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2012 IL App (5th) 110092WC-U

NO. 5-11-0092WC

Order filed April 19, 2012

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

CONTINENTAL TIRE THE AMERICAS, L.L.C.,)	Appeal from the Circuit Court of the 2nd Judicial Circuit, Jefferson County, Illinois.
Appellant,)	
v.)	Circuit No. 10-MR-59
THE ILLINOIS WORKERS' COMPENSATION COMMISSION <i>et al.</i> (Jeff Peak, Appellee).)	Honorable Timothy R. Neubauer, Judge, Presiding.

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

ORDER

¶ 1 *Held:* The Commission's decision to award benefits under a theory of repetitive trauma (in part) was proper and did not prejudice the respondent, even though that theory was not presented to the arbitrator, because the respondent was aware of evidence supporting the theory prior to the arbitration. In addition, the Commission's finding that the claimant's current left shoulder condition was causally related to a February 13, 2006, work accident and to the claimant's repetitive work activities was not against the manifest weight of the evidence.

¶ 2 The claimant, Jeff Peak, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)) seeking benefits

for a shoulder injury he claimed to have sustained while working as an employee of respondent Continental Tire the Americas, L.L.C. (employer). Following a hearing, an arbitrator found that the claimant had failed to establish that his current shoulder condition was causally related to a work-related accident that occurred on February 13, 2006. Although the arbitrator found that the claimant had injured his shoulder during that accident, she found that the claimant had reached maximum medical improvement (MMI) for that injury on August 18, 2008, and that the claimant's ongoing symptoms were solely related to a preexisting osteoarthritic condition. Accordingly, the arbitrator awarded temporary total disability (TTD) and medical expenses for the period prior to August 18, 2008, but denied the claimant's claims for medical expenses and prospective medical treatment for all times after that date.

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission reversed the arbitrator's decision. The Commission found that the claimant's current shoulder condition was caused by repetitive lifting at work (which aggravated his preexisting osteoarthritis) and by the February 13, 2006, work accident. Moreover, the Commission rejected the arbitrator's conclusion that the claimant had reached MMI for his work-related injuries on August 18, 2008, and ruled that the claimant had "established ongoing causation" and "remains in need of care for his left shoulder condition." Accordingly, the Commission affirmed the arbitrator's award of TTD benefits and awarded all of the medical expenses and prospective medical care sought by the claimant, including total shoulder replacement surgery.

¶ 4 The employer sought judicial review of the Commission's decision in the circuit court of Jefferson County. The circuit court affirmed the Commission's decision. This appeal followed.

¶ 5

FACTS

¶ 6 The claimant began working for the employer in 1997. From 2001 until the time of his work accident in February 2006, the claimant worked exclusively as a passenger tire press operator. The job required the claimant to load tires onto presses by lifting and placing each tire onto a "pan" that was 4 feet, 10 inches high. The tires ranged in weight from 30 to 50 pounds. Because he was left-handed, the claimant used his left arm to lift and place each tire. He typically lifted more than 2,000 tires per 12-hour shift. During the period before the accident, the claimant worked 48 to 56 hours per week, including two 12-hour shifts each weekend.

¶ 7 On February 13, 2006, the claimant sustained an injury at work while loading presses. As he reached down to grab a tire, he felt a pulling sensation in his left shoulder. The claimant reported this incident to his supervisor.

¶ 8 On February 17, 2006, the claimant saw Ellen Pogue, a nurse practitioner. The claimant told Pogue that he had started experiencing pain and tingling in his left shoulder, elbow, forearm, and wrist on February 13, 2006. Pogue ordered X-rays and a left shoulder MRI. The X-rays showed areas of arthritis and possible loose body formation. The MRI showed large areas of loose body formation, posttraumatic changes in the anterior margin of the labrum, and joint effusion with a partial tear of the supraspinatus tendon. Pogue ordered the claimant off work and referred him to Dr. Joon Ahn, an orthopedic surgeon.

¶ 9 Claimant first saw Dr. Ahn on February 27, 2006. The claimant told Dr. Ahn that he had "been gradually developing soreness" in his left shoulder while lifting 40-pound tires in the course of his press operator duties and that he "felt a pulling sensation in the [his] shoulder" and a "sharp pain" at the time of the February 13, 2006, work accident. Dr. Ahn interpreted the X-rays as showing "degenerative changes, probably secondary to heavy manual activity the past several years," along with possible rotator cuff tendonopathy. The

doctor recommended an initial course of conservative care, administered a cortisone injection, and prescribed physical therapy. He restricted the claimant to no lifting over 20 pounds and no overhead activity with the left arm. Shortly thereafter, the claimant began performing light duty in the employer's tire passenger area.

¶ 10 The claimant returned to Dr. Ahn on April 5, 2006, reporting no significant improvement from the injection or the physical therapy. Dr. Ahn felt it was possible the claimant had a full rotator cuff tear, given the trauma the claimant experienced and "the long duration of the work activity [the claimant] has been doing with heavy manual activity." He prescribed an MR arthrogram of the left shoulder, which was performed on April 24, 2006. The arthrogram showed "advanced degenerative arthritis at the glenohumeral joint¹ with large inferior osteophyte formation," "multiple large osteocartilaginous loose bodies in the inferior joint space," and signs of tendonopathy. The radiologist who interpreted the arthrogram also suspected a "small focal full-thickness tear of the distal supraspinatus tendon."

¶ 11 On May 9, 2006, the claimant was examined by Dr. James Chow, an orthopedic surgeon. Dr. Chow concluded that the claimant was mainly suffering from osteoarthritis of the glenohumeral joint and the AC joint.² Dr. Chow concluded that this condition "will not get any better" and that there was "a possibility that it could get worse in the future." Dr. Chow believed that, although the claimant might have a rotator cuff tear, the claimant's pain was due to osteoarthritis rather than a tear. He indicated that the claimant "obviously" might

¹The glenohumeral joint is a ball-and-socket joint in the shoulder that allows for the arm to move in a circular rotation, as well as movement of the arm towards and away from the body.

²The acromioclavicular joint, or AC joint, is a joint at the top of the shoulder. It is the junction between the acromion (the highest point of the shoulder) and the clavicle.

need a total shoulder replacement eventually but not at the present time. He also noted that the claimant had a "very strenuous labor-type job involving the left shoulder" and advised the claimant that he might not be able to perform those types of job duties anymore.

¶ 12 On May 15, 2006, Dr. Ahn noted that the claimant's X-rays showed an arthritic condition in both shoulders with the left shoulder being "much worse" than the right. Dr. Ahn diagnosed shoulder pain due to the significant arthritic condition of the left shoulder. In his medical records, Dr. Ahn noted that the claimant had performed "heavy manual labor" for several years and that the claimant "used mostly the left arm to lift heavy tires" because he was left-hand dominant. Accordingly, Dr. Ahn concluded that "[m]ost likely there is some contributing factor from the work that has caused the arthritic condition in the shoulder." He opined that, if the claimant's work was not "fully responsible for causing the arthritis," it has, "[a]t least," "been a significant contributing factor to the worsening of the symptoms in that shoulder." Dr. Ahn noted that the claimant's main symptom at the time was the arthritic condition of his shoulder. The doctor recommended a second injection and continued the claimant on a 10-pound lifting restriction with "no overhead activity."

¶ 13 On July 10, 2006, the claimant was evaluated by Dr. Christopher Rothrock, the employer's section 12 examiner. Dr. Rothrock's notes reflect that claimant had been experiencing intermittent left shoulder pain "over the last couple of years" and that this pain had worsened with his tire-lifting work activities and overtime. The history also indicates that, while the claimant was loading tires on February 13, 2006, "he experienced pain in his left shoulder and could not continue to work." Dr. Rothrock examined the claimant and reviewed the claimant's medical records and diagnostic films. He prepared a written report summarizing his findings, which stated:

"In my professional opinion, [the claimant's] employment *** is the prevailing factor in his current state of pain and disability about his left shoulder. He has very severe

osteoarthritis of the glenohumeral joint in his dominant shoulder at a very young age and without a prior history of trauma. The most likely cause of such rapid degeneration about his glenohumeral joint is the job that he has performed for [the employer], which has required extensive lifting of tires with his left dominant arm over a prolonged period."

¶ 14 Dr. Rothrock concluded that the claimant had not yet reached MMI. He suggested that the claimant might ultimately require a total shoulder arthroplasty, which would best be performed by a shoulder surgeon who specializes in total shoulder replacement surgery.

¶ 15 On September 12, 2006, the claimant returned to nurse Pogue, complaining of left shoulder pain, numbness and tingling, as well as neck tightness. Pogue referred the claimant to Dr. George Paletta, an orthopedic surgeon.

¶ 16 Dr. Paletta examined the claimant on September 27, 2006, and prepared a written report detailing his diagnoses and treatment recommendations. After reviewing the X-rays of the claimant's shoulders, Dr. Paletta diagnosed: "1) advanced osteoarthritis, left shoulder, moderately symptomatic; and 2) osteoarthritis, right shoulder, asymptomatic." Dr. Paletta's written report also addressed the issue of causation. Although Dr. Paletta believed that the claimant's osteoarthritis "clearly pre-existed the onset of [the claimant's] symptoms following the injury in February," he opined that claimant's work "is causatively related to and is the primary exacerbating factor in the onset of symptoms correlating to February of 2006." He also opined that, although osteoarthritis is "multifactorial" and develops gradually over time, the claimant's osteoarthritis was "causally related to his repetitive work activities."

¶ 17 Dr. Paletta recommended a therapeutic course of nonsteroidal anti-inflammatories and activity modification. He noted that the claimant "could consider arthroscopy with removal of loose body and possible debridement." However, Dr. Paletta noted that "this would likely be a short term benefit and in fact may result in no improvement of [the claimant's]

symptoms at all." Dr. Paletta concluded that, "[i]f [the claimant's] symptoms reach the point where they are not manageable with the above outlined strategies, his only other option would be total shoulder arthroscopy." Dr. Paletta limited the claimant to light work with no overhead activities.

¶ 18 On December 29, 2006, the claimant returned to Dr. Paletta for a follow-up visit. Dr. Paletta described his examination findings as "virtually unchanged." He described the claimant's condition as "chronic." In his medical record, Dr. Paletta again noted that arthroscopy and debridement would be "unpredictable" and would provide "at best" only "temporary relief" of the claimant's symptoms. He noted that "[d]efinitive surgical treatment would include total shoulder arthroplasty." However, given the fact that the claimant had "good motion" and "good strength" and that "his main complaint [was] pain," Dr. Paletta stated that he was "reluctant to consider total shoulder arthroplasty in such a young patient."

¶ 19 During a follow-up visit in October 2007, Dr. Paletta again noted the possible need for a total shoulder arthroplasty. During another visit on March 17, 2008, the doctor discussed with the claimant the possibility of a total shoulder replacement but, given the claimant's young age, he recommended an arthroscopic procedure instead.

¶ 20 On May 6, 2008, Dr. Paletta performed an arthroscopy on the claimant's left shoulder with extensive debridement, capsular release, lysis of adhesions, and the removal of loose bodies.³ On May 19, 2008, Dr. Paletta released the claimant to return to work with restrictions of one-handed duty and a 10-pound lifting limit with no overhead lifting. On

³"Debridement" is the removal of dead, damaged, or infected tissue to improve the healing potential of the remaining healthy tissue. "Capsular release" involves cutting and removing the thickened, swollen inflamed abnormal capsule surrounding the shoulder joint. "Lysis of adhesions" is the process of cutting scar tissue within the body to restore normal function and reduce pain.

June 30, 2008, Dr. Paletta recorded in his notes that the claimant still had pain in his left shoulder. The doctor described the claimant's osteoarthritis as a "chronic underlying condition that has the potential to wax and wane." He again noted that a total surgical shoulder replacement may be necessary.

¶ 21 The claimant returned to Dr. Paletta on August 18, 2008. The claimant told Dr. Paletta that, although he initially had "good relief" of the pain and improved range of motion, his pain had "gradually progressed to the point where it [was] almost as significant as it was before surgery." Dr. Paletta felt that the claimant's remaining treatment options were either to "continue symptomatic treatment," consider consultation regarding a possible surgical resurfacing of the glenoid and humeral head, or "total shoulder arthroplasty." Due to the claimant's young age, Dr. Paletta recommended that claimant consult with Dr. Ken Yamaguchi to evaluate whether the claimant was a candidate for a surgical resurfacing rather than shoulder replacement.⁴

¶ 22 Dr. Paletta noted that, as of August 18, 2008, the claimant was "essentially at maximum medical improvement following the arthroscopy, debridement and release," and that "[c]ontinued treatment would be aimed at treating his underlying glenohumeral osteoarthritis and the pain related to that osteoarthritis." The doctor recommended new work restrictions, including a maximum lifting limit of 20 pounds occasionally above chest level and a maximum single lifting limit of 50 pounds from floor to waist. The employer assigned the claimant to a different type of light duty in its battery station.

¶ 23 On August 28, 2008, Dr. Paletta prepared a letter at the request of the workers' compensation insurance adjuster stating that the claimant had reached MMI "with regard to his outcome following the arthroscopy," but needed additional treatment for his underlying

⁴The claimant testified that he did not see Dr. Yamaguchi because "workmen's comp never cleared it." The transcript contains no records from Dr. Yamaguchi.

osteoarthritis and the pain related to that condition. Dr. Paletta stated that the need for this additional treatment "is not related to the lift incident of 2-13-06 but is solely related to the natural progression of his underlying osteoarthritis."

¶ 24 On October 22, 2008, Dr. Paletta sent a report to the claimant's counsel in which he restated and clarified his causation opinion. Specifically, Dr. Paletta stated:

"It is my opinion that the need for continued treatment is for [the claimant's] osteoarthritis and the symptoms related to his osteoarthritis. It is my opinion that the arthroscopic procedure was of limited value and benefit to the patient. As such, he was placed at maximum medical improvement following that procedure. The indication for that procedure was the symptoms resulting from exacerbation of his underlying osteoarthritis. He continues to experience symptoms related to his underlying osteoarthritis, thus additional treatment would be aimed at those particular symptoms. Again, I would restate my opinion as initially laid out in my office note of September 27, 2006[,] that his work was the primary exacerbating factor in the onset of symptoms related to his underlying osteoarthritis. This opinion is not substantially or materially different from that expressed by Dr. Joon Ahn or Dr. Chris Rothrock[.]"

¶ 25 On November 21, 2008, the claimant returned to Dr. Paletta and complained of "persistent consistent pain" exacerbated by any use of his left shoulder. On examination, Dr. Paletta noted "findings consistent with advanced osteoarthritis," such as a limited range of shoulder motion. Dr. Paletta obtained new X-rays which demonstrated advanced osteoarthritis. He concluded that the claimant's "only option from a surgical standpoint is to consider total shoulder arthroplasty."

¶ 26 On May 5, 2009, the claimant saw his family physician, Dr. Neal, and complained of left shoulder pain dating back to February 13, 2006. Petitioner indicated he was "still waiting

for surg[ery] with Dr. Paletta" and was experiencing stomach problems due to taking Aleve.

¶ 27 The employer hired a private investigator to conduct surveillance of the claimant on several occasions between March and May of 2009. The investigators videotaped the claimant at his home on April 23, 2009, May 11, 2009, May 12, 2009, and May 15, 2009. The videos show the claimant doing yard work (*e.g.*, shoveling, lifting a wheelbarrow, and lifting a bag of mulch), cleaning out the back of his pickup truck, painting gutters, and running various errands. The April 23, 2009, video shows the claimant and a woman moving a tree.

¶ 28 Dr. Paletta gave an evidence deposition on June 4, 2009. During the deposition, Dr. Paletta outlined the treatments he had performed on the claimant and opined that the claimant's "only viable option" at the present time was a shoulder replacement. Dr. Paletta acknowledged that the advanced osteoarthritic changes shown on the MR arthrogram predated the February 13, 2006, accident. However, he testified that the claimant's work activities as of February 13, 2006, "ha[d] the potential to be aggravating factors in a patient who has arthritis to the extent of the [the claimant's]." Dr. Paletta testified that any type of heavy activities can cause arthritic changes to become symptomatic. He opined that the claimant's work activities accelerated the need for the total shoulder replacement.

¶ 29 On cross-examination, the employer's counsel asked Dr. Paletta "if *** [the claimant] was seen involved with heavy shoveling activities, lifting, working overhead, painting for extended periods of time," whether those types of activities would "make the shoulder symptomatic and *** also accelerate the underlying arthritic condition." Dr. Paletta acknowledged that these types of activities could likely increase the claimant's symptoms related to his osteoarthritis. However, Dr. Paletta opined that the claimant's osteoarthritis was "end stage" when Dr. Paletta first saw him in September 2006 and, therefore, the issue of acceleration was "nearly moot."

¶ 30 On redirect, the claimant's counsel asked Dr. Paletta how he would reconcile the opinion he expressed in his August 28, 2008, letter to the workers' compensation insurance adjuster, *i.e.*, that the need for additional treatment was "not related to the lift incident of 2-13-06 but [was] solely related to the natural progression of his underlying osteoarthritis," with his opinion that the claimant's work activities aggravated his osteoarthritis. Dr. Paletta responded by noting that, even though the claimant's osteoarthritis was advanced prior to the February 13, 2006, work incident, the claimant had no significant problems with his left shoulder prior to that incident, and that it was that incident that caused the left shoulder osteoarthritis to become symptomatic, eventually requiring a total shoulder replacement. Moreover, Dr. Paletta agreed with Dr. Rothrock's conclusion that the most likely cause of the rapid degeneration of the claimant's glenohumeral joint is the job the claimant performed for the employer, which required extensive lifting with his dominant (left) arm over a prolonged period.

¶ 31 At the employer's request, the claimant underwent a second section 12 examination with a different examiner, Dr. Michael Nogalski (an orthopedic surgeon), on August 3, 2009. Dr. Nogalski reviewed the claimant's records from Drs. Ahn, Rothrock, and Paletta, along with Dr. Paletta's deposition, a battery station operator instructional video, and various surveillance videos. Although Dr. Nogalski viewed the claimant's work activities as having "reasonably created a strain" requiring an arthroscopy, he did not view those activities as causing the claimant's osteoarthritis. In addition, Dr. Nogalski concluded that the surveillance videos showed that the claimant had "very solid function of his shoulder" in April and May of 2009, and he opined that the activities that the claimant was shown performing in the surveillance video were more strenuous than his current work activities. Thus, Dr. Nogalski found it "much more likely than not that [the claimant's] symptoms would have come from his home activities" rather than his work activities.

¶ 32 During his subsequent evidence deposition, Dr. Nogalski acknowledged that the claimant's job duties as a tire press operator could aggravate osteoarthritis in an individual's shoulder. However, Dr. Nogalski disagreed with Dr. Rothrock's statement that the extensive tire lifting the claimant performed was the "most likely cause" of the rapid degeneration of his glenohumeral joint. In addition, Dr. Nogalski opined that the February 13, 2006, work accident aggravated the claimant's left shoulder condition and necessitated the arthroscopy. However, he did not believe that any treatment the claimant received three months after the arthroscopy stemmed from the work accident. According to Dr. Nogalski, the claimant's condition as of the August 3, 2009, examination was due solely to his underlying osteoarthritis. Moreover, Dr. Nogalski testified that the claimant was not a candidate for a total shoulder replacement.

¶ 33 During the arbitration hearing, the claimant testified that he experiences pain in his shoulder "constantly" and that this pain "seems to be getting worse." He stated that he has difficulty sleeping due to pain and takes pain medication daily. He denied injuring his left shoulder at any time before or after February 13, 2006. Regarding the activities depicted in the surveillance videos, the claimant testified that the bag of mulch he lifted weighed 12 pounds and that he never lifted more than 24 pounds. He also denied lifting the tree shown in the video.⁵

¶ 34 The arbitrator found that claimant reached MMI with respect to his work-related left shoulder condition on August 18, 2008, and that the left shoulder problems the claimant experienced after that date stemmed solely from an underlying, non-work-related osteoarthritic condition. In making these findings, the arbitrator relied primarily on Dr.

⁵The claimant testified that his father-in-law and some other individuals took the tree off of a truck and moved it, and the claimant and his wife merely "scooted" the tree a short distance and rolled it into a hole.

Nogalski's causation opinions. The arbitrator characterized Dr. Paletta's causation opinions as "equivocal" because, according to the arbitrator, Dr. Paletta initially found no connection between the work accident and the condition of the claimant's shoulder after August 18, 2008, but later opined that the claimant's "work activities" were an exacerbating factor in the development of claimant's arthritis-related symptoms.⁶ The arbitrator also found that the claimant "reported a significant increase in left shoulder pain" during visits to Dr. Neal in April and May of 2009 and that the dates of these visits "correlated specifically" with the dates of the surveillance videos which showed the claimant engaging in various physical activities. From this, the arbitrator concluded that "if there was an aggravation of [the claimant's] underlying end-stage osteoarthritic condition, it was related to the activities [the claimant] was engaged in as reflected on the surveillance video."

¶ 35 The claimant appealed the arbitrator's decision to the Commission. The Commission reversed. The Commission rejected the arbitrator's conclusion that the claimant reached MMI with respect to his work-related left shoulder condition on August 18, 2008, and found that the claimant "established ongoing causation" "and remains in need of care for his left shoulder condition." The Commission stated that it "view[ed] [the claimant's] current left shoulder condition as stemming from several causes, including the repetitive tire lifting duties [the claimant] performed with his left arm and the specific left shoulder trauma of February 13, 2006." The Commission noted that, under Illinois law, a claimant seeking benefits under the Act need only show that work was "a cause of his condition" and found that the claimant had made that showing. The Commission stated that it viewed the specific

⁶The arbitrator gave little weight Dr. Paletta's subsequent opinion because she assumed that Dr. Paletta was referring to the "work activities" that the claimant performed in the battery station (after the accident), and Dr. Paletta gave no indication that he was, in fact, familiar with those activities.

trauma of February 13, 2006, as "the proverbial 'straw that broke the camel's back' in terms of it being the last in a long sequence of repetitive traumas."

¶ 36 In so holding, the Commission relied on the causation opinions of Drs. Ahn, Paletta, and Rothrock. The Commission disagreed with the arbitrator's characterization of Dr. Paletta's causation opinion as "equivocal." The Commission noted that, although Dr. Paletta opined that the treatment *relative to the specific trauma* ended on August 18, 2008, and that subsequent treatments "related solely to the underlying osteoarthritis," "he viewed the osteoarthritis as having been aggravated by the repetitive tire lifting duties." Thus, according to Dr. Paletta, the treatments rendered after August 18, 2008, related to a work-related condition. The Commission found Dr. Nogalski's causation opinions "illogical" and "puzzling." Further, the Commission found that Dr. Nogalski placed "undue emphasis" on the "relatively innocuous activities" shown on the surveillance videos, and it noted that Dr. Paletta recommended the total shoulder replacement months before the surveillance began.⁷

¶ 37 Accordingly, the Commission affirmed the arbitrator's award of two weeks of TTD benefits and medical expenses and modified the arbitrator's decision by: (1) awarding additional medical expenses for treatments incurred after August 18, 2008; and (2) ordering the employer to authorize and pay for the total left shoulder replacement recommended by Dr. Paletta.

¶ 38 The employer sought judicial review of the Commission's decision in the circuit court of Jefferson County. The circuit court affirmed. This appeal followed.

⁷In addition, the Commission "carefully examined the transcript and *** found no treatment notes or bills from Dr. Neal" corresponding to the dates of the surveillance videos. Further, contrary to the arbitrator's finding, the Commission noted that Dr. Neal's notes of the claimant's visits in May 2009 "do not reflect that [the claimant] complained of any significant increase in shoulder pain."

¶ 40 The Commission's Authority to Grant Benefits Under a Repetitive Trauma Theory

¶ 41 The employer maintains that the Commission concluded *sua sponte* that the claimant's current left shoulder condition was "causally related solely to his repetitive work activities" and not to the February 13, 2006, work accident. Moreover, the employer argues the Commission's decision to grant benefits under a theory of repetitive trauma was improper and prejudicial to the employer because the claimant did not raise this theory before the arbitrator and employer did not have an opportunity to defend against a repetitive trauma theory.

¶ 42 We disagree. First, the Commission did not conclude that the claimant's current left shoulder condition was caused *solely* by his prior repetitive work activities. To the contrary, the Commission explicitly stated that it viewed the claimant's current left shoulder condition as "stemming from several causes, including the repetitive tire lifting duties [the claimant] performed with his left arm and the specific left shoulder trauma of February 13, 2006." As the employer acknowledges, the Commission found that the claimant's preexisting osteoarthritis was caused or aggravated by his repetitive work activities (*i.e.*, by years of lifting heavy tires on a daily basis). Moreover, the Commission also apparently found that the trauma that the claimant suffered on February 13, 2006, played a role in rendering the claimant's preexisting osteoarthritis symptomatic, resulting in both pain and disability. As the Commission recognized, the symptoms that became manifest immediately after the February 13, 2006, accident have not yet resolved, and the claimant needs further treatment (including a total shoulder replacement) to treat those symptoms. In sum, the Commission found that the preexisting osteoarthritis, which had been caused or aggravated by the claimant's repetitive work activities, combined with the February 13, 2006, work accident to produce the claimant's current condition of ill-being.⁸

⁸The employer asserts that the Commission "adopted Dr. Paletta's opinion that [the

¶ 43 Moreover, it was entirely proper in this case for the Commission to grant benefits under a theory of repetitive trauma. The Commission has original jurisdiction in cases which come before it. *Caterpillar Tractor Co. v. Industrial Comm'n*, 215 Ill. App. 3d 229, 237 (1991). Accordingly, the Commission may consider a new theory of recovery—even if that theory was never presented to the arbitrator and the claimant did not amend his application for adjustment of claim to include the new theory—so long as the Commission's consideration of the new theory does not prejudice a party's substantial rights. *Id.* at 238. The Commission's decision to grant benefits under a new theory of recovery does not prejudice an employer's substantial rights if the employer is aware of evidence supporting the theory before the arbitration. *Id.* at 240.

¶ 44 Here, the record was replete with evidence supporting a theory of repetitive trauma, and the employer was well aware of that evidence before the arbitration. Dr. Rothrock, the employer's initial section 12 examiner, drafted a report in which he opined that the claimant's employment was "the prevailing factor in his current state of pain and disability about his left shoulder" and that the "most likely cause" of the claimant's severe osteoarthritis was "the job that he has performed for [the employer], which has required extensive lifting of tires with _____ claimant] reached maximum medical improvement on August 18, 2008, for the specific trauma" and the subsequent treatment was related solely to the preexisting osteoarthritis. We disagree. The Commission rejected the arbitrator's conclusion that the claimant reached MMI with respect to his work-related left shoulder condition on August 18, 2008, and found that the claimant "remains in need of care for his left shoulder condition." Moreover, the Commission found that the claimant's current left shoulder condition was caused, in part, by the February 13, 2006, accident. Regardless, as shown in greater detail below, we would uphold the Commission's award of benefits even if it were based entirely on a theory of repetitive trauma.

his left dominant arm over a prolonged period." The employer received Dr. Rothrock's report more than *three years* before the arbitration hearing. Moreover, in medical records which were produced to the employer, Drs. Ahn and Paletta also opined that the claimant's osteoarthritis was either caused or aggravated by his repetitive work activities, and Dr. Paletta testified to that effect during the arbitration hearing. Further, although he disagreed with the causation opinions issued by Drs. Rothrock, Ahn, and Paletta, Dr. Nogalski (the employer's second section 12 examiner) conceded that the claimant's job duties as a tire press operator could aggravate osteoarthritis in an individual's shoulder. In addition, as the employer acknowledges, the claimant raised the theory of repetitive trauma in his briefs before the Commission. Under these circumstances, the employer cannot credibly claim that it was ambushed or that it had no opportunity to address the theory relied upon by the Commission. Thus, under the facts presented in this case, the Commission's decision to grant benefits under a theory of repetitive trauma was not improper. See *Caterpillar Tractor Co.*, 215 Ill. App. 3d at 240 (employer's substantial rights were not unduly prejudiced by the Commission's award of benefits under a repetitive trauma theory not raised before the arbitrator where medical records and other evidence provided to the employer prior to the arbitration hearing supported a repetitive trauma theory "but the [employer] failed to refute these facts despite the advance knowledge of this evidence").⁹

¶ 45

2. Causation

¶ 46 The employer also argues that the Commission's causation finding is against the

⁹The Commission's authority to award benefits under a repetitive trauma theory in this case is even clearer than it was in *Caterpillar Tractor Co.* In *Caterpillar Tractor Co.*, the Commission "considered a repetitive trauma theory without that theory being presented by either party." 215 Ill. App. 3d at 239-40. Here, by contrast, the claimant raised the theory in his briefs before the Commission.

manifest weight of the evidence. The employer's argument lacks merit. To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. *Sisbro*, 207 Ill. 2d at 205; *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981); *Swartz*, 359 Ill. App. 3d at 1086.

¶ 47 Whether an accident aggravated or accelerated a preexisting condition is a factual question to be decided by the Commission. *Sisbro*, 207 Ill. 2d at 206. In resolving disputed issues of fact, including issues related to 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. *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). We will overturn the Commission's causation finding only when it is against the manifest weight of the evidence. A factual finding is against the manifest weight of the evidence if the opposite conclusion is "clearly apparent." *Swartz*, 359 Ill. App. 3d at 1086. The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any

other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 48 Applying these standards, we cannot say that the Commission's conclusion that the claimant's current condition of ill-being is causally related to his employment was against the manifest weight of the evidence. It is undisputed that, for approximately 5 years prior to the February 13, 2006, accident, the claimant's job required him to lift tires weighing 30 to 50 pounds up to 2,000 times per day. As noted, Drs. Rothrock, Ahn, and Paletta each opined that the claimant's underlying osteoarthritis was caused or aggravated by these repetitive work activities. Moreover, Dr. Paletta opined that the claimant's osteoarthritis was the cause of his current left shoulder symptoms (*i.e.*, his current shoulder pain and the current physical disability of his shoulder) and that the claimant needed ongoing treatment for those symptoms, including a total shoulder replacement. Accordingly, regardless of the independent causal impact of the February 13, 2006, work accident (if any), there was sufficient evidence to establish that the claimant's employment was *a* causative factor in his current condition of ill-being. *Sisbro*, 207 Ill. 2d at 205; see also *Caterpillar Tractor Co.*, 215 Ill. App. 3d at 241 (affirming Commission's finding of causation where evidence showed that claimant's repetitive job activities aggravated a preexisting condition). Although Dr. Nogalski reached a different conclusion, the Commission was entitled to credit the opinions of Drs. Rothrock, Ahn, and Paletta over those of Dr. Nogalski. See *Hosteny*, 397 Ill. App. 3d at 675 (it is the Commission's province to assess the credibility of witnesses, determine what weight to give their testimony, and resolve conflicts in medical opinion evidence).

¶ 49 The employer argues that, although there is medical evidence that the claimant's repetitive work activities from 2001 to 2006 "contributed to" his osteoarthritis, it was the February 13, 2006, accident that "made the osteoarthritis symptomatic." Thus, the employer maintains, it was the claimant's February 13, 2006, accident, and *not* his prior repetitive work

activities, that gave rise to a compensable "injury." Moreover, the employer contends that the claimant reached MMI for that injury on August 18, 2008. We disagree. First, Drs. Chow and Ahn both opined that it was the claimant's osteoarthritis (rather than an independent injury suffered on February 13, 2006) that caused his left shoulder pain. Moreover, as noted above, Drs. Rothrock, Ahn, and Paletta each concluded that the claimant's repetitive work activities caused or aggravated his osteoarthritis.¹⁰ Thus, contrary to the employer's argument, there is evidence suggesting that the claimant's prior repetitive work activities played a causal role in rendering his osteoarthritis symptomatic; it is not clear that the February 13, 2006, accident was the *only* factor that played such a role. In any event, whatever caused the claimant to begin feeling pain and other symptoms, the evidence shows that those symptoms are ongoing and have not resolved, and Dr. Paletta has prescribed additional treatments for those symptoms, including a total shoulder replacement. This refutes the employer's assertion that the claimant reached MMI with respect to his work-related shoulder condition on August 18, 2008.¹¹

¹⁰As Dr. Ahn put it, if the claimant's repetitive work activities were not "fully responsible for causing the arthritis," they have been, at the very least, a "significant contributing factor to the worsening of the symptoms in that shoulder."

¹¹The employer maintains that Dr. Paletta concluded that the claimant had reached MMI as to the February 13, 2006, accident by August 18, 2008. However, Dr. Paletta never concluded that the claimant had reached MMI with respect to his work-related shoulder condition. As he explained in his October 22, 2008, report, he merely placed the claimant on MMI "following [the arthroscopy]" after he concluded that the arthroscopy was "of limited value and benefit to the [claimant]." In other words, Dr. Paletta merely concluded that the claimant had received whatever benefit he was going to receive *from the arthroscopy* by August 18, 2008; he did not conclude that the claimant's shoulder injury had reached

¶ 50

CONCLUSION

¶ 51 For the foregoing reasons, we affirm the judgment of the Jefferson County circuit court confirming the Commission's decision and remand the cause to the Commission for further proceedings.

¶ 52 Affirmed; cause remanded.

MMI. To the contrary, Dr. Paletta prescribed a shoulder replacement surgery and other treatments after August 18, 2008.