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2014 IL App (5th) 140038WC-U

FILED: September 24, 2014

NO. 5-14-0038WC

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JEFF EDWARDS,	)	Appeal from
	)	Circuit Court of
Appellant,	)	Washington County
	)	No. 13MR7
v.	)	
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION <i>et al.</i> (Cloverleaf Grain, Appellee).	)	Daniel Emge,
	)	Judge Presiding.

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

### ORDER

¶ 1 *Held:* The Commission's decision that claimant failed to give timely notice was not against the manifest weight of the evidence.

¶ 2 On March 4, 2011, claimant, Jeff Edwards, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), seeking benefits from the employer, Cloverleaf Grain, LLC. He alleged a work accident that occurred on September 21, 2009, causing injury to his back and right shoulder. Following a hearing, the arbitrator denied claimant benefits, concluding that although claimant proved he had sustained an accident on September 21, 2009, he failed to (1) give timely notice to the employer

within 45 days of the accident or (2) show a causal relationship between his injuries and the work accident.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Washington County confirmed the Commission's decision. This appeal followed.

¶ 4 I. BACKGROUND

¶ 5 The following evidence was elicited at the May 23, 2012, arbitration hearing. Claimant began working for the employer in February 2008 as a general grain elevator worker and truck driver. On September 21, 2009, while at work, claimant slipped on a ladder he was using to enter a grain bin and fell onto a grain auger, striking his head and right shoulder.

Claimant testified his co-worker, Dale Payne, witnessed the accident. Claimant testified he "was in some pain" directly after the fall and could not get up. However, after sitting for 15 minutes, he went back to work thinking the pain in his shoulder and head "would probably work its way out."

¶ 6 Claimant testified later that day, he saw his direct supervisor, James Michael, walking down the hallway of the office. According to claimant, Michael "had a smile on his face, so I thought he knew what happened. And I said, well, I guess you heard. He said, no. I said, I fell off the ladder inside the grain bin and \*\*\* he made some comment, and I don't really remember what it was, but \*\*\* that was the end of the conversation." Approximately one week later, claimant had a doctor's appointment scheduled with his regular physician for an unrelated issue and he told Michael he was going to have his shoulder checked while at the doctor's office. According to claimant, Michael told him, "he didn't believe that it was covered under workmen's [sic] comp because it had been over 72 hours" but claimant stated he was "going to talk to [his]

doctor about it anyway." Claimant testified when he returned from seeing his doctor, he told Michael, "I was informed it takes a long time for an injury like this to heal and that we need to see what happens."

¶ 7 Claimant continued to work for the employer until July 2010. Claimant testified during this time, he noticed the pain in his right shoulder was not improving because he "was aggravating it" by continuing to work, but, "there wasn't really anything I could do about that. I needed a job." In addition to pain in his right shoulder, claimant's back started to hurt "real bad." Claimant described his back pain as "a pain that shoots down my—my backs of my legs. It was just in one leg and then it went to the other leg and at times it's pretty severe." Prompted by the constant pain, claimant began treatment with chiropractor Dr. Michael Bowman in May 2011. Bowman referred claimant to Dr. Mark D. Miller, an orthopedic surgeon. Since the accident, claimant testified he has lost some movement and strength in his right shoulder and is unable to bend over or walk a distance of 50 to 60 yards before he is forced to sit down due to pressure in his back that he cannot "hardly tolerate."

¶ 8 On cross-examination, claimant acknowledged he was involved in a second work accident on October 29, 2009, involving an injury to an eye. Claimant reported this accident to Michael and, on November 6, 2009, claimant completed an accident report. Claimant stated, "I completed the form two weeks after the accident happened because I didn't—I didn't go to the doctor immediately. I thought that I would be okay, and after I went to the doctor and received care and treatment on it, then I filled out the form." At the time he completed the form, which was given to him by the employer's bookkeeper, Henry Reuter, claimant testified no one mentioned anything about the "72-hour issue" and claimant did not think about it. The following colloquy ensued:

"Q. "After you completed this accident form for your eye injury, did you wonder why you hadn't completed any accident report for your shoulder injury?

A. Well, I was told that it would heal, probably heal, and when I talked to Mr. Michael, he said I only had 72 hours to do it.

Q. So you thought that was just over, is that what you thought?

A. Well, when I come back to [Michael's] office after going to the doctor and we talked about it, I said, did you find anything out about the 72 hours, and he said, yes, I did. You only have 72 hours.

Q. To do what?

A. To file a report, to do the paperwork."

¶ 9 Since claimant ceased working for the employer, he has worked for two other companies driving a truck. Claimant testified he has not suffered any traumatic injuries at either of these places of employment.

¶ 10 Dale Payne testified he has worked for the employer for approximately 25 years. On September 21, 2009, Payne was in the grain elevator and witnessed claimant slip and fall. According to Payne, claimant fell approximately two feet and landed on his right side, with his head close to a grain auger. Payne described the auger as a 12-inch screw that sits in the trough and is used to pick the grain from the floor. Payne did not report the accident to anyone because he "figure[d claimant] would report it." According to Payne, Michael asked him about the accident "[l]ater on down the road," but he could not recall how soon after the accident Michael

questioned him.

¶ 11 James Michael testified he was a manager for the employer for approximately 5 years and had been employed there for 23 years. Michael did not recall claimant reporting an injury to him involving his right shoulder at any point during claimant's employment. When asked whether he "kn[e]w anything about any 72 hour [requirement] that has anything to do with worker's compensation," Michael responded, "[n]o, I do not." Michael further testified he could think of no reason he would have said something like that to claimant. Michael acknowledged claimant told him of the October 29, 2009, accident involving claimant's eye.

¶ 12 According to Michael, the first time he learned of claimant's right shoulder injury was when the employer received a letter, dated March 7, 2011, from claimant's attorney. Michael did not recall anyone mentioning the accident to him prior to March of 2011. The following colloquy ensued:

"Q. Did you ever record anything on an [occupational safety and health administration (OSHA)] log concerning a Jeff Edwards' injury on or about October 29 [*sic*] of 2009?

A. No.

Q. So when [claimant] says he talked to you again about a week after this accident, are you saying that conversation did not take place?

A. I can't remember. I mean, no. I can't remember. I mean it's been three years ago. I don't know. I mean, I can honestly say I do not recollect talking to him about this.

Q. If he had told you about it, would you have filled out an accident report or talked to him further or filled out an OSHA report?

A. Yes.

Q. And none of this was ever done?

A. No."

Michael did not notice claimant performing his job any differently after the accident.

¶ 13 The medical records of Dr. Hoffman were admitted into evidence and contained the medical reports from seven different appointments related to claimant's diabetes and cardiac care beginning on September 28, 2009, and ending March 7, 2011. Dr. Hoffman's record of the September 28, 2009, office visit reflects claimant did not report any head, neck, musculoskeletal or neurological symptoms at that time. The first notation of the work accident at issue here is found in the March 7, 2011, medical report, in which Dr. Hoffman notes, "[f]ell in grain bin year before last and landed on right shoulder and has been hurting ever since and is not getting any better. Has discussed it with me each visit since." The medical report further states, "[o]verall findings Right shoulder decreased rom with tenderness on rom."

¶ 14 The medical records of Dr. Bowman, whom claimant began chiropractic treatment with in May 2011, were admitted into evidence. On an intake form dated May 17, 2011, claimant wrote his injury was caused when he "fell from ladder onto [right] shoulder in grain bin, ladder was broke/bent, fell 7ft onto [right] shoulder and back onto grain auger." On the same form, claimant noted he also had sharp pain that "shoots down both legs." On May 19, 2011, Dr. Bowman referred claimant to Dr. Miller for evaluation and treatment, noting a diagnosis of "impingement syndrome right shoulder."

¶ 15 The medical records of Dr. Miller were admitted into evidence. Miller evaluated claimant on June 6, 2011. Miller's report for that visit indicates claimant was referred to him by Dr. Hoffman. Regarding claimant's history of the right shoulder injury, Miller noted, "The

ladder was bent and [he] slipped. He slipped off the ladder, falling approximately six feet onto a concrete floor. He landed with the right shoulder adducted against his body, direct blow.

Evidently he fell over an auger." Following an MRI arthrogram of the right shoulder, Miller diagnosed a posttraumatic frozen shoulder and recommended aggressive physical therapy. After one month of physical therapy, claimant continued to struggle with range of motion in his right shoulder, and Miller recommended claimant undergo manipulation under anesthesia, arthroscopic lysis of adhesions, and capsular releases. As of the May 2012 arbitration hearing, claimant had not undergone the procedure.

¶ 16 On June 25, 2012, the arbitrator issued his decision in the matter. As stated, he denied claimant benefits, concluding claimant failed to (1) give timely notice to the employer within 45 days of the accident or (2) show a causal relationship between his injuries and the work accident.

¶ 17 On April 24, 2013, the Commission affirmed and adopted the arbitrator's decision. We note the Commission's decision also remands the matter pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980). However, as the Commission affirmed the arbitrator's decision denying benefits based on untimely notice and lack of causation, no reason exists to remand and we conclude this notation was made in error. It appears a second workers' compensation claim may be pending but it has not been consolidated with the instant claim. On December 14, 2012, the circuit court of Washington County confirmed the Commission's decision.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, claimant argues the Commission erred in finding he failed to provide

the employer with timely notice of the accident. Specifically, claimant contends his testimony on this issue, *i.e.*, that he informed Michael of the accident on the day it happened and again one week later, was more credible than Michael's testimony he did not.

¶ 21 Under the Act, "[n]otice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c) (West 2008). The purpose of the Act's notice requirement "is to enable employers to investigate alleged accidents." *S & H Floor Covering, Inc. v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 259, 264, 870 N.E.2d 821, 825 (2007). "A claimant complies with the Act if, within 45 days, the employer possesses the known facts related to the accident." *Id.* at 264-65, 870 N.E.2d at 825. "The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act." *Id.* at 265, 870 N.E.2d at 825. On review, we will not disturb the Commission's notice finding unless it is against the manifest weight of the evidence. *Id.* at 264, 870 N.E.2d at 825. A finding is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent. *Id.* at 266, 870 N.E.2d at 826. "[I]t is solely within the province of the Commission to judge the credibility of witnesses, to draw reasonable inferences from the testimony and to determine the weight evidence is to be given." *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 95, 631 N.E.2d 724, 727 (1994).

¶ 22 In this case, the Commission, by adopting the arbitrator's decision, found "a lack of credible evidence supporting timely notice to the [employer] within 45 days of the accident." Claimant asserts the Commission's finding was in error, however, and cites *Gano* for support—a case he contends is factually similar to his and one where the Commission found timely notice had been given.

¶ 23 In *Gano*, the claimant testified he reported the work accident that resulted in

injury to his shoulder and arm immediately after it happened. *Gano*, 260 Ill. App. 3d at 93, 631 N.E.2d at 726. One of the claimant's co-worker's observed the claimant and the foreman talking shortly after the accident occurred, and although he could not hear the conversation, he saw claimant "messaging with his shoulder" and noted he "had a nasty look on his face" like something had happened. *Id.* at 96, 631 N.E.2d at 727-28. After speaking to his foreman, the claimant told his co-workers he had injured himself. *Id.* at 96, 631 N.E.2d at 728. Although the foreman could not recall whether the claimant had informed him of the accident, the foreman stated unless it was a medical emergency, he would not have "consider[ed] the incident sufficiently significant to report it to his supervisors." *Id.* at 94, 631 N.E.2d at 726. Based on this evidence, the Commission found the claimant had provided timely notice to the employer. *Id.* at 96, 631 N.E.2d at 727. The appellate court affirmed, holding the Commission's decision was supported by the manifest weight of the evidence. *Id.* at 96, 631 N.E.2d at 728.

¶ 24 As an initial matter, we note an important difference in the positions on appeal of the claimant in *Gano* and the claimant here. The claimant in *Gano*, as appellee, sought to uphold the Commission's finding of timely notice—that is, to confirm that its finding of timely notice *was not* against the manifest weight of the evidence. However, claimant, appellant here, carries the burden of establishing the Commission's finding of untimely notice *was* against the manifest weight of the evidence. As to the facts regarding notice, claimant testified he told Michael of the September 21, 2009, accident the day it happened, and again one week later, at which time Michael allegedly told him the injury would probably not be covered under workers' compensation because it was not reported within 72 hours of the accident. Unlike *Gano*, however, no one here corroborated either of the alleged conversations between claimant and Michael. Also, contrary to *Gano*, where the foreman would not have reported the accident

unless it was a medical emergency, Michael testified he would have filled out an OSHA form to document the injury if claimant had told him about it. No OSHA form was filled out regarding the subject accident, thus lending credence to Michael's testimony he was not informed of the accident.

¶ 25 The evidence here further shows claimant filled out an accident report for his October 29, 2009, eye injury on November 6, 2009—eight days after the accident occurred. Despite the fact the eye accident happened approximately one month after the accident at issue here—and after claimant was allegedly informed an accident would not be covered by workers' compensation if it was not reported within 72 hours—claimant filled out the accident report without questioning or wondering about the "72-hour" issue. The arbitrator noted claimant "was evasive in his response when asked if he wondered why an accident report for the shoulder was not filled out." Additionally, Payne, the sole witness to the accident, testified he did not inform the employer of the accident and it was not until "later on down the road" when Michael questioned him about it.

¶ 26 We note claimant argues discrepancies in Michael's testimony support his contention that his testimony was more credible. Specifically, claimant states, "Michael testified he completed [the November 6, 2009] accident form," when, in fact, it was claimant who completed the form. Further, claimant states he obtained the form from a co-worker, not Michael as Michael claimed. However, our review of the record reveals that Michael neither testified that he completed the November 6, 2009, accident form himself, or that he gave claimant the form to complete.

¶ 27 Here, the record contains sufficient support for finding timely notice was not given, and thus, the Commission's decision was not against the manifest weight of the evidence.

¶ 28

### III. CONCLUSION

¶ 29 For the reasons stated, we affirm the circuit court's judgment, confirming the Commission's decision.

¶ 30 Affirmed.