2014 IL App (1st) 131453WC-U
No. 1-13-1453WC
Order filed June 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MANUEL VALDEZ,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-L-50482
	)	
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION and	)	
PETE'S FRESH MARKET,	)	Honorable
	)	Robert Lopez-Cepero,
Defendants-Appellants.	)	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*: The Commission's finding that claimant failed to sustain his burden of establishing accidents arising out of and in the course of his employment with respondent on June 13, 2009, and August 9, 2009, was not against the manifest weight of the evidence given the conflicting evidence regarding the history of the alleged accidents. Accordingly, the judgment of the trial court setting aside the Commission's decision would be reversed and the decision of the Commission would be reinstated.

¶ 2 Respondent, Pete's Fresh Market, appeals from the judgment of the circuit court of Cook County, which set aside a decision of the Illinois Workers' Compensation Commission (Commission) denying benefits to claimant, Manuel Valdez, under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)). We conclude that the Commission's decision that claimant failed to establish an accident arising out of and in the course of his employment with respondent is not against the manifest weight of the evidence. Accordingly, we reverse the judgment of the circuit court and reinstate the decision of the Commission.

¶ 3 I. BACKGROUND

¶ 4 On August 25, 2009, claimant filed an application for adjustment of claim alleging he sustained an injury to his lower back on June 13, 2009, while in respondent's employ. Claimant filed a second application for adjustment of claim on December 11, 2009, alleging that he sustained an injury to his back on August 9, 2009, also while in respondent's employ. The two cases were consolidated and the matter proceeded to an arbitration hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)). The following evidence relevant to this appeal was presented at the arbitration hearing.

¶ 5 Respondent operates a chain of grocery stores. Claimant began working for respondent in September 2007 and was assigned to respondent's location at 118th Street and Avenue O in Chicago. Claimant's job duties included stocking the meat department, attending to the store's customers, and cleaning the store. Claimant testified that sometime in February 2008, while he was cleaning the store, he slipped and fell.[1] Claimant immediately began to experience pain in

[1] English is not claimant's native language. As a result, he testified at the arbitration hearing through the aid of an interpreter.

his lower back, so he notified the store manager. According to claimant, the manager laughed and told claimant it was "not that big of a thing." Claimant ceased working for respondent shortly after the February 2008 accident, but he did not seek medical attention for his injury. Claimant denied experiencing any problems with his back before February 2008.

¶ 6 Claimant did not return to work in any capacity until June 2009, when he was rehired by respondent and assigned to its location on 57th Street and Kedzie in Chicago. Claimant testified that on June 13, 2009, his first day at work after being rehired, he was lifting 50-pound boxes of menudo when he felt a "pop" in his back with pain radiating down his right leg. Claimant called his girlfriend, Maria Pinto, and she drove him home.[2] Claimant was unable to locate a manager before he left the store, so he did not report the incident to respondent.

¶ 7 Claimant testified that on June 14, 2009, he could no longer tolerate the pain, so he sought medical treatment. To that end, claimant reported to the emergency room at St. Catherine's Hospital, accompanied by Pinto and Pinto's father. According to hospital records, claimant's chief complaint was pain to the right buttock with an onset date one month earlier. Claimant reported that the pain recently began radiating down his leg. Claimant denied any injury, but noted that he performs heavy lifting at work. Claimant was diagnosed with back pain and sciatica. He was prescribed pain medication and rest and instructed not to do any heavy lifting, pulling, or pushing.

[2] Pinto is referred to as claimant's "wife" throughout the record. During cross-examination, claimant clarified that he lives with Pinto and has a child with her, but that he and Pinto are not married. Pinto served as a translator for claimant at many of his doctor appointments.

¶ 8 On June 18, 2009, claimant reported to the East Chicago Community Health Center, where he was treated principally by Dr. Ricardo Hood. Dr. Hood's office note from that visit details the following history of injury:

> "26 year old H-Male born in Mexico, presents with c/o pain from his back to his foot. States he was in an accident at work 2/2008. States he was working cleaning the meat department. States he was lifting a boax [*sic*] then slipped and fell. States he has had pain since that time. No workers comp claim filed by employer [*sic*]. States he attempted to return to work 1 week ago and found difficulty with pain in his right leg."

Dr. Hood diagnosed a muscle spasm. He prescribed pain medication and issued an off-work slip.

¶ 9 Claimant followed up with Dr. Hood on July 20, 2009. At that time, claimant complained of pain in the right lumbar area. Claimant denied any radiation of the pain, but noted numbness in the right leg. Dr. Hood's note states that the pain began as a result of a fall occurring one year earlier. Dr. Hood diagnosed a lumbar sprain. He prescribed pain medication and instructed claimant to return in one month. Dr. Hood released claimant to return to work with a 10-pound lifting restriction.

¶ 10 Claimant testified that he presented respondent with the work authorization slip issued by Dr. Hood, and he was allowed to return to work on August 7, 2009. Claimant worked an eight-hour shift on both August 7 and 8, 2009. According to claimant, on August 9, 2009, one of his coworkers did not show up for work, so he was tasked with lifting 40-pound boxes of chicken. Claimant testified that he had been working with the boxes of chicken for about three hours when he noticed his back and right leg pain return. Claimant stated that he informed Nick Theodospoulos, the store manager, about his condition, and Theodospoulos authorized claimant to leave.

¶ 11 After leaving work on August 9, 2009, claimant presented to the emergency room at St. Catherine's Hospital with complaints of back pain radiating to the right leg. The history taken by the triage nurse states in part that "[claimant] works and lifts objects; back has been increasing [*sic*] painful for the past few days. [Claimant] ran out of his meds." The hospital records also reflect that claimant injured his back at work one year earlier, he had been experiencing back pain since then, and he previously presented to the hospital's emergency room in June 2009 due to back pain. Claimant was diagnosed with back pain and lumbar radiculopathy. He was administered an injection, prescribed pain medication, and instructed to follow up with a doctor.

¶ 12 Claimant returned to the emergency room at St. Catherine's Hospital on August 10, 2009. At that time, the triage nurse took the following history from claimant: "Verbally c/o lower back pain, states pain is chronic [due to] old injury in April." Claimant also told the triage nurse that he did not fill the prescriptions issued by the hospital the previous day. The notes of the emergency room doctor reflect that claimant provided a history of "Back Pain Lower for 3 Day(s)" with radiation to the right leg, but claimant denied any recent trauma. Claimant was again diagnosed with back pain and lumbar radiculopathy and prescribed medication.

¶ 13 Claimant returned to Dr. Hood on August 11, 2009. At that time, claimant complained of back stiffness and radicular pain in the left leg. Claimant told Dr. Hood that he "hurt his lower back 1 year ago by falling and 3 months ago [he] hurt [his] lower back again lifting boxes." Dr. Hood diagnosed a lumbar sprain/strain and authorized claimant to return to work in two weeks.

¶ 14 On August 14, 2009, claimant sought treatment from Dr. Mark Gerber. Claimant presented to Dr. Gerber with complaints of pain and limitation of motion in his lower back. Claimant provided Dr. Gerber with a history of "previous lower back injuries with the same

employer which he was treated for about a year ago and returned back to work on 06/13/09 and reinjured his lower back and continued to work, but on 08/08/09 when while [*sic*] lifting heavy boxes he injured his lower back." Dr. Gerber prescribed pain medication and a course of physical therapy, referred claimant to Dr. Richard Kiang for pain management, and issued an off-work slip.

¶ 15 Claimant consulted with Dr. Kiang on September 3, 2009. Claimant's chief complaint was low back and right leg pain with a pain score index of 7-8 out of 10. Dr. Kiang's report reflects the following history:

> "[Claimant] was doing well until August 9, 2009 during the course of his employment for [respondent]; he was lifting heavy boxes and injured his lower back. He had a prior injury and was treated about a year ago, and returned back to work on June 13, 2009 and reinjured his lower back and continued to work, but on August 9, 2009 he was lifting heavy boxes and he injured his lower back severely. A few days later this back pain started to radiate down his right leg."

Dr. Kiang administered an NCV/EMG study, which was consistent with a moderately severe acute right L5 radiculopathy. Dr. Kiang recommended continued conservative management, including physical therapy, and a series of injections. Claimant underwent the injections beginning on September 9, 2009. Claimant testified that neither the injections nor the physical therapy alleviated his pain.

¶ 16 On October 22, 2009, claimant sought treatment from Dr. Ruben Bermudez. Claimant presented with low back pain radiating to his right leg and down to his right foot. Claimant told Dr. Bermudez that he was involved in a work-related accident "on 08/08/09" while working for respondent. In particular, claimant related that he was lifting boxes weighing in excess of 40

pounds, and, after lifting 30 to 40 such boxes, he began to feel "major pain" in his low back. Claimant told Dr. Bermudez that at the time of the accident, he was working under restrictions of no lifting greater than 10 pounds due to a previous injury. Claimant also referenced a previous work-related injury to his low back on June 13, 2009. Dr. Bermudez's assessment was: (1) herniated muscular pulposus of the lumbar spine; (2) right lumbar radiculopathy; (3) muscle spasm; (4) myofascial trigger points; and (5) lumbar sprain/strain. Claimant was referred to Dr. Ronald Michael, an orthopaedic surgeon.

¶ 17 Claimant saw Dr. Michael on October 26, 2009. Dr. Michael's records reflect that claimant sustained a work-related injury on June 13, 2009, while lifting boxes weighing 60 pounds. Following an examination, Dr. Michael diagnosed a nonspecific lumbar radiculitis and ordered an MRI of the lumbosacral spine and a lumbar discogram. Following the diagnostic tests, Dr. Michael diagnosed herniated discs at L4-L5 and L5-S1. Dr. Michael recommended fusion surgery for claimant's back.

¶ 18 On December 1, 2009, claimant returned to the emergency room at St. Catherine's Hospital with back pain. The triage nurse noted the onset of lower back pain as claimant was getting out of bed. Claimant was diagnosed with chronic back pain. Claimant again presented to the emergency room at St. Catherine's Hospital on January 14, 2010, complaining of back pain with an onset date four days earlier. At that time, claimant denied any radiating symptoms. He was diagnosed with back pain and disc herniation.

¶ 19 Pinto testified that claimant injured his back in February 2008 while working for respondent. According to Pinto, when claimant went back to work for respondent in June 2009, he had occasional complaints of pain in his back from his February 2008 fall, but he did not have any problems with pain or numbness in his right leg. Pinto testified that claimant's pain

appeared to be stronger following the June 2009 incident. On cross-examination, Pinto stated that claimant did not seek medical treatment following the February 2008 accident. Pinto acknowledged that when claimant went to the hospital on June 14, 2009, she told the medical personnel that he had been experiencing pain in his lower back and right buttocks for one month. Pinto also acknowledged that she told medical personnel at the hospital on August 9, 2009, that claimant injured his back a year earlier and ran out of medication.

¶ 20 Theodospoulos testified that when claimant returned to work early in August 2009, he did not provide respondent with a doctor's note outlining any work restrictions. Theodospoulos further testified that claimant worked a full shift on both August 7 and August 8 with no complaints of back pain. On August 9, 2009, however, claimant approached Theodospoulos to report that he had back pain. When Theodospoulos asked claimant what happened, claimant responded, "I have back pain from before I came to work here." During this conversation, claimant did not indicate that his back pain was caused from any work activities that day. Theodospoulos instructed claimant to seek treatment at the hospital. Theodospoulos testified that he did not complete an accident report on August 9, 2009, because claimant reported that this back pain was not work related. Theodospoulos did not see claimant again until August 20, 2009, when claimant came to pick up his paycheck. It was at that time that claimant gave Theodospoulos a doctor's note.

¶ 21 Based on the foregoing evidence, the arbitrator concluded that claimant established that he sustained injuries arising out of and in the course of his employment with respondent on both June 13, 2009, and August 9, 2009. In addition, the arbitrator found claimant's current condition of ill-being causally related to the accidents. The arbitrator awarded claimant reasonable and necessary medical expenses, prospective medical care, and temporary total disability benefits.

¶ 22 In a unanimous decision, the Commission reversed the decision of the arbitrator. The Commission noted various discrepancies between claimant's testimony, the record, and the testimony of other witnesses. Citing, "[claimant's] lack of credibility, a lack of corroboration in the medical records, and the significant contrast between [claimant's] testimony as to three very specific accidents and the histories given to early medical providers which suggest [claimant's] back problems in 2009 stem from an earlier work accident occurring in February 2008," the Commission concluded that claimant failed to prove that he sustained accidents arising out of and in the course of his employment on either June 13, 2009, or August 9, 2009. On judicial review, the circuit court of Cook County set aside the decision of the Commission and reinstated the arbitrator's decision. The circuit court reasoned that most of the discrepancies identified by the Commission were "manufactured inconsistencies *** that are not supported by the record." This timely appeal by respondent followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, respondent argues that the Commission's finding that claimant's alleged accidents did not arise out of his employment was based on sufficient factual evidence and supported by contemporaneous medical histories. As a result, respondent asserts that the trial court erroneously substituted its judgment for that of the Commission. Respondent requests this court to overturn the trial court's ruling and reinstate the decision of the Commission. Claimant responds that the Commission's finding that he failed to establish an accident arising out of and in the course of his employment on either June 13, 2009, or August 9, 2009, was against the manifest weight of the evidence. According to claimant, his back complaints after June 2009 differed from his complaints before the accidents. As such, claimant's urges us to affirm the trial court's decision.

¶ 25 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).

¶ 26 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).

¶ 27 In the present case, claimant alleged that he sustained two industrial accidents, the first occurring on June 13, 2009. The Commission concluded that claimant failed to prove he sustained an accident on June 13, 2009, that arose out of and in the course of his employment with respondent. In support of its conclusion, the Commission explained that the medical records of St. Catherine's Hospital and Dr. Hood fail to mention a work accident on June 13, 2009, and, in fact, both claimant and Pinto gave a history of February 2008, when asked for an onset date. Based on our review of the record, we cannot say that a conclusion opposite that of the Commission is clearly apparent.

¶ 28 It is true that both claimant and Pinto testified at the arbitration hearing that claimant was injured at work on June 13, 2009. Moreover, the records of Dr. Gerber, Dr. Kiang, Dr. Bermudez, and Dr. Michael reflect an accident occurring in June 2009. However, there is also evidence from which the Commission could have reasonably inferred that an industrial accident did not occur on June 13, 2009. For instance, claimant presented to St. Catherine's Hospital on June 14, 2009, one day after he allegedly sustained the accident. At that time, claimant's chief complaint was pain of the right buttock. However, the hospital records do not reference any work-related accident occurring on June 13, 2009. To the contrary, claimant specifically *denied* any injury and told hospital staff that the pain had been present for a month. Similarly, when

claimant presented to Dr. Hood a few days later, he did not reference a work-related injury occurring on June 13, 2009. Instead, claimant complained of "pain from his back to his foot" which originated from a fall in February 2008. Dr. Hood's office note from claimant's follow-up visit on July 20, 2009, is also devoid of any reference to a work-related accident. Rather, claimant provided a history of pain in the right lumbar area occurring as a result of a fall one year earlier.

¶ 29 In addition, when claimant presented to the emergency room at St. Catherine's Hospital on August 9 and 10, 2009, he did not mention a work-related injury in June 2009. It is not until August 11, 2009, that the medical records reference an accident more recent than February 2008. At that time, claimant told Dr. Hood that he "hurt his lower back 1 year ago by falling and *3 months ago* hurt lower back again lifting boxes." (Emphasis added.) Curiously, however, this reference does not correspond with a June 2009 accident date. Rather, it dates claimant's alleged accident to May 2009, prior to the date he returned to respondent's employ, and is therefore consistent with the onset date claimant provided when he presented to St. Catherine's Hospital in June 2009. As noted above, the Commission, as the trier of fact, is charged with judging the credibility of the witnesses, resolving conflicts in the evidence, assigning weight to be accorded the evidence, and drawing reasonable inferences therefrom. *Hosteny*, 397 Ill. App. 3d at 674. Thus, while there may be some evidence to support an accident date of June 13, 2009, in light of the conflicting testimony presented on this issue, we cannot say that the Commission's finding that claimant failed to sustain his burden of proving an accident arising out of and in the course of his employment with respondent on June 13, 2009, is against the manifest weight of the evidence.

¶ 30 The Commission also concluded that the medical records fail to corroborate any history of accident having occurred on August 9, 2009. In support of this finding, the Commission noted that when claimant presented to the emergency room in August 2009, he described the pain as the same type he felt previously and specifically told medical personnel that he was at the emergency room due to chronic lower back pain from an old injury occurring in April. Again, given the evidence of record and in light of the deferential standard of review, we cannot say that a conclusion opposite to that of the Commission is clearly apparent.

¶ 31 In this regard, we do not dispute that there is some evidence of record to support an accident date of August 9, 2009. Claimant testified at the arbitration hearing that he was injured on August 9, 2009, while lifting boxes of chicken and the records of Dr. Gerber and Dr. Kiang reference an August 2009 accident. However, there was also evidence to the contrary. Significantly, the records of St. Catherine's Hospital, where claimant presented with complaints of lower back pain on both August 9, 2009, and August 10, 2009, do not reference an August 2009 work injury. The notes from the August 9 visit indicate that claimant had been treating for back pain originating a year earlier. The notes from the August 10 visit indicate that claimant specifically denied any recent injury and that he attributed his chronic pain to an old injury occurring in April. Similarly, Dr. Hood's office note of August 11, 2009, does not reference a work-related accident occurring in August 2009. We also point out that claimant's testimony of an accident occurring on August 9, 2009, was refuted by Theodospoulos. According to Theodospoulos, when claimant left work on August 9, 2009, he advised that his back pain had been present since before he began to work with respondent. Thus, while there may be some evidence to support an accident date of August 9, 2009, in light of the conflicting testimony presented on this issue, we cannot say that the Commission's finding that claimant failed to

sustain his burden of proving an accident arising out of and in the course of his employment with respondent on June 13, 2009, is against the manifest weight of the evidence.

¶ 32 Claimant acknowledges that when he sought medical treatment in June and August 2009, he provided a history of a prior injury to his back in February 2008. Claimant notes, however, that employers take their employees as they find them and that an employee with a preexisting condition may obtain compensation under the Act so long as the employment was *a* causative factor of the employee's accidental injury. According to claimant, the evidence of record establishes that although he had occasional low back pain following the incident of February 2008, he experienced no radicular symptoms until after the June 2009 accident.

¶ 33 It is true that, in cases involving a preexisting condition, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting condition such that the employee's condition of ill-being could be said to be causally connected to the work-related injury. *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 949. Here, the Commission did not expressly address whether claimant's current condition of ill-being resulted from the aggravation or acceleration of a preexisting condition. Instead, the Commission denied compensation on the basis that claimant failed to establish a work-related accident arising out of and in the course of his employment with respondent in either June 2009 or August 2009. Indeed, in the absence of a work-related accident, we find that there was no need for the Commission to address whether claimant's condition of ill-being resulted from an aggravation or acceleration of a preexisting condition.

¶ 34 III. CONCLUSION

¶ 35 In short, given the inconsistencies between the testimony of the various witnesses at the arbitration hearing and the medical records, we cannot say that the Commission's decision that

claimant failed to sustain his burden of proving a compensable accident occurring on either June 13, 2009, or August 9, 2009, is against the manifest weight of the evidence. Accordingly, for the reasons set forth above, we reverse the judgment of the circuit court of Cook County, which set aside the decision of the Commission denying claimant benefits under the Act, and we reinstate the decision of the Commission.

¶ 36 Reversed and Commission decision reinstated.