

NOTICE
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2012 IL App (1st) 111328WC-U

NO.1-11-1328WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

FELICIANO ITALIANO,

Appellant,

v.

THE ILLINOIS WORKERS' COMPENSATION
COMMISSION, *et al.*, (Rausch Construction, Appellee).

) Appeal from the
) Circuit Court of
) Cook County.
)
) No. 10 L 051017
)
) Honorable
) James C. Murray, Jr.
) Judge, presiding.

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

ORDER

¶ 1 *Held:* Where the objective medical evidence established that the claimant sustained an injury and the sole causation opinion attributed the claimant's condition to the repetitive motions of his work, the Commission's decision that the claimant did not sustain injuries that arose out of and in the course of his employment is against the manifest weight of the evidence.

¶ 2 The claimant, Feliciano Italiano, filed an application for adjustment of claim against his employer, Rausch Construction, seeking workers' compensation

benefits for repetitive trauma injuries to his hands and arms allegedly caused by a work related accident on May 6, 2009. The claim proceeded to an arbitration hearing under Section 19(b-1) of the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2008)). The arbitrator found that the claimant failed to prove that he sustained injuries that arose out of and in the course of his employment.

¶ 3 The claimant appealed to the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision. One Commissioner dissented stating that she believed the claimant "proved that he sustained accidental injuries which arose out of his employment as a result of repetitive trauma, with a manifestation date of May 6, 2009 (last day worked and date [the claimant] reported symptomatology to his employer) or May 7, 2009 (first date of medical treatment for conditions alleged.)" The claimant filed a timely petition for review in the circuit court of Cook County. The circuit court confirmed the Commission's decision, and the claimant appealed.

¶ 4 STATEMENT OF FACTS

¶ 5 The claimant testified that he has worked as a union cement mason for the past ten years. He started working for the employer as a cement finisher foreman in October 2007, replacing sidewalks and handicapped ramps.

¶ 6 The claimant testified that on May 6, 2009, he was grinding a wall with a 12-inch grinder when he noticed numbness in his hands all the way to his elbows and sharp pain in both shoulders. He stated that he told his supervisor Matt Kovalsky about the pain and numbness. When he made the report, he had been grinding for four hours with a 15 to 20 pound grinder that had to be held with two

hands. The claimant testified that, as of May 6, 2009, he had been grinding cement for about one week.

¶ 7 The claimant stated that he had experienced similar symptoms in the fall of 2008, but that he did not report it to the employer or seek medical treatment for it at that time. He said that he did not report the pain in 2008, because in his "line of work, you get a lot of stress in your arms and legs and back, and I don't know if it was an injury or just because I was working so many hours and my body don't recuperate." He said that there was a general lay-off in November 2008, and his body recuperated over the time off, but when he returned to work in April 2009, the pain returned. The claimant testified that he did not report his pain and numbness before May 6, 2009, because it was not until that day that the pain had reached a level that interfered with his ability to work.

¶ 8 Bernadino Villasenor testified that he had worked for the employer for 25 years and worked as the operations manager at the time of the hearing. He stated that he had known the claimant since October of 2007. He said he spoke with the claimant infrequently. Mr. Villasenor testified that the claimant never mentioned that he had pain in his wrists or shoulders. He stated that he regularly visited the job site where the claimant worked, and he never saw any indication that the claimant was in pain or uncomfortable in any way.

¶ 9 Matt Kovalsky testified that he is the project engineer for the employer. He stated that he saw the claimant at least once per day. He stated that on May 6, 2009, the claimant came to him and reported that he had shoulder pain and that his shoulder had been bothering him for a little over a year. He stated that prior to May 6, 2009, the claimant never complained of numbness in his arms or wrists, and never appeared to be in any pain or discomfort while working.

¶ 10 Mr. Kovalsky testified that he asked the claimant if he hurt himself on the job, and he responded "no." Mr. Kovalsky stated that he informed the claimant that if he hurt himself on the job, he needed to go to a clinic to be checked out. He testified that the claimant refused. On cross examination, Mr. Kovalsky admitted that he may have told the claimant that, given the circumstances, there was no reason to go to the clinic. He also admitted sending an email to Mr. Villasenor on May 7, 2009, that read:

"I told him that typically for an injury, [the employer] will either send you to Concentra or the emergency room. Seeing that this was not an emergency, there was really no reason for him to go. He asked me if this was something that [the employer] would pay for or if he had to go through his own insurance. I replied with I don't know."

¶ 11 Mr. Villasenor testified that on May 6, 2009, he had a telephone conversation with Mr. Kovalsky in which Mr. Kovalsky asked whether they needed the claimant to work the following day. Mr. Villasenor replied that, due to the forecast, the claimant was not needed. Mr. Kovalsky testified that he telephoned the claimant at about 7:00 p.m. that evening and told him that, due to the weather, they would not be pouring concrete the next day, so his services would not be needed. Mr. Kovalsky testified on cross examination that there were cement masons working on May 7, 2009, but that they did not need the claimant. On cross examination, Mr. Villasenor admitted that typically the foreman worked if cement masons were working.

¶ 12 Mr. Kovalsky testified that on May 7, 2009, the claimant came to his office to ask if he could fill out an accident report. Mr. Kovalsky told him no because accident reports are to be completed immediately after an accident when an

employee hurts himself on the job. He gave the claimant an "incident" report to complete. Mr. Kovalsky stated that an "incident" report is used to make a record for "an incident that may or may not have occurred on the job." The claimant completed an "employers first report of injury or illness" form and wrote that he sustained a shoulder injury on May 6, 2009, due to the repetitive motion of grinding and chipping concrete.

¶ 13 The claimant testified he first sought medical treatment on May 7, 2009, from his family physician, Dr. Trevor Marcotte, to whom he explained that he was a cement finisher and that he performed repetitive motions that put a strain on his arms and back. In his initial injury report, Dr. Marcotte wrote that the claimant was seen for complaints of bilateral shoulder pain. Dr. Marcotte wrote that the claimant told him that he had been "doing the same job over and over" and that it caused him pain in his shoulders radiating down into his hands. Dr. Marcotte assessed the claimant with bilateral acromioclavicular strain and probable carpal tunnel bilaterally.

¶ 14 On May 19, 2009, the claimant underwent an electromyogram. Dr. Amarjit Bhasin wrote in his report that "the electrophysiological data obtained today is suggestive of bilateral median mononeuropathy at rest secondary to carpal tunnel syndrome, mainly by wrist-palm technique criteria only."

¶ 15 On May 27, 2009, Dr. Marcotte re-examined the claimant. According to his notes, the claimant still suffered from numbness and tingling in his first three fingers, thumb and two fingers on bilateral hands, and pain in his shoulders. Dr. Marcotte wrote that his symptoms had improved significantly, but that any time he lifts his arms straight up or over his head, the pain returned. Dr. Marcotte assessed

the claimant with bilateral carpal tunnel and AC joint strain. Dr. Marcotte referred him to Dr. Gregory McComis, an orthopedic surgeon.

¶ 16 On June 1, 2009, Dr. McComis examined the claimant. In his office visit notes, Dr. McComis diagnosed the claimant with carpal tunnel syndrome and recommended he undergo a bilateral carpal tunnel release.

¶ 17 The claimant was seen by Dr. Michael Corcoran on June 15 and 24, 2009. Dr. Corcoran wrote in his work status report that the claimant had bilateral carpal tunnel syndrome. On June 24, 2009, x-rays were taken and Dr. Corcoran wrote that both shoulders showed type II and type III acromion with mild AC arthropathy. Dr. Corcoran diagnosed the claimant with bilateral rotator cuff tendonitis and bilateral carpal tunnel syndrome. In his notes, Dr. Corcoran recommended that, because the claimant's right side was worse than his left, he should first have a right open carpal tunnel release, and once that healed, he should proceed with the left side. He recommended that the claimant have physical therapy to treat his rotator cuff tendonitis. On June 29, 2009, Dr. Corcoran performed a right open carpal tunnel release on the claimant.

¶ 18 On July 29, 2009, Dr. Scott Rubinstein examined the claimant. In his office notes, Dr. Rubinstein wrote that it was his impression that the claimant suffered from bilateral carpal tunnel syndrome and bilateral rotator cuff tendonitis. He wrote "in view of the repetitive motion activities of cement finishing which also involve a significant amount of forceful pushing and pulling, it would be my opinion that these problems are related directly to his workplace activities." On September 17, 2009, Dr. Rubinstein performed a left carpal tunnel release on the claimant.

¶ 19 The claimant testified that the last day he worked for the employer was May 6, 2009, and that his pain began subsiding at the end of May or beginning of June 2009, but that his numbness never decreased until he had his surgery. The claimant testified that prior to the carpal tunnel release surgeries, he found it difficult to perform day-to-day tasks due to the numbness in his hands. He said that the pain in his shoulders made it difficult to lift things. After completing physical therapy he said he no longer has any pain in his shoulders. He testified that the surgery was successful in relieving the pain and symptoms in his hands.

¶ 20 Daniel Lindblad testified that he is a senior investigator with Factual Photo and that he had been doing surveillance work for approximately 18 years. He stated that he conducted surveillance on the claimant on June 5, 2009. He observed the claimant running errands where he pushed a shopping cart and carried shopping bags. The claimant returned to his residence, where Mr. Lindblad observed him remove two trailer tires from the back of his vehicle, lift the trailer up approximately three inches, remove the old tires, and place the new tires on the trailer. Mr. Lindblad testified that the claimant did not appear to struggle when performing this task. Mr. Lindblad testified that the claimant also removed a case of water from the back of his vehicle, placed it onto his left shoulder, and carried it into his residence.

¶ 21 Mr. Lindblad testified that on June 8, 2009, he observed the claimant exit his residence, place two "full size" suitcases in the back of his vehicle, drive to a church and remove two pieces of luggage from another car and place them in his car, and drive to a church camp near Indianapolis. Mr. Lindblad stated that when the claimant arrived at the church camp, he observed the claimant remove the

luggage from the vehicle, place one piece of luggage on his shoulder and carry two pieces of luggage to the entrance.

¶ 22 Mr. Lindblad testified that he observed the claimant for a final time on August 14, 2009. He observed the claimant conduct a yard sale. He saw the claimant open his garage door manually, then remove items from his garage, such as tables, closet doors, lamps, large plastic containers, a large table umbrella, and wood. Mr. Lindblad observed him arrange the items in his yard and lift them to show people. Mr. Lindblad testified that he had a specific recollection of this case because there was so much activity.

¶ 23 On January 20, 2010, the arbitrator issued his decision finding that the claimant did not sustain injuries that arose out of and in the course of employment. The arbitrator found that the claimant "was not a credible witness, and he was contradicted by the [employer's] project engineer and operations manager, who were credible. There is a lack of credible evidence that an alleged compensable repetitive trauma ever occurred. The [employer's] investigator provided extremely convincing and mostly unrebutted testimony of the [claimant's] physical activities. The [claimant's] lack of candor regarding his present complaints affects his credibility in general."

¶ 24 On February 2, 2010, the claimant filed section 19(e) special interrogatories setting out five questions for the Commission. On June 14, 2010, the Commission filed its decision and opinion on review affirming and adopting the decision of the arbitrator. One Commissioner dissented. The dissenting Commissioner felt that the claimant proved that he sustained accidental injuries that arose out of and in the course of his employment as a result of repetitive trauma. The dissenting Commissioner found that the claimant's testimony was better corroborated and

more credible than that of the employer's witnesses and found the majority's opinion contrary to the manifest weight of the evidence. On August 19, 2010, the claimant filed a motion to set aside the Commission's decision and remand the case to the Commission with instructions to make findings in response to the 19(e) interrogatories. On September 7, 2010, the employer filed a response to the claimant's motion to set aside. On October 27, 2010, the circuit court entered an order denying the claimant's motion to set aside. On April 6, 2011, the circuit court confirmed the Commission's decision. The claimant filed a timely notice of appeal.

¶ 25

ANALYSIS

¶ 26 The claimant argues that the Commission's decision that he did not sustain injuries that arose out of and in the course of his employment is against the manifest weight of the evidence. An injury is compensable under the Act only if it arises out of and in the course of one's employment. 820 ILCS 305/2 (West 2008). Whether an injury arose out of and in the course of one's employment is generally a question of fact. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). A reviewing court will not overturn the decision of the Commission regarding whether an injury arose out of and in the course of employment unless the Commission's decision is contrary to the manifest weight of the evidence. *Id.* A finding of fact is contrary to the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 203, 904 N.E.2d 1122, 1133 (2009). "[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, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 707 N.E.2d 665, 673 (2003). Despite the high hurdle that the manifest weight of the evidence standard presents, it does not relieve a reviewing court of its obligation to impartially examine the evidence and to reverse an order that is unsupported by the facts. *Boom Town Saloon, Inc. v. The City of Chicago*, 384 Ill. App. 3d 27, 32, 892 N.E.2d 1112, 1117 (2008). While a reviewing court should not be easily moved to set aside a Commission decision on a factual question, it should not hesitate to do so where the clearly evident, plain, and indisputable weight of the evidence compels an apparent, opposite conclusion. *Montgomery Elevator Company v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567, 613 N.E.2d 822, 825 (1993).

¶ 27 In determining whether the claimant sustained injuries that arose out of and in the course of his employment we first need to address whether or not he sustained an injury. The claimant testified that on May 6, 2009, after grinding cement for four hours, he had sharp pain in both his shoulders, and numbness from his hands to his elbows. He reported this to Mr. Kovalsky.

¶ 28 Dr. Marcotte examined the claimant the day after he reported his injury to Mr. Kovalsky. In his office notes, Dr. Marcotte wrote that the claimant suffered from bilateral AC strain and probable carpal tunnel bilaterally. On May 19, 2009, the claimant had an electromyogram which revealed "bilateral mononeuropathy at rest secondary to carpal tunnel syndrome, mainly by wrist-palm technique." On June 1, 2009, the claimant was examined by Dr. McComis who diagnosed the claimant with carpal tunnel syndrome. The claimant then sought treatment from Dr. Corcoran who took x-rays on June 24, 2009, and diagnosed him with bilateral

rotator cuff tendonitis and bilateral carpal tunnel syndrome. On June 29, 2009, Dr. Corcoran performed a right open carpal tunnel release on the claimant. The claimant was examined by Dr. Rubinstein on July 29, 2009. Dr. Rubinstein diagnosed the claimant with bilateral rotator cuff tendonitis and carpal tunnel syndrome. On September 17, 2009, Dr. Rubinstein performed a left carpal tunnel release on the claimant. The claimant testified that the surgery relieved his pain and other symptoms in his hands. He also stated that he participated in physical therapy for his shoulders and that, after his release from therapy, he no longer suffered from shoulder pain.

¶ 29 Mr. Lindblad testified as to activities he saw the claimant engage in while under surveillance. Since the nature and extent of the claimant's injury was not an issue in this 19(b-1) hearing, the purpose of this testimony presented on behalf of the employer could only have been to suggest that the claimant did not sustain any injury. However, the medical evidence presented by the claimant is completely uncontradicted. The employer failed to present any medical evidence to rebut the need for the extensive medical treatment provided to the claimant by his treating physicians. We fail to see how the surveillance testimony could overcome the consistent medical records of the claimant's injury. Based on the claimant's testimony and the treating notes of Dr. Marcotte, Dr. Bhasin, Dr. McComis, Dr. Corcoran, and Dr. Rubinstein, there is clear, indisputable evidence that the claimant suffered from an injury to his shoulders, arms, and hands.

¶ 30 Next we must examine whether the claimant's injury arose out of and in the course of his employment. For an injury to arise out of a claimant's employment, its origin must be in some risk connected with or incidental to his employment so as to create a causal connection between the employment and the accidental injury.

The City of Springfield v. Illinois Workers' Compensation Comm'n, 388 Ill. App. 3d 297, 313, 901 N.E.2d 1066, 1079 (2009). "It is well established in Illinois that when a worker's physical structures give way under the repetitive stresses of their usual work tasks, the law views it as an accident arising out of and in the course of employment." *Butler Manufacturing Company v. Industrial Comm'n*, 140 Ill. App. 3d 729, 732, 489 N.E.2d 374, 377 (1986). An employee alleging injury from repetitive trauma must meet the same standard of proof as other claimants alleging accidental injury. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773, 780 (2005). In repetitive trauma cases, the claimant generally relies on medical proof establishing a causal connection between the work performed and the claimant's injury. *The City of Springfield*, 388 Ill. App. 3d at 315, 901 N.E.2d at 1081. In repetitive trauma cases, the claimant may demonstrate an accidental injury by tracing a work-related injury either to a specific accident identifiable as to time and place or as to the specific moment of collapse of one's physical structure identifiable as to time and place. *Butler Manufacturing Company*, 140 Ill. App. 3d at 734, 489 N.E.2d at 378.

¶ 31 In the instant case, the claimant can trace his injury to a specific moment of collapse of his physical structure. He testified that on May 6, 2009, the pain in his shoulders and the numbness in his hands had become so severe that he felt it interfered with his ability to work. He reported his condition to Mr. Kovalsky on that date. Mr. Kovalsky testified that the claimant came to him complaining about shoulder pain and asked if there was some type of medical treatment the employer would pay for or if he would have to submit the cost of his medical treatment to his own insurance. On May 7, 2009, Mr. Kovalsky sent an email to Mr. Villasenor recapping his conversation with the claimant about his injury. The claimant went

to Mr. Kovlasky's office on May 7, 2009, and asked to fill out an accident report. Mr. Kovlasky refused to allow him to complete an accident report, but allowed him to fill out an "incident" report. On this form, the claimant wrote that he sustained a shoulder injury on May 6, 2009, due to the repetitive motion of grinding and chipping concrete. The claimant went to see Dr. Marcotte on May 7, 2009, for bilateral shoulder pain. Dr. Marcotte's notes indicate that the claimant told him he did the "same job over and over," and it caused shoulder pain radiating down into his hands. Clearly, the injury is traceable to May 6, 2009.

¶ 32 Dr. Marcotte wrote in his medical records that the claimant reported experiencing pain and numbness on May 6, 2009, as a result of the repetitive nature of his job. Dr. Marcotte also wrote in his notes that the claimant told him that his symptoms subsided in the months he was not working, but returned when he started working again performing a job similar to what he had done when he stopped working for the winter. The claimant testified that on May 6, 2009, he had been grinding a cement wall using a 15 to 20 pound grinder for four hours when the pain and numbness became intolerable. He stated that he had been using the grinder on that project for about one week. He also testified that the job put a lot of stress on his arms.

¶ 33 Dr. Rubinstein provided the only causation opinion. He wrote in his medical records that the claimant's bilateral carpal tunnel syndrome and bilateral rotator cuff tendonitis were directly related to the "repetitive motion activities of cement finishing which also involve a significant amount of forceful pushing and pulling." The claimant's medical evidence was uncontroverted.

¶ 34 The clearly evident, plain, and indisputable weight of the evidence compels a conclusion that the Commission's decision was against the manifest weight of the

evidence and that the claimant sustained injuries that arose out of and in the course of his employment. The objective medical evidence established that the claimant had bilateral carpal tunnel syndrome and bilateral rotator cuff tendonitis. The sole causation opinion from Dr. Rubinstein attributed the claimant's condition to the repetitive motions of his work. The claimant testified that he experienced the symptoms while working and that they subsided when he was not working for a period of time. He testified that his injury was work related. The claimant's testimony as to his attempts to discuss his need for medical treatment for his work related injury is corroborated by the email that Mr. Kovalsky admitted sending to Mr. Villasenor stating that the claimant asked whether the employer would pay for his medical treatment or whether he had to submit it to his own insurance. The claimant's testimony as to his work, the onset of symptoms, improvement, recurrence, and progressions of his symptoms is consistent with his histories documented in his medical records. No evidence to the contrary was presented. No one disputed that the claimant was using a grinder on the day of the accident or the days preceding it. No one contradicted his description of the repetitive nature of his work. The employer did not present causation evidence that contradicted Dr. Rubinstein's opinion that the claimant's condition of ill-being was causally related to his work. The Commission's decision that the claimant's injuries did not arise out of and in the course of his employment is against the manifest weight of the evidence because an opposite conclusion is clearly apparent.

¶ 35 The claimant also argues that the circuit court's denial of his motion to set aside its order for the Commission to answer his section 19(e) special interrogatories was an abuse of discretion. Because the judgment of the circuit court of Cook County confirming the decision of the Commission should be

reversed and remanded for further proceedings, the issue of the 19(e) interrogatories is moot.

¶ 36

CONCLUSION

¶ 37 We reverse the judgment of the circuit court of Cook County confirming the decision of the Commission and remand the cause to the Commission for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399, N.E.2d 1322 (1980).

¶ 38 Reversed and remanded.