2013 IL App (5th) 120324WC-U
No. 5-12-0324WC
Order filed July 24, 2013

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MIKE MERKAN, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Cerro Flow, Appellee).	))))))))))	Appeal from the Circuit Court of St. Clair County. No. 11-MR-349 Honorable Stephen P. McGlynn, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The decision of the Commission denying benefits under the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2008)) due to claimant's failure to provide his employer with notice of his accident was not contrary to the manifest weight of the evidence.

¶ 2 Claimant, Mike Merkan, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)) alleging he sustained a repetitive-

trauma injury–bilateral carpal tunnel syndrome–while in the employ of respondent, Cerro Flow. The Illinois Workers' Compensation Commission (Commission) determined that claimant did not provide timely notice of his injury as required by the Act (see 820 ILCS 305/6(c) (West 2008)) and denied the claim. The circuit court of St. Clair County confirmed, and this appeal followed. For the reasons that follow, we affirm.

¶ 3 The sole issue before us is the propriety of the Commission's finding regarding notice. The Act requires a claimant to provide notice "not later than 45 days after the accident." 820 ILCS 305/6(c) (West 2008). In a repetitive-trauma case, the date of the accident is the date on which the injury manifests itself. *White v. Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 910 (2007). This is the date on which the injury and its causal relationship to employment would become plainly apparent to a reasonable person. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 65 (2006). This presents a question of fact. *Id*. Therefore, we will review this issue using the manifest-weight standard (*id*. at 64), as we will the question of whether proper notice was given (*Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 95 (1994)). Thus, we will disturb the Commission's decisions on these matters only if an opposite conclusion is clearly apparent. *Bassgar, Inc. v. Illinois Workers' Compensation Comm'n*, 394 Ill. App. 3d 1079, 1085 (2009). It is primarily for the Commission to assess the credibility of witnesses, weigh evidence, resolve conflicts in the evidence, and draw inferences from the record. *Bennett Auto Rebuilders v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655 (1999). A claimant bears the burden of proving all elements of a claim. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 449 (1995). Moreover, on appeal, the appellant (here claimant) bears the burden of affirmatively establishing an error warranting reversal has been committed in the proceedings below. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*,

382 Ill. App. 3d 1171, 1173 (2008).

¶ 4 The earliest date on which the record indicates claimant gave notice to respondent is December 2007. Claimant testified that he informed the plant manager of his condition during that month. The Commission cited this testimony in its decision. Claimant does not identify any earlier occasion on which he gave notice in his brief. For the purpose of resolving this appeal, we will accept that claimant provided notice to respondent in December 2007.

¶ 5 Thus, the question becomes whether claimant's injury manifested itself prior to mid-October 2007. Claimant's first problem is his own testimony. The following colloquy took place between claimant and respondent's counsel during cross-examination:

> "Q. And just so it's clear, when you went to the Cerro dispensary on March the 26, 2008, for the problems with your hands, you knew you had carpal tunnel for almost three years; is that right?
>
> A. Yes.
>
> Q. Okay. And you also knew for about three years that your hand symptoms were related to your job duties, did you not?
>
> A. I always thought they were, yes."

Later, respondent's attorney asked claimant, "And in December of '07, you already knew that you had carpal tunnel syndrome for over two years, correct?" Claimant replied, "Yeah." Claimant unequivocally testified that, as of approximately the spring of 2005, he knew he had carpal tunnel syndrome that was related to his employment with respondent. Claimant also acknowledged that in 2005 he had an "electro whatever test," which "was the first time the results came back that [he] had carpal tunnel." Thus, claimant's own testimony supports the Commission's finding that his

injury manifested more than 45 days before he gave notice to respondent.

¶ 6 Additional evidence supports the Commission's decision. For example, claimant's medical records maintained by his family doctor show diagnoses of carpal tunnel syndrome on November 3, 2005, and February 14, 2006. Further, after reporting his condition to respondent in March 2008, respondent sent claimant for an evaluation at Midwest Occupational Medicine. The record of that visit contains the following history, taken by Dr. Bryan Ruiz on March 26, 2008: "[Claimant] comes in today telling me that he has known that he has had carpal tunnel syndrome for almost 3 years and desires to report this now because the statute of limitations is running out on his case." Joseph Grana, respondent's "manufacturing support manager," testified that he spoke with claimant on March 26, 2008, on respondent's premises. He asked claimant why he was reporting his injury at that time. Grana testified that claimant said, "my three-year time limit *** is coming up." Thus, there was considerable evidence supporting the Commission's determination that claimant's injury manifested well before the time at which he gave notice to respondent. As such, we cannot say that an opposite conclusion to that drawn by the Commission is clearly apparent or that, in turn, its decision is contrary to the manifest weight of the evidence. *Bassgar*, 394 Ill. App. 3d at 1085.

¶ 7 Claimant attempts to segregate the question of notice to his arms individually. He charges that there had been no diagnosis of carpal tunnel with respect to his left arm prior to April 2008. In fact, this is the sum total of his argument on this point. Claimant provides no legal authority to support the proposition that for an injury to manifest itself, there must be a formal medical diagnosis. As such, we find this argument both waived (*Novakovic v. Samutin*, 354 Ill. App. 3d 660, 667 (2004) ("[A] party who fails to argue or cite authority in support of a point waives the issue for purposes of appeal.")) and also unpersuasive, as *Durand*, 224 Ill. 2d at 72 ("A formal diagnosis, of course, is

not required."), holds to the contrary. Moreover, we note that, as the Commission recognized, respondent's independent medical examiner opined that the 2005 "neurometrix" study showed evidence of bilateral carpal tunnel syndrome, which was "very advanced" on the left side. Before leaving this issue, we note that claimant suggests that the Commission did not address this point and that we should therefore remand to allow the Commission to consider it. This is not how appellate review proceeds. In the absence of an express finding, we presume a lower tribunal resolved a point in favor of the prevailing party. See *Larkin v. Sanelli*, 213 Ill. App. 3d 597, 604 (1991); *Century 21 Castles by King, Ltd. v. First National Bank of Western Springs*, 170 Ill. App. 3d 544, 549 (1988). On appeal, the appellant bears the burden of showing that the presumed finding is against the manifest weight of the evidence. See *Hargrove v. Neuner*, 138 Ill. App. 3d 811, 813 (1985). Instead of seeking remand, claimant should have explained why the absence of a formal medical diagnosis rendered the Commission's decision erroneous, citing pertinent authority to that effect.

¶ 8 Claimant also cites *Durand*, 224 Ill. 2d at 74, in support of his position, where the supreme court stated, "We decline to penalize an employee who diligently worked through progressive pain until it affected her ability to work and required medical treatment." Claimant contends that because his condition was relatively mild in 2005 and increased in severity over time, his condition is "compensable under the *Durand* case." Claimant fails to come to grips with the complexity of the analysis set forth by the supreme court in *Durand*. The court first reaffirmed that the manifestation date of a repetitive-trauma injury is the date upon which " 'the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.' " *Id*. at 67, quoting *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). It noted the possibility that a contrary rule requiring an acute

injury might force employees to push themselves to the point where their bodies collapsed. *Id*., quoting *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 529-30. It is also not the policy of this state to allow workers to silently push themselves to medical collapse before an employer is entitled to notice. *Id*. at 70-71, quoting *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 49 (1989). The date on which an employee is no longer capable of performing his or her job or the last date of employment may help fix the manifestation date. *Id*. at 68-69. Similarly, the date on which medical treatment became necessary may be relevant. *Id*. at 72. Ultimately, "[t]he facts must be closely examined in repetitive-injury cases to ensure a fair result for both the faithful employee and the employer's insurance carrier." *Id*. at 71.

¶ 9 Keeping in mind that, as stated in *Durand*, the determination of a manifestation date requires a fact-intensive inquiry, we note that the evidence in the record establishes the following. Claimant had some sort of objective medical test in May 2005 (described as a "neurometric study" or, by claimant, as an "electro whatever test") that indicated claimant had carpal tunnel syndrome. Claimant was diagnosed with carpal tunnel syndrome on several occasions substantially predating his giving notice to respondent. Furthermore, it is apparent that claimant regarded his manifestation date as May 2005. He told both Dr. Ruiz and Grana in March 2008 that the limitations period on his injury was about to run. Hence, this is not a case where a claimant has worked to the point where medical treatment is necessary or where he could no longer perform his job. Rather, claimant's motivation in coming forward in March 2008 was that he was aware that his injury had manifested nearly three years earlier and what that meant for the timeliness of his claim. Claimant's keen awareness of the manifestation date of his injury distinguishes the instant case from *Durand*. In *Durand*, "[t]he record strongly suggest[ed] that this doubt [regarding the existence of an injury]

lingered until 2000," and "[a] reasonable person would not have known of this injury and its putative relationship to [employment] before that time." *Durand*, 224 Ill. 2d at 74. Claimant's reliance on *Durand* is therefore misplaced.

¶ 10 In sum, we hold that opposite conclusions to those drawn by the Commission are not clearly apparent and, thus, the Commission's decisions regarding the manifestation date of claimant's injury and the lack of timely notice to respondent are not contrary to the manifest weight of the evidence. Accordingly, the Commission's decision is affirmed.

¶ 11 Affirmed.