2012 IL App (5th) 100460WC-U

NO. 5-10-0460WC

Order filed: April 30, 2012

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CONSOLIDATION COAL COMPANY, Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Douglas Bockhorn, Appellant).	)	Appeal from Circuit Court of Franklin County No. 10MR3 Honorable Melissa A. Drew, Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) Appellate Court had jurisdiction over the appeal and (2) Commission's decision was not contrary to the manifest weight of the evidence.

¶ 2 On November 1, 2004, claimant, Douglas Bockhorn, filed an application for adjustment of claim pursuant to the Occupational Diseases Act (Act) (820 ILCS 310/1 through 27 (West 2002)), seeking benefits from employer, Consolidation Coal Company. After a hearing, an arbitrator found claimant proved he suffered from the disease process of coal workers'

pneumoconiosis (CWP) arising out of and in the course of his employment with employer. The arbitrator awarded claimant benefits in the amount of $485.65 per week for a period of 50 weeks pursuant to section 8(d)(2) of the Workers' Compensation Act (Compensation Act) (820 ILCS 305/8(d)(2) (West 2002)), for permanent partial disability (PPD) to the extent of 10% of the man as a whole.

¶ 3 Employer filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On review, a majority of the Commission affirmed and adopted the arbitrator's decision. Thereafter, employer filed a petition seeking judicial review in the circuit court of Franklin County. On September 7, 2010, the circuit court vacated the award stating it was against the manifest weight of the evidence. The court remanded to the Commission "to enter a decision consistent with this finding."

¶ 4 Claimant appeals, arguing that (1) the Commission's finding that he suffered an occupational disease is not against the manifest weight of the evidence, (2) the Commission's finding that claimant proved he suffered disablement within two years after the last day of the last exposure to the hazards of the occupational disease is not against the manifest weight of the evidence, (3) the Commission's finding that claimant gave timely notice is not against the manifest weight of the evidence, and (4) the Commission properly found section 19(d) of the Act not applicable to reduce claimant's award. For the reasons that follow, we reverse the judgment of the circuit court and reinstate the decision of the Commission.

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing on December 12, 2007. The 57-year-old claimant worked in above-ground coal mining for approximately 28 years where he was regularly exposed to coal dust. Claimant last worked in

mining on November 3, 1999, at Consol's Burning Star #4 Mine near Jamestown, Illinois. Claimant was 49 years old and working as a mechanic when the mine closed. While working in the mines, claimant held the classifications of mechanic, welder, mobile equipment operator, and loading shovel oiler. Claimant retained his panel rights after being laid off but was never recalled.

¶ 6 Claimant testified that he noticed a change in his breathing the last few years he worked in the mines. This occurred when he "was doing the heavier work, well, it was around *** when I was still on the coal loader, pulling cable, cabling changes, and things, it's a hurry up, heavy work job, pulling around trail cable, you get winded pretty quickly." Claimant also had to climb up and down the boom while carrying supplies. He had to stop and catch his breath between trips up the boom.

¶ 7 At the time of the arbitration hearing, claimant walked 1/4 mile before noticing a change in his breathing. He climbed a full flight of stairs before experiencing breathing problems. Claimant testified that his breathing problems have gradually worsened. Any heavy labor induces breathlessness. Carrying his grandchildren also makes him winded quickly. Claimant began smoking in 1970. He smokes 1 1/2 to 2 packs of cigarettes per day.

¶ 8 Dr. William Houser examined claimant on December 17, 2004, at the request of his attorneys. Dr. Houser is a board-certified pulmonologist and internist. He has been the medical director of the Deaconess Hospital Black Lung Clinic in Evansville, Indiana, since 1979. Claimant reported an occasional cough and occasional wheezing. He did not complain of significant dyspnea. Claimant smoked a pack of cigarettes a day for 27 years, and two packs a day for the last seven years. Claimant's chest exam was normal. Pulmonary function testing

showed a mild airway obstruction involving the small airways.

¶ 9 Dr. Houser interpreted claimant's August 9, 2004, chest x-ray as positive for CWP, category 1/0. He noted P-type opacities in the right upper and both mid-lung zones. Dr. Houser concluded that claimant had CWP secondary to mining. Dr. Houser also considered the report of B-reader/radiologist, Dr. Michael Alexander, who found category 1/1 CWP. Dr. Houser stated that when one has CWP, any additional exposure to coal dust would increase the likelihood that the disease will progress. Dr. Houser stated that claimant had no exposures after coal mining that could have caused his CWP. Based upon the natural history of CWP, he felt that claimant's disease would have been present when he last coal mined.

¶ 10 Dr. Peter Tuteur, a pulmonologist, examined claimant on March 4, 2005, at employer's request. Claimant reported mild breathlessness when climbing stairs and a daily productive cough. Claimant's chest exam was normal. There was no change from an earlier film of August 9, 2004. Dr. Tuteur stated that his CT scan was high resolution and showed no interstitial process. Pulmonary function testing was at the borderline between normal and the possibility of a very minimal obstructive defect. According to Dr. Tuteur, claimant experienced a very mild impairment of gas exchange at rest on arterial blood gas testing due to chronic bronchitis secondary to smoking. Dr. Tuteur concluded that claimant did not have CWP or any other mining-related disease of sufficient severity to produce symptoms, pulmonary function impairment, or radiographic change.

¶ 11 Dr. Daniel Whitehead interpreted the chest x-ray of March 4, 2005, as showing a few small nodular opacities which could reflect mild changes of pneumoconiosis, category 1/0. Dr. Whitehead is a B-reader/radiologist.

¶ 12 B-reader/radiologist, Dr. Jerome Wiot, interpreted the CT scan of March 4, 2005, as showing no evidence of CWP. Dr. Wiot interpreted the chest x-rays from August 9, 2004, and March 4, 2005, as showing no evidence of CWP.

¶ 13 In a decision filed with the Commission on January 25, 2008, the arbitrator found claimant's testimony credible and resolved the conflicting evidence in claimant's favor. The arbitrator found employer's evidence concerning a high resolution CT scan questionable and gave "greater credence to Petitioner's x-ray evidence, inasmuch as Dr. Whitehead also noted abnormalities which were consistent with CWP." The arbitrator concluded that claimant suffered from CWP and that claimant's disease would have been present when he last coal mined. The arbitrator awarded claimant benefits in the amount of $485.65 per week for a period of 50 weeks pursuant to section 8(d)(2) of the Compensation Act (820 ILCS 305/8(d)(2) (West 2002)), for PPD to the extent of 10% of the man as a whole.

¶ 14 Employer filed a petition for review of the arbitrator's decision before the Commission. A majority of the Commission affirmed and adopted the arbitrator's decision. The dissenting commissioner did not believe claimant proved disablement because he mined above ground.

¶ 15 Thereafter, employer filed a petition seeking judicial review in the circuit court of Franklin County. On September 7, 2010, the circuit court vacated the award stating it was against the manifest weight of the evidence. The court remanded to the Commission "to enter a decision consistent with this finding."

¶ 16 This appeal followed.

¶ 17 Before turning to the merits of this appeal, we note that a potential jurisdictional issue exists. In this case, the circuit court vacated the award stating it was against the manifest weight

of the evidence. The court remanded to the Commission "to enter a decision consistent with this finding."

¶ 18 " 'Jurisdiction of appellate courts is limited to reviewing appeals from final judgments, subject to statutory or supreme court rule exceptions.' " *Williams v. Industrial Comm'n*, 336 Ill. App. 3d 513, 515, 784 N.E.2d 396, 398-99 (2003) (quoting *In re Marriage of Verdung*, 126 Ill. 2d 542, 553, 535 N.E.2d 818, 823 (1989)). A judgment is final, for appeal purposes, if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *Williams*, 336 Ill. App. 3d at 515, 784 N.E.2d at 399.

¶ 19 When the circuit court reverses a decision of an administrative agency and remands the case to the agency for further proceedings involving disputed questions of law or fact, the order is not final for purposes of appeal. *Williams*, 336 Ill. App. 3d at 516, 784 N.E.2d at 399. " 'If, however, the agency on remand has only to act in accordance with the directions of the court and conduct proceedings on uncontroverted incidental matters or merely make a mathematical calculation, then the order is final for purposes of appeal.' " *St. Elizabeth's Hosp. v. Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 883, 864 N.E.2d 266, 269 (2007) (quoting *Williams*, 336 Ill. App. 3d at 516, 784 N.E.2d at 399).

¶ 20 In the statement of jurisdiction contained in his brief, claimant asserts that the circuit court's order of September 7, 2010, is "final and appealable." We agree. The Commission on remand has only to act in accordance with the directions of the circuit court, entering a decision finding the award was against the manifest weight of the evidence. Accordingly, we do not lack jurisdiction over this appeal.

¶ 21 Claimant argues that the Commission's finding that he suffered an occupational disease is not against the manifest weight of the evidence. We agree.

¶ 22 The Commission is charged with the functions of deciding questions of fact, judging the credibility of witnesses, and resolving conflicting medical evidence. *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 856, 806 N.E.2d 230, 234-35 (2004). "Likewise, it is for the Commission to decide which of two conflicting opinions should be accepted." *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055, 820 N.E.2d 586, 592 (2004). We will not disturb the Commission's resolution of a question of fact unless it is against the manifest weight of the evidence. *Docksteiner*, 346 Ill. App. 3d at 856, 806 N.E.2d at 235. "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Docksteiner*, 346 Ill. App. 3d at 857, 806 N.E.2d at 235.

¶ 23 In this case, the Commission affirmed and adopted the arbitrator's decision. Dr. Houser testified that claimant suffered from CWP and that claimant's CWP was causally related to his exposure to coal dust. Dr. Houser based his opinion on occupational exposure of approximately 28 years and chest x-rays indicating a category 1/0 CWP. Dr. Houser concluded that claimant suffered from a permanent impairment of function that left him disabled from mining because any additional dust exposure would aggravate claimant's condition. Dr. Houser's opinion was in accord with the statutory presumption found in the Act. See 820 ILCS 310/1(d) (West 2002). Although Dr. Tuteur opined that claimant did not have CWP or any other mining-related disease, the Commission found "Dr. Tuteur's position that coal mine dust rarely causes obstruction [raised] credibility issues." Credibility is a question reserved for the Commission's determination. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223-24

(1980). Based upon the record before us, the Commission's resolution of the issue is not against the manifest weight of the evidence.

¶ 24 We acknowledge employer's arguments characterizing the Commission's analysis as insufficient, deficient, unsound, inconsistent, and erroneous. We point out that we may affirm a decision of the Commission if there is any legal basis in the record to do so, regardless of whether the Commission's reasoning is correct or sound. *Ameritech Services, Inc. v. Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208, 904 N.E.2d 1122, 1136 (2009); *Builders Square, Inc. v. Industrial Comm'n*, 339 Ill. App. 3d 1006, 1012, 791 N.E.2d 1308, 1313 (2003). Based on the record before us, the Commission's finding that claimant suffered an occupational disease is not against the manifest weight of the evidence.

¶ 25 Claimant next argues that the Commission's finding that claimant proved he suffered disablement within two years after the last day of the last exposure to the hazards of the occupational disease is not against the manifest weight of the evidence. See 820 ILCS 310/1(f) (West 2002). Whether a claimant has provided sufficient evidence of disablement is a question of fact for the Commission, and its decision in this regard will not be reversed unless it is against the manifest weight of the evidence. *Freeman United Coal Mining Co. v. Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 784, 901 N.E.2d 906, 911 (2008).

¶ 26 Claimant last worked in mining on November 3, 1999. Claimant testified that he noticed breathing limitations while doing heavier work at the mines such as pulling cable or climbing the boom. Currently any heavy labor induces breathlessness. Claimant did not describe severe symptoms or limitations. Claimant testified that he felt able to (1) walk a quarter of a mile before noticing a change in his breathing and (2) climb a full flight of stairs before experiencing

breathing problems.

¶ 27 Dr. Houser examined claimant in December 2004 and concluded that claimant (1) suffered from CWP caused by exposure to coal and rock dust and (2) was disabled from mining. With regard to whether the CWP was present when claimant last coal mined, employer admits that Dr. Tuteur described the frequency of a person developing CWP after leaving the mines as "very small." Dr. Houser provided that statistically, the likelihood of CWP manifesting itself after claimant left coal mining was less than one percent.

¶ 28 Employer contends that claimant's medical records are void of "timely pulmonary complaints." Claimant testified that he never complained to his physician about his breathing problems because "[t]his is not something that I think he can do anything about. I don't – when I go to him, I'm there for a cold or whatever. I get my blood pressure checked." Dr. Houser explained that an absence of pulmonary complaints in treatment records would not affect his diagnosis: "The treatment records are frequently for individual condition[s] such as a sprained ankle or stomachache or sore throat and don't specifically address respiratory history, or respiratory complaints, and probably don't even in [] most cases address occupational history, which is one of the crucial components." The evidence supports the Commission's conclusion that claimant's disablement occurred within the statutory two-year period.

¶ 29 Claimant next argues that the Commission's finding that claimant gave timely notice is not against the manifest weight of the evidence. We agree.

¶ 30 The purpose of the notice requirement is to enable the employer to investigate the alleged disablement. See *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 95, 411 N.E.2d 249, 252 (1980). Compliance with the requirement is accomplished by placing the employer in possession of the

known facts related to the disablement arising from an occupational disease "as soon as practicable after the date of the disablement." See 820 ILCS 310/6(c) (West 2002). A claim is barred only if no notice whatsoever has been given. *Silica Sand Transport, Inc. v. Industrial Comm'n,* 197 Ill. App. 3d 640, 651, 554 N.E.2d 734, 742 (1990). Because the legislature has mandated a liberal construction on the issue of notice (*Atlantic & Pacific Tea Co. v. Industrial Comm'n,* 67 Ill. 2d 137, 143, 364 N.E.2d 83, 86 (1977)), if some notice has been given, although inaccurate or defective, then the employer must show that it has been unduly prejudiced (*Silica Sand*, 197 Ill. App. 3d at 651, 554 N.E.2d at 742).

¶ 31 Here, the Commission determined claimant gave timely notice. The evidence supports this determination. Claimant filed his application for compensation on November 1, 2004, and thereby gave notice to employer. See *Crane Co. v. Industrial Comm'n*, 32 Ill. 2d 348, 352, 205 N.E.2d 425, 427 (1965) (required notice satisfied by filing of claim for compensation under the Act). Further, claimant filed his application for compensation with the Commission within five years after claimant was last exposed. See 820 ILCS 310/6(c) (West 2002). Claimant's CWP was not diagnosed until Dr. Alexander reviewed his chest film of September 6, 2004. Dr. Houser's review of the same film occurred on October 7, 2004. There was, therefore, approximately a two-month lapse between diagnosis and filing. In any event, employer has made no showing of prejudice resulting from any delay in giving notice. Given such circumstances, the Commission's findings with respect to the issue of notice are not contrary to the manifest weight of the evidence.

¶ 32 Claimant next argues that the Commission properly found section 19(d) of the Act not applicable to reduce claimant's award. Section 19(d), by its plain terms, vests the Commission

with discretion to reduce an award where a claimant engages in an injurious or unsanitary practice. 820 ILCS 305/19(d) (West 2002) ("If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee"). There is no requirement that an injurious practice be the sole cause of a claimant's condition of ill-being for the Commission to reduce or deny compensation. See 820 ILCS 305/19(d) (West 2002). Rather, the Commission may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery. *Keystone Steel & Wire Co. v. Industrial Comm'n*, 72 Ill. 2d 474, 481, 381 N.E.2d 672, 675 (1978). Section 19(d) vests the Commission's discretion on this subject, so we will only overturn its decision if that discretion is abused. See *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 412, 911 N.E.2d 1042, 1047 (2009). An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the Commission. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947, 856 N.E.2d 602, 610 (2006).

¶ 33 The Commission did not abuse its discretion here. We begin with the well-established principle that "an employer takes his employees as he finds them." *Bocian v. Industrial Comm'n*, 282 Ill. App. 3d 519, 528, 668 N.E.2d 1, 6 (1996). Claimant is a smoker and, apparently, smoked throughout his career in coal mining. We see no evidence that claimant smoked cigarettes for the purpose of imperiling or retarding his recovery from CWP. In this case, claimant smoked in spite of its potential impact on his recovery, not because of it. The Commission did not abuse its discretion in determining that claimant should not be denied

recovery because of it.

¶ 34 We, therefore, reverse the judgment of the circuit court and reinstate the decision of the Commission which awarded the claimant benefits under the Act.

¶ 35 Judgment reversed; award reinstated.