NOTICE
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NOTICE
Decision filed 04/17/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (4th) 110370WC-U

NO. 4-11-0370WC

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BRETT E. HILL,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Macon County.
	)	
v.	)	No. 10-MR-25
	)	
ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION,	)	
(Tate & Lyle North America,	)	Honorable
	)	A. G. Webber,
Appellees).	)	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: The Commission's decision reversing the arbitrator and finding that the claimant failed to prove that he sustained accidental injuries arising out of and in the course of his employment is not against the manifest weight of the evidence.

¶ 2 The claimant, Brett E. Hill, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2008)) seeking an

award for an injury to his shoulders caused by repetitive motion activity in his employment with Tate & Lyle North America (the employer). The arbitrator found that the claimant sustained injuries that arose out of and in the course of his employment and awarded him temporary and permanent benefits. The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission reversed the arbitrator, finding that the claimant failed to prove that he sustained accidental injuries arising out of and in the scope of his employment. The claimant appealed the Commission's decision to the circuit court of Macon County. The circuit court confirmed the Commission's decision, and the claimant filed a timely appeal.

¶ 3 BACKGROUND

¶ 4 The evidence presented at the June 24, 2008, arbitration hearing is as follows. The claimant began working for the employer on December 3, 2002. At that time, the claimant's job involved physically handling 50-pound bags of corn syrup solids as they came off the conveyor belt. He loaded the bags 10 layers deep onto pallets. When he loaded the bags onto the last three layers of the pallet, he was required to place the bags at or above shoulder level. He testified that he moved about 1700 bags onto these pallets during each 12-hour shift. He did this job for about nine months.

¶ 5 Around September of 2003, he began working as a hand-packer, a job that was semi-automated but required some manual labor. The claimant testified that, in this job, he held an empty bag as an automated spout filled it with the sugar product. The filled bag was then dropped onto a conveyor belt that was about waist-high. After the filled bag dropped onto the conveyor belt, the claimant was required to line it up and feed it through a sealer. He testified that he often had to drag the filled bags back before they went into the sealer when they were not lined up properly. He also testified that he had to pick up the 50-pound bags

and move them above shoulder level about 200 times during each 12-hour shift. He continued in this position for about nine months, or until June 2004.

¶ 6 The claimant testified that he began experiencing shoulder pain about two or three months after he began working as a hand-packer. Until that time, he had not experienced any shoulder pain or suffered any shoulder injuries. He testified that, around this time, he "said something" about his shoulder pain to his supervisor, Jack Stroud, "just in casual conversation."

¶ 7 Office notes from the claimant's treating physician, Dr. Kenneth Scribner, indicate that the claimant saw Dr. Scribner on May 5, 2004, July 22, 2004, and January 5, 2005, at which time he diagnosed the claimant with bilateral shoulder pain or tendonitis. The May 5, 2004, note stated that the shoulder pain was "likely secondary to a repetitive muscularly demanding job description." Dr. Scribner treated the claimant's pain with medications and injections.

¶ 8 In June 2004, the employer fully automated the claimant's job. The claimant testified that another worker operated the packer spout, and the employer brought in a robot to palletize the sugar bags. He said that the machine "pretty much" did all the physical labor after his job was automated. Even though his job was automated, he was still required to physically handle from 5 to 100 50-pound bags per 12-hour shift. This occurred when the bags were overweight or underweight. When he placed the off-weight bags onto the pallets, he was required to place them at or above shoulder level for the last three rows of the pallet.

¶ 9 The claimant saw Dr. Scribner for shoulder complaints again on October 16, 2006. At that time, the claimant told him that he had been experiencing shoulder pain for two and one-half to three years and that it began when he started doing manual labor. Dr. Scribner noted that the claimant no longer did manual labor but that he still had disability. He

diagnosed the claimant with a probable rotator cuff tendonopathy bilaterally and ordered a magnetic imaging resonance (MRI) test.

¶ 10 On November 20, 2006, the MRI was performed, and it showed that the claimant had rotator cuff tears in both shoulder muscles.

¶ 11 The employer's expert witness, Dr. David Fletcher, a board-certified occupational and preventative medicine specialist, testified by evidence deposition that he was very familiar with the operations of the plant where the claimant worked. Dr. Fletcher conducted a work-site evaluation of the plant on December 5, 2006. During that evaluation, the claimant was present. Dr. Fletcher testified that the claimant explained to him how he got hurt. According to Dr. Fletcher, the claimant told him that he had experienced a gradual onset of shoulder pain for the previous year and a half. The claimant attributed his pain to his former manual labor and denied any acute injury. The claimant denied that Dr. Fletcher asked him any questions on that date. The claimant stated that Dr. Fletcher examined him for a minute or two and "then took off in a corner" with the employer's safety manager and a supervisor.

¶ 12 Dr. Fletcher testified that his work-site evaluation was two-fold; he evaluated the claimant in order to determine his fitness to continue working for the employer, and he conducted a job-site evaluation. Dr. Fletcher determined that the claimant had treated with Dr. Scribner and had been referred to an orthopedic surgeon who was scheduled to perform a bilateral rotator cuff repair on the claimant. In December 2006, Dr. Fletcher thought that the claimant had an impingement and probably a rotator cuff tear. He allowed the claimant to continue working at that time because he believed that the claimant's job duties would not aggravate his condition since his work was fully automated without any physical demands or any requirement for overhead lifting.

¶ 13 Dr. Fletcher explained that the plant where the claimant worked had been automated about two years before his work-site evaluation. Dr. Fletcher concluded that the claimant's

shoulder problems could not have been caused by his work duties since his shoulder pain had not begun until about six months after his work was automated. He testified,

"Again, based on the automation of the system two years ago, prior to the onset of his shoulder pain, in my opinion there's no way this could be related to his work activities. I thought it was an age-related degenerative process, especially based on his pathology present. He has a type 2 acromion process. That's the little beak poking down from the scapula that sort of *** irritates into the rotator cuff muscle in kind of *** a sandpaper type of wedging. Because of that congenital presentation and his age, this was, in my opinion, strictly an age-related degenerative condition and had nothing to do with his work activities."

¶ 14 Dr. Kenneth Tuan, a board-certified orthopedic surgeon, testified by evidence deposition that he examined the claimant on December 21, 2006. The claimant told Dr. Tuan that he had been having pain in both shoulders for about a year and a half. The claimant did not recall any previous injury. Dr. Tuan testified that the claimant explained that his job involved "a lot of manual labor and especially motions at or above shoulder level." In his office note of that date, Dr. Tuan wrote that the claimant's work involved "significant manual labor" and that "all of his motions are at or above shoulder level." Dr. Tuan reviewed the claimant's MRIs and noted a "full thickness rotator cuff tear" with a lateral downsloping acromion on his left shoulder and a "large rotator cuff tear" and a lateral downsloping acromion with type II subacromial spur on his right shoulder. Dr. Tuan testified that "the nature of his occupation at least aggravated his underlying condition." He testified that he based his opinion on the job description that the claimant provided because "repetitive motions at or above shoulder levels are known to aggravate shoulder problems." Regardless of this history and the indication of rotator cuff tears, Dr. Tuan did not place any work restrictions on the claimant in December 2006, but he testified that the claimant should not have been performing any overhead lifting at that time.

¶ 15 On January 10, 2007, Dr. Tuan performed a right shoulder arthroscopy with rotator cuff repair and a superior labral repair. Dr. Tuan examined the claimant on March 19, 2007. He testified that the claimant again told him that his work involved a "lot of repetitive overhead lifting activities." Dr. Tuan stated that the claimant "described that he regularly lift[ed] bags of sugar weighing 50 pounds and he has to manipulate them at or above shoulder level. He also says that he needed to stack up pallets filled with these 50 pound bags and this has been essentially his job over the past several years and that, that's what he felt really aggravated his shoulder pain." Dr. Tuan testified that he was not sure what caused the rotator cuff tear, but he believed that the claimant's job of stacking and manipulating 50-pound bags of sugar at least aggravated his underlying condition.

¶ 16 Dr. Fletcher testified that, in addition to his work-site evaluation, he also conducted an independent medical examination (IME) of the claimant on April 30, 2007, in which he examined the claimant, took an updated history from him, and reviewed his updated medical records, including a review of Dr. Tuan's operative report and evidence deposition. Dr. Fletcher testified that he conducted "a very detailed " physical examination of the claimant. Dr. Fletcher noted that the claimant had undergone a right shoulder rotator cuff repair, and he felt that it would be reasonable for the claimant to proceed with the same surgery on his left shoulder. Even though Dr. Fletcher believed that the claimant needed surgery, he believed that the claimant could return to work without restrictions because his job was "very nonphysical, sedentary, light in nature." Dr. Fletcher testified that the additional information he obtained in his April 2007 IME did not change his opinion about the causation of the claimant's condition. "My opinion is, based on the history he gave me and the congenital presence of acromial type 2 processes in his scapula, his age, all would give an explanation of why he developed a problem. It's my opinion his work activities the last year and a half when he had the onset of subjective complaints could not be the causative factor because of

the nonphysical aspects of his work."

¶ 17 Dr. Fletcher was critical of Dr. Tuan's opinion that the claimant's job duties aggravated his shoulder condition. Dr. Fletcher testified that Dr. Tuan's opinion was faulty because it was based on an inaccurate description of claimant's job duties. Dr. Fletcher testified that he was very familiar with the claimant's work site and job duties, which had not involved repetition or overhead activities for over two years. Dr. Fletcher testified that, even if the claimant's job still involved overhead lifting of up to 25 bags weighing 50 pounds each over a 12-hour shift, he did not believe that activity could aggravate a rotator cuff tear. He acknowledged that the claimant's bilateral shoulder problems were first documented in May 2004 while he was still performing manual labor for the employer. However, Dr. Fletcher determined that any shoulder problem the claimant experienced in 2004 resolved on its own since he did not experience any additional shoulder problems until approximately June 2005 (one and a half years before Dr. Fletcher's work-site evaluation).

¶ 18 On September 5, 2007, Dr. Tuan performed a rotator cuff repair on the claimant's left shoulder.

¶ 19 The arbitrator found that the claimant's injury arose out of and in the course of his employment and awarded him temporary and permanent benefits. In support of her ruling, the arbitrator found that the claimant was credible and relied on Dr. Tuan's account of the claimant's job description.

¶ 20 On review, the Commission found "Dr. Fletcher to be more persuasive in regard to whether the Petitioner's condition of ill being is the result of a work accident." The Commission noted that the claimant told Dr. Tuan in December 2006 that he was performing repetitive overhead lifting at or above shoulder level. The Commission found that the claimant's "own testimony contradicts that history" because he had testified that "his old job was automated in June of 2004 and the repetitive lifting ended at that point." The

Commission reversed the arbitrator's decision and found that the claimant had failed to prove that his condition of ill being was the result of an accident arising out of and in the course of his employment.

¶ 21 On judicial review, the circuit court confirmed the Commission's decision, and this appeal followed.

¶ 22 ANALYSIS

¶ 23 Essentially, the claimant asserts that the Commission should have been persuaded by his treating physicians rather than by the employer's expert, Dr. Fletcher. The employer responds that the Commission's decision is supported by the manifest weight of the evidence. The employer also points out that the claimant did not cite any case law or any other authority in his appellant's brief. The employer does not, however, argue that we should impose any sanction on the claimant as a result of this deficiency. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of the appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on). Without citation to some authority in support of his contentions, the claimant has technically forfeited his arguments on appeal. *Vancura v. Katris*, 238 Ill. 2d 352, 370, 939 N.E.2d 328, 340 (2010). Nevertheless, we choose to address the merits of the appeal.

¶ 24 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). In the course of one's employment generally refers to the time, place, and circumstances surrounding the injury, and arising out of the employment is "primarily concerned with the causal connection" between the injury and the claimant's job duties. *Sisbro, Inc.*, 207 Ill. 2d at 203, 797 N.E.2d at 671-72. In the case at bar, the claimant

argues that the evidence showed that his work duties of overhead lifting caused or aggravated his condition, causing his subsequent need for bilateral rotator cuff repair. The Commission found and the employer argues that the evidence showed that the claimant's need for surgery was unrelated to his employment duties because he was doing very little overhead lifting when his symptoms began. The claimant points to the evidence that his treating physicians believed his work at least aggravated his injury, and the employer focuses on the opinion of its expert witness that the claimant's work duties could not have caused or aggravated his condition. Therefore, the issue centers around the divergent opinions of medical experts.

¶ 25 It is the Commission's province to judge the credibility of the witnesses, to resolve conflicts in the medical evidence, to draw reasonable inferences from the testimony, and to determine what weight the testimony is to be given. *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055, 820 N.E.2d 586, 591 (2004). On review, we are not to overturn the Commission's decision on a question of fact unless it is against the manifest weight of the evidence. *Id.* "Whether a claimant's disability is attributable solely to a degenerative process of the preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the *** Commission." *Sisbro, Inc.*, 207 Ill. 2d at 205, 797 N.E.2d at 673. For a finding of fact to be against the manifest weight of the evidence, the opposite conclusion must be clearly apparent. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 257, 899 N.E.2d 365, 378 (2008). "If there is sufficient factual evidence in the record to support the Commission's determination, it will not be set aside on appeal." *Id.* "Further, 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.*, 207 Ill. 2d at 206, 797 N.E.2d at 673.

¶ 26 The claimant asserts that Dr. Fletcher's opinion is "based on a series of misstatements." First, he states that Dr. Fletcher claimed that he did not have any symptoms of shoulder pain until after his job was fully automated. The claimant points out that Dr. Scribner diagnosed him with bilateral shoulder tendonitis in May 2004, about one month before his job was almost completely automated. However, Dr. Fletcher acknowledged this diagnosis, but he testified that any shoulder problems the claimant had in May 2004 must have resolved on their own since the claimant did not seek any medical treatment for that condition for almost two years after that diagnosis. Additionally, Dr. Fletcher testified several times that the claimant had told him that his symptoms did not begin until approximately June 2005, about a year after his job was automated.

¶ 27 Second, the claimant contends that Dr. Fletcher ignored the evidence that, when he began working for the employer in 2002, he was handling around 1700 50-pound bags per shift, much of which involved lifting the bags at or above shoulder-height. The claimant argues that Dr. Fletcher's opinion is based upon a faulty assumption that the claimant's current position is fully automated with no manual labor involved. The claimant asserts that he "still handles up to 100 fifty pound bags a day. Sometimes they are handled above the shoulder." The claimant does not fully and accurately summarize the record.

¶ 28 Dr. Fletcher actually testified that the claimant's current job "rarely" involved overhead lifting but that overhead lifting was still required when their was "some kind of malfunction of the palletizing system." Dr. Fletcher testified that the claimant attributed the gradual onset of his shoulder pain to his former work as a manual packer. In December 2006, Dr. Fletcher felt that the claimant could continue working because his work activities would not aggravate or cause the shoulder problems he was experiencing at that time. He stated,

"Again, based on the automation of the system two years ago, prior to the onset of his

shoulder pain, in my opinion there's no way this could be related to his work activities. I thought it was an age-related degenerative process, especially based on his pathology present. He has a type 2 acromion process. *** Because of that congenital presentation and his age, this was, in my opinion, strictly an age-related degenerative condition and had nothing to do with his work activities."

On cross-examination, Dr. Fletcher testified that if the claimant were to lift between 150 and 250 50-pound bags in a 12-hour shift, and if he had to lift about 10% of those bags overhead, that activity would not aggravate a rotator cuff tear.

¶ 29 Therefore, the claimant's argument that Dr. Fletcher's opinion is based upon an unsubstantiated belief that the claimant's job was completely automated is not persuasive. Dr. Fletcher acknowledged that the claimant's work continued to involve some overhead lifting but that did not change his opinion that the claimant's job did not cause or aggravate his condition of ill-being. Moreover, in its decision, the Commission noted that the claimant's job was automated in approximately June 2004 but that the claimant was still required to move up to 100 50-pound bags per shift.

¶ 30 The claimant's third criticism of Dr. Fletcher's testimony is that he incorrectly stated that the claimant had undergone a left shoulder surgery in 2003 when he worked for a company named Climate Control. The claimant testified that he had never worked for that company and did not have shoulder surgery in 2003. Therefore, the claimant is correct that Dr. Fletcher was mistaken in this portion of his testimony. The employer acknowledges Dr. Fletcher's mistake but argues that it is irrelevant because he did not base his opinion on the mistake but, rather, upon the claimant's statement that his symptoms did not begin until after his work was mostly automated and upon the documented history that the claimant suffered from a degenerative, age-related condition that was the probable cause of his shoulder problems.

¶ 31 From the record, it is clear that the Commission found Dr. Fletcher's opinion more reliable due to his detailed knowledge of the claimant's working conditions. The Commission was skeptical of Dr. Tuan's opinion because it was based upon faulty information. Dr. Tuan's records and his testimony indicate that the claimant told him and he believed, incorrectly, that for the past several years and continuing through March 2007, the claimant's work involved regular, repetitive heavy lifting at or above shoulder level. The record refutes these statements of the claimant to Dr. Tuan. Accordingly, there is support in the record for the Commission's decision, and it is not against the manifest weight of the evidence.

¶ 32 CONCLUSION

¶ 33 The circuit court's order confirming the Commission's decision is affirmed.

¶ 34 Affirmed.