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Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160929WC
No. 4-16-0929WC
Order filed October 25, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ROBERT FISHER,	)	Appeal from the Circuit Court
	)	of McLean County
Appellant,	)	
	)	
v.	)	No. 16-MR-674
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Rebecca Foley,
(Cornbelt Energy Corp., Appellee).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Appleton, and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The decision of the Illinois Workers' Compensation Commission that claimant failed to prove he suffered a work-related accident or that his condition of ill-being was caused by his employment were not contrary to the manifest weight of the evidence where there was expert medical testimony supporting that decision, Commission's finding that claimant lacked credibility was not against the manifest weight of the evidence, claimant engaged in basketball game after alleged occurrence of accident and delayed reporting injury to respondent until after the basketball game—Commission did not err in analyzing claim as being based on an acute-trauma theory.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Robert Fisher, appeals an order of the circuit court of McLean County confirming a decision of the Illinois Workers' Compensation Commission (Commission) denying him benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2012)). The Commission found that claimant failed to prove that his condition of ill-being was causally related to an at-work accident or that he suffered a work-related accident. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Claimant testified at the arbitration hearing as follows. At the time of the hearing, he was 57 years old and had worked for respondent for over 37 years. He is a journeyman lineman, a position he has held since 1991. His duties include climbing poles, working with wire, driving trucks, and digging holes. He has to pull himself up into trucks. Wire he works with is typically in front of him or above him. Sometimes he has to use fiberglass extensions to work with wire, which are either four feet or eight feet long.

¶ 6 On November 30, 2012 (a Friday), claimant was working with heavy wire, bending it and shaping it to allow it to fit inside electrical blocks. Toward the end of the day, he felt a pain in his right shoulder. A coworker, Todd Moore, finished the wire-bending job for claimant. After work, claimant took a warm shower and rested a while. He then went to a going-away party to which he had previously committed. He had a few drinks, and, when he got home, "took some Ibuprofen," as his shoulder was "very painful." The pain subsided somewhat overnight, and, on Saturday morning, claimant went to play basketball. When he returned home, he noted his arm was "hurting even more." Claimant went to sleep, and, when he awoke, he "could hardly raise [his] arm up" due to the pain. Claimant went to work on Monday, but he was not able to actually work. He also called a doctor on Monday, whom he saw on Tuesday. Claimant was taken off

work as of Wednesday, December 5, 2012 (he subsequently returned to work for respondent after his condition resolved). Claimant was referred to Dr. Anthony Dustman for a consultation on December 13, 2012. Claimant testified that, as of the time of the hearing, he was still experiencing grinding and popping in his right shoulder.

¶ 7 On cross-examination, claimant acknowledged that he had no problems with his right shoulder prior to November 30, 2012. Claimant had surgery on his left shoulder for a rotator cuff problem in 2000. Claimant testified that he was "attributing the [current] injury to the specific work activity of bending the wire." He did not report the "tingling sensation" he had when bending the wire on the day it occurred. He finished his shift on that day, though he did not perform all the tasks assigned to him. He did not seek medical attention that day either. Regarding the basketball game, claimant stated that he was left handed and primarily used his left hand. He was able to raise and move his right arm during the game, though "[n]ot very well." However, he acknowledged engaging in actions—such as playing defense and passing the ball—that required two hands. Claimant played the entire game. Claimant was released to return to full duty in October 2013.

¶ 8 Claimant submitted the evidence deposition of Dr. Dustman. Dustman testified that he is a board-certified orthopedic surgeon. He examined claimant on December 13, 2012, and had previously treated claimant for a left-shoulder problem and a knee injury. Claimant reported that he had pain in his right shoulder. Dustman stated, "He described it as being a very specific time when it occurred, on" November 30, 2012. Claimant told Dustman that he had been "bending two-inch diameter wire and he had to do it for about two days." Claimant noted a "specific tingling sensation." Subsequently, claimant experienced pain. Dustman ordered X rays, which showed "some degenerative changes of the AC joint." It also showed "subsisting changes on the

humeral head" which Dustman felt indicated a rotator cuff issue. An MRI confirmed an actual tear of the rotator cuff. Claimant underwent surgery on March 20, 2013. Dustman characterized the outcome of the surgery as "successful," but he noted that rehabilitation following this particular surgery is "very hard."

¶ 9 Dustman agreed that generally, as people age, degenerative changes occur in the shoulders. Such changes can be aggravated by employment activities. Moreover, repetitive use can cause "weaker spots," and an activity like bending wire, "can kind of finish it off and then cause the symptomatology." Dustman was asked whether the sorts of activities claimant engaged in at work for respondent (climbing into a truck; loading a truck; reaching to work on power lines; using a jack or hoist; pulling wire off reels; shoveling dirt and mud) could have caused or aggravated claimant's right-shoulder condition, and he replied affirmatively.

¶ 10 On cross-examination, Dustman testified that bending wire as described by claimant would place a load on the shoulder. Anything "loading the shoulder or upper extremity has a risk of damaging that rotator cuff." Dustman testified that the tingling described by claimant would have been his rotator-cuff tearing. Further, it would have been possible for claimant to play basketball the next day, as he only tore one of the four tendons that make up the rotator cuff. Dustman did not believe basketball caused the tear because claimant did not experience anything like the tingling sensation he felt when bending wire that could have been a tear occurring.

¶ 11 Respondent submitted the evidence deposition of Dr. Bret Johnson, who examined claimant on respondent's behalf. Johnson is a board-certified orthopedic surgeon. Johnson examined claimant on January 30, 2013. Claimant described the injury at work to Johnson and the subsequent events, including attending the party and playing basketball the next morning. Claimant also described his job duties to Johnson. Johnson believed Dustman's treatment of

claimant was reasonable and necessary. Johnson diagnosed a partial-thickness rotator-cuff tear or a small, full-thickness rotator-cuff tear. He felt claimant's subjective complaints correlated with the objective findings, such as the MRI. However, he opined that the mechanism of injury described by claimant (bending wire) would not typically cause a rotator-cuff tear. Accordingly, he further opined that claimant's condition of ill being was not related to his employment with respondent. If claimant had torn his rotator cuff at work bending wire, he could not have played basketball the next day. Moreover, the tingling sensation described by claimant would not, in itself, be indicative of a rotator-cuff tear. Rather, a person who tore his or her rotator-cuff would feel pain. Johnson opined that claimant's condition was degenerative in nature.

¶ 12 On cross-examination, Johnson agreed that physical labor could contribute to degeneration of the shoulder. The types of work activities claimant engaged in could put stress on a shoulder. However, Johnson added, people that have non-stressful jobs have a similar incidence of rotator-cuff injuries as they age. After examining the actual wire claimant had been bending, Johnson agreed that that activity could have put stress on claimant's shoulder.

¶ 13 The arbitrator begin his ruling by stating that claimant "has alleged a specific injury to his right shoulder as a result of bending wire on November 30, 2012." However, the arbitrator noted that claimant did not report his injury to anyone that day and did not present the coworker who purportedly witnessed the injury to corroborate his testimony. Further, claimant did not seek immediate medical assistance. Rather, he went home, showered, went to a party, and played basketball the next morning. The arbitrator noted that claimant "even testified that he was feeling fine the day after the alleged accident." The arbitrator further noted that "markedly increased symptoms following the basketball game are consistently reported in all the medical records submitted into evidence." The arbitrator questioned claimant's testimony that his arm

hurt during the game and he limited using it because it conflicted with his testimony that he woke up feeling fine. Moreover, claimant admitted using both hands at times during the game for activities "such as passing, catching, shooting, and playing defense." The arbitrator then made an adverse finding regarding claimant's credibility and found that the basketball game was more likely the cause of claimant's condition of ill-being.

¶ 14 The arbitrator then discussed the testimony of the two doctors—Dustman and Johnson—that examined claimant. The arbitrator stated that both doctors noted that claimant "had pre-existing, degenerative findings in the right shoulder." He found that had claimant actually experienced a tear on November 30, 2012, as Dustman believed, claimant would "have had onset [an] of symptoms, such as pain, difficulty moving, [or] inflammation, the *next day*, or shortly after the incident." However, this was not the case as claimant did not have an onset of symptoms until after the basketball game and did not seek medical treatment or notify respondent until the following Monday. The arbitrator then credited Johnson's opinions. The arbitrator then found that claimant failed to carry his burden of proving the occurrence of an at-work accident or causation. The Commission affirmed, adopting the arbitrator's decision, and the circuit court confirmed the Commission. This appeal followed.

¶ 15 III. ANALYSIS

¶ 16 Claimant contends that the Commission's decision is against the manifest weight of the evidence with regard to its findings concerning accident and causation. Of course, a claimant bears the burden of proving each and every element of his or her claim. *Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 5 (1996). This burden includes accident and causation. *ABF Freight Systems, Inc. v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 141306WC, ¶ 19 (causation); *Stapleton v. Industrial Comm'n*, 282 Ill. App. 3d 12, 18 (1996)

(accident). Furthermore, on appeal, the appellant—in this case, claimant—bears the burden of establishing error in the proceedings below. *ABF Freight Systems, Inc.*, 2015 IL App (1st) 141306WC, ¶ 19. The Commission is primarily responsible for resolving conflicts in the record, weighing evidence, and assessing the credibility of witnesses. *Hosteny v. Illinois Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). We owe great deference to the Commission's factual decisions. *Edward Gray Corp. v. Industrial Comm'n*, 316 Ill. App. 3d 1217, 1222 (2000). This is particularly true with respect to medical issues, where the Commission's expertise has long been recognized. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). Accordingly, we will reverse only if a factual decision is contrary to the manifest weight of the evidence. *ABF Freight Systems, Inc.*, 2015 IL App (1st) 141306WC, ¶ 19. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Id.*

¶ 17 Here, there clearly was adequate evidence supporting the Commission's decision. Claimant's delay in seeking medical attention or reporting the injury allow an inference adverse to him, as does his participation in a basketball game the day after the alleged injury (claimant's contentions that the basketball game is not relevant and would have had to be an intervening cause sufficient to break the chain of causation would be well taken only if claimant had established an work-related cause of his injury in the first place). While the Commission was not required to draw such an inference, it was clearly not unreasonable for it to interpret this evidence in this manner. Additionally, Johnson flatly opined that there was no causal relationship between claimant's condition of ill-being and the alleged accident. While there was conflicting evidence here in the form of Dustman's testimony, we cannot simply reweigh this evidence and substitute our judgment for that of the Commission. *Setzekorn v. Industrial*

Comm'n, 353 Ill. App. 3d 1049, 1055 (2004). In short, the Commission's decision finds support in the record, and any countervailing evidence is not so significant that we could say that an opposite conclusion to the Commission's is clearly apparent.

¶ 18 Claimant contends that the Commission erred by not analyzing this case using a repetitive-trauma theory. See *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529-531 (1987). Claimant begins his argument by stating that the Commission "ruled on a question that was not asked"—*i.e.*, acute trauma. However, we note that claimant did not plead this as a repetitive-trauma case. Claimant's application for adjustment of claim states, in the space provided to describe how the accident occurred: "Bending 2 [inch] wire by hand. Shaped to put in transformer." Thus, the question the Commission ruled on was certainly asked (in his reply brief, without citation to the record to substantiate the claim, claimant asserts that "the theory presented to the arbitrator and Commission was an injury based on repetitive trauma"). We also note testimony that pertains to an acute-trauma theory. For example, claimant himself testified that he was "attributing the [current] injury to the specific work activity of bending the wire." Similarly, Dustman testified claimant was "being a very specific [regarding the] time when it occurred" which was when he had been "bending two-inch diameter wire." Thus, it is not surprising that the Commission and the arbitrator did not treat this as a repetitive trauma case.

¶ 19 We also note that the Commission (adopting the arbitrator) made a general, adverse finding about claimant's credibility. This was based on what it found to be claimant's equivocation between testifying he felt fine when he awoke the morning after the alleged injury and his testimony that his arm hurt during the basketball game that he engaged in that same morning. Given the Commission found claimant to lack credibility, it is difficult to see how he

could have carried his burden, regardless of whether the case were analyzed employing an acute-trauma or repetitive-trauma theory. Additionally, Johnson, whom the Commission found "credible and persuasive on the issues of accident and causation," testified that claimant's condition was degenerative in nature. Thus, Johnson explained claimant's condition independently of claimant's employment with respondent. We acknowledge that Johnson stated claimant's work activities were of the sort that *could have* put stress on claimant's shoulder; however, in the end, he opined the injury was degenerative in nature.

¶ 20 Claimant contends he has set forth a 21-year course of repetitive activities. However, a number of them do not appear to be repetitive on their face. For example, claimant points to having to pull himself up into a truck. Similarly, claimant points to the fact that he "threw used materials away" and "dug with shovels." How many times per day did these activities occur? Indeed, claimant points to no evidence concerning the frequency or duration that he engaged in any activity he claims was repetitive. While "[t]here is no requirement that a certain percentage of time be spent on a task in order for the duties to meet a legal definition of 'repetitive,' " (*Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005)), to make out a repetitive-trauma claim claimant needed to present some evidence he engaged repetitive activities.

¶ 21 In sum, we find no error in the Commission's failure to analyze this case using a repetitive-trauma theory. Claimant framed the case as an acute trauma case. Further, it does not appear to us that claimant would have succeeded had he pursued such a theory.

¶ 22 IV. CONCLUSION

¶ 23 In light of the foregoing, the order of the circuit court of McLean County confirming the decision of the Commission is affirmed.

¶ 24 Affirmed.