

Order filed April 25, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

SANDY HICKS,)	Appeal from the
)	Circuit Court of
Appellant,)	Jefferson County.
)	
v.)	No. 12-MR-94
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Wal-Mart, Appellee).)	Timothy R. Neubauer,
)	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 findings were not against the manifest weight of the evidence where the evidence supports the Commission's finding that the claimant failed to prove accident with regard to her right shoulder on either date alleged in her applications for adjustment of claims.

¶ 2 The claimant, Sandy Hicks, was employed by Wal-Mart. The claimant filed an

application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2010)), alleging that up to and including February 13, 2009, she sustained "repetitive trauma to both upper extremities." The claimant filed a second application for adjustment of claim alleging that on May 4, 2011, she sustained injuries to her "right shoulder, right upper extremity, and other body parts."

¶ 3 The claims, which were consolidated, proceeded to an expedited arbitration hearing under section 19(b) of the Act (820 ILCS 305/19(b) (West 2010)). At the hearing, the arbitrator granted the claimant's motion to amend the date of accident of the first application as up to and including February 14, 2009. The arbitrator issued a single decision in the consolidated cases. The arbitrator found in favor of the claimant regarding the claim of injury to her left shoulder. However, the arbitrator found that with respect to the condition of ill-being in her right shoulder the claimant failed to prove accident, causal connection, and notice, and therefore denied prospective medical care. The claimant appealed the arbitrator's decision regarding her claims of injuries to her right shoulder to the Illinois Workers' Compensation Commission (the Commission). The Commission authored a lengthy decision in which it affirmed the arbitrator's decision on the issues of accident and causal connection but concluded that it need not address the issues of notice and prospective medical care for the claimant's right shoulder. The Commission remanded the case to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980), regarding the claimant's left shoulder. The claimant then appealed the Commission's decision regarding injuries to her right shoulder to the circuit court. The circuit court entered a judgment that confirmed the

Commission's decision. The claimant now appeals the circuit court's judgment.

¶ 4

BACKGROUND

¶ 5 The Commission found that the claimant sustained a work-related injury to her left shoulder. The focus of this appeal is the claimant's assertion of two separate work-related injuries to her right shoulder. The following evidence was presented at the arbitration hearing.

¶ 6 The claimant began working as an overnight apparel processor for the employer on June 15, 2008. She typically worked eight hours a day, four days a week. As part of her job duties, the claimant was responsible for unloading and hanging clothing delivered to the store. The clothing and other merchandise arrived in break pack boxes that were loaded onto pallets which had to be unloaded and separated into different departments. The claimant testified that at times she assisted a coworker in this task. When that happened, she would reach up over her head to pull the top box off of the pallet, place it on the floor, and remove and separate the merchandise. She continued this process until all of the boxes had been removed from the pallet and the merchandise had been separated and placed into shopping carts. The claimant testified that at times the boxes were stacked six to seven feet high on pallets and could weigh up to 40 pounds. She also testified that the loaded pallets might weigh anywhere from 200 to 400 pounds. The claimant did not testify as to how often she assisted her coworker in these tasks.

¶ 7 Once the clothing was in the shopping carts, the claimant's duties as an apparel processor began. She described in detail how she further divided the clothing and placed it into separate shopping carts by department. She then removed the plastic from the

clothing. She explained that she would lift a piece of clothing with her left hand and remove the plastic with her right hand. This work was typically done at waist level. She testified that at times it took between four or five hours just to remove the plastic from the clothing. After the plastic was removed, the claimant would then place the merchandise on the shelf or hang the clothing on a rack. The claimant testified that she is five feet tall and that the hanging racks are approximately four feet tall. She also testified that at times merchandise came in that had to be hung on the wall. When that happened she used her right hand. If she could not reach the hook, she would retrieve a step stool or ladder and would then reach up over her head to hang the articles of clothing. She testified that she would reach shoulder level or higher throughout her shift.

¶ 8 The claimant testified that towards the end of her shift, she would discontinue processing the clothing and return the back stock to the break pack boxes. After the boxes were refilled, the claimant would lift the boxes, ranging from five to seven pounds, and place them onto a pallet. The claimant would then place the excess cardboard and plastic into an empty shopping cart, push the cart approximately 700 feet to the trash compactor in the back of the store, and dispose of the trash.

¶ 9 In order to return the pallets to the back, the claimant testified that she would retrieve the manual hand jack, place it under the skid, and pump it up with both hands until the skid was off of the floor. If she was working with someone else, they would take turns with the manual hand jack. The claimant testified that she usually pulled the pallet with her right hand, but if the pallet was heavier than 200 to 300 pounds, she used both hands. She testified that she pulled the pallet approximately 200 feet or more. She further

testified that she did that each night she worked, although at times she left the heavier pallets for a male coworker to return.

¶ 10 The claimant testified that prior to working for the employer she had no injury to or pain in either shoulder and denied receiving medical treatment for pain or discomfort in either shoulder prior to working for the employer. She had not been placed under restrictions by any physician for her shoulders prior to working for the employer. The claimant testified that on the days, weeks, and months leading up to February 2009, both of her shoulders hurt as she performed her job duties. She further testified that reaching up and pulling the heavy boxes off of the pallets, repetitively pulling off the plastic, putting boxes back onto the pallet, and pulling the pallet with the manual hand jack caused her to experience discomfort in both of her shoulders.

¶ 11 On Thursday, February 13, 2009, the claimant began her overnight shift. She stated that the employer was "short-handed" that night. The claimant testified that she had seven pallets to unload. Two of the pallets were stacked approximately seven feet high, and she struggled to get the boxes from the top. Towards the end of her shift on the morning of February 14, 2009, she had unloaded approximately three-quarters of the first pallet and had to return the seven pallets to the back of the store. She stated that some of the pallets were stacked so high that she had to wrap them in plastic so they would not fall over. She estimated that the pallets weighed 200 to 300 pounds. The claimant testified that she attempted to move the pallets with a manual hand jack using her right arm only, but ultimately had to use both arms. The claimant testified that at the end of her shift she had pain in both of her shoulders. She stated that after pulling the seven pallets she had severe

pain in her left shoulder. She described it as a "stabbing and a burning feeling." She testified that she also had pain in her right shoulder, but it was not as severe. The claimant testified that after returning the seven pallets to the back of the store, she clocked out.

¶ 12 On cross-examination the claimant testified that she had discomfort in both shoulders "[o]ff and on the whole month of January." She stated that prior to pulling the pallets with the pallet jack on February 14, 2009, she had discomfort in both of her shoulders, but afterwards she had an increase of pain in both shoulders. She testified that the pain in her left shoulder was "excruciating."

¶ 13 The claimant testified that when she returned to work the evening of February 14, 2009, she reported to an overnight manager named Cindy that both of her shoulders were hurting after pulling the seven pallets, but the left shoulder was worse than the right shoulder. She testified that Cindy took down a brief statement regarding the injuries, although this written statement was not with the other accident forms. The claimant later conceded that she did not know whether Cindy wrote down her statement but maintained that she told Cindy that both of her shoulders were hurting. The claimant testified that Cindy advised her that she would need to speak with Lynn Holder, an asset protection manager, to file an accident report and get a drug test. The drug test could not be done until Monday.

¶ 14 On February 16, 2009, Kirsten Wright, an overnight asset manager, assisted the claimant in filling out an associate incident log form regarding the events of February 14, 2009. Both Kirsten and the claimant signed the form. The claimant wrote the following statement on the form:

"My left shoulder and part of my arm is in constant pain, from pulling plastic, lifting heavy boxes. I might have pulled some muscles, from pulling heavy pallets."

¶ 15 On February 17, 2009, the claimant filled out and signed an associate statement form. On the form the claimant indicated that she reported her injury to Kirsten on February 16, 2009. In identifying the parts of her body that were injured, the claimant wrote "left shoulder, back part of my left arm." On cross-examination the claimant conceded that she did not mention her right shoulder pain because her "left shoulder was in so much more pain" and everyone was focusing on her left shoulder. However, during her testimony, she continued to maintain that she told Cindy about pain in her right shoulder on February 14, 2009. Cindy, who still works for the employer at another location, was not called as a witness.

¶ 16 On February 24, 2009, the claimant sought treatment from Dr. Jeffrey McIntosh, an orthopedic surgeon. The claimant testified that she informed Dr. McIntosh that she had experienced some discomfort in both of her shoulders but that she had a sudden increase in pain in both shoulders on February 14, 2009. Although the claimant informed Dr. McIntosh of the amount of repetitive work required on her job, she did not recall telling him the weight of the pallets, the size of the pallets, or the number of boxes she moved on an average night. The claimant maintained that she informed Dr. McIntosh on subsequent visits that she had continued right shoulder pain. Dr. McIntosh administered a corticosteroid injection to the claimant's left shoulder, which provided temporary relief, and prescribed medication. Dr. McIntosh allowed the claimant to return to work with the

restriction that she was not to use her left arm. She testified that she used her right arm and shoulder while performing her job duties as an apparel processor after seeing Dr. McIntosh.

¶ 17 Dr. McIntosh testified at the arbitration hearing by way of an evidence deposition, and his medical records were admitted into evidence. In his patient notes of the claimant's initial visit on February 24, 2009, Dr. McIntosh wrote:

"[The claimant] is a 50 year old, right hand dominant employee of [the employer], who comes in for evaluation of injury to her left shoulder."

There is no mention in Dr. McIntosh's report that the claimant also suffered an injury to her right shoulder. Dr. McIntosh diagnosed the claimant with tendonitis in the rotator cuff tendons of her left shoulder and administered an injection. He prescribed anti-inflammatory medication and physical therapy. Dr. McIntosh released the claimant with restrictions of "no pushing or pulling, and no working above the chest or shoulders."

¶ 18 On March 2, 2009, the claimant accepted a light-duty position as a people greeter. Between her injury on February 14, 2009, and the March 2, 2009, reassignment to light duty, the claimant continued working as an apparel processor. The claimant testified that during this time, the symptoms in her right shoulder worsened. The claimant did not work as an apparel processor after March 2, 2009.

¶ 19 The claimant testified that as a people greeter, she was required to pull out an empty cart for customers as they came into the store. She also testified that when customers brought merchandise to be returned, she would have to lift the merchandise to scan the bar code and then tag it. She further testified that she would have to reach back behind the

electronic carts to unplug or plug it for elderly or disabled customers. The claimant testified that if a customer was walking out of the store and an alarm went off, she would have to use a hand scanner to deactivate a security tag. She testified that as she was performing these duties, she started experiencing a lot of discomfort in her right shoulder.

¶ 20 The claimant saw Dr. McIntosh again for treatment on March 17, 2009. Dr. McIntosh administered another injection to the claimant's left shoulder and recommended an MRI evaluation. The medical records do not indicate that the claimant reported right shoulder pain on this visit.

¶ 21 The claimant underwent an MRI of her left shoulder and returned to see Dr. McIntosh on April 9, 2009. Dr. McIntosh testified that the April 9, 2009, visit was the first time the claimant reported right shoulder pain. Dr. McIntosh stated that the claimant did not report a specific accident to her right shoulder but rather reported that she had a slow progression of right shoulder pain because she was using it more than the left shoulder. In his progress note from that visit Dr. McIntosh noted:

"[The claimant] continues to have a significant amount of pain in her shoulder, and this is now starting to affect her right shoulder because she is compensating with her right upper extremity."

¶ 22 Dr. McIntosh's assessment was that the claimant had developed tendonitis in her right shoulder and that she was not improving with the tendonitis in her left shoulder. Dr. McIntosh could not exclude the claimant's work duties as causing her right shoulder pain. Dr. McIntosh administered an injection into the claimant's right shoulder and recommended surgical intervention for her left shoulder. The claimant underwent left

shoulder surgery on May 8, 2009. The postoperative diagnosis was left shoulder impingement syndrome and rotator cuff tear.

¶ 23 The claimant returned to see Dr. McIntosh for post-op visits on May 12 and May 21, 2009. Progress notes from May 21, 2009, indicate that the claimant's left shoulder was healing, but she reported that her right shoulder continued to give her "problems." Dr. McIntosh ordered an MRI of the claimant's right shoulder and instructed the claimant to remain off work. The MRI revealed biceps tenosynovitis and rotator cuff tears.

¶ 24 The claimant returned to see Dr. McIntosh on June 11, 2009. Dr. McIntosh prescribed physical therapy for the claimant's right shoulder. The claimant was released to return to work on June 18, 2009, with a restriction of no work above her chest or shoulders and a five-pound weight restriction. The employer accommodated the restrictions.

¶ 25 When the claimant returned to Dr. McIntosh on July 7, 2009, she reported that the light-duty work was making her right shoulder pain "more extreme." Progress notes reveal that given the MRI findings of biceps tenosynovitis and rotator cuff tears, Dr. McIntosh recommended right shoulder surgery and continued the claimant on light duty until surgery was scheduled.

¶ 26 On August 13, 2009, Dr. McIntosh performed surgery on the claimant's right shoulder that consisted of a "[r]ight shoulder arthroscopy with synovectomy" and "[o]pen decompression with acromioplasty, bursectomy, and rotator cuff repair."

¶ 27 Dr. McIntosh saw the claimant following her right shoulder surgery on August 18 and August 28, 2009. The claimant began to report complaints of pain on her visit to Dr.

McIntosh on September 8, 2009, and on September 29, 2009, Dr. McIntosh administered an injection in the claimant's right shoulder "in [an] effort to decrease her discomfort." The claimant received another injection in her right shoulder on October 20, 2009, with no lasting relief.

¶ 28 In November 2009, while the claimant was engaged in physical therapy exercises, her right shoulder "popped." She testified that she and the therapist both heard the pop. The claimant stated she was advised by the therapist to discontinue therapy until she had been evaluated by Dr. McIntosh. Dr. McIntosh discontinued therapy at that time.

¶ 29 The claimant underwent another MRI of her right shoulder, which revealed a possibility of surgical changes or a new tear. Dr. McIntosh recommended a second surgery for a possible rotator cuff repair. The claimant underwent a second surgery on her right shoulder on February 19, 2010. Dr. McIntosh's surgical findings were that the claimant had "significant bursitis" in her right shoulder but her rotator cuff was intact.

¶ 30 The claimant continued to have complaints of pain in her right shoulder following the two surgical interventions and continued to treat with Dr. McIntosh. In March 2010 Dr. McIntosh prescribed a TENS unit for the claimant.

¶ 31 When the claimant returned to work in April 2010 following the second right shoulder surgery, the restrictions were no work above her chest or shoulders, no prolonged standing or walking, and alternate with sitting or standing. The employer accommodated these restrictions, and the claimant was assigned to answer the phone in the fitting room.

¶ 32 On August 10, 2010, the claimant saw Dr. McIntosh with continued complaints of right shoulder pain. The claimant reported that the more she worked, the more her

shoulder bothered her. Dr. McIntosh stated during his deposition testimony that he "didn't have a good reason for continued discomfort in [the claimant's] right shoulder," so he gave her another shot and kept her on the same restrictions. Dr. McIntosh stated that when the claimant returned to see him three weeks later, he recommended a third surgery on her right shoulder "[b]ecause nothing else was helping. So we were just running out of options."

¶ 33 On November 3, 2010, the claimant had an MRI of her right shoulder which revealed probable postoperative and degenerative changes. The report indicated that a partial tear could not be excluded. Dr. McIntosh saw the claimant again on November 5, 2010, and she still had complaints of pain even though she was working within the restrictions he had given her. Dr. McIntosh noted that the MRI revealed bursitis and rotator cuff tendonitis, but he did not see a distinct tear.

¶ 34 The claimant returned again to Dr. McIntosh for treatment on November 19, 2010. Progress notes indicate the claimant reported that she was fairly stressed out with the hours she was working and that her shoulder was giving her more and more discomfort. At this point the claimant was working at light-duty capacity. Dr. McIntosh recommended that the claimant use a sling for her right arm while at work. He administered another injection and restricted the claimant to no heavy lifting, no pushing of carts, and no repetitive work with her right arm.

¶ 35 The claimant returned again on February 11, 2011, with "significant complaints of pain."

¶ 36 When asked on cross-examination how often she wore the sling from November

2010 through February 2011, the claimant responded that she wore the sling when she left the house. She testified that she could not use her arm or do any type of lifting with her right arm during this time. The claimant further testified that she tried not to use her right arm and shoulder at all. On redirect examination, the claimant testified that she did not wear the sling 100% of the time when she left the house and that she was able to perform some tasks with her right arm.

¶ 37 At the employer's request, the claimant underwent a section 12 exam with Dr. Richard Lehman, an orthopedic surgeon. In the health questionnaire the claimant completed prior to the exam, she noted that she had undergone left shoulder surgery and two right shoulder surgeries. She listed two dates of onset for her symptoms: February 14, 2009, and June 2009. It is unclear which onset date applied to her right shoulder symptoms.

¶ 38 In his report dated April 14, 2011, Dr. Lehman outlined the claimant's medical history and his findings upon examination. Dr. Lehman found no swelling in her right shoulder but found the claimant had pain with rotator stress to her shoulder. Dr. Lehman diagnosed the claimant with rotator cuff tendonitis in her right shoulder. He stated that he did not believe that the claimant's overuse on the job created tendonitis in her right shoulder, but rather believed that the tendonitis was consistent with the claimant's age. In reviewing the claimant's initial MRIs, he found no evidence of substantial acute pathology. Dr. Lehman believed that the claimant's problems were related to preexisting degenerative changes in the rotator cuff.

¶ 39 Dr. Lehman opined that the claimant was at maximum medical improvement

(MMI) and that she was able to return to work without restrictions. Dr. Lehman stated, "The [claimant] has subjective complaints of pain that are not objectified on her physical examination and her MRI's consistently are showing very little pathology as has her improvement." It was his opinion that the claimant was not a candidate for a third surgery on her right shoulder.

¶ 40 On May 3, 2011, the claimant saw Dr. McIntosh. She reported that she had been examined by Dr. Lehman and that it was his opinion that she was at MMI and could work without restrictions. Based on her continued complaints of pain, Dr. McIntosh administered an injection to the claimant's right shoulder.

¶ 41 When the claimant returned to work on May 4, 2011, her position as an overnight apparel processor was no longer available. The employer showed her a list of job openings at the store. She was offered a position as a stocker on overnights, a cashier on day shift, or work in the dairy/produce area. The claimant testified that she took the job as an overnight stocker because she believed the work in the dairy/produce area would be too heavy. Additionally, she testified that the day shift cashier position paid a dollar less per hour than the overnight stocker position.

¶ 42 On the evening of May 4, 2011, the claimant began her position as an overnight stocker. The employer assigned her to the craft department to unload a pallet with approximately 50 boxes. The boxes contained bags of sand and decorative rocks weighing up to 14 pounds. The claimant testified that since employees were no longer allowed to work out of the shopping carts, she went to the back of the store to get a roll cart. Since she did not see a roll cart in the freight area, she had to go outside of the building to

get one. The claimant testified that in order to get outside of the building, she had to "lift a big heavy metal warehouse door." She testified that she bent down, lifted the door over her head with both hands, and walked out. She retrieved the roll cart, but when she turned to go back inside, the warehouse door had closed. The claimant testified that she attempted to open the door again but felt pain in her shoulders and could not get the door up higher than her nose. She testified that a coworker saw her struggling and lifted the door for her.

¶ 43 She testified that because her right shoulder was beginning to hurt she alternated between her left arm and her right arm in pulling the roll cart. The claimant returned to the craft department and began to unload the merchandise from the boxes. She testified that as she was attempting to lift a box onto a hook using her right hand, her arm would not go above her head so she had to switch to her left hand to hang the rest of the merchandise.

¶ 44 The claimant testified that she next unloaded a portable sewing machine that weighed approximately 25 to 30 pounds. She stated that she had to carry the sewing machine with both hands, approximately waist level, about 10 feet to place it on the bottom shelf. She testified that by now both shoulders were hurting, but especially her right shoulder. The claimant testified that when she attempted to pick up a box from the pallet she heard her shoulder "pop, kind of crack" and she dropped the box to the floor. She testified that she then attempted to pick up another box, and this time her right shoulder "just gave out completely" and she dropped the box to the floor. She testified that she placed her left hand on her shoulder and went to find a coworker to call for help. The claimant testified that she reported to one of the managers that she had "reinjured" her

shoulder and sought immediate treatment at the Crossroads emergency room. The emergency room doctor instructed the claimant to use her sling, continue pain medications, and follow up with her treating physician.

¶ 45 On May 6, 2011, the claimant returned to see Dr. McIntosh. She claimed that her return to full-duty work did not go very well. She reported that her shoulders had "failed" and that she had to go to the emergency room due to the significant increase in pain. Dr. McIntosh recommended an MRI evaluation of her right shoulder before recommending further care. Dr. McIntosh administered an additional injection to the claimant's shoulder. Dr. McIntosh instructed the claimant to stay off work completely. The claimant has not returned to work since May 6, 2011.

¶ 46 At the hearing the claimant testified that on a scale of 1 to 10, her right shoulder pain was at a level 8. The claimant testified that she has trouble with her right shoulder in performing all of her normal daily activities, such as taking a shower, washing her hair, getting dressed, and cleaning her house. She claimed that she is not able to reach her arms above her head to "put cups [or] glasses in the cabinet" and "can't even lift a gallon of milk." The claimant testified that Dr. McIntosh recommended further surgery on her right shoulder, but the employer's workers' compensation carrier had not authorized the surgery. On redirect examination, the claimant clarified that her right arm and shoulder are not completely functionless and she can complete some tasks.

¶ 47 The last time that Dr. McIntosh saw the claimant prior to the hearing was July 21, 2011, and the claimant continued to report pain in her right shoulder. At the time of Dr. McIntosh's evidence deposition, the claimant had not received authorization from the

workers' compensation carrier to have the MRI evaluation or the recommended surgery.

¶ 48 Dr. McIntosh diagnosed the claimant with rotator cuff tendonitis/chronic pain of the right shoulder. With regard to causation of the claimant's right shoulder injury, Dr. McIntosh stated that as the claimant started to compensate for her left shoulder, and her right shoulder became worse, she started down the path of inflammation and pain, and suffered failure of the rotator cuff. Dr. McIntosh believed that the claimant's return to work was a mistake and "it has probably significantly caused her aggravation to her shoulder."

¶ 49 Dr. McIntosh recommended a third surgery to the claimant's right shoulder prior to the alleged injury on May 4, 2011. He testified that the claimant's job duties, especially the pushing and pulling, would continue to aggravate her right shoulder. At the time of his evidence deposition Dr. McIntosh did not believe that the claimant's right shoulder was at MMI.

¶ 50 Dr. McIntosh reviewed the report generated by Dr. Lehman dated April 14, 2011. He agreed with Dr. Lehman that the claimant had no swelling in her right shoulder and agreed with Dr. Lehman's diagnosis of rotator cuff tendonitis. He disagreed, however, with Dr. Lehman's conclusion that the claimant's overuse on the job had not created tendonitis in her shoulder. Dr. McIntosh disagreed with Dr. Lehman's conclusion because based on the history provided to him by the claimant, he did not have an alternative cause for her tendonitis. Dr. McIntosh disagreed that the claimant was able to return to work without restrictions. He could not say for certain that a third surgery would help.

¶ 51 It was Dr. McIntosh's opinion that the claimant's job duties as an apparel processor

could have aggravated a preexisting condition of her shoulders and made it symptomatic. He stated that overcompensating for the lack of ability in the claimant's left shoulder by using her right shoulder to perform activities such as those she reported doing on May 4, 2011, could cause or aggravate the preexisting condition in her right shoulder.

¶ 52 On cross-examination when asked whether the claimant had complaints of right shoulder pain on her initial visit on February 24, 2009, Dr. McIntosh responded: "No. She did not, as far as—if I didn't document it in my record, then I don't believe she was having problems with her right shoulder at that time."

¶ 53 Dr. Lehman testified by way of evidence deposition. Dr. Lehman reviewed the claimant's medical records and saw the claimant on one occasion. He stated that an exam typically lasts 15 to 20 minutes, although Dr. Lehman could not state for certain how long he examined the claimant. The claimant reported her job duties to him and filled out an intake form. Dr. Lehman examined both of the claimant's shoulders. He did not see swelling of the claimant's right shoulder. Dr. Lehman noted that on physical examination the claimant had pain with rotatory stress of her right shoulder and reported that any type of motion caused pain. He noted, however, that when he distracted the claimant during the exam "all of her symptoms resolved." Dr. Lehman noticed inconsistencies between the claimant's subjective complaints and what he found on physical exam. He opined that the claimant's subjective complaints were not corroborated by her exam. Dr. Lehman did not believe that the condition of the claimant's left or right shoulder was causally related to her job duties. It was his opinion that the claimant's left and right rotator cuffs had the same pathology and that symmetric changes of this nature are age-related.

¶ 54 The claimant testified that she was not aware of Dr. Lehman looking at her bare shoulder at any time during the section 12 exam. She also denied that he had distracted her during the exam. The claimant testified that she was unable to lift her arm above her head so Dr. Lehman lifted her arm up. She testified that it was very painful. She claimed that he did not ask her to lift objects in his office, nor did he ask her about what she could or could not lift with her right arm.

¶ 55 Kirsten Wright testified on behalf of the employer. Kirsten, who had assisted the claimant in filling out the associate incident log form on February 16, 2009, testified that the claimant reported to her that she had left hand and arm pain but did not report right hand or arm pain. Kirsten stated that if the claimant had reported right hand or arm pain she would have had the claimant put it in the report. She testified that it was not the employer's policy to ignore one injury and focus on the more severe injury.

¶ 56 Lynn Holder, an asset protection coordinator, testified on behalf of the employer. Although Lynn was not working on February 14, 2009, she was on duty when the claimant filled out the associate statement form. She explained that it was her duty to ensure the accuracy of incident reports. Lynn testified that the claimant reported that she had left shoulder pain that had been ongoing for about one month or so due to repetitive motion of opening boxes, pulling plastic off, and pulling pallets. Lynn testified that the claimant did not report to her any problems with her right shoulder. Lynn further testified that if the claimant had told her about an injury to her right shoulder, Lynn would have had the claimant add that information to the form. She testified that when an employee reports an accident, they do not focus on one body part and not the other.

¶ 57 The employer introduced into evidence video surveillance of the claimant's activities on various dates. Lynn testified that she had viewed the surveillance video of the claimant shopping in the store on January 12, 2011, and noted that the claimant was not wearing a sling. She stated that the video showed the claimant lifting a "big 3-door tote" which Lynn estimated to weigh approximately five pounds. Lynn observed that when the claimant was at the register, she lifted the tote from the top of the carousel with both of her hands and placed it on top of her cart. She testified that she saw the claimant's arms go above her neck. She also saw the claimant lift the tote into her SUV using both arms and then use her right arm to reach up over her head to close the back hatch. On cross-examination Lynn admitted that she was not aware that Dr. McIntosh had prescribed use of the sling only while the claimant was working and that she did not know whether lifting the tote caused the claimant pain in her right shoulder.

¶ 58 Lynn testified that she also viewed surveillance video taken of the claimant while she was working at the store on May 4, 2011. Lynn testified that she observed the claimant use just her right arm to lift the big metal door to go outside to get a cart. She noted that when the claimant turned around to go back inside with the cart, the door had closed. She observed the claimant lift the door above her head until she could not reach any higher, and then a coworker pushed the door open enough so that the cart could come into the building. The surveillance video showed the claimant unloading a pallet in the craft department. Lynn testified that at no time did she see outward signs that the claimant was experiencing pain nor did she see the claimant grab her right shoulder. Instead, she testified that she observed the claimant walking down the aisle with both of her arms

"moving in a swinging motion."

¶ 59 The arbitrator found that the claimant had met her burden of proving accident, notice, and causal connection as to her left shoulder condition, but not to her right shoulder. The claimant appealed the arbitrator's decision regarding her claims of injuries to her right shoulder to the Commission. The Commission affirmed the arbitrator's decision on the issues of accident and causal connection regarding the claimant's right shoulder. The claimant appealed to the circuit court, which confirmed the Commission's decision. The claimant appeals.

¶ 60

ANALYSIS

¶ 61 The claimant's first application for adjustment of claim alleged "repetitive trauma to both upper extremities" and asserted an accident date "up to and including February 13, 2009," which was later amended to February 14, 2009. The claimant's second application for adjustment of claim alleged that on May 4, 2011, she sustained injuries to her "right shoulder, right upper extremity, and other body parts." On appeal the claimant contends that the circuit court erred in confirming the Commission's finding that she failed to prove in either claim that she sustained accidental injuries to her right shoulder which arose out of and in the course of her employment. We will examine each of these claims in turn.

¶ 62 "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). The "in the course of" component refers to the time, place, and circumstances of the accident. *Caterpillar Tractor Co. v. Industrial Comm'n*,

129 Ill. 2d 52, 57, 541 N.E.2d 665, 667 (1989). The "arising out of" component of a workers' compensation claim pertains to the origin and cause of the injury. *Circuit City Stores, Inc. v. Illinois Workers' Compensation Comm'n*, 391 Ill. App. 3d 913, 920, 909 N.E.2d 983, 989 (2009). "The determination of whether an injury arose out of and in the course of a claimant's employment is a question of fact for the Commission to resolve, and its finding in that regard will not be set aside on review unless it is against the manifest weight of the evidence." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 24, 990 N.E.2d 284. "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Id.* "[A] reviewing 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." *Sisbro*, 207 Ill. 2d at 206, 797 N.E.2d at 673.

¶ 63 "An employee who suffers a repetitive-trauma injury still may apply for benefits under the Act, but must meet the same standard of proof as an employee who suffers a sudden injury." *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). "That means, *inter alia*, an employee suffering from a repetitive-trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person." *Id.* at 65, 862 N.E.2d at 924. "Setting this so-called manifestation date is a fact determination for the Commission." *Id.* at 65, 862 N.E.2d at 925.

¶ 64 It should be noted that the Commission found in favor of the claimant regarding her claim of left shoulder injury, but found that she failed to prove accident and causal connection with respect to her right shoulder claim. Because we find that the Commission did not err in finding that the claimant failed to prove accident, we decline to consider the issue of causal connection.

¶ 65 The claimant testified that she injured both shoulders on February 14, 2009, and she claimed that she reported these injuries to a manager named Cindy when she came back to work for her next overnight shift. She first testified that Cindy had written down her statement, but later conceded that she was not certain if Cindy had actually written it down. The claimant continued to maintain that she had informed Cindy that both shoulders were injured. We note, however, that when the claimant completed the associate statement she indicated that she reported her left shoulder injury to "Kirsten" on February 16, 2009, and made no mention of reporting bilateral shoulder injuries to Cindy two days earlier.

¶ 66 The claimant also testified that when she completed the associate incident log and the associate statement, she reported bilateral shoulder injuries. However, both the associate incident log and the associate statement reveal that the claimant reported an injury to her left shoulder and arm. These contemporaneous forms do not identify injury to the claimant's right shoulder. By way of explanation the claimant stated that she reported injuries to both shoulders but that the employer focused only on the left shoulder since it was the source of her severe pain. That explanation is unpersuasive as the claimant completed and signed the forms in question. Further, the claimant's testimony was soundly refuted by the testimony of Lynn Holder and Kirsten Wright. Both Lynn and

Kirsten, who assisted the claimant in the completion of the forms, testified that the claimant reported only a left shoulder injury.

¶ 67 The early medical records also do not support the claimant's assertion that she sustained a right shoulder injury on February 14, 2009. Review of Dr. McIntosh's notes from February 24, 2009, reveals that the claimant reported only an injury to her left shoulder at her initial visit. Dr. McIntosh also testified that the claimant did not report a right shoulder injury on her initial visit. At her next visit on March 17, 2009, there is still no mention in the medical record that the claimant reported an injury to her right shoulder. It was not until April 9, 2009, that Dr. McIntosh's progress notes indicate that the claimant reported right shoulder pain. Even then the records do not support the claimant's assertion that she injured her right shoulder on February 14, 2009. Rather, review of Dr. McIntosh's note indicates that the claimant reported to him that her left shoulder pain was "starting to affect her right shoulder because she is compensating with her right upper extremity." The Commission could reasonably infer that the claimant's right shoulder pain did not begin until after she had injured her left shoulder on February 14, 2009, which is inconsistent with the manifestation date alleged by the claimant.

¶ 68 Upon review of the record as a whole, we agree that the claimant failed to prove an accident on February 14, 2009, with respect to her right shoulder. The lack of notation of right shoulder complaints in the associate incident log, the associate statement, the testimony of Lynn and Kirsten, and the initial treatment records undermines the claimant's assertion that she sustained injuries to her right shoulder on February 14, 2009. In turn, the claimant's insistence that she sustained injuries to her right shoulder on February 14,

2009, undermines the opinion of her treating physician Dr. McIntosh that the claimant's right shoulder condition was aggravated as the claimant relied on her right upper extremity more as a way of compensating for her left shoulder pain.

¶ 69 The claimant next maintains on appeal that she sustained accidental injuries to her right shoulder on May 4, 2011, when she returned to full-duty work. The claimant stated that on May 4, 2011, she had to go outside to obtain a cart. She testified that she bent down, lifted the heavy metal warehouse door over her head with both hands, and walked out. She testified that as she attempted to lift the warehouse door to reenter the building she felt pain in her shoulders and could not get the door up higher than her nose. She testified that a coworker saw her struggling and lifted the door for her.

¶ 70 Lynn, who viewed the surveillance video of the claimant working that night, testified that she observed the claimant use just her right arm to lift the big metal door to go outside to get a cart. She observed the claimant lift the door above her head until she could not reach any higher, and then a coworker pushed the door open enough so that the cart could come into the building. Lynn also viewed the surveillance video of the claimant unloading a pallet in the craft department. While the claimant testified that she placed her left hand on her shoulder after she injured her shoulder and went to find a coworker to call for help, Lynn testified that at no time did she see outward signs that the claimant was experiencing pain nor did she see the claimant grab her right shoulder. Instead, she testified that she observed the claimant walking down the aisle with both of her arms "moving in a swinging motion."

¶ 71 Here, the Commission, faced with conflicting evidence, found Lynn's testimony

more credible. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009) ("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."). The Commission found that the video surveillance did not corroborate the claimant's assertion that she sustained a right shoulder injury on May 4, 2011. Accordingly, we find there is sufficient evidence in the record to support the Commission's finding that the claimant failed to prove accident with regard to her right shoulder on either date alleged in her applications for adjustment of claims.

¶ 72

CONCLUSION

¶ 73 For the foregoing reasons, we affirm the judgment of the circuit court confirming the decision of the Commission, and remand to the Commission pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 74 Affirmed and remanded.