2013 IL App (5th) 130043WC-U
No. 5-13-0043WC
Order filed September 24, 2013

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MARK WITHERSPOON, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (White County Coal Company, Appellee).	)	Appeal from the Circuit Court of Williamson County. No. 12-MR-170 Honorable Brad K. Bleyer, 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*: Judgment of the trial court would be vacated, decision of the Commission would be vacated, and cause would be remanded to the Commission for further proceedings where Commission's findings of fact and law were insufficient to allow appellate court to adequately review Commission's decision.

¶ 2 Claimant, Mark Witherspoon, filed an application for adjustment of claim pursuant to the Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 *et seq.* (West 2006)) seeking benefits

from respondent, White County Coal Company. In his application, claimant alleged that as a result of inhaling coal mine dust, he experiences shortness of breath and exercise intolerance. Following a hearing, the arbitrator concluded that claimant suffers from the occupational disease processes of coal workers' pneumoconiosis (CWP) and asthma and that he established disablement within two years after the date of last exposure to the hazards of the disease (see 820 ILCS 310/1(f) (West 2006)). As such, the arbitrator awarded claimant permanent partial disability (PPD) benefits of $414.80 per week for 75 weeks, representing 15% of the person as a whole (see 820 ILCS 305/8(d)2 (West 2006); 820 ILCS 310/7 (West 2006)). A majority of the Illinois Workers' Compensation Commission (Commission) reversed, finding that claimant "failed to prove a causal connection between his claimed respiratory complaints and his employment with Respondent." On judicial review, the circuit court of Williamson County confirmed the decision of the Commission. Thereafter, claimant filed the present appeal. For the reasons set forth below, we vacate the decision of the trial court, vacate the decision of the Commission and remand the matter for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing held on April 12, 2011, as well as the record on appeal. Claimant worked as an underground coal miner for approximately 23 years, beginning in 1983. During his career as a coal miner, claimant held a variety of positions, including that of shuttle-car operator, hoister helper, continuous miner helper, and supply man. Claimant testified that these positions regularly exposed him to various substances, including coal and rock dust, silica, and smoke from cable and transformer fires.

Claimant's last exposure to coal mining was April 17, 2006. At that time, claimant was 53 years old and working general underground labor, when he sustained a back injury. Claimant underwent surgery, but never returned to work for respondent.

¶ 5 Claimant testified that he first noticed a change in his breathing when he was about 40 years old. He stated that he often had to stop and take a break because of breathing problems. At the arbitration hearing, claimant testified that he continues to experience breathing problems when doing any physically exerting activity. For instance, claimant stated that he becomes short of breath while doing the activities of daily living, such as housework. Claimant further stated that he experiences shortness of breath after walking only two blocks or climbing between two and four flights of stairs. Claimant testified that his breathing problems have worsened since their onset. He did not believe that he would physically be able to do any of his previous coal mining jobs because of back and breathing problems. When asked about his history of smoking, claimant acknowledged that he smoked cigarettes for approximately five years beginning at age 16 and quitting at age 21. Claimant also reported that he smoked three or four cigars a day for approximately 15 years, quitting in 2005 or 2006. Claimant added, however, that he did not inhale the cigar smoke.

¶ 6 Claimant testified that his family physician is Dr. David Stricklin. Claimant related that although he has treated with Dr. Stricklin for about 10 years, he has not talked to him about his breathing problem. Claimant explained that he did not feel that Dr. Stricklin could help him because his condition is "irreversible" and it is something he has to live with. Claimant was examined by Dr. Glennon Paul at the request of his attorney. Dr. Paul prescribed two medications for claimant's breathing problems. Claimant testified that he never took the medications because he has no

insurance (other than Medicare) and cannot afford them. On cross-examination, however, claimant conceded that he was drawing workers' compensation and social security disability benefits at the time Dr. Paul prescribed the medications.

¶ 7 Dr. Paul examined claimant on December 13, 2007. Dr. Paul testified by evidence deposition that he is board certified in internal medicine and in the field of asthma, allergy, and immunology. Dr. Paul related that in his practice, he reads about 5,000 chest X rays each year. Claimant told Dr. Paul that he periodically experiences shortness of breath and associated wheezing and mucus production. Claimant stated that these symptoms began while working in the coal mines. Claimant also reported smoking an occasional cigar, but indicated that he was never a regular smoker. Dr. Paul testified that claimant's physical examination was normal, as was baseline spirometry. A methacholine challenge was performed with an abnormal result, demonstrating hyper-reactive airways in the asthmatic range. Dr. Paul diagnosed "intrinsic asthma." Dr. Paul opined that claimant's mining exposures caused or aggravated his asthmatic condition. Dr. Paul classified claimant's asthma as "quite significant" because claimant experiences shortness of breath with only mild exertion. Dr. Paul prescribed two different medications, Advair and Ventolin, but he was not aware whether claimant began taking them.

¶ 8 Dr. Paul also diagnosed CWP. Dr. Paul based this diagnosis on a chest film of claimant taken on June 27, 2007. He testified that the film showed small nodules in both lower lobe areas compatible with CWP. Dr. Paul also noted that B reader/radiologist Dr. Henry Smith interpreted the film as positive for CWP, category 1/0. Dr. Paul opined that the cause of claimant's CWP was the inhalation of coal dust. Dr. Paul testified that based on his diagnoses of asthma and CWP, claimant

could not have any further exposure to coal mine dust without further endangering his health. He further testified that claimant is permanently and totally disabled from working as a coal miner.

¶ 9 On cross-examination, Dr. Paul testified that he is not a certified B reader or a board-certified pulmonologist. Dr. Paul stated that the basis for his diagnosis of asthma was a positive methacholine stimulation test. When asked whether it was his opinion that claimant's exposure to coal dust caused the asthma, Dr. Paul responded, "Well, I don't know. It could have. It may only have aggravated it." Dr. Paul acknowledged that as long as claimant is not exposed to coal dust or any other triggers, he should not experience any asthmatic symptoms. Dr. Paul also testified that smoking cigars on a regular basis would aggravate claimant's asthma "if he inhaled."

¶ 10 At respondent's request, claimant was examined by Dr. Jeffrey Selby on August 21, 2008. Dr. Selby testified by evidence deposition that he is board certified in internal medicine and pulmonology and that he is a certified B reader. Dr. Selby testified that claimant's chief complaint at the time of the examination was back pain. Claimant also reported a history of coughing clear secretions several times a week for the previous five to six years. Claimant told Dr. Selby that these secretions were black when he worked in the mines. In addition, claimant complained of shortness of breath for seven to eight years and of weakness and fatigue after walking on level ground three to four blocks. Dr. Selby stated that he was unable to obtain any history of definite smoking because claimant told him that he had not smoked for years, but also mentioned that he smoked cigars once in a while.

¶ 11 Dr. Selby performed a physical examination with an emphasis on claimant's respiratory system. He also ordered a chest X ray, pulmonary function tests, and a treadmill exercise test. Dr.

Selby testified that claimant's chest examination was "completely normal," without wheezes, rales, or rhonchi. Dr. Selby testified that the chest X ray, a grade II quality film as a result of underinflation of the lungs, was normal and negative for CWP. Dr. Selby testified that the results of the pulmonary function tests were "normal to supernormal in that the forced vital capacity was 120 percent of predicted; the FEV1 was 113 percent; the ratio of the two was 76 percent; the lung volumes were normal, and the diffusion capacity was 112 percent of predicted." The treadmill exercise test lasted only three minutes because claimant began to complain of back pain and, secondarily, shortness of breath. Dr. Selby noted, however, that claimant's oxygen saturation was at 98% throughout the test. Thus, even though the treadmill exercise test was "short," it was normal. Dr. Selby noted that claimant refused a high resolution CT scan without providing a reason. Claimant also refused all laboratory work, stating he has a "needle phobia." Dr. Selby testified that based on his evaluation, claimant does not have CWP or any kind of lung disease as a result of coal mine dust inhalation or coal mine employment. Dr. Selby opined that claimant's pulmonary capacity is "at least normal, if not better." Dr. Selby further opined that, from a respiratory standpoint, claimant could perform "the most vigorous duties required of anyone in a coal mine."

¶ 12 On cross-examination, Dr. Selby testified that spirometry measures the function of the entire lung. As a result, a person can have shortness of breath but still have pulmonary function tests within the range of normal. Dr. Selby also testified on cross-examination that he was not provided the result of the methacholine test administered by Dr. Paul. Dr. Selby explained that he did not administer such a test on his own because claimant did not qualify for the test under clinical conditions. He related that unless the patient is undergoing "a very high level military physical" to

qualify as a pilot or astronaut, a methacholine challenge study is not warranted for an individual who does not have a history of wheezing or a dry cough or anything that would be purported to be asthma symptoms. Dr. Selby agreed that asthma is a condition that can cause a person's pulmonary function to wax and wane over time, and he acknowledged that it is possible that if claimant has asthma, he could have normal pulmonary function test results one week and an abnormally low score on the same tests the following week.

¶ 13 A report authored contemporaneously to Dr. Selby's examination was admitted into evidence. In that report Dr. Selby wrote:

> "[Claimant] complained of 'coughing clear phlegm several times per week for 5 to 6 years.' He was not noted to be coughing (especially not productively for the few hours while in our presence) even despite exercise testing. This is likely from chronic sinusitis or possibly asthma in an occult fashion. It is not due to coal mining since this would have cleared within a few months of coal dust exposure."

Dr. Selby further noted in his report that claimant is overweight and that this condition "could contribute to his shortness of breath." In addition, Dr. Selby reported that claimant underwent an electrocardiogram which showed a left axis deviation. Dr. Selby opined that this abnormality "may be associated with serious heart disease and indicate another occult cause of shortness of breath."

¶ 14 Based on the foregoing evidence, the arbitrator concluded that claimant suffers from CWP and asthma. The arbitrator found the opinion of Dr. Paul more persuasive than the opinion of Dr. Selby, noting in part that Dr. Paul administered a methacholine challenge test whereas Dr. Selby did not. The arbitrator further found that claimant suffered a timely disability pursuant to section 1(f)

of the Act (820 ILCS 310/1(f) (West 2006)). The arbitrator awarded claimant PPD benefits of $414.80 per week for 75 weeks, representing 15% of the person as a whole (see 820 ILCS 305/8(d)2 (West 2006); 820 ILCS 310/7 (West 2006)). Respondent sought review of the arbitrator's decision.

¶ 15 A majority of the Commission reversed the decision of the arbitrator and vacated the PPD award. Although the Commission acknowledged Dr. Smith's conclusion that claimant "exhibited early mild pneumoconiosis," Dr. Paul's testimony that claimant had small nodules in the lower lobes of his lungs compatible with CWP, and Dr. Paul's conclusion that claimant had contracted CWP due to the inhalation of coal dust, it never expressly concluded that claimant suffers from CWP. The Commission also stated that a diagnosis of CWP does not "automatically necessarily" equate to a finding of disablement, but never determined whether claimant established disablement. Ultimately, the Commission denied benefits on the basis that claimant "failed to prove a causal connection between his claimed respiratory complaints and his employment with Respondent." The Commission explained:

> "The Commission finds the single greatest impediment to finding a causal connection between [claimant's] claimed respiratory difficulties and their relationship to the work he performed for Respondent is the failure of [claimant] to introduce a medical history that documents this condition and could lead to, at least, an inference of such a connection. [Claimant] testified that, while working for Respondent, he had to take breaks because of his breathing problems. He testified further that his breathing problems, even after leaving the employ of Respondent, continued and has affected his activities of daily living. [Claimant] stated that he loses his breath with any kind of physical activity, providing examples of being

> able to walk only a few blocks at a regular pace or of being able to climb, at most, four flights of stairs before noticing a change to his breathing. If [claimant's] claim is to be believed, it must be accepted that he suffered these respiratory deficiencies without seeking medical intervention.
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> It is a well known axiom that the burden lay with the employee to demonstrate a causal connection between a claimed injury and his or her employment. In the immediate case, the Commission cannot rely solely on a single examination by a non-treating physician to find that such a connection exists. In the absence of medical records chronicling [claimant's] condition, the Commission cannot help but find [claimant] failed to demonstrate that his claimed respiratory complaints are attributable to his work for Respondent."

¶ 16 Commissioner Tyrell would have affirmed the decision of the arbitrator. He noted the undisputed testimony that claimant worked in an underground coal mine for 23 years. He further noted that although both Dr. Paul and Dr. Selby have excellent qualifications, the arbitrator opted to accept the opinion of Dr. Paul as being more persuasive than the opinion of Dr. Selby.

¶ 17 Thereafter, claimant sought judicial review, and the circuit court of Williamson County confirmed the decision of the Commission. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, claimant argues that the Commission's refusal to find "occupational asthma" and CWP is not supported by the manifest weight of the evidence, the applicable statutes, or controlling case law. Respondent argues that claimant forfeited any claim related to CWP by expressly waiving

it in his written submissions to the trial court. On the merits, respondent asserts that a finding of "occupational asthma" was not the "critical" issue before the Commission. Rather, respondent contends, the Commission focused on "the fundamental underpinnings of causation and disablement rather than a single diagnosis." According to respondent, the Commission ultimately reversed the decision of the arbitrator because it concluded that claimant and his medical expert, Dr. Paul, lacked credibility. We conclude that the Commission did not make adequate findings of fact to support its conclusions and that its failure to do so in this case warrants vacating the decisions of the trial court and the Commission and remanding the cause for further proceedings.

¶ 20 It is well settled that the arbitrator and the Commission are required to make findings of fact and law. *Skzubel v. Illinois Workers' Compensation Comm'n*, 401 Ill. App. 3d 263, 269 (2010); *J.S. Masonry, Inc. v. Industrial Comm'n*, 369 Ill. App. 3d 591, 598 (2006); *Illinois Bell Telephone Co. v. Industrial Comm'n*, 265 Ill. App. 3d 681, 686 (1994); *Swift & Co. v. Industrial Comm'n*, 150 Ill. App. 3d 216, 220 (1986). These findings need not be stated in any particular language and, if possible, may be implied from the Commission's decision. *Skzubel*, 401 Ill. App. 3d at 269; *J.S. Masonry, Inc.*, 369 Ill. App. 3d at 598; *Illinois Bell Telephone Co.*, 265 Ill. App. 3d at 686; *Swift & Co.*, 150 Ill. App. 3d at 221. The Commission may also satisfy the requirement that it make findings of fact and law by adopting the findings of the arbitrator. *Swift & Co.*, 150 Ill. App. 3d at 220. The rationale for requiring the arbitrator and the Commission to make findings of fact and law is to allow the reviewing court to adequately review the Commission's decision. See *Skzubel*, 401 Ill. App. 3d at 269 (citing *Reinhardt v. Board of Education of Alton Community Unit School District No. 11*, 61 Ill. 2d 101, 103 (1975)).

¶ 21 Here, we are unable to properly review the Commission's decision because it is unclear to us exactly what the Commission found. The Commission reversed the decision of the arbitrator. Thus, its decision cannot be read as adopting the findings of the arbitrator. Moreover, we cannot imply findings from the Commission's decision because the Commission merely recites some of the underlying evidence without making any findings of fact or law regarding the principal issues in dispute. Significantly, we are unable to ascertain whether the Commission found that claimant suffers from an occupational disease. The arbitrator determined that claimant sustained his burden of proving that he suffered from both CWP and asthma. In support of these findings, the arbitrator found the opinion of Dr. Paul more persuasive than that of Dr. Shelby. On review, the Commission reversed the decision of the arbitrator, stating:

> "The Commission, in reversing the Decision of the Arbitrator, acknowledges Dr. Henry Smith, a AOBR Certified/NIOSH B-Reader, concluded that [claimant] exhibited early mild pneumoconiosis as of June 27, 2007, and Dr. Glennon Paul testified that he identified small nodules in [claimant's] lower lobes compatible with coal workers' pneumoconiosis (CWP) in [claimant's] June 27, 2007, chest x-ray and subsequently concluded that [claimant] had contracted CWP due to coal dust inhalation. The Commission, however, does not find that a diagnosis of CWP automatically necessarily equates to a finding of disablement."

From the foregoing passage, it is unclear to us exactly what the Commission found. Did the Commission agree with the arbitrator that claimant suffers from CWP or did it conclude that claimant failed to meet his burden of proving that he suffers from pneumoconiosis? If the former, did the Commission reverse the decision of the arbitrator on the basis that he failed to establish

disablement within the relevant statutory period? We note, too, that the Commission never discusses whether it agreed with the arbitrator's finding that claimant suffers from asthma.

¶ 22 We also find problematic the Commission's statement that it "cannot rely on a single examination by a non-treating physician to find that [a causal] connection exists." We recognize that it is solely within the province of the Commission to judge the credibility of witnesses, determine the weight to give testimony, and resolve conflicting evidence, including medical testimony. See *City of Springfield, Illinois, Police Department v. Industrial Comm'n*, 328 Ill. App. 3d 448, 452 (2002); *Alexander v. Industrial Comm'n*, 314 Ill. App. 3d 909, 915 (2000); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). Moreover, we acknowledge that there was conflicting evidence on causation. However, there is no indication that the Commission reached its conclusion regarding causation by weighing the conflicting evidence or making a credibility determination. To the extent that the foregoing statement signifies the Commission's belief that, as a matter of law, the opinion of a non-treating physician who examines an injured employee on only one occasion is insufficient to support a finding of causation, this premise is simply not supported by any authority. See, *e.g.*, *Bruno v. Industrial Comm'n*, 31 Ill. 2d 447, 448-49 (1964) (upholding award of benefits to decedent's spouse despite fact that only doctor to testify was a non-treating physician who never examined the decedent); *Peabody Coal Co. v. Industrial Comm'n*, 355 Ill. App. 3d 879, 882-83 (2005) (affirming finding of occupational disease principally upon opinion of non-treating physician); *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 468 (2001) (noting that recovery under the Act can be based upon an injured employee's uncorroborated testimony); *Cassens Transport Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 332 (1994) (noting that a finding of

causal connection may be premised upon a medical expert's opinion that the injury "could have" or "might have" been caused by the accident).

¶ 23 Before concluding, we acknowledge respondent's claim that the issue of claimant's entitlement to benefits for CWP is not properly before us because claimant did not raise the issue in his written submissions to the trial court. Claimant does not dispute that the written arguments he submitted to the trial court indicate that he was not challenging the Commission's findings as to CWP. He argues, however, that his attorney had "a change of heart, and at oral argument told the circuit court judge that [he] was not waiving CWP." The doctrine of forfeiture is a limitation upon the parties and not a restriction upon the reviewing court. See *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 505 (2004). Given the inadequacy of the Commission's findings in this case, we decline to apply the forfeiture rule. See *Skzubel*, 401 Ill. App. 3d at 270.

¶ 24 In short, the Commission reversed the decision of the arbitrator without clearly articulating the basis for its decision or making any factual findings in support of it. Accordingly, we vacate the decision of the trial court which confirmed the decision of the Commission, we vacate the decision of the Commission in its entirety, and we remand the matter to the Commission for further proceedings consistent with this order. See *Skzubel*, 401 Ill. App. 3d at 270. Upon remand, the Commission shall make appropriate findings regarding from which occupational disease, if any, claimant suffers, whether claimant timely established disablement as that term is defined in the Act, and, if necessary, whether claimant established a causal connection between his claimed occupational diseases and his employment.

¶ 25 Vacated and cause remanded with directions.