2015 IL App (1st) 143855WC-U

Workers' Compensation
Commission Division
Order Filed: December 18, 2015

No. 1-14-3855WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THOMAS G. TODD, INC.,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 14 L 50222
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Carl Anthony Walker,
(David Flesner, Appellee).	)	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 findings of the Workers' Compensation Commission that the claimant sustained an accident which arose out of and in the course of his employment and that his condition of ill being is causally related to that accident were not against the manifest weight of the evidence. Further, the Commission's award of medical expenses is not against the manifest weight of the evidence.

¶ 2 Thomas G. Todd, Inc. (Todd) appeals from an order of the circuit court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission)

which awarded the claimant, David Flesner, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following facts are taken from the evidence adduced at the arbitration hearing conducted on February 22, 2013.

¶ 4 The claimant was employed by Todd as the store manager of Nancy's Pizza. His duties included making batches of dough and sauce for pizzas. The claimant testified that he was required to make pizza dough once every day and sauce every two days. He stated that, in order to make pizza dough, he was required to lift 50-pound bags of dough mix and put the mix into a container for mixing with other ingredients, including water. According to the claimant, when full, the container weighs about 80 pounds. He stated that, after he mixed the ingredients, he carried the completed dough into a cooler. To make each batch of sauce, the claimant mixed 12 cans of tomato sauce, and when completed the batch of sauce weighed 25 to 30 pounds. He then carried it into a storage cooler. The claimant testified that his work was the only physical activity in which he engaged. He stated that he does not exercise, participate in sports, or perform heavy work at home.

¶ 5 On November 16, 2010, the claimant saw Dr. Papadopoulous, an internist, complaining of foot pain and requesting he be evaluated for diabetes. Following his examination of the claimant on that date, Dr. Papadopoulous noted an umbilical hernia. Nothing in the doctor's notes relate the claimant's hernia to his employment. Thereafter, the claimant returned to see Dr. Papadopoulous in late November of 2010, December of 2010 and January of 2011; however, the doctor's records of those visits make no mention of the claimant's hernia.

¶ 6 The claimant testified that, following his visits to Dr. Papadopoulous, he did not experience any acute symptoms of the hernia, and he continued performing his normal duties at work. As the months passed, however, he began to notice a pulling sensation in the area of his hernia. A sensation that he would occasionally experience when picking up a 50-pound bag of dough mix. According to the claimant, by June 1, 2011, he was experiencing hernia symptoms on a more frequent basis, and after that date, he avoided heavy lifting as he did not wish to injure himself. He testified that, on June 1, 2011, he advised Todd's owner, Thomas Todd, that he needed to curtail lifting dough and sauce mixes.

¶ 7 The next evidence of medical treatment is contained in the records of Dr. Inna Milgram, the claimant's primary care physician. Dr. Milgram's records reflect that she saw the claimant on November 8, 2011. The claimant reported noticing his hernia protrusion in December of 2010 and that it had gotten worse since. However, he denied that his discomfort was related to any physical activity, and the doctor's notes of that visit do not contain any statements by the claimant relating his condition to his duties at work. Dr. Milgram diagnosed the claimant as suffering from an umbilical hernia and advised him to consult a surgeon.

¶ 8 At the request of his attorney, the claimant was examined by Dr. Jeffery Coe on March 27, 2012. Following his examination of the claimant and a review of his medical records, Dr. Coe issued a report. In his report, Dr. Coe gave a description of the claimant's job duties, noting that the claimant lifted boxes of food weighing 40 pounds and prepared mixes of dough and sauce. According to the report, the claimant had an umbilical hernia with protrusion. Dr. Coe opined that the claimant sustained "repetitive strain injuries to his abdominal wall" and that the repetitive strain was "a factor in the development of a mildly symptomatic umbilical hernia."

According to Dr. Coe's deposition testimony, lifting of the type described by the claimant "can be a factor causing breakdown or separation of an abdominal wall with hernia formation." He admitted, however, that the claimant's medical records do not support a conclusion that his hernia is related to his work activities, and that obesity is a significant risk factor in the development of hernias. Nevertheless, he was of the opinion that, within a reasonable degree of medical and surgical certainty, the claimant's work duties are causally related to his umbilical hernia. Based upon his examination of the claimant, Dr. Coe concluded that a surgical evaluation and treatment would be his appropriate course of action.

¶ 9 At Todd's request, the claimant was examined by Dr. Liana Palacci on August 23, 2012. Dr. Palacci examined the claimant and reviewed the records of Drs. Papadopoulos and Milgram. Dr. Palacci issued a report and was subsequently deposed. She noted that the claimant denied periumbilical pain or discomfort while performing his job duties and that the records of Drs. Papadopoulos and Milgram contain no mention of any work accident or trauma on June 1, 2011. According to Dr. Palacci, the claimant suffered from an umbilical hernia. However, she stated that the claimant's morbid obesity and large protuberant abdomen predisposed him to the development of the hernia. She opined that "to attribute his umbilical hernia to his work duties or alleged accident on June 1, 2011, is pure speculation and cannot be causally related." Dr. Palacci testified that, in her opinion, the claimant's umbilical hernia was "likely secondary to his morbid obesity" and not the result of any work related accident occurring on June 1, 2011. However, on cross examination, Dr. Palacci admitted that heavy lifting can increase abdominal pressure associated with an umbilical hernia and that individuals with umbilical hernias are

advised to avoid heavy lifting. She stated that she would advise a patient with an umbilical hernia to avoid lifting in excess of 25 pounds.

¶ 10 The claimant denied having been involved in an accident or sustaining any acute trauma. He testified to his desire to undergo the recommended surgery to repair his hernia.

¶ 11 Following a hearing held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2012)), the arbitrator issued a decision, finding that the claimant failed to prove that he sustained an accident that arose out of and in the course of his employment with Todd on June 1, 2011, and failed to prove that his condition of ill being is causally related to his alleged work-related accident. Consequently, the arbitrator denied the claimant any benefits pursuant to the Act.

¶ 12 The claimant sought a review of the arbitrator's decision before the Commission. On February 1, 2014, the Commission, with one commissioner dissenting, issued a decision reversing the arbitrator, finding that the claimant's umbilical hernia was the result of, or aggravated by, repetitive trauma to which he was exposed while working for Todd. In so finding, the Commission relied upon the causation opinion of Dr. Coe over the contrary opinion of Dr. Palacci. The Commission ordered Todd to pay $250 for medical services rendered to the claimant and to pay for all related prospective medical treatment, including the surgery proposed by Drs. Milgram and Papadopoulos. The Commission remanded the matter back to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 13 Todd sought judicial review of the Commission's decision in the circuit court of Cook County. On November 15, 2014, the circuit court issued its amended opinion and order, confirming the decision of the Commission and this appeal followed.

¶ 14 Todd fixes its issues on appeal as whether certain findings of the circuit court are against the manifest weight of the evidence. However, on appeal from a judgment of the circuit court in an action for judicial review of a Commission's decision, it is the decision of the Commission which we review, not the decision of the circuit court. *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 543 (2010). However, as the assignments of error which Todd asserts would also apply to the Commission's decision, we will address them in that context.

¶ 15 For its first assignment of error, Todd argues that the finding that the claimant sustained an injury arising out of and in the course of his employment is against the manifest weight of the evidence. Todd contends that the claimant failed to prove that he suffered a repetitive trauma injury which manifested itself on June 1, 2011. It notes that the claimant failed to produce any evidence that he was diagnosed with a hernia on June 1, 2011, and that the first mention of his having a hernia, following his initial diagnosis on November 16, 2010, is in the records of Dr. Milgram from a visit on November 8, 2011. According to Todd, the claimant did not testify to any constant, repetitive activities which could constitute repetitive trauma.

¶ 16 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, that his injuries arose out of and in the course of his employment. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). Both elements must be present in order to justify compensation under the Act. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). The determination of whether an injury arose out of and in the course of the employment is a question of fact for the Commission to decide, and its resolution of the issue should not be disturbed on review unless it is against the manifest weight of the

evidence. *Knox County YMCA v. Industrial Comm'n*, 311 Ill. App. 3d 880, 885 (2000). In reaching its resolution of the issue, the Commission is entitled to make reasonable inferences from the evidence presented, and the reasonable inferences drawn by the Commission should not be rejected on review because the court might have drawn different inferences based upon the same evidence. *Id*. For the Commission's determination on an issue of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id*.

¶ 17 Arising out of the employment refers to the origin or cause of the claimant's injury. An injury arises out of the employment if, at the time of the injury causing occurrence, the claimant was performing acts he was instructed to perform by his employer or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). In this case, the claimant's theory of recovery is that his umbilical hernia is causally related to the repetitive abdominal stress of lifting heavy objects on a daily basis as part of his work duties. If such a causal relationship does exist, then clearly the injury causing acts arose out of his employment.

¶ 18 In the course of the employment refers to the time, place, and circumstances under which the claimant is injured. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366 (1977). The lifting of the heavy objects which the claimant asserts is a causative factor in the development of his umbilical hernia took place while he was working at Todd's premises and performing his assigned tasks. Again, if a causal relationship between the claimant's lifting of heavy objects at work on a daily basis and the development of his hernia exists, then the injury was sustained in the course of his employment.

¶ 19 The overreaching issue in this appeal is whether the claimant's umbilical hernia is causally related to the performance of his duties at work. Todd argues that the Commission's finding of a causal connection between the claimant's umbilical hernia and his employment is against the manifest weight of the evidence. According to Todd, the Commission's reliance upon Dr. Coe's causation opinion was misplaced as it was based upon pure speculation, an inaccurate history, and contradicted by the claimant's medical records. Distilled to its finest, Todd argues that the Commission should have relied upon Dr. Palacci's opinion that the claimant's hernia is not causally related to his employment.

¶ 20 As noted earlier, Dr. Coe opined that the repetitive strain injuries to the claimant's stomach wall, occurring while he was working, was a factor in the development of his mildly symptomatic umbilical hernia. Dr. Palacci, although agreeing that the claimant suffered from an umbilical hernia, opined that "to attribute his umbilical hernia to his work duties or alleged accident on June 1, 2011, is purely speculative and cannot necessarily be causally related." According to Dr. Palacci, the claimant's obesity was a significant factor in his development of a hernia. Although Dr. Coe agreed that obesity is a risk factor in the development of an umbilical hernia, he was still of the opinion that, within a reasonable degree of medical certainty, the claimant's duties while working, including heavy lifting, have a causal relationship with his umbilical hernia.

¶ 21 The question of whether there exists a causal relationship between a claimant's employment and his condition of ill being is one of fact to be resolved by the Commission, and its determination on the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 207 (2003); *Payne v.*

Industrial Comm'n, 61 Ill. 2d 66, 69 (1975). In order to be entitled to benefits pursuant to the Act, a claimant's employment need not be the sole cause of his injury, nor even the primary cause, so long as his employment was a causative factor in his condition of ill being. *Sisbro*, 207 Ill. 2d at 205.

¶ 22 It is the function of the Commission to judge the credibility of the witnesses and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. In this case, the Commission found Dr. Coe's causation opinion more persuasive than the opinion of Dr. Palacci. Relying on Dr. Coe's opinion, the Commission found that a causal relationship exists between the claimant's employment and his umbilical hernia. And based upon the record before us, we are unable to conclude that the Commission's credibility finding and its resultant reliance upon Dr. Coe's causation opinion is against the manifest weight of the evidence.

¶ 23 Todd makes much of the fact that the claimant never testified to a specific trauma occurring on June 1, 2011 or that he received medical treatment for his hernia on that date. However, the claimant's theory of recovery was based upon repetitive trauma. An employee who suffers a gradual injury due to repetitive trauma is entitled to benefits under the Act, but he must meet the same standard of proof as a claimant alleging a single, definable accident. *A.C. & S. v. Industrial Comm'n*, 304 Ill. App. 3d 875, 879 (1999). The date of the accidental injury in a repetitive-trauma case is the date upon which the injury manifests itself. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). That is to say, the date on which both the injury and its causal relationship to the claimant's employment became plainly apparent to a reasonable person. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 65 (2006). Setting of the manifestation date is a fact determination to be made by the Commission. *Id.*

¶ 24 The Commission found that the claimant had proven that his umbilical hernia was the result of, or aggravated by, the repetitive trauma to which he was exposed during his job on June 1, 2011. The claimant testified to lifting a 50-pound bag of dough mix and an 80-pound container of pizza dough on a daily basis while working. He was first diagnosed with an umbilical hernia on November 16, 2010. He testified that by June 1, 2011, he was experiencing hernia symptoms on a more frequent basis, and after that date, he avoided heavy lifting as he did not wish to injure himself. The claimant also testified that, on June 1, 2011, he advised Todd's owner, Thomas Todd, that he needed to curtail lifting dough and sauce mixes. We believe that, based upon this evidence, the Commission could have reasonably inferred that it was on June 1, 2011, that it became apparent to the claimant that heavy lifting while working was related to the increase in the frequency of his hernia symptoms. We are unable to conclude, therefore that the Commission's setting of the manifestation date of the claimant's injury as June 1, 2011, is against the manifest weight of the evidence.

¶ 25 In summary, we conclude, based upon the foregoing analysis, that the Commission's findings on accident, causation, and manifestation date are not against the manifest weight of the evidence. Whether we might have reached the same conclusions on these questions of fact is not the test of whether the Commission's determinations are against the manifest weight of the evidence. The appropriate test is whether there is sufficient evidence in the record to support the Commission's determinations. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). And we believe that sufficient evidence exists within this record.

¶ 26 Finally, Todd argues that, based upon the claimant's failure to prove both accident and causation, the Commission's award of medical expenses, including prospective medical care, is

against the manifest weight of the evidence. Its argument in this regard is premised upon the same arguments it made concerning the Commission's finding of both accident and causation. Having rejected Todd's arguments addressed to the Commission's findings of accident and causation, we also reject its argument addressed to the award of medical expenses for the same reasons.

¶ 27 Based upon the foregoing reasoning, we affirm the judgment of the circuit court which confirmed the decision of the commission and remand the matter back to the Commission for further proceedings.

¶ 28 Affirmed and remanded.