2016 IL App (5th) 150317WC-U

Order filed: October 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CATHERINE PRICE,	)	Appeal from the Circuit Court
	)	of Montgomery County, Illinois.
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 5-15-0317WC
	)	Circuit No. 2014-MR-117
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Hillsboro Rehabilitation Center, Appellees).	)	Honorable Douglas J. Jarman, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The Commission's finding that the claimant failed to prove that she sustained an accident that arose out of and in the course of her employment was not against the manifest weight of the evidence; (2) the employer fulfilled its obligations under the Act and under the Illinois Rules of Professional Conduct by disclosing and producing certain subpoenaed documents immediately prior to the arbitration hearing, and the claimant waived any argument that she was prejudiced by the employer's allegedly untimely disclosure of such documents by expressly waiving any objection to the documents and by relying upon them during the hearing; and (3) the claimant forfeited the argument that the employer's failure to disclose and produce certain subpoenaed documents constituted spoliation for which the employer should be sanctioned by failing to raise the argument

before the arbitrator or the Commission, and the claimant's spoliation argument failed on the merits.

¶ 2 The claimant, Catherine Price, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries to her left shoulder and arm which she allegedly sustained while working for respondent Hillsboro Rehabilitation Center (employer). After conducting a hearing, an arbitrator found that the claimant had failed to prove that she sustained an accident that arose out of and in the course of her employment, and denied benefits.

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission unanimously affirmed and adopted the arbitrator's decision.

¶ 4 The claimant then sought judicial review of the Commission's decision in the circuit court of Montgomery County, which confirmed the Commission's ruling.

¶ 5 This appeal followed.

¶ 6 FACTS

¶ 7 The claimant worked for the employer as a certified nurse's assistant (CNA). Her duties included assisting residents of the employer's facility in their rehabilitation efforts and performing the general duties of a nurse. The claimant testified that she worked with patients who had Alzheimer's disease, among others.

¶ 8 On December 21, 2008, the claimant filed an Application for Adjustment of Claim alleging that she sustained a work-related injury to her left shoulder and arm while lifting a patient on September 22, 2008. The claimant did not allege that she suffered a neck or back injury.

¶ 9 During the arbitration hearing, the claimant testified that she was injured at work while

attempting to get an Alzheimer's patient dressed. She claimed that she felt stinging in her hand and arm while attempting to dress the patient and put him in a wheelchair. The claimant acknowledged that she was not sure when the work accident occurred. She testified that she was "bad with dates" because she had suffered a stroke several months prior to the hearing which had affected her memory.

¶ 10 The claimant testified that, after suffering the work accident, she told "nurse Jan" that her hands and arms hurt "because of stinging." However, she did not mention the accident involving the Alzheimer's patient to Jan. The claimant admitted that she never had a conversation with Jan about what she was doing when the pain first occurred. The claimant continued to work for several days before seeking treatment, and she never filed an accident report. She acknowledged that she had no reason to dispute the employer's claim that it did not receive notice of the claimant's alleged work accident until November 2008.

¶ 11 On September 22, 2008, the alleged date of the claimant's work-related accident, the claimant sought treatment at the Hillsboro Area Hospital. The hospital's medical records of that visit indicate that the claimant presented with complaints of pain in her right middle finger.[1] The hospital's records do not indicate that the claimant complained of any neck, arm, or shoulder pain at that time. Nor do they mention any work injury.

¶ 12 On October 10, 2008, the claimant went to the emergency room (ER) at Hillsboro Area Hospital complaining of pain in her neck and upper back. The claimant reported that she began experiencing this pain one week before the ER visit (*i.e.*, around October 2, 2008). The hospital's record of the claimant's October 10, 2008, visit indicates that the symptoms the

[1]On cross-examination, the claimant testified that she had jammed her finger on September 22, 2008, which was the reason she went to the hospital for treatment on that date.

claimant was experiencing were not the result of any known injury. The claimant was diagnosed with a neck strain and left shoulder strain. A CT scan was performed on the claimant's cervical spine which revealed degenerative bony changes with bony spurring. The CT scan showed no evidence of an acute injury or any other abnormalities.

¶ 13 The claimant's last day working for the employer was November 9, 2008. The following day, the claimant went to the Litchfield Family Practice Center (Litchfield) seeking treatment for a possible urinary tract infection. The claimant also complained of a generalized muscle pain which had been occurring in a persistent pattern for three weeks. The November 10, 2008, record from Litchfield contains no reference to a work injury or accident. Nor does it indicate that the claimant was experiencing pain in her neck, shoulder, or back at that time.

¶ 14 The claimant returned to Litchfield on December 18, 2008, seeking treatment for a cough. The Litchfield medical records of this visit do not reference any complaints of neck, back, shoulder, or arm pain. Nor do they include any mention of a work-related injury.

¶ 15 On March 9, 2009, the claimant saw Dr. Stephen Pineda, an orthopedic surgeon who practices in Springfield, Illinois. At that time, the claimant complained of pain in her neck and back. Dr. Pineda's March 9, 2009, medical record reflects that the claimant reported that her neck and back symptoms "began around September 2008." The claimant reported the same medical history in Dr. Pineda's patient history intake form. Dr. Pineda noted that the claimant "has had back pain in the past" and prior back surgery. Upon examination, Dr. Pineda also noted that the claimant had: (1) "diffusion in her back" and "some degenerative change in the lumbar spine with fusion with probable pedicle screws"; and (2) a small cervical disc herniation at C6-7. Dr. Pineda observed that, although the claimant's cervical disc herniation was "to the right of center," she reported experiencing pain mostly in the center of her neck. Dr. Pineda

recommended that the claimant see a pain management doctor and did not recommend any aggressive surgery.

¶ 16 On March 17, 2009, the claimant returned to Litchfield. She reported that she was experiencing muscle pain in her neck and shoulder and indicated that she wanted to be referred to a Dr. David Kennedy, a neurological surgeon who had previously treated her in St. Louis. The claimant reported that the pain in her neck and shoulder was of sudden onset and had been occurring in a persistent pattern for three weeks. The claimant did not suggest that her neck and shoulder pain were work related.

¶ 17 On May 14, 2009, the claimant saw Dr. Matthew Gornet, an orthopedic surgeon whose practice is devoted to spine surgery. The claimant presented with complaints of low back pain into both buttocks and both legs with tingling into her feet. She also had neck pain, shoulder pain, and headaches. The claimant told Dr. Gornet that her problems began "in September" when she was "working in a nursing home." The claimant stated that she "was pulling a patient up to move them from a bed to a wheelchair" when she felt a pull in her neck and shoulder as well as her low back. The claimant told Dr. Gornet that she initially felt it was simply a pulled muscle but when it did not improve she reported it "one to two days later." She subsequently went to the ER and had an MRI of her neck and low back. The claimant reported a history of prior back problems "dating back to 1994," including a prior back surgery (an L2-3 fusion) performed by Dr. Kennedy. The claimant indicated that she had seen a chiropractor intermittently anywhere from two to six months prior to the alleged work injury. She told Dr. Gornet that she had had a dramatic increase in pain and symptoms since the work accident which affected her ability to sleep and to function.

¶ 18 Dr. Gornet diagnosed a potential irritation of the C7 nerve root in the right cervical spine.

Dr. Gornet later testified that: (1) a February 23, 2009, MRI scan of the claimant's lumbar spine revealed a disc herniation and annular tear at L2-3 and another annular tear at L4-5 on the "far left" side; and (2) a cervical MRI performed on the same date revealed disc herniation at C6-7 correlating with the claimant's symptoms. Dr. Gornet opined that the claimant had structural injury to the cervical and lumbar spine and that her symptoms were causally related to her work injury. He placed the claimant on light duty and recommended conservative care.

¶ 19 On August 25, 2009, Dr. Gornet performed a microdiscectomy and disc replacement at C5-6 and C6-7. The claimant's neck pain, headaches, and arm symptoms all improved following the surgery. Dr. Gornet recommended physical therapy and kept the claimant off work. He returned the claimant to full work duty as of December 7, 2009. On March 4, 2010, Dr. Gornet declared the claimant to be at maximum medical improvement (MMI).

¶ 20 On October 7, 2009, the claimant was examined by Dr. Morris Soriano, a neurosurgeon, at the employer's request. The claimant told Dr. Soriano that she began suddenly experiencing numbness in her fingers at work on or about November 10, 2008, and that she reported these symptoms to the nurse on duty. She claimed that she then returned to work on her Alzheimer's unit. While she was in the process of turning a combative patient over in bed, she experienced pain, numbness and tingling in her neck and equally down both arms. She told Dr. Soriano that she did not think she reported any injury. The claimant admitted having a long history of neck pain prior to her injuries.

¶ 21 During his evidence deposition, Dr. Soriano testified that the claimant did not report a history of accident occurring on or about September 22, 2008. He stated that, when he asked the claimant whether the accident date was November 10, 2008, the claimant confirmed that it was.

¶ 22 After examining the claimant and reviewing her medical records, x-rays, and MRI films,

Dr. Soriano opined that the claimant had not suffered an acute injury and that her neck, back, arm, and shoulder symptoms were caused by a preexisting degenerative collapse of a disc in the claimant's cervical spine. Although he acknowledged that repetitive lifting was "a possible source" of a cervical disc rupture, Soriano did not believe that the claimant's work activities were causally related to her injury. Dr. Soriano concluded that the alleged work accident on or about November 10, 2008, did not result in a need for any of the treatments that the claimant received after that date. He further opined that the claimant had reached MMI and was capable of full unrestricted work activities.

¶ 23 The claimant testified that, at the time she was hired by the employer in October 2007, she was informed of the employer's policy regarding the reporting of work accidents. Specifically, the claimant understood that the employer's policy required an employee to report any work-related injury to a supervisor immediately.

¶ 24 During cross-examination, the claimant acknowledged that she had previously filed a workers' compensation claim involving her lower back.[2] Accordingly, the claimant testified that

[2]The claimant's prior workers' compensation claim involving her lower back was settled for 25% man as a whole on or about December 6, 1999. When the claimant was hired by the employer in 2007, the claimant filled out a post-offer medical history questionnaire in which she indicated that she had never experienced any back injury or back symptoms. The claimant also stated in that medical history questionnaire that she had not experienced any prior neck injury, neck symptoms, neck aches, shoulder pain, or tingling sensations in her arms and fingers. Similarly, during the arbitration hearing in the instant case, the claimant testified that she had never experienced any neck injury, neck pain, or other neck symptoms prior to her alleged September 22, 2008, work accident. During the hearing, the employer introduced several

she understood what needed to be included in an Application for Adjustment of Claim document.

¶ 25 The claimant also testified on cross-examination that she did not actually seek treatment for neck and shoulder pain until October 10, 2008. She further testified that she had an accident in February of 2009 that required her to seek treatment for her neck and shoulder in March of 2009. The claimant further testified that she could not recall meeting with Dr. Soriano for an independent medical examination in October of 2009 and could not recall the medical history she provided Dr. Soriano at that time.

¶ 26 Jana McArthur, a licensed professional nurse (LPN) who had worked from the employer for 12 years, testified on behalf of the employer. McArthur, who goes by the name "Jan," worked for the employer as a floor nurse from September 2008 to December 2008. She worked with the claimant during that time period. McArthur testified that the claimant never reported a work injury to her. Nor did the claimant ever mention an accident involving lifting a resident. On one occasion, the claimant asked McArthur what carpal tunnel syndrome was and reported experiencing carpal tunnel-like symptoms. At that time, McArthur explained to the claimant what carpal tunnel syndrome was and asked her whether the claimant had hurt herself. According to McArthur, the claimant responded, "no," and went back to work. McArthur wrote a record of this conversation with the claimant which states that: (1) "at approximately 7:00 p.m." the claimant told McArthur that her hands and wrists hurt; (2) McArthur asked the

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medical records indicating that the claimant had repeatedly complained of and was treated for neck and shoulder pain prior to September 2008. The employer also introduced medical records revealing that the claimant had experienced pain in her hands and weakness in her grip dating back to April of 1997.

claimant if she hurt herself and the claimant stated, "no, I don't know why they hurt"; (3) McArthur then told the claimant that McArthur had carpal tunnel syndrome and "sometimes they just hurt"; (4) the claimant said nothing further and returned to work.

¶ 27 Tracy Craige, the employer's director of nursing in the fall of 2008, also testified on the employer's behalf.[3] Craige testified that, in the Fall of 2008, she was the claimant's boss and she often worked with the claimant. Craige testified that she was familiar with the employer's accident reporting policy. According to Craige, the policy required an employee to report a work related accident to her supervisor verbally and to and fill out the appropriate documents which included an incident report. Craige noted that, because she was the director of nursing, she was the "person to see" if a work accident occurred. Craige testified that the claimant never mentioned an incident that occurred while she was lifting a resident in the Alzheimer's unit. Nor did the claimant ever fill out an incident report regarding her alleged work injury. Moreover, Craige stated that the claimant never made any neck, shoulder, or arm complaints.

¶ 28 The employer also called Edith Crouch to testify at the time of trial. Crouch is a CNA who had worked for the employer for 15 years. Crouch testified that she was the claimant's partner and worked with her several times a week during the relevant time period. According to Crouch, the claimant never mentioned any work injury or complained of any neck, shoulder, arm, or hand symptoms to her. At no time did the claimant mention an incident involving lifting a resident.

¶ 29 The arbitrator found that the claimant had failed to prove a work accident arising out of and in the course of her employment with the employer. Because the claimant testified that she

[3]At the time of the arbitration hearing, Craige was no longer employed by the employer. She testified that she was brought to the hearing via subpoena.

had suffered a stroke which affected her memory approximately eight months before the arbitration hearing, the arbitrator did not "attach much weight to the inconsistencies contained in [the claimant's] testimony and her inability to remember things," such as her earlier cervical care and the date of the alleged work accident. Nevertheless, because the claimant alleged a specific accident, the arbitrator noted that the claimant "still had the burden of proving an accident traceable to a definite time, place and cause related to her employment." The arbitrator found that the claimant had failed to meet this burden.

¶ 30 In her Application for Adjustment of Claim, the claimant stated that she had injured her left shoulder and arm lifting a patient on September 22, 2008. The arbitrator found that "[t]he evidence at Arbitration proved that such an accident did not occur" and that "[t]here were many facts shown at the hearing which were inconsistent with the Claimant's claimed accident." First, although the claimant acknowledged that she "was aware of how to report an accident while working for the [e]mployer," "she did not fill out any accident reports." Second, Crouch testified she never saw the claimant injure herself in the fall of 2008 and was never told by the claimant that an accident had occurred. The arbitrator observed that, because Crouch was the claimant's "co-worker and partner on the job who worked with her on a daily basis," "it seems likely that if the Claimant had injured her arm transferring an Alzheimer's patient, Ms. Crouch would have known of it." Third, "Nurse McArthur, whom the Claimant said she reported her accident to when it happened, denied ever being told that the Claimant had injured herself at work." The arbitrator noted that, although McArthur acknowledged that the claimant once told her that her hands and wrists were hurting, she said that the claimant denied hurting herself at work, and "[n]othing contained in Nurse McArthur's written statement impeaches that testimony."

¶ 31 Finally, the arbitrator emphasized that there was "no mention of any accident or

occurrence at work on any date in the histories provided by the Claimant to her medical providers until March of 2009" when she saw Dr. Pineda, "several months after her claim had been filed." Although the claimant testified that her work accident occurred several days before she went to the Hillsboro Hospital ER on October 10, 2008, and that she sought treatment at that time due to worsening symptoms following the work accident, there was no mention of these facts in the ER records. In addition, the arbitrator noted that "[m]edical histories for subsequent treatment also fail[ed] to contain any reference to a work injury." For example, when the claimant sought treatment on November 10, 2008, "she simply reported that she'd had shoulder and upper arm pain for three weeks." "There was also no mention of a work accident in early 2009 when [the claimant] saw Dr. Gill." The arbitrator noted that the claimant "first mentioned her work as a possible cause when she completed a history form for Dr. Pineda, several months after her claim had been filed."

¶ 32 In sum, the arbitrator found that: (1) "[n]othing was introduced to corroborate [the claimant's] testimony"; (2) "[h]er closest co-worker knew nothing of the accident; nor did the charge nurse on her floor"; and (3) "[t]he contemporaneous medical histories also [did] not support [the claimant's] version of the facts." Accordingly, the arbitrator found that the claimant had failed to meet her burden of proving an accident arising out of her employment. The arbitrator denied her claim on that basis and found all other issues raised by the claimant to be moot.

¶ 33 The claimant appealed the arbitrator's decision to the Commission, which unanimously affirmed and adopted the arbitrator's decision.

¶ 34 The claimant then sought judicial review of the Commission's decision in the circuit court of Montgomery County. The circuit court confirmed the Commission's ruling. Because

the claimant "never told her co-worker of the accident, and the contemporaneous medical records do not support the [claimant's] version" of events, the circuit court found that the Commission's denial of the claimant's claim was not against the manifest weight of the evidence.

¶ 35 The circuit court also addressed the claimant's argument that "the decision should be reversed because the employer failed to produce subpoenaed documents in violation of *** Illinois Rule[] of Professional Conduct 3.4, and unfairly relied on those documents at the hearing." The circuit court rejected this argument "[b]ecause there is no advance discovery in workers' compensation cases." The circuit court further noted that the employer filed a motion to quash the subpoena and that the claimant "withdrew his objection" to the documents at issue during the arbitration hearing "because [she] wanted to use [them] for [her] case."

¶ 36 This appeal followed.

¶ 37 ANALYSIS

¶ 38 1. Accident

¶ 39 The claimant argues that the Commission's finding that she failed to prove that she sustained an accidental injury arising out of and in the course of her employment was against the manifest weight of the evidence.

¶ 40 The claimant has the burden of establishing, by a preponderance of the evidence, that her injury arose out of and in the course of her employment. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980); *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 35. Whether an injury arose out of and in the course of one's employment is a question of fact. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, determine the weight that their testimony is to be given, and resolve conflicts in the

evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206 (2003); *O'Dette*, 79 Ill. 2d at 253.

¶ 41 The Commission's credibility determinations and other factual findings will not be disturbed on review unless they are against the manifest weight of the evidence. *Shafer*, 2011 IL App (4th) 100505WC, ¶¶ 35-36. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be "clearly apparent." *Id.* ¶ 35; see also *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). The appropriate test is whether the record contains sufficient evidence to support the Commission's decision, not whether this court might have reached the same conclusion. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013 (2011).

¶ 42 Applying these standards, we cannot say that the Commission's finding that the claimant failed to prove an accident arising out of and in the course of her employment was against the manifest weight of the evidence. In her Application for Adjustment of Claim, the claimant stated that she had injured her left shoulder and arm lifting a patient on September 22, 2008. There is no evidence in the record corroborating that claim. Although the medical records confirm that the claimant went to Hillsboro Area Hospital on September 22, 2008, the records indicate that she sought treatment on that date for an injury to the middle finger on her right hand, not for shoulder or arm injuries. The September 22, 2008, medical records do not indicate that the claimant mentioned any work injury or that she complained of any neck, arm, or shoulder pain at that time. Moreover, although the claimant went to the ER on October 10, 2008, seeking treatment for neck and upper back pain, the medical records indicate that the symptoms the claimant was experiencing at that time were not the result of any known injury. The claimant treated at Litchfield in November and December of 2008, but the records of those visits do not

include any references to a work injury or to any neck, shoulder, back, or arm pain. The first reference to a work-related injury in the medical records occurred on March 9, 2009, when the claimant saw Dr. Pineda several months after she filed her claim. Even then, however, the claimant complained of neck and back symptoms, not shoulder and arm injuries. When the claimant returned to Litchfield approximately one week later, she reported pain in her neck and shoulder, but she did not suggest that these symptoms were work related. To the contrary, the claimant reported that her neck and shoulder symptoms were "of sudden onset" and had been occurring in a persistent pattern "for three weeks." The claimant made that statement more than four months after her last day of work for the employer.

¶ 43 In addition, as the arbitrator noted, the testimony of the employer's witnesses refuted the claimant's claim that she suffered a work accident in the fall of 2008. McArthur testified that the claimant never reported a work injury to her and never mentioned an accident involving lifting a resident. Although the claimant once told McArthur than she had been experiencing carpal tunnel-like symptoms, the claimant denied that these symptoms were connected to a work injury. McArthur's handwritten note of that conversation corroborated McArthur's testimony. Craige, the claimant's supervisor, testified that the claimant never filled out an accident report, never mentioned an incident that occurred while she was lifting a resident in the Alzheimer's unit, and never made any neck, shoulder, or arm complaints. Crouch, the claimant's coworker, testified that the claimant never mentioned any work injury to her nor complained of any neck, shoulder, arm, or hand symptoms.

¶ 44 Moreover, Dr. Soriano, the employer's IME, concluded that the claimant's work activities were not causally related to her injury. Dr. Soriano opined that the claimant had not suffered an acute injury and that her neck, back, arm, and shoulder symptoms were caused by a

preexisting degenerative collapse of a disc in the claimant's cervical spine. Although Dr. Gornet disagreed, it was the Commission's province to resolve conflicts in the medical opinion evidence. *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999).

¶ 45 In sum, there was ample evidence supporting the Commission's finding that the claimant failed to prove a work-related accident. An opposite conclusion is not clearly apparent. Accordingly, we will not disturb the Commission's finding.

¶ 46 2. The Employer's Failure to Disclose Documents

¶ 47 More than four years prior to the arbitration hearing, the Commission issued a subpoena at the claimant's request ordering the employer to disclose the following documents: (1) a copy of the claimant's complete personnel file; (2) any and all accident or incident reports completed by the claimant or any other individual "where [the claimant] was involved in an incident or accident"; and (3) a copy of all pay records showing the amounts and weeks the claimant was paid from August 1, 2007, through October 1, 2009. The subpoena ordered the employer to mail these documents to the claimant's counsel by February 8, 2010, or to appear with the documents before Arbitrator Neal on February 9, 2010. When the employer failed to comply with the subpoena, the claimant filed with the Commission a request for an order to show cause why the employer had failed to produce the documents. The employer filed a motion to quash the subpoena on the ground that the Act does not provide for pretrial discovery in workers' compensation cases.

¶ 48 During a hearing on the parties' motions, the arbitrator suggested that the claimant could obtain the claimant's personnel file from the employer by asking the employer for it. The claimant subsequently signed a release and asked the employer to produce the same documents covered by the subpoena. On May 3, 2010, the employer sent the claimant certain of its business

records in response to the claimant's request.

¶ 49 The arbitration hearing took place three years later, on May 7, 2013. Prior to the hearing, the parties disclosed the exhibits they intended to introduce during the hearing. One of the employer's exhibits (Exhibit 20) included, *inter alia*: (1) signed handwritten statements prepared by several of the employer's employees attesting that the claimant had never reported an injury to them; and (2) McArthur's written statement reporting her conversation with the claimant regarding the claimant's alleged pain in her hands and wrists. The documents (five pages in all) were not previously disclosed to the claimant, despite the fact that they were responsive to the Commission's subpoena and to the claimant's subsequent request for documents from the employer.

¶ 50 The claimant initially objected to the employer's Exhibit 20. However, the claimant's counsel relied upon some of the documents contained in that exhibit while cross-examining the employer's witnesses. When the arbitrator asked claimant's counsel if he wanted to withdraw his objection to Exhibit 20, counsel replied, "I think I'm going to have to, I don't think I can have my cake and eat it too, Judge." The arbitrator agreed and admitted the exhibit into evidence.

¶ 51 On appeal, the claimant argues that the employer's "intentional and misleading" "partial disclosure" of documents covered by the Commission's subpoena violated section 16 of the Act (820 ILCS 305/16 (West 2010)) and Illinois Rule of Professional Conduct 3.4, and that the employer's use of the documents in Exhibit 20 during the arbitration hearing "resulted in reversible prejudice" to the claimant. The claimant also contends that the employer's failure to disclose and produce those documents is "tantamount to spoliation," warranting sanctions against the employer.

¶ 52 We do not find these arguments persuasive. As the claimant acknowledges, the formal discovery rules governing civil actions do not apply in workers' compensation cases under the Act. *Chidichimo v. Industrial Comm'n*, 278 Ill. App. 3d 369, 375 (1996). Although section 16 of the Act authorizes the Commission to issue subpoenas *duces tecum*, the Commission may only order a witness to bring documents *to the hearing on the claimant's claim*, unless the parties agree otherwise. *Holtkamp Trucking Co. v. Fletcher*, 402 Ill. App. 3d 1109, 1123 (2010); see also Commission Rule 7030.50(b) (50 Ill. Adm. Code § 7030.50(b) (1996)), recodified to 50 Ill. Adm. Code 9030.50(b) (eff. Dec. 4, 2012) ("Unless otherwise agreed by the parties, witnesses or documents may only be subpoenaed to appear or be produced at the time and place set for hearing of the cause."). In this case, the Commission's initial subpoena ordered the employer to produce the documents at issue prior to the arbitration hearing. However, the employer moved to quash that subpoena on the ground that pretrial discovery is not available under the Act. Thereafter, the arbitrator recommended that the claimant simply ask the employer to produce her personnel file, and the claimant followed the arbitrator's suggestion and did not seek judicial enforcement of the prior subpoena. The employer produced the documents at issue prior to the hearing, and the claimant's counsel had an opportunity to review the documents before the start of the hearing. Accordingly, the employer fulfilled its obligations under the Act and under the Rules of Professional Conduct.

¶ 53 In any event, even if the employer had violated an obligation to disclose the documents sooner, the claimant's counsel expressly waived any objection to the documents and proceeded to rely upon them during the arbitration hearing. The claimant has therefore waived any objection to the employer's use of the documents and any argument that such use constituted "reversible prejudice" to the claimant. *Turner v. Industrial Comm'n*, 393 Ill. 528, 534 (1946);

Bergman v. Kelsey, 375 Ill. App. 3d 612, 627 (2007). Moreover, although the employer does not raise the issue, the claimant also forfeited these arguments by failing to raise them in her petition to review the arbitrator's decision before the Commission. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020 (2005); see also *Carter v. Illinois Workers' Compensation Comm'n*, 2014 IL App (5th) 130151WC, ¶ 31.

¶ 54 The claimant's spoliation argument also fails. As an initial matter, the claimant raised this issue for the first time before the circuit court. She therefore forfeited the argument by failing to raise it before the arbitrator or the Commission. *Greaney*, 358 Ill. App. 3d at 1020; *Carter*, 2014 IL App (5th) 130151WC, ¶ 31.

¶ 55 However, even if the claimant had preserved this argument below, the argument would fail. Spoliation is the "destruction," "alteration" or "failure to preserve" evidence during on-going litigation or during an investigation or when either might occur sometime in the future. Daniel B. Garrie and Bill Spernow, LEGALLY CORRECT BUT TECHNOLOGICALLY OFF THE MARK, 9 Nw. J. Tech. & Intell. Prop. 1, 9 n.4 (Fall 2010). Under Illinois law, a plaintiff claiming spoliation of evidence must prove that: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by *losing or destroying* the evidence; (3) the *loss or destruction* of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. (Emphasis added.) *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26; see also *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004); *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194, 196 (1995). Here, the employer did not lose, destroy, or fail to preserve the evidence at issue. To the contrary, it disclosed the evidence before the arbitration hearing and the claimant relied upon the evidence during the hearing. Thus, even if sanctions for spoliation are available in workers' compensation

cases,[4] no such sanctions would be appropriate here.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of Montgomery County, which confirmed the Commission's decision.

¶ 58 Affirmed.

[4]See *Chidichimo*, 278 Ill. App. 3d at 376 ("even in an Industrial Commission context, the intentional destruction of evidence should warrant the imposition of sanctions").