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2012 IL App (1st) 113483WC-U

Order Filed: November 13, 2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JAMES POULOS,)	Appeal from the Circuit Court
)	of Cook County, Illinois
)	
Plaintiff-Appellant,)	
)	
v.)	Appeal No. 1-11-3483WC
)	Circuit No. 11-L-50483
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Goebel Forming,)	Margaret Ann Brennan, III,
Defendants-Appellees).)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The Commission's determination that the claimant had failed to establish by a preponderance of evidence that he suffered either specific or repetitive trauma injuries arising out of and in the course of his employment was not against the manifest weight of the evidence.
- ¶ 2 The claimant, James Poulos, filed two applications for adjustment of claims under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 1998)) seeking benefits for injuries to his bilateral shoulders allegedly sustained on March 26, 2009, and March 27, 2009,

while working on a "clean out job" while working as a foreman for Goebel Forming, his employer. On the day of hearing, the claimant amended each application to allege that he sustained a repetitive trauma injury to his bilateral shoulders which manifested itself on March 26, 2009, and March 27, 2009. After the hearing, Arbitrator Kurt Carlson found that the claimant had failed to prove by a preponderance of the evidence that he sustained specific or repetitive trauma injuries that arose out of and in the course of his employment, nor had he proven that his current state of ill-being was causally connected to his employment. The arbitrator denied compensation. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission), which unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling. This appeal followed.

¶ 3 The claimant raises the following issues on appeal: (1) whether the Commission's determination that the claimant failed to prove that his injuries arose out of and in the course of his employment was against the manifest weight of the evidence; (2) whether the Commission erred in finding that the claimant failed to establish a causal connection between his current condition of ill-being and his employment; (3) whether the Commission erred in denying medical expenses to the claimant; (4) whether the Commission erred in denying the claimant's request for temporary total disability (TTD) benefits; and (5) whether the Commission erred in not awarding the claimant benefits based upon an average weekly wage of \$2,086.65.

¶ 4

FACTS

¶ 5 The claimant, a 47-year-old carpenter, testified that he worked as both a general carpenter and a working foreman for the employer and that he had worked for the employer since 1994. On March 26 and 27, 2009, the claimant was working as a working foreman at a job site at 155 N. Wacker in Chicago, Illinois. The claimant testified that, on March 26, 2009, he and a coworker, Ivan Castro, were carrying a file cabinet weighing approximately 200 pounds out of the building to load onto a truck. As he and Castro were lifting the cabinet onto the truck, the claimant felt both of his shoulders "pop." Claimant testified that he let out a yell, after which Castro and another coworker, Trinidad Vega, assisted in lifting the cabinet onto the truck. Claimant testified that his level of pain in his shoulders immediately increased from the usual 2 or 3 on a scale of 10 to 7 or 8 on a scale of 10. He testified that he immediately told Castro and Vega about the pain in his shoulders. Claimant further testified that he continued working after the incident with the cabinet, including moving a jackhammer weighing 130 pounds without any assistance. He testified that he drove himself home after work and did not seek any medical treatment.

¶ 6 On cross-examination, claimant admitted that he did not know the weight of the cabinet. He also admitted that he did not tell Vega that he had any shoulder pain after lifting the file cabinet.

¶ 7 The claimant testified that, on the next morning, March 27, 2009, his shoulders were extremely sore, but he was able to report for work. He worked for approximately two hours jackhammering concrete, loading chunks of concrete into a wheelbarrow, pushing the wheelbarrow to a dumpster, and putting the concrete chunks into the dumpster. He also testified that he framed walls and poured and finished concrete. After performing all these tasks, the claimant and Castro attempted to load a banding machine, weighing approximately 150 pounds,

onto a truck. They were unable to lift the machine onto the truck and called out to a coworker to assist with the lifting. The claimant testified that, after lifting the machine onto the truck, he returned to the concrete work. He later worked approximately an hour lifting wooden pallets onto a truck. Claimant testified that, by the end of the day, his shoulders were painful - an 8 or 9 on a scale of 10. He also testified that, later that night, he was unable to lift his hands over his head.

¶ 8 In addition to his description of the lifting injuries involving the file cabinet and the banding machine, the claimant also testified to the repetitive nature of his job duties as both a general carpenter and a working foreman. Specifically, the claimant testified that he was required to pick up heavy materials, use a jackhammer, shovel concrete in and out of wheelbarrows, climb up and down ladders, pour and finish concrete, load and unload trucks, and otherwise handle heavy materials. He also testified that his job involved the use of his arms in an overhead position, often in a repetitive motion.

¶ 9 Vega testified that he was present on March 26, 2009, when the claimant allegedly injured his shoulders lifting the file cabinet. Vega stated that he emptied the file cabinet of its contents and that it weighed substantially less than 200 pounds. He also testified that the claimant did not indicate that he felt a popping in his shoulders when he lifted the cabinet, did not report any injury at all, and that he continued to work without incident after they lifted the filing cabinet. Vega also testified that he was present on March 27, 2009, and did not observe claimant exhibiting any physical problems while working, nor did the claimant make any statements that he had in any way injured himself at work that day.

¶ 10 Ray Ulrich, Jr. and Robert Showalter, the claimant's coworkers, each testified to the claimant's job duties. Each corroborated the claimant's description of his job duties. Each

testified that they observed the claimant engaged in various tasks involving repetitive overhead reaching and other repetitive motions.

¶ 11 Castro testified that he was also present on March 26, 2009. He was a good friend of the claimant and had been so for eight years. He also testified that the filing cabinet was empty and it weighed, in his opinion, no more than 20 to 30 pounds. Castro also testified that the claimant did not exhibit any signs that he had suffered an injury while at work that day, nor did he make any statements about being in pain or injuring his shoulders. Castro then testified that he was also present on March 27, 2009. Castro also testified that the claimant did not tell him that he injured his shoulders lifting the file cabinet, and he gave no indication that he had suffered any injuries on the following day.

¶ 12 The claimant testified that he was informed at the end of the day on March 27, 2009, that he was laid off. He testified that he was in shock following the news of his being laid off. Castro also testified that claimant was informed that he was laid off at the end of work on March 27, 2009.

¶ 13 Claimant further testified that, as part of his job duties as a foreman, he was aware of the requirement that all employees immediately report work injuries and accidents to their foreman and that he was aware of the injury reporting procedures. Claimant acknowledged that he never reported the March 26, 2009, and March 27, 2009, injuries to his supervisor, nor did he fill out any accident reports as required by company procedures.

¶ 14 The claimant testified that he had a scrap metal business which was completely separate from, and in no way related to, his employment with Goebel Forming. The claimant testified that he had operated his scrap metal business for about four or five months prior to March 26, 2009. Vega, however, testified that he was aware that the claimant had operated his scrap metal

business for several years. The scrap metal business consisted of the claimant collecting discarded scrap metal at the various job sites and loading them into his truck. Vega testified that he observed the claimant loading approximately 2000 pounds of scrap per week onto his truck and that the majority of that scrap was loaded by the claimant by hand, usually pieces weighing up to 120 pounds. Vega also testified that he observed the claimant loading scrap on his truck three or four times per week over a number of years.

¶ 15 The claimant testified that he had no records regarding his scrap metal business and that he never reported any income from this business on his tax returns because he was sure he never made more than \$600 on the business. In subsequent cross-examination, the claimant testified that he did make substantially more than \$600 on his scrap business. He also testified that he told others that he had substantial income from the scrap business but that he was not telling the truth when he made those statements. Regarding the scrap business, the arbitrator made the following observation: "Despite giving detailed testimony about his scrap metal business, and referring to it as such, [claimant] later testified that he had worked exclusively for Respondent since 1995, and did not have a scrap metal business."

¶ 16 Richard Petrusky testified for the employer. On March 26, 2009, through March 28, 2009, Petrusky worked for another contractor at the same job site where the claimant alleged his injuries occurred. He testified that, on March 28, 2009, he observed the claimant loading several large pieces of scrap metal onto a truck. According to Petrusky, the claimant carried and lifted several extremely large pieces of scrap metal without any assistance.

¶ 17 Castro testified that he saw the claimant loading scrap metal at the work site on March 28, 2009, the day following the claimant's alleged injury. Castro also testified that he and the

claimant attended a flea market together on March 29, 2009. They were together for over eight hours that day, but the claimant never mentioned any shoulder pain or injury.

¶ 18 The claimant testified that, prior to seeking any medical attention for his shoulder pain, he consulted an attorney. The claimant was referred by his attorney to Dr. Steven Chudik. A board-certified orthopedic surgeon, Dr. Chudik first examined the claimant on April 1, 2009, at the physician's Hinsdale Orthopedics practice. The claimant gave a history of increasing bilateral shoulder pain, beginning approximately one year prior, with greater pain in the right shoulder than the left. The claimant also reported that the pain became significantly more intense after lifting a filing cabinet at work on March 26, 2009, and lifting a banding machine the following day.

¶ 19 The claimant sought treatment from Dr. Chudik on April 29, 2009, with reports of increased shoulder pain since his last examination. Dr. Chudik ordered and reviewed an MRI, which revealed a right rotator cuff tear, tendinosis, and a moderate AC joint degenerative condition. The claimant returned to Dr. Chudik on May 4, 2009, with a report of increased pain in the right shoulder. There is no indication in the record that the claimant described activities performed between April 29, 2009, and May 4, 2009, which might have triggered the increased pain, nor is there any indication that Dr. Chudik inquired about the claimant's activities during this period.

¶ 20 Records from Cicero Iron and Metal, Inc. were entered into evidence, which showed that the claimant delivered scrap metal to Cicero throughout April 2009, with his last delivery on April 30, 2009. However, the claimant did not report these scrapping activities to Dr. Chudik when he sought treatment on April 29, 2009, and May 4, 2009.

¶ 21 Claimant testified that he did not tell Dr. Chudik about his scrap metal business because he did not have a scrap metal business. On cross-examination, the claimant testified that he did not tell Dr. Chudik about his scrap metal business because he believed that it was not relevant, since he had no pain while doing his scrap metal work. When reminded that he previously testified that he had constant pain at the level of 2 or 3 on a scale of 10, the claimant changed his testimony to state that he had pain at a 2 or 3 level when performing his scrap metal business.

¶ 22 Dr. Chudik testified by deposition that the claimant suffered from a preexisting condition of both shoulders which manifested deterioration far greater than would be expected of a man of the claimant's relatively young age. Dr. Chudik opined that the repetitive nature of the claimant's work duties aggravated and accelerated the claimant's degenerative condition. He further opined that the file cabinet and band machine incidents of March 26, 2009, and March 27, 2009, further aggravated the claimant's condition and triggered the need for surgical intervention in the right shoulder, which Dr. Chudik performed in May 2009.

¶ 23 On July 2, 2009, the claimant was examined at the request of the employer by Dr. Kevin Walsh, also a board-certified orthopedic surgeon. In addition to examining the claimant and taking a detailed history, Dr. Walsh also reviewed the claimant's medical records, including the MRI ordered by Dr. Chudik. Dr. Walsh prepared a report dated July 4, 2009, in which he noted that the claimant's right arm was still in a sling following surgery. Dr. Walsh reported normal range of motion and strength in the left shoulder. Dr. Walsh noted that the claimant was involved in his own scrap metal business but, without knowing the specifics of that work, he could not opine as to its relationship to the claimant's current condition of ill-being. He commented, however, that "[i]t is not at all likely that the one lifting episode described by the [claimant] caused all of the MRI findings in the right shoulder and simultaneously caused a pop

in both shoulders." Dr. Walsh further noted, "[c]ertainly, if the [claimant's] scrap metal work required repetitive and strenuous lifting, carrying or overhead activities, this could have contributed to degenerative changes in both shoulders and eventual rotator cuff tears." When queried as to the possibility that the possible repetitive nature of the claimant's employment duties with the employer might have contributed to the claimant's shoulder injuries, Dr. Walsh responded, "it would depend on, of course, the period of time that the patient did the repetitive, strenuous overhead activity, the frequency, and the duration. *** [i]f the patient did frequent, consistent strenuous overhead activities during a prolonged period of time, certainly it can cause rotator cuff tendonitis and a rotator cuff tear." Dr. Walsh then opined that the claimant's current condition of ill-being in the bilateral shoulders was not causally connected to the claimant's employment, either the specific accidents in March or any repetitive nature of his duties.

¶ 24 Dr. Walsh subsequently testified by deposition that he learned of the claimant's scrap metal business activities from the employer. Dr. Walsh further testified that when he questioned the claimant about his scrap metal business, the claimant denied being involved in any scrap metal business. At the hearing, the claimant admitted that he did not tell Dr. Walsh about his scrap metal business. He testified that Dr. Walsh never asked him about any scrap metal work. When asked several times on cross-examination why he did not tell Dr. Walsh about his scrap metal work, which consisted of moving two to three thousand pounds of scrap metal at least twice per week, the claimant only stated that he did not think it was important.

¶ 25 The arbitrator found that the claimant had failed to prove by a "preponderance of the *credible* evidence" that he sustained accidental injuries arising out of and in the course of his employment. (Emphasis in the original.) Likewise, the arbitrator found that the claimant failed

to prove by a preponderance of the credible evidence that his current condition of ill-being in his bilateral shoulder was causally related to his employment. Specifically, the arbitrator wrote:

"The Arbitrator concludes that [claimant] is not credible. The arbitrator bases this conclusion on the numerous facial inconsistencies in [claimant's] own testimony, [claimant's] own admission of general untruthfulness, the inconsistencies with the testimony of Mr. Vega, Mr. Castro and Mr. Petrusky, and that [claimant's] actions and activities following the alleged accident are not consistent with [claimant] having sustained an accidental injury on March 29, 2009. The Arbitrator notes that the only evidence that [claimant] presented of having sustained an accidental injury on March 29, 2009, was his own testimony. Given that the Arbitrator concluded that [claimant] was not credible, the Arbitrator concludes that [claimant] has failed to meet his burden of proof by a preponderance of the *credible* evidence that he sustained accidental injuries arising out of and in the course of his employment by [employer] on March 26, 2009. In fact, the Arbitrator notes that the manifest weight of the evidence shows that [claimant] *did not* sustain an accidental injury arising out of and in the course of his employment by [employer] on March 26, 2009."

¶ 26 The arbitrator noted that Vega and Castor credibly testified that the claimant did not sustain or report an injury, and their testimony was not impeached or contradicted. He further

noted that: (1) the claimant's activities in the days following the alleged accident were not consistent with a person having sustained a specific injury as the claimant alleged; (2) the claimant did not report a work accident, even though, as a working foreman, he was well aware of the need for such reports and the procedure for filing an accident report; (3) the claimant was observed engaged in his scrap metal business, lifting large metal pieces without any sign of pain or discomfort on the day following his allegedly painful injury; (4) the claimant exhibited no signs of an injury and did not describe an injury to Castro despite spending the entire day with him at the flea market on March 28, 2009; and (5) the claimant consulted an attorney before seeking any medical attention for his alleged injuries.

¶ 27 Likewise, the arbitrator found that the claimant failed to present credible evidence of a work-related injury on March 27, 2009. The arbitrator noted that the claimant testified that he completed all his work tasks on that day and reported no change in his physical condition throughout the day. The arbitrator further noted that the claimant did not report any accidental injury that day, nor did he seek medical attention for any specific injury occurring on March 27, 2009.

¶ 28 As to the claimant's allegation of repetitive trauma injuries, the arbitrator also found a lack of credible evidence to support the claim. The arbitrator noted that the claimant testified that he first experienced shoulder pain approximately one year prior to March 2009. However, the claimant presented no evidence that a repetitive trauma injury manifested on March 26, 2009. There was no evidence of a medical diagnosis rendered on that date. The arbitrator further noted that, even if the claimant had sustained a repetitive trauma injury, the manifestation date would not have been March 2009, but rather March 2008, the time when the claimant first noticed bilateral shoulder pain and believed that the pain was related to his employment. The arbitrator

pointed out, however, that the mere fact that a repetitive trauma injury could have manifested itself is not sufficient to establish that such an injury did manifest itself on that date.

¶ 29 The arbitrator also found that the claimant's claim of a repetitive trauma injury lacked supporting medical opinion testimony. Although Dr. Chudik opined that the claimant's bilateral shoulder injury was caused, at least in part, by the repetitive nature of his employment, the arbitrator did not credit Dr. Chudik's opinion. The arbitrator found that Dr. Chudik's opinion was based upon an incomplete and inaccurate history, including deliberately-concealed facts regarding the claimant's scrap metal business. Additionally, the arbitrator questioned Dr. Chudik's objectivity, given the fact that the claimant's attorney had referred him to Dr. Chudik. Moreover, Dr. Walsh's opinion conflicted with Dr. Chudik's opinion. Dr. Walsh observed that the claimant's left shoulder showed normal range of motion and flexation. He further observed that the claimant's right shoulder showed signs of degeneration, but the degeneration could be considered normal for a person of the claimant's age.

¶ 30 The claimant appealed the arbitrator's decision to the Commission, which unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling. This appeal followed.

¶ 31 ANALYSIS

¶ 32 In order to recover benefits under the Act, a claimant must prove by a preponderance of the credible evidence that he sustained an accidental injury arising out of and in the course of his employment. *Quality Wood Products Corp. v. Industrial Comm'n*, 97 Ill. 2d 417, 423 (1983). It is well settled that the factual findings of the Commission are not to be disturbed on review unless they are against the manifest weight of the evidence. *Wagner Castings Co. v. Industrial*

Comm'n, 241 Ill. App. 3d 584, 595 (1993). Factual determinations are against the manifest weight of the evidence where the opposite conclusion is clearly apparent or when no rational trier of fact could reach the same determination based upon the record. *D.J. Masonry Co. v. Industrial Comm'n*, 295 Ill. App. 3d 924, 930 (1988). This standard applies to all factual findings, including whether there was an accidental injury arising out of and in the course of the claimant's employment, whether there was timely notice, and the causation and nature and extent of the claimant's injuries. *Id.* It is also well settled that, in making those factual determinations, it is solely within the province of the Commission to judge the credibility of witnesses, to draw reasonable inferences from the testimony and to determine the weight to accorded conflicting evidence. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483-84 (1989); *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 188 (1999). Likewise, it is for the Commission to decide which of two conflicting medical opinions should be accepted. *Material Service Corp. v. Industrial Comm'n*, 97 Ill. 2d 382, 357 (1983).

¶ 33 Here, the claimant maintains that the Commission should have found that he sustained accidental injuries arising out of and in the course of his employment on March 26, 2009, and again on March 27, 2009, or it should have found that he put forth a preponderance of evidence in support of a repetitive trauma claim to both shoulders with a manifestation date of March 27, 2009, that being the date of his last employment by this employer. In support of his claim, the claimant points out his own testimony that he suffered a specific injury on March 26, 2009, when lifting a file cabinet, and again on March 27, 2009, when he lifted a banding machine. He further points out his own testimony that he had been experiencing bilateral shoulder pain for a year prior to March 26, 2009, and that he only became aware of the connection between his pain and

his employment on his last date of employment. He further points out that Dr. Chudik gave medical opinion testimony in support of both his specific injury and traumatic injury claims.

¶ 34 A major problem with the claimant's reasoning is that the Commission did not believe anything he said. The Commission found the claimant to be completely lacking in credibility. On appeal, this court's task is to determine whether the Commission's determination that the claimant lacked credibility was against the manifest weight of the evidence. Our review of the record leads inescapably to the conclusion that the Commission's weighing of the claimant's credibility was supported by the record. As the arbitrator pointed out in great detail, the claimant's testimony was either contradicted by the testimony of a disinterested witness, in the case of Mr. Castro, his friend of many years, or impeached by other evidence, such as his complete failure to mention any pain or discomfort to anyone nearby or his failure to follow the simple procedures for reporting an injury. The arbitrator's observation that the first person he told about his injury was his attorney was given particular weight. In addition, on several occasions the claimant either admitted to lying or had to retract or correct his testimony on cross-examination. Once the claimant's testimony was discarded by the Commission, there remained no evidence to support his contention that he suffered an industrial accident on either March 26, 2009, or March 27, 2009. If there was no accident on those dates, there could be no injuries arising out of or in the course of his employment. Likewise, with no evidence of an accident on either of those dates, there could be no causal connection between the claimant's current condition of ill-being and his employment.

¶ 35 On the matter of the repetitive trauma claim, the analysis is essentially the same. The claimant relies primarily on his own testimony to establish the repetitive nature of his job duties, although Ulrich and Showalter testified to the repetitive nature of the duties of the duties that the

claimant performed in the working foreman position. In addition, the claimant provided the medical opinion testimony of Dr. Chudik, who opined that the claimant's condition of ill-being was causally related to the repetitive nature of his employment. While there is some evidence supporting his repetitive trauma claim, the Commission chose to discount Dr. Chudik's opinion in favor of Dr. Walsh's opinion that the claimant's condition was the result of a normal degenerative process possibly exacerbated by the claimant's scrap metal recovery business. The Commission's weighing of the competing medical opinions as to the claimant's repetitive trauma claim was not contrary to the manifest weight of the evidence. Dr. Chudik did not have any knowledge of the physical demands of the claimant's scrap metal business. The Commission faulted both the claimant and Dr. Chudik for the fact that this information was not taken into account by Dr. Chudik in reaching his conclusion. Additionally, the Commission noted that Dr. Walsh had a more accurate picture of the claimant's physical activities, particularly his scrap metal activities, and, thus, was in a better position to render an opinion as to the claimant's repetitive trauma claim.

¶ 36 The claimant challenges Dr. Walsh's opinion that the claimant's shoulder injuries were not caused by the repetitive nature of his duties with the employer. He suggests that Dr. Walsh's medical opinion testimony, in fact, confirmed that the repetitive nature of the claimant's job duties contributed to his condition of ill-being. We disagree. Dr. Walsh opined that "if the patient did frequent, consistent strenuous overhead activity during a prolonged period of time, certainly it can cause rotator cuff tendonitis and a rotator cuff tear." He noted, however, that without knowing the frequency and duration of the repetitive tasks in the claimant's job duties as a working foreman it would not be possible to determine whether those job duties contributed to the claimant's current condition of ill-being. While Dr. Walsh opined that repetitive tasks as

described in the claimant's position description could be a causative factor in the claimant's rotator cuff and shoulder injuries, he further opined that any opinion on whether the claimant's injuries were causally related to the repetitive nature of his employment would be incomplete without knowing the frequency and duration of time that the claimant actually performed these repetitive tasks. Dr. Walsh noted that he had no information regarding the frequency and duration for the repetitive tasks performed by the claimant. Thus, his opinion, as given in his deposition, does not support a conclusion that the claimant's injuries were causally connected to any repetitive tasks performed by the claimant in the course of his employment. Reviewing the record, we cannot say, therefore, that the Commission's finding as to the claimant's repetitive trauma claim was against the manifest weight of the evidence.

¶ 37 The claimant also maintains that the Commission erred: (1) in calculating his average weekly wage; (2) denying him temporary total disability (TTD) benefits; and (3) denying his claim reimbursement of reasonable and necessary medical expenses. We note, however, that these claims of error are moot since we are affirming the Commission's determination that he did not suffer from injuries arising out of and in the course of his employment. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the Cook County circuit court, which confirmed the Commission's decision is affirmed.

¶ 40 Affirmed.