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2012 IL App (3d) 100876WC-U

Order filed February 14, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BERGENSONS/ADMINISTAFF,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Appellant,	)	Kankakee County, Illinois
	)	
	)	Appeal No. 3-10-0876WC
v.	)	Circuit No. 09-MR-435
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al*. (Kevin Kreger, Appellee).	)	Kendall O. Wenzelman,
	)	Judge, Presiding

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's determination that the claimant's injuries arose out of and in the course of his employment, the award of TTD benefits and the award of prospective medical benefits were not against the manifest weight of the evidence. The award of penalties and attorney fees for the employer's termination of TTD benefits was against the manifest weight of the evidence. The employer's request to supplement the record on appeal with evidence not presented to the Commission was denied.

¶ 2 The claimant, Kevin Kreger, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2002)) seeking benefits for an injury to his knee alleged to have occurred on October 1, 2004, arising out of and in the course of his employment with Bergensons/Administaff (employer). Following a 19(b) hearing, held on February 20, 2008, and April 4, 2008, an arbitrator found that the claimant established that his accident injuries arose out of and in the course of his employment and awarded 170 1/7 weeks of temporary total disability (TTD) benefits for the period November 16, 2004, through February 20, 2008. The employer was given credit for TTD benefits previously paid. The arbitrator additionally awarded penalties as provided under sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), (l) (West 2002)), as well as attorney fees as provided under section 16 of the Act (820 ILCS 305/16 (West 2002)).

¶ 3 The matter again proceeded to a section 19(b) hearing on November 7, 2008, following which the arbitrator awarded additional TTD benefits of 37 weeks, from February 21, 2008, through November 6, 2008, and additional penalties and attorney fees. In an addendum to the order, the arbitrator also ordered the employer to authorize and pay for a pain rehabilitation program offered at the Cleveland Clinic. The arbitrator also found that a request from the claimant for an orthopedic evaluation of his left leg was reasonable and ordered the employer to authorize it as well.

¶ 4 The employer sought review of the arbitrator's decisions by the Illinois Workers' Compensation Commission (the Commission). The Commission declined to adopt some of the arbitrator's evidentiary rulings but, in all other ways, unanimously affirmed and adopted the arbitrator's decision. The employer then sought judicial review of the Commission's decision in

the circuit court of Kankakee County, which confirmed the Commission's decision. This appeal followed.

¶ 5 FACTS

¶ 6 The claimant worked for the employer as a regional manager. His job required him to travel throughout several states from North Dakota to Kentucky. The claimant's home was in South Bend, Indiana. As regional manager, he was required to oversee the employer's janitorial service operations in approximately 300 retail establishments. His primary job was to ensure that cleaning crews were performing satisfactorily. In connection with his employment, the claimant traveled between 1,500 and 2,000 miles per week. The claimant testified that, on those occasions when a cleaning crew failed to report for work, he would do the work himself.

¶ 7 The claimant arrived at a Marshall's department store in Bradley, Illinois, at approximately 7 a.m. on October 1, 2004, after spending the previous night at a motel in Champaign, Illinois. The store was not open to the general public until 9 a.m. The claimant testified that he parked his car in the store parking lot, walked into the store, and toured the store with the store manager. He then returned to his car to retrieve a cleaning checklist. As he was walking back to the store with the list, he slipped on a newly-taped parking stripe in the recently-paved parking lot. He testified that he did not hit the ground or his car. However, as he fell forward, he felt a pop in his left knee. At the time, he was carrying the paperwork and a small appointment book. The claimant testified that, although it had not been raining, the pavement in the parking lot near his car was wet. He observed that area was wet due to the automatic sprinklers for the shrubbery near where he was parked.

¶ 8 The claimant then testified that he completed his calls the rest of the day, with tolerable pain in his left leg. However, that night, his left leg became very swollen, which prompted him to seek medical attention at the emergency department of Memorial Hospital in South Bend, Indiana. He gave a history of twisting his left knee suddenly that morning, with pain in his left leg thereafter and with gradual swelling in the left leg that day. Dr. Mark Walsh, attending physician, noted swelling of the left calf and ankle, with limited range of motion due to left knee pain. Dr. Walsh diagnosed left knee strain.

¶ 9 On October 2, 2004, the claimant returned to the emergency department, reporting pain and swelling in his left knee. The claimant was given a knee immobilizer and instructed to follow up with an orthopedic specialist.

¶ 10 On October 19, 2004, the claimant reported to the emergency department with left knee pain, swelling and numbness. Upon examination, his entire left leg was swollen with decreased sensation. The claimant was again treated for left leg swelling on October 20, 26, 28, and 29, 2004.

¶ 11 On November 3, 2004, the claimant reported to Dr. Thomas with extreme pain and swelling in the entire left leg. Dr. Thomas noted extreme edema to the point that he could not detect a pulse in the left toes due to the extreme edema. Dr. Thomas diagnosed acute left lower extremity edema secondary to trauma with venous/lymphatic injury.

¶ 12 After several treatments, with no significant improvement, the claimant was diagnosed with reflex sympathetic dystrophy (RSD). RSD is a variant of complex regional pain syndrome (CRPS), an uncommon nerve disorder which causes intense pain, usually in the arms, hands, legs or feet. The claimant subsequently underwent two surgical procedures in June of 2005, neither

of which alleviated his symptoms. The claimant has been off work due to the symptoms of RSD since the date of the accident.

¶ 13 On September 12, 2005, Dr. Scott Eshowsky, noting that the claimant had been through a course of 18 months of treatment with little or no relief, referred the claimant to Dr. Stanton-Hicks at the Cleveland Clinic for pain management, who recommended an orthopedic evaluation.

¶ 14 On March 2, 2006, the claimant underwent an independent medical examination performed by Dr. Timothy Lubenow, who authored a report finding a causal connection between the claimant's current condition of RSD and his accident on October 1, 2004. Dr. Lubenow also concurred in the treatment plan to date.

¶ 15 On December 26, 2006, the claimant completed a standard two-day functional capacity evaluation (FCE). The FCE showed little functional capacity and near constant pain.

¶ 16 On January 24, 2007, Dr. Lubenow authored a second report, indicating some improvement since his last examination but also indicating his overall agreement with his treatment for pain.

¶ 17 On September 19, 2007, Dr. Lubenow again examined the claimant for an independent medical examination. Dr. Lubenow reiterated a diagnosis of complex regional pain syndrome of the legs which, by this time, had spread to his arms, face and back. Dr. Lubenow's report indicated that he viewed some surveillance tapes of the claimant engaged in some light carpentry work and similar activities. Dr. Lubenow indicated that, while the tapes did not change his diagnosis or his opinion of the claimant's current plan of treatment, it would indicate that the claimant had reached maximum medical improvement (MMI) and could handle some degree of light duty.

¶ 18 On the basis of Dr. Lubenow's report, the employer terminated the claimant's TTD benefits. The employer indicated that an offer of light duty employment would be forthcoming, however, the record does not contain any indication that an offer of light duty was ever made.

¶ 19 ANALYSIS

¶ 20 1. Whether the Commission erred in finding that the claimant's injuries arose out of and in the course of his employment.

¶ 21 To be compensable under the Act, the injury complained of must be one "arising out of and in the course of the employment." 820 ILCS 305/2 (West 2006). An injury "arises out of" one's employment if "its origin is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Saunders v. Industrial Comm'n*, 189 Ill. 2d 623, 627 (2000); see also *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393 (1995). A risk is "incidental to the employment" when it "belongs to or is connected with what the employee has to do in fulfilling his duties." *Stembridge Builders, Inc. v. Industrial Comm'n,* 263 Ill. App. 3d 878, 880 (1994).

¶ 22 Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been performing his duties, and while the claimant is actually performing those duties, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). Here, it is undisputed that the claimant's injuries were sustained in the course of his employment. At the time he fell, the claimant was retrieving a cleaning list from his car that was to be used in the process of cleaning the Marshall's department store, a task required by the claimant's position.

¶ 23 The employer disputes the Commission's finding that the claimant's injuries arose out of his employment. The "arising out of" component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. Courts have recognized three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116 (2007).

¶ 24 In this case, the claimant was injured when he fell in a newly-painted and recently-paved parking lot. There was also evidence that the pavement was wet due to a nearby automatic sprinkler system which had apparently watered the nearby shrubbery. The record indicated that the claimant was injured at approximately 7 a.m., but the parking lot was not opened to the general public until 9 a.m. There is no evidence indicating that the claimant suffered from a physical condition that caused his fall, nor is there any indication that the risk of falling in the parking lot was distinctly associated with his employment. Thus, we find, as the Commission determined, that the risk of injury was neutral in nature.

¶ 25 Before proceeding to the arguments raised by the employer, we note that the risk to which the claimant was exposed was greater than that to which the general public was exposed by virtue of the fact that the claimant was present in the parking lot at 7 a.m., while the general public would not be expected to be present in that parking lot until 9 a.m. Here, the record established that the pavement where the claimant slipped was wet due to the fact that an automatic sprinkler

system had recently operated to water decorative shrubbery near where the claimant's car was parked. Assuming that the automatic sprinklers were timed to water when the public was not expected to be present in the parking lot, the fact that the claimant was present at 7 a.m. so as to complete the cleaning of the store prior to its opening would necessarily expose him to the risk of water on the pavement to a degree greater than that of the general public. If this were the case, the risk would not be a neutral risk but would instead be a risk distinctly associated with the claimant's employment.

¶ 26 However, even if the risk to which the claimant was exposed was a neutral risk we find that the claimant had established a connection between the risk and his current condition of ill-being. Injuries resulting from neutral risks are not generally compensable unless the claimant can establish that he was exposed to the risk to a degree greater than that to which the general public would be exposed. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163 (2000). Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Potenzo*, 378 Ill. App. 3d at 117.

¶ 27 Here, the Commission adopted the arbitrator's reference to the so-called "street risk doctrine" to determine that the claimant's exposure to the risk of falling in the parking lot was quantitatively greater than that to which the general public would be exposed. The arbitrator concluded that the claimant was "a traveling employee and thereby [was] at greater risk of injury than the general public."

¶ 28 Although neither party nor the Commission properly addressed the special status of a "traveling employee," we find it useful to do so. Traveling employees are employees "whose work is largely outside the plant because of the nature of their business, [and who] are compelled to expose themselves to the hazards of the streets and the hazards of automobiles * * * much more than the general public." *Illinois Publishing & Printing Co. v. Industrial Comm'n*, 299 Ill. 189, 191 (1921). In short, a traveling employee is one for whom travel is an essential element of his or her employment. *Urban v. Industrial Comm'n*, 34 Ill. 2d 159, 163 (1966). For a traveling employee, an injury arises out of his employment if his conduct at the time of the injury was reasonable and foreseeable by the employer. *Robinson v. Industrial Comm'n*, 96 Ill. 2d 87, 92 (1983).

¶ 29 Analyzing the instant matter under the traveling employee doctrine, we conclude that the claimant herein was a traveling employee. The record clearly established that the claimant's employment required him to travel extensively to perform his duties. Although there is nothing in the record to indicate the number of days per week the employee traveled, the record does establish that he traveled 1,500 to 2,000 miles per week to supervising cleaning operations at various retail stores throughout a large geographical area. Additionally, the record supports a clear inference that the claimant's work duties were conducted entirely away from the employer's location. Since the claimant is clearly a "traveling employee," his exposure to the hazards of the street is, by definition, greater quantitatively than that of the general public, as long as his conduct at the time of the injury was reasonable and foreseeable to the employer. *Illinois Publishing & Printing*, 299 Ill. at 191; *Robinson*, 96 Ill. 2d at 92. Given that the claimant was a "traveling employee," we find that his risk of injury by slipping or tripping in a parking lot of one

of the stores he was sent to by the employer to oversee the cleaning operation was a risk to which he was exposed to a degree greater than the general public.

¶ 30 While the Commission correctly noted that the claimant was a "traveling employee," it limited its analysis to the so-called "street risk doctrine" which holds, generally, that "where the evidence establishes that the claimant's job requires that [he] be on the street to perform the duties of his employment, the risks of the street become one of the risks of the employment, and an injury sustained while performing that duty has a causal connection to [his] employment." *Potenzo*, 378 Ill. App. 3d at 118. In such a circumstance, it is presumed that the claimant is exposed to risks of accidents in the street to a greater degree than if he had not been employed in such a capacity, and the claimant is thereby entitled to benefits. *City of Chicago v. Industrial Comm'n*, 389 Ill. 592, 601 (1945).

¶ 31 Here, the Commission's finding that the claimant's employment exposed him to the risks of the street (and presumably the parking lot) was not against the manifest weight of the evidence. The record is clear that the claimant's job duties required him to be on the street, and in parking lots, to such a degree that risks of the street became the risks of his employment. While we find that the claimant's status as a "traveling employee" is the more appropriate analysis, we nonetheless find that the Commission's "street risk" analysis is supported by the record. We, therefore, affirm the Commission's finding that the claimant's injuries arose out of and in the course of his employment.

¶ 32 2. Whether the Commission erred in awarding TTD benefits from October 29, 2007, through November 7, 2008.

¶ 33 The employer next disputes the claimant's entitlement to TTD benefits from October 29, 2007, through November 7, 2008. Whether a claimant is entitled to TTD benefits is a question of fact for the Commission which will not be overturned on appeal unless it is against the manifest weight of the evidence. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. App. 3d 132, 142 (2010). Here, the Commission determined that the claimant had not yet reached MMI during the period in question, that the claimant's work restrictions during that period of time were of a completely sedentary nature, and that the employer had failed to offer a light-duty job within the claimant's restrictions. The employer points out that the report of Dr. Lubenow supported a finding that the claimant had reached MMI. However, other medical evidence supported a conclusion that the claimant had not yet reached MMI during the time in question.

¶ 34 As to whether the employer offered the claimant a job within his physical restrictions, the record is subject to disputed interpretations. Although a meeting took place on November 12, 2007, at which the claimant's job restrictions and a possible return to work within those restrictions was discussed, nothing in the record indicates that the employer followed up the meeting with an actual job offer within the claimant's restrictions. Given the record, we cannot say that the Commission's determinations as to TTD benefits was against the manifest weight of the evidence.

¶ 35 3. Whether the Commission erred in awarding penalties and attorney fees.

¶ 36 The employer next maintains that the Commission erred in awarding penalties and attorney fees. Whether to award penalties and attorney fees under the Act is a factual question, and a reviewing court will not overturn the Commission's decision unless it is against the manifest weight of the evidence. *McKay Plating Co. v. Industrial Comm'n*, 91 Ill. 2d 198, 209 (1982). Penalties are appropriate where an employer's decision to delay payment of benefits is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514 (1998). When, however, an employer acts in reliance upon reasonable medical opinions or when there are conflicting medical opinions, penalties ordinarily are not imposed. *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805 (2005).

¶ 37 Here, the employer relied primarily upon the medical opinion of Dr. Lubenow that the claimant had reached MMI when it ceased paying TTD benefits. However, as the arbitrator noted when awarding penalties, Dr. Lubenow did not opine that the claimant could return to unrestricted duty. Rather, he opined that the claimant could perform certain light-duty functions. The arbitrator then noted that no light-duty employment was offered by the employer. Reviewing Dr. Lubenow's records, the arbitrator found no good faith basis upon which the employer could reasonably terminate TTD benefits. The Commission adopted the arbitrator's findings.

¶ 38 We find that the Commission's award of penalties and attorney fees was against the manifest weight of the evidence. Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). In the instant matter,

a controversy existed as to whether the claimant could perform light-duty work and whether the employer in fact offered such light-duty work. However, that controversy was not relevant to the question of whether the employer had a good faith basis for terminating TTD benefits. Dr. Lubenow had opined that the claimant had reached MMI, and the employer relied upon his opinion in terminating TTD benefits. The employer's termination of TTD benefits, based upon Dr. Lubenow's opinion that the claimant had reached MMI, was not unreasonable or vexatious and the Commission's award of penalties and attorney fees was against the manifest weight of the evidence. We reverse the Commission's award of penalties and attorney fees and vacate the decision granting penalties and attorney fees to the claimant.

¶ 39 4. Whether the Commission erred in instructing the employer to authorize and pay for orthopedic treatment.

¶ 40 The employer next maintains that the Commission erred in instructing it to authorize and pay for prospective orthopedic treatment. The employer offers no citation to case authority to support its argument. It is well-settled that arguments made without citation to supporting authority are deemed waived. *Peitrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 830 (2002). Moreover, it is well-settled that the Commission has the authority to order prospective medical benefits, and its decision to do so will not be overturned on appeal unless it is against the manifest weight of the evidence. *Plantation Manufacturing Co. v. Industrial Comm'n*, 294 Ill. App. 3d 705, 710-11 (1997). Here, prospective orthopedic treatment was deemed warranted by Dr. Stanton-Hicks, and we cannot say that the Commission's reliance upon Dr. Stanton-Hick's opinion was against the manifest weight of the evidence.

¶ 41 5. Whether the appellate court should consider evidence in the instant matter that was not proffered to the Commission.

¶ 42 The employer lastly maintains that it should be allowed to supplement the record upon review before this court with certain medical records which it received pursuant to a subpoena served on March 30, 2010, and received by it on May 17, 2010. This subpoena was issued 23 months after proofs were closed in the first 19(b) hearing and 18 months after the proofs were closed in the second 19(b) hearing.

¶ 43 There is no authority for this court to allow the record to be supplemented with material not of record before the Commission. This court has jurisdiction to review only the final determinations of the Commission. *International Paper Co. v. Industrial Comm'n*, 99 Ill. 2d 458 (1984). The employer cites *A-Tech Computer Services, Inc. v. Soo Hoo*, 254 Ill. App. 3d 392 (1993), for the general proposition that the appellate court can accept non-record evidence. However, *A-Tech Computer Services, Inc.* has no relevance to matters involving appeals from a decision of the Commission. We find that there is no authority under the Act for permitting the employer to supplement the record on appeal to add evidence which was not presented to the Commission.

¶ 44 CONCLUSION

¶ 45 The judgment of the Kankakee County circuit court, which confirmed the Commission's decision is affirmed in part. The Commission's award of penalties and attorney fees is reversed and vacated. The matter is remanded to the Commission for further proceedings.

¶ 46 Affirmed in part and reversed in part and vacated in part; cause remanded.