2014 IL App (1st) 130259WC-U

Worker's Compensation
Commission Division
Order filed: November 14, 2014

No. 1-13-0259WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SLAWOMIR DUDA,	)	Appeal from the Circuit Court
	)	of Cook County.
	)	
Appellant,	)	
	)	
v.	)	No. 11-L-51487
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Daniel T. Gillespie,
(Krugel Cobbles, Inc. Appellees).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The decision of the Commission finding, that the claimant's injury did not arise out of and in the course of his employment, was not contrary to the manifest weight of the evidence, but its finding that the claimant filed to provide timely notice was contrary to the manifest weight of the evidence.

¶ 2 The claimant, Slawomir Duda, appeals from the circuit court judgment which confirmed the decision of the Workers' Compensation Commission (Commission) denying him benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)) for an injury

allegedly sustained while in the employ of Krugel Cobbles, Inc. (Krugel) on the bases that the claimant failed to provide timely notice to Krugel and failed to establish a causal connection between his injury and his employment. For the reasons that follow, we reverse that portion of the circuit court judgment finding a lack of timely notice, but we affirm that portion denying the claimant benefits under the Act.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on April 18, 2011.

¶ 4 The claimant testified that he has worked as a bricklayer for 14 years and has worked for Krugel for four years. He explained that his work with Krugel required the removal of old bricks and installing new bricks in existing buildings and required the use of grinders, saws, chisels, spatulas and hammers. When asked how many bricks he lays per hour, the claimant stated "between 100 to 300 bricks sometimes."

¶ 5 The claimant testified that, sometime in October 2010, he began experiencing pain in his right hand and wrist. He saw his family physician, Dr. Andrew Indyk, on October 26, 2010, and November 9, 2010, for his hand pain. Dr. Indyk ordered the claimant to undergo an EMG nerve study to be performed at Resurrection Medical Center.

¶ 6 On November 11, 2010, the claimant was using an electric hammer to remove a brick from a building in Evanston, when he "felt such a strong pain in [his] hand that [he] felt like crying." On November 15, 2010, the claimant informed Jakob Schneider, a fellow Krugel coworker at the Evanston job site, that he could not work and had to see a doctor about his hand. He admitted that he told Schneider that he did not believe that he injured his hand while working.

¶ 7 On November 23, 2010, the claimant saw Dr. Indyk, who ordered him off work through November 29, 2010, and diagnosed him with right hand pain and carpal tunnel syndrome.

¶ 8 On December 2, 2010, Dr. Aleksandra Stobnicki conducted an EMG study of the claimant's wrist, which showed "mild sensory neuropathy of the right ulnar dorsal sensory branch."

¶ 9 On December 16, 2010, the claimant again saw Dr. Indyk, who referred him to an orthopedic surgeon, Dr. Paul Papierski.

¶ 10 On December 28, 2010, Dr. Papierski evaluated the claimant. The claimant reported that he suffered no trauma to his hand, but had worsening pain, numbness and tingling. Dr. Papierski recommended an MRI exam of the right wrist based on his suspicion that the claimant had a mass compressing the ulnar nerve. The claimant's medical chart of that date states that he was released to work without restrictions. However, the claimant testified that he was never released to full-duty work, but only to light-duty work or work using only his left hand.

¶ 11 On December 29, 2010, the claimant had an MRI of his right wrist, which revealed a "bilobed cystic nodule," "probably a ganglion cyst adjacent to the palmar aspect of the triquetrum and pisiform bones."

¶ 12 On February 22, 2011, the claimant again saw Dr. Papierski and reported worsening right hand numbness, tingling, and pain. The doctor noted that the claimant worked as a bricklayer, "using the hand to repetitively place bricks and tamp them down with a shovel." Dr. Papierski wrote that the claimant's EMG indicated changes on the ulnar nerve dorsal branch and that his MRI revealed a ganglion cyst in the area of Guyon's/triquetrum palmarly, "most consistent with compression of the ulnar nerve in this vicinity." Dr. Papierski recommended surgical excision of

the ganglion cyst with ulnar nerve exploration and decompression. He also noted that the "work activities of placing bricks and tamping them down are consistent with the development of these diagnoses." Further, Dr. Papierski released the claimant to "light work" duties. The claimant testified that he wanted the surgery recommended by Dr. Papierski and believed he would be unable to work as a bricklayer without it.

¶ 13 Jakob Schneider, a project manager for Krugel, testified that, on November 15, 2010, the claimant told him that he could not continue working at the Evanston job site because of his hand. The claimant told Schneider that he did not know what was causing his hand pain and denied that he hurt himself at work. Schneider described brick repair work as non-repetitive work, requiring the use of chisels, power saws, air hammers and grinders to cut out old bricks. In addition to bricklaying duties, the crew performed other work throughout the day, such as grinding out mortar joints, carrying cement, mixing mortar, moving bricks, and caulking. While the claimant testified that he laid 100 to 300 bricks per hour at times, Schneider testified that the Evanston job required the removal and replacement of 1,000 to 3,000 bricks and that three men worked on the site.

¶ 14 Krugel submitted into evidence a March 24, 2011, report by its independent medical examiner (IME), Dr. Jay Pomerance. Dr. Pomerance evaluated the claimant, who reported the onset of right wrist pain in late October 2010. The claimant told Dr. Pomerance that his condition worsened over time and began to include tingling and numbness. The claimant denied that a specific event or trauma triggered his pain. The claimant also told Dr. Pomerance that he was a bricklayer and described his duties. Additionally, Dr. Pomerance received a written job description for a "masonry crew leader," which indicated that the duties varied and included

lifting 93-pound bags of cement twice a day, lifting 25 to 35 pounds of steel per day, lifting individual bricks 10 times per hour, and using trowels, ladders, saws and grinders.

¶ 15 Dr. Pomerance reviewed the claimant's MRI and EMG exams, which revealed the ganglion cyst and ulnar nerve condition. Upon his physical examination of the claimant, Dr. Pomerance observed evidence of bilateral ulnar nerve instability, but no evidence of swelling, deformity, or limited range-of-motion in the right wrist. According to Dr. Pomerance, "a ganglion cyst is degenerative in nature and the MRI scan [did] not show any evidence of any type of trauma." Based on the claimant's verbal job description, as well as the written job description, Dr. Pomerance opined that the ganglion cyst was not caused by the claimant's work duties and that such a cyst "can occur even in patients who are not working in any type of employment." Further, the claimant's "ulnar nerve instability, which [was] present in both elbows, is a congenital/developmental condition and not due to his work." Dr. Pomerance saw no medical reason to restrict the claimant's work duties.

¶ 16 Following a hearing, the arbitrator denied the claimant's request for benefits under the Act on the bases that he did not provide timely notice to Krugel of his injury and failed to prove that his injury arose out of and in the course of his employment.

¶ 17 The claimant sought review before the Commission. On December 14, 2011, the Commission affirmed and adopted the arbitrator's decision.

¶ 18 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On December 27, 2012, the circuit court confirmed the Commission's decision, and this appeal followed.

¶ 19 At the outset, we agree with the claimant that the Commission's finding that he failed to provide timely notice of his injury to Krugel is contrary to the manifest weight of the evidence.

¶ 20 The 45-day notice requirement provided in section 6(c) of the Act (820 ILCS 305/6(c) (West 2010)) applies to employees, including those alleging repetitive trauma injuries. *White v. Workers' Comp. Comm'n*, 374 Ill. App. 3d 907, 910-11 (2007). The notice is jurisdictional, and the failure of the claimant to provide notice will bar his claim. *Tolbert v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130523WC, ¶67. However, a claim is only barred if no notice has been given; if some notice has been given, but the notice is defective or inaccurate, the employer must then show that he has been unduly prejudiced. *Id.*

¶ 21 Here, the claimant testified that, on November 11, 2010, his right wrist and hand pain worsened while using an electric hammer at work to such a degree that his condition prevented him from continuing his employment. He filed his application for adjustment of claim on December 27, 2010, listing the date of injury as November 11, 2010. Factoring in that the 45th day from the date of the injury (December 26) fell on a Sunday, the claimant's application was timely filed on December 27. The filing of an application for an adjustment of a claim satisfies the Act's notice requirement. See *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 96 (finding the Act's notice requirement is satisfied by the filing of an application for adjustment of claim within the proper timeframe).

¶ 22 Furthermore, the record demonstrates that Krugel had some notice of the claimant's injury prior to December 27, 2010, as there are medical records indicating that the claimant's treating physicians submitted bills to Krugel's workers' compensation insurer on December 2 and December 14, 2010, and that the insurer investigated and denied the claims by December 29, 2010. Thus, even if there was a defect in the claimant's notice, Krugel cannot establish it was

unduly prejudiced by the defect as the evidence establishes that it was investigating the claim before the 45-day time period expired. See 820 ILCS 305/6(c)(2) (West 2010); *White*, 374 Ill. App. 3d at 910. Accordingly, the Commission's determination that the claimant failed to provide timely notice to Krugel of his injury is contrary to the manifest weight of the evidence, and the Commission therefore had jurisdiction to address whether the claimant established a causal connection between his injury and his employment.

¶ 23 Regarding causation, however, we disagree with the claimant's argument that the Commission's determination that he did not establish a causal connection between his injury and his employment is contrary to the manifest weight of the evidence.

¶ 24 To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered an injury which arose out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203-04 (2003); *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, ¶19. "[A]n injury is considered accidental even though it develops gradually over a period of time as a result of a repetitive trauma, without requiring complete dysfunction, if it is caused by the performance of [the] claimant's job." *Id.*; *Cassens Transportation Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 330 (1994). In repetitive trauma claims, the claimant carries the burden of proving that the injury was work related and not the result of normal degenerative aging processes. *Id.* Compensation may be awarded for a claimant's condition of ill-being even though the conditions of his employment do not constitute the sole, or even the principal, cause of injury. *Fierke v. Industrial Comm'n*, 309 Ill. App. 3d 1037, 1040 (2000).

¶ 25 "[T]he question of whether a claimant's disability is attributable to a degenerative condition or, because of an accident, to an aggravation of a preexisting condition, is a question of

fact to be decided by the [] Commission" (*Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d 30, 36-37 (1982)), and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence (*Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 44, (1987)). Moreover, "to the extent that the medical testimony might be construed as conflicting, it is well established that resolution of such conflicts falls within the province of the Commission, and its findings will not be reversed unless contrary to the manifest weight of the evidence." *Caterpillar Tractor,* 92 Ill. 2d at 37.

¶ 26 In this case, we cannot find that the Commission's conclusion, that the claimant's condition of ill-being was not causally connected to his employment, is contrary to the manifest weight of the evidence. While the claimant argues that he proved that his employment was a causative factor, if not the sole cause, of his condition, his argument is based on the opinion of his treating orthopedic physician, Dr. Papierski. Dr. Papierski opined that the claimant's "work activities of placing bricks and tamping them down [were] consistent with the development" of his condition. However, Dr. Pomerance, Krugel's IME, specifically opined that he did not believe that the claimant's ganglion cyst was caused by his work duties as any person could develop such a cyst, regardless of his employment. He also stated that the claimant's ganglion cyst was "degenerative in nature" and that his "ulnar nerve instability" was a "congenital/developmental condition and not due to his work." The Commission found that Dr. Pomerance's opinions were consistent with the December 28, 2010, medical report of Dr. Papierski, which released the claimant to full duty work. The Commission further noted that it did not find Dr. Papierski's subsequent opinion that the claimant's work activities caused his condition to be credible. As stated, the resolution of such conflicting medical opinions falls

within the province of the Commission, and we will not reverse its findings unless contrary to the manifest weight of the evidence.

¶ 27 Based on the foregoing reasons, we reverse that portion of the judgment of the circuit court which confirmed the Commission's finding that the claimant failed to provide timely notice to Krugel of his injury, but we affirm that portion of the judgment which confirmed the Commission's denial of benefits under the Act.

¶ 28 Circuit court judgment affirmed in part and reversed in part; Commission decision reversed in part.