2014 IL App (2d) 130333WC-U
No. 02-13-0333WC
Order filed March 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MUSTAFA ALASSADY, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Berner Foods, Appellee).	)	Appeal from Circuit Court of Winnebago County No. 12MR645 Honorable Eugene G. Doherty, 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*: (1) The Personnel Record Review Act did not provide a basis to bar testimony and (2) the Commission's finding that claimant failed to prove he sustained an accident that arose out of and in the course of his employment with the employer on December 10, 2009, was not against the manifest weight of the evidence.

¶ 2 On January 11, 2010, claimant, Mustafa Alassady, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 through 30 (West 2008)), seeking benefits from the employer, Berner Foods, for injuries suffered to his back on December 10, 2009. Following a hearing, the arbitrator found claimant failed to prove

he sustained an accident that arose out of and in the course of his employment with the employer on December 10, 2009. Claimant sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On August 6, 2012, the Commission issued an order affirming and adopting the arbitrator's decision. Thereafter, claimant filed a petition seeking judicial review in the circuit court of Winnebago County and the circuit court confirmed the Commission's decision.

¶ 3 On appeal, defendant argues (1) section 4 of the Illinois Personnel Record Review Act (820 ILCS 40/4 (West 2008)) precluded the admission of testimony of each of the employer's witnesses regarding the confrontation on December 10, 2009, and claimant's termination by the employer, and (2) the Commission's finding that claimant failed to prove he sustained an accident that arose out of and in the course of his employment with the employer on December 10, 2009, is against the manifest weight of the evidence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing on December 22, 2011.

¶ 6 The 50-year-old claimant testified through an Arabic interpreter that he began work for the employer on July 14, 2008. The employer produces coffees and cheeses. Claimant worked on a production line. On December 10, 2009, claimant worked removing labels from jars. After emptying a pallet of 70 boxes filled with the jars, claimant lifted the pallet and felt pain in his back, neck, and right shoulder. Claimant believed the pallet weighed between 50 and 70 pounds. Claimant testified he immediately sat on the floor. Within a few minutes, he reported his injuries to two supervisors, an individual named Chris, and Gary Schurch. The men

advised claimant he should rest in the cafeteria. According to claimant, he injured himself lifting the pallet at approximately noon, and he rested in the cafeteria for three to four hours. At approximately 4:00 p.m., Schurch advised claimant he should go home and rest.

¶ 7 On cross-examination, claimant testified he did not argue with Roberto Tinajero, a coworker, on December 10, 2009, and did not run over Tinajero's foot with a motorized pallet jack. Claimant did not use a pallet jack on December 10, 2009. Claimant testified he was not terminated from his employment with the employer on December 10, 2009. Claimant has not worked since December 10, 2009.

¶ 8 Tinajero testified he worked for the employer on December 10, 2009. He and claimant argued that morning, between 8:30 and 9:00 a.m. Claimant swore at Tinajero and when Tinajero approached claimant to tell him to stop swearing at him, claimant ran over Tinajero's left foot with a motorized pallet jack. Tinajero pushed claimant away from the controls, pulled his left foot from under the pallet jack, and immediately reported the incident to the human resources department.

¶ 9 Tinajero testified he returned to work and ate lunch in the cafeteria at approximately noon. Claimant was not in the cafeteria. Tinajero did not seek medical treatment for his left foot. He wore steel-toed shoes. The pallet jack bent the steel toe leaving only a scratch on his left foot but he could no longer wear the shoe.

¶ 10 Schurch testified he is a supervisor for the employer. According to Schurch, the individual claimant referred to as "Chris" is not a supervisor but was claimant's coworker. Schurch worked on December 10, 2009. Claimant approached Schurch at approximately 9:30 or 10:00 a.m., reporting his altercation with Tinajero. Schurch advised claimant the altercation was

being investigated. He observed claimant four or five times between 9:30 and 11:00 a.m. Claimant used a motorized pallet jack. Schurch did not observe claimant seated on the floor on December 10, 2009, and did not direct that claimant sit in the cafeteria. Claimant did not report to Schurch he had suffered an injury. According to Schurch, claimant was terminated from his employment at approximately noon as a result of the altercation with Tinajero.

¶ 11 Paul Calvagna testified he worked as the human services director for the employer on December 10, 2009. Tinajero came into his office at approximately 9:00 a.m., reporting an altercation between Tinajero and claimant. Calvagna contacted Scott Chehak, who worked as the operations director, and asked that he investigate the altercation between Tinajero and claimant. Chehak spoke to a number of individuals and determined claimant ran over Tinajero's foot with a motorized pallet jack and Tinajero pushed claimant out of the way "in self-defense." Based on what Chehak learned in the investigation, and the employer's policy manual, Calvagna and Chehak terminated claimant from his employment at approximately noon. Calvagna testified he "explained to [claimant] we are terminating your position based on the investigation *** effective immediately." Calvagna testified claimant became agitated, questioning repeatedly what would happen to Tinajero. Calvagna walked claimant to the locker room where claimant changed shoes and gathered his belongings. Calvagna then walked claimant to an exit and observed him get into his car. Claimant did not report a work injury to Calvagna and Calvagna did not observe any evidence that claimant suffered back pain, neck pain, or shoulder pain.

¶ 12 Approximately seven days later, claimant returned to the plant and spoke with Calvagna. Calvagna testified claimant wanted to know what was happening to Tinajero and asked for his job back. Calvagna reminded claimant he was terminated and there was nothing

Calvagna could do. Calvagna observed claimant exit the building, walk down 17 to 20 steps, and enter his vehicle. Calvagna did not observe anything unusual concerning claimant's walk to his car.

¶ 13 On cross-examination, Calvagna testified he was not aware of any written documentation concerning the December 10, 2009, events involving claimant. He acknowledged "it would be typical following an investigation in a decision to terminate an employee that information that was used or relied upon to make the termination decision be found in the employee's personnel file."

¶ 14 Chehak testified he is the operations director for the employer and worked on December 10, 2009. Calvagna asked that he investigate an altercation between Tinajero and claimant. Chehak knew most of the individuals working on the production floor. He spoke with Tinajero who reported claimant was swearing at him and he asked claimant to stop. Claimant did not stop and ran over Tinajero's left foot with a motorized pallet jack. Chehak observed an "obvious newer scuff mark" on Tinajero's left shoe, describing the damage to the shoe as "fairly blatant" and "gouged." Chehak also spoke to Dave Buss, a warehouse employee. Buss observed the confrontation. He believed claimant was the aggressor. Chehak summarized his conversation with Buss, stating claimant "pulled the handle of the pallet jack and proceeded to take off. And as [Buss] put it, [Tinajero] was standing right underneath or right next to the pallet jack, and [Buss] saw [Tinajero] jump backwards and push [claimant] away from the controls of the machine." According to Buss, Tinajero pushed claimant in self-defense. Although claimant testified he did not use a pallet jack on December 10, 2009, Chehak observed claimant using a pallet jack while Chehak walked through the production floor. Chehak watched claimant as he

worked on the production line, lifting boxes weighing approximately 12 pounds, bending, and twisting. Chehak did not observe claimant acting out of the ordinary and claimant did not report a work injury to Chehak.

¶ 15 When Chehak asked claimant about the altercation with Tinajero, claimant told Chehak that Tinajero was in his way and Tinajero pushed claimant. Chehak described claimant as "very agitated and using a lot of swear words." Claimant denied hitting Tinajero with the pallet jack. After leaving the production floor, Chehak met with Calvagna. Chehak advised Calvagna of "a very deliberate safety issue violated" involving "a power motorized vehicle" weighing 2,000 pounds. Calvagna asked Chehak to bring claimant to his office. Calvagna advised claimant he was terminated. Chehak described claimant as agitated "to the point of I was feeling uncomfortable."

¶ 16 The record shows claimant sought medical treatment at FHN Memorial Hospital emergency room at approximately 7:40 p.m., on December 10, 2009. Claimant complained of right-sided neck and shoulder pain, low back pain, and left elbow pain. Claimant reported developing pain after lifting 70 pounds at work. Claimant was prescribed Vicodin and Flexeril and removed from work on December 11 and 12. On December 15, 2009, claimant sought medical treatment at the FHN Family Healthcare Center. In a medical note, the treatment provider wrote: "Patient was terminated on 12/10/09 prior to injury to his back." Claimant continued to seek medical treatment for low back pain. On May 27, 2010, Dr. Michel Malek recommended claimant undergo a L4-S1 fusion. Claimant advised he would not undergo surgery because Dr. Malek could not provide him a 100% guarantee of improvement.

¶ 17 Following the hearing, the arbitrator found claimant failed to prove he sustained

injuries arising out of and in the course of his employment with the employer on December 10, 2009. The arbitrator detailed the inconsistencies in the testimony and specifically found claimant was not credible. Claimant sought review of the arbitrator's decision before the Commission. In an order entered on August 6, 2012, the Commission affirmed and adopted the arbitrator's decision. Thereafter, claimant filed a petition seeking judicial review in the circuit court of Winnebago County and the circuit court confirmed the Commission's decision.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Claimant first argues the Commission erred in allowing the testimony of each of the employer's witnesses regarding "the alleged confrontation" on December 10, 2009, and claimant's termination by the employer. Claimant argues section 4 of the Illinois Personnel Record Review Act (Personnel Record Review Act) (820 ILCS 40/4 (West 2008)) "bars admission of testimony or evidence [before the Commission] not contained within plaintiff's personnel file." According to claimant, because his personnel file "was barren of any evidence *** of a confrontation" or termination, the Commission should have stricken all of the testimony offered by the employer based upon the Personnel Record Review Act.

¶ 21 The employer argues claimant waived any objection to the testimony by failing to object before the arbitrator. We agree. During the arbitration hearing, claimant did not object to the testimony offered by the employer's witnesses regarding "the alleged confrontation" or claimant's termination based upon the Personnel Record Review Act and, therefore, has waived any objection to the Commission's consideration of the testimony. See *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 856, 806 N.E.2d 230, 234 (2004) (claimant waived any objection

to Commission's consideration of physician's testimony where claimant failed to object during arbitration hearing). Moreover, the Personnel Record Review Act does not provide a basis to bar the testimony. The Personnel Record Review Act guarantees Illinois workers the right, upon request, to inspect any personnel documents maintained by their employers. 820 ILCS 40/2 (West 2008). An employer who willfully fails to provide such records on request is barred from using them in a judicial or quasi-judicial proceeding. 820 ILCS 40/4 (West 2008). Although the right to inspect personnel documents includes those materials that "are, have been or are intended to be used by the employer *** in determining an individual employee's discharge or discipline" (820 ILCS 40/2 (West 2008)), the uncontroverted testimony in the instant case was there were no such documents maintained by the employer. The Personnel Record Review Act does not impose an affirmative duty on the part of an employer to create a record in the first place. Thus, the Personnel Record Review Act has no application here.

¶ 22 Claimant next argues the Commission's finding that claimant failed to prove he sustained an accident that arose out of and in the course of his employment with the employer on December 10, 2009, is against the manifest weight of the evidence. We disagree.

¶ 23 In order to be compensable under the Act, an injury must both arise out of and be in the course of employment. *Brady v. Louis Ruffolo & Sons Const. Co.*, 143 Ill. 2d 542, 547-48, 578 N.E.2d 921, 923 (1991); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). "Arising out of" employment refers to the causal connection between the injury and the employment, and is proven where the employee

establishes that his injury originated with some risk inherent in the job itself. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 480, 548 N.E.2d 1033, 1038 (1989); *Hosteny*, 397 Ill. App. 3d at 676, 928 N.E.2d at 483.

¶ 24 The question of whether an injury arose out of and in the course of employment is one of fact, and as such, is not subject to reversal by this court unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 1007 (1987); *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 868, 923 N.E.2d 870, 878 (2010). For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009). The appropriate test is simply whether the record contains sufficient evidence to support the Commission's determination. *R & D Thiel*, 398 Ill. App. 3d at 866, 923 N.E.2d at 877. In deciding questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny*, 397 Ill. App. 3d at 674, 928 N.E.2d at 482.

¶ 25 In arguing the Commission's decision is contrary to the manifest weight of the evidence, claimant points to his testimony that he lifted an empty pallet at approximately noon on December 10, 2009, and felt immediate neck, shoulder, and low back pain. According to claimant, he reported his injury to supervisors and spent three or four hours resting in the cafeteria. However, the Commission found this testimony not credible. In support of this finding, the Commission noted the testimony of Tinajero, Schurch, Chehak, and Calvagna. Each witness testified claimant engaged in an altercation with Tinajero on December 10, 2009, and

was thereafter terminated from his employment. The Commission found credible the testimony that Chehak and Calvagna advised claimant he was terminated and escorted claimant from the building at approximately noon. In contradiction to claimant's testimony, witnesses testified they observed claimant operating a motorized pallet jack on December 10, 2009. According to witnesses, claimant did not report a work injury and did not demonstrate any evidence of an injury. No witness observed claimant seated in the cafeteria on December 10, 2009.

¶ 26 While claimant asserts he "reported a plausible explanation for how his injuries occurred," it is not the only plausible interpretation of the evidence. Another possible conclusion is that the alleged accident never occurred. The Commission came to the latter conclusion (or, more specifically, it found that claimant did not prove that this accident occurred).

¶ 27 Claimant argues the employer's failure to (1) document its investigation and claimant's termination; and (2) produce claimant's time card and Tinajero's damaged shoe, support his claim that he suffered a work-related accident on December 10, 2009. Contrary to claimant's argument, it was claimant's burden to show by a preponderance of the evidence, that he suffered an injury which arose out of and in the course of his employment. See *Sisbro, Inc.*, 207 Ill. 2d at 203, 797 N.E.2d at 671. Although Calvagna acknowledged "it would be typical" that information regarding an employee's termination be placed in the employee's personnel file, there was no such written documentation in the instant case. The absence of such documentation does not itself support the conclusion claimant suffered a work-related accident. Further, claimant's claim regarding the employer's failure to produce claimant's time card is meritless where there was no evidence a time card existed in the first place. Employer had no duty to produce a time card (assuming one existed) or Tinajero's damaged shoe at the arbitration hearing.

¶ 28 Claimant also argues a document prepared by the Department of Employment Security (Department), and placed in claimant's personnel file, supports his argument that the Commission's decision is against the manifest weight of the evidence. The document, dated April 14, 2010, provided notice to the employer of a determination by the Department that claimant's actions *which resulted in his discharge* were not "deliberate and willful" and, therefore, the Department found claimant eligible for benefits. The document is irrelevant here where the issue before this court is not whether claimant's conduct leading to his termination was "deliberate and willful" but simply whether the Commission's finding that claimant failed to prove he sustained a injury that arose out of and in the course of his employment with the employer on December 10, 2009, is against the manifest weight of the evidence.

¶ 29 It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223 (1980). The Commission did so in this case. The Commission weighed the inconsistencies in the testimony and found claimant was not credible. There is sufficient evidence in the record to support the Commission's findings. We, therefore, cannot say that the Commission's finding that claimant failed to prove he sustained an accident that arose out of and in the course of his employment with the employer on December 10, 2009, is against the manifest weight of the evidence.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the circuit court of Winnebago County confirming the Commission's decision.

¶ 32 Affirmed.