2013 IL App (5th) 120008WC-U

NO. 5-12-0008WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BRIAN C. FLOWERS, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Mid-American Gunite, Inc., Appellee).	)))))))))	Appeal from the Circuit Court of Madison County. No. 11-MR-19 Honorable Clarence W. Harrison II, Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.

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

ORDER

¶ 1 *Held*: The Commission's finding that the claimant failed to prove that his conditions of ill-being in his neck and left shoulder are causally related to a workplace accident is not against the manifest weight of the evidence. The claimant waived his objection to the employer's briefs filed with the Commission and in the circuit court by failing to object to the briefs in the lower proceedings. The claimant waived any argument concerning his right to choose a physician by failing to raise the issue before the Commission and the circuit court.

¶ 2 The claimant, Brian C. Flowers, worked for the employer, Mid-American Gunite, Inc., as a laborer. He maintains that he suffers from conditions of ill-being in his neck and left shoulder as a result of working for the employer for five days in May 1997, operating a jackhammer part of the time. The Illinois Workers' Compensation Commission (Commission) found that the claimant's conditions were the result of a normal degenerative process and not from the claimant's work activities. The circuit court confirmed the

Commission's decision, and this appeal ensued.

¶ 3 BACKGROUND

¶ 4 The claimant was hired by the employer to work on relining a blast furnace at a job site located at Granite City Steel in Granite City, Illinois. He worked for the employer for a total of five days. On May 15, 1997, the claimant used a jackhammer to break up slag. He testified that he had to lie on his left side and hold the jackhammer with his left arm in an awkward position while in a confined area. While doing this, he felt a burning sensation in his left forearm and pain in his left shoulder. He did not report the pain that day, but went home and woke up from his sleep at 2 a.m. with pain down his left arm.

¶ 5 The claimant went to the emergency room on May 17, 1997, with complaints of pain in his left hand and forearm. The attending physician diagnosed the claimant as having tendon strain and noted overuse syndrome of both forearms. The ER records do not indicate that the claimant complained of neck or shoulder symptoms.

¶ 6 The claimant followed up with a chiropractor, Dr. Lawrence Shipley, on May 19, 1997, with complaints of left forearm pain, left hand numbness with very little dexterity, right hand numbness, and pain and stiffness in the lower neck. Thereafter, the claimant treated with Dr. Shipley.

¶ 7 The claimant first saw an orthopedic surgeon, Dr. Schoedinger, on May 15, 1998, nearly a year after working for the employer. He complained of headaches, persistent posterior neck pain and interscapular pain, and difficulty gripping objects with either hand. An MRI of the claimant's cervical spine showed a soft disc protrusion at C5-6 with encroachment on the right side. Dr. Schoedinger's impression was that the claimant had suffered a cervical disc rupture.

¶ 8 On October 19, 1998, Dr. Schoedinger noted that the claimant reported that his cervical pain had decreased significantly. Dr. Schoedinger did not recommend any further

care with respect to the claimant's cervical spine. He referred the claimant to Dr. Haueisen, an orthopedic surgeon, for right wrist complaints.

¶ 9 The claimant saw Dr. Haueisen on October 22, 1998, and reported complaints of bilateral wrist pain since being injured at work on May 17, 1997. Dr. Haueisen's diagnosis was chronic strain or derangement of the wrist. He administered a cortisone injection in the claimant's right wrist which provided no substantive relief. In November 1998, the claimant complained that he had developed bilateral hand tremor.

¶ 10 On November 23, 1998, the claimant returned to Dr. Schoedinger with increased neck symptoms after he helped another person lift a tiller into the rear of a truck. The claimant was experiencing pain that radiated into his upper left limb, but a repeat cervical MRI showed no interval change.

¶ 11 The claimant saw a general practitioner, Dr. Orgel, on June 7, 1999. Dr. Orgel's examination of the claimant's back and upper extremities was normal. In December 1999, he referred the claimant to a neurosurgeon, Dr. Mendelsohn, for his neck symptoms.

¶ 12 Dr. Mendelsohn examined the claimant on February 16, 2000. Dr. Mendelsohn noted that the claimant had neurologic symptoms for which there is no explanation. He further wrote as follows:

> "The small defect seen at C5-6 on the right could not be responsible for his bilateral symptoms, and, certainly, not for the left-sided symptoms. There are many features of examination that are suggestive for a functional disorder. I think this patient does not have any ongoing neurologic process. I do not believe any surgery is indicated nor is there a need for further investigation. I believe he has not sustained any permanent partial disability."

¶ 13 On September 25, 2000, the claimant was examined by another orthopedic surgeon, Dr. Emanuel. Dr. Emanuel's diagnosis was early AC arthritis in the left shoulder, possible

rotator cuff tear, degenerative disc disease of the cervical spine, and possible bilateral carpal tunnel syndrome. He recommended a left shoulder MRI and EMG/NCS of the claimant's upper extremities.

¶ 14 At the request of the employer, the claimant submitted to an independent medical examination (IME) conducted by Dr. Kennedy on March 6, 2001. Dr. Kennedy reported that the only noticeable aspect of his physical examination was minimal slight tenderness at the base of the claimant's cervical spine on the left. He reviewed the MRI of the claimant's cervical spine and noted the small prolapse at C5-6 that encroached minimally on the nerve root. He did not believe that the small bulging at C5-6 was pathologic or represented a disease process. Dr. Kennedy testified that neither his physical examination nor the MRI accounted for the claimant's diffused nonlocalized pain complaints. He opined that the claimant's complaints did not correlate to his employment and that the claimant was at maximum medical improvement (MMI) on March 6, 2001.

¶ 15 On November 8, 2002, the claimant saw Dr. Benzaquen, a neurologist, with complaints of constant neck pain that radiated to both arms, left more than right. Dr. Benzaquen's diagnosis was C5-6 radiculopathy. Another cervical MRI revealed posterior disc herniation at C5-6 lateralizing to the right with slight cord impingement. Dr. Benzaquen referred the claimant to another neurosurgeon, Dr. Cole, who was a partner of Dr. Mendelsohn.

¶ 16 Dr. Cole examined the claimant on November 25, 2002. Dr. Cole was unaware of any of the claimant's work activities other than Dr. Mendelsohn's notes that referred to jackhammering. Dr. Cole ordered an EMG/NCS which revealed findings consistent with bilateral carpal tunnel syndrome. He testified that the carpal tunnel syndrome was not work-related but was idiopathic. With respect to the claimant's cervical condition, he noted that the claimant's cervical complaints were worse in 2000 than in 1998, which was consistent

with a degenerative process.

¶ 17 He opined that there was a relationship between the cervical disc herniation and the May 1997 work activities. However, Dr. Cole did not review the 1998 MRI of the claimant's cervical spine that Dr. Mendelsohn had relied on in concluding that the claimant was not a candidate for surgery at that time. Dr. Cole also testified that if the claimant's jackhammering had caused a cervical disc herniation, the claimant would have had symptoms within 24 hours.

¶ 18 In December 2003, Dr. Cole performed an anterior cervical diskectomy and fusion at C5-6 and a right and a left carpal tunnel release.

¶ 19 The claimant saw Dr. Emanuel again in February 2006. X-rays revealed acromioclavicular joint arthritis, and an MRI showed no evidence of a rotator cuff tear but showed signs of tendon inflammation. In March 2006, Dr. Emanuel performed arthroscopic surgery on the claimant's left shoulder. According to Dr. Emanuel, based upon a history of the claimant lying on his shoulder while operating a jackhammer, he believed that the work activities probably aggravated some arthritic changes in the claimant's acromioclavicular joint. He believed that the claimant would be able to return to work as a laborer after the surgery. Dr. Emanuel offered no opinions with respect to the claimant's neck conditions.

¶ 20 On October 4, 2006, at the request of the employer, the claimant underwent an IME conducted by an orthopedic surgeon, Dr. Ritchie. Dr. Ritchie noted that the claimant's shoulder had excellent range of motion without any significant pain or weakness. Dr. Ritchie testified that the claimant's left shoulder complaints were not due to his job duties with the employer. He noted that in the initial ER visit, the claimant's complaints were numbness and tingling with no shoulder complaints. He explained that someone who injures his shoulder using a jackhammer would know it immediately because it is a specific event. He opined that the claimant's findings with respect to his shoulder, such as AC joint arthritis, could not

have developed as a result of five days of work for the employer.

¶ 21 On December 11, 2006, the claimant saw Dr. Lescher, another orthopedic surgeon. The claimant complained of neck pain and bilateral upper extremity pain, left greater than right. Another MRI revealed status post fixation C5-6, multilevel degenerative disc disease, uncovertebral osteoarthritis without canal or foraminal stenosis, and an enlarged thyroid.

¶ 22 In April 2007, the claimant began treating with a new chiropractor, Dr. Brasfield, without a referral. Dr. Brasfield's diagnosis was cervical segmental dysfunction, sprain and strains of the neck, thoracic segmental dysfunction, sprains and strains of the thoracic spine, lumbar segmental dysfunction, sprains and strains of the lumber spine, sprain and strains of the lumbosacral joint/ligament pain in limb, and shoulder pain. She believed that it was "possible" that the claimant's conditions were causally related to jackhammering in 1997. She testified that she could not be more specific with her causation opinion because she first saw the claimant nearly 10 years after his injury.

¶ 23 Dr. Kennedy reevaluated the claimant in September 2007. He did not believe that Dr. Cole's cervical surgery was related to the claimant's work duties for the employer because the claimant did not have a disc herniation when he first examined him in 2001. Instead, there was only a "really minor" bulge at C5-6 that was not abnormal and was not caused by any injury.

¶ 24 The claimant has not worked since May 1997 and has been on social security disability since December 1, 2001.

¶ 25 At the conclusion of the arbitration hearing, the arbitrator found as follows:

> "[The claimant] has failed to prove that his neck condition for which he underwent surgery *** or left shoulder condition is causally related to his work injury. This is based on his inconsistent testimony, the treatment records and opinions of the physicians involved, mostly all of which were chosen by him."

¶ 26 With respect to the claimant's neck, the arbitrator found that the "need for neck surgery was due to the on-going progression of [the claimant]'s pre-existing degenerative disc disease." Concerning the claimant's left shoulder, the arbitrator noted that the claimant did not initially complain about his shoulder "in the 2 ER visits, to Dr. Schoedinger, Dr. Haueisen, Dr. Mendelsohn, Dr. Benzaquen, or Dr. Cole." The claimant did not voice shoulder complaints until he saw Dr. Emanuel in September 2000, and he did not seek further treatment for the shoulder until February 2006. The arbitrator concluded that the operative findings "are entirely consistent with the degenerative process."

¶ 27 The arbitrator also denied benefits for the conditions of the claimant's low back and for bilateral carpal tunnel syndrome, finding that the claimant failed to prove causation.

¶ 28 The claimant appealed the arbitrator's decision to the Commission, and the Commission unanimously affirmed and adopted the arbitrator's decision in its entirety. The claimant appealed to the circuit court, and the circuit court entered a judgment that confirmed the Commission's decision. In confirming the Commission's decision, the circuit court noted as follows:

> "[The claimant]'s proof of causation is impeded by multiple factors including: the limited time with the employer, the difficulty identifying the precise injury at the time of the accident, significant gaps in treatment, and multiple conflicting medical opinions. The record in this proceeding is lengthy with many pieces of conflicting factual evidence. Among that conflicting factual evidence is sufficient evidence to support the decision by the Commission to deny benefits. As a result, the Court does not find that the Commission's decision is against the manifest weight of the evidence."

¶ 29 The claimant now appeals the circuit court's judgment, and for the following reasons, we affirm.

¶ 30 ANALYSIS

¶ 31 I

¶ 32 Causation

¶ 33 To establish causation under the Workers' Compensation Act (820 ILCS 305/1 to 30 (West 2010)), a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 592 (2005). It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Republic Steel Corp. v. Industrial Comm'n*, 26 Ill. 2d 32, 45, 185 N.E.2d 877, 884 (1962). Whether a causal connection exists between a claimant's condition of ill-being and his employment is an issue of fact to be decided by the Commission. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 160 (2011). The Commission's findings with respect to factual issues are reviewed under the manifest weight of the evidence standard. *Id*.

¶ 34 "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009). The appropriate test is not whether this court might have reached the same conclusion, but whether the record contains sufficient evidence to support the Commission's determination. *R&D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010).

¶ 35 "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).

Resolution of conflicts in medical testimony is also within the province of the Commission. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003). On review, a court "must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence." *Id*.

¶ 36 Reviewing the record under these standards, we cannot conclude that the Commission's findings with respect to causation are against the manifest weight of the evidence.

¶ 37 (a)

¶ 38 Conditions of Ill-Being in the Claimant's Neck

¶ 39 In denying benefits for conditions of ill-being in the claimant's neck, the Commission adopted the arbitrator's finding that his neck surgery was for a preexisting degenerative disc disease, not from the workplace accident. The workplace accident occurred in May 1997, and the claimant's neck surgery took place in December 2003. Immediately after the workplace accident, the claimant's complaints were related to hand and forearm pain and tingling as a result of using a jackhammer, not neck pain. An MRI in 1998 showed a soft protrusion at C5-6 with encroachment on the right side, but the claimant's complaints were on his left side. Dr. Schoedinger released the claimant to light-duty work, and by October 1998, Dr. Schoedinger reported that the claimant's cervical pain had decreased significantly. The doctor did not recommend any further care with respect to his cervical spine.

¶ 40 The Commission also noted that the claimant's own neurosurgeon, Dr. Mendelsohn, saw the claimant in February 2000 and opined that the small C5-6 defect on the right side could not be responsible for the claimant's symptoms. He did not believe that the claimant has sustained a permanent partial disability, believed that many features of his examination

suggested a functional disorder, and believed that surgery was not indicated. The Commission also relied on evidence that in March 2001, Dr. Kennedy agreed with Dr. Mendelsohn's findings and opined that the claimant had minimal findings with respect to his cervical spine, that he had sustained no permanent injury as a result of the accident, and that his neck condition was unrelated to his work activities. Dr. Kennedy described the C5-6 bulge shown in the claimant's 1998 MRI as a "really minor" bulge that was not abnormal and was not caused by any injury.

¶ 41 The claimant had the burden of proving that his injuries are work-related and not the result of a normal degenerative process. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979, 983 (2001). The Commission's findings with respect to the claimant's neck conditions are supported by the medical evidence contained in the record.

¶ 42 (b)

¶ 43 Conditions of Ill-Being in the Claimant's Left Shoulder

¶ 44 With respect to the claimant's left shoulder, the Commission again noted that the claimant did not initially complain about his shoulder after the workplace accident. The arbitrator's decision adopted by the Commission states as follows: "He did not complain of his shoulder in the 2 ER visits, to Dr. Schoedinger, Dr. Haueisen, Dr. Mendelsohn, Dr. Benzaquen, or Dr. Cole. His complaints were left forearm pain." The claimant's medical records indicate that he began complaining of shoulder symptoms in February 2000 when he saw Dr. Emanuel and that there was no change in his condition from 2000 to 2006.

¶ 45 Dr. Emanuel performed left shoulder surgery in March 2006 and opined that the claimant's work duties for the employer probably aggravated some arthritic changes in his AC joint. His opinion was based on the history of the claimant lying on his shoulder for 12 hours a day, five days in a row. However, when the claimant saw Dr. Shipley on May 19,

1997, the claimant described his work activities as follows: "After working for the last four days of a 5 day job *** The last day I was put on a air jackhammer for approx. 5 hrs alternating with only 1 other person. We were working in tight quarters *** It was very hot and I had to lay on my left-side and leaning on my left elbow propping up the jackhammer to get the appropriate angle." He did not report that he laid on his shoulder for 12 hours a day, five days in a row. In addition, the claimant was examined by Dr. Ritchie in October 2006, and he opined that the claimant's left shoulder complaints were not due to his work activities for the employer. He noted that in the first ER visit, the claimant's complaints were numbness and tingling with no shoulder complaints. Based on this evidence, we cannot say that the Commission's findings with respect to causation of the claimant's left shoulder conditions are against the manifest weight of the evidence.

¶ 46 (c)

¶ 47 Conditions of Ill-Being in the Claimant's Low Back

¶ 48 In his brief before the Commission, the claimant did not dispute the arbitrator's finding that he failed to prove a causal connection with respect to conditions of his low back. The claimant wrote in his statement of exceptions filed with the Commission as follows: "[B]y the time of the arbitration hearing, [the claimant]'s counsel was not claiming that his employment caused his low-back condition. He is not claiming it here." Accordingly, we affirm the Commission's findings with respect to the claimant's low back.

¶ 49 (d)

¶ 50 Bilateral Carpal Tunnel Syndrome

¶ 51 The claimant conceded the causation issue with respect to his bilateral carpal tunnel syndrome in his statement of exceptions filed with the Commission. The claimant noted that causation with respect to his carpal tunnel was disputed at the arbitration hearing, but that the claimant "grudgingly concedes that the evidence of cause was too thin to press convincingly

on review."

¶ 52 II.

¶ 53 The Employer's Briefs Filed With the Commission and Circuit Court

¶ 54 The claimant argues that the briefs the employer submitted to the Commission and to the circuit court did not comply with Illinois Supreme Court Rule 341 (eff. July 1, 2008) in that the briefs did not provide appropriate references to pages in the record on appeal. Nothing in the record indicates that the claimant objected to the employer's briefs filed with the Commission or with the circuit court until the present appeal. Accordingly, the claimant's contentions are waived. It is a well-settled rule that the failure to raise an issue before the Commission or the circuit court results in its waiver. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020, 832 N.E.2d 331, 348 (2005); *May v. Industrial Comm'n*, 195 Ill. App. 3d 468, 472, 552 N.E.2d 258, 260 (1990) (claimant waived her *res judicata* challenge to the Commission's decision where she did not present the issue to the circuit court).

¶ 55 III.

¶ 56 The Claimant's Right to Choose a Physician

¶ 57 The claimant's final argument is couched in terms of his right to choose a physician under section 8 of the Act (820 ILCS 305/8(a) (West 2010) ("The employee may at any time elect to secure his own physician, surgeon and hospital services at the employer's expense ***.")). Again, the claimant did not raise this issue before the Commission or the circuit court. This issue, therefore, is also waived. *Greaney*, 358 Ill. App. 3d at 1020, 832 N.E.2d at 348; *May*, 195 Ill. App. 3d at 472, 552 N.E.2d at 260.

¶ 58 CONCLUSION

¶ 59 For the foregoing reasons, we affirm the judgment of the circuit court that confirmed the Commission's decision.

¶ 60 Affirmed.