

2014 IL App (2d) 130833WC-U
No. 2-13-0833WC
Order filed November 12, 2014

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

LARRY WEAVER,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 13-MR-21
)	
THE ILLINOIS WORKERS')	
COMPENSATION COMMISSION and)	
CITY OF ELGIN,)	Honorable
)	David R. Akemann,
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:* Commission's finding that claimant failed to establish that his injury arose out of and in the course of his employment is not against the manifest weight of the evidence.

¶ 2 Claimant, Larry Weaver, appeals from the judgment of the circuit court of Kane County, which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) denying his application for benefits under the Workers' Compensation Act (Act) (820 ILCS

305/1 *et seq.* (West 2010)). On appeal, respondent challenges the Commission's finding that he failed to establish that his injury arose out of and in the course of his employment with respondent, the City of Elgin. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On May 27, 2010, claimant filed an application for adjustment of claim asserting that he injured his left foot on May 8, 2010, while working for respondent. The matter was tried before an arbitrator on December 12, 2011. Because the sole issue on appeal concerns whether claimant established that his injury arose out of and in the course of his employment with respondent, we confine our recitation of the facts to evidence regarding that matter.

¶ 5 Claimant worked as a groundskeeper for respondent's department of Parks and Recreation. Although claimant is a high-school graduate, he attended special-education classes and needs assistance with tasks involving reading and writing. In addition, claimant's past medical history is significant for diabetes. Early in May 2010, claimant sustained a bimalleolar fracture of the left ankle. At the time of the injury, claimant was 51 years old. As a result of the fracture to his left ankle, claimant began treating with Dr. Michael Gitelis, an orthopaedic surgeon. Claimant underwent five surgeries. The last surgery, performed in August 2010, resulted in the amputation of claimant's left leg about six inches below the knee. Following the August 2010 operation, claimant was fitted with a prosthesis.

¶ 6 At the arbitration hearing, claimant testified regarding the events leading to his left ankle fracture. Claimant recounted that on the morning of May 8, 2010, he reported to work at 5 a.m. Claimant and two coworkers were asked to erect temporary fencing for a softball field at the Elgin Sports Complex. This task required placing poles in the ground and attaching fencing to the poles. Shortly after arriving, while walking to a golf cart to retrieve some fencing, claimant

twisted his left foot, which had caught in the turf. According to claimant, he almost fell, but was able to catch himself. Claimant testified that he was “fine” after the accident and he did not feel pain or discomfort in his left ankle. Claimant was aware that respondent’s policy was for employees to report a work injury as soon as it occurs. He acknowledged, however, that he did not tell respondent or his coworkers that he twisted his ankle at the time it happened.

¶ 7 Claimant testified that he finished erecting the fencing on the softball field at about 8:30 a.m. Thereafter, he and his coworkers met with their supervisor, Richard Hornbeak. According to claimant, Hornbeak gave the employees the option of punching out or working longer. Claimant testified that although his coworkers opted to leave, he stayed, with Hornbeak’s approval, to “clean[] out the brick house.” Claimant further testified that after finishing that task, he began to collect garbage. Claimant stated that he worked alone during this time. Claimant testified that when he punched out at 3 p.m., Hornbeak told him that he would see him on Monday. Thereafter, claimant got into his van and went home.

¶ 8 Claimant denied going to a friend’s house after work to help her with a garage sale. According to claimant, he helped his friend at the garage sale on May 7, 2010. Instead, claimant related that after leaving work on May 8, 2010, he went home where he watched television, ate dinner, and sat in front of his house. Claimant initially testified that he did not notice that his left ankle was bruised or swollen until he took off his work boots and socks at around 5 p.m. on May 8. Claimant later testified that he did not notice the bruising and swelling until between 8 and 8:30 p.m., when he went to bed. He explained that although he removed his work boots at about 5 p.m., he did not take off his socks until he went to bed. Claimant stated that despite the bruising and swelling, he did not feel any pain.

¶ 9 Claimant testified that on May 9, 2010, he awoke at 5 a.m. His left ankle was still swollen and bruised. Claimant touched the area, but felt no pain and he denied any problems with stability at that time. Claimant showered, ate breakfast, and watched television until 8 a.m. He then put on tennis shoes and left for his brother's house to mow his lawn. Claimant admitted that he did not contact respondent about the condition of his ankle prior to going to his brother's house.

¶ 10 Claimant testified that the drive to his brother's house is about 10 minutes. Claimant did not recall any problems with his left foot while driving. Claimant testified that after he exited his vehicle, while walking on his brother's driveway, he heard "a pop and a crack" from his left ankle. Claimant then fell down. Claimant testified that he experienced "an aching and stabbing pain" in his left ankle when he heard the "pop," but otherwise was not feeling any pain or discomfort. Claimant was able to reach his vehicle, which was parked across the street, and drive himself to Provena St. Joseph's Hospital.

¶ 11 The hospital's triage assessment states that claimant "stepped on something today c/o left foot pain, also mentioned he recently injured left ankle." The triage assessment further provides that claimant reported pain at level 10 on a 10-point scale. The history obtained by the emergency room physician states that claimant "rolled ankle—1 week ago, but has been ambulating w/o pain. Today rolled ankle again—heard [and] felt a 'pop'—unable to weight bear." The emergency room physician's note also provided that claimant reported aching and stabbing pain at level 10 on a 10-point scale. Claimant was given pain medication in the emergency room, and, at the time of his discharge, he reported that his pain had been reduced to level two. At the arbitration hearing, claimant denied the history noted in the hospital records.

¶ 12 Claimant testified that he contacted Hornbeak on May 9, 2010, after being discharged from the hospital. He told Hornbeak that he had twisted his ankle on May 8, 2010, and asked to complete an accident report. On May 11, 2010, claimant had his brother complete the accident report, which claimant then signed. Claimant testified that he has been unable to work since his injury and that he was terminated by respondent three or four months after the accident, following 14 years of employment.

¶ 13 Hornbeak testified that on May 8, 2010, claimant reported to work at 5 a.m. Hornbeak further testified that claimant and his two coworkers finished erecting the temporary fencing at about 8 a.m. At that time, Hornbeak met with the three employees and instructed them to collect garbage until 8:30 a.m. Hornbeak testified that all three employees complied with his instructions and punched out at 8:30 a.m. Hornbeak denied talking to claimant about working after 8:30 a.m. that day. According to Hornbeak, he observed claimant leave the premises at around 8:30 a.m. and walk to his vehicle. Hornbeak testified that he did not notice claimant walking with a limp at that time. Hornbeak further testified that at no time on May 8 did claimant mention twisting his leg or otherwise state that he encountered any problems while erecting the fencing.

¶ 14 Hornbeak testified that claimant contacted him by telephone between 12 and 1:30 p.m. on May 9, 2010. Claimant asked whether it was too late to file an accident report for an injury sustained the previous day. Claimant explained that he might have twisted or broken his ankle while working on May 8. Hornbeak suggested that claimant would have known that he injured his ankle at the time it occurred. Claimant responded that he had helped a friend with a garage sale on May 8, but his ankle had not bothered him and he was not aware that he had been injured. Claimant stated that when he went to mow his brother's yard on May 9, he heard a "pop" while

walking on the driveway and fell down. Hornbeak told claimant to come in and complete an accident report.

¶ 15 Dr. Gitelis testified by evidence deposition on November 23, 2010. Dr. Gitelis related that claimant first presented for treatment on May 11, 2010. Claimant reported that his injury occurred on May 8, 2010, when he twisted his ankle while erecting a fence at work. Dr. Gitelis diagnosed a bimalleolar ankle fracture and displacement of the left lower extremity with ligament disruption. Dr. Gitelis noted that because of diabetic neuropathy (a limited ability to feel sensation), claimant had minimal pain symptoms and he did not exhibit significant discriminative sharp touch to the foot. Dr. Gitelis also noted that because claimant fractured two areas of the ankle joint, there is “nothing to give [the ankle] stability.” Dr. Gitelis testified that due to complications resulting from the injury, claimant eventually had his left leg amputated below the knee.

¶ 16 Dr. Gitelis believed that the mechanism of injury reported by claimant, *i.e.*, that he twisted his ankle while erecting a fence at work, was the cause of his left ankle fracture. Dr. Gitelis did not find it surprising that claimant did not exhibit any symptoms of pain given his diabetic neuropathy. Dr. Gitelis explained that while the popping sensation claimant experienced on May 9 could be indicative of when the injury occurred, it could also be attributable to a shifting of the already-fractured bones. Based on the history claimant provided, Dr. Gitelis opined that claimant twisted his left ankle on May 8, resulting in a fracture. Dr. Gitelis further opined that the popping sound that claimant heard on May 9 was the bones shifting. Dr. Gitelis stated that he had no reason to disbelieve claimant and noted that his opinions were based on claimant’s report of the injury. Dr. Gitelis further testified that neither claimant’s diabetes nor the sequelae thereof caused the ankle fracture itself. Moreover, he did not believe that the type

of injury claimant sustained could have occurred simply by walking without any “force mechanism” such as twisting.

¶ 17 On cross-examination, Dr. Gitelis testified that given the nature of the injury claimant sustained, he would expect swelling to occur “pretty quick[ly]” after the injury occurred and he would expect problems with the stability of the ankle. With respect to stability, he explained that if claimant was putting weight on the ankle, the stability would depend on whether the tibia portion of the ankle joint stays relatively on top of the talus. He further stated that if claimant was not putting weight on the ankle, he might not notice the instability. Dr. Gitelis acknowledged, however, that ultimately, “something has got to give.” The following colloquy then occurred between respondent’s attorney and Dr. Gitelis:

“Q. Now, I’m going to mention some hypotheticals to you with [claimant].

If, in fact, what occurred on May 8—he worked the entire day from, let’s say, 5:00 a.m. to 8:30 a.m. and then left and walked to his car without any apparent problems to his left ankle, pain or instability—if that, in fact, occurred, would that affect any of your opinions as to whether any alleged work injury on May 8 regarding twisting may have caused his injury?

A. It would completely depend, once again, on the same thing I alluded to before.

If the initial fracture—you can get a bimalleolar ankle fracture and—but the bone still have [*sic*] some degree of connection, if you will.

If he was still—if the joint was still basically sitting in a relatively normal position, because he’s not—doesn’t have good sensation to pain or virtually none—that he could have certainly—the best I can tell you is this: That he could have ambulated on

that ankle until you get to a position that it's unstable, and then at that point he wouldn't be able to. And I can't answer any better than that, Counsel.

Q. All right. Do you have any specific opinions as to whether he was able to in his position between his alleged May 8, 2010 injury and the date he first sought treatment on May 9, whether he could have ambulated on his ankle for an approximate 24-hour period?

A. Well, I have to tell you, you know—I'll just tell you what my thought process was—didn't even presume until I found out subsequently that there was an issue of ambulation because even with a diabetic, because of the severity of the ankle, I didn't think that would be easy to occur. That was just my opinion because of the reasons I just told you.

You're asking for a certain amount of internal stability in the face of an unstable ankle, that it could have occurred and then until it became unstable but that's presuming a lot.

And in most patients, you know, the vast majority of patients have these fractures and they're not putting any weight on it. They're not putting anywhere close to it. They just couldn't do it at all and that's the issue.

So, once again, it's another thing that—it is hypothetical because you're saying that the ankle had to stay intact—and it could have—until it didn't. And that's the best way I can answer it.”

Dr. Gitelis was also asked on cross-examination if his opinion would change if he learned that, after finishing work on May 8, claimant helped a friend at a garage sale. He acknowledged that

that scenario would place additional stress on the left ankle and “could allow for increasing severity of the injury.” He added that that could also explain the complex nature of the injury.

¶ 18 At respondent’s request, claimant presented to orthopaedic surgeon Steven Kodros on January 6, 2011, for an independent medical examination (see 820 ILCS 305/12 (West 2010)). In conjunction with the examination, Dr. Kodros reviewed claimant’s medical records (Provena St. Joseph’s Hospital and Dr. Gitelis) and some diagnostic films brought by claimant. He noted that claimant’s past medical history was significant for diabetes and associated neuropathy. Claimant told Dr. Kodros that he injured his left ankle when he twisted his ankle at work on May 8, 2010, while erecting fencing. Claimant stated that he did not have any pain and he completed his work shift. However, the following day, while walking up his brother’s driveway, claimant heard a popping sound, and his left ankle gave way, causing him to fall. Claimant told Dr. Kodros that he had the onset of pain at that time and he was unable to ambulate. Dr. Kodros’ assessment was status post comminuted displaced bimalleolar left ankle fracture. He opined that claimant’s injury was complicated by the presence of diabetes with peripheral sensory neuropathy, tobacco use, and possibly the presence of some mild peripheral vascular disease.

¶ 19 In the report he prepared following the examination, Dr. Kodros responded to a series of inquiries presented by respondent’s attorney. Dr. Kodros stated that it was unlikely that claimant’s diabetic peripheral neuropathy would have resulted in his left ankle fracture with normal daily activities in the absence of any traumatic incident. However, he opined that it was possible, given the presence of claimant’s diabetic peripheral neuropathy, that he originally sustained an occult fracture of the left ankle as a result of the event that occurred on May 8, 2010, and that this subsequently became displaced as a result of the May 9, 2010, incident. Nevertheless, based on the history provided by claimant and his review of the medical records,

Dr. Kodros believed that it was more likely than not that claimant's left-sided bimalleolar fracture occurred on May 9, 2010. In reaching this conclusion, Dr. Kodros did not find significant the absence of pain complaints or evidence indicating that claimant was able to walk in light of his diabetic condition. However, he found it unlikely that claimant sustained a left ankle fracture on May 8, based on the lack of significant swelling, bruising, or discoloration following that incident. Dr. Kodros did not believe that there would be an associated ligamentous injury expected with the bimalleolar fracture. As such, he opined that a lack of instability following the May 8, 2010, event would not have a bearing on the timing of the injury.

¶ 20 Based on the foregoing evidence, the arbitrator determined that claimant failed to prove that he sustained a compensable accident on May 8, 2010. In support of this finding, the arbitrator noted discrepancies between claimant's testimony, the accident report, and the emergency room records. The arbitrator explained that there was a gap of more than 24 hours between the event of May 8 and the collapse of claimant's left ankle the following day, and claimant was "on his feet" during much of that time. The arbitrator also noted that both Dr. Gitelis and Dr. Kodros opined that if claimant had fractured his ankle there would have been swelling and bruising, particularly if he remained active. Although claimant testified that he noticed swelling and bruising when he arrived home on May 8, 2010, the arbitrator did not find claimant's testimony credible given the absence of such a history in any of the medical records. The arbitrator also pointed out that claimant could not identify when he first noticed swelling and bruising. Additionally, the arbitrator cited Dr. Gitelis' testimony that, given the ligament damage observed, it was "presuming a lot" to think that claimant could have ambulated all day if he had fractured the ankle on May 8, 2010. Finally, the arbitrator noted that there was conflicting evidence regarding what claimant did after 8:30 a.m. on May 8. The arbitrator found

Hornbeak's testimony more credible, but noted in any event, claimant remained active for a minimum of another 6½ hours after the accident. Accordingly, based on Dr. Gitelis' testimony and the evidence that claimant remained active until after 3 p.m. on May 8, 2010, the arbitrator concluded that claimant did not fracture his ankle until May 9, 2010. The Commission affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Kane County confirmed the decision of the Commission. This appeal followed.

¶ 21

II. ANALYSIS

¶ 22 On appeal, claimant argues that the Commission's finding that he failed to prove that he sustained an accident arising out of and in the course of his employment with respondent is against the manifest weight of the evidence. According to claimant, both Dr. Gitelis and Dr. Kodros agreed that the work accident on May 8, 2010, resulted in a fracture of the left ankle. However, the fracture remained undetected due to diabetic neuropathy, which inhibited claimant's ability to feel pain in his left foot. Claimant alleges that on May 9, 2010, while walking on his brother's driveway, his previously fractured ankle "gave way" when it became displaced. Claimant maintains that the Commission failed to draw upon the medical evidence and instead relied on its own concept of how a fractured ankle manifests itself. As such, he argues that the Commission's decision was against the manifest weight of the evidence and should be reversed.

¶ 23 An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" the employment. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (2006); *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416 (2000). A claimant bears the burden of proving by a preponderance of the evidence both of these elements. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 477

(2011); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). The phrase “in the course of” refers to the time, place, and circumstances of the injury. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (2000). Injuries sustained on an employer’s premises, or at a place where the employee might reasonably have been while performing his or her duties, and while the employee is at work, are generally deemed to have been received “in the course of” one’s employment. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers’ Compensation Comm’n*, 407 Ill. App. 3d 1010, 1013-14 (2011). For an injury to “arise out of” one’s employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm’n*, 129 Ill. 2d 52, 58 (1989).

¶ 24 Typically, the question of whether an employee’s injury arose out of and in the course of his employment is one of fact. *Brais v. Illinois Workers’ Compensation Comm’n*, 2014 IL App (3d) 120820WC, ¶ 19. With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers’ Compensation Comm’n*, 397 Ill. App. 3d 665, 674 (2009). A reviewing court may not substitute its judgment for that of the Commission merely because other inferences from the evidence may be drawn. *Berry v. Industrial Comm’n*, 99 Ill. 2d 401, 407 (1984). We will not overturn the Commission’s determination on a factual matter unless it is against the manifest weight of the evidence. *Mlynarczyk v. Illinois Workers’ Compensation Comm’n*, 2013 IL App (3d) 120411WC, ¶ 15. A decision is against the manifest weight of the evidence only if an

opposite conclusion is clearly apparent. *Elgin Board of Education School District U-46 v. Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 949 (2011).

¶ 25 In the present case, the Commission, in affirming and adopting the decision of the arbitrator, determined that claimant did not fracture his left ankle until May 9, 2010, while he was walking up his brother's driveway. In other words, the Commission rejected the notion that claimant sustained an accident on May 8, 2010, while in the course of his employment. The Commission's determination was based primarily on discrepancies between claimant's testimony and the other evidence submitted at the arbitration hearing, its assessment of the credibility of the witnesses who testified at the arbitration hearing, and its review of the medical testimony. The evidence of record amply supports the Commission's finding.

¶ 26 First, there are multiple discrepancies between claimant's arbitration testimony and other evidence presented at the arbitration hearing. For instance, claimant testified that while at work on May 8, 2010, he twisted his ankle. Claimant testified that when he arrived home later in the day, he noted bruising and swelling. Despite the fact that claimant was aware of respondent's policy for reporting work accidents, claimant readily acknowledged that he did not immediately report the event of May 8, 2010, to respondent and he did not mention the incident to the two coworkers who were also erecting fencing on that date. In fact, claimant did not report the alleged incident until he was discharged from the emergency room on the afternoon of May 9, more than 24 hours after the work accident allegedly occurred.

¶ 27 In addition, claimant's testimony regarding when he first noticed bruising and swelling is inconsistent. Claimant initially testified that he did not notice the swelling or bruising until he took off his work boots and socks at around 5 p.m. on May 8. Claimant later testified that he did not notice the bruising and swelling until between 8 and 8:30 p.m., when he went to bed. More

significant, the history claimant related at the arbitration hearing was inconsistent with the emergency room records of May 9. The triage assessment states that claimant “stepped on something today c/o left foot pain, also mentioned he recently injured left ankle.” The emergency-room physician’s notes reflect that claimant “rolled his ankle” on two separate occasions. Curiously, claimant did not report that either of these incidents occurred on May 8 or while working for respondent. Assuming *arguendo* that the initial ankle roll referenced in the emergency room records was the alleged work incident, claimant told the emergency room doctor that he had been able to ambulate without pain and he did not reference any bruising or swelling associated with that incident. Further, although the evidence establishes that the absence of pain complaints would not be unusual given the medical history of claimant’s diabetic neuropathy, claimant reported severe pain in the emergency room which was treated with pain medication. This history is contrary to his repeated testimony at the arbitration hearing that he did not feel any pain (except at the time he heard the popping sound on May 9).

¶ 28 Furthermore, there was conflicting evidence regarding what claimant did after 8:30 a.m. on May 8. Claimant testified that he worked for respondent until about 3 p.m., first cleaning the “brick house” and then collecting garbage. However, Hornbeak, claimant’s supervisor, testified that he observed claimant leave the work premises at around 8:30 a.m. and walk to his vehicle. According to Hornbeak, claimant was not walking with a limp at that time. Hornbeak further testified that when claimant called the following day to report the alleged accident, he mentioned that he had helped a friend at a garage sale after work on May 8.

¶ 29 Moreover, we find that the medical evidence supports the Commission’s finding that claimant did not sustain a work-related accident on May 8. Dr. Kodros did not rule out the possibility that claimant sustained an occult fracture of the left ankle as a result of the event of

May 8, 2010, which became displaced as a result of the May 9, 2010, incident. However, based on the history provided by claimant and his review of the medical records, Dr. Kodros opined that it was more likely than not that claimant's left-sided bimalleolar fracture occurred on May 9. In support of this opinion, Dr. Kodros cited a lack of significant swelling, bruising, or discoloration following the alleged incident of May 8. As noted above, the contemporaneous medical records support the basis cited by Dr. Kodros for his opinion. That is, the contemporaneous emergency room records fail to mention any injury occurring on May 8, 2010, much less any associated swelling or bruising. Although Dr. Gitelis opined that the mechanism of injury reported by claimant on May 8, 2010, was the cause of claimant's left ankle fracture, this opinion was problematic in that even he acknowledged that it would be "presuming a lot" that claimant would be able to walk after that event, given the suspected instability of the ankle and the evidence that claimant remained active following the alleged injury.

¶ 30 As noted above, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). In this case, the Commission weighed the evidence presented and determined that claimant failed to establish that he fractured his left ankle at work on May 8, 2010. It is not the function of this court to reweigh the evidence. See *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 407 (1984); *Plantation Manufacturing Co. v. Industrial Comm'n*, 294 Ill. App. 3d 705, 712 (1997). Considering the foregoing evidence in light of the Commission's role as fact finder, we cannot say that a conclusion opposite that of the Commission is clearly apparent. As such, the Commission's finding that claimant failed to establish that he sustained a work-related injury on May 8, 2010, is not against the manifest weight of the evidence.

¶ 31

III. CONCLUSION

¶ 32 For the reasons set forth above, we affirm the judgment of the circuit court of Kane County which confirmed the decision of the Commission.

¶ 33 Affirmed.