2015 IL App (1st) 123220WC-U

FILED: September 30, 2015

NO. 1-12-3220WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RODOLFO ORTIZ, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (The Ritz Carlton, Appellee).	))))))))	Appeal from Circuit Court of Cook County No. 11L51388 Honorable Margaret Brennan, Judge Presiding.

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 committed no error in denying claimant benefits under the Workers' Compensation Act where its finding that claimant failed to give notice of his alleged accidental injuries to the employer was not against the manifest weight of the evidence.

¶ 2 On October 15, 2002, claimant, Rodolfo Ortiz, filed a second amended application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2000)), seeking benefits from the employer, the Ritz Carlton. During the underlying proceedings, claimant alleged he sustained work-related, repetitive-trauma injuries to his right hand, right shoulder, and cervical spine. Following a hearing, the arbitrator determined claimant

was not entitled to benefits under the Act, finding he failed to (1) give timely notice of his alleged accidental injuries to the employer or (2) establish that he sustained accidental injuries arising out of and in the course of his employment. The Workers' Compensation Commission (Commission) affirmed the arbitrator's decision. On judicial review, the circuit court of Cook County confirmed the Commission. Claimant appeals, arguing (1) the Commission's finding that he failed to provide timely notice of his alleged accident to the employer was against the manifest weight of the evidence and (2) the Commission's finding that claimant failed to prove his injuries arose out of and in the course of his employment was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At arbitration, claimant testified with the aid of an interpreter. He stated that, for approximately two years, he worked for the employer as a pot washer. He was required to "wash all the pots that the cooks use[d]" and stated he washed the pots "by hand and put them on a machine." Claimant testified he did not have a set amount of hours that he worked each week but "sometimes" he worked 9 to 10 hours a day and "sometimes" he worked on Saturdays. He stated he usually rested on Mondays or Tuesdays. Sundays were "a day when [he] would work."

¶ 5 Claimant testified that while performing his work duties in October and November 2001, he began to notice pain in his right shoulder, right wrist, and the lower part of his neck. He received medical care at Thorek Hospital and was referred to Dr. Spiros Stamelos. On November 19, 2001, the 58-year-old claimant underwent magnetic resonance imagings (MRIs) of the cervical spine and right shoulder. The MRI of claimant's cervical spine showed degenerative disc changes at C5-C6 and C6-C7, moderate size disc protrusions at C5-C6 and C6-C7 with compression of the anterior dural sac at C5-C6 and C6-C7 and very slight cord impingement at

the C5-C6 level, and neural foraminal compromise at C5-C6 and C6 "on the right secondary to degenerative spondylosis." Claimant's right shoulder MRI showed acromioclavicular degenerative changes, evidence of tendinopathy involving the supraspinatus tendon, a possible partial tear of the distal supraspinatus tendon, mild sub acromial bursitis changes, and a superior labral tear with extension into the posterior labrum superiorly compatible with a slap-type tear.

¶ 6 At arbitration, the following colloquy occurred between claimant and his attorney:

"Q. Your last day of work was November 26, 2001; is that correct?

A. I believe so. I don't remember very well, but yes.

Q. Okay. At that time did you tell anybody at work about what you were experiencing with respect to your lower part of your neck, your shoulder, and your hand?

A. I asked her [*sic*] permission and I went to Thorek.

Q. Who did you ask permission from? Who did you tell?

A. I had two bosses. I asked them for permission.

Q. Okay. You don't recall the name right now of your boss?

A. I don't remember. It's been years. But one of them his name was Valentino."

¶ 7 Dr. Stamelos's records reflect he first saw claimant on May 24, 2001. On December 11, 2001, he authored a letter which stated he had seen claimant "on several occasions" and claimant reported significant pain in his right shoulder, cervical spine, and upper extremities. Dr. Stamelos noted claimant was previously seen on June 4, 2001, "for what seemed to be neck and

arm pain, especially right shoulder pain." In his December 2001 letter, he identified claimant's conditions of ill-being as "cervical disc syndrome, right shoulder rotator cuff[,] and bilateral carpal tunnel syndrome." Further, he opined as follows:

> "The manager where [claimant] was working as a pots washer presented in October of 2001 new work and harder work that increased [claimant's] pain significantly. He presently has a condition known as cervical disc syndrome, right shoulder rotator cuff and bilateral carpal tunnel syndrome.
>
> The condition is definitely work-related due to the fact that the work was the cause and the aggravating factor and has rendered [claimant] unable to work under any condition. ***
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> * * *
>
> [Claimant] has work-related injuries to his cervical spine, right shoulder and bilateral wrists secondary to repetitive, heavy work being a pot washer or pot cleaner."

Additionally, Dr. Stamelos opined claimant needed surgical intervention and "work avoidance." On January 29, 2002, Dr. Stamelos performed surgery on claimant's right hand.

¶ 8 Claimant testified he eventually began undergoing physical therapy with Dr. Michael Foreman at Northside Medical Center. Dr. Foreman's records show he first saw claimant on April 17, 2002, with chief complaints of neck, back, right shoulder, and right hand pain. His typewritten records document the following history:

> [Claimant] stated that in July 2001, he was diagnosed with a herniated disc in his low back, and was off work through Octo-

> ber. When he returned to work, he began to experience neck, upper back, and right shoulder pain."

Dr. Foreman's handwritten records stated claimant "experienced hernia in July '01 [and] was off work until October."

¶ 9 Dr. Foreman diagnosed claimant with (1) cervical degenerative spondylosis with bulging discs and slight cord compression; (2) acromioclavicular degeneration with probable supraspinatus impingement, evidence of supraspinatus tendinitis with possible tear, and possible superior labial tear in the posterior superior labrum; and (3) right wrist sprain/strain post surgery for carpal tunnel. On June 7, 2002, he discharged claimant from care, noting claimant was at maximum medical improvement. Dr. Foreman also referred claimant for orthopedic evaluation and treatment.

¶ 10 Claimant testified Dr. Foreman referred him to Dr. James Diesfeld. On June 25, 2002, Dr. Diesfeld noted claimant reported "that in approximately October 2001[,] he began to experience progressively worse pain in his neck, right shoulder[,] and upper back." In June and July 2002, Dr. Diesfeld performed a series of cervical epidural steroid injections and trigger point injections on claimant.

¶ 11 On November 5, 2002, Dr. Stamelos opined that claimant remained "100% disabled for any kind of work." He described claimant's condition as "that of an advanced, severe degenerative arthritic condition of multiple joints and multiple discs that renders him disabled permanently and completely."

¶ 12 On October 23, 2003, claimant returned to see Dr. Stamelos, who noted claimant was "still in pain in spite of a significant amount of therapy, injection therapy[,] and time." He further noted as follows:

> "[Claimant] continues to be disabled for work. All this is as a result of an injury he sustained at work approximately two years ago. He doesn't have memory of a specific date. He was a pot and dishwasher [with the employer] when [i]n October of 2001[,] he was injured while at work. He was doing repetitive movement, and while doing this repetitive movement, he developed shoulder and interscapular pain."

Dr. Stamelos found claimant's "problem truly goes back to work and repetitive usage; not any kind of pre-existing or metabolic or inherent injury or disease that has nothing to do with his work." Claimant testified he continued to treat with Dr. Stamelos until approximately 2005.

¶ 13 On August 5, 2010, claimant was examined by Dr. Kern Singh at the employer's request. Dr. Singh authored a report showing claimant provided a history that, during the course of his work activities as a dishwasher on October 9, 2001, he "began to experience worsening pain in his neck, as well as his right shoulder." Dr. Singh reviewed claimant's medical records and diagnosed him with degenerative cervical spondylosis and degenerative supraspinatus tendinopathy. He opined as follows:

> "[Claimant] has no identifiable mechanism of injury based upon the medical records that I personally reviewed from [Dr. Stamelos, Dr. Foreman, and Dr. Diesfeld]. In light of that, the patient has age-appropriate cervical and shoulder degeneration that does not appear to be aggravated or a result of the work-related injury."

Dr. Singh further opined that claimant's C5-C6 and C6-C7 central disc protrusions were "pre-existing and degenerative in nature, resulting in [claimant's] degenerative neural foraminal stenosis." With respect to causation, he further found as follows:

> "It appears that [claimant] is claiming that washing dishes and washing pots is the mechanism of injury for his degenerative changes and symptoms. That does not appear to be the case. These are pre-existing and degenerative conditions that have presented over several years. I do not believe that his activities at work aggravated or resulted in any of the symptomatology that [claimant] has currently presented with."

¶ 14 Claimant testified he never returned to work for the employer. He denied sustaining any new injury involving his neck, right shoulder, or right hand after November 2001. Claimant stated he was currently receiving social security disability benefits. Further, he testified he continued to notice pain in his cervical area when performing household chores.

¶ 15 On cross-examination, claimant testified he did not fill out an accident report at work because he did not fall or break anything and his "injury was gradual." Additionally, he acknowledged sustaining a work-related accident on July 21, 2001, that involved "a hernia something." His medical records show, on August 13, 2001, he underwent a hernia repair. Claimant filed a workers' compensation claim and the case was settled.

¶ 16 On November 8, 2010, the arbitrator issued his decision in the matter, denying benefits under the Act. Specifically, he found claimant failed to (1) give the employer notice of his alleged accident and (2) establish that he sustained accidental injuries that arose out of and in the course of his employment.

¶ 17 On November 7, 2011, the Commission affirmed and adopted the arbitrator's decision. With respect to the issue of notice, the Commission added the following comments:

> "[T]he Arbitrator found that [claimant] failed to provide timely notice. The Commission finds that [claimant] did not provide notice at all. [Claimant] testified that his last day of work was on November 26, 2001. When led by his attorney, [claimant] testified that he asked for permission to go to Thorek Hospital. We do not believe that asking permission to go see a medical provider is sufficient notice to [the employer] of a work injury. While it may be reasonable for [claimant] not to report an accident because he did not sustain an acute injury, [claimant] did not testify that he asked to go to Thorek Hospital because of symptoms he was experiencing as a result of his work duties."

On September 25, 2012, the circuit court of Cook County confirmed the Commission's decision.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, claimant argues the Commission's finding that he failed to provide notice of his alleged work accident to the employer was against the manifest weight of the evidence. He contends his "unrebutted" testimony showed "he gave notice to two different supervisors on the date of accident, November 19, 2001."

¶ 21 Under the Act, notice of an alleged accident must "be given to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c) (West 2000). "The purpose of the 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 has the burden of proving that notice of his or her accident has been given as required by statute. *Brown Shoe Co. v. Industrial Comm'n*, 374 Ill. 500, 503, 30 N.E.2d 4, 6 (1940). Further, the Act's "notice requirement applies to employees who suffer repetitive[-]trauma injuries." *White v. Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 910, 873 N.E.2d 388, 391 (2007). In a repetitive-trauma case, the date of an accidental injury is the date when an injury "manifests itself," meaning "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531, 505 N.E.2d 1026, 1029 (1987).

¶ 22 "A claimant complies with the Act if, within 45 days, the employer possesses the known facts related to the accident." *S & H Floor Covering*, 373 Ill. App. 3d at 264-65, 870 N.E.2d at 825. "A claim is barred only if no notice whatsoever has been given." *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96, 631 N.E.2d 724, 727 (1994). However, "the legislature has mandated a liberal construction on the issue of notice" and, "if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced." *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 727. "[P]rejudice to the employer is pertinent only where some notice is given in the first place." *White*, 374 Ill. App. 3d at 910, 873 N.E.2d at 391.

¶ 23 Additionally, "[t]he findings of the Commission regarding notice will not be disturbed on review unless they are against the manifest weight of the evidence." *S & H Floor Covering*, 373 Ill. App. 3d at 264, 870 N.E.2d at 825. "A factual decision is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent from the record."

White, 374 Ill. App. 3d at 911, 873 N.E.2d at 391.

¶ 24 The record reflects claimant alleged an accident date of November 19, 2001, the day MRIs were performed on his cervical spine and right shoulder. At arbitration, he testified that, while working for the employer in October and November 2001, he began to notice pain in his right shoulder, right wrist, and the lower part of his neck. However, despite knowing that he experienced certain symptoms while performing his work duties, claimant's testimony showed only that, around the time of his last day of work—November 26, 2001—he asked two supervisors for permission to go to the hospital. No evidence was presented that, at any point, claimant relayed information regarding the symptoms he was experiencing while performing his work duties. Thus, the record fails to show the employer possessed the *known facts* related to claimant's alleged accident within the statutory time frame.

¶ 25 In this case, claimant's request for permission to go to the hospital, without more, was insufficient to establish compliance with the Act. We find this particularly true where the evidence also showed claimant had only recently returned to work following a separate and unrelated work-related injury. Under such circumstances, a bare request for permission to go to the hospital did nothing to inform the employer that claimant was suffering from a new and different condition of ill-being. Given the evidence presented, the Commission's decision that claimant failed to provide notice to the employer was not against the manifest weight of the evidence. Additionally, because no notice was given, the issue of whether the employer was unduly prejudiced was irrelevant.

¶ 26 On appeal, claimant also challenges the Commission's determination that he failed to prove he sustained accidental injuries arising out of and in the course of his employment. However, given our determination that the Commission committed no error in finding claimant

failed to give notice of his alleged accident to the employer, it is unnecessary to address any further issue raised by claimant on appeal. See *S & H Floor Covering*, 373 Ill. App. 3d at 265, 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.").

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the circuit court's judgment.

¶ 29 Affirmed.