2022 IL App (1st) 210956WC-U
No. 1-21-0956WC

Order filed: August 5, 2022

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION DIVISION

DANIEL CUMMINGS,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 20 L 0503211
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*,	)	Honorable
	)	Daniel P. Duffy,
(Future Environmental, Inc., Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Illinois Workers' Compensation Commission abused its discretion and committed reversible error by *sua sponte* excluding, on foundational grounds, medical records to which the employer had stated, in the arbitration hearing, that it had no objection.

¶ 2 Petitioner, Daniel Cummings, claimed workers' compensation benefits from respondent, Future Environmental, Inc. After an arbitration hearing, the Illinois Workers' Compensation Commission (Commission) found his claim to be unproven, and accordingly, the

Commission declined to award him any benefits. Petitioner then sought review in the Cook County circuit court, which confirmed the Commission's decision, concluding that the decision was not against the manifest weight of the evidence. Petitioner appeals on two grounds.

¶ 3 First, petitioner argues the Commission abused its discretion by excluding from consideration 109 pages of medical records to which respondent's attorney had stated he had no objection. Second, petitioner argues the Commission abused its discretion by sustaining respondent's irrelevancy objection to nine photographs of petitioner holding bags of asbestos he had removed from work sites.

¶ 4 While disagreeing with petitioner's second contention, we find merit in the first. By *sua sponte* excluding the medical records from consideration, the arbitrator essentially made a foundational objection for respondent. The arbitrator thereby abused his discretion. The Commission adopted the arbitrator's recommended decision without qualification, making the arbitrator's abuse of discretion the Commission's own abuse of discretion. We are unconvinced that this error was harmless. Therefore, we reverse the circuit court's judgment and the Commission's decision, and we remand this case to the Commission with directions to issue a new decision, this time taking into consideration the improperly excluded medical records.

¶ 5 I. BACKGROUND

¶ 6 On November 24, 2014, petitioner filed his workers' compensation claim. According to his application for adjustment of claim, the "part of the body *** affected" was "[o]ccupational exposure [*sic*]," and the "[d]ate of [the] accident" was September 16, 2014.

¶ 7 In an arbitration decision issued on June 6, 2018, Arbitrator Ciecko found that petitioner had failed to "prove [that] he suffer[ed] from an occupational disease." The arbitrator further found that petitioner had failed to prove "a causal connection *** between a disease and

his employment." Accordingly, the arbitrator concluded that petitioner was "not entitled to medical benefits, temporary total disability, *** permanent partial disability," or "benefits of any kind."

¶ 8 On July 15, 2020, a majority of the Commission affirmed and adopted the arbitrator's decision. Commissioner Tyrrell, however, dissented. He disagreed with some evidentiary rulings, including what he described as the "inexplicable" and "mind-boggling" exclusion of medical records to which respondent never objected. Also, Commissioner Tyrrell was of the opinion that, contrary to the majority's decision, petitioner had carried his burden of proving an occupational disease.

¶ 9 The evidence in this case was essentially as follows.

¶ 10 Since March 2007, petitioner, age 37, was employed by respondent as a hazardous materials technician. His duties were to clean up hazardous materials, such as oil spills, and to clean petroleum products off the interior of tanks.

¶ 11 Respondent's industrial coordinator, Kenneth Houston, testified that the host company (the company that hired respondent to do the cleaning) always gave respondent a safety data sheet, which listed the chemical composition of the material to be cleaned up and the hazards that each chemical posed. On the basis of the safety data sheet, Houston and the job site supervisor decided what safety equipment was needed. They ensured that the employees had the necessary equipment. Employees were issued masks, which were fit-tested for each employee. Any employee at the work site could shut down a job if he or she believed the conditions were unsafe.

¶ 12 Petitioner testified that the tanks he cleaned were cramped, enclosed spaces in which, oftentimes, he worked without having been supplied oxygen. About 70% of his job consisted of using citrus degreasers to remove petroleum products from the inside of tanks—a task he had performed over a thousand times in the course of his employment with respondent. He used

whatever protective gear that respondent provided.

¶ 13 The arbitrator found petitioner's testimony to be vague and nonspecific about "his exposures or instances of lack of proper equipment." The arbitrator wrote:

> "Petitioner was vague in his testimony regarding safety equipment and personal protection equipment saying he worked around Styrene without oxygen being provided; was not always provided an air supply in a closed space; and was not sure of the number of times he was provided an oxygen mask while working in an enclosed space. There was no testimony about the need for oxygen around Styrene, no testimony about the need for oxygen in a closed space, and no testimony he should have been provided an oxygen mask when working in an enclosed space. In short, there was no context to his testimony. *** Petitioner offered no specific dates, or jobs, or times, or locations, or circumstances in his testimony. ***
>
> ***
>
> Petitioner failed to testify to, or recount, any single specific exposure or incident while working, setting in motion his claim of injury or exposure, seven years after beginning employment with Respondent."

¶ 14 The arbitrator acknowledged the discussion of respiratory symptoms in petitioner's medical records. For example, petitioner presented a medical record from Northwestern Medical Group (Northwestern) that on September 16, 2014, he was suffering from dyspnea. Nevertheless, the arbitrator noted that petitioner "avoided any specific testimony as to the onset of his symptoms, or specifics as to a trigger." The arbitrator continued:

> "[T]he history indicates that in August 2014, he was cleaning a site at a Styrene factory when he developed acute onset of a cough. Later that night he developed

> acute onset of chest tightness, dyspnea, and wheezing. The history indicates he presented to urgent care and was given a nebulizer. There is no supporting evidence of such urgent care visit offered by Petitioner, and no testimony of it by Petitioner. There is no notation in the record of exposure to anything except Styrene. A diagnosis of Asthma due to inhalation of fumes was made."

The person at Northwestern who wrote the patient history was, the arbitrator noted, Trevor Nicholson, "someone working with [Dr. Robert] Cohen." It was unclear to the arbitrator who Nicholson was, but according to the history, petitioner told Nicholson of " 'a recent example of exposure to *ethylene dichloride* while not using respiratory precautions (September 2014).' " (Emphasis added.) So, this medical record contained a discrepancy between styrene and ethyl dichloride.

¶ 15 The arbitrator recalled that, in petitioner's testimony in the arbitration hearing, "[t]here was only one brief, vague[ ] mention of ethylene dichloride." Apparently, the arbitrator was referring to the following testimony:

> "[Q.] How often did you work with ethylene dichloride?
>
> ***
>
> [A.] Well, that would be a chemical, I believe, that we worked with at a certain terminal for at least the last four years of my employment with Future Environmental. It was—BASF, I think the terminal was called."

¶ 16 Petitioner's expert, Dr. Cohen, testified that in September 2014 petitioner had a significant exposure to ethylene dioxide. Dr. Cohen opined that, as a result of this exposure, petitioner was suffering from work-related chronic obstructive pulmonary disease with an asthmatic component. "However," the arbitrator pointed out, Dr. Cohen "testified to the wrong

chemical": petitioner reportedly was exposed to styrene in August 2014, not to ethylene dioxide. Not only did Dr. Cohen misidentify the chemical, the arbitrator continued, but Dr. Cohen did not even "know the permissible exposure limits for ethylene dichloride, or whether Petitioner's exposure was above or below the limits."

¶ 17 The arbitrator summed up his reservations about Dr. Cohen's testimony:

> "[Dr. Cohen offered his causation opinion] despite: not knowing if Petitioner worked in a confined space, or used protective equipment; not knowing the permissible exposure limits for ethylene dichloride, or what Petitioner's exposure was; having only one example of working with ethylene dichloride; not knowing how often Petitioner worked with styrene, or used protective equipment; there being no indication how often Petitioner cleaned up, in his description, volatile organic compounds, or whether protective air breathing equipment was used; not knowing the permissible exposure limits for styrene or whether Petitioner's exposure exceeded permissible limits; never getting information from Petitioner on chemical exposures or documents from [the Occupational Safety and Health Administration]; not knowing what the actual intensity of any of Petitioner's exposures were, or its duration."

¶ 18 Dr. David Fletcher, who performed an independent medical examination of petitioner in January 2017, agreed with Dr. Cohen that petitioner had asthma. Dr. Fletcher found, however, that the asthma was controlled and not disabling, and he saw no evidence that the asthma was causally related to petitioner's work for respondent. The arbitrator recounted:

> "[Dr.] Fletcher testified that although Petitioner talked about some of the things he was exposed to, the problem [Dr.] Fletcher had is the lack of industrial hygiene

data. He had no assessment of Petitioner's workplace as far as what exposures Petitioner had, saying that's very important when deciding on causation. [Dr.] Fletcher was familiar with the two substances Petitioner mentioned, ethylene dichloride and styrene, but there was no data showing how much exposure Petitioner had. [Dr.] Fletcher testified Petitioner's CT scan showed no evidence of any active lung disease. Petitioner had some nodules, a density in the lungs he considered unremarkable, probably a benign process. That, said [Dr.] Fletcher, would not be work related. ***

*** His diagnosis was extrinsic asthma that is controlled. He would place no work restrictions on Petitioner at all. ***

[Dr.] Fletcher further testified he disagreed with Dr. Cohen, saying he did not believe one could, with medical certainty, identify the manner of causation of Petitioner's conditions without the industrial hygiene data and the exposure data. He testified there was not enough information for [Dr.] Cohen to formulate his opinion, and no documentation to support [Dr.] Cohen's saying Petitioner had many years of exposure to petroleum products, solvents, and [volatile organic compounds] with inadequate respiratory protection. [Dr.] Fletcher testified he would need to have specific documentation of Petitioner's exposures, when or when he didn't wear a respirator."

¶ 19 The arbitrator—and the Commission, which affirmed and adopted the arbitrator's decision—found Dr. Fletcher's testimony to be more believable than Dr. Cohen's testimony. The arbitrator wrote, "Petitioner repeatedly failed to give concrete testimony as to his exposures or instances of the lack of proper equipment, in short, any evidence that could be extrapolated into

data necessary to support a diagnosis with medical certainty."

¶ 20 II. ANALYSIS

¶ 21 On appeal, petitioner does not directly challenge this credibility determination by the Commission. See *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 19 (stating that "[w]e will not merely reevaluate the credibility of these [expert] witnesses and substitute our judgment for that of the Commission"). He maintains, though, that credibility should be assessed in the context of all the admissible evidence. He challenges the Commission's exclusion of, or refusal to consider, some items of evidence. Specifically, he raises two evidentiary issues.

¶ 22 The first evidentiary issue concerns an incomplete certification in petitioner's exhibit No. 2, which was made up of medical records from Northwestern. Even though, in the arbitration hearing, respondent's attorney stated that he had no objection to the admission of this exhibit and even though the arbitrator, accordingly, admitted this exhibit in evidence, the arbitrator later refused to consider most of this exhibit when he wrote his recommended decision. The arbitrator justified the refusal as follows:

> "Petitioner's medical records from Northwestern Medicine, submitted as purportedly received in response to subpoena, consist of 135 pages. However, the Certification of Medical Records by Northwestern indicates the documents sent in response to subpoena consist of 38 pages as requested. Petitioner fails to explain this discrepancy. Moreover, the handwritten notation of *9/16/14-12/1/2014* seems to correspond to the *Encounter date 12/1/14* on the upper right of certain pages in Petitioners Exhibit 2. Therefore, I will consider pages 1 through 26 of Exhibit 2. See 820 ILCS 305/16." (Emphases in original.)

¶ 23 The other evidentiary issue in this appeal concerns petitioner's exhibit No. 7, which consists of nine photographs. According to petitioner's testimony, a co-employee named Dwayne took these photographs in 2007, about 10 months after petitioner started working for respondent, and the photographs showed petitioner holding bags filled with asbestos that petitioner had removed from job sites. In the photographs, the bags were marked "asbestos" and "danger." Petitioner was asked:

> "Q. And looking at those photographs, does it accurately depict the condition of your work site at the time you were working there?
>
> A. Yes.
>
> Q. And the individual that you've identified as yourself, does that accurately depict the work that you were doing at the time you were doing it at that job site?
>
> A. Yes."

¶ 24 In the arbitration hearing, at the conclusion of petitioner's presentation of evidence, the arbitrator asked respondent's attorney if he had any objection to the asbestos photographs, petitioner's exhibit No. 7. Respondent's attorney answered:

> "MR. ULRICH: We would object based upon relevance. They were done in 2007.
>
> MR. GANNON [(PETITIONER'S ATTORNEY)]: In response, [Y]our Honor, that was his first year working; and I believe they're relevant because he's doing that job roughly seven years prior to his diagnosis.
>
> THE ARBITRATOR: I'm going to take that under advisement."

¶ 25 In his recommended decision, the arbitrator sustained respondent's objection to

petitioner's exhibit No. 7. "Here, the foundation is lacking," the arbitrator explained, "because the photographs purportedly depict a worksite and work seven years before the date of accident (exposure) alleged by Petitioner in both the Application of Adjustment of Claim (Application for Benefits) and the Request for Hearing, a time not relevant to the issues at hand." (Again, according to the application for adjustment of claim, the date of the accident was September 16, 2014.)

¶ 26 So, this appeal concerns (1) the *sua sponte* exclusion of 109 pages of medical records (most of petitioner's exhibit No. 2) and (2) the sustaining of respondent's irrelevancy objection to the asbestos photographs (petitioner's exhibit No. 7).

¶ 27 Let us take those two evidentiary issues one at a time.

¶ 28 A. Petitioner's Exhibit No. 2

¶ 29 In deciding not to consider most of petitioner's exhibit No. 2, the arbitrator cited section 16 of the Workers' Compensation Act (820 ILCS 305/16 (West 2020)), a section that provided, "There shall be a rebuttable presumption that [medical] records *** received in response to Commission subpoena are certified to be true and correct." The arbitrator inferred, from the certification in petitioner's exhibit No. 2, that only 26 pages of the exhibit were received in response to a subpoena. He impliedly refrained from considering the remaining 109 pages of the exhibit because those pages, evidently, were not received in response to a subpoena and, hence, were not presumed to be "true and correct." *Id.*

¶ 30 The next sentence of section 16 provides, however, "This paragraph does not restrict, limit, or prevent the admissibility of records *** that are otherwise admissible." *Id.* Evidence is admissible if the opposing party does not object to it. See *Town of Cicero v. Industrial Comm'n*, 404 Ill. 487, 495 (1950); *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 855 (2004). In other words, if evidence is "received without objection," the evidence, though

"incompetent," "*is to be considered* and given its natural probative effect *as if* it was in law admissible." (Emphases added.) *Town of Cicero*, 404 Ill. at 495.

¶ 31 No doubt, regardless of the absence of an objection, an arbitrator, like a judge, may reasonably control the conduct of the hearing by *sua sponte* cutting off the presentation of obviously irrelevant, cumulative, or otherwise inadmissible evidence the presentation of which would only result in a waste of time and resources. *Cf. People v. Moon*, 2019 IL App (1st) 161573, ¶ 40 (explaining that "a judge is not a mere referee," that "she has wide discretion to control the course of the trial," and that such discretion includes "raising objections" *sua sponte* (internal quotation marks omitted)).

¶ 32 In the present case, however, after the close of evidence, the arbitrator *sua sponte* raised a foundational objection to an exhibit to which respondent's attorney had stated he had no objection and which the arbitrator had accordingly admitted in the hearing. See *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1011, 1012-13 (2005). Consequently, petitioner never received a fair opportunity to remedy the certification problem or to otherwise demonstrate that he had received all of the medical records in response to a subpoena. See *Bafia v. City International Trucks, Inc.*, 258 Ill. App. 3d 4, 8 (1994) (holding that "where the ground for the objection is of a character that can be remedied such as a lack of proper foundation, the objecting party must make the objection in order to allow an opportunity to correct it"). As Commissioner Tyrrell aptly remarked, this *sua sponte* posthearing exclusion of medical records to which respondent's attorney said, in the arbitration hearing, he had no objection is "inexplicable" and "mind-boggling." Instead of raising a foundational issue that respondent never raised, the Commission should have taken into consideration the 109 uncertified pages of petitioner's exhibit No. 2, giving those pages whatever natural probative effect they deserved. See *Town of Cicero*, 404 Ill. at 495. The

unsolicited exclusion of those medical records from consideration as evidence was an abuse of discretion.

¶ 33 But it is not enough for petitioner to identify this error. He also must show resulting prejudice. See *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, 258 Ill. App. 3d 4, 8 (1994). He must show that the error "materially affect[ed] the outcome of this case." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (1990). For two reasons, respondent argues that any error in the exclusion of the medical records was harmless.

¶ 34 First, respondent observes that many of the excluded records in petitioner's exhibit No. 2 "were contained elsewhere in the record," in other exhibits, "meaning the records were not truly excluded." We cannot be sure, though, that this "meaning" really follows. If the Commission refused to consider an uncertified record in petitioner's exhibit No. 2, it is unclear by what logic the Commission would have deemed the problem to have been solved, and would have considered the record after all, simply because the record was included in another exhibit. If the Commission had regarded inclusion in another exhibit as curative, the Commission presumably would not have declined to consider all the uncertified records in petitioner's exhibit No. 2.

¶ 35 Second, respondent argues that (1) the outcome of this case was determined by the scarcity of "industrial hygiene data and exposure data" and (2) petitioner fails to demonstrate that the 109 pages of petitioner's exhibit No. 2 that the Commission impliedly declined to consider would have supplied that deficiency.

¶ 36 Respondent has a point here. Even so, the Commission found Dr. Cohen to be less credible than Dr. Fletcher, and the lack of supporting medical records can affect a testifying doctor's credibility. "[An] expert's opinion is only as valid as the reasons that underlie it." *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 201 Ill. 2d 260, 299 (2002). The arbitrary

exclusion of 109 pages of medical records could have contributed to weakening Dr. Cohen's credibility if his opinion needed support from more medical records. By the same token, the exclusion of the medical records might have made Dr. Fletcher's opinion seem more convincing than it otherwise might have seemed. Generally, medical records are important evidence in worker's compensation cases. It is in the context of medical records that doctors form their opinions and testify. We are unwilling to dismiss the arbitrary impoverishment of this context as harmless error.

¶ 37 B. Petitioner's Exhibit No. 7

¶ 38 The arbitrator sustained respondent's objection to petitioner's exhibit No. 7, the nine asbestos photographs—although the arbitrator seemed to confuse irrelevancy with a lack of foundation. Compare *Greaney*, 358 Ill. App. 3d at 1011 (explaining that, "[i]n order to lay an adequate foundation, the proponent must present evidence to demonstrate that the document is what it claims to be") with Ill. R. Evid. 401 (eff. Jan. 1, 2011) (defining " '[r]elevant evidence' " as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). On appeal, petitioner quotes from *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶ 29: "In general, photographs are admissible into evidence if they are identified by a witness who has personal knowledge of the subject matter depicted in the photographs and the witness testifies that the photographs are a fair and accurate representation of the subject matter at the relevant time." (Internal quotation marks omitted.) Because petitioner testified that the nine asbestos photographs (petitioner's exhibit No. 7) "accurately depict[ed] the condition of [his] work site at the time [he was] working there," petitioner contends that the arbitrator abused his discretion by sustaining

respondent's objection to those photographs and by ruling those photographs to be inadmissible on the ground of a lack of foundation.

¶ 39 Respondent's objection, however, was an irrelevancy objection, not a foundational objection. "Because we are not bound by the Commission's reasons or findings supporting its decision, we may affirm the Commission's decision based upon any legal basis appearing in the record." *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572, 575 (1999). By sustaining respondent's objection to petitioner's exhibit No. 7, the Commission did not abuse its discretion, considering that the objection was an irrelevancy objection. See *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947 (2006). The record appears to contain no evidence that asbestos causes asthma, let alone that the protective equipment that petitioner was wearing failed to protect him from asbestos fibers. Also, the asbestos removal took place seven years before the alleged date of exposure listed in the application for adjustment of claim. A reasonable person, therefore, could find merit in respondent's irrelevancy objection to petitioner's exhibit No. 7. See *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 412 (2009) (explaining that "[a]n abuse of discretion occurs only where no reasonable person could agree with the position adopted by the Commission").

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we reverse the circuit court's judgment and the Commission's decision, and we remand this case to the Commission with directions to issue a new decision, this time taking into consideration the improperly excluded medical records.

¶ 42 Circuit court judgment reversed; Commission decision reversed; cause remanded to the Commission with directions.