

No. 1-14-1336WC

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

DAN SAWYER,)	Appeal from the
)	Circuit Court of
Appellee,)	Cook County
)	
v.)	No. 12 L 50737
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	Honorable
)	Patrick J. Sherlock,
(FedEx Freight, Appellant).)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hudson, Harris, and Stewart concurred in the judgment.
Presiding Justice Holdridge dissented.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court which set aside a decision of the Commission as contrary to the manifest weight of the evidence was affirmed.
- ¶ 2 FedEx Freight (FedEx), appeals from the circuit court order which set aside a decision of the Illinois Workers' Compensation Commission (Commission) finding that the claimant, Dan Sawyer, failed to prove that he injured his lumbar spine as the result of a work accident on January 13, 2011, and denying him benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)) for treatment of his lumbar spine and temporary total disability

benefits after August 14, 2011. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing.

¶ 4 At all times relevant, the claimant was employed by FedEx as a driver, picking up and moving freight to and from the homes of customers. He had been so employed for 15 years. The claimant testified that, on January 13, 2011, he was installing a temporary shelving unit in his trailer. According to the claimant, as he was positioning a 4-foot by 4-foot piece of ¾-inch plywood in the shelving unit, he felt pain in his right shoulder and upper back. After completing his shift that day, the claimant notified his supervisor of the incident, and he was instructed to go to the Alexian Brothers Medical Center for evaluation.

¶ 5 The records of the Alexian Brothers Medical Center reflect that the claimant presented on January 13, 2011, reporting that he had injured his back while unloading a truck. Following his examination on that date, the claimant was diagnosed with a "sprain/strain thoracic" and released to work restricted duties which included no lifting or carrying more than 10 pounds, limited pushing and pulling of up to 10 pounds, no reaching or lifting above the right shoulder, and no driving or using moving machinery. The claimant was prescribed medication and advised to take warm showers and use a heating pad to alleviate his pain. He was also advised to seek follow-up care at the Alexian Brothers Clinic on January 18, 2011.

¶ 6 The claimant received follow-up care at the Alexian Brothers Clinic on January 18, 2011, January 24, 2011, February 22, 2011, and March 15, 2011. The claimant was referred for physical therapy and prescribed medication for pain. His diagnosis remained "sprain/strain thoracic." None of the Alexian Brothers Clinic records note any complaints by the claimant of

injury to his low back or lumbar spine, nor do they reflect any treatment for an injury to his low back or lumbar spine.

¶ 7 On April 8, 2011, the claimant sought care from Dr. Rolande Balan, a chiropractor. Dr. Balan's records stated that the claimant complained of throbbing pain in his right shoulder and "spastic pain in the low back bilaterally, radiating into both hips." Dr. Balan's diagnosis on that date included "Thoracic Segmental Dysfunction" and "Lumbar Segmental Dysfunction." The doctor's report of that visit is the first medical record making reference to the claimant having sustained an injury to his lumbar spine. The doctor's proposed treatment plan consisted of home exercises, spinal manipulation, and physical therapy exercises three times per week for a period of four weeks. Dr. Balan estimated that the claimant would require treatment for 8 to 10 weeks. Dr. Balan took the claimant off of full-duty work and estimated that he would be able to return to full-duty work on April 16, 2011.

¶ 8 As of April 14, 2011, Dr. Balan authorized the claimant to return to limited duty work. However, on May 9, 2011, the doctor again took the claimant off of work, estimating that he could return to limited duty on May 12, 2011.

¶ 9 Dr. Balan's records of the claimant's follow-up visits in April and May of 2011 state that the claimant had restricted range of motion of the thoracic and lumbar regions with pain. In his notes of the claimant's visits on June 2, 6, 13, 16, 21 and 23, 2011, Dr. Balan recorded only restricted range of motion of the lumbar region of the spine. However, on June 27, 2011, Dr. Balan again noted restricted range of motion of both the thoracic and lumbar regions. The doctor's objective evaluation remained the same throughout the remainder of his treatment of the claimant.

¶ 10 During the entire course of Dr. Balan's treatment of the claimant from April 8, 2011, through his last treatment on July 8, 2011, the doctor recorded in his notes of each treatment that the claimant complained of both shoulder and low back pain. Additionally, each of Dr. Balan's treatment notes state that the claimant sustained a work-related accident on April 8, 2011. However, in a letter dated October 12, 2011, Dr. Balan wrote that the claimant stated that he had been injured at work on January 13, 2011, and that the claimant's initial examination was on April 8, 2011, "and did not reflect the actual date of injury."

¶ 11 On July 8, 2011, Dr. Balan referred the claimant to Dr. John O'Keefe, an orthopedic surgeon for an evaluation. The claimant first saw Dr. O'Keefe on July 19, 2011. The doctor's notes of that visit state that the claimant gave a history of an accident while working for FedEx on January 13, 2011, that was consistent with his testimony at the arbitration hearing. Dr. O'Keefe noted that the results of his examination of the claimant revealed a flattening of the normal thoracic kyphosis and lumbar lordosis with obvious spasm. Dr. O'Keefe recorded a clinical impression of "[s]train and sprain of right shoulder girdle" and "[d]iscal injury with right radiculitis." According to the doctor's notes, the claimant was not healthy enough to perform his normal work duties and, as a consequence, he was taken off of work. Dr. O'Keefe ordered a magnetic resonance imaging (MRI), prescribed pain medication, ordered physical therapy, and scheduled a follow-up visit in two weeks.

¶ 12 On July 28, 2011, the claimant underwent an MRI of his lumbar spine which revealed, among other conditions: facet degeneration at L1-2, L2-3, L3-4, L4-5, and L5-S1; disc bulging at L2-3, L3-4, and L4-5; spinal stenosis at L2-3, L3-4 and L4-5; and a posterior annular tear at L4-5.

¶ 13 On July 29, 2011, the claimant presented at Jackson Park Medical Associates for the purpose of receiving physical therapy as ordered by Dr. O'Keefe. The claimant was treated at Jackson Park Medical Associates from July 29, 2011, through August 31, 2011. In a letter dated August 31, 2011, Dr. Michael Foreman, medical director at Jackson Park Medical Associates, wrote that the claimant gave a history of having felt a sharp pain in his lower back while loading his truck at work on January 13, 2011. He also wrote that a physical examination of the claimant revealed bilateral lower thoracic spine musculature hypertonicity and tenderness and bilateral upper lumbar spine paraspinal musculature hypertonicity and tenderness. Dr. Foreman gave an impression of post-traumatic lumbar spine strain.

¶ 14 The claimant next saw Dr. O'Keefe on August 2, 2011. Dr. O'Keefe noted that the claimant was experiencing "right radicular symptoms" in his leg, which he believed was being compounded by a screw in the claimant's foot that was inserted when the claimant underwent foot surgery in 2008. Dr. O'Keefe wrote that the screw in the claimant's foot was causing him increasing pain and should be removed. The doctor also noted that his examination of the claimant revealed that the claimant's back had flattening with regards to both the thoracic kyphosis and lumbar lordosis and spasm at L2-3 and L4-5-S1 levels. Dr. O'Keefe ordered an electromyography (EMG).

¶ 15 On August 17, 2011, the claimant had an EMG. The testing was performed by Dr. Oleh Paly at Central Medical Specialists. Dr. Paly's report of the test states that the results were consistent with mild right L5 nerve root irritation.

¶ 16 The claimant was seen by Dr. O'Keefe on September 6, 2011. In his notes of that visit the doctor wrote that, in his opinion, the claimant was "intact and without debility or work restrictions prior to 01-13-11" and that he had consistent complaints of shoulder and low back

pain and debility since. Following his examination of the claimant on that date, Dr. O'Keefe noted clinical impressions of right shoulder sprain and low back pain with discal injury. He also noted that the MRI of the claimant's back taken in July 2011 showed a traumatic tear at L4-5, and the EMG showed a right L5 radiculopathy.

¶ 17 The claimant next saw Dr. O'Keefe on October 6, 2011, and complained of back pain and "burning, tingling pain in the right more than the left leg." Following his examination of the claimant, the doctor noted back spasm and palpable tenderness at the L5-S1 junction. Dr. O'Keefe adjusted the claimant's medication and recommended that he be seen by Dr. Chami for a pain management assessment and treatment.

¶ 18 At the arbitration hearing which was held on October 27, 2011, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2010)), the claimant testified that, while working on January 13, 2011, as he was positioning a 4-foot by 4-foot piece of 3/4-inch plywood in the shelving unit he was installing in his truck, he felt pain in his right shoulder and upper back. According to the arbitrator's decision, the claimant testified that, shortly after the date of his accident, he began to feel pain in both his upper and lower back.

¶ 19 Following the arbitration hearing, the arbitrator issued a decision, finding that the claimant sustained injuries to his right shoulder and low back which arose out of and in the course of his employment with FedEx. The arbitrator found that the claimant testified credibly and there was no evidence in the record to indicate that he was "less than asymptomatic, fully functional and treatment free for right shoulder or low back pain prior to the work accident." Additionally, the arbitrator adopted the opinion of Dr. O'Keefe, concluding that it was the only credible and reliable opinion relating to the connection between the claimant's work accident and his low back and shoulder conditions of ill-being.

¶ 20 FedEx paid the claimant temporary total disability (TTD) benefits until August 14, 2011, when he was advised that no further TTD benefits would be paid. The arbitrator found that the claimant continued to be temporarily and totally disabled, and as a consequence, awarded him 10⁵/₇ weeks of TTD benefits for the period from August 14, 2011, through the date of the hearing on October 27, 2011. Additionally, the arbitrator ordered FedEx to pay \$25,215.95 for reasonable and necessary medical expenses incurred by the claimant and to authorize the pain management treatment by Dr. Chami as recommended by Dr. O'Keefe.

¶ 21 FedEx sought a review of the arbitrator's decision before the Commission, arguing that the claimant sustained only an injury to his thoracic spine as a result of his work-related accident on January 13, 2011, and that he did not sustain any injury to his lumbar spine. In a unanimous decision, the Commission found that the claimant failed to prove that he injured his lumbar spine as a result of his work-related accident on January 13, 2011. The Commission found that, contrary to the arbitrator's finding, the claimant did not testify that, shortly after the date of his accident, he began to feel pain in his lower back. The Commission also noted that the claimant had testified that he was still having problems with his feet that were affecting his back. Additionally, the Commission found Dr. O'Keefe's causation opinion unpersuasive as it was based on the premise that the claimant experienced low back pain at the time of this accident on January 13, 2011; a premise which the Commission found unsupported by the evidence. As a consequence, the Commission modified the arbitrator's decision by denying the claim for the payment of medical expenses incurred for the treatment of the claimant's lumbar spine and TTD benefits after August 14, 2011. The Commission otherwise affirmed and adopted the arbitrator's decision, including the order for FedEx to pay for reasonable and necessary medical expenses incurred by the claimant in the treatment of his upper back and right shoulder, and remanded the

matter to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 337 (1980).

¶ 22 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On April 2, 2014, the circuit court entered an order reversing the Commission's decision and reinstating the decision of the arbitrator. According to the circuit court's order, "[t]he record is devoid of any testimony or medical evidence supporting the Commission's conclusion." The court found that the record supports the opposite conclusion. The court noted that, when testifying, the claimant generally referred to his back, not specifying upper or lower back and pointed out that he was unable to distinguish pain that starts at the top of his back or pain that starts in his low back. This appeal followed.

¶ 23 FedEx argues that the Commission's finding that the claimant failed to prove a causal connection between his work accident of January 13, 2011, and his condition of low back ill-being is not against the manifest weight of the evidence. FedEx notes that the records of Alexian Brothers' Medical Center and Clinic are devoid of any reference to a complaint by the claimant relating to his low back. It additionally contends that Dr. O'Keefe never explained how the claimant's foot injury from 2008 affected his back injury. FedEx argues that the circuit court usurped the function of the Commission by substituting its determination as to the credibility of Dr. O'Keefe's causation opinion and its interpretation of the claimant's medical records for that of the Commission.

¶ 24 In deciding an appeal from a judgment of the circuit court which was rendered on judicial review of a decision of the Commission, it is the Commission's decision, not the circuit court's judgment, which we review. *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 33. The claimant has the burden in a workers' compensation case of proving, by a

preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on review unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567 (1993).

¶ 25 Based upon the evidence in the record before us, we conclude that the Commission's finding that the claimant failed to prove a causal connection between his work-related accident of January 13, 2011, and an injury to his low back is against the manifest weight of the evidence.

¶ 26 Nothing in the record suggests that the claimant sustained a low back injury or suffered low back pain prior to January 13, 2011. Clearly, the claimant testified that, at the time of his accident, he immediately felt pain in his right shoulder and upper back. And it is true, as FedEx

notes, that the records of Alexian Brothers' Medical Center and Clinic are devoid of any reference to a complaint by the claimant relating to his low back. It is also true, however, that those same records are devoid of any reference to the claimant having complained specifically of pain in his upper back. The histories contained in those records state merely that the claimant complained of pain in his back. Each of the records contain a diagnosis of "sprain/strain thoracic," and there is no reference in any of those records to the claimant having been treated for low back pain while he was under the care of Alexian Brothers' Medical Center or its Clinic.

¶ 27 The first reference to the claimant complaining of low back pain appears in Dr. Balan's notes of the claimant's April 8, 2011, visit. It is in those same notes that a diagnosis of injury to the claimant's low back first appears. There is no evidence in the record suggesting that the claimant suffered any low back injury following his work accident of January 13, 2011, and before his first appointment with Dr. Balan on April 8, 2011.

¶ 28 During the course of the claimant's medical treatment from April 8, 2011, through his last appointment with Dr. O'Keefe on October 6, 2011, virtually every medical record addressing the claimant's treatment makes reference to the claimant suffering low back pain. The MRI scan of the claimant's lumbar spine taken on July 28, 2011, revealed facet degeneration, disc bulging, spinal stenosis, and a posterior annular tear. The results of the EMG test performed on August 17, 2011, were consistent with mild right L5 nerve root irritation. Dr. Foreman was of the impression that the claimant suffered from post-traumatic lumbar spine strain. In the face of this evidence, there can be no question that the claimant suffered from a condition of low back ill-being. The only question remaining is whether the Commission's determination that the claimant failed to prove that the condition is causally related to his work accident of January 13, 2011, is against the manifest weight of the evidence.

¶ 29 Dr. O'Keefe opined the claimant was "intact and without debility or work restrictions prior to 01-13-11" and that he had consistent complaints of shoulder and low back pain and debility since. In his notes of August 2, 2011, Dr. O'Keefe recorded an impression that the claimant injured his back as the result of a work accident in January of 2011, which produced a disc injury that was seen on the MRI of his lumbar spine. The opinion was discounted by the Commission mainly because there is no evidence in the record supporting the premise that the claimant had consistent low back complaints since the date of his work accident. In addition, the Commission found significant that Dr. O'Keefe did not explain how the claimant's 2008 foot injury caused or contributed to his back and right leg radicular symptoms. However, the evidence does support the proposition that the claimant was "intact and without debility or work restrictions prior to 01-13-11."

¶ 30 In the absence of any medical evidence disputing the opinions of Drs. O'Keefe and Foreman and in the absence of any evidence supporting the notion that the claimant's low back condition was caused by any event other than his work accident of January 13, 2011, we conclude, as did the circuit court, that the Commission's finding that the claimant failed to prove that his low back condition was caused by his work injury is against the manifest weight of the evidence. Although, as the Commission found, the claimant never testified that he felt low back pain immediately following his accident of January 13, 2011, the Alexian Brothers' records state that he complained of back pain generally and, beginning with his visit to Dr. Balan on April 8, 2011, every other medical record of his treatment thereafter reflects that he complained of low back pain. These circumstances coupled with the fact that there is no question that the claimant suffers from a condition of the low back, we believe that a conclusion opposite to that reached by the Commission on the issue of causation is clearly apparent.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court which (1) set aside the decision of the Commission that modified the arbitrator's award of benefits to the claimant, and (2) reinstated the arbitrator's decision.

¶ 32 Affirmed.

¶ 33 PRESIDING JUSTICE HOLDRIDGE, dissenting:

¶ 34 I dissent. In my view, The Commission's finding that the claimant failed to prove a causal connection between his January 13, 2011, work accident and his lower back condition was not against the manifest weight of the evidence. As the majority acknowledges, the medical records of Alexian Brothers' Medical Center and Clinic (Alexian), the hospital where the claimant was treated immediately after the work accident, do not indicate that the claimant complained of lower back pain or received treatment for any lower back condition at that time. *Supra* ¶ 26. To the contrary, Alexian's records reflect that the claimant was diagnosed with a sprain or strain of his *thoracic* spine. As the majority notes, "[t]he first reference to the claimant complaining of low back pain appears in Dr. Balan's notes of the claimant's April 8, 2011, visit," which occurred approximately three months after the work accident. Moreover, although the claimant testified generally about back pain he experienced immediately after the January 2011 work accident, he did not testify that he experienced pain in his *lower* back at that time. Thus, in my view, there was sufficient evidence to support the Commission's finding of no causation as to the claimant's lower back injury.

¶ 35 In concluding otherwise, the majority relies upon the causation opinions of Drs. O'Keefe and Foreman and suggests that we should credit those opinions in the absence of any evidence that the claimant's low back condition was caused by some event other than the work accident. *Supra* ¶ 30. I disagree. "Expert opinions must be supported by facts and are only as valid as the

facts underlying them." *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶ 24; see also *Sunny Hill of Will County v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, ¶ 36. Here, the causation opinions of Drs. O'Keefe and Foreman are each based on the assumption that the claimant experienced pain in his lower back immediately after the January 2011 work accident. As noted above, that assumption is belied by the record. There is evidence that the claimant complained of back pain generally at that time but no evidence that he complained of *lower* back pain, and he was treated only for *thoracic* back pain at the time. Accordingly, the central factual premise underlying Dr. O'Keefe's and Dr. Foreman's causation opinions was erroneous. The Commission was entitled to reject both opinions on that basis even though they were not rebutted by the opinions of other experts. *Gross*, 2011 IL App (4th) 100615WC, ¶ 24 (ruling that "[a]n expert opinion is only as valid as the reasons for the opinion" and the facts underlying it and that "[t]he proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion"); see also *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1042 (1999) (ruling that the Commission is "not bound by unrebutted medical testimony"). Moreover, contrary to the majority's suggestion, it was the claimant's burden to prove that his lower back condition was caused by the January 2011 work accident, not the employer's burden to prove some other cause.

¶ 36 Although the majority concedes that the claimant "never testified that he felt low back pain immediately following" the January 2011 work accident, it emphasizes that the Alexian records "state that he complained of back pain generally" and that, beginning with his visit to Dr. Balan on April 8, 2011, "every other medical record of his treatment thereafter reflects that he complained of low back pain." *Supra* ¶ 30. In my view, these facts support the Commission's finding because they suggest that the claimant: (1) knew the difference between "back pain

generally" and *lower* back pain, but (2) did not begin complaining of the latter until three months after the work accident. Moreover, regardless of how the claimant described his pain at Alexian immediately after the accident, it is undisputed that he was diagnosed with a *thoracic* injury at that time, not a lumbar injury.

¶ 37 The issue of causal connection is a factual question to be decided by the Commission. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206 (2003). When 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, and determine what weight to give testimony. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009); *Fickas*, 308 Ill. App. 3d at 1041. We owe particularly "substantial deference" to the Commission's findings regarding medical issues, "as its expertise in this area is well recognized." *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 18; see also *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). A reviewing court may not substitute its judgment for that of the Commission on factual issues merely because other inferences from the evidence may be drawn. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 407 (1984). We will overturn the Commission's causation finding only when it is against the manifest weight of the evidence, *i.e.*, only when 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).

¶ 38 Applying these deferential standards, I believe that there was sufficient evidence to support the Commission's finding. The medical records suggest that the opinions of Drs. O'Keefe and Foreman were unreliable, and the evidence supports a reasonable inference that the

claimant's lower back condition was unrelated to the January 2011 work accident. I would therefore reverse the circuit court's judgment and reinstate the Commission's decision.