2022 IL App (4th) 210124-U

NO. 4-21-0124

FILED
February 22, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JASON GARRETT,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
JAMES ACKERMAN,	)	No. 19L213
Defendant-Appellee.	)	
	)	Honorable
	)	Gail L. Noll,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices DeArmond and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion to dismiss plaintiff's legal malpractice complaint.

¶ 2 Plaintiff, Jason Garrett, brought a legal malpractice claim against defendant, attorney James Ackerman, alleging he negligently represented plaintiff on appeal from the denial of plaintiff's workers' compensation claim against his employer based on a claimed repetitive trauma injury to plaintiff's low back. The trial court granted defendant's motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2018)), and plaintiff appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Underlying Workers' Compensation Claim

¶ 5 Plaintiff retained defendant to represent him in proceedings under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), and in 2014 and 2015, he filed applications for adjustment of claim, seeking benefits from his employer, Liberty Mutual Insurance Group, Inc. (Liberty Mutual). In his first application (case No. 14-WC-3167), plaintiff alleged he sustained a repetitive trauma injury to his low back, which manifested itself on August 29, 2013. In his second application (case No. 15-WC-18366), he alleged an acute trauma injury to his low back, also occurring on August 29, 2013, from "sitting in [a] bad position." Plaintiff moved to consolidate his claims, but his motion was denied.

¶ 6 In July 2015, an arbitration hearing was conducted under the Act. Plaintiff, who was then 44 years old, testified that, beginning in September 1997, he worked for Liberty Mutual as a sales representative. In September or October 2006, he started working for Liberty Mutual from home and dedicated a room in his house to his job. Plaintiff testified he supplied the desk he used at home while Liberty Mutual supplied his "docking station" and chair.

¶ 7 Plaintiff described his job as being "quite diverse" and stated it included soliciting and servicing clients. Sales representatives were also assigned a "lead day," which required them to remain available in their office to take calls from clients and to receive and respond to internet leads. Plaintiff stated lead days started early and that leads were "remarkably important" to his job. If a sales representative failed to respond to leads in a timely manner, Liberty Mutual would penalize the representative by taking the leads away and redistributing them to someone else.

¶ 8 In August 2007, plaintiff reported to his supervisor that his office chair would not "maintain height" and was hurting his back. Liberty Mutual responded by sending a technician "to replace the hydraulic ram on [plaintiff's] chair." Plaintiff testified that although the technician

"fixed the chair," his back pain did not resolve.

¶ 9 Plaintiff maintained he began having back problems in "[m]id 2007," but that he first received medical treatment for a back injury in 2011. Plaintiff's medical records showed that on November 4, 2011, he sought treatment for back-related symptoms from Dr. William Payne, an orthopedic surgeon. He reported that he injured his back while golfing on June 1, 2011. Dr. Payne noted plaintiff had complaints of "left lower extremity sciatica" and stated that plaintiff remembered having "immediate pain in his back" after swinging a golf club. Dr. Payne assessed claimant as having lower back pain and lumbar radiculopathy. He recommended a magnetic resonance imaging (MRI) scan and an epidural steroid injection with Dr. Gary Western.

¶ 10 On November 15, 2011, an MRI on plaintiff's lumbar spine showed: "Multilevel degenerative changes superimposed on multilevel congenitally short pedicles" with "resulting severe left neuroforaminal stenosis at L4-L5 secondary to a left neuroforaminal disc extrusion." A "[m]ild diffuse disc bulge" was also noted at the L2-L3 level. In December 2011, plaintiff saw Dr. Western and received an epidural steroid injection.

¶ 11 On May 6, 2013, plaintiff returned to Dr. Western for an evaluation of back and leg pain. Dr. Western noted plaintiff had "done quite well" with his previous injection. Although he reported "no new injuries or issues," he complained of pain, which Dr. Western noted sounded similar to what plaintiff experienced in 2011. Dr. Western assessed plaintiff as having pain at a high level and recommended another epidural steroid injection, which plaintiff received on May 9, 2013. Dr. Western's records reflect plaintiff reported no relief from the injection. Dr. Western recommended a new MRI, which was performed on May 21, 2013, and it showed (1) a small left lateral focal disc protrusion at L4-L5 and (2) a large L2-L3 left paracentral disc herniation,

compressing the L3 nerve root. On May 23, 2013, plaintiff received a further epidural steroid injection from Dr. Western. On June 4, 2013, he returned to Dr. Payne, and they discussed surgical intervention. Dr. Payne noted plaintiff wanted to avoid back surgery and stated he would continue with conservative treatment.

¶ 12 Plaintiff testified that August 29, 2013, his alleged accident date, was a lead day. He began work between 7:30 and 8 a.m., and his day ended between 3:30 and 4:30 p.m. Plaintiff stated he had a busy day with "lots of leads." For nearly the entire day, he was on the phone and inputting data into his computer, which required him to twist his body to the left and lean forward. Plaintiff testified he had to use his computer "to do business within the Liberty Mutual environment" and, as a result, he was "always twisted." Plaintiff acknowledged that he could have changed his positioning; however, he described his job as "paperwork intensive" and asserted that if he moved his computer monitor to another position on his desk, he "had no other place to put the paperwork." Plaintiff also testified that he did not understand the risk he was taking with his positioning.

¶ 13 According to plaintiff, he began experiencing pain early in the day on August 29, 2013, and his pain "got progressively worse." At the end of the day, he "needed to fetch some paper" for his printer, but he "couldn't stand up." He felt a lot of pain in his back and his left leg.

¶ 14 On September 2, 2013, claimant went to the emergency room, complaining of pain in his left lower back. Medical records show he reported symptoms in his left lower back that began two days prior, "came on gradually," and increased in intensity. Plaintiff was diagnosed with sciatica and prescribed medication. On September 3, 2013, plaintiff returned to Dr. Payne and reported a "sudden severe worsening of his pain" in his left lower extremity when he "stood

up" from his desk after "doing a lot of work on the computer." Dr. Payne recommended an MRI, which was performed on September 10, 2013, and showed (1) interval worsening of the L3 nerve root compression from a large left lateral L2-L3 disc extrusion and (2) additional chronic degenerative changes. Dr. Payne ultimately recommended surgery, which he performed on plaintiff on September 30, 2013.

¶ 15 Plaintiff continued to follow up with Dr. Payne. On December 26, 2013, Dr. Payne noted plaintiff reported that his pain started after "he had been at his desk for [seven to eight] hours leaning forward, working at a computer." Plaintiff stated when he got up, he was unable to stand straight and had severe pain down his left leg. He further reported that "a work[ ]space expert" came to his home office to help him with positioning his desk and "[f]ound multiple seating and visualizing problems." Dr. Payne noted as follows:

> "I talked with [plaintiff] about the link between his disc herniation and the seating. We know that sitting in a chair, leaning forward in a chair puts some of the highest pressure on discs as far as positions go. I think prolonged sitting can be a link to his disc herniation of the lumbar spine. Obviously[,] he has had herniation there before and problems with his back, but those have resolved without surgical intervention. Clearly, before we did surgery, he had very large significant change in disc herniation in the lumbar spine, so I think there is a link there with the seating at work and his back problems."

¶ 16 At arbitration, plaintiff presented Dr. Payne's evidence deposition. Dr. Payne testified he had known plaintiff for a long time and they "used to shoot trap" together. He was aware that plaintiff had been working from home for approximately seven years and that, when

working for Liberty Mutual, he could "sometimes *** spend *** long hours on the phone working at a computer." Dr. Payne talked with plaintiff "about his positioning" and "specifically his sitting position at his desk, how he spen[t] a lot of time at his desk turned to the side in a flexed position." He testified such a position "has detrimental effects on pressures in the low back" and twisting increases the risk of a herniation. He stated twisting affected "the orientation of the oblique fibers of the annulus of the discs" and would "tension one set of fibers and cause the other set of fibers to go lax," which was thought to predispose a person to herniation. He did not know of any study "that describe[d] a certain position where people have more disc herniations."

¶ 17 Dr. Payne acknowledged plaintiff sought treatment from him in June 2013, and complained of back pain. At that time, an MRI showed an L2-L3 disc herniation. Plaintiff was taking anti-inflammatory medication and did not want to have surgery. Dr. Payne testified plaintiff returned to see him on September 3, 2013, with "significantly worse" pain. According to Dr. Payne, plaintiff reported his increase in pain "started when he was sitting at his desk." Plaintiff maintained he "had a long day at work and had been working at his computer." His pain "became significantly worse while he was doing his work at the desk." Plaintiff underwent an MRI in September 2013. Dr. Payne stated the MRI showed plaintiff's "disc was a lot bigger." He believed plaintiff's "bigger disc" caused his increase in pain and that "the way [plaintiff] was sitting at work contributed to [the bigger disc] or caused it."

¶ 18 On cross-examination, Dr. Payne testified that plaintiff was a large man. Medical records showed he was approximately six and a half feet tall and weighed 365 pounds. Based on his height and weight, plaintiff was considered obese. Dr. Payne testified that being obese increased pressure on the discs of the spine. He further stated that disc herniations could be caused

by traumatic injuries or be "idiopathic where people just show up [at a doctor's office] with a disc herniation." Disc herniations could also be part of the normal degenerative aging process and could be caused by sneezing, bending, twisting, engaging in athletic activities, or getting out of bed.

¶ 19 Dr. Payne acknowledged treating plaintiff for back pain in 2011, which plaintiff reported he experienced after "swinging a golf club." Plaintiff underwent an MRI, which showed a mild diffuse disc bulge at the L2-L3 level of claimant's spine. Dr. Payne testified a disc bulge was "kind of a normal middle-age finding" but he agreed it was also an indication that "there is something going on at that level."

¶ 20 Dr. Payne further agreed that in September 2013, plaintiff reported a history of "sitting at his desk *** doing a lot of work on the computer" and experiencing "sudden severe worsening" of his pain "when he stood up." He stated that, "according to [his] medical records, there was a change in position when [plaintiff] felt the sudden severe worsening of his complaints." Dr. Payne testified moving from a sitting to a standing position had "to place pressure on the disc." He stated that after plaintiff moved from a sitting to a standing position "that's when [plaintiff] says he's noticing it really became bad, yeah. I mean, yeah, I guess it could have happened when he went from a sitting to a standing position." He further agreed that getting out of a desk chair involved the same type of mechanisms as getting up from a toilet, a dining room chair, or other types of chairs.

¶ 21 On redirect examination, Dr. Payne testified plaintiff was "in a terrible position in his workspace" and "forward flexed with a twist" was "the worst thing you could do for your back" and that it put plaintiff "at risk for damaging a disc in his back." He suspected plaintiff "probably herniated a disc while he was sitting there, and then when he stood up, it put traction on his

nerves[,] and it irritated it." On recross-examination, Dr. Payne testified that sitting in a terrible position at a desk does not automatically cause the development of a herniated disc, and he agreed that a person could herniate a disc while standing up. Dr. Payne further testified that he could not "swear" that plaintiff herniated his disc while sitting down, he could "only give [his] best opinion." Further, he agreed that according to the history in his records, plaintiff noticed pain "while standing up."

¶ 22 At the arbitration hearing, plaintiff also presented testimony from one of his former supervisors, as well as witnesses and evidence to support his claim of poor workspace positioning. Lisa Raydant testified she had worked for Liberty Mutual for 20 years. For a period of time, she was plaintiff's supervisor, and she recalled plaintiff mentioning "that he was having back issues." In April 2009, she visited plaintiff's home office with her manager and observed that plaintiff's desk and monitor were "low" and "it looked like his knees were around his ears." She described plaintiff as "a very large guy" and stated, "it didn't look like he was set up correctly." Plaintiff appeared "off center" or "twisted," and was leaning forward. Raydant testified she "got [plaintiff] risers for the desk" and was "able to correct the monitor level." Raydant visited plaintiff's home office again in 2011, but stated she never performed an ergonomic assessment on his workstation.

¶ 23 Raydant further testified each sales representative was assigned a "[l]ead day," *i.e.*, a day of the week when they would be responsible for quickly following up on leads received through the internet. She stated employees would be "tied to their desk" on a lead day, needing to be at their computer and available to see the leads when they came in. If an employee failed to respond to leads in a reasonable amount of time, they would "be removed from that program" and "no longer have a lead day." A lead day was important because it was part of how a sales

representative got sales and could affect the employee's commission. Raydant testified that on a lead day, plaintiff could go to lunch or have appointments but he "needed to be returned to the office in a timely manner *** to make sure those leads were worked timely."

¶ 24 Plaintiff further presented the evidence deposition of Erin Steinacher, an occupational therapist. In September 2013, Steinacher conducted an ergonomic assessment of plaintiff's workstation. She determined there were several issues with plaintiff's workspace, including that his desk was too low for his legs to fit fully underneath; he sat with his knees above 90 degrees, which put pressure on his hip area; he did not "have a keyboard area" and had to put his arms up on his desk with his wrists "in extension" to reach his keyboard; and he sat with his head, neck, and back in a forward leaning position when using his computer. Steinacher testified that having the head forward can strain a person's neck and back and "stress the back over time." On cross-examination, Steinacher acknowledged that she was not a medical doctor, and she did not review plaintiff's medical records. She agreed that anyone could adjust a computer monitor. Further, she testified she did not observe any defects in claimant's desk or chair, and there was nothing in plaintiff's workspace that prevented him from getting up or stretching as needed.

¶ 25 Alysha Davis-Barth, a licensed physical therapist and ergonomic assessment specialist, testified at the arbitration hearing that she was hired by plaintiff to review information in the case, which included photographs of plaintiff's workspace, Steinacher's ergonomic assessment, and "deposition statements" of Steinacher and the parties' medical experts. In looking at photographs of plaintiff's workstation, Davis-Barth noted plaintiff's computer terminal was "set up at an angle from the angle of his chair" and there was not enough room for his legs underneath the desk. As a result, plaintiff had to rotate to the left to use his keyboard and look at his computer

monitor. He also had to lean forward to reach his keyboard.

¶ 26 Davis-Barth testified "forward flexion and torsion causes an increased pressure on the discs and a breakdown of the static protective tissues around the spine and discs." She stated that when a person sits for a prolonged period of time in an awkward position, particularly one that involves forward flexion and torsion in combination, static tissues tend to stretch out or lose their protective function and breakdown, causing discs to herniate. Davis-Barth opined that sitting at plaintiff's workspace in a flexed and rotated position "would lead to a breakdown of the structures around the spine supporting the discs." Further, she stated that "[a] breakdown in the protective structures can cause a disc herniation, can lead to a disc herniation." Davis-Barth also testified that there was a cumulative effect on the spine from sitting in a "forward flexed and twisted position for a long period of time."

¶ 27 On cross-examination, Davis-Barth testified she "did not do an ergonomic assessment of [plaintiff]." Also, she did not observe plaintiff's workplace in person and the opinions she offered were not based on plaintiff's medical records. With regard to plaintiff's disc herniation, Davis Barth stated as follows: "I know that he had a disc herniation. Beyond that I know that these positions can lead to a disc herniation, I know that he was medically diagnosed with a disc herniation. That's what I know." She testified other causes of disc herniations included "genetics, repetitive stress and trauma to the disc, [and] age degeneration of the disc."

¶ 28 As part of its case, Liberty Mutual first presented testimony from two of its employees. Rachel Weygandt testified she worked for Liberty Mutual from 2012 to 2015 as an administrative assistant and "safety specialist." Part of her job included conducting workstation assessments. In April 2013, she assessed plaintiff's workstation over the phone by reading

questions from a workstation assessment form and recording plaintiff's answers. Weygandt testified that, at the time of the assessment, plaintiff did not report any back or leg pain to her or any problems with his desk, chair, or monitor.

¶ 29 Brittaney Brinkmann testified she worked for Liberty Mutual and was plaintiff's supervisor for a period of time. In the spring of 2013, plaintiff reported to her that he was having "back issues" and undergoing medical treatment. At that time, he did not report a work injury or indicate "that his complaints were due to his office equipment." Brinkmann testified that, later, in August 2013, plaintiff reported experiencing severe pain in his back, which he thought was caused by his workstation set up. Thereafter, he requested an ergonomic assessment to "look into seeing if he need[ed] a new chair or new desk."

¶ 30 Liberty Mutual further presented the evidence deposition of Dr. Timothy VanFleet, an orthopedic spine surgeon who examined plaintiff at Liberty Mutual's request in March 2014. Dr. VanFleet testified he also reviewed certain medical records, as well as MRI films from November 2011, May 2013, November 2013, and February 2014. According to Dr. VanFleet, plaintiff was 6 feet, 4 inches in height, weighed 380 pounds, and had a body mass index of 46.3, which was considered morbidly obese. He testified plaintiff reported experiencing back pain that began in 2011 and which he attributed to "habitually sitting for long periods of time in his chair at work." Plaintiff reported that on August 29, 2013, he "was sitting in his chair at his desk for a long period of time" and experienced significant pain across his back and down his left lower extremity when "he went to stand up."

¶ 31 Dr. VanFleet diagnosed plaintiff with morbid obesity and "a lumbar multilevel degenerative disc condition." He testified that prior to August 29, 2013, plaintiff's diagnostic

studies showed "evidence of multilevel lumbar degenerative disc disease with evidence of disc prolapse previously as well as evidence of spinal stenosis." He stated such findings indicated "a long[-]standing process of lumbar degenerative disc disease." In his report, documenting his evaluation of plaintiff, Dr. VanFleet opined plaintiff's weight had "every bit to do with his underlying condition" and created "a significant hazard for his lumbar disc spaces, especially with sitting as this loads his disc spaces more considerably than either standing or lying down." Dr. VanFleet attributed plaintiff's need for surgery to "his morbid obesity and significant loading of his disc spaces."

¶ 32 With respect to plaintiff's alleged work injury, Dr. VanFleet's understanding was that plaintiff had an onset of pain after getting out of a chair. He opined that the mechanism of injury—getting out of a chair—did not contribute in any fashion to plaintiff's underlying degenerative disc disease. Although the act of getting out of a chair could change the pressures on one's spine, the act described by plaintiff was no different than getting out of other types of chairs. In Dr. VanFleet's opinion, plaintiff's longstanding difficulties with his back were "not entirely related to his workplace, but related more towards his home environment and his morbid obesity."

¶ 33 Dr. VanFleet testified he did not recall reviewing any ergonomic assessments in plaintiff's case or "any photographs of his positioning." He stated leaning forward at a computer for a long period of time could put increased weight on disc spaces. However, he asserted that workstations tended "to be more difficult on individuals' necks than on their lumbar spines." Dr. VanFleet stated "anything is possible" but he "would assume [plaintiff would] probably more likely have a neck injury than a back injury" from such positioning.

¶ 34 Following the arbitration hearing, the arbitrator issued a decision in case No. 14-

WC-3167, denying plaintiff benefits for his claimed repetitive trauma injury. The arbitrator determined plaintiff failed to prove "he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment." She based her decision, in part, on findings that (1) plaintiff failed to present "specific and detailed information concerning his work activities, including the frequency, duration, [or] manner of performing" and (2) medical experts in the case lacked "a detailed and accurate understanding of [plaintiff's] work activities." The arbitrator did not address plaintiff's alternate claim in case No. 15-WC-18366, alleging an acute trauma injury; however, plaintiff ultimately sought review of both cases with the Workers' Compensation Commission (Commission).

¶ 35 In September 2016, the Commission consolidated plaintiff's claims, noting they involved the same parties and alleged injured body part and that the only difference between them was the theory of compensability. It issued a decision finding plaintiff failed to prove either a repetitive or a discrete traumatic accident that caused a condition of ill-being in his lumbar spine. See *Garrett v. Liberty Mutual Group, Inc.*, Ill. Workers' Comp. Comm'n, No. 14-WC-3167 (Sept. 13, 2016).

¶ 36 Regarding plaintiff's repetitive trauma claim, the Commission stated it agreed with the arbitrator's decision. It stated the arbitrator correctly determined that plaintiff failed to "present evidence regarding his specific work activities that could have caused or aggravated his lumbar spine position." However, it also noted that plaintiff's "claim for compensability [was] based on his theory that working at an ergonomically improper workstation all day, every day, for seven years caused his disc herniation." The Commission stated that under such a theory, evidence "specifying [plaintiff's] work activities" was not "entirely dispositive" of his repetitive trauma

claim. In addressing plaintiff's "ergonomically improper workstation" theory, the Commission additionally stated as follows:

> "[Plaintiff] presented evidence that his work[ ]station may not have been optimal. He also presented evidence that a poor ergonomic work[ ]station may be a contributing factor in aggravating a preexisting degenerative disc condition. Nevertheless, the Commission finds that [plaintiff] did not sustain his burden of proving that his allegedly ergonomically improper work[ ]station actually aggravated *his* preexisting degenerative disc disease thereby causing *his* herniation.
>
> The Commission does not consider proof of a bad ergonomic condition and a particular condition of ill-being is sufficient [to] prove a compensable accident. Because there was no evidence directly relating [plaintiff's] work[ ]station to his herniation, a finding that [plaintiff's] work[ ]station was the cause of his herniation necessarily would be based on conjecture or speculation, in which the Commission is not permitted to engage. Therefore, the Commission affirms the [arbitrator's decision] that [plaintiff] failed to sustain his burden of proving a repetitive trauma accident resulting in a condition of ill-being of his lumbar spine." (Emphases in original.)

¶ 37 The Commission next addressed plaintiff's acute trauma claim. It found the specific event alleged by plaintiff was "his arising, or attempting to arise, from his chair on August 29, 2013." The Commission stated that "[g]etting up from a seated position is clearly an activity members of the general public engage in numerous times on a daily basis" and that both Dr. Payne and Dr. VanFleet "testified the mechanism of getting out of that work chair should be no different

from that of getting out of any other chair." Accordingly, the Commission held plaintiff failed to sustain "his burden of proving that his work activities placed him at any greater risk of injuring himself by arising from a seated position than that of any member of the public in general."

¶ 38 Plaintiff next sought judicial review of the Commission's decision with the circuit court of Sangamon County. In August 2017, the court confirmed the Commission's decision and plaintiff appealed.

¶ 39 In May 2018, the Workers' Compensation Commission Division of the appellate court affirmed the circuit court's decision, confirming the Commission. *Garrett v. Illinois Workers' Compensation Comm'n*, 2018 IL App (4th) 170606WC-U, ¶ 2. It found the Commission's decision was not against the manifest weight of the evidence with respect to either of plaintiff's theories of compensability. *Id.* ¶¶ 58, 63. However, prior to reaching the merits of plaintiff's appeal, the court addressed deficiencies in plaintiff's appellant's brief, setting forth several ways plaintiff's brief failed to comply with the requirements of Illinois Supreme Court Rule 341(h) (eff. July 1, 2017). *Garrett*, 2018 IL App (4th) 170606WC-U, ¶¶ 41-43. In particular, it noted flaws with respect to the points and authorities section of plaintiff's brief, his statement of the issues presented for review, and his statement of facts. *Id.* Further, the court stated plaintiff's brief improperly introduced facts for the first time in its argument section. *Id.* ¶ 43. Although it found plaintiff's appeal was "subject to dismissal" because of the deficiencies in his brief, the court elected to address the merits of his appeal, stating it had "the benefit of cogent decisions of the arbitrator and Commission, as well as a brief filed by Liberty Mutual." *Id.* ¶¶ 44-45. The court found those materials "shored up some of [plaintiff's] deficiencies" and indicated it would disregard portions of plaintiff's brief that did not comply with Rule 341(h). *Id.* ¶ 45.

¶ 40 B. Legal Malpractice Claim

¶ 41 In September 2019, plaintiff filed his legal malpractice complaint against defendant. He alleged defendant negligently breached the duty of care he owed as plaintiff's attorney when representing him on appeal in his workers' compensation case by failing to prepare an appellant's brief in compliance with Illinois Supreme Court Rule 341(h) (eff. July 1, 2017). Specifically, plaintiff asserted defendant negligently failed to (1) "identify on pages [two] and [three]" of the appellant's brief "the specific points [plaintiff] was asserting to overturn the Commission's decision and the legal authorities relied upon for each"; (2) identify the issues presented for review on page four of the appellant's brief; (3) present a full and complete statement of the underlying facts, omitting facts necessary to an understanding of plaintiff's bases for appeal; (4) cite to pages of the record on appeal in the statement of facts; (5) cite to relevant medical evidence in the statement of facts; (6) include relevant facts in his statement of facts section that he referenced in the argument section of plaintiff's brief; and (7) make cohesive arguments or cite pertinent facts and legal authority to support plaintiff's contentions on appeal. Plaintiff further alleged that his appeal of the denial of his repetitive trauma claim would have succeeded if defendant had complied with Rule 341(h) "and cohesively advanced the arguments which supported [his] appeal." He also claimed damages in the form of the loss of workers' compensation benefits.

¶ 42 In December 2019, defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2018)). He alleged the record before the appellate court demonstrated that the Commission's denial of benefits was not against the manifest weight of the evidence and there was no set of facts upon which plaintiff could

prevail on his legal malpractice claim. Defendant asked the trial court to dismiss plaintiff's complaint with prejudice.

¶ 43 The same date, defendant filed a memorandum of law in support of his motion. He argued plaintiff's complaint was subject to dismissal under section 2-619(a)(9) because there were affirmative matters that defeated his claim. In particular, he asserted no set of facts existed upon which plaintiff could establish that his alleged negligence was a proximate cause of the appellate court's adverse ruling. Defendant maintained the Commission's denial of benefits was supported by the medical evidence in the case and was not against the manifest weight of the evidence.

¶ 44 Defendant asked the trial court to take judicial notice of the appellate record in plaintiff's workers' compensation appeal (appeal No. 4-17-0606WC). He also attached various documents to his memorandum, including the May 2018 appellate court decision, Liberty Mutual's appellee's brief in appeal No. 4-17-0606WC, the Commission's decision, the arbitrator's decision, Dr. VanFleet's evidence deposition, and Dr. Payne's evidence deposition.

¶ 45 In March 2020, plaintiff filed a memorandum in response to defendant's motion to dismiss. He noted he raised both "singular accident" and repetitive trauma claims when seeking workers' compensation benefits. Plaintiff agreed that the evidence before the Commission as well as legal authority supported the Commission's denial of his singular accident claim. However, he maintained the Commission's decision was both against the manifest weight of the evidence and unsupported by the law with respect to its denial of his repetitive trauma claim. Plaintiff argued the arbitrator and Commission erroneously found (1) he failed to present specific, detailed evidence concerning his work activities; (2) medical experts in the case lacked a detailed and accurate understanding of his work activities; (3) he suffered a prior golf-related injury to his back

that never resolved; and (4) no evidence was presented that directly related his back condition of ill-being to his workstation. Plaintiff also attached several documents to his memorandum, including the arbitrator and Commission's decisions, evidence depositions and exhibits admitted into evidence at the arbitration hearing, and excerpts of witness testimony from the arbitration hearing.

¶ 46 In December 2020, the trial court conducted a hearing on defendant's motion to dismiss and granted the motion. In February 2021, the court's written order dismissing plaintiff's complaint with prejudice was filed. In its order, the court found the materials presented to it "completely negate[d] the proximate cause element of [p]laintiff's cause of action for appellate legal malpractice" and, thus, he could not establish defendant's alleged breach of duty proximately caused his lack of success on appeal.

¶ 47 This appeal followed.

¶ 48 II. ANALYSIS

¶ 49 On appeal, plaintiff argues the trial court erred by granting defendant's motion to dismiss his legal malpractice complaint. He maintains the court erred in finding the Commission's decision was not contrary to law or against the manifest weight of the evidence and that, as a result, he could not establish the proximate cause element of his legal malpractice claim.

¶ 50 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 (2003). Section 2-619(a)(9) of the Code permits dismissal of a complaint when "the claim asserted against [the] defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2018).

¶ 51 When ruling on such a motion, "the court should construe the pleadings and supporting documents in the light most favorable to the nonmoving party," and it "must accept as true all well-pleaded facts in [the] plaintiff's complaint and all inferences that may reasonably be drawn in [the] plaintiff's favor." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55, 962 N.E.2d 418. "The question on appeal is whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." (Internal quotation marks omitted.) *Id.* The dismissal of a complaint pursuant to section 2-619(a)(9) is subject to *de novo* review. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 115, 896 N.E.2d 232, 235 (2008).

¶ 52 In a legal malpractice action, "the plaintiff must plead and prove that: the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship; that the defendant breached that duty; and that as a proximate result, the plaintiff suffered injury [citation] in the form of actual damages [citation]." *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 199, 850 N.E.2d 183, 186-87 (2006). "In cases involving litigation, no legal malpractice exists unless the attorney's negligence resulted in the loss of an underlying cause of action." *Id.* at 200. A client must establish "that 'but for' the attorney's negligence, the client would have been successful in the underlying suit." *Id.* Under such circumstances, "a legal malpractice plaintiff must litigate a 'case within a case.' " *Id.* Further, "the issue of proximate cause in an appellate legal malpractice action is inherently a question of law for the court and not a question of fact for the jury." *Id.* at 214.

¶ 53 Here, defendant argued, and the trial court found, that evidence in the record in appeal No. 4-17-0606WC completely negated the proximate cause element of plaintiff's appellate

legal malpractice claim. In other words, the evidence before the appellate court demonstrated that the Commission's decision was not against the manifest weight of the evidence and, as a result, plaintiff could not establish that he would have prevailed on appeal but for defendant's alleged negligent acts or omissions. We agree with the trial court's determination.

¶ 54 "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). To arise "in the course of employment," an injury "generally must occur within the time and space boundaries of the employment." *Id.* However, "[t]he 'arising out of' component is primarily concerned with causal connection" and is satisfied upon a showing "that 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.*

¶ 55 Additionally, under the Act, compensable injuries may arise from a single identifiable event or be caused gradually by repetitive trauma. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773, 780 (2005). "An employee who alleges injury from repetitive trauma must still meet the same standard of proof as other claimants alleging accidental injury" and "show that the injury is work related and not the result of a normal degenerative aging process." *Id.* "[T]he date of the injury in a repetitive-trauma compensation case is the date when the injury manifests itself—'the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.' " *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 67, 862 N.E.2d 918, 926 (2006) (quoting *Peoria County Belwood Nursing Home v. Industrial*

Comm'n, 115 Ill. 2d 524, 531, 505 N.E.2d 1026, 1029 (1987)). Further, cases involving a repetitive trauma injury typically require medical opinion evidence to establish a causal connection between the claimant's injury and his employment. *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 477, 510 N.E.2d 502, 506 (1987).

¶ 56 In workers' compensation cases, the Commission is the ultimate decisionmaker. *Durand*, 224 Ill. 2d at 63. "A reviewing court will not reverse the Commission unless its decision is contrary to law [citation] or its fact determinations are against the manifest weight of the evidence [citation]." *Id.* at 64. "Fact determinations are against the manifest weight of the evidence only when an opposite conclusion is clearly apparent—that is, when no rational trier of fact could have agreed with the agency." *Id.*

¶ 57 Initially, we note that both parties attached portions of the record in appeal No. 4-17-0606WC to their filings before the trial court and defendant asked the trial court to take judicial notice of the entire record in that case (although the record does not reflect whether that request was granted). On appeal, defendant also asks this court to take judicial notice of the appellate record in case No. 4-17-0606WC. See *People v. Henderson*, 171 Ill. 2d 124, 134, 662 N.E.2d 1287, 1293 (1996) ("It is well established that courts may take judicial notice of matters which are commonly known or, if not commonly known, are readily verifiable from sources of indisputable accuracy."). However, we find such a request unnecessary as the appellate record in this case has already been supplemented with the record from plaintiff's previous workers' compensation appeal—appeal No. 4-17-0606WC. Both parties have cited to that prior appellate record in their respective briefs, and both rely on its contents in presenting their arguments regarding the propriety of the trial court's dismissal of plaintiff's legal malpractice complaint.

Accordingly, the appellate record in case No. 4-17-0606WC is already properly before this court.

¶ 58 Next, as stated, in challenging the trial court's dismissal of his legal malpractice claim, plaintiff argues that the Commission's underlying denial of his repetitive trauma claim for workers' compensation benefits was both contrary to law and against the manifest weight of the evidence. He contends the Commission—which supplemented but otherwise affirmed and adopted the arbitrator's decision—erroneously concluded (1) he was required, but failed, to present specific and detailed information regarding the frequency, duration, and manner of performing his work activities to establish a repetitive trauma injury; (2) medical experts in the case lacked detailed and accurate understandings of his work activities; (3) he sustained a golf-related injury in May 2011 that never resolved; and (4) there was no evidence directly relating his workstation to his low back condition of ill-being.

¶ 59 Here, the record shows the crux of the Commission's denial of plaintiff's repetitive trauma claim was its finding that "there was no evidence directly relating [plaintiff's] work[ ]station to his herniation." In setting forth its decision, the Commission stated that, although it agreed with the arbitrator's determination that plaintiff did not present evidence of his specific work activities, such evidence was not "dispositive" of the issue of causation based on plaintiff's theory of compensability—"that working in an ergonomically improper workstation all day, every day, for seven years caused his disc herniation." The Commission's decision reflects a determination that while plaintiff presented evidence that he was poorly positioned at his workstation and that such positioning "may" aggravate a preexisting degenerative disc condition, he failed to prove "that his allegedly ergonomically improper work[ ]station actually aggravated *his* preexisting degenerative disc disease thereby causing *his* herniation." (Emphases in original.)

We find an opposite conclusion from the one reached by the Commission in not clearly apparent.

¶ 60 Plaintiff argues that evidence directly relating his workstation positioning to his herniation came from both Davis-Barth and Dr. Payne. First, Davis-Barth, a physical therapist and ergonomic assessment specialist, described how a position like plaintiff alleged he sat in at his workstation—which involved forward flexion and torsion—could cause discs to break down and could lead to a disc herniation. She also stated there was a cumulative effect on the spine from sitting in a "forward flexed and twisted position for a long period of time." Significantly, however, Davis-Barth also testified that the opinions she offered were not based on plaintiff's medical records. She acknowledged that other causes of disc herniations included "age degeneration of the disc" and stated as follows: "I know that he had a disc herniation. Beyond that I know that these positions can lead to a disc herniation, I know that he was medically diagnosed with a disc herniation. That's what I know." Although her testimony suggested a relationship between poor workstation positioning and disc herniations was possible, it fell short of directly relating plaintiff's injury to his work.

¶ 61 Second, although Dr. Payne offered an opinion that plaintiff's "sitting at work" contributed to or caused his back condition of ill-being, as the appellate court noted, he failed to elaborate on his causal connection opinion and did not clearly identify any particular repetitive activity as a causative factor in plaintiff's condition. *Garrett*, 2018 IL App (4th) 170606WC-U, ¶ 61. Dr. Payne acknowledged that plaintiff was considered obese and that being obese increased pressure on a person's vertebral discs. He also testified that disc herniations could be idiopathic or caused by the normal degenerative aging process, sneezing, bending, twisting, engaging in athletic activities, or getting out of bed. Dr. Payne agreed that his medical records showed plaintiff reported

"there was a change in position when [he] felt the sudden severe worsening of his complaints." He testified moving from a sitting to a standing position had "to place pressure on the disc" and that plaintiff's disc herniation "could have happened when he went from a sitting to a standing position." Additionally, he acknowledged that sitting in a terrible position at a desk does not automatically cause the development of a herniated disc and that a person could herniate a disc while standing up.

¶ 62 Viewing the testimony of Davis-Barth and Dr. Payne in their entirety, along with Dr. VanFleet's testimony that plaintiff suffered from "a long[-]standing process of lumbar degenerative disc disease" that was primarily affected by his weight, we cannot say the Commission erred in finding no causal connection. Evidence that a causal relationship is possible does not necessarily establish that one existed. The Commission could have properly found the evidence presented showed only the former and not the latter.

¶ 63 We note that, on appeal, plaintiff cites case authority for the proposition that "[a] finding of a causal relation may be based on a medical expert's opinion that an accident 'could have' or 'might have' caused an injury." *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226 (1983). However, in *Mason & Dixon Lines*, the Commission's finding of a causal connection was affirmed on review. *Id.* As stated, the Commission is the ultimate decisionmaker in workers' compensation cases. *Durand*, 224 Ill. 2d at 63. "It is the Commission's role to judge the credibility of the witnesses, determine the weight of their testimony, and draw appropriate inferences from the evidence." *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 396, 657 N.E.2d 882, 887 (1995). "[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.

¶ 64 The standard of review before the appellate court in case No. 4-17-0606WC required deference be given to the Commission. The record in that case reflects the Commission drew appropriate inferences from the evidence and, ultimately, the record supports its decision. Reversal of the Commission's decision is not warranted because the evidence may be viewed as conflicting or because it was susceptible to other inferences.

¶ 65 For the reasons set forth above, we find the evidence presented in plaintiff's workers' compensation case supports the Commission's denial of his repetitive trauma claim. As a result, plaintiff cannot establish that he would have been successful in his appeal of the Commission's decision absent defendant's alleged negligent preparation of his appellant's brief. Accordingly, we find no error in the trial court's dismissal of plaintiff's legal malpractice complaint.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we affirm the trial court's judgment.

¶ 68 Affirmed.