2014 IL App (2d) 130753WC-U

Order filed July 21, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ABF FREIGHT,	)	Appeal from the Circuit Court
	)	of the Sixteenth Judicial Circuit,
	)	Kane County, Illinois
Appellant,	)	
	)	
v.	)	Appeal No. 2-13-0753WC
	)	Circuit No. 12-MR-477
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.* (Joseph Fisher, Appellee).	)	Honorable David R. Akemann, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's findings that the claimant's current cervical condition was causally related to a work-related accident and that the claimant was entitled to undergo cervical surgery recommended by his treating doctors were not against the manifest weight of the evidence.

¶ 2 The claimant, Joseph Fisher, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries which he allegedly sustained on November 10, 2009, while working for ABF Freight

(employer). After conducting a hearing, Arbitrator Jacqueline Kinnaman found that the claimant's cervical and bilateral upper extremity conditions were causally related to his November 10, 2009, work accident. The arbitrator awarded the claimant TTD benefits and prospective medical care (including diagnostic testing) by Dr. George DePhillips, the claimant's treating doctor. The arbitrator also ordered the employer to pay penalties pursuant to section 19(l) of the Act (820 ILCS 305/19(l) (West 2008)) because it found that the employer's failure to pay certain TTD benefits was unreasonable. The employer did not appeal the arbitrator's ruling.

¶ 3 Several months later, Dr. DePhillips ordered a cervical discography, which revealed that the claimant was suffering pain at C3-C4 level of his cervical spine. Dr. DePhillips and another doctor each recommended that the claimant undergo surgery to treat this condition. A second hearing was held before Arbitrator Kinnaman to determine whether the employer was required to authorize the surgical procedure recommended by the claimant's doctors. On September 27, 2011, the arbitrator found that the claimant's current cervical and bilateral upper extremity conditions (including his pain at C3-C4) were causally related to his November 10, 2009, work accident and the claimant was entitled to receive the surgery prescribed by his doctors. The arbitrator rejected the employer's argument that her prior causation finding was limited to the C6-C7 level of the claimant's cervical spine and noted that the claimant's "complaints, symptoms, and diagnoses remain the same as at the earlier hearing."

¶ 4 The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission unanimously affirmed and adopted the arbitrator's decision.

¶ 5 The employer then sought judicial review of the Commission's decision in the circuit court of Kane County, which confirmed the Commission's ruling. This appeal followed.

¶ 6 **FACTS**

¶ 7 The claimant worked for the employer as a truck driver and dockman. His job duties included loading and unloading merchandise into trailers. At times this required using a forklift. On November 10, 2009, the claimant was driving a forklift inside a trailer when he dropped a pallet and put his forklift in reverse. At that moment, another dockman backed his forklift into the trailer and the two forklifts collided. The claimant testified that the impact was severe and he felt a sharp pain in his upper neck. The claimant continued to work that day, but he felt light headed and had pain on both sides of his neck. As he was working, the pain began to shoot up to the top of his head and he felt tingling.

¶ 8 Approximately six months before the work accident (on May 21, 2009), the claimant had neck surgery to correct a condition resulting from a non-work-related automobile accident that occurred in 2006. The surgery was a fusion at two levels of the claimant's cervical spine, C4-C6. Two months after the surgery, the claimant underwent a Department of Transportation physical. The examining doctor told the claimant that he had no problems that would limit his work for the employer.

¶ 9 On August 3, 2009, Dr. DePhillips, the claimant's treating doctor, released the claimant to work full duty. When he returned to work, the claimant initially had some pain and stiffness. Dr. DePhillips's September 26, 2009, office note reflects that the claimant had pain in his neck and bilateral shoulders, but his radicular pain had resolved after surgery. After undergoing a second course of physical therapy in October 2009, the claimant told his supervisor he was

feeling well and it was the best his neck had felt in four years.

¶ 10 In the days immediately following his work accident, the claimant experienced nausea and pounding headaches while working. On November 12, 2009, he sought treatment at Physicians Immediate Care. While examining the claimant, a doctor noted tenderness to palpation of the insertion of the trapezius muscle at the base of the skull and decreased range of motion. The claimant was prescribed medication and told not to drive a forklift.

¶ 11 On December 3, 2009, the claimant saw Dr. DePhillips. The doctor noted that the claimant was suffering worsening pain due to his November 10, 2009, work injury. An x-ray of the claimant's cervical spine did not show any hardware failure or complications from the prior fusion surgery.

¶ 12 The claimant returned to Dr. DePhillips on January 21, 2010. He reported worsening shooting pain into the right forearm radiating into the hand and first and second digits. Dr. DePhillips noted that these pain symptoms were in the C6 nerve root distribution. Dr. DePhillips opined that the claimant's worsening pain and right radicular arm pain were most likely due to injury at the C6-C7 level of the claimant's cervical spine. Dr. DePhillips took him off work and prescribed more physical therapy. On February 10, 2010, the claimant returned to Dr. DePhillips complaining of headaches and continuing neck pain shooting into the right arm with numbness of the first digit of the right hand. Dr. DePhillips's medical record of that visit noted that the claimant was suffering neck pain and headaches with "new onset right radicular arm pain C6/7 nerve root distribution with onset following work injury." The doctor kept the claimant off work and continued his physical therapy.

¶ 13 On February 22, 2010, the employer's case manager, Kimberly Knight, prepared an "Initial Evaluation Report" of the claimant's condition. Ms. Knight noted that Dr. DePhillips

documented complaints of neck and bilateral shoulder pain on September 26, 2009, and neck pain radiating into both shoulders (worse on the right) on October 28, 2009. She quoted Dr. DePhillips's note of December 3, 2009, that the claimant had worsening pain due to his recent work injury. Ms. Knight also noted that, when she visited the claimant and Dr. DePhillips after the February 10, 2010, examination, Dr. DePhillips opined that: (1) the [claimant's] right arm/radicular symptoms along the C6/7 nerve root distribution and headaches were ne[w] onset, following the 11/10/09 injury"; and (2) "the symptoms are not the result of the cervical fusion as imaging reveals a solid fusion with no complications."

¶ 14 At the employer's request, the claimant was examined by Dr. Andrew Zelby on March 10, 2010. Dr. Zelby found mild tenderness to deep palpation in the cervical spine and decreased range of motion. Vibratory and pin prick sensations were diminished in the entire right arm from the elbow distally (*i.e.*, toward the fingers). However, Dr. Zelby thought that the etiology of the claimant's right upper extremity complaints was unclear because his abnormal findings were in a non-anatomic pattern. Dr. Zelby opined that the claimant had sustained a cervical strain in the context of a preexisting and already symptomatic condition. He suggested three to four weeks of physical therapy and opined that the claimant could return to his pre-accident activities without restrictions.

¶ 15 The claimant saw Dr. DePhillips again on May 13, 2010. He had continued complaints of headaches, neck pain, pain radiating into both upper extremities, and numbness and tingling in the right thumb and both feet. The doctor recommended medial nerve branch blocks and prescribed Norco and Firinal with codeine. Dr. DePhillips noted that the claimant's physical therapy was increasing his flexibility and motion but the effects appeared to be temporary.

¶ 16 The employer sought another opinion from Dr. Zelby. After reviewing additional

medical records, Dr. Zelby opined that the claimant had an essentially normal neurologic exam with no objective medical condition that would be treated with physical therapy, medial branch blocks, or epidural steroid injections. The opinions Dr. Zelby had rendered on March 10, 2010, were unchanged.

¶ 17 During the July 14, 2010, arbitration hearing, the claimant testified that he still had not received the injections or testing prescribed by Dr. DePhillips. He stated that he is always in extreme pain. Although he admitted that he had some pain between August 2009 and November 10, 2009, he characterized that pain as "muscular," whereas the pain he was experiencing at the time of the hearing was like a hot poker or knife stuck into his spine.

¶ 18 Arbitrator Kinnaman found that "[the claimant's] current cervical and bilateral upper extremity conditions are causally connected to his undisputed accident of November 10, 2009." Although the arbitrator acknowledged that the claimant "had some residual symptoms" after his prior cervical fusion surgery, she noted that the claimant had returned to work, his neck "felt great," and his upper extremity radicular symptoms "had resolved" prior to the November 10, 2009, work accident. The arbitrator noted that, immediately after the work accident, "[the claimant's] neck symptoms worsened and his arm symptoms returned." She also observed that Dr. DePhillips opined that "the symptoms" were at C6/7, which "placed the pathology below the level of the previous fusion." Immediately after making this statement, the arbitrator clarified that Dr. DePhillips thought the claimant's "right radicular pain in the C6/7 nerve distribution" were new and were related to the claimant's work injury and not to his prior cervical fusion. The arbitrator found Dr. DePhillips's opinions more credible than Dr. Zelby's opinions.

¶ 19 The arbitrator found that the claimant was temporarily totally disabled from January 21, 2010 (when Dr. DePhillips took him off work), through the date of the arbitration hearing, and

awarded TTD benefits for that period. She also found that the claimant was "entitled to undergo the medial nerve branch blocks and diagnostic testing prescribed by Dr. DePhillips." The arbitrator also awarded the claimant $3,990 in penalties under section 19(l) of the Act (820 ILCS 305/19(l) (2008)) because she found that the employer's failure to pay TTD benefits for much of the period between January 10, 2010, and the date of the arbitration hearing was unreasonable. The employer did not appeal the arbitrator's decision.

¶ 20 Following the July 14, 2010, arbitration hearing, the claimant continued to receive medical treatment for his cervical spine from Dr. DePhillips. On March 3, 2011, the claimant underwent a cervical discography.[1] Dr. DePhillips concluded that the discography had provoked concordant pain at the C3-C4 level. Dr. DePhillips's March 10, 2011, medical record states that the claimant "continues to complain of neck pain, bilateral shoulder pain, and headaches, which can reach a 10 on a scale of 1-10." Although Dr. DePhillips noted that the pain also radiated into the right arm and forearm, he stated that "80% of [the claimant's] pain [was] axial neck pain." Dr. DePhillips's March 30, 2011, medical record notes that the claimant "continues to suffer neck pain and headaches" which were not relieved by epidural steroid injections.

¶ 21 The claimant returned to Dr. DePhillips on May 6, 2011. Dr. DePhillips's office visit note reflects that the claimant continued to suffer neck pain, headaches, and interscapular pain. He had numbness in the first and second digits of his right hand and occasional shooting pain in his right arm. However, Dr. DePhillips noted that "the majority of his pain [was] in the neck and

[1] A discography is a procedure used to identify the source of neck pain. During discography, a contrast medium is injected into the disc and the patient's response to the injection is noted; provocation of "concordant pain" (*i.e.*, pain that is similar to the patient's existing neck pain) suggests that the disc might the source of the pain.

shoulder with the associated headaches." Dr. DePhillips and Dr. Sharma (a doctor who gave the claimant epidural steroid injections at the Pain and Spine Institute) both concluded that the claimant should undergo diagnostic medial nerve branch blocks above the level of the claimant's previous fusion to determine whether the pain at C3-C4 was "facet mediated."[2] If the pain was facet mediated, the doctors would consider a cervical radiofrequency rhizotomy.[3] If not, Dr. DePhillips recommended a surgical procedure to extend the claimant's previous cervical fusion to the C3-C4 level. It does not appear that the diagnostic medial nerve branch blocks recommended by Drs. DePhillips and Sharma were ever performed on the claimant. Dr. DePhillips referred the claimant to Dr. Mark Lorenz of Hinsdale Orthopedics for a second opinion.

¶ 22 On May 19, 2011, the claimant saw Dr. Lorenz. The claimant reported his medical history, including his prior cervical fusion, his November 10, 2009, work accident, and his ongoing symptoms including neck pain of 8 out of 10 and pain in the right arm "going into the C6 and C7 dermatomes."[4] He also reported numbness down the left side of his torso posteriorly and laterally and down the back of his left leg. On examination, the claimant had pain with

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[2] "Facet mediated" pain is pain in the facet joints of the cervical, thoracic or lumbar spine. These joints help stabilize the spine and limit excessive motion. When the facet joints are stressed because of an accident or degeneration, the cartilage in the joints can wear away and the joints can become swollen, causing bone to rub against bone. This can result in bone spurs.

[3] A "radiofrequency rhizotomy" is a non-invasive procedure wherein a doctor applies a precisely targeted electrical field to a specific branch of a spinal nerve rendering it incapable of transmitting pain signals.

[4] A "dermatome" is an area of skin that is mainly supplied by a single spinal nerve.

forward flexion, extension and rotation. After examining the claimant and reviewing the diagnostic testing, Dr. Lorenz diagnosed the claimant with C4 to C6 anterior cervical fusion and disc bulges at C3-C4 and C6-C7. He recommended that the claimant remain off work and follow up with Dr. DePhillips. Dr. Lorenz recommended that the claimant undergo fusion extension surgery at C3-C4.

¶ 23 The claimant last saw Dr. DePhillips on June 21, 2011. At that time, Dr. DePhillips concurred with Dr. Lorenz's recommendation of a C3-C4 fusion extension. Dr. DePhillips discussed the surgery with the claimant and Ms. Knight, the employer's case manager. Dr. DePhillips kept the claimant off work and told the claimant that he would perform the surgery following workers' compensation approval.

¶ 24 At the employer's request, Dr. Zelby authored addendums to his previous Independent Medical Examiner (IME) report on February 14, 2011 and August 3, 2011. In the February 14, 2011, addendum, Dr. Zelby indicated that he had reviewed the claimant's diagnostic studies and Dr. DePhillips's recent treatment records. Dr. Zelby opined that there were no objective findings to explain the claimant's continued subjective complaints of severe neck pain and that the claimant "does not have a condition treated with ongoing physical therapy, injections, discography or more surgery." Dr. Zelby concluded that the claimant had reached maximum medical improvement (MMI) "long ago." He stated that his recommendations of March and June 2010 were "unchanged since the objective findings leading to the bases for those recommendations are also unchanged."

¶ 25 After reviewing additional records (including the discography report of March 3, 2011, and Dr. DePhillips's office note of March 30, 2011), Dr. Zelby prepared another addendum to his IME report on August 3, 2011. In that addendum, Dr. Zelby again noted that he could find no

objective findings supporting the claimant's subjective complaints of pain. He opined that only mild degeneration was seen on the MRI at the C3-C4 and C6-C7 levels. He also opined that the claimant's lack of improvement with treatment was the best predictor that surgery, rhizotomy, or other additional treatment would not benefit the claimant. He believed the claimant was at MMI and was "easily qualified" to return to work without restrictions.

¶ 26 During the Sept. 12, 2011, arbitration hearing, the claimant testified he has pain in his neck and arms, numbness in his hand, and severe headaches. He stated that these are the same symptoms he has had since his November 10, 2009, work injury, but they are more intense. The claimant testified that he had discussed the fusion extension surgery with Dr. DePhillips and wanted to have it done but was waiting for approval from the employer. The claimant indicated that, because of his ongoing symptoms, he intended to have the surgery as soon as possible. He had no other accident since his work accident on Nov. 12, 2009. Moreover, the claimant stated that he had not seen or talked to Dr. Zelby since the previous arbitration hearing.

¶ 27 Arbitrator Kinnaman found that the claimant's "current cervical and bilateral upper extremity conditions are causally connected to his undisputed accident of Nov. 12, 2009." The arbitrator based this conclusion on "the chain of medical treatment which is unbroken since the Arbitrator's early causal[] connection finding." The arbitrator also found it significant that "[the claimant's] complaints, symptoms and diagnoses remain the same as at the earlier hearing." The arbitrator rejected the employer's argument that her previous causal connection finding was "limited to the C6/7 level." The arbitrator noted that this argument is "not supported by the clear language" of the arbitrator's prior decision, which states that the claimant's ' *** cervical and bilateral upper extremity conditions *** ' " were causally connected to his work accident.

¶ 28 The arbitrator also found that the claimant was entitled to undergo the cervical fusion

extension surgery recommended by Drs. DePhillips and Lorenz. She noted that "conservative treatment options have been exhausted." Moreover, the arbitrator found that the opinions of Drs. DePhillips and Lorenz were "more credible" than those of Dr. Zelby because Drs. DePhillips and Lorenz actually examined the claimant whereas Dr. Zelby based his opinions entirely on his review of the records. The arbitrator further observed that Dr. Zelby's record review was "not complete" because "he apparently did not see Dr. Lorenz's records nor Dr. DePhillips' most recent report."

¶ 29 The employer appealed the arbitrator's decision to the Commission, which unanimously affirmed and adopted the arbitrator's decision. The employer then sought judicial review of the Commission's decision in the circuit court of Kane County, which confirmed the Commission's ruling. This appeal followed.

¶ 30 **ANALYSIS**

¶ 31 On appeal, the employer argues that the Commission erred in finding that the claimant's current condition of ill-being at the C3-C4 level of his cervical spine and his need for fusion extension surgery at that level is causally related to his November 10, 2009, work accident. We disagree.

¶ 32 Under the Act, a compensable injury is one that both "arises out of" and "in the course of" a claimant's employment. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). An injury is said to arise out of one's employment when there is a causal connection between the employment and the injury, *i.e.*, the origin or cause of the current condition of ill-being must be attributable to some risk connected with the claimant's employment. *Id.* at 676.

¶ 33 Whether the claimant's current condition of ill-being is causally related to his or her

employment is generally a question of fact. *R&D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 868 (2010). In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny*, 397 Ill. App. 3d at 675; *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). A reviewing court may not substitute its judgment for that of the Commission on these issues merely because other inferences from the evidence may be drawn. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 407 (1984). We will overturn the Commission's causation finding only when it is against the manifest weight of the evidence, *i.e.*, only when the opposite conclusion is "clearly apparent." *Swartz v. Illinois Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002). When the evidence is sufficient to support the Commission's causation finding, we will affirm. *Id.*

¶ 34 Here, the Commission's causation finding is not against the manifest weight of the evidence. The employer's argument is premised on the assumption that the arbitrator's initial causation finding was limited to a particular level of the claimant's cervical spine. Specifically, the employer contends that, after the July 14, 2010, arbitration proceeding, the arbitrator found only that the claimant's "cervical condition at C6-7" was causally related to the November 10, 2009, work accident. Thus, the employer maintains, the arbitrator's initial finding did not encompass the claimant's current pain symptoms at the C3-C4 level. We disagree. The arbitrator's initial causation finding was broader than the employer suggests. As the arbitrator

herself recognized in her 2011 decision, her initial causation finding applied to all of the claimant's "current cervical and bilateral upper extremity conditions." At the time of the initial arbitration proceeding, the claimant was suffering from a variety of such conditions, including neck pain that was not localized to any particular level of his cervical spine. The arbitrator found this pain was causally related to the claimant's work accident. The employer did not appeal this determination. Accordingly, it became a final judgment and the law of the case. *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 606 (2003).

¶ 35 After the arbitrator made this causation finding, the claimant continued to suffer from neck pain. In fact, on March 10, 2011, Dr. DePhillips noted that neck pain accounted for 80% of the claimant's pain. During the second arbitration hearing, the claimant testified that he was currently experiencing the same type of symptoms that he had since the day of the work accident. Given this evidence, the Commission reasonably found that the arbitrator's initial causation finding (which encompassed all of the claimant's cervical conditions and associated neck pain) also encompassed the claimant's neck pain at C3-C4. The fact that the claimant's neck pain was diagnosed with greater precision (*i.e.*, was associated with a particular level of the claimant's cervical spine) after the arbitrator's initial causation finding does not suggest that it was not included in that finding.

¶ 36 The employer cites a portion of the arbitrator's initial decision addressing symptoms associated with the C6-C7 nerve distribution and argues that the arbitrator's initial causation finding was limited to those symptoms. Specifically, the employer notes that the arbitrator relied upon Dr. DePhillips's statement that the claimant's "symptoms" were at C6/7 and that these "symptoms" were related to the claimant's work injury and not to his prior cervical fusion. In the statement at issue, however, Dr. DePhillips was addressing the symptoms of *radicular pain into*

the claimant's arm. It was those symptoms, and only those symptoms, that Dr. DePhillips associated with the C6-C7 nerve distribution. Neither Dr. DePhillips nor the arbitrator suggested that *all* of the claimant's symptoms (including all of his neck pain) were associated with the C6-C7 level. Both before and after the initial arbitration hearing, the claimant consistently complained of "neck pain," not merely of pain and numbness radiating into the right arm. As noted, the arbitrator's initial causation finding encompassed all of the claimant's neck pain and cervical symptoms, not merely the symptoms specific to the C6-C7 nerve distribution.

¶ 37 Moreover, the Commission's finding that the claimant was entitled to undergo fusion extension surgery was not against the manifest weight of the evidence. Although Dr. Zelby opined that claimant had reached MMI and did not need fusion extension surgery, the Commission was entitled to reject that opinion. Two of the claimant's treating doctors (Drs. DePhillips and Lorenz) reached the opposite conclusion after examining the claimant from March through May of 2011. Dr. Zelby based his opinion entirely on a review of the medical records, a review which apparently did not include Dr. Lorenz's records or Dr. DePhillips's most recent report. It is the Commission's province to weigh the evidence, judge the credibility of witnesses, and resolve conflicts in medical opinion evidence. *Hosteny*, 397 Ill. App. 3d at 675; *Fickas*, 308 Ill. App. 3d at 1041. Here, the Commission found the opinions of Drs. DePhillips and Lorenz more credible than those of Dr. Zelby. We cannot say that this finding was against the manifest weight of the evidence.

¶ 38 **CONCLUSION**

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County, which confirmed the Commission's decision.

¶ 40 Affirmed; cause remanded.