2013 IL App (4th) 111012WC-U

Workers' Compensation
Commission Division
Filed: April 18, 2013

No. 4-11-1012WC

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

ROBERT TROXELL,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Morgan County
	)	
v.	)	
	)	No. 11 MR 14
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, et al.,	)	
(Nestle, Inc.,	)	Honorable
	)	Richard T. Mitchell,
Appellee).	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hudson, Harris and Stewart concurred in the judgment.

ORDER

Held: 1. The finding of the Illinois Workers' Compensation Commission (Commission) that any employment injury the claimant suffered after January 23, 2006, is not causally related to an injury he suffered on April 15, 2005, is not against the manifest weight of the evidence.
2. The finding of the Commission that the claimant failed to give timely notice of the repetitive trauma injury he suffered after January 23, 2006, is not against the manifest weight of the evidence.

¶ 1 The claimant, Robert Troxell, appeals from an order of the Circuit Court of Morgan County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), denying him benefits pursuant to the Workers' Compensation Act (Act) (820

ILCS 305/1 et seq. (West 2008)) for low-back injuries that he allegedly received while in the employ of Nestle, Inc. (Nestle) on May 15, 2009. The claimant now appeals.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on May 12, 2010.

¶ 3 The claimant began working as an electrician for Nestle in 1993, and he testified that his job required him to maintain and fix machinery at a Nestle plant. The claimant explained that, although his duties varied from day to day, his job generally required him to stoop or squat for 15 to 20 seconds at a time, stay on his feet for extended periods, climb stairs and ladders, bend over frequently, crawl occasionally, reach overhead, and sometimes lift objects weighing up to 50 pounds. He recalled that, on April 11, 2005, shortly after moving several 50-pound bags of salt, he noticed a sharp pain in his lower back. He testified that he had never had any problems with his lower back prior to that date, but he had undergone spinal surgery two years prior.

¶ 4 On the date of his injury, the claimant sought treatment at Passavant Area Hosptital, where he was diagnosed with low-back pain and restricted to light work. A hospital examination revealed mild degenerative changes in the claimant's lumbar spine.

¶ 5 On April 13, the claimant visited Dr. Robert Gordon, who diagnosed a lumbosacral strain and ordered that the claimant not lift more than 15 pounds at work. At this time, the claimant recalled that he was experiencing tightness in his lower back and through his hips, with occasional pain in his upper legs. On April 20, the claimant returned to Dr. Gordon, who continued his prior work restrictions.

¶ 6 The claimant sought treatment with Dr. A. Kurt Savegnago on April 20, 2005. Dr. Savegnago ordered an MRI and referred the claimant to Dr. Michael McIlhany, a neurosurgeon.

¶ 7 On April 22, the claimant underwent an MRI on his lower back. The report of the MRI described a moderate central disc protrusion at L4-5 and a "significant loss of height of the intervertebral disk" and a minimal diffuse intervertebral disc bulge at L5-S1. In a treatment note

regarding his May 2 examination of the claimant, Dr. McIlhany wrote that the claimant suffered from a work-related lumbar disc herniation. Dr. McIlhany prescribed pain medication and ordered that the claimant be limited to light work. The claimant testified that the medication prescribed by Dr. McIlhany provided no lasting relief and that the tightness in his lower back would progress to pain as his work day progressed.

¶ 8 The claimant continued to treat with Dr. McIlhany through the summer. After a September 9, 2005, visit, Dr. McIlhany noted that medications were ineffective, and he recommended epidural steroid injections. The claimant testified that the injections decreased his pain but that he continued to experience the same symptoms, just to a lesser degree.

¶ 9 On January 23, 2006, the claimant visited Dr. McIlhany. According to the claimant, Dr. McIlhany told him at that time that his back would not improve with rest and that his "options at that time [were] to live with it and be very careful *** or have surgery." The claimant said that he chose the former option, because "it was manageable at the time." The claimant then returned to full work at Nestle. Dr. McIlhany's treatment note for that visit does not mention surgery but instead says that epidural injections "seemed to produce a lot of benefit." The note also states that the claimant, per his request, was released to full work duties (with a 50-pound lifting limit) and was not given a follow-up appointment.

¶ 10 The claimant testified that, "[e]ventually," he began to feel pain at work. He explained that his pain was a "0 or 1 in the morning" on a scale of 1 to 10 but "by the evening when [he] got off work it would be up to like 4 or 5." The claimant further explained the pain as follows:

> "Q. What type of activities would you be doing at work where you would notice that increase in symptoms?
>
> A. Taking water samples, stooping down, standing back up, lifting the salt bags, leaning forward, working with my hands over my head would cause noticeable pain in my hips and legs."

¶ 11 The claimant testified on cross-examination that he continued to work until finally seeking treatment in August 2008 to address his pain, which was becoming "progressively worse." The claimant testified that, as a result of this hip and leg pain, he sought additional care from Dr. Savegnago on August 18, 2008. When asked if there was a specific event that triggered his seeking additional treatment, the claimant stated that he believed that his pain was related to his April 2005 accident.

¶ 12 An August 20, 2008, MRI report stated that the claimant had degenerative disc disease at "L4-L5 and L5-S1 worse at L5-S1," as well as a mild disc bulge at L3-L4 which was causing minimal compression. Near this time, Dr. Savegnago referred the claimant to Dr. Yibing Li, a doctor at a pain management clinic.

¶ 13 In a September 11, 2008, treatment note, Dr. Li wrote that the claimant had "started to have burning pain and numbness from the lateral thigh area without weakness" approximately 6-8 weeks prior to his visit. This estimate was mirrored on an initial visit form completed by the claimant. Dr. Li noted that the claimant suffered from bilateral lateral femoral cutaneous neuropathy.

¶ 14 On September 25, 2008, the claimant returned to Dr. Li still complaining of lower back, hip, and leg pain. In her note regarding that visit, Dr. Li wrote that the claimant's MRI revealed L5-S1 degenerative disc disease and persistent discogenic back pain. She recommended two epidural steroid injections. The claimant testified that the first injection, which was administered on a Friday, provided him relief through the weekend, but that his pain returned after he worked a full day on Monday.

¶ 15 On October 9, 2008, the claimant was administered another epidural injection, and, in an October 23, 2008, treatment note, Dr. Li wrote that the claimant "show[ed] very good response" to the injection. She also wrote that she explained that his symptoms "could be the combination of repetitive trauma along with aging or degenerative changes to the disc." She added that

"[r]epetitive lifting and bending forward with poor body mechanism could aggravate the symptoms."

¶ 16 On November 6, the claimant was given yet another epidural injection. The claimant recalled that this injection "had the same effect as the first one. [He] had relief [for the weekend] and then Monday the pain started to return and by Tuesday [he] could barely walk." Dr. Li referred the claimant to Dr. Kevin Henry, who works at the Illinois Regional Pain Institute.

¶ 17 In a December 8, 2008, treatment note, Dr. Henry wrote that the claimant's nerve study results were consistent with meralgia paresthetica, and he ordered nerve block injections, which were performed in December 2008 and February 2009. The claimant testified that those injections provided him no relief.

¶ 18 On May 15, 2009, after Dr. Henry told him that his only option was to continue to receive epidural injections, the claimant visited Dr. Savegnago to discuss his continued pain. Dr. Savegnago's note for that visit states that Savegnago had "no question *** that the patient['s] symptomology [was] progressing since the last year." His assessment was that the claimant suffered from herniated disc syndrome pursuant to an L3-L4 disc herniation, and he ordered additional testing and further evaluation.

¶ 19 The claimant stated that, on the following Monday, May 18, he notified his supervisor that his work was causing him back pain and stated that he wanted to complete an accident report. According to the claimant, his supervisor told him that a report was unnecessary because "it [was] a continuation from the" April 2005 accident. The claimant nonetheless submitted a report on May 22. He testified that he did not suspect until May 19 that his work might be causing him a new repetitive stress injury.

¶ 20 On May 20, the claimant underwent an MRI examination, and the report of that examination stated that the claimant suffered from "[d]egenerative disc disease *** and facet changes at L3-L4, L4-L5 and L5-S1," as well as "[m]ild to moderate spinal canal and

neuroforaminal narrowing."

¶ 21 On June 11, 2009, the claimant saw Dr. Dennis Mollman, who wrote in his treatment note that he discussed the option of the claimant's undergoing a lumbar fusion surgery at L5-S1. Dr. Mollman also wrote that the May 20 MRI showed "significant narrowing" with disc bulging at L5-S1, significant foraminal stenosis, and root compression. On August 5, the claimant underwent the fusion surgery, and, on October 28, he was released for work without restrictions.

¶ 22 In his evidence deposition, Dr. Mollman stated that the claimant's loss of disc height at the L5-S1 level could have begun in April 2005 and continued until Dr. Mollman saw him in 2009. He also testified that lack of space between discs was a likely cause of the claimant's pain in 2009. Dr. Mollman further testified that the type of lifting the claimant performed for his job could exacerbate a degenerative disc condition. When asked whether the claimant's April 2005 injury could have caused the exacerbation of his degenerative disc disease, Dr. Mollman responded that "causality is really hard to determine, because as we age it's going to degenerate anyway" but that physical activities will aggravate symptomology. Dr. Mollman then stated that the claimant's work activities would have caused an aggravation of his symptoms. He also testified that, when he performed a fusion on the claimant's L5-S1 level, he saw no need to treat the L3-L4 or L4-L5 levels. Dr. Mollman stated that he saw no disc herniations at those levels, and he explained that it is possible for herniations to retract over time. In total, Dr. Mollman testified that the claimant most likely suffered from a pre-existing degenerative disc disease and that both work and non-work-related activities contributed to his degeneration. On cross-examination, Dr. Mollman agreed that he had reviewed only his own notes, and those of Dr. McIlhany, before testifying.

¶ 23 At Nestle's request, Dr. Andrew Zelby examined the claimant on June 19, 2009. Based on that examination and his review of the claimant's medical records, Dr. Zelby concluded that the claimant "had an injury at work in 2005 and had a good response to treatment after that

injury." Dr. Zelby noted that the claimant sought no treatment for his back for two-and-one-half years following the last treatment he received for the 2005 injury, in January 2006. Dr. Zelby observed that, during that time, the claimant was "clearly able to perform his regular job duties." Dr. Zelby opined that, when the claimant again sought treatment, "those symptoms were exclusively a manifestation of his underlying degenerative condition" and "were not related to his 2005 work injury." Dr. Zelby agreed that the type of work the claimant performed could aggravate a pre-existing L5-S1 degenerative disc disease,

¶ 24 Also at Nestle's request, Dr. Morris Soriano examined the claimant on July 14, 2005. Based on his examination and review of medical records, Dr. Soriano opined that any injury the claimant sustained at work in 2005 would have resolved over a four-week period and would not have caused any permanent injury.

¶ 25 Following a hearing, the arbitrator found in separate decisions that the claimant sustained a work-related back injury on April 11, 2005, that his condition had stabilized on January 23, 2006, and that the claimant's claim for a May 15, 2009, back injury sought benefits for a new injury without timely notice to Nestle. In so finding, the arbitrator noted that the claimant did not seek treatment for his back injury between January 2006 and August 2008, and he concluded that the claimant's April 2005 condition reached a state of permanency on January 23, 2006. With respect to the claimant's claim for symptoms that were treated after 2006, the arbitrator noted that the claimant should have been aware by October 23, 2008, that he had a work-related injury, yet did not notify his employer until May 2009. The arbitrator awarded the claimant permanent partial disability (PPD) benefits for the 10% loss of his person as a whole in relation to the April 11, 2005, accident, but he denied claimant claim benefits under the Act for the alleged May 15, 2009, injury.

¶ 26 The claimant sought review of the arbitrator's decisions before the Commission, which adopted and affirmed the arbitrator's decisions. Thereafter, the claimant sought judicial review of

the Commission's decision in the circuit court of Cass County, but the matter was later transferred to Morgan County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 27 The claimant's first argument on appeal is that the Commission erred in concluding that the back symptoms for which he sought treatment in 2008 and 2009 were causally related to a new injury, and not his April 15, 2005, workplace accident. The Commission's decision regarding causal connection will not be set aside on review unless it is contrary to the manifest weight of the evidence. Certi-Serve, Inc. v Industrial Comm'n, 101 Ill. 2d 236, 244, 461 N.E.2d 954. See Orsini v. Industrial Comm'n, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987) (Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence). For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Caterpillar, Inc. v. Industrial Comm'n, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992).

¶ 28 Here, the Commission found that the claimant's April 15, 2005, injury had stabilized by January 23, 2006, and thus that any later injuries bore no causal relationship to it. To support his argument to the contrary, the claimant relies on his own testimony that he and Dr. McIlhany discussed surgery at the claimant's January 23, 2006, treatment visit. However, Dr. McIlhany's treatment note for that visit includes no mention of any surgical option. Thus, the evidence on that point is, at best, mixed. The claimant also emphasizes the fact that his supervisor initially told him that he did not need to complete another accident report in 2009, because his symptoms were a result of his April 2005 injury. That statement, however, was not a medical opinion, and the Commission was entitled to place more reliance on the actual medical evidence the parties produced.

¶ 29 Regarding that medical evidence, the claimant points out that "Dr. Mollman testified that the MRI findings in April 2005 showed loss of disk height at L5-S1 and that [the claimant's] later

MRI findings might have been a continuation" of that problem. This equivocal testimony, however, was refuted by stronger evidence to support Nestle's position. That evidence included the claimant's medical treatment records, which indicated that Dr. McIlhany released the claimant to work in January 2006 and that the claimant sought no further medical treatment for his back for the ensuing two-and-one-half years. The evidence also included expert testimony from Dr. Zelby, who opined that the claimant's April 2005 injury had resolved itself and that any later symptoms were unrelated to his 2005 injury. Given this evidence, we conclude that the Commission's finding, that the claimant's 2008 and 2009 back symptoms were not causally related to his April 2005 workplace accident, is not against the manifest weight of the evidence.

¶ 30 The claimant's second argument on appeal is that, even if his May 15, 2009, symptoms were not related to his 2005 accident, the Commission erred in finding that he did not provide timely notice of the 2009 symptoms. The claimant does not dispute that he was required to notify his employer within 45 days of the date of his injury. See 820 ILCS 305/6(c) (West 2008). Neither does he dispute that he first provided notice of his second injury in May 2009. Instead, he argues that the Commission erred in setting the date of his second injury as October 23, 2008, instead of May 15, 2009.

¶ 31 For a repetitive trauma injury, such as the claimant's alleged back injury, the date of the injury or accident is considered to be the date on which the injury manifested itself, that is, the date on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable employee. Durand v. Industrial Commission, 224 Ill. 2d 53, 63, 72, 862 N.E.2d 918 (2007). "Setting this so-called manifestation date is a fact determination for the Commission." Durand, 224 Ill. 2d at 65. A reviewing court will not disturb the Commission's determinations of fact unless they are against the manifest weight of the evidence. Durand, 224 Ill. 2d at 64.

¶ 32 Here, the claimant argues that he could not have known by October 2008 that he had

sustained a new injury, and that he in fact did not learn of this possibility until he discussed it with Dr. Savegnago on May 15, 2009. The claimant also asserts that he was unaware of the possibility that his repetitive work was aggravating his condition. The claimant's argument rests largely on the premise, rejected above, that his 2008 and 2009 symptoms were related to his April 2005 accident. However, for the same reasons that we reject the claimant's argument that the Commission erred in finding no causal link between his two injuries, we reject his argument that the Commission erred in finding that he could have been aware of a new, repetitive stress injury. Further, as Nestle observes in its briefs, and as the Commission noted in its decision, the claimant's own testimony establishes his awareness that his condition had improved until his work activities aggravated his symptoms. In his testimony, the claimant explained that his symptoms had decreased and that he was able to work without real restrictions by January 2006. The medical evidence, which indicates that the claimant sought no medical treatment for his back for over two years after January 2006, coincides with the claimant's testimony. The claimant also testified that he "eventually" began to feel pain at work, and he attributed that pain to specific activities he performed at work. In August 2008, the claimant began to seek medical treatment for pain that he thought was becoming "progressively worse." This evidence establishes the claimant's awareness that (1) his April 2005 condition had ameliorated by January 2006, and (2) by August 2008, his repetitive work activities were causing him to experience back symptoms anew. Moreover, as the Commission noted, Dr. Li's treatment notes indicate that, on October 23, 2008, she discussed with him the possibility that his symptoms were attributable to repetitive trauma at work. Based on this evidence, we reject the claimant's assertion that the Commission's finding, that his second back injury manifested itself by October 2008 rather than May 2009, is against the manifest weight of the evidence. Because we uphold the Commission's finding that the claimant's injury occurred on October 23, 2008, we agree with the Commission that his May 2009 notice to Nestle was not timely.

¶ 33 Based upon the foregoing analysis, we affirm the judgment of the circuit court, which confirmed the decision of the Commission.

¶ 34 Affirmed.