2013 IL App (5th) 120143WC-U

NO. 5-12-0143WC

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CONSOLIDATION COAL COMPANY, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Roy Yanez, Appellee).	)))))))	Appeal from Circuit Court of Jefferson County No. 11MR48 Honorable Timothy R. Neubauer Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.

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

ORDER

¶ 1 *Held*: The Commission's finding (1) of jurisdiction over claimant's workers' compensation claim was not against the manifest weight of the evidence and (2) that claimant suffered injuries as a result of exposure to an occupational disease was not against the manifest weight of the evidence.

¶ 2 On October 9, 2007, claimant, Roy Yanez, filed an application for adjustment of claim pursuant to the Occupational Diseases Act (Act) (820 ILCS 310/1 to 27 (West 2006)), seeking benefits from the employer, Consolidation Coal Company. After a hearing, an arbitrator denied claimant benefits by reason of a lack of jurisdiction. Claimant filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On review, a majority of the Commission reversed the arbitrator's decision

finding (1) jurisdiction proper and (2) claimant proved he suffered injuries as a result of exposure to an occupational disease. The Commission awarded claimant benefits pursuant to section 8(d)(2) of the Workers' Compensation Act (Compensation Act) (820 ILCS 305/8(d)(2) (West 2006)), for permanent partial disability to the extent of 5% of the man as a whole. Thereafter, the employer filed a petition seeking judicial review in the circuit court of Jefferson County. On March 15, 2012, the circuit court confirmed the Commission's decision.

¶ 3 The employer appeals, arguing the Commission's finding (1) of jurisdiction over claimant's workers' compensation claim is against the manifest weight of the evidence and (2) that claimant suffered injuries as a result of exposure to an occupational disease is against the manifest weight of the evidence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing on February 4, 2010. The 59-year-old claimant worked in above-ground and below-ground coal mining for approximately 23 years where he was regularly exposed to coal dust. Claimant began work for the employer on October 31, 1978. Claimant testified that he began experiencing shortness of breath in approximately 1999 and developed a dry cough within the past three or four years. Claimant worked at the Wheeler Creek and Rend Lake mines in Illinois until July 8, 2002, when employer closed the Rend Lake mine and laid claimant off from work.

¶ 6 The employer, as a member of the Bituminous Coal Operators Association, and the United Mine Workers of America (of which claimant is a member) entered into a collective bargaining agreement providing in part for layoff and recall procedures. The agreement provides

that an employer fill certain vacancies with "classified laid off Employee's [*sic*] on the panels of the Employer's operations." Further, the agreement directs an employer to "review the list of Employees on the panel from other mines and the Employer shall recall to employment Employees on layoff status in *** order." The employer recalled claimant for a job at its Emery mine in Utah. Claimant completed a required physical examination and began work on March 13, 2003, and employer laid claimant off from work on September 2, 2003. Claimant returned to his home in Bluford, Illinois.

¶ 7 The employer next advised claimant by letter of a work opportunity at its Loveridge mine in West Virginia. Claimant spoke with a manager of the employer at a location in Mt. Vernon, Illinois, concerning the position at Loveridge mine. Claimant confirmed his interest in working at the mine and immediately began completing the various tasks required by employer for claimant to begin work. Claimant began work as a longwall mechanic/electrician at the mine on March 10, 2004, and continued to work until September 12, 2006, when he suffered an injury to his knee.

¶ 8 Thomas Hudson testified that he was a supervisor of human resources for employer. He notified claimant of the position at Loveridge mine. According to Hudson, claimant "could have turned us down, or he could have agreed to go for a physical and come to work for us." The employer provided recalled employees approximately five days to accept or decline a position. Even if claimant chose not to work at the Loveridge mine, he retained his right of recall to employment at mines he identified on a panel form. Further, claimant could renew his rights at the Loveridge mine if employer laid claimant off from work again and claimant completed a new panel form that included Loveridge mine. Hudson stated that claimant

began work for the employer on March 15, 1979, at the Wheeler Creek mine in Illinois. Hudson agreed that whenever claimant worked at a mine owned by the employer, he was an employee of the employer. Claimant had not been terminated from his employment with the employer.

¶ 9 Claimant testified that he told his supervisor at the Loveridge mine that he was having breathing problems within 45 days of his last exposure. Claimant started smoking when he was 18 or 19 and quit in 1998 or 1999. He smoked approximately 1/2 a pack of cigarettes a day. Claimant testified he currently uses an inhaler that was prescribed by an emergency room physician at Good Samaritan Hospital, Mt. Vernon, Illinois.

¶ 10 Medical records from Monongalia General Hospital in West Virginia indicated claimant underwent chest x-rays on October 7, 2005, and September 12, 2006. According to the medical notes, the 2005 film showed good lung expansion, "no infiltrates or congestive change," and normal cardio-vascular structures. The final impression stated: "Negative portable chest." The 2006 x-ray revealed no acute infiltration in the visualized lung fields. The final impression stated: "No evidence of acute process."

¶ 11 On October 9, 2007, claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits from the employer. Claimant alleged an accident date of September 12, 2006, his last day of employment at the Loveridge mine. Claimant sought benefits for "pneumoconiosis, heart, lungs, exercise intolerance, and breathing impairment" caused by exposure to coal, coal dust, rock dust, fumes and vapors during the course of his employment, in excess of 20 1/2 years.

¶ 12 Claimant submitted the deposition and report of board certified pulmonologist and B-reader, Dr. Robert Cohen. Dr. Cohen examined claimant for purposes of his federal black lung

claim on June 28, 2008. Claimant reported shortness of breath upon exertion for approximately 10 years and a dry cough. Dr. Cohen reviewed claimant's chest x-ray taken on March 10, 2008. Dr. Cohen diagnosed claimant with coal workers' pneumoconiosis (CWP) at a 1/0 ILO classification level, resulting from 23 years of exposure to coal mine dust. He recommended that claimant not return to mining.

¶ 13 The employer submitted the report and deposition testimony of board certified pulmonologist and B-reader, Dr. Byron Westerfield. Dr. Westerfield reviewed claimant's chest film dated March 10, 2008, and opined claimant did not have CWP and could return to work as a miner.

¶ 14 After the hearing, the arbitrator denied claimant benefits by reason of a lack of jurisdiction. Specifically, the arbitrator found "the last acts necessary to complete the employment contract occurred in West Virginia" and therefore, Illinois jurisdiction was not proper.

¶ 15 Claimant filed a petition for review of the arbitrator's decision before the Commission. On review, a majority of the Commission reversed the arbitrator's decision finding jurisdiction proper where "the contract of employment between Petitioner and Respondent was formed in Illinois." Further, the Commission found claimant proved he suffered injuries as a result of exposure to an occupational disease and awarded claimant benefits. Thereafter, the employer filed a petition seeking judicial review in the circuit court of Jefferson County. On March 15, 2012, the circuit court confirmed the Commission's decision and this appeal followed.

¶ 16 II. ANALYSIS

¶ 17 The employer argues that the Commission's finding of jurisdiction over claimant's

workers' compensation claim is against the manifest weight of the evidence. Specifically, the employer argues claimant's employment was not continuous from 1978 to 2006 due to his various layoffs and thus, the original Illinois employment contract was broken. Thereafter, the employer argues, the last acts necessary to give validity to the contract for hire at the Loveridge mine were effected in West Virginia, not Illinois.

¶ 18 Section 1(b)(2) of the Act defines "employee" as:

> "Every person in the service of another under any contract of hire, express or implied, oral or written, who contracts an occupational disease while working in the State of Illinois, or who contracts an occupational disease while working outside of the State of Illinois but where the contract of hire is made within the State of Illinois, and any person whose employment is principally localized within the State of Illinois, regardless of the place where the disease was contracted or place where the contract of hire was made ***. An employee *** under this Act who shall have a cause of action by reason of an occupational disease, disablement or death arising out of and in the course of his or her employment may elect or pursue his or her remedy in the State where the disease was contracted, or in the State where the contract of hire is made, or in the State where the employment is principally localized." 820 ILCS 310/1(b)(2) (West 2006).

¶ 19 Illinois has jurisdiction over claims under the Act asserted by persons whose

employment is outside the State of Illinois "where the contract of hire is made within the State of Illinois." 820 ILCS 310/1(b)(2) (West 2006); see also *Mahoney v. Industrial Comm'n*, 218 Ill. 2d 358, 374, 843 N.E.2d 317, 326 (2006); *Chicago Bridge & Iron, Inc. v. Industrial Comm'n*, 248 Ill. App. 3d 687, 691, 618 N.E.2d 1143, 1147 (1993); *Energy Erectors, Ltd. v. Industrial Comm'n*, 230 Ill. App. 3d 158, 161, 595 N.E.2d 641, 643 (1992). A contract for hire is made where the last act necessary for the formation of the contract occurs. *Cowger v. Industrial Comm'n*, 313 Ill. App. 3d 364, 370, 728 N.E.2d 789, 793 (2000); see also *Chicago Bridge & Iron*, 248 Ill. App. 3d at 691, 618 N.E.2d at 1147 (contract for hire is made "where the last act necessary to give it validity occurs").

¶ 20 Whether a contract for hire was made within Illinois is a question of fact for the Commission to determine, and the Commission's decision will not be disturbed unless it is against the manifest weight of the evidence. *Energy Erectors*, 230 Ill. App. 3d at 161, 595 N.E.2d at 643; see also *Chicago Bridge & Iron*, 248 Ill. App. 3d at 691, 618 N.E.2d at 1147. A decision is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 949, 949 N.E.2d 198, 204 (2011). The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833, 769 N.E.2d 66, 71 (2002). "A reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006).

¶ 21 The Commission's determination that the contract of hire took place in Illinois was not against the manifest weight of the evidence and thus provided a basis for Illinois jurisdiction. Claimant began work for the employer in 1978, and continued to work for the employer until September 12, 2006. Claimant did not work for anyone else. Claimant was laid off from work by the employer multiple times during his 23-year career in mining. Following each layoff, the employer recalled claimant to work at mines in Illinois, Utah, and West Virginia, each mine owned by the employer. Hudson testified that claimant had never been terminated from his employment with the employer.

¶ 22 Further, claimant testified that he worked as a longwall mechanic/electrician in West Virginia, a position he held in Illinois while working for the employer. Claimant was not required to complete an employment application and did not enter into a new contract for hire with the employer. Rather, he and the employer resumed the ongoing relationship initially established in Illinois. A different result may have been obtained if claimant had never worked for the employer prior to the employer advising claimant of a work opportunity in West Virginia, or if claimant had regularly worked for others during his 23-year career in mining. Claimant's contract of hire was made in Illinois when he began work for the employer in 1978, and it did not cease after the various layoffs.

¶ 23 The employer relies on *Youngstown Sheet & Tube Co. v. Industrial Comm'n*, 79 Ill. 2d 425, 404 N.E.2d 253 (1980). *Youngstown* is clearly inapposite upon its facts. In *Youngstown*, the supreme court applied the place-of-hire test, finding it apparent from a reading of section 1(b)(2) of the Compensation Act that "an out-of-State injury falls within the Act where the contract of employment was made in Illinois." *Youngstown*, 79 Ill. 2d at 430, 404 N.E.2d at

256. The court concluded, however, that a new contract of employment was formed in Indiana following the termination of the employment relationship in Illinois, noting the claimant had no right to employment at the Indiana plant, was interviewed for employment in Indiana, underwent a preemployment physical examination in Indiana, received a new employee identification number, joined a different local of the union, and was not placed in a position comparable to his Illinois employment. *Youngstown*, 79 Ill. 2d at 433, 404 N.E.2d at 257. Further, the necessary documents for employment were executed in Indiana and the claimant had already received payments under the Indiana workers' compensation laws following notice of the accident. Indiana had assumed jurisdiction of the case. Thus, the supreme court held Illinois lacked jurisdiction, observing that its "jurisdictional finding" was "particularly appropriate *** where the employee has not even worked in the State in which he is seeking relief for over 12 years." *Youngstown*, 79 Ill. 2d at 434, 404 N.E.2d at 257-58.

¶ 24 Citing *Youngstown*, the employer asserts at page 39 of its brief that "[a] union employee's right of recall stemming from a collective bargaining agreement does not create an employment contract between the employer and the employee." Further, the employer asserts that "[a] lay off and recall of an employee constitutes a new employment contract." Contrary to the employer's assertions, *Youngstown* did not involve a claimant with a right of recall to employment. In *Youngstown*, the supreme court, citing *Conner v. Phoenix Steel Corp.*, 249 A. 2d 866, 869 (1969), found that "[a]lthough Kristovic's termination slip reflected that he was 'laid off,' the situation was not a temporary cessation of employment with an expectation of eventual return." *Youngstown*, 79 Ill. 2d at 431, 404 N.E.2d at 256. See also *Conner*, 249 A. 2d at 869 (layoff means the temporary cessation of employment with an expectation of eventual return).

The *Youngstown* claimant was not laid off and further, had no right to employment following his termination in Illinois. Thus, the supreme court found that the claimant entered into a new contract of employment in Indiana. *Youngstown*, 79 Ill. 2d at 432, 404 N.E.2d at 257. According to the supreme court, the *Youngstown* case involved "a cessation of employment in Illinois and a reemployment in Indiana with certain carry-over benefits derived from the contract between the parent company and the labor union." *Youngstown*, 79 Ill. 2d at 433, 404 N.E.2d at 257. The referenced carry-over benefits were seniority rights that the claimant regained upon his reemployment with the employer in Indiana, and not a right of recall to employment. We do not find support for the employer's assertions in *Youngstown* or in the various cases cited by the employer at oral argument.

¶ 25 Here, claimant experienced a temporary cessation of employment. The employer provided claimant with a right of recall to employment and further, returned claimant to work following each layoff. Claimant was not required to be interviewed at the new job site and had not been terminated by the employer. The employer placed claimant in a position he had with the employer in Illinois. The instant record does not show an old contract of hire ending with layoff, and an injury occurring while working under a new contract of hire executed in West Virginia. Claimant began work for employer in 1978. Claimant worked at the Wheeler Creek and Rend Lake mines in Illinois until July 8, 2002, when employer closed the Rend Lake mine and laid claimant off from work. The employer provided claimant with a right of recall to employment. Claimant received his assignments from the employer at his home in Illinois. The Commission's finding that the contract for hire was made in Illinois, for an assignment outside of Illinois, was not against the manifest weight of the evidence. Therefore, claimant was subject to

coverage under the Act.

¶ 26 The employer also relies on *United States Steel Corp. v. Industrial Comm'n*, 161 Ill. App. 3d 437, 510 N.E.2d 452 (1987); *Energy Erectors, Ltd. v. Industrial Comm'n*, 230 Ill. App. 3d 158, 595 N.E.2d 641 (1992); and *Ford Aerospace & Communication Services, Inc. v. Industrial Comm'n*, 262 Ill. App. 3d 1115, 635 N.E.2d 872 (1994), in support of its argument that the last acts necessary to give validity to the contract for hire were effected in West Virginia, not Illinois. We need not address the employer's argument because we find claimant's contract of hire was made in Illinois when he began work for the employer in 1978, and was not terminated after each of his periodic layoffs. A reviewing court can affirm the Commission's decision if there is any legal basis in the record to support its decision, regardless of the Commission's findings or reasoning. *General Motors Corp. v. Industrial Comm'n*, 179 Ill. App. 3d 683, 695, 534 N.E.2d 992, 1000 (1989). Nor do we find it necessary to address the employer's argument that claimant's application for benefits was not timely filed.

¶ 27 Because we have found a sufficient basis for jurisdiction, we need not address alternative bases for jurisdiction discussed by the parties.

¶ 28 Employer next argues that the Commission's finding that claimant suffered injuries as a result of exposure to an occupational disease is against the manifest weight of the evidence. The employer seeks to support its argument on the basis of x-rays taken in 1978, 1982, 2005, and 2006, that did not show CWP. The employer infers that because the earlier x-rays were negative, the 2008 x-ray could not have shown positive findings for CWP.

¶ 29 It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *Docksteiner v. Industrial*

Comm'n, 346 Ill. App. 3d 851, 856, 806 N.E.2d 230, 234-35 (2004). The Commission's decision on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Docksteiner*, 346 Ill. App. 3d at 856-57, 806 N.E.2d at 235. For a finding 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. The Commission's finding as to whether a claimant suffered an occupational disease is reviewed under this manifest-weight standard. See *Freeman United Coal Mining Co. v. Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 782-83, 901 N.E.2d 906, 910 (2008).

¶ 30 In this case, the Commission relied on the opinion of Dr. Cohen to find that claimant suffered injuries as a result of exposure to an occupational disease. Dr. Cohen examined claimant on June 28, 2008. Claimant reported shortness of breath upon exertion for approximately 10 years and a dry cough. Dr. Cohen reviewed claimant's chest x-ray taken on March 10, 2008. The x-ray revealed positive findings for CWP. Dr. Cohen diagnosed claimant with CWP at a 1/0 ILO classification level, resulting from 23 years of exposure to coal mine dust. Although claimant's pulmonary function testing was normal, Dr. Cohen recommended that claimant not return to mining. Dr. Cohen's opinion was in accord with the statutory presumption found in the Act. See 820 ILCS 310/1(d) (West 2006) ("If a miner who is suffering *** from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall *** be a rebuttable presumption that his or her pneumoconiosis arose out of such employment"). While Dr. Westerfield testified that he did not believe claimant had CWP, it is the function of the Commission to resolve conflicts in the medical testimony. See *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003). The Commission's finding that claimant

suffered injuries as a result of exposure to an occupational disease was not against the manifest weight of the evidence.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision.