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

ANDREW KREHER,)	Appeal from the Circuit Court
)	of Washington County.
Appellant,)	
)	
v.)	No. 12-MR-5
)	
WORKERS' COMPENSATION COMMISSION)	
<i>et al.</i> ,)	Honorable
)	Daniel Emge,
(Bechtel Construction, Appellee).)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The decision of the Commission finding that claimant did not prove the occurrence of a work-related accident is not contrary to the manifest weight of the evidence; all other issues are moot.
- ¶ 2 Claimant, Andrew Kreher, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)) alleging he sustained an

injury to his lower back while in the employ of respondent, Bechtel Construction. Claimant raises several issues; however, dispositive here is the finding of the Illinois Workers' Compensation Commission (Commission) that claimant failed to prove that he suffered a work-related accident. As that finding is not contrary to the manifest weight of the evidence, we affirm. In light of this holding, all other issues are moot.

¶ 3 Pertinent to the issue of accident and in addition to the documentary evidence presented, the following testimony was offered at the arbitration hearing. Claimant testified that he was employed by respondent for a specific construction project on March 21, 2011, as a union laborer. His position required him to assist a carpentry crew in building scaffolding. He had been working on the project since September 1, 2010, and prior to March 21, 2011, he had not experienced any low-back pain, numbness, or tingling in his legs while so employed. Prior to this project, claimant had been working as a laborer since October 2007, and he had never filed a workers' compensation claim or reported low-back pain to anyone.

¶ 4 On March 21, 2011, claimant was at work. He "started to notice a little tenderness in [his] back." As the day progressed, his back became "tighter." Claimant testified that "the last thing that [he] did specifically that [he knew] really caused [him] to hurt was [he] lifted a bag of beam clamps that [he eventually] had to go get help for [*sic*] to carry." After that, claimant continued, "[M]y back was bothering me really bad." Beam clamps weighed less than one pound apiece, and there were 20 to 25 of them in a bag. When he picked up the bag, claimant "noticed pain in [his] back that was more than it was earlier." Claimant rested his back and went to lunch; however, after lunch, his back was "really sore," so he informed his supervisor of his condition. He told his supervisor that he

would like to see the company nurse because he “felt that it was muscle spasms that were [*sic*] causing this and [he] told [his supervisor] that [he] had it before.”

¶ 5 When he got to the nurse's station, he informed the nurse that he was having muscle spasms. The nurse, James Schlichenmeyer, offered claimant Tylenol. Claimant declined, as he knew that it would not help because he “previously had muscle spasms” and “had muscle relaxers” and “anything really less doesn’t really help.” Claimant testified that he had previously been diagnosed with scoliosis when he was in the Navy. He was discharged as a result of that diagnosis. Following his discharge, he sought treatment from his physician, Dr. Schenewerk. Schenewerk told claimant that he had a “slight curve” in his spine and that if claimant was not experiencing pain at the time, treatment was not necessary.

¶ 6 Claimant reviewed the nurse’s notes, which stated that claimant told the nurse that his “back went out.” Claimant stated that this was not accurate. Further, the notes also state that claimant “denie[d] a work-related accident.” Claimant testified that the nurse never asked about the cause of his condition. The nurse did not believe that claimant could drive himself home in light of his condition, so he arranged transportation for claimant. The nurse also gave claimant a “safety concern letter,” which stated that claimant could not return to work until cleared by a doctor.

¶ 7 Claimant saw Schenewerk for that purpose. When he saw Schenewerk, the doctor placed claimant on light duty. Respondent would not accommodate claimant’s restrictions. Schenewerk ordered an MRI, which claimant underwent on April 5, 2011. The MRI revealed a bulging disc at L4-5. After he got the results of the MRI, claimant contacted respondent and first informed respondent that he believed his condition was work related.

¶ 8 Claimant subsequently came under the care of Dr. Matthew Gornet. Gornet recommended that claimant undergo surgery to correct the condition of his lower back. Since March 21, 2011, claimant experiences pain if he sits or stands for too long. He gets “sudden pain down [his] legs and in [his] back.” He is unable to lift either of his children.

¶ 9 During cross-examination, claimant acknowledged that he had problems with his lower back since the eighth grade. Generally, rather than being “related to specific activities,” “[i]t would just come on on its own.” However, claimant had not needed muscle relaxers since before 2007. Claimant answered affirmatively when asked whether he told the nurse that his back “was a personal condition” and that he “would develop muscle spasms from time to time in the past.” At the time he saw the nurse, he believed the pain he was experiencing was related to the condition he had previously experienced.

¶ 10 After claimant learned respondent would not accommodate his light-duty restrictions, claimant testified, he did not tell them his condition was work related. Claimant had an MRI scheduled the following week. After he heard the results of the MRI—a bulging disc—he contacted respondent to report his condition. It was at this time that he first told respondent that he believed the condition was work related. Claimant asked to fill out an accident report. He was told that this was not necessary, as he no longer worked for respondent. He was instructed to file a claim with respondent’s insurer.

¶ 11 When claimant first saw Gornet, he underwent a course of conservative treatment (injections and physical therapy). This afforded no relief. Since he ceased working, claimant observed, he can walk a little better, but that was the only improvement he noted.

¶ 12 James Schlichenmeyer, an “occupational health nurse” employed by respondent, next testified. Claimant came to the first-aid office on March 22, 2011.¹ Schlichenmeyer stated that his note that memorialized the claimant’s visit was accurate in stating that claimant stated his condition was not work related and that claimant’s back “spontaneously goes out from time to time.” Claimant also stated that he has had this condition “for quite sometime.” Claimant did not want any medications, as he “had some personal medication that he was already taking.” Schlichenmeyer gave claimant a “safety concern letter” and arranged a ride for claimant to his mother’s house.

¶ 13 On cross-examination, Schlichenmeyer testified that he had been working at the same project as claimant during claimant’s entire tenure there. Claimant had only come to him on one occasion for an unrelated condition. Schlichenmeyer reiterated that claimant told him that claimant’s low-back condition was personal in nature.

¶ 14 Dr. Gornet testified via evidence deposition. Gornet first saw claimant on April 8, 2011. Claimant told Gornet that his problem began when he was working for respondent on March 21, 2011, and he lifted a bag of clamps weighing 25 pounds. Claimant had felt “some tightness” earlier that day. Claimant “did not recall any previous problems of significance with his back in the past, although he stated he had a history of muscle spasms.” Claimant had been treated with “mild muscle relaxants,” but never underwent physical therapy or chiropractic care. Gornet performed a physical

¹The date on which the accident occurred is sometimes identified as March 21 and at other times as March 22. This is apparently because claimant worked the night shift, which started prior to midnight and finished thereafter.

examination. It was Gornet's opinion that claimant's condition was related to his employment with respondent.

¶ 15 Gornet again saw claimant on April 18, 2011, after reviewing an MRI. The MRI showed "a central slightly bilobular annular tear at L4-5, which was consistent with his low back bilateral buttock, bilateral leg pain." There was also "some subtle suggestion of a problem or a tear at 5-1." Gornet saw claimant on June 13, 2011, after claimant had undergone physical therapy and spinal injections. Claimant's condition had not improved significantly. Gornet recommended disc replacement surgery. He added that scoliosis has nothing to do with claimant's current condition. In fact, according to Gornet, claimant did not have significant scoliosis. Gornet also opined that claimant's subjective complaints were consistent with his objective findings.

¶ 16 During cross-examination, Gornet acknowledged that, on an intake form, claimant wrote that his condition was caused by repetitive lifting at work rather than by an acute incident involving lifting a bag of clamps. He denied observing any Waddell's signs.

¶ 17 Dr. Robert Bernardi, who examined claimant on behalf of respondent on May 31, 2011, also testified via evidence deposition. Claimant told Bernardi that, on March 21, 2011, he started his shift at 6:30 p.m. About 10:30 p.m., claimant started to notice pain in his back. Claimant related that he had previously experienced episodes of muscular back pain and that he initially believed that he was experiencing pain of that nature. He took lunch at 11 p.m. His pain was increasing. After lunch, he informed his supervisor of his condition and was sent to the nurse's station. Claimant did not "relate the onset of his symptoms to any specific incident or work activity." Claimant also related to Bernardi the course of the treatment he subsequently received.

¶ 18 At the time he saw Bernardi, claimant reported that he was experiencing pain and numbness that radiated into his groin and legs, with the right side being worse than the left side. Bernardi opined that “there really isn’t an explanation for the type of leg symptoms [claimant] describe[d].” Generally, an “irritated nerve” causes pain in a “very well described *** dermatomal distribution.” Bernardi explained that “[t]here really is no explanation for how you can get circumferential leg pain, that is, leg pain or leg numbness that involves the entire limb all the way around.” Bernardi also observed “multiple Waddell’s signs.” He added that Waddell’s signs are “often misinterpreted as signs of malingering, which they are not.” Rather, while they “can be seen in malingerers, they can also be seen in individuals who are not malingering.” In fact, they are “signs of nonorganic pain behavior, that is to say there is something other than a physical ailment that is contributing to the individual’s symptoms.” Bernardi observed positive responses on three such tests.

¶ 19 During the neurological portion of his examination, Bernardi noted ratcheting—a nonphysiological finding. He explained that “ratcheting” is when a patient repeatedly gives way when a doctor pushes on a limb “like cranking a ratchet.” He added, “[P]eople who have genuine neurological weakness do not exhibit that sort of a pattern of motor behavior.”

¶ 20 Bernardi also reviewed imaging studies, including an MRI. He noted mild curvature of the lower back and possible mild degenerative disc disease at L4-5 on X rays. The MRI also showed the degenerative disc disease at L4-5 as well as “an associated slight posterior disc bulge.” Bernardi also “thought that there might have been some slight left-sided stenosis at the L4-5 segment.”

¶ 21 Bernardi testified that, while there were indications that claimant’s condition started while he was at work, he could not relate the condition to claimant’s work activities. He based this

conclusion on four factors. First, claimant had a history of back problems, and “[p]eople who have back pain will have back pain again.” He added that very few people who experience such problems have the pain go away and never return. Second, there were no “acute or posttraumatic abnormalities on [claimant’s] MRI scan.” The types of abnormalities observed were chronic and “were present prior to” March 21, 2011. Third, while claimant’s symptoms may be “consistent with an annular tear or disc disease at L4-5,” “[t]hey are also consistent with a wide variety of other processes.” Moreover, claimant’s “clinical presentation is actually dominated by nonphysiological factors.” Fourth, claimant “did not describe any singular event as causing his symptoms” to the nurse of Bernardi. Bernardi also testified that he did not see the annular tear in the MRI that was described by Gornet.

¶ 22 Bernardi opined that claimant’s work did not cause his condition of ill-being. Further, he would not recommend claimant undergo a discography. He did not believe claimant was a candidate for surgery of any type. He did, however, believe that additional physical therapy and work hardening would be a reasonable course of treatment.

¶ 23 Bernardi issued a supplemental report after he reviewed a discography that had been ordered by Gornet after Bernardi’s initial involvement in this case. Gornet indicated that the test showed that the L4-5 level was “the pain generator.” Bernardi stated that he could not come to that same conclusion based on the discography. He believed that discographies do not “have any clinical relevance.” He added, “I used to get a wild hair and try to use discography on a patient, and my outcomes from surgery were so incredibly poor that I quit doing it.” Bernardi expressly disagreed with Gornet’s recommendation that claimant undergo a disc replacement at the L4-5 level.

¶ 24 During cross-examination, Bernardi agreed that claimant did have back problems predating March 21, 2011. He further agreed that claimant performed a “physical job.” He acknowledged that if the history presented to him and the nurse was not accurate, he would have to reconsider his opinions. Bernardi agreed that claimant developed back pain at work on March 21, 2011. He had no opinion on whether claimant’s work activities aggravated a preexisting condition. He later opined that “the role of occupational factors in this type of aggravation has been grossly overestimated.” He acknowledged that he never saw a second MRI ordered by Gornet. Bernardi testified that the type of abnormality observed in claimant could, in fact, cause groin and testicular pain, but leg pain was unlikely.

¶ 25 The arbitrator found claimant did not meet his burden of proving an accident arising out of and occurring in the course of his employment with respondent. He first noted claimant’s history of back pain. He then observed that it was claimant’s burden to prove a definite accident and that, to this end, claimant testified regarding lifting a bag of clamps weighing about 25 pounds. The arbitrator found it significant that claimant did not tell the nurse of this event, despite allegedly relating it to his supervisor just before seeing the nurse. Schenewerk also did not record a history of a workplace accident. Moreover, claimant did not tell respondent his condition was work related until after respondent refused to accommodate claimant’s light-duty restrictions. When he presented for a physical-therapy evaluation, claimant simply stated that he was standing at work and developed muscle spasms without mentioning a specific accident. Similarly, he made no mention of the accident when he completed a handwritten history for Gornet. He also did not mention the alleged accident to Bernardi. The arbitrator then found claimant’s “testimony regarding the March 21

accidental injury not to be credible.” Moreover, to the extent they were based on claimant’s history of an accident occurring when lifting the bag of clamps, the arbitrator also found that Gornet’s report and opinion were not credible. In turn, the arbitrator concluded that claimant did not carry his burden of proving the occurrence of a work-related accident. The Commission adopted the decision of the arbitrator and affirmed.² The circuit court of Washington County confirmed the Commission, and this appeal followed.

¶26 We agree with the circuit court that the Commission’s decision is not contrary to the manifest weight of the evidence. Whether claimant’s condition is attributable to a work-related accident presents a question of fact. *Caterpillar Tractor Co. v. Industrial Comm’n*, 92 Ill. 2d 30, 37 (1982). As such, the manifest-weight standard guides our review, under which we will reverse only if an opposite conclusion is clearly apparent. *University of Illinois v. Industrial Comm’n*, 365 Ill. App. 3d 906, 910 (2006). It is primarily the role of the Commission, as trier of fact, to resolve conflicts in and attribute weight to the evidence. *O’Dette v. Industrial Comm’n*, 79 Ill. 2d 249, 253 (1980).

²We note that the Commission also remanded this case to the arbitrator for “further proceedings of a further amount of temporary total disability or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm’n*, 78 Ill. 2d 327, 399 (1980).” As the arbitrator determined that claimant did not suffer an at-work accident and denied claimant’s request for compensation, we believe that this language was included in the Commission’s order in error. If there was some reason not apparent to us that this cause should be remanded, either party may file a motion to reconsider seeking a remand.

This is particularly true regarding medical evidence due to the Commission's long-recognized expertise in this area. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). Assessing the credibility of witnesses is also a matter primarily for the Commission. *O'Dette*, 79 Ill. 2d at 253.

¶ 27 Furthermore, it is axiomatic that a claimant bears the burden of proving each and every element of a claim for compensation. *Navistar International Transportation Corp. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1202 (2000). One such element is the occurrence of a work-related accident. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 188 (1999). Our supreme court has explained that an " 'accident' is not a technical legal term but encompasses anything that happens without design or an event which is unforeseen by the person to whom it happens" and that "an injury is accidental within the meaning of the Act when it is traceable to a definite time, place and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee." *International Harvester Co. v. Industrial Comm'n*, 56 Ill. 2d 84, 88-89 (1973). Unless it is contrary to the manifest weight of the evidence, the Commission's finding that claimant failed to prove that he suffered a work-related accident is dispositive here.

¶ 28 In arguing that the Commission's decision is contrary to the manifest weight of the evidence, claimant points to his testimony that the injury occurred while he was lifting a bag of clamps. The problem for claimant is that the Commission found this testimony incredible. In support of this finding, the Commission noted that claimant did not report such an event when he saw the company nurse on the day of the accident. Also, his treating physician (Schenewerk) did not record a history of such an accident. Further, claimant made no mention of this alleged cause of his condition in a handwritten history he prepared for Gornet or during a physical-therapy evaluation. He also did not

relate anything of this nature to Bernardi.

¶ 29 Claimant counters that what he told the nurse is in dispute; however, he provides us with no reason that the Commission could not accept the nurse's version of what transpired during claimant's visit to the nursing station rather than claimant's version. Claimant contends that he was not sure of the cause of his condition when he went to the nurse's station and that it was only after he got the results of the initial MRI (performed April 5, 2011) that he first believed his condition was work related. While that is certainly one plausible interpretation of the evidence, it is not the only one. Another possible conclusion is that the alleged accident never occurred. The Commission came to the latter conclusion (or, more specifically, it found that claimant did not prove that this accident occurred). Claimant does not explain why his interpretation of these events is so persuasive that the Commission was compelled to accept it. Moreover, we note that this argument is undermined to a degree by the fact that claimant also did not mention this accident to Bernardi nearly two months after the MRI, when claimant would have purportedly already known that his condition was caused by a work-related accident. In sum, we can find no error in the Commission's decision.

¶ 30 Claimant argues that his medical records support his testimony that he suffered a work-related accident on March 21, 2011. He points out that Schenewerk's notes indicate an onset date of March 21, 2011. They also state that his symptoms occurred while he was standing at work and that he was working as a laborer putting up scaffolding. Claimant also points to the report of the first MRI, which states that he was experiencing pain for two weeks. The MRI was taken exactly two weeks after March 21, 2011. All of these records merely indicate that claimant's back became symptomatic on March 21, 2011, while he was at work. This proposition is not in dispute. As the

arbitrator noted, claimant's "development of lower back pain while work [*sic*] is not enough to make this an accidental injury, [claimant] must show he was doing something at work." These records say nothing about the actual cause of claimant's condition.

¶ 31 Claimant also asserts that the Commission ignored the testimony of Gornet. However, the Commission expressly found his report and opinion to lack credibility. Further, we acknowledge that claimant did report to Gornet the version of events to which he testified at trial. As such, Gornet's records corroborate claimant's testimony to a degree. However, claimant failed to report such events on five other occasions (to the nurse, to Bernardi, to Schenewerk, during the physical-therapy evaluation, and in the written history provided to Gornet). Thus, whatever the corroborative value of claimant's oral report to Gornet, in light of these other instances where claimant made no mention of the alleged accident, we cannot say that an opposite conclusion to the one reached by the Commission is clearly apparent. See *University of Illinois*, 365 Ill. App. 3d at 910 (holding that the decision of the Commission on a question of fact will be reversed only if an opposite conclusion is clearly apparent).

¶ 32 In sum, though there is some evidence supporting claimant's position, there is a significant amount of evidence supporting the Commission's decision. Accordingly, its decision is not against the manifest weight of the evidence (see *id.*), and we affirm it.

¶ 33 Affirmed.