury—as he testified that the history given by claimant did not reference repetitive work activity. Put simply, removing 20 bundles of shingles, though repetitive in the lay sense of the term, is not repetitive activity as it pertains to repetitive trauma. Thus Ithikar’s testimony is consistent with the law set forth above.

¶ 21 Finally, we note that the policies underlying *Peoria County*, 115 Ill. 2d 524, do not favor treating injuries like claimant’s as repetitive-trauma injuries. There, our supreme court observed the following:

“Requiring complete collapse in a case like the instant one would not be beneficial

to the employee or the employer because it might force employees needing the protection of the Act to push their bodies to a precise moment of collapse. Simply because an employee's work-related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits. The Act was intended to compensate workers who have been injured as a result of their employment. To deny an employee benefits for a work-related injury that is not the result of a sudden mishap or completely disabling penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Id.* at 529-30.

Here, claimant alleges his condition deteriorated over the course of clearing a jam in a single machine. Claimant was never in a position similar to an employee who suffers a typical repetitive-trauma injury. Claimant did not push himself to collapse; rather, he experienced pain for the first time while fixing a machine and immediately took time off from work following the completion of his shift. As such, this injury was properly treated as an acute-trauma injury.

¶ 22 Obviously, there must be a repetitive-trauma injury before the question of when the injury manifested itself becomes relevant. As claimant has not met his burden of establishing a repetitive-trauma injury, we find no error in the Commission's decision to treat claimant's claim as an acute-trauma injury and deny benefits accordingly.

¶ 23 In light of the foregoing, the decision of the circuit court of Cook County confirming the decision of the Commission is affirmed.

¶ 24 Affirmed.