Workers' Compensation
Commission Division
FILED: March 31, 2011

No. 1-09-3310WC

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

OSGOOD INDUSTRIES, INC.,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Appellant,	)	COOK COUNTY
	)	
v.	)	No. 09 L 50636
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, et al.,	)	
(PAUL BOLE,	)	HONORABLE
	)	SANJAY T. TAILOR,
Appellee).	)	JUDGE PRESIDING.

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

O R D E R

HELD: That the Illinois Workers' Compensation erred when it adopted the arbitrator's ruling which permitted the taking of a deposition after the start of the arbitration hearing.

Osgood Industries, Inc. (Osgood) appeals from an order of the Circuit Court of Cook County, confirming a decision of the Illinois Workers' Compensation Commission (Commission) which awarded the claimant, Paul Bole, benefits pursuant to the Workers's Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2004)) for injuries he allegedly received on April 12, 2004. For the reasons which follow, we reverse the judgment of the circuit court, vacate the decision of the Commission and remand the matter back to the Commission for further proceedings.

The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on February 21, 2008, April 9, 2008, and June 8, 2008.

The claimant, who had worked with Osgood for 14 years, was a senior service technician, a position in which he would build machines, install them, and teach others how to operate and service them. The position required him to kneel, lift 50- to 60-pound items, climb ladders, and sometimes crawl, and his workdays lasted anywhere between 8 and 16 hours.

On April 12, 2004, as he was installing a freezer, he stood up and "felt like somebody took a razor blade and cut [his] leg in half." Medical records indicate that Dr. Robert Hall administered a steroid injection to the claimant's right knee on May 13. On May 27, Dr. Hall determined that the claimant had suffered a torn medial meniscus of the right knee. The claimant continued to work until June 30, 2004, and he underwent an

arthroscopy, debridement of patellofermoral joint, and medial meniscectomy to repair the meniscus tear in his right knee on July 2, 2004.

In a post-operative note, dated July 6, 2004, Dr. Hall stated that the claimant reported "mild pain" in his right knee. A physical therapist's report, dated July 14, 2004, indicated that the claimant was reporting constant right-knee pain that increased with walking and climbing. According to records from his physical therapist, the claimant reported on July 30 that his pain was decreasing but that he experienced "significant pain" when climbing stairs, and he reported on August 18 that his "pain levels [were] decreasing." In an August 30, treatment note, Dr. Hall stated that the claimant was "feeling much better" and was ready to return to work. The claimant returned to work on August 31, 2004, but he performed only light duty, which he described as "sitting and checking out the machine" and "tell[ing] [others] what to do."

A September 20, 2004, treatment note by Dr. Hall states that the claimant had "been doing quite a bit of work" and was having "increasing discomfort in the medial side" of his right knee. An October 21, 2004, note from Dr. Hall states that the claimant reported that a previous steroid injection to his right knee "lasted about a month and then his pain returned."

On December 22, 2004, Dr. Hall noted that the claimant's previous surgeries did not relieve his right knee pain and that

the claimant may have "re[-]torn his meniscus." In his testimony, the claimant denied sustaining any separate injuries in the latter part of 2004:

"Q. Now the issue has come up *** about whether *** you had an accident in September of '04.

A. No. The only thing that ever happened --

Q. Did you or did you not have an accident in September of '04?

A. No.

Q. Okay.

Did you or did you not have an accident in December of '04?

A. No.

Q. Okay.

Now those two dates have been mentioned repeatedly in Dr. Levin's report as being accident dates that you told him that you had.

Is that true?

A. No.

Q. Did he ever ask you?

A. No. He just kept throwing dates at me, like when I was off of work, and that was it."

The claimant also explained that he worked continuously through September and December 2004 and did not take any time off until February 2005. He confirmed on cross examination that he

suffered only one injury to his right knee.

In a January 21, 2005, note following the claimant's having an MRI scan of his right knee, Dr. Hall indicated that the claimant had suffered "an oblique tear of the posterior horn of the medial meniscus though there was not much medial meniscus to tear based on [the claimant's] recent meniscectomy."

On February 14, 2005, at Osgood's request, the claimant underwent a medical examination by Dr. Jay Levin. In his summary of his examination, Levin stated that the claimant reported feeling "99% better" two months after his July 2004 surgery. Levin further said that the claimant "state[d] that he had a new injury in September of 2004. Levin's letter relayed the claimant's description of the September 2004 injury:

> "In September of 2004 he was rebuilding the bottom of a machine. When he got up off of his hands and knees he felt a 'rip' again in his right knee."

In his report, Levin opined that the claimant's need for further right-knee surgery was attributable to the September 2004 injury, not the April 2004 injury. Levin's later reports, which relied on new interviews and examinations of the claimant, repeated his earlier statements that the claimant described a distinct second injury suffered in late 2004 and that the claimant's right knee had almost recovered prior to that second injury.

Dr. Hall's medical report admitting the claimant for a second arthroscopy and medial meniscectomy of the right knee on

February 25, 2005, stated that the claimant's pain returned after his July 2004 operation and that an MRI revealed a "re-tear of the *** medial meniscus."

After his February surgery, the claimant did not return to work until October 10, 2005, and, in the intervening period, he continued to pursue treatment for his right knee. A March 10, 2005, report from his physical therapist indicated that the claimant "report[ed] re[-]injuring his knee at work while kneeling down, he felt a ripping sensation." On March 21, the claimant reported to his physical therapist that he had seen no improvement in his right-knee pain. Likewise, records created by his physical therapist on April 8, and May 2, 2005, state that the claimant reported "continued pain in the right knee with activity."

A June 1, 2005, report from his physical therapist stated that the claimant's pain levels "continue[d] to increase." On August 4, 2005, the claimant underwent a partial knee replacement to address his progressive right-knee pain.

The claimant testified that he worked from October 2005 through June 9, 2006, but did not work after that date.

On August 17, 2006, the claimant again saw Dr. Levin, who concurred with other medical opinions that the claimant required a total right-knee replacement. On September 7, the claimant underwent a total right-knee replacement. His medical records indicate that he continued to have difficulties, including

infections, in his right knee after the surgery.

The claimant testified that, near his last day of work, he noticed that his left knee began to hurt; he attributed this pain to his compensating for the problems with his right knee. Records from Dr. Hall and Dr. Levin indicate that they reached the same conclusion as to the cause of the pain in the claimant's left knee. The claimant testified that he eventually had surgery on his left knee, first on May 15, 2007, to attempt to repair his meniscus, and again on October 16, 2007, to replace his left knee.

A report from the claimant's September 20, 2007, visit to Dr. Levin, states that the claimant reported having "almost completely recovered" two months after his April 2004 injury, before sustaining a second injury in September 2004. The report indicates that the claimant reported feeling a " 'ripping' " in his right knee in September or December 2004, and, in his report, Levin attributes the claimant's need for further medical intervention, including intervention for the claimant's left knee, to the September or December 2004 accident.

In his testimony, the claimant challenged the claims contained in Levin's September 20, 2007, report. He said he had "no idea" where Levin got the idea that a second injury took place. The claimant explained that "[t]here was no" second injury and that, instead, his first injury "kept progressively getting worse." The claimant also denied that he had nearly

healed shortly after April 2004 injury; he said that, in fact, he "was always hurting, and it just kept *** getting worse and worse and worse."

During the hearing, after the claimant reaffirmed that he had suffered only one injury, he and his counsel agreed to dismiss his application based on a December 2004 injury and instead stand on the application alleging the April 2004 injury.

Also during the hearing, the claimant attempted to present a letter Dr. Hall had prepared to describe the claimant's condition. The arbitrator sustained an objection to the exhibit on the ground that it was prepared in preparation for litigation.

After both sides rested their cases, the following exchange took place:

> "THE ARBITRATOR: [Counsel for the claimant], do you wish to take any depositions or are we closing proofs today?
>
> [CLAIMANT'S COUNSEL]: With regard to Dr. Hall, his treating record and letter which you wouldn't let me put in, I ask leave to take his deposition.
>
> [OSGOOD'S COUNSEL]: And I would object to that. As I had told [counsel] previously, whether he had objections to the Dr. Levin reports so we could take his deposition -- he said, no I don't. ***
>
> I informed him of my objection to Dr. Hall's narrative report[,] and depositions would have been able to have been completed prior to trial.

THE ARBITRATOR: Well, your objection is noted. It's his case in [chief]. He has a right to take a deposition. Let me give you a status date."

On April 9, 2008, the arbitration hearing resumed, apparently for a ruling on the claimant's motion for a an order allowing him to depose witnesses, and the following colloquy took place:

"[OSGOOD'S COUNSEL]: My objection, as I stated also at the trial, was that counsel learned of this issue in September 2007 and had ample time to put together reports regarding these issues and knew of my objections to his reports prior to the date of the trial and stated that he would be proceeding anyway regardless of my objections. He was well aware that I was objecting based upon hearsay on the narrative reports, and, therefore, we proceeded to trial.

And now the reason for the bifurcation, as I understand it, is that he stated he would need to take the depositions to get his evidence in. However, he knew that at the time of trial and had time to do that prior to the trial."

In response, the claimant's counsel argued that the excluded report from Hall had been represented to him as a medical record. The claimant's counsel further argued that "[t]he rules, 7030.60, regarding depositions, subsection (f), give [the arbitrator] the opportunity and the right to order a deposition" pursuant to an

oral request.

The arbitrator granted the claimant's request:

> "Being that [Osgood] had valid evidentiary objections and I sustained those objections, consequently, [the claimant] has no recourse but to take a deposition to perfect his claim and present his evidence."

When the arbitration hearing resumed on June 8, 2010, Dr. Hall's deposition testimony was admitted into evidence over Osgood's continued objection. In the deposition, Hall recounted his treatment of the claimant, including a description of the procedures he had performed. Hall recalled that the claimant showed improvement during the August 4 and August 30 visits following his July 2004 surgery. Hall said, as the claimant's medical records indicated, that, by September 20, the claimant "was having increasing discomfort in the right knee ***, having worked apparently an extended period of time." Hall said that he treated the claimant with an injection into his knee, which the claimant later told him helped for approximately one month. On December 22, 2004, the claimant "still had pain in his knee," and, Hall said, later tests revealed a torn miniscus. Hall described the progression from a partial to a total right-knee replacement, and he agreed that the claimant's disease throughout the process had been "continuous and unrelenting" since April 2004. Hall also described his treatment of the claimant's left knee, and he said it was "conceivable" (a term he defined as

"possible, more likely than not, perhaps" or "probable") that the left-knee problems related to the claimant's April 2004 right-knee injury. Hall stated that nothing in his notes indicated that the claimant had suffered a second right-knee injury in late 2004.

Following the hearing, which was held pursuant to section 19(b) of the Act, the arbitrator found that the claimant's April 12, 2004, injury left him temporarily disabled. In his written findings, the arbitrator concluded as follows:

> "The arbitrator adopts the opinions of Dr. Hall, as expressed in his deposition, that [the claimant's] present condition *** [in both knees] [is] causally related to the accident on April 12, 2004. Further, the arbitrator finds that there is only one accident, and that occurred on April 12, 2004."

The arbitrator awarded the claimant temporary total disability (TTD) benefits for a total of 145 4/7 weeks, from the periods of June 30, 2004, through August 31, 2004; February 24, 2005, through October 10, 2004; and June 9, 2008, through June 10, 2008. The arbitrator further ordered Osgood to pay $266,076.55 in the claimant's medical expenses, less $209,127.98 already paid.

Osgood filed a petition for review of the arbitrator's decision with the Commission. In a decision with one commissioner dissenting, the Commission adopted the arbitrator's

decision with one correction as to the date of the claimant's disability.

Osgood filed a petition for judicial review of the Commission's decision to the Circuit Court on Cook County. The circuit court which confirmed the Commission's decision, and this appeal followed.

Osgood first argues that the Commission erred when it upheld the arbitrator's decision to allow the claimant to depose Dr. Hall after the start of the arbitration hearing. As Osgood observes in its brief, section 7030.60 of the regulations adopted by the Commission governs the timing of evidence depositions. See 50 Ill. Adm. Code §7030.60 (2008). Section 7030.60 provides as follows, in pertinent part:

> "(a) *** Evidence depositions of any witness may be taken after the hearing begins only upon order of the Arbitrator or Commissioner, for good cause shown. Except as provided in subsection (f) below, such [application by either party for a deposition] shall be in writing and shall contain [specific information itemized by the rule].
>
> * * *
>
> (b) The time for taking depositions *** shall be on a date set not less than ten (10) days after the issuance [of the order allowing the deposition].
>
> * * *
>
> (d) Except as provided in subsection (f) below, notice

> of the issuance of the [order] shall be given in sufficient time so that the receipt of such copy of the [order] shall not be less than ten (10) days before the date set for the taking of the deposition. ***
>
> * * *
>
> (f) Exceptions
>
> 1) Provided, however, where it is shown that complying with the time requirements prescribed herein, the party seeking the [deposition] may be deprived of evidence sought to be obtained by the deposition, that the Arbitrator or Commissioner *** may, in his discretion:
>
> A) on notice and hearing before trial waive such requirements, or
>
> B) permit a party to present an oral application [for deposition] immediately before or during trial and, after due consideration of such application and any objections thereto that may be orally raised by the opposite party, rule upon the application." 50 Ill. Adm. Code §7030.60 (2008).

Osgood argues that the arbitrator erred when it allowed the late deposition of Dr. Hall without articulating "good cause" for doing so, as described in subsection (a). The claimant counters that, under his interpretation of the above regulation, subsection (f) allowed the arbitrator to grant an oral request for a late deposition without a "good cause" finding. Although

subsection (a) states that requests for depositions after the start of a hearing may be granted only upon a showing of good cause, the claimant seems to argue that subsection (f) creates an exception to all of subsection (a)'s requirements. The parties thus call upon us to interpret section 7030.60.

A court will interpret an administrative regulation in the same manner as it would interpret a statute. *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 391, 556 N.E.2d 236 (1990). Thus, our primary aim in construing a regulation is to give effect to the drafters' intent, and the best indicator of that intent is the plain and ordinary meaning of the whole regulation. *Nolan v. Hillard*, 309 Ill. App. 3d 129, 722 N.E.2d 736 (1999); *Malinkowski v. Cook County Sheriff's Merit Bd.*, 395 Ill. App. 3d 317, 322, 917 N.E. 2d 1148 (2009).

As a whole, section 7030.60 states that parties may take depositions only upon application and permission from the arbitrator or the Commission; the regulation delineates procedures to ensure that opposing parties have ample notice of, and opportunity to object to, requests for depositions. Thus, subsection (a) requires that applications be in writing and contain certain information, subsection (c) requires that the application be served on opposing parties (and that parties receive five days to object), and subsection (d) requires that an order allowing a deposition be issued at least ten days before the deposition. Each of these requirements is prefaced with the

qualification, "[e]xcept as provided in subsection (f)," a qualification that appears in the regulation only before these three requirements. Thus, read as a whole, section 7030.60 strongly indicates that subsection (f) was created as an exception to only the three above timing and notice requirements otherwise imposed by the regulation.

The language of subsection (f) comports with this view. It states that it applies "where it is shown that by complying with the time requirements prescribed herein"--a phrase we interpret to refer to the above-described requirements from subsections (a), (c), and (d)--"the party seeking [an order allowing a deposition] may be deprived of the evidence sought to be obtained by the deposition."

This understanding of subsection (f) strongly undermines the claimant's position that subsection (f) excuses subsection (a)'s "good cause" requirement. Our reading of the purpose of subsection (f), discussed above, tells us that it is limited to alleviating the above-described timing and notice requirements, not any other requirements contained in the regulation. Indeed, as noted above, before each of those above-described requirements, and nowhere else, the regulation specifically references subsection (f). These specific references indicate that the reach of subsection (f) is limited to those provisions that incorporate it.

Further, even if we were to set aside our reading of the

purpose underlying subsection (f), we would conclude that its plain language precludes its application to this case. As noted above, subsection (f) begins by stating that it applies "where it is shown that by complying with the time requirements prescribed herein, the party seeking [an order allowing a deposition] may be deprived of the evidence sought to be obtained by the deposition." 50 Ill. Adm. Code §7030.60(f). The claimant did not argue to the arbitrator, and does not argue on appeal, that the timing and notice requirements of the regulation caused his inability to present Dr. Hall's opinions. Rather, the claimant identified his impediment as the arbitrator's excluding other evidence of Hall's opinions. Subsection (f) is not triggered unless the proponent of evidence makes a showing that compliance with the time and notice requirements would deprive him of evidence, and the claimant made no such showing here. He attributed his potential deprivation of evidence to the arbitrator's exclusion of Dr. Hall's written report, not to the regulation's timing requirements. Accordingly, the claimant did nothing to trigger the exception provided in subsection (f).

To urge the opposite result, the claimant relies on the portion of subsection (f) pertaining to oral requests for deposition made during trial. That portion provides that, once subsection (f) is triggered, an arbitrator or the Commission may permit an oral request for deposition "before or during trial and, after due consideration of such application and any

objections ***, rule upon the application." 50 Ill. Adm. Code §7030.60(f)(1)(B) (2008). However, we have held above that the claimant did not trigger subsection (f), so this provision does not apply. Further, under our reading, subsection (f) will excuse only the timing and procedural requirements that subsection (f) normally excuses. A party proceeding under this provision must still satisfy the regulation's general "good cause" requirement for late depositions. In sum, we disagree with the claimant that subsection (f) excuses the "good cause" showing that subsection (a) requires for any party requesting a deposition after the start of a hearing.

The claimant bases his entire argument on this issue on his interpretation of the regulation: he makes no argument that there was actually a showing of "good cause" that would satisfy section 7030.60(a). Further, our review of the record reveals no showing of good cause. When he granted the claimant's request for a deposition after the start of the hearing, the arbitrator neither used the term "good cause" nor articulated any reason that could be considered "good cause" for allowing a late deposition. In fact, the only reason the arbitrator articulated was the circular reason that would be true in the case of any potential evidence: were the evidence not allowed, its proponent would be precluded from presenting it.

By allowing a deposition after the start of a hearing without requiring any showing of good cause, the arbitrator

violated section 7030.60. The Commission repeated that mistake when it adopted the arbitrator's ruling. Since there was no showing of good cause, section 7030.60 mandated that the claimant's request for a late deposition be denied. The arbitrator and the Commission thus erred in allowing the late deposition.

The arbitrator's, and the Commission's, decision relied heavily on Dr. Hall's deposition testimony. We therefore cannot uphold their rulings on the basis that Dr. Hall's improperly allowed deposition testimony did not affect the outcome of the hearing. As Osgood requests, we must remand this matter to the Commission for new findings that do not rely on the Hall deposition.

Because we remand this matter for findings, we do not reach Osgood's second argument, that the Commission's findings regarding the claimant's purported second injury were against the manifest weight of the evidence.

Based upon the foregoing analysis, we reverse the judgment of the circuit court, vacate the decision of the Commission, and remand the cause to the Commission for further proceedings consistent with the holdings contained herein.

Circuit court reversed, Commission decision vacated, and remanded to the Commission.

JUSTICE HOLDRIDGE, dissenting:

I respectfully dissent. Evidentiary rulings of the

Commission will not be disturbed on review absent an abuse of discretion. Mobil Oil Corporation v. Industrial Comm'n, 327 Ill. App. 3d 778, 782 (2002). Moreover, the Commission's decisions regarding "good cause" have generally been subject to an abuse of discretion standard of review. See Interlake Steel, Inc. v. Industrial Comm'n, 130 Ill. App. 3d 269 (1985). An abuse of discretion occurs when no reasonable person would take the view adopted by the Commission. Certified Testing, Inc. v. Industrial Comm'n, 367 Ill. App. 3d 938, 947 (2006). The question at issue in the instant matter, therefore, is whether the Commission's decision to allow Dr. Hall's deposition was an abuse of discretion. The majority would find that the Commission abused its discretion by: (1) failing to articulate a specific finding of "good cause" for allowing the deposition; and (2) by supporting its ruling by stating that the reason for allowing Dr. Hall's deposition was the fact that the claimant was precluded from presenting Dr. Hall's written narrative report based upon a sustained hearsay objection. I do not agree with either basis for finding that the Commission's evidentiary ruling was an abuse of discretion.

The fact that the Commission did not articulate a specific finding of good cause does not mean that no reasonable person would take the view adopted by the Commission. More simply put, as long as it appears from the record that the Commission had good cause for allowing Dr. Hall's deposition, we should not find

that the Commission abused its discretion in allowing the deposition to be taken. Moreover, it appears from the record that the need for Dr. Hall's deposition arose only after the second application for adjustment of claim was dismissed as a result of the claimant's clearly unexpected testimony disavowing any knowledge of a second accident. The record established that the employer had switched workers' compensation insurance carriers effective July 31, 2007, and that the employer's counsel on the first claim had indicated that she had no concern regarding an accident alleged to have occurred after that date. Although it is not entirely clear how the abrupt dismissal of the second claim impacted upon the claimant's theory regarding causation for the first claim, it would not be unreasonable for the Commission to find that the unanticipated withdrawal of the second claim at hearing was good cause to allow the Commission's evidentiary ruling regarding Dr. Hall's deposition to stand.

As I would affirm the Commission's evidentiary ruling on Dr. Hall's deposition, I would find that the Commission's award of benefits, based largely upon Dr. Hall's deposition testimony, was not against the manifest weight of the evidence. I would, therefore, affirm the Commission's decision.