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2012 IL App (1st) 111449WC-U

Order filed: March 5, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| JAMES UBLASI, | ) | Appeal from the Circuit Court |
| | ) | of Cook County, Illinois |
| Appellant, | ) | |
| | ) | |
| v. | ) | Appeal No. 1-11-1449WC |
| | ) | Circuit No. 10-L-50799 |
| | ) | |
| THE ILLINOIS WORKERS' COMPENSATION | ) | Honorable |
| COMMISSION *et al*. (IHC Construction | ) | Elmer J. Tolmaire, III |
| Companies, Inc., Appellee). | ) | Judge, Presiding |

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

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**ORDER**

¶ 1 *Held*: The Commission's determination that the claimant's current condition of ill-being did not arise out of and in the course of his employment, and its determination not to award certain medical expenses were not against the manifest weight of the evidence; nor did the Commission err in admitting and weighing evidence or denying the claimant's petition for penalties and attorney fees.

¶ 2 The claimant, James Ublasi, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2002)) seeking benefits for

injuries he claimed to have sustained while working as a cement mason for IHC Construction Companies, Inc. (employer). Following a 19(b) hearing, an arbitrator found that the claimant sustained an injury arising out of and in the course of his employment and awarded temporary total disability (TTD) benefits from the date of the accident, October 26, 2005, through March 2, 2007. The arbitrator further found that the claimant was not entitled to benefits after that date and also denied the claimant's request for penalties and attorney fees. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission affirmed and adopted the arbitrator's decision with clarification. The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

¶ 3 FACTS

¶ 4 The claimant worked as a journeyman cement mason. He was hired for a one-day job by the employer on October 25, 2005. The claimant testified that, while smoothing a wet concrete surface, he slipped and fell. He initially noted a burning pain in his right shoulder, right hand, neck, and back. The claimant reported the injury to the safety officer, who directed the claimant to go to either Mercy Works or the nearby hospital emergency department. The claimant chose to go to Mercy Works, where treatment notes indicated that he reported a work accident and complained of pain in the right shoulder, neck, and back. He was diagnosed with neck, right shoulder, and thoracic strains, provided with a cervical collar, a sling, and pain medication and was instructed to seek follow-up medical attention. He also was held off work until further notice.

¶ 5 On October 27, 2005, the claimant sought treatment from his family physician, Dr. Richard Brash. He complained of injury to his right arm and shoulder, neck and upper back. X-rays were negative for any significant conditions but showed some mild degenerative condition of the cervical and lumbar spine. Dr. Brash kept the claimant off work due to the claimant's report of right shoulder pain, pending an MRI of the right shoulder.

¶ 6 On November 7, 2005, the claimant returned to Mercy Works complaining of right shoulder and neck pain. A treatment report indicated that the claimant appeared to be magnifying his neck symptoms.

¶ 7 On November 16, 2005, the right shoulder MRI indicated no rotator cuff damage, moderate AC joint hypertrophy, mild to moderate impingement, and a possible tear of the superior glenoid labrum. The following day, November 17, 2005, the claimant reported low back pain to Dr. Brash. An x-ray of the lumbar spine, sacrum, and coccyx revealed no acute abnormalities. Treatment records indicate that arthroscopic right shoulder surgery was discussed.

¶ 8 On December 8, 2005, the claimant underwent arthroscopic surgery on the right shoulder. The claimant began physical therapy on December 27, 2005, which continued until May 16, 2006. Treatment records indicate right shoulder improvement, although the claimant noted continuing cervical pain. In January 2006, the claimant underwent diagnostic testing and treatment for hiatal hernia, gastritis, esophagits, and possible gallbladder issues.

¶ 9 On January 27, 2006, following the claimant's complaints of right shoulder, neck, and low back pain, Dr. Brash ordered a cervical MRI. Dr. Brash referred the claimant for epidural injections and cervical surgery evaluation.

¶ 10 On March 15, 2006, the claimant was examined at the employer's request by Dr. Jesse Butler. Dr. Butler also had the claimant's medical records. Dr. Butler noted that the claimant had significant preexisting problems with his low back related to a car accident in June 2003. Dr. Butler did not find any objective reports of significant low back problems in the six months preceding his examination. He opined that the claimant's right shoulder and neck conditions appeared to be causally connected to his October 25, 2005, accident and that the claimant had reached maximum medical improvement. He recommended a functional capacity evaluation.

¶ 11 On April 13, 2006, the claimant sought treatment from Dr. Lawrence Frank. Dr. Frank noted right shoulder and right side neck pain. Dr. Frank also noted MRI results indicating a cervical disc herniation at C5-C6.

¶ 12 On October 5, 2006, the claimant underwent facet injections to the cervical spine administered by Dr. Frank.

¶ 13 In September through November 2006, the claimant was under extensive video surveillance. These videos recorded the claimant conducting activities of normal daily life including extensive walking, sitting, getting into and out of cars, lifting, carrying small bags and parcels, and playing with a young child approximately three years old (presumed to be his granddaughter). A particular video, recorded on October 3, 2006, showed the claimant playing with the young child, with the child vigorously climbing on the claimant's neck and back. The arbitrator described the scene as follows:

> "Her full weight is often apparently on his head, neck and shoulders. She is placing large strains on his head, neck and shoulders in all directions. [Claimant] shows no apparent signs of

> any pain. He makes no attempt to brace his head, neck or shoulders. He shows no attempt to guard any muscle or body part. He makes no attempt to limit the exuberance of the child or to prevent her from pushing his head in any direction though he does stop her from falling on two occasions. He appears to be totally unconcerned and confident that the vigorous range of motion will not cause him any discomfort. It is not just that he endures the activity; rather, it is the abandon and confidence with which he demonstrates his total indifference to having his head jerked in all directions with such exuberance."

¶ 14 The claimant next had appointments with Dr. Brash on November 17, 2006, and December 8, 2006. On January 5, 2007, an MRI of the lumbar spine was performed which revealed bulging and herniated discs, as well as degenerative disc disease. The claimant had numerous follow-up appointments with Dr. Brash between January 5, 2007, and March 7, 2007, as well as undergoing additional physical therapy during that time frame. He remained off work on orders of Dr. Brash.

¶ 15 On February 21, 2007, the claimant returned to Dr. Frank with complaints of low back pain. Dr. Frank noted that the January 5, 2007, MRI of the lumbar spine showed several levels of degenerative disc disease. He ordered an EMG to rule out nerve damage, noting the claimant's "new" complaints of lower extremity tingling. Dr. Frank noted that February 21, 2007, was the first time that the claimant had reported lumbar back pain. He opined that, due to the claimant's previous history and the late onset of lower back pain, it was unlikely that the claimant's lumbar

pain was related to the October 25, 2005, incident. Dr. Frank also suggested a surgical consultation to determine whether the claimant was a candidate for lumbar surgery.

¶ 16 On March 7, 2007, the claimant was again examined by Dr. Butler at the employer's request. Dr. Butler reviewed the January 5, 2007, MRI and noted mild degeneration at C5-C6, as well as mild degenerative disc disease in the lumbar spine consistent with expectations for a 63-year-old individual. He also noted his opinion that the claimant affected an intentional right limp and self-limiting rotation of the neck. He further noted no lower extremity neurological defects. Dr. Butler also reviewed the surveillance video, observing that the claimant appeared to be moving normally with no discernable pain. Dr. Butler opined that the claimant's condition of ill-being caused by the accident was limited to cervical strain, which should have completely resolved by March 7, 2007. He opined that the claimant's lumbar complaints were not related to the October 25, 2005, accident. He further opined that a strong component of the claimant's current condition was the result of malingering and that the claimant should be released to full duty as of that date. At this point, Dr. Butler released the claimant to return to work without restrictions.

¶ 17 In March 2007, Dr. Brash referred the claimant to Dr. Domingo for heat and massage therapy. Dr. Brash continued to recommend that the claimant remain off work. Dr. Domingo treated the claimant from March 12, 2007, until April 5, 2007.

¶ 18 On March 26, 2007, the claimant received treatment from Dr. Frank. His treatment records indicated no lower extremity pain.

¶ 19 On May 8, 2007, the claimant sought a surgical consultation with Dr. Wesley Yapor. Dr. Yapor diagnosed disc herniation at C5-C6 and recommended an MRI of the cervical spine, which

was performed on May 11, 2007. On May 17, 2007, the claimant consulted with Dr. Brown, who recommended surgery on C5-C6. He did not recommend lumbar surgery. Dr. Brown also recommended that the claimant remain off work.

¶ 20 On June 5, 2007, the claimant again consulted with Dr. Yapor, who prescribed steroid injections and recommended cervical spine surgery.

¶ 21 The claimant testified that he has not undergone any surgery due to the decision of the employer's workers' compensation insurance not to authorize payment. He further testified that he has not worked since the October 25, 2005, incident.

¶ 22 The arbitrator determined that the claimant's neck complaints were causally related to the October 25, 2005, accident. However, the arbitrator further determined that the claimant's current complaints of neck pain were "non-anatomic." (On review, the Commission interpreted the phrase "non-anatomic" to mean that the arbitrator concluded that the claimant "was exaggerating the extent of his neck symptomatology. In other words, although [the claimant] did sustain a cervical strain, he required no further treatment."). Regarding the claimant's complaint of low back/lumbar pain, the arbitrator found a lack of causal connection, noting Dr. Frank's opinion that the lumbar pain was not causally related to the industrial accident on October 25, 2005.

¶ 23 The claimant appealed the arbitrator’s decision to the Commission. The Commission affirmed the arbitrator’s decision, clarifying the term "non-anatomic" and observing that the child in the video appeared to weigh approximately 30 to 40 pounds. Regarding the arbitrator's finding that the claimant's condition of ill-being of his lumbar spine was not causally connected to the October 25, 2005, accident, the Commission noted the claimant's first documented report of low

back pain occurred during his visit to Dr. Brash on November 17, 2005, more than three weeks after the accident. The Commission also noted that the claimant's complaints of pain prior to November 17, 2005, had been limited to his neck, right shoulder, and upper back. The Commission further noted the first documented diagnosis of low back pathology did not occur until Dr. Brash diagnosed a lumbar strain in March 10, 2006, nearly five months after the accident. In addition, the Commission noted that Dr. Brown recorded a "new complaint" of bilateral lower extremity tingling on February 21, 2007. Moreover, the Commission determined that the mechanics of the October 25, 2005, accident, while consistent with neck and cervical spine injuries, was inconsistent with lumbar injuries. Finally, the Commission noted several instances of inconsistency and exaggeration in the claimant's statements regarding his symptoms which reflected negatively on his credibility.

¶ 24 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

¶ 25 ANALYSIS

¶ 26 1. Causal Connection Between Work Injury and the Claimant's Present Condition

¶ 27 The claimant first argues that the Commission's finding that he failed to prove a causal connection between the October 25, 2005, work accident and his current condition of his lumbar spine was against the manifest weight of the evidence. To establish causation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Whether a causal connection exists between a claimant's condition of ill-being and his employment is an issue of fact to be decided by the Commission. *Tower Automotive v. Illinois*

*Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434 (2011). In determining causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). A reviewing court may not substitute its judgment for that of the Commission on these issues merely because other inferences may be drawn from the evidence. *Berry*, 99 Ill. 2d at 407. The Commission's findings will not be overturned unless they are against the manifest weight of the evidence (*Tower Automotive*, 407 Ill. App. 3d at 434), *i.e.*, unless the record discloses that an opposite conclusion is "clearly apparent." *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992); see also *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729-30 (2000). When the evidence is sufficient to support the Commission's causation finding, we must affirm. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 28 The claimant maintains that the Commission misconstrued the record to establish that he made no complaints of lower back injury until nearly three weeks after the October 25, 2005, accident. He maintains that the record showed that he complained of low back pain when he presented at Mercy Works the day of the accident and on several occasions thereafter. A review of the reports generated by Mercy Works does not support the claimant's contention. The report includes a complaint of "back" pain; however, the diagnostic and treatment notes address only *cervical* strains and contained no mention of *lumbar* injury.

¶ 29 As the Commission pointed out, however, regardless of when the claimant first reported low back pain, the first documented diagnosis of low back pathology did not occur until Dr. Brash diagnosed lumbar strain approximately five weeks after the accident. Moreover, the record contained no objective indication of lumbar abnormalities until January 2007, at which time the problems in the lumbar region were attributed by Dr. Butler to the normal degenerative process of aging. In fact, the claimant's treating physician, Dr. Frank, noted that February 21, 2007, was the first time that the claimant had reported lumbar back pain to him. He opined that, due to the claimant's previous history and the late onset of lower back pain, it was unlikely that the claimant's lumbar pain was related to the October 25, 2005, incident. The Commission was certain within its province in relying upon Dr. Frank's causation opinion.

¶ 30 In addition, the claimant exhibited a general lack of credibility. The record established that as early as November 7, 2005, approximately two weeks after the accident, the medical report from Mercy Works reported apparent symptom magnification. Moreover, Dr. Butler's report of March 7, 2007, recorded observations of intentional right limp, self-limiting rotation of the neck and a complete lack of objective neurological deficits. Dr. Butler also viewed the surveillance video. Based upon his examination of the claimant and the video, Dr. Butler opined that there was "a strong component of malingering" and further opined that the claimant could be released to work without restrictions. These observations by medical examiners, along with the videotape evidence, supported a general conclusion by the Commission that the claimant lacked credibility, whether in reporting his condition during treatment or in his testimony at the 19(b) hearing.

¶ 31 Given the record, the Commission's determination that the claimant's condition of ill-being of the lumbar spine was not related to the October 25, 2005, accident was not against the manifest weight of the evidence.

¶ 32 2. Videotape Evidence

¶ 33 The claimant next takes issue with the Commission's apparent reliance upon the videotape to conclude that his cervical and neck injuries were completely resolved as of that date. He maintains that this finding is at odds with the objective medical evidence as well as the opinions of Drs. Brown and Yapor. The claimant maintains that, while the tape was properly admitted into evidence, the Commission abused its discretion in relying upon it to conclude that the claimant had fully recovered from the neck and cervical injuries related to the October 25, 2005, accident.

¶ 34 The rule is well settled that it is the province of the Commission to draw reasonable inferences and conclusions from evidentiary facts, and the courts will not set aside the findings of the Commission unless they are against the manifest weight of the evidence. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 451 (1995). Here, the Commission found the videotape showing the physical pressures and manipulations placed upon his shoulder and neck, and his apparent lack of any resistence, to be compelling evidence that the claimant's condition had completely resolved and that the claimant's contemporaneous complaints of pain lacked credibility. We note that the Commissioners were not the only ones who interpreted the videotape in the same manner. The arbitrator, and more importantly, Dr. Butler, reached the same conclusion. Thus, the Commission was well within its province as the trier of fact to find that the videotape evidence was compelling evidence that the claimant's neck and cervical pain had completely

resolved by the time the videotape was made. The Commission was also within its purview in finding that the videotape reflected adversely on the question of the claimant's general credibility.

¶ 35 3. Weight of Medical Evidence

¶ 36 The claimant next maintains that the Commission erred in failing to give proper weight to the medical opinion testimony regarding the claimant's need for surgery. The claimant suggests that this court must apply the clearly erroneous standard of review appropriate to a mixed question of law and fact. *AFM Messenger Service, Inc. v. Illinois Department of Employment Security*, 198 Ill. 2d 380, 391 (2001). The claimant's statement of the appropriate standard of review is incorrect. It is well settled that the weight to be accorded medical opinion testimony is within the unique province of the Commission as the ultimate decision maker. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1093 (2007).

¶ 37 Here, the medical opinion testimony was conflicting as to the claimant's need for surgery. However, Dr. Butler opined that the claimant could be a candidate for cervical surgery if conservative treatment failed. We find it significant, as did the Commission, that Dr. Butler's opinion regarding the need for surgery changed between 2006 and 2007. By 2007, Dr. Butler was of the opinion that the claimant suffered only from a cervical strain and was capable of returning to work without the need for further treatment. The claimant maintains nonetheless that Dr. Butler's opinion is at odds with certain diagnostic evidence. However, a review of the record shows no indication of objective diagnostic findings in conflict with Dr. Butler's opinion.

¶ 38 The claimant also points out that Dr. Butler's opinion regarding the need for surgery is in conflict with Drs. Brown and Yapor. As all these physicians were relying upon the same diagnostic information, the question was merely one of the weight to be accorded conflicting

medical opinion testimony, a question within the exclusive purview of the Commission. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 66 (1982).

¶ 39 Here, given Dr. Butler's opinion and the videotape evidence, it is clearly apparent that the Commission found that the claimant's conservative treatment had been successful and the claimant was not a candidate for surgery. The record does not establish that the opposite conclusion is clearly apparent.

¶ 40 4. Medical Costs

¶ 41 The claimant next maintains that the Commission erred as a matter of law in denying an award of certain medical expenses. We note that neither party has cited to any authority on this issue. Failure to city to authority in support of an argument waives the argument. *Zawadzka v. Catholic Bishop of Chicago*, 337 Ill. App. 3d 66, 69 (2003). Moreover, from our review of the record, the medical expenses sought by the claimant were related to expenses related to conditions the Commission found were not causally related to the October 25, 2005, accident. We find, therefore, that the Commission's award of medical expenses was not in error.

¶ 42 5. Penalties and Attorney Fees

¶ 43 The claimant's final argument is that the Commission erred in not awarding him penalties and attorney fees for alleged unreasonable and vexatious denial of benefits. We note, however, that the benefits the claimant maintains were unreasonably and vexatiously denied were for benefits that would have been do only if the Commission determined that a causal connection existed between the allegedly denied benefits and an industrial accident. Here the Commission found no such causal connection. Thus the claimant was not entitled to the benefits allegedly denied to him. If a claimant is not entitled to benefits under the Act, the employer’s refusal to

pay such benefits cannot be deemed "vexatious" or otherwise sanctionable. See, *e.g.*, *Pemble v. Industrial Comm'n*, 181 Ill. App. 3d 409, 418 (1989) ("it cannot be said the employer vexatiously delayed paying benefits to which claimant was not entitled").

¶ 44 CONCLUSION

¶ 45 The judgment of the Cook County circuit court, which confirmed the Commission's decision, is affirmed. The cause is remanded to the Commission for further proceedings.

¶ 46 Affirmed and remanded.