

Workers' Compensation
Commission Division
Filed: February 27, 2012

No. 1-10-1103WC

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

MICHAEL KOWALCZYK,)	Appeal from the Circuit Court
)	of Cook County.
Petitioner-Appellant,)	
)	
v.)	No. 08-L-51051
)	
WORKERS' COMPENSATION COMMISSION)	
OF ILLINOIS and JAC MASONRY, INC.,)	Honorable
)	Elmer James Tolmaire, III,
Respondents-Appellees.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman, Holdridge, and Stewart concurred in the judgment.

ORDER

Held: The decision of the Commission that claimant failed to prove his condition of ill being is causally related to his at-work injury is not contrary to the manifest weight of the evidence.

¶ 1 Claimant, Michael Kowalczyk, filed an application for adjustment of claim pursuant to the

Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 1996)) alleging he sustained an injury to the whole person while in the employ of respondent, JAC Masonry, Inc. The arbitrator found that claimant had carried his burden of proving that his condition of ill-being is causally related to his employment. Pertinent here, the arbitrator, *inter alia*, entered a wage-differential award (820 ILCS 305/8(d)(1) (West 1996)) in the amount of \$322.52 for the duration of the disability. The Commission modified the decision of the arbitrator, finding that claimant was entitled to an award of 50 weeks compensation at a rate of \$439.89 for a loss of 10% of the person as a whole (820 ILCS 305/8(d)(2) (West 1996)). The circuit court of Cook County confirmed the Commission's decision, and, for the reasons that follow, we affirm.

¶ 2

BACKGROUND

¶ 3 Claimant was employed as a bricklayer by respondent. This job required lifting bricks and blocks weighing as much as 60 pounds, bags of mortar weighing 80 pounds, and, with assistance, pieces of steel weighing up to 200 pounds. It also required frequent bending and stooping.¹ In July 1995, claimant underwent a laminectomy and discectomy due to a right-sided herniation of a disc. A workers' compensation claim was filed; however, claimant voluntarily dismissed the claim after three months because his medical insurance policy would not pay his medical bills while there was a workers' compensation case pending. Claimant returned to full duty in November 1995. From

¹In his statement of facts, claimant provides citation to the record by setting forth a long, string-citation at the end of each paragraph. Claimant's counsel is advised that it would be preferable to place citations at the end of each sentence so that the court would not be forced to guess which citation applies to which sentence. Additionally, citations that identify 20 pages of material, such as "R.C 813-832" following numerous factual assertions are not particularly helpful.

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that time until July 15, 1997 (the date of the injury at issue in this case), claimant experienced no significant symptoms due to his lower back outside of “your basic workday pains.”

¶ 4 On July 15, 1997, claimant was building a wall from a foundation to a height of about six feet. This required claimant to work in a bent-over position for the majority of the workday. After the wall was completed, claimant stood straight up. He then noticed pain in his lower back. He notified a supervisor of this incident. Claimant worked a few more days, and his pain became progressively worse.

¶ 5 Claimant sought treatment for his family physician, Dr. Lisa Simonds. Her notes reflect that claimant came to her complaining of back pain that was caused by his employment. She believed his symptoms were consistent with lumbar disc syndrome and prescribed naproxen. She also referred claimant to Dr. Marshall Cushman. Cushman is a neurosurgeon and had performed the 1995 surgery on claimant’s back. Simonds ordered claimant off work, and respondent began paying temporary total disability (TTD) benefits.

¶ 6 Cushman examined claimant on July 28, 1997. He noted a diminished range of motion of the lower spine on backward extension. He ordered physical therapy, which took place over the next month. Cushman’s notes state that “there is little to be found” and that “[t]here is no sensory and no motor deficit but back bending is limited to about 45 degrees.” Cushman also observed, “Interestingly, it is noted that prior to his previous ruptured disc[,] symptoms were similar with back pain and a great paucity of neurological findings, no reflex nor sensory changes then either.”

¶ 7 Dr. Mohammed Rafiullah saw claimant during a period in which Cushman was unavailable. Claimant complained of increased pain with radiation down his left leg. Rafiullah ordered continued physical therapy and prescribed Advil. He also ordered an MRI, which was performed on August

13, 1997. This MRI was compared to one that was performed prior to claimant's 1995 surgery. The MRI revealed "minimal post surgical changes" since 1995. A disc fragment that had been observed in 1995 was no longer present on the right side of claimant's spine. The report of the MRI stated, "No conclusive herniated pulposus spinal stenosis is present, though the neural foramina [*sic*] are narrowed bilaterally at L5-S1, more on the left than the right. It also noted "degenerative dessication and loss of signal with moderate disc bulging" at L4-L5. It further noted "mild degenerative changes elsewhere." The report concluded that there was "[n]o sign of recurrent herniated nucleus pulposus" and that there was a "[f]irst degree anterior spondylolisthesis and bilateraly [*sic*] pars interarticularis defects at L5-S1." Additionally, "[t]he neural foramina at this level are narrowed bilaterally." Cushman later noted that claimant's "MRI scan has shown no evidence of recurrent disc herniation" and "[t]he spondylolisthesis, Grade 1 does not appear changed from the 1995 scan."

¶ 8 Cushman examined claimant on August 25, 1997. Cushman felt that claimant could not return to bricklaying as long as he remained in pain. A series of epidural injections was prescribed. This resulted in temporary, symptomatic relief. When Cushman saw claimant on September 10, 1997, claimant reported that he was able to obtain a degree of relief by using a foam roll he had been given in a prior work-hardening program. A physical examination revealed that "[s]traight leg raising is negative and heel and toe walking is good as it has been." Cushman referred claimant to Dr. Subbanna Jayaprakash.

¶ 9 Claimant first saw Jayaprakash on September 12, 1997. Jayaprakash's notes from that visit state that the MRI obtained on August 13, 1997, "shows no evidence of any recurrent disk herniation but clear-cut evidence of a grade I spondylolisthesis with bilateral pars interarticularis defect at the L5-S1 segment." The doctor noted a diminished range of motion of the lumbar spine. He initially

ordered claimant into a work-hardening program; however, he then cancelled the order and ordered a functional capacity examination (FCE), which took place on September 16, 1997. Following the examination, Jayaprakash suggested claimant find a new occupation. He imposed restrictions limiting claimant to the medium/light level, including limited lifting to 35 or 40 pounds and only occasional bending and stooping. Jayaprakash believed further work-hardening might worsen claimant's condition. Subsequently, Jayaprakash testified, via evidence deposition, that the incident of July 15, 1997, was a "material contributory cause" of claimant's condition. Jayaprakash explained that claimant's "spine had worsened," as indicated by "well defined objective changes in his back." Jayaprakash testified that the MRI of August 13, 2007 "had shown that [claimant] had now some worsening condition in his lower back in the form of a recurrent disc herniation."

¶ 10 Dr. Jay Levin examined claimant on respondent's behalf. He opined that the events of July 15, 1997, were not the cause of claimant's current condition of ill being. His diagnosis was "[s]tatus post remote lumbar laminectomy—that meaning a previous lumbar laminectomy—with pre-existing spondylolisthesis at L5-S1." He noted "no evidence of a recurrent disk herniation," including in his examination of the MRI performed in August 1997. Levin explained that while claimant's subjective complaints are consistent with his diagnosis, they were not related to the events of July 15, 1997. He saw no permanent changes in claimant's condition resulting from that incident. Levin testified that he was not "convinced" that the restrictions imposed following the 1997 FCE were appropriate. During cross-examination, Levin agreed that claimant began exhibiting symptoms on July 15, 1997. Further, he agreed that it was possible for an individual to sustain a traumatic injury to the spine in the manner described by claimant (though he later clarified that he did not believe this to be the case with claimant). He acknowledged that sciatic-notch tenderness—a symptom exhibited

by claimant—could indicate a traumatic injury and that trauma to the lower back could aggravate a pre-existing condition in a post-operative spine, even after two asymptomatic years.

¶ 11 Claimant obtained employment with the village of Union Grove, Wisconsin, on April 3, 1998. As of 2007, he earned approximately \$15 less per hour in this position than he would have as a bricklayer. Part of his duties include collecting garbage; however, a village ordinance requires garbage cans to weigh less than 40 pounds. He also performs general maintenance around the village. An investigator surveilled claimant and videos entered into evidence show claimant performing this job. Both parties presented testimony from vocational rehabilitation specialists, and they roughly concurred, given his restrictions, that claimant's earning capacity was about what he was earning in his current position.

¶ 12 The arbitrator found claimant had sustained a compensable injury on July 15, 1997. He found claimant's account of the events of July 15, 1997, credible. He noted that claimant's testimony was corroborated by the records of his treating doctors and that even Levin agreed that claimant could have sustained an injury in the manner claimant described. The arbitrator further stated that he found Jayaprakash's opinion regarding causation credible. He noted that Levin had only examined claimant on one occasion. He also found the surveillance videos to be entitled to little weight on the issue of causation, as they had not been examined by a doctor. Finally, the arbitrator noted the sequence of events supported the existence of a causal relationship between employment and claimant's injury. The arbitrator then examined the evidence regarding claimant's earnings and the extent of his disability. Given our disposition, that evidence is not material here. Ultimately, the arbitrator awarded claimant 10 weeks TTD in the amount of \$664.48 and a wage-differential award of \$322.52 per week for the duration of claimant's disability.

¶ 13 The Commission modified the arbitrator's award by replacing the wage-differential award with an award of \$439.89 per week for 50 weeks, representing a 10% loss to the person as a whole and otherwise affirmed and adopted the arbitrator's decision (in essence, the Commission found claimant was entitled to some compensation as a result of the July 15, 1997, incident, but it disagreed with the arbitrator's finding the claimant's continuing condition of ill being was causally related to this incident). It noted Jayaprakash's deposition testimony was inconsistent with his records. Specifically, while the doctor testified that the 1997 MRI showed a recurrent herniated disk, his records from his September 12, 1997, examination of claimant specifically state that the MRI "shows no evidence of recurrent disc herniations." It further observed that neither Cushman nor Levin found evidence of a recurrent disk herniation. The Commission then noted that Jayaprakash first ordered work hardening but quickly reversed himself. It expressly found Jayaprakash to lack credibility. Stating that it found Levin more credible, the Commission relied on his opinions that the restrictions imposed on claimant's ability to work were too restrictive and that claimant's condition was the result of underlying degenerative changes and post-operative changes relating to the 1995 laminectomy. Finally, the Commission observed that claimant did not appear to be in any distress in the surveillance videos as he performed his job for the Village of Union Grove. The circuit court of Cook County confirmed the Commission, and this appeal ensued.

¶ 14

ANALYSIS

¶ 15 Claimant contends that the Commission erred in finding no causal relationship between the July 15, 1997, incident and the conditions that result in his diminished earning capacity. Claimant purports to raise two arguments, that the Commission erred as a matter of law and that it erred as a matter of fact. However, the former argument is based on his assertion that the facts are susceptible

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to but a single inference. See *Phillips v. Industrial Comm'n*, 187 Ill. App. 3d 704, 707 (1989) (“[W]here factual matters are susceptible of only one inference, it becomes a question of law, and this court is not bound by the Commission's decision.”). This is simply not the case here; conflicting evidence exists in the record. For example, the opinions of Jayaprakash and Levin on causation were plainly contradictory. Moreover, resolving this conflict (and others) involved an assessment of credibility. Accordingly, this appeal presents a question of fact, and we will conduct review using the manifest-weight standard. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 785 (2008). Hence, we will disturb the Commission's decision only if the opposite conclusion is clearly apparent. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1093 (2007).

¶ 16 Preliminarily, we will address claimant's contention that the Commission's decision is entitled to diminished deference because it reversed the arbitrator and it was the arbitrator, having conducted the hearing, who was in the best position to assess the evidence. This is not the law. See *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675-76 (2009). The Commission is the finder of fact, and it is to the Commission that we owe deference on factual issues. *Edward Gray Corp. v. Industrial Comm'n*, 316 Ill. App. 3d 1217, 1222 (2000), citing *Morgan Cab Co. v. Industrial Comm'n*, 60 Ill. 2d 92 (1975) (“Where the evidence gives rise to more than one inference, however, the question remains one of fact and the Commission's determination is accorded great deference.”). Claimant cites two cases that stand for the proposition that the trial court may rely on an arbitrator's decision in reversing the Commission. See *Ray v. Industrial Comm'n*, 52 Ill. 2d 23, 27 (1972); *Hendren v. Industrial Comm'n*, 19 Ill. 2d 44, 49 (1960). Giving effect to a well-reasoned decision by an arbitrator where the Commission's decision is contrary to

the manifest weight of the evidence is not the same thing as giving deference to such a decision. Moreover, this authority is relatively old, preceding a significant amount of authority holding that we owe deference to the Commission, including cases cited earlier in this paragraph. Interpreting these two cases as claimant advocates would be inconsistent with these more recent holdings.

¶ 17 We now turn to the substance of claimant's arguments. Claimant first contends that his testimony was uncontroverted regarding the events of July 15, 1997. While this is true, it is also not relevant. The issue in this case concerns the causal relationship between those events and claimant's condition of ill being. On this issue, the evidence was not uncontroverted. Specifically, Levin opined that no causal relationship existed.

¶ 18 Claimant asserts that the Commission essentially found that his condition of ill being related to the 1995 surgery rather than the 1997 accident. He then points out that the 1995 surgery involved a herniation on the right side of his spine while the symptoms stemming from his 1997 injury involved his left side. We fail to see the significance of this assertion. Again, at issue here is which of these events are the cause of claimant's condition of ill being. That they are unrelated says nothing about which resulted in the restrictions currently imposed on claimant's ability to work. Indeed, the fact that the two events are unrelated weakens claimant's position in that the 1997 incident cannot be said to have aggravated a pre-existing condition. See *Kishwaukee Community Hospital v. Industrial Comm'n*, 356 Ill. App. 3d 915, 922 (2005) ("The fact that a work-related accident may aggravate or accelerate a preexisting condition does not mean that the employee is not entitled to benefits, *so long as the work-related accident was a factor contributing to the disability.*" (emphasis added)).

¶ 19 Claimant complains that the Commission denied his claim based upon the rejection of

Jayaprakash's testimony while ignoring relevant nonmedical testimony. Specifically, claimant points to the chain of events surrounding his injury. It is true that proof of prior good health followed by an injury and a change in health following the injury may establish causation. *Navistar International Transportation Corp. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000). However, claimant has not set forth proof of prior good health. Claimant underwent a previous laminectomy, and there was testimony that this was the cause of his condition of ill being. As such, we cannot say that the Commission erred based on the chain of events surrounding claimant's injury.

¶ 20 Claimant criticizes the Commission's finding that Jayaprakash was not credible as irrelevant. The Commission rejected Jayaprakash's opinions because his testimony that the 1997 MRI showed a recurrent herniated disk was inconsistent with a statement Jayaprakash memorialized in claimant's medical records. Claimant argues that this inconsistency is immaterial in that the MRI was not the basis for the restrictions Jayaprakash later imposed on him. However, flaws in portions of a witness's testimony may affect the credibility of the witness as a whole. See *People v. Herman*, 407 Ill. App. 3d 688, 707-08 (2011). As such, the inconsistency between Jayaprakash's testimony and his earlier statement provided a basis for the Commission to question the propriety of the restrictions he placed upon claimant.

¶ 21 Claimant next argues that since the Commission found Levin credible, it was required to credit his testimony on cross-examination, which claimant characterizes as favorable to him. We do not find that testimony cited by claimant as being so favorable as to render the Commission's decision contrary to the manifest weight of the evidence. For example, Levin testified that it was possible for an individual to sustain a traumatic injury to the spine in the manner described by claimant. However, this is certainly not the same as stating that the injury actually happened in the

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manner claimant related. More importantly, it is perfectly acceptable for a trier of fact to accept one part of a witness's testimony and reject another part of it. *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 496-97 (2008); *People v. Rodriguez*, 187 Ill. App. 3d 484, 491 (1989).

¶22 Claimant contends that the Commission ignored the testimony of the vocational rehabilitation specialists. As we read its decision, it is based on claimant's failure to prove a causal connection between his condition and his injury. That is, the Commission did not find that claimant's earning capacity had not diminished; rather, it found that any such diminishment was not the result of the events of July 15, 1997. Hence, the testimony of the vocational rehabilitation specialists was not material to the issue upon which the Commission based its decision.

¶23 Finally, claimant complains of the Commission's reliance on the surveillance videos, which show claimant performing his job for the Village of Union Grove. He points to the arbitrator's finding that the videos are not helpful on the issue of causation because they have not been examined by a physician. The Commission, however, is not an ordinary fact finder; it possesses substantial expertise in the area of workers' compensation claims (*Yaeger v. Industrial Comm'n*, 232 Ill. App. 3d 936, 942 (1992)). As such, it was capable of drawing its own factual inferences from these tapes. While we agree with claimant that the videos do not show claimant performing tasks as demanding as bricklaying, they do show claimant performing somewhat strenuous physical activity, which the Commission was entitled to consider in light of other evidence in the record. Indeed, recalling that claimant bore the burden of proving his claim (*R & D Thiel v. Industrial Comm'n*, 398 Ill. App. 3d 858, 867 (2010)), the fact that claimant could perform his job for Union Grove does not provide evidence that he was incapable of performing more strenuous work. It does not, therefore, point to an opposite conclusion. Moreover, the Commission's decision relies heavily on other evidence, such

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as Levin's testimony.

¶ 24

CONCLUSION

¶ 25 In light of the foregoing, the order of the circuit court of Cook County confirming the decision of the Commission is affirmed.

¶ 26 Affirmed.