2017 IL App (5th) 160429WC-U

FILED: November 1, 2017

NO. 5-16-0429WC

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CHRISTINE OSINGA, Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Elks Lodge #572, Appellant).	))))))))	Appeal from Circuit Court of Jackson County No. 16MR24 Honorable Charles Cavaness, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's decision that claimant failed to prove she sustained an accidental injury arising out of and in the course of her employment was not against the manifest weight of the evidence.

¶ 2 On June 24, 2014, claimant, Christine Osinga, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2014)), seeking benefits from the employer, Elks Lodge #572. Following a hearing, the arbitrator determined that (1) claimant sustained an injury to her cervical spine arising out of and in the course of her employment; and (2) her condition of ill-being was causally related to a work

accident on June 3, 2014. The arbitrator awarded claimant medical expenses and 41 weeks' temporary total disability (TTD) benefits.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) reversed the arbitrator's decision, finding claimant failed to prove that (1) she sustained an accidental injury arising out of and in the course of her employment on June 3, 2014; and (2) her condition of ill-being was causally related to her employment. On judicial review, the circuit court of Jackson County reversed the Commission's decision. The employer appeals.

¶ 4 I. BACKGROUND

¶ 5 At arbitration, the 43-year-old claimant testified that she worked as a manager for the employer, Elks Lodge #572, for eight months prior to her alleged work accident. Her job duties included payroll, inventory, tending bar, and washing dishes. Claimant alleged she was injured at work on June 3, 2014. She described the incident as follows:

> "I was doing inventory *** so I could put the order in that afternoon at 2:00 when the distributor came[.] *** [T]here was a full untapped keg kind of in the middle but pushed up against another one and I could not *** see behind. *** I went to go kind of pick it up, you know, it has two handles, *** [and] when I did I heard this loud – I mean, it was a pop right here in my neck and excruciating, like forceful pain up the back of my neck into my head."

¶ 6 Claimant testified that she sat down after attempting to lift the keg because of the excruciating pain, which was radiating into her arms. Claimant further testified that she subsequently reported the accident to Debbie Sauer, the "Exalted Ruler" of Elks Lodge #572, after Sauer asked claimant why she kept "grabbing" her neck. Claimant stated she attempted to report her injury to her supervisor, Steve Schemonia, but Schemonia did not answer his phone.

Claimant testified that she informed Schemonia about her injury later that day when Schemonia came to work. Claimant further testified that she did not complete an accident report because she did not "have access to those as manager." Claimant acknowledged that she continued working that day but was unable to finish her shift because of the pain.

¶ 7 The day after the alleged accident, claimant had a bad headache, tingling and stabbing pain in the back of her neck, and tingling and numbness down both of her arms and hands. She did not work that morning, but she filled in for a bartender in the evening because she could not find anyone else to take the shift that same day. That same day, she had another conversation with Sauer and Schemonia regarding her neck injury. Claimant testified that, following the adjournment of a board meeting, the members of the board "came out as they usually do and sit around the bar and drink." According to claimant, "it was obvious to everyone *** [that she] couldn't move [her] head at the time, it was completely locked and *** [she] couldn't really reach for things." She further testified that she served patrons but she "did not stock." Instead, she counted the cash, cleaned the bar as best she could, and returned home.

¶ 8 Claimant testified that she did not go to work on June 5, 2014, because it was her day off.

¶ 9 On June 6, 2014, claimant first sought medical treatment for her alleged work injury from St. Joseph Medical Center after she woke up with numbness in her face. Claimant testified she first contacted her primary care physician, who informed her that she needed a workers' compensation policy claim number from her employer before she could receive medical treatment. Claimant testified that she called Schemonia for a claim number but he did not provide one until June 9, 2014.

¶ 10 Medical records from St. Joseph Medical Center show claimant's chief complaint

was "neck pain onst [*sic*] Tues after moving beer keg at work; now c/o increased neck pain, HA, 2BP with numbness to the entire left side." The attending physician noted claimant had tenderness to palpation in her neck and back, as well as decreased range of motion due to pain. A CT scan of her cervical spine showed "Grade 1 anterolisthesis of C4 on C5, C5 on C6, and C6 on C7" that was "probably degenerative in etiology." The medical records note claimant had mild central canal stenosis at C5-6 and C6-7 and multilevel neural foramen stenosis. Claimant was discharged with a diagnosis of "neck pain" and "back pain."

¶ 11 On June 10, 2014, claimant saw her primary care physician, Dr. Evan Belfer. His medical records reflect that claimant was "moving a full keg [and] had a pop/snap in her neck [with] [i]mmediate pain and numbness into arm, usually R neck has discomfort, all now is on L new, numb in left face, arm and leg." Dr. Belfer referred claimant to Dr. Matthew Gornet, an orthopedic surgeon.

¶ 12 On June 19, 2014, claimant underwent a magnetic resonance imaging (MRI) scan of her cervical spine. Dr. David Dusek, a radiologist, noted that his impression of the C5-6 level was as follows: "Mild disc desiccation. Hyperintense signal within the posterior central aspect of the disc likely represents an annular tear. There is a mild broad-based central disc protrusion which contributes to mild central canal stenosis." Dr. Dusek noted that the C5-6 level was not significantly changed from the comparison MRI scan of claimant's cervical spine conducted in July 2013 prior to her alleged work-related accident. With respect to the MRI scan of the C6-7 level, Dr. Dusek noted "mild disc desiccation with annular tear and a broad-based central disc protrusion with near complete effacement of the ventral surface of the thecal sac that minimally effaces the ventral surface of the spinal cord." He noted "this contributes to mild to moderate central canal stenosis." He further noted that the C6-7 level had "worsened from the comparison

exam."

¶ 13 That same day, claimant met with Dr. Matthew Gornet for the first time. Dr. Gornet noted claimant's chief complaint was "neck pain, severe headaches, pain to the base of her neck into both shoulders with numbness and tingling into both arms and down the left and right arms into her hands." Dr. Gornet reviewed claimant's MRI taken that day and compared it to the earlier MRI of her cervical spine taken in July 2013. Dr. Gornet opined that the "[c]urrent MRI today reveals an increasing size of the disc herniation at C6-7" and "C5-6 appears to be approximately the same." His impression was that she had an "increasing size of her disc pathology at C6-7" and she "may have aggravated the C5-6 lesion." He opined that her "current symptoms, at least in their level of magnitude and severity, are causally connected to her recent lifting accident." Dr. Gornet took claimant off work and opined that she was temporarily and totally disabled.

¶ 14 On July 24, 2014, after injections had failed to provide claimant with lasting relief, Dr. Gornet recommended cervical disc replacement at C5-6 and C6-7. Dr. Gornet's medical records note his opinion that claimant's need for surgery was causally connected to her work accident.

¶ 15 On December 19, 2014, Dr. Donald deGrange performed an independent medical examination (IME) of claimant. Dr. deGrange's report states that he reviewed claimant's medical records and conducted a physical examination. According to Dr. deGrange, claimant's current condition of ill-being was not causally related to any work accident. He indicated in his report that he reviewed nine prior diagnostic studies, including prior MRI scans and x-rays of claimant's cervical spine. He noted that for the last "several years" claimant has had a history of lower back and neck pain. Regarding his examination of claimant, Dr. deGrange noted that

"there were significant signs of symptom magnification, including her inability to sit erect without holding her head, which was at odds with the gait [he] observed as she left the office." Dr. deGrange opined that "there appears to be a significant degree of symptom magnification, somatization, and chronicity of illness." He further opined that the MRIs of claimant's cervical spine offer "no credible objective evidence for her subjective complaints" and he could find "no basis for surgery." He further found no evidence of any injury "beyond a simple strain" to her cervical spine. He diagnosed claimant with "(1) cervical strain; (2) C5-6, C6-7 degenerative disc disease; (3) chronic low back pain." His report also noted that claimant reached maximum medical improvement as of June 17, 2014, and she was capable of doing her customary work.

¶ 16 Steve Schemonia testified for the employer. He stated that he was claimant's supervisor at the time of her alleged work accident. He testified that he was at the bar on the evening of June 3, 2014. When asked whether claimant approached him at any time about a work injury, he responded, she "never has." He testified that he first became aware of claimant's alleged work injury when he was contacted by a medical provider requesting insurance information. He acknowledged, however, that claimant "could have" reported a work injury to Sauer. Further, he disputed claimant's testimony that she did not return to work on Thursday, June 5, 2014. Although it was normally her day off, Schemonia explained, claimant came to work that day to "unlock *** a cabinet[,] *** got the checks out[,] and she left." He further confirmed that claimant called him on June 6, 2014, to inform him that "she couldn't come in, *** her jaw and arm [were] numb and that she had a doctor's appointment."

¶ 17 At arbitration, the employer submitted medical records that predated claimant's alleged work accident in June 2014. Claimant acknowledged that she had experienced "some" neck pain prior to her alleged work-related injury. In 2001, claimant had neck problems after a

motor vehicle accident. In October 2010, she sought treatment from Trinity Neuroscience after sustaining an injury from a rollercoaster ride. Medical records from Trinity Neuroscience note that claimant complained of pain in her "neck, lower back, legs, [and] arms."

¶ 18 Further, pre-accident medical records show claimant underwent an MRI scan of her cervical spine in November 2010. The MRI report noted "minimal disc bulge" at C5-6 and C6-7, reverse cervical lordosis with multi-level degenerative changes, and no evidence of significant foraminal stenosis at any of the reviewed levels. In December 2010, claimant saw Dr. Gerson Criste after she "felt a pop in the neck while eating and had severe pain" that radiated into her right shoulder and arm. In December 2011, claimant saw Dr. Belfer for neck pain and vertigo. Claimant underwent another MRI of her cervical spine in January 2012, which showed, at C5-C6 and C6-C7, that "DOC indents the thecal sac" and "[u]nconvertebral and facet joint arthropathy caused mild left neural foraminal narrowing." The examining physician noted "[m]ild degenerative changes of the cervical spine without significant spinal canal or neural foraminal narrowing."

¶ 19 In January, July, and August 2012, claimant reported neck pain to Dr. Belfer. Specifically, Dr. Belfer's records dated August 22, 2012, reflect claimant complained that she could not turn her neck and she had a "knot [at] C6-7." Claimant also reported that she "could not drive or work, or even get out of bed." Several days later, on August 29, 2012, claimant saw Dr. Criste and complained of "neck pain" in the right lateral neck and bilateral posterior neck. Dr. Criste's records also note that "[t]he problem is severe" and "[t]he frequency of pain is constant."

¶ 20 In February 2013, claimant met with Dr. Belfer and complained that her neck was "locked up," her arm was numb, and she had restricted range of motion after a domestic violence

incident. On July 26, 2013, claimant underwent another MRI of her cervical spine. Dr. Belfer's impression of the MRI was as follows:

> "There is mild [*sic*] mild/moderate posterior central bulging of the C5-C6 disc with mild to moderate encroachment upon the ventral thecal sac. There is mild posterior bulging of the C6-C7 disc with mild encroachment upon the ventral thecal sac."

¶ 21 In August 2013, claimant met with Dr. Mark Fleming, a neurosurgeon. His records reflect that claimant had a history of neck pain for "quite a few years." He noted that the "problem is severe," it has "worsened," and the "frequency of pain is daily." The location of her pain was noted as bilateral head, bilateral neck, and bilateral posterior neck, radiating into the "bilateral upper arm, bilateral elbow, bilateral forearm and bilateral hand." Dr. Fleming noted that he saw "no hard findings to explain her symptoms, no acute disease in LB." He further noted that claimant had low grade, age-appropriate disc changes in her neck but the condition was not of surgical significance. He referred claimant for pain management. In October 2013, claimant received "bilateral C2-3 facet joint injections under fluoroscopy." That same month, claimant met with Dr. Criste, who recommended that she continue with the injections. Dr. Criste noted that claimant had "chronic neck and back pain." Dr. Criste also explained that the neck pain and tingling in her hands were "more likely anxiety related/hyperventilation syndrome." He noted, however, that she "does have significant tenderness of the upper Cspine."

¶ 22 Following the hearing, the arbitrator awarded claimant benefits, finding that (1) she sustained an injury in her cervical spine arising out of and in the course of her employment; and (2) her condition of ill-being was causally related to her work accident on June 3, 2014. The arbitrator awarded claimant her medical expenses and 41 weeks of TTD benefits.

¶ 23 The employer sought review of the arbitrator's decision before the Commission. The Commission reversed the arbitrator's award of benefits to claimant. It found claimant failed to prove that (1) she sustained an accidental injury arising out of and in the course of her employment on June 3, 2014; and (2) her cervical spine injury was causally related to her employment. The Commission reasoned that claimant's complaints of neck pain were not new or different from her complaints prior to the alleged accident on June 3, 2014. The Commission found claimant's uncorroborated testimony regarding the alleged work-related accident lacked credibility. Further, the Commission found Dr. deGrange's medical opinion regarding causation more persuasive than the medical opinion of Dr. Gornet.

¶ 24 Claimant sought judicial review in the circuit court. The circuit court reversed the Commission's decision. The circuit court found the Commission made improper credibility determinations which were contrary to those made by the arbitrator. The circuit court further found that the Commission's decision finding no accident was against the manifest weight of the evidence.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, the employer argues the circuit court erred in reversing the Commission's finding that claimant failed to prove she sustained accidental injuries to her cervical spine arising out of and in the course of her employment. The employer also argues the circuit court erred in reversing the Commission's finding that claimant's cervical spine injury was not causally related to her employment-related accident. We agree with the employer as to its first assertion.

¶ 28 An employee's injury is compensable only when it arises out of and in the course

of her employment. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 160 (2011). "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [s]he has suffered a disabling injury which arose out of and in the course of h[er] employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). An injury "arises out of" employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.*

¶ 29 Generally, the determination of whether an injury arose out of and in the course of one's employment is a question of fact for the Commission and its determination will not be disturbed unless it is against the manifest weight of the evidence. *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, ¶ 19, 10 N.E.3d 403. "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." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). On review, the "court is not to discard the findings of the Commission merely because different inferences could be drawn from the same evidence." *Kishwaukee Community Hospital v. Industrial Comm'n*, 356 Ill. App. 3d 915, 920, 828 N.E.2d 283, 289 (2005). "The appropriate test is whether there is sufficient evidence in the record to support the Commission's finding, 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, 944 N.E.2d 800, 803 (2011). "For the Commission's decision to be against the manifest weight of the evidence, the record

must disclose that an opposite conclusion clearly was the proper result." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 592 (2005).

¶ 30 The employer argues that the circuit court failed to recognize the Commission's authority to make credibility determinations contrary to those of the arbitrator, and that it failed to give the Commission's decision due deference under the manifest weight standard of review. We agree. In its written decision, the circuit court cited *Cook v. Industrial Commission*, 176 Ill. App. 3d 545, 531 N.E.2d 379 (1988), and *Orkin Exterminating Company v. Industrial Commission*, 172 Ill. App. 3d 753, 526 N.E.2d 861 (1988), in support of its determination that the Commission overstepped its authority by making credibility findings that were contrary to those of the arbitrator. In *Cook*, the court stated as follows:

> "In cases where the Commission has rejected the arbitrator's factual findings without receiving any new evidence it is the function of this court on review to examine the entire record and weigh the evidence to determine whether the factual findings of the Industrial Commission were against the manifest weight of the evidence. While recognizing that the Commission is in no way bound by an arbitrator's decision, we note that the arbitrator's decision is not without legal effect. Further, we note that in performing its role as reviewer of the record, the Commission is at a practical disadvantage as compared to the arbitrator. The arbitrator, having heard the live testimony, is actually in a better position to evaluate that evidence.
>
> Accordingly, in cases where the Commission has rejected the arbitrator's factual findings without receiving any new evidence, we apply an extra degree of scrutiny to the record in determining whether there is sufficient support for the

Commission's decision." (Internal citations omitted.) *Cook*, 176 Ill. App. 3d at 551-52, 531 N.E.2d at 383-84.

See also *Orkin*, 172 Ill. App. 3d at 757, 526 N.E.2d at 864 ("While recognizing that the Commission is in no way bound by an arbitrator's decision, we note that the arbitrator's decision is not without legal effect.").

¶ 31 As stated, it is well established that it is within the province of the Commission to assess the credibility of witnesses and resolve conflicts in the evidence. *ABF Freight System v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 141306WC, ¶ 19, 45 N.E.3d 757. Further, the proposition expressed in *Cook* and *Orkin*—that the Commission's credibility findings are entitled to less deference when they are contrary to those of the arbitrator—has been rejected in subsequent decisions. See *Wagner Castings Co. v. Industrial Comm'n*, 241 Ill. App. 3d 584, 594, 609 N.E.2d 397, 404 (1993) (explaining that courts had "repudiated the statement found in both *Cook* *** and *Orkin* *** that a court of review is required to give 'extra scrutiny' to a Commission's decision overturning an arbitrator's decision without considering additional evidence"); *Boatman v. Industrial Comm'n*, 256 Ill. App. 3d 1070, 1071, 628 N.E.2d 829, 830 (1993) (finding *Cook* has been rejected as an incorrect statement of the law); *Dillon v. Industrial Comm'n*, 195 Ill. App. 3d 599, 607, 552 N.E.2d 1082, 1087 (1990) ("Regardless of whether the Commission hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings.").

¶ 32 Here, the Commission found claimant's assertion that she sustained a work-related accident on June 3, 2014, was not credible. The Commission found claimant's testimony that she experienced "some" neck pain prior to her alleged work-related accident was inconsistent with the medical records of prior treatment showing claimant repeatedly made

similar complaints of neck pain from 2001 until 2013. Further, although claimant argues that she provided detailed and consistent testimony regarding her work-related accident on June 3, 2014, the Commission noted claimant failed to produce any witnesses to corroborate her testimony even though several potential witnesses were clearly identified. In addition, claimant's supervisor, Schemonia, directly contradicted claimant's testimony that she complained of pain or performed her job duties differently on the day she allegedly sustained the injury. He further denied that claimant reported a work-related accident to him. As to claimant's assertion that she reported her injury, she contends that the Commission "ignored" screen shots from her cell phone that purportedly show she made multiple phone calls to Schemonia on June 3, 4, 6, 9, and 10. However, the screen shots were not admitted into evidence.

¶ 33 In addition, the Commission was not persuaded by claimant's testimony that she did not file an accident report because she was unable to "access *** those as manager." The Commission noted that, although notice was not in dispute, the absence of an accident report and Schemonia's testimony in that regard were relevant to whether an accident in fact occurred.

¶ 34 As stated, assessing credibility and weighing evidence are within the province of the Commission. *ABF Freight System*, 2015 IL App (1st) 141306WC, ¶ 19, 45 N.E.3d 757. Based on our review of the relevant facts and authority, we conclude there was sufficient evidence to support the Commission's determination that claimant failed to prove she sustained an accidental injury to her cervical spine arising out of and in the course of her employment.

¶ 35 The employer also argues the circuit court erred in reversing the Commission's finding that claimant's cervical spine injury was not causally related to her employment. However, we need not address this issue based on our decision regarding accident.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse the circuit court's judgment and reinstate the Commission's decision.

¶ 38 Judgment reversed.