2012 IL App (5th) 110373WC-U
NO. 5-11-0373WC
Order filed September 26, 2012

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CENTURION INDUSTRIES, INC., Appellant, v. WORKERS' COMPENSATION COMMISSION, *et al*. (Robert H. Brock, Appellee).	))))))))	Appeal from Circuit Court of Perry County No. 11MR16 Honorable Richard A. Aguirre, Judge Presiding.

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

ORDER

¶ 1 *Held*: The Commission's decisions as to accident and causal connection were supported by the record and not against the manifest weight of the evidence; however, the Commission erred in ordering employer to pay penalties and attorney's fees where employer relied upon responsible medical opinion in challenging liability.

¶ 2 On January 8, 2010, claimant, Robert H. Brock, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)), seeking benefits from employer, Centurion Industries, Inc. Following a hearing, the arbitrator determined claimant sustained injuries that arose out of and in the course of his employment on

December 18, 2009. He awarded claimant 18-1/7 weeks' temporary total disability (TTD) benefits, $4,500.05 in medical expenses, and $295.84 in mileage expenses. The arbitrator also ordered employer to pay (1) $6,184.04 in penalties pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2008)), (2) $1,800 in penalties pursuant to section 19(*l*) of the Act (820 ILCS 305/19(*l*) (West 2008)), and (3) $2,473.61 in attorney's fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2008)).

¶ 3 On review, the Workers' Compensation Commission (Commission) modified the arbitrator's decision by vacating a portion of his mileage award. It otherwise affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Perry County confirmed the Commission's decision. Employer appeals, arguing (1) the Commission's findings as to accident were against the manifest weight of the evidence, (2) the Commission's finding that claimant's condition of ill-being was causally connected to a work-related accident was contrary to law or against the manifest weight of the evidence, and (3) the Commission erred in awarding claimant penalties and attorney's fees. We affirm in part and reverse in part.

¶ 4 The parties are familiar with the evidence presented, and we discuss it only to the extent necessary to put their arguments in context. The record shows claimant worked for employer as a welder for approximately four months. On December 18, 2009, he was working for employer at a job site in Nebraska. He testified his duties on that date required him to break apart metal supports using two-by-fours and a pry bar. Claimant testified he pushed and pulled with both arms using the pry bar and, after an hour and a half to two hours, he noticed pain in his left shoulder. The following day, claimant sought emergency room care and reported left shoulder pain. On December 21, 2009, after returning to Illinois, claimant saw Dr. Robert Braco at

employer's direction. At arbitration, employer submitted deposition testimony from Dr. Braco, showing his opinion that claimant's left shoulder condition was not causally connected to claimant's employment. On February 1, 2010, Dr. George Paletta diagnosed claimant with a large anterior-superior labral tear and recommended surgical intervention.

¶ 5 On May 18, 2010, the arbitrator issued his decision, finding claimant sustained a work-related injury to his left shoulder on December 18, 2009, and awarding benefits as stated. On March 18, 2011, the Commission modified the arbitrator's award of mileage expenses but otherwise affirmed and adopted the arbitrator's decision. On September 8, 2011, the circuit court of Perry County confirmed the Commission's decision.

¶ 6 This appeal followed.

¶ 7 On appeal, employer first argues the Commission's finding as to accident was against the manifest weight of the evidence. It contends claimant's testimony on the matter was not credible and his medical records were contradictory. Employer argues that the Commission should have relied on the medical records and testimony of Dr. Braco to find no accident occurred.

¶ 8 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). Generally, an injury arises "in the course of employment" if it occurs within the time and space boundaries of the employment. *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 671. "The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant shows "that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and

the accidental injury." *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 672.

¶ 9 Whether a claimant's injury arises out of and in the course of employment is a question of fact to be decided by the Commission and, on review, its decision will not be overturned unless it is against the manifest weight of the evidence. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013, 944 N.E.2d 800, 803 (2011). "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). "A finding of fact is contrary to the manifest weight of the evidence only where an opposite conclusion is clearly apparent." *Metropolitan*, 407 Ill. App. 3d at 1013, 944 N.E.2d at 803. "The appropriate test is whether there is sufficient evidence in the record to support the Commission's finding, not whether this court might have reached the same conclusion." *Metropolitan*, 407 Ill. App. 3d at 1013, 944 N.E.2d at 803.

¶ 10 Here, evidence showed claimant had no prior history of left shoulder problems. At arbitration, he testified he noticed pain in his left shoulder after using a pry bar at work on December 18, 2009. Evidence further showed claimant immediately reported his injury to employer. Additionally, medical records show claimant consistently reported to his medical providers that his left shoulder pain originated at work while he was performing his job duties. Specifically, on December 19, 2009, claimant sought emergency room care and reported a two-day history of left shoulder pain after "lifting some heavy objects while doing some manual labor." Dr. Braco's records, dated December 21, 2009, show claimant reported he was at work

performing his "normal duties" when his left shoulder began hurting. Finally, on January 27, 2010, claimant saw Dr. Paletta and complained of left shoulder pain that originated after working on December 18, 2009, "on some rigging on a crane."

¶ 11 Employer points out that claimant's medical records fail to reference his use of a pry bar before he began experiencing left shoulder pain. However, claimant's reports of noticing left shoulder pain at work after "lifting some heavy objects," performing manual labor, or performing his "normal duties" are not necessarily inconsistent with his more detailed accident description at arbitration. The Commission adopted the arbitrator's express finding that claimant was credible, and it was within the province of the Commission to make such a finding. Further, although employer relies on Dr. Braco's deposition testimony that claimant stated his left shoulder began hurting "while he was outdoors waiting for a crane," Dr. Braco's own records were inconsistent with his deposition testimony and show only that claimant was performing his "normal duties" at work on the date his symptoms originated.

¶ 12 Evidence supports the Commission's finding as to accident. Its decision was not against the manifest weight of the evidence.

¶ 13 On appeal, employer also challenges the Commission's decision that claimant's left shoulder condition of ill-being was causally connected to his employment. It notes the only medical opinion regarding causal connection came from Dr. Braco who determined claimant's shoulder injury was not work related. Employer contends that, not only was the Commission's decision against the manifest weight of the evidence, but the Commission erred as a matter of law by refusing to accept the sole medical evidence offered regarding causal connection. Further, it maintains the remaining evidence in the case falls short of establishing causation, asserting

none of the medical evidence supported claimant's testimony that he used a pry bar on the day of his alleged work accident.

¶ 14 "A claimant has the burden of proving all the elements of his case in order to recover benefits under the *** Act." *Illinois Bell Telephone Co. v. Industrial Comm'n*, 265 Ill. App. 3d 681, 685, 638 N.E.2d 307, 310 (1994). "Medical testimony is not essential to support the conclusion that an accident caused a claimant's condition of ill-being" (*University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 912, 851 N.E.2d 72, 78 (2006)) and "[a] claimant's testimony, standing alone, may support an award where all of the facts and circumstances do not preponderate in favor of the opposite conclusion" (*Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 35, ___ N.E.2d ___, ___). Further, "[a] chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64, 442 N.E.2d 908, 911 (1982).

¶ 15 As noted, employer contends the Commission erred as a matter of law by refusing to accept and rely upon the sole medical evidence offered regarding causal connection, *i.e.*, Dr. Braco's testimony that claimant's shoulder condition was not causally connected to his employment. Where the facts of a case "are undisputed and are susceptible to only a single reasonable inference, the question of whether an injury arose out of the claimant's employment is one of law to be reviewed *de novo*." *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 104-05, 853 N.E.2d 799, 803 (2006). "However, if more than one inference may be drawn from the undisputed facts, the Commission's determination will not be disturbed unless it is

against the manifest weight of the evidence." *First Cash*, 367 Ill. App. 3d at 105, 853 N.E.2d at 803. Here, despite Dr. Braco's expressed opinion on causation, the evidence in the case was susceptible to more than a single reasonable inference. The appropriate standard of review is the manifest-weight-of-the-evidence standard.

¶ 16 The Commission found a causal connection between claimant's employment and his left shoulder condition of ill-being, adopting the following findings of the arbitrator:

> "[Claimant's] left shoulder condition is causally related to his work on December 18, 2009. This is based upon the chain of events and [employer's] physician[,] Dr. Braco's[,] admission that use of pry bars and [two-by-fours] could have caused or aggravated [claimant's] left shoulder condition."

The record supports the Commission's decision.

¶ 17 As stated, claimant had no prior history of injuries to his left shoulder. After working December 18, 2009, he consistently reported left shoulder pain to his medical providers. Although Dr. Braco opined no causal connection existed between claimant's injury and his employment, Dr. Braco's testimony regarding claimant's reported accident history, upon which he based his opinion, was contradicted by the history recorded in Dr. Braco's own medical records. At his deposition, Dr. Braco testified claimant reported feeling pain in his left shoulder "while he was outdoors waiting for the crane"; however, Dr. Braco's medical records reflect claimant stated "he was working, doing his normal duties" on the accident date and make no mention of "waiting for a crane." Moreover, the Commission found claimant credible when he testified that he noticed shoulder pain after using a pry bar at work. Dr. Braco acknowledged that "the use of a

pry bar *** could injure the shoulder in terms of tearing a labrum or biceps or subscapular muscle in terms of sufficient force and duration." Dr. Paletta diagnosed claimant with a large anterior-superior labral tear.

¶ 18 Again, evidence in the record supports the Commission's factual findings. Its causal-connection decision was not against the manifest weight of the evidence.

¶ 19 Finally, employer argues the Commission erred in its award of penalties and attorney's fees. Under the Act, a claimant may be awarded penalties and attorney's fees as a result of certain conduct by employer. 820 ILCS 305/19(k), 19(*l*), 16 (West 2008). Penalties may be ordered pursuant to section 19(*l*) when the employer or its insurer "without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits." 820 ILCS 305/19(*l*) (West 2008). Additionally, compensation may be awarded under sections 19(k) and 16 of the Act where there is an unreasonable or vexatious delay of payment, intentional underpayment, or the instituting or carrying on of proceedings that are frivolous or for the purpose of delay. 820 ILCS 305/19(k), 16 (West 2008).

¶ 20 "An employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act." *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173, 746 N.E.2d 751, 756 (2001). Penalties are generally not imposed when there are conflicting medical opinions, or when the employer acts in reliance upon responsible medical opinion. *Matlock*, 321 Ill. App. 3d at 173, 746 N.E.2d at 756. Whether to award penalties and attorney's fees presents a factual question for the Commission, and we will not disturb its decision on such matters unless it is contrary to the manifest weight of the evidence. *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 413-14, 911 N.E.2d 1042, 1048 (2009).

¶ 21 Here, we agree with employer and find the Commission erred in awarding claimant penalties and attorney's fees. Although the Commission's ultimate findings of accident and causal connection are supported by the record and not against the manifest weight of the evidence, the record contains conflicting medical opinion upon which employer relied to challenge its liability. Dr. Braco opined claimant's left shoulder injury was not causally connected to claimant's work for employer. He based his opinion on the accident history claimant provided which showed only that claimant was working and performing his normal duties.

¶ 22 The Commission erred in awarding claimant penalties and attorney's fees pursuant to sections 19(k), 19(*l*), and 16 of the Act. We reverse the portion of the circuit court's decision which confirmed the Commission's penalties and fees award and otherwise affirm the circuit court's decision.

¶ 23 For the reasons stated, we affirm in part and reverse in part the circuit court's judgment.

¶ 24 Affirmed in part and reversed in part.