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NOTICE

Decision filed 11/1/11.
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2011 IL App (3d) 100614WC-U

NO. 3-10-0614WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

STEPAN COMPANY,

Appellant,

v.

THE ILLINOIS WORKERS' COMPENSATION
COMMISSION *et al.* (Earl Johnson, Appellee).

) Appeal from the
) Circuit Court of
) Will County.
)
) No. 10 MR 168
)
) Honorable
) Bobbie N. Petrungaro
) Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.

Presiding Justice McCullough and Justices Hoffman, Hudson, and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The Commission's finding that the claimant sustained an injury to his left foot that arose out of and in the course of his employment was not against the manifest weight of the evidence. There was sufficient evidence in the record to support a finding that the claimant's condition of ill-being was causally related to his work-related accident. The Commission's award of permanent partial disability benefits in the amount of 20% loss of use of a left foot was not against the manifest weight of the evidence.

¶ 2 The claimant, Earl Johnson, filed an application for adjustment of claim against his employer, Stepan Company, seeking workers' compensation benefits for injuries to his left foot allegedly caused by a work-related accident on July 26, 2006. The claim proceeded to an arbitration hearing under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2008)). The arbitrator found that the claimant failed to prove that an accident occurred on July 26, 2006 that arose out of and in the course of his employment.

¶ 3 The claimant appealed to the Illinois Workers' Compensation Commission (Commission), which reversed the arbitrator and found that the claimant's condition arose out of and in the course of employment and that there was a causal connection between the accident and the claimant's condition of ill-being. The Commission found that the claimant was entitled to temporary total disability benefits from August 5, 2006 through October 3, 2006. The Commission ordered the employer to pay reasonable and necessary medical bills totaling \$9,737.40. The Commission found that the claimant was entitled to a permanent partial disability award of 20% loss of use of the left foot at \$619.97 per week for 33.4 weeks. One commissioner dissented. The employer filed a timely petition for review in the circuit court of Will County. The circuit court confirmed the Commission's decision, and the employer appealed.

¶ 4 BACKGROUND

¶ 5 The claimant testified that, at the time of his injury, he worked as a lab shipper and had been working for the employer for approximately 27 years. His job entailed shipping various chemicals to potential and existing customers. During the morning he worked in the warehouse where he moved 55 gallon barrels full of chemicals. On average, each barrel weighed 450 pounds. He testified that he

moved the barrels on a dolly and with a forklift. To place the barrels on the dolly, he attached a lever to the top of the drum, then used his foot to slip the prongs of the dolly under the drum.

¶ 6 The claimant testified that on July 26, 2006, he was operating a forklift. He stepped off the forklift and stepped down approximately 16 inches onto a concrete floor. He felt an immediate sharp pain in his left foot, specifically in the Achilles tendon area. He stated that he never had any problems with his foot prior to this injury. As soon as he hurt his foot, he sat down, rested, and told a co-worker about the accident. He testified that he remained at work the entire day, but he was unable to perform his job duties.

¶ 7 The claimant stated that he reported his injury the next morning to his supervisor, John McCormack. He testified that Ken Herber, one of the safety coordinators, was present when the claimant spoke with Mr. McCormack, and Mr. Herber examined the claimant's foot.

¶ 8 On July 27, 2006, the claimant went to PROVENA Saint Joseph Medical Center. In the claimant's medical records from that day, the emergency department treating physician wrote that the claimant presented with left heel pain. The doctor wrote:

"It began yesterday while at work. He is on a truck and gets off and on all day. He states that it gradually became worse as the day went on. He never has had this happen in the past."

The doctor examined the claimant and found no rupture of the Achilles tendon. He wrote that there was tenderness at the insertion of the Achilles tendon on the calcaneus, mild swelling, and very faint erythema on the left foot. The claimant was discharged with instructions to follow-up with an orthopedic surgeon.

¶ 9 The claimant followed up with Dr. Leah Urbanosky from Hinsdale Orthopaedic Associates. In a letter dated July 28, 2006, Dr. Urbanosky wrote that the claimant sustained an injury on July 26, 2006, when he was on forklift duty, "jumping off and on the forklift all day." She reported that the claimant stated he "felt some fatigue at the time, but he had increasing pain throughout the day and then the next day was unable to bear full weight." She diagnosed the claimant with Achilles strain with Achilles tendinitis and acute calcific retrocalcaneal bursitis secondary to strain. She wrote that it was "likely related to his work activities of July 26, 2006." She placed him in a CAM walker boot and instructed him to undergo therapy for three weeks. Dr. Urbanosky examined the claimant again on September 1, 2006 and September 29, 2006. On September 29, 2006, she recommended that the claimant follow-up with a podiatrist for a custom orthotic fitting.

¶ 10 On October 4, 2006, the claimant returned to full duty work in his pre-injury position as a lab shipper. Dr. Michael Wood, a podiatrist, examined the claimant on October 26, 2006. In his patient notes he wrote that the claimant told him that on July 26, 2006, he stepped off a truck at work and felt a deep pain in his left Achilles tendon area. Dr. Wood's assessment of the claimant was that he had a positive history of Achilles tendonitis. He wrote that he agreed with Dr. Urbanosky that the claimant had a deep Achilles tendon sprain significantly responsive to conservative care. Dr. Wood found:

"We relate the fact that it appears that the mechanism of injury that he describes is most consistent with Achilles tendon type of injury of stepping off hyperdorsiflexing the foot on the ankle as he moves plantar grade off the

forklift especially considering the fact that prior to this injury, he denies any history of previous Achilles tendon problem."

Dr. Wood recommended orthotics to help absorb some of the abuse that the claimant's foot would normally undergo and ideally prevent reoccurrence of this type of injury.

¶ 11 Dr. Urbanosky examined the claimant on March 6, 2007, and wrote, in the progress notes, that the claimant continued to have pain despite being fitted with an orthotic by a podiatrist. She wrote that his flexibility had reached its maximum and that he seemed to have stagnated relative to improvement. She referred him to Dr. Robyn Vargo.

¶ 12 Dr. Vargo examined the claimant on March 21, and April 18, 2007. On March 30, 2007, the claimant had a magnetic resonance imaging (MRI) of his left ankle. In his report, Dr. Edward Bruno wrote that there was an increased amount of fluid in the retrocalcaneal bursa consistent with bursitis, there was a subchondral cyst in the posterior part of the calcaneus adjacent to the Achilles tendon, and there was a partial or healed tear of the Achilles tendon. On April 18, 2007, Dr. Vargo reassessed the claimant's condition and discussed with him the findings of the MRI. In her office notes, she wrote that the MRI confirmed a healing partial tear of the Achilles tendon and a mild retrocalcaneal bursitis, which was also resolving. She reported that he had some problems with Achilles tendinosis. She wrote that she felt he was at maximum medical improvement regarding his Achilles tendon area.

¶ 13 Dr. Michael Gross testified by evidence deposition. He stated he is board certified in ambulatory medicine and had practiced as a surgeon performing orthopedic and general surgery. He examined the claimant on May 7, 2008, at the request of the claimant's attorney. Dr. Gross testified that the claimant told him that

on July 26, 2006, he stepped off a forklift and felt immediate pain in his left lateral ankle and his heel. He stopped working and, because he thought the injury would get better, waited to report it until the next day. Overnight his heel swelled in the posterior aspect and he sought emergency room treatment, where the diagnosis of Achilles tendonitis was made. He underwent six weeks of therapy. Dr. Gross stated that the claimant complained of heel pain, that he avoided walking long distances or on uneven surfaces, and that he suffered from left lateral ankle swelling.

¶ 14 Dr. Gross testified that he reviewed the claimant's medical records. The MRI dated March 29, 2007, showed a subchondral cyst in the posterior part of the calcaneus adjacent to the Achilles tendon, as well as some increased fluid in the area consistent with bursitis. He stated that the cyst was a marker for wear and tear in that region of the body. He diagnosed the claimant with residuals of soft tissue and tendon injury of the left foot and ankle, specifically an Achilles tendon tear, and Achilles tendonitis in the left ankle. He stated that to a reasonable degree of medical and surgical certainty, the cause of the claimant's condition of ill-being of his left foot and ankle was the accident that occurred on July 26, 2006. He further stated that it caused moderate loss of use of his left lower extremity. He stated that stepping on and off a forklift would cause wear and tear of the claimant's left Achilles tendon and that the July 26, 2006, incident could be characterized as "the straw that broke the camel's back." He attributed the wear and tear of the tendon and the July 26, 2006, accident to the claimant's job activities. He testified that the claimant's medical care was reasonable and necessary for the treatment of his work-related condition. He attributed any periods that the claimant was prevented from working due to the left extremity to his work injury.

¶ 15 Dr. George B. Holmes, a board certified orthopaedic surgeon, testified by evidence deposition. On December 18, 2007, he performed an independent medical examination of the claimant at the employer's request. Dr. Holmes testified that the claimant told him that on July 26, 2006, he stepped off a forklift truck and felt a sudden onset of pain in his left foot and ankle. When Dr. Holmes examined the claimant, he complained of throbbing heel and ankle pain. The claimant told Dr. Holmes the pain increased with prolonged weight bearing. Dr. Holmes testified that the claimant stated he had reported the injury to his supervisor the morning after the accident.

¶ 16 Dr. Holmes testified that he reviewed the claimant's medical records. Dr. Holmes reviewed x-rays of the claimant that were taken in his office on the date of his exam, and they were unremarkable. Dr. Holmes testified that based on his review of the claimant's medical records, his review of his own diagnostic information, and his own physical examination findings, to a reasonable degree of medical and surgical certainty, there were three possible diagnoses to account for the claimant's condition: Achilles tendonosis, tendinitis, or a partial old tear. He testified that there was no causal relationship between the claimant's employment and his condition. He stated that the Achilles tendon has to be pre-diseased to become symptomatic. He opined that it was just a coincidence that the claimant's condition became symptomatic when he stepped down from the forklift, and that the injury could have happened in a number of benign ways.

¶ 17 Dr. Holmes testified that, at the time of the examination, he felt that the claimant no longer needed treatment and that he did not need any work restrictions. He opined that the claimant had reached maximum medical improvement. He

further testified that it was his opinion that the claimant had not sustained any permanent disability as a result of the reported injury.

¶ 18 On February 4, 2008, Dr. Vargo examined the claimant for a final follow-up exam after the independent medical examination by Dr. Holmes. In her progress notes, Dr. Vargo wrote that the claimant continued to have pain to the left heel, but had managed to return to a reasonable level of function. She reviewed Dr. Holmes' report and stated,

"I am in slight disagreement with Dr. Holmes' opinion that [the claimant] did not experience a tear in his Achilles tendon. I think that there is objective evidence that he, in fact, did. I do not mean to suggest that I am in disagreement fully with where we would expect [the claimant] to be at this point in time. I do think he has had good resolution of his injury and, despite his subjective complaints of discomfort, the tendon has healed and is functioning for him."

¶ 19 The claimant testified that his condition had not completely resolved. He still suffers pain and he has to exercise every morning to maintain flexibility. He wears an orthotic device daily. He avoids activities that require him to use his left foot excessively.

¶ 20 The employer moved to admit into evidence an affidavit from Mr. McCormack. In the affidavit, Mr. McCormack stated that he was the claimant's supervisor and that the claimant never reported a work-related accident to him. He also swore he never witnessed the claimant sustain any injuries due to a work-related accident. The claimant's attorney objected on the basis of hearsay. The arbitrator ruled that the affidavit was not admissible. The employer's counsel moved to submit it as an offer of proof. It was accepted as an offer of proof.

¶ 21 The arbitrator found that the claimant failed to prove that an accident occurred on July 26, 2006, that arose out of and in the course of his employment. He found that the claimant did not report a work related accident to his supervisor that day. The arbitrator found that

"although [the claimant] claims he reported that he sustained injuries due to a work related accident to his supervisor John McCormack on July 27, 2006, John McCormack stated that no work-related injuries were ever reported to him by [the claimant] on July 26, 2006 nor any date thereafter. Further, John McCormack stated that he never witnessed any work-related accident involving [the claimant.]"

The arbitrator went on to find that the claimant failed to prove that his condition of ill-being was causally related to a work-related accident. The arbitrator found that the employer was not liable for any medical expenses.

¶ 22 The Commission reversed the arbitrator's decision. It found that the July 26, 2006, accident arose out of and in the course of the claimant's employment. It found that there was a causal connection between the claimant's condition of ill-being and the work-related accident. The Commission found that the claimant timely notified the employer of the accident. The Commission found that the claimant met the burden of proof with the evidence and testimony that he was unable to work from August 5, 2006, through October 3, 2006, a period of 8 4/7 weeks and was entitled to temporary total disability at a rate of \$709.53 per week for this time. The Commission ordered the employer to pay \$9,737.40 for reasonable and necessary medical care the claimant received for this injury. The Commission found that the claimant was permanently partially disabled and awarded him 20% loss of the use of a left foot. One commissioner dissented. The

employer filed a petition for review in the circuit court of Will County which confirmed the Commission's decision. The employer filed a timely notice of appeal.

¶ 23

ANALYSIS

¶ 24 The employer argues that the Commission's finding that the claimant sustained an injury on July 26, 2006, to his left ankle that arose out of and in the course of his employment is against the manifest weight of the evidence. "Whether an injury arose out of and in the course of one's employment is a question of fact for the Commission to decide, and its determination will not be disturbed unless it is against the manifest weight of the evidence." *The City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 312, 901 N.E.2d 1066, 1079 (2009). Fact determinations are against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). "A reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Durand*, 224 Ill. 2d at 64, 862 N.E.2d at 924.

¶ 25 An injury is compensable under the Act only if it "arises out of" and "in the course of " one's employment. 820 ILCS 305/2 (West 2008). "Both elements must be present at the time of the injury in order to justify compensation, and it is the employee's burden to establish these elements by a preponderance of the evidence." *Hosteny v. Illinois Workers' Comp. 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 under which the accident occurred. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 667 (1989). "An injury is

received in the course of employment when it occurs within the period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or is engaged in something incidental thereto." *J.S. Masonry, Inc. v. Industrial Comm'n*, 369 Ill. App. 3d 591, 596, 861 N.E.2d 202, 207 (2006).

¶ 26 In the instant case, the claimant testified that on July 26, 2006, he stepped off the forklift at work and felt an immediate sharp pain in his left foot. The claimant stated that he told his co-worker about the accident and that, the next morning, he informed his supervisor, Mr. McCormack. The claimant gave consistent histories to his treating physicians about how his injury occurred. The claimant went to the emergency room at Saint Joseph Medical Center the day after the accident. In the emergency room records, the treating physician wrote that the claimant's heel pain "began yesterday while at work. He is on a truck and gets off and on all day." Dr. Urbanosky wrote that the claimant sustained an injury on July 26, 2006, while on forklift duty "jumping off and on the forklift all day." Dr. Wood wrote in his patient history that on July 26, 2006, the claimant stepped off a truck at work and felt a deep pain in his left Achilles tendon area. Dr. Gross testified that the claimant told him that on July 26, 2006, the claimant stepped off of a forklift and felt immediate pain in his left lateral ankle and heel. Dr. Holmes testified that the claimant told him that on July 26, 2006, the claimant stepped off a forklift truck and felt a sudden onset of pain in his left foot and ankle. No other testimony was presented regarding the claimant's injury.

¶ 27 In determining that the claimant's injury did not arise in the course of his employment, the arbitrator erroneously relied on an affidavit from Mr. McCormack that was excluded from evidence as hearsay. The Commission reviewed the

affidavit and found it lacked credibility, although there is no reason to weigh the credibility of inadmissible hearsay. The Commission weighed the claimant's testimony that he told his co-worker about the accident immediately after it happened, that he reported the accident to Mr. McCormack the next day, and that he then went for medical treatment the day after the accident, against the timing and content of the affidavit. The Commission found that:

"John McCormack, via affidavit, offer of proof, date[d] a day prior to this hearing stated that [the claimant] did not report an accident to him [on] the date of the accident or any subsequent day. While [the claimant] did not present his co-worker as a witness, neither did [the employer] present their witness and this affidavit, offer of proof is suspect with its presentation and lacks credibility. The evidence supports, as [the claimant] testified, that he went for medical treatment the next day and that falls in support here of [the claimant's] testimony of providing notice and then going for treatment."

Based on the admissible evidence, the claimant injured his left foot while at work and while performing his job duties.

¶ 28 "However, the fact that the injury arose in the course of employment is not sufficient to impose liability; to be compensable, the injury must also 'arise out of the employment.'" *Caterpillar Tractor Co*, 129 Ill. 2d at 58, 541 N.E.2d at 667. An injury arises out of employment when its origin is connected with what the employee has to do in fulfilling his job duties so as to create a causal connection between the employment and the accidental injury. *Id.* "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might

reasonably be expected to perform incident to his assigned duties." *Id.* An injury is not compensable if it results from a hazard to which the employee would have been equally exposed apart from employment, or a risk personal to the employee. *Caterpillar Tractor Co.*, 129 Ill. 2d at 59, 541 N.E.2d at 667.

¶ 29 In the instant case, the claimant was injured while stepping off a forklift. Clearly he was performing acts incident to his assigned duties. Stepping off a forklift is not a hazard to which the claimant would have been exposed apart from his employment, nor was the accident a risk personal to the employee.

¶ 30 Conflicting medical evidence was presented regarding whether there was a causal connection between the claimant's employment and his accidental injury. In Dr. Urbanosky's July 28, 2006, letter she wrote, "I feel [the claimant] has an Achilles strain with Achilles tendinitis and acute calcific retrocalcaneal bursitis secondary to strain, likely related to his work activities of July 26, 2006." Dr. Wood wrote in his notes that it appeared that the mechanism of injury was stepping off the forklift. Dr. Gross testified that stepping on and off a forklift would cause wear and tear of the claimant's left Achilles tendon and that the July 26, 2006, incident could be characterized as "the straw that broke the camel's back." He stated that, to a reasonable degree of medical and surgical certainty, the cause of the claimant's condition of ill-being was the July 26, 2006, accident. Dr. Holmes testified that it was a coincidence that the claimant's condition became symptomatic while stepping down from the forklift and that there was no causal connection between the claimant's employment and his condition.

¶ 31 "In resolving questions of fact, it is the function of the Commission to judge the credibility of the witnesses and resolve conflicting medical evidence." *The City of Springfield*, 388 Ill. App. 3d at 315, 90 N.E.2d at 1081. The Commission found:

"The preponderance of evidence and credible testimony finds support of an accident that arose out of and in the course of employment July 2[6], 2006 to the contrary of the Arbitrator's finding and [the claimant] did meet the burden of proof. A finding of accident finds the same evidence and testimony supporting causal connection with a mechanism of injury and causal connection testified to by [the claimant] that is supported in the medical records and medical opinion's of Dr. Gross and Dr. Wood (also supporting a causal connection) being more credible than [the employer's] Section 12, Dr. Holmes opinion to the contrary."

The Commission resolved the conflicting medical evidence in favor of Dr. Urbanosky, Dr. Gross, and Dr. Wood, and against Dr. Holmes. The Commission's determination that the claimant's injury arose out of and in the course of his employment is not against the manifest weight of the evidence. Further, there was sufficient evidence in the record to support the Commission's finding that the claimant's condition of ill-being was causally related to his work accident.

¶ 32 The employer argues that if the Commission's finding of accident and causal relationship was against the manifest weight of the evidence, the medical expenses and temporary total disability benefits were also against the manifest weight of the evidence. Since the Commission's findings of accident and causal relationship were not against the manifest weight of the evidence, we need not address this issue.

¶ 33 The employer argues that the Commission's award of permanent partial disability benefits in the amount of 20% loss of use of a left foot was against the manifest weight of the evidence. "Determining the nature and extent of an injury is primarily the responsibility of the Industrial Commission." *English v. Industrial Comm'n*, 151 Ill. App. 3d 682, 685, 502 N.E.2d 1247, 1249 (1986). It is presumed

that the Commission reaches its decision based on the consideration of competent and proper evidence. *Id.* "Because of the Commission's expertise in the area of workers' compensation, its finding on the question of disability should be given substantial deference." *English*, 151 Ill. App. 3d at 686, 502 N.E.2d at 1249.

¶ 34 The Commission found that the claimant met the burden of proving entitlement to a permanent partial disability award. The claimant testified that his condition had not completely resolved. He stated that he still had pain in his left foot, that he had to exercise every morning because his foot stiffens up, and he had to "get it flexible before he starts off." He stated that he no longer jogs or exercises in the same manner as in the past. He uses an elliptical exercise machine to stay in shape and is afraid to use a treadmill. The claimant testified that he avoids activities that involve extensive use of his left foot.

¶ 35 Medical evidence was presented that the claimant suffered from a permanent partial disability. Dr. Vargo acknowledged that while the claimant had a good resolution of his injury, he continued to have pain in his left heel. Dr. Urbanosky wrote in her progress notes dated March 6, 2007, that the claimant continued to have pain despite being fitted for an orthotic. She wrote that he had stagnated relative to improvement and that his flexibility had reached its maximum point. Dr. Gross testified that the claimant complained of heel pain and swelling of his left ankle and that it impacted the distances and surfaces on which he walked. He further stated that the accident caused moderate loss of use of the claimant's lower left extremity. There is sufficient evidence in the record to support the Commission's determination that the claimant was permanently partially disabled in the amount of 20% loss of use of a left foot.

¶ 36

CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Will County confirming the decision of the Commission is affirmed.

¶ 38 Affirmed.