2016 IL App (1st) 152355WC-U

Order filed: November 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MENARD INC.,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	Appeal No. 1-15-2355WC
	)	Circuit Nos. 12-L-51085, 13-L-50734,
	)	14-L-50886
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*, (Mark Hagan,	)	Honorable
	)	Robert Lopez-Cepero,
Defendants-Appellees).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) The circuit court did not prejudice the employer's appeal by remanding the matter to the Commission twice or by issuing an Order to Show Cause to the Commissioners *sua sponte*; (2) the Commission's finding that the claimant's condition of ill-being in his lumbar spine was causally related to a work-related accident was not against the manifest weight of the evidence; (3) the Commission's award of medical expenses did not violate the "two-physician" rule; (4) the Commission's award of TTD benefits after November 5, 2009, was not against the manifest weight of the evidence; (5) the Commission's award of medical expenses was not against the manifest weight of the evidence; and (6) the Commission's award of prospective medical treatment was not against the manifest weight of the evidence.

¶ 2 The claimant, Mark Hagan, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries to his middle and lower back allegedly sustained on August 10, 2009, while he was employed as an outside yard receiver by Menard, Inc. (employer). Following a hearing on March 15, 2011, the arbitrator found that the claimant had failed to establish that he current condition of ill-being after November 5, 2009, was causally related his employment. Specifically, the arbitrator found that the claimant had failed to establish any causal relationship between his work and any injury to the lumbar spine, and limited compensation to benefits and expenses related to the thoracic spine only. The arbitrator awarded temporary disability benefits and medical expenses for the period ending November 5, 2009. The claimant sought review of the arbitrator's award before the Illinois Workers' Compensation Commission (Commission), which, with one dissent, reversed the decision of the arbitrator. The Commission found that the claimant had established that the condition of ill-being of the lumbar spine was also causally related to the accident. The Commission further awarded medical expenses related to the claimant's lumbar spine injury, temporary total disability benefits through the date of the hearing, and prospective medical treatment for the claimant's current condition of ill-being of the lumbar spine.

¶ 3 The employer then sought judicial review of the Commission's decision before the circuit court of Cook County. Judge Robert Lopez-Cepero remanded the matter to the Commission with instructions to specifically address why it had made certain credibility determinations. The Commission issued a decision on remand in which the Commission unanimously reiterated the prior decision while attempting to provide additional detail as to its reasoning in the prior decision. The employer filed a timely request for judicial review. Judge Lopez-Cepero again remanded the matter to the Commission with instructions that a supplemental decision be issued

"that articulates the weight [the Commission] is affording to all of the credible evidence." The Commission thereafter issued a third decision again reiterating its reasoning and conclusions regarding the claimant's entitlement to benefits under the Act. The employer again filed a petition for judicial review and the matter was again assigned to Judge Lopez-Cepero. At oral arguments, Judge Lopez-Cepero advised the parties that the court would *sua sponte* issue a Rule to Show Cause ordering the majority Commissioners to appear before the court. Apparently, Judge Lopez-Cepero was looking into possible "*Himmel* violations" on the part of these Commissioners. The Commission filed a motion to dismiss the Rule to Show Cause Order, which was denied by Judge Lopez-Cepero. Commissioner Thomas Tyrrell testified in response to the show cause order. Following the hearing, Judge Lopez-Cepero entered an order confirming the decision of the Commission. The employer filed this timely appeal.

¶ 4 BACKGROUND

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on March 15, 2011.

¶ 6 The claimant testified that he was 25 years old on August 10, 2009, and had been working for the employer as a materials receiver for approximately five months. His duties were to unload trucks with a forklift and break down freight. The claimant testified he was injured while unloading a pallet loaded with cabinets. The claimant further testified that his manager was operating the forklift while he was holding a gate open so the forklift could lift the load up to the second story level of a storage rack. The claimant saw that he was in the path of the forklift and tried to tell the manager. As the claimant tried to move clear of the forklift, he was pinned between a pallet of cabinets and the wall. He yelled out that he was being crushed. The

manager moved the forklift away from the claimant, however the forklift lurched forward into the claimant immediately prior to backing away from the claimant.

¶ 7 The claimant testified that "the whole front of [his] body minus part of [his] neck to the left side of his head, and the whole back of [his] body was against the wall, with the exception of [his] right arm." He further explained that his right arm was the only part of his body that was not pinned between the wall and the load on the forklift. The claimant also testified that he remained pinned between the wall and the load for 45 seconds to a minute. He testified that he was not cognizant of pain at the moment, but rather felt a sense of "pure shock."

¶ 8 After the incident, the claimant was instructed to report to Ingalls Urgent Aid for post-accident drug testing. He testified that he asked for medical treatment but was refused. He further testified that while in the process of testing, he reported that his back was hurting. He was told that the employer had called Ingalls and instructed that the claimant be denied any treatment at that time.

¶ 9 On August 12, 2009, the claimant sought treatment from Dr. Sylvia McKnight, an internist associated with Concentra Medical Center. The record established that Concentra was the employer's "company clinic." The claimant described the August 10, 2009, accident and reported pain in the middle back area. Dr. McKnight noted that x-rays of the thoracic spine were negative and that her examination of the lumbar spine revealed no indications of spasms. Dr. McKnight diagnosed thoracic strain and prescribed pain medication. She placed the claimant on light-duty work restrictions.

¶ 10 On August 14, 2009, the claimant again sought treatment from Dr. McKnight. Dr. McKnight reported the claimant complained of worsening symptoms of pain in the middle back. She further noted spasms and radiating pain "up and down the back." She continued the pain

medication and work restrictions and ordered physical therapy. The claimant presented for physical therapy at Concentra the same day.

¶ 11 The record established that the claimant gave a report to the physical therapist of both thoracic and lumbar pain. The written notes of the physical therapist contained an entry dated August 14, 2009, noting that the claimant was "referred for therapy with medical diagnosis of lumbar/thoracic strain." The report further documented the claimant's chief complaint as "pain in the lumbar, thoracic area" and tenderness in the "thoracolumbar, lumbar, areas." Physical therapy notes for treatments received on August 17, 2009, and August 21, 2009, reported the claimant's continuing pain symptoms in the thoracolumbar area.

¶ 12 On August 21, 2009, the claimant again sought treatment from Dr. McKnight. Dr. McKnight's treatment notes indicate the claimant reported pain "to the mid and low back." Dr. McKnight diagnosed thoracic strain, contusion of the thorax, and contusion of the lumbar spine. The treatment notes did not contain any diagnostic or treatment modalities specifically directed to the lumbar spine.

¶ 13 On August 28, 2009, the claimant was again treated by Dr. McKnight. The claimant reported increasing mid-back pain, with occasional radiating pain into the neck. The claimant further reported pain in the low back with some weakness in the legs. Dr. McKnight observed moderate tenderness located in the mid-thoracic spine and the mid-lumbar spine. The bilateral straight leg test was negative and she reported no palpable spasms in the low back. Dr. McKnight's treatment notes continued the previous diagnosis of thoracic strain, contusion of the thorax, and contusion of the lumbar spine. However, she ordered a diagnostic MRI for the thoracic spine only.

¶ 14 On September 4, 2009, the claimant received a physical therapy session. The report of that session noted possible "over reactive pain" and "guarding." The claimant's range of motion was reported as normal except for possible patient self-limiting.

¶ 15 Following the physical therapy session, the claimant was examined by Dr. Rolando Garces at Concentra. Dr. Garces noted the claimant reported lumbar and thoracic spinal pain. (The arbitrator found it to be significant that Dr. Garces reported "upper" lumbar pain, not "lower" lumbar pain.) Dr. Garces reported negative straight leg raise on the left and positive straight leg on the right at 45 degrees. He also reported decreased range of motion due to complaints of tenderness and spasms in the paraspinous muscles from T8 through L4. Dr. Garces diagnosed thoracic and lumbar strain. He prescribed Medrol Dosepak, and continued the previously prescribed medication and work restrictions.

¶ 16 After being examined by Dr. Garces, the claimant presented that same day for an MRI of the thoracic spine. The MRI was subsequently read as unremarkable. The claimant testified that after undergoing the MRI, he experienced pain in the middle and lower back. He sought treatment at the emergency department of Advocate Christ Hospital, where a written report indicated the claimant reported with "middle, back injury, back pain, back weakness, back tenderness" and right leg weakness and numbness following an MRI. The report included a diagnosis by the emergency physician as "back pain [with] L4 radiculopathy." It was recommended that he follow up with an orthopedic evaluation.

¶ 17 On September 10, 2009, the claimant was again treated by Dr. McKnight. The claimant reported symptom improvement, with continuing pain but less spasm. She again diagnosed contusion of the lumbar spine as well as thoracic strain and contusion of the thorax, and continued his medication and work restrictions.

¶ 18 On September 17, 2009, the claimant was discharged from physical therapy with a report of no further need for therapy as his performances were within normal limits, except for a perception of possible self-limiting.

¶ 19 On that same date, September 17, 2009, the claimant was examined by Dr. Afiz Taiwo at Concentra. Dr. Taiwo examined the claimant, noting only normal range of motion with self-limiting and subjective reports of pain. Dr. Taiwo discharged the claimant from further treatment and released him to unrestricted work duties.

¶ 20 On September 18, 2009, the claimant presented for treatment with Dr. Anis Mekhail, a board certified orthopedic surgeon associated with Parkview Orthopedic Group. The claimant had been referred to Parkview by the emergency physician at Advocate Christ Hospital. Dr. Mekhail diagnosed back strain and placed the claimant on complete restriction from work and ordered physical therapy. Dr. Mekhail then referred the claimant to Dr. Russell Glantz, a neurologist. This referral was made due to possible neurological pathologies revealed following the claimant's MRI.

¶ 21 On October 8, 2009, the claimant was again treated by Dr. Mekhail. The claimant continued to report back pain, but also reported improvement following physical therapy.

¶ 22 On October 25, 2009, the claimant was examined by Dr. Glantz, who ordered a brain MRI for migraine evaluations.

¶ 23 November 9, 2009, the claimant was seen for a final time by Dr. Mekhail. Following an additional round of physical therapy, Dr. Mekhail opined that the claimant was in need of no further medical treatment and released him to unrestricted work.

¶ 24 On November 16, 2009, the claimant sought treatment from Dr. Ronald Michael, a board certified neurosurgeon. The claimant was not refereed to Dr. Michael by any previously treating

physician. The claimant gave a history of injury at work and reported complaints of back pain following the accident. Dr. Michael ordered MRIs of both the lumbar and thoracic spine, which were completed on January 15, 2010.

¶ 25 On February 2, 2010, Dr. Michael referred the claimant to Dr. Suneela Harsoor, who recommended a series of lumbar epidural steroid injections. The record established that the claimant received lumbar injections on April 22, 2010, May 7, 2010, and May 20, 2010.

¶ 26 The MRI results were interpreted by both Dr. Harsoor and Dr. Michael. Dr. Harsoor opined that the MRI of the lumbar spine revealed only degenerative pathologies. Dr. Michael, however, opined that the MRI of the lumbar spine revealed desiccation at L3-L4 and disc protrusion at L4-L5. Based upon his reading of the lumbar spine MRI, Dr. Michael recommended a discogram of the lumbar spine, which he performed on September 14, 2010. Following the discogram, Dr. Michael diagnosed protrusions at L3-L4 and L4-L5. Dr. Michael then ordered a diagnostic CT of the lumbar spine, which confirmed protrusions at L3-L4 and L4-L5. By evidence deposition, Dr. Michael described the CT test as the most efficient at revealing annular tears presenting with protrusions. He further noted that the CT performed on the claimant was particularly adept at revealing a significant annular tear at L5, which he described as a level that was largely ignored by all the claimant's providers, including himself initially. Dr. Michael opined that he was in the best position of all the examining and treating physicians to diagnose lumbar protrusion since he alone had the results of all diagnostic testing. He explained: "to simply dismiss the [claimant] on the basis of a single CT scan or a single MRI scan leads us to miss pathologies far too often, but when I have an MRI, a discogram and a CT, a post-discogram CT, I have much more information [and] can more confidently arrive at a good diagnosis." Dr. Michael recommended lumbar fusion or compression surgery.

¶ 27 The claimant was examined at the request of the employer by Dr. David Fardon, a board certified orthopedic spinal surgeon. These examinations occurred on October 30, 2009, and November 16, 2009. Dr. Fardon disagreed with Dr. Michael's diagnosis and treatment plan. He opined that the claimant's pathologies at L3-L4 and L4-L5 were not as clear and prominent as Dr. Michael opined. Dr. Fardon further opined that any condition of ill-being of the claimant's lumbar spine was degenerative in nature and thus not related in any way to the August 10, 2009, accident. In reaching that conclusion, Dr. Fardon opined that the annular tear noted in the post-discogram CT was not consistent with a traumatic injury.

¶ 28 At the arbitration hearing, the claimant was instructed to physically demonstrate where the pain was located on his back. The arbitrator noted that the claimant indicated the area of his mid back "above his belt line and going up." The arbitrator interpreted the "area above his belt line and going up" as a clear indication that the involved area was *not* the lumbar spine.

¶ 29 The arbitrator found the opinion of Dr. Fardon to be credible and of more weight than Dr. Michael's opinion testimony. In addition, the arbitrator found that the medical history did not reveal any complaints of lumbar pain until the claimant began treating with Dr. Michael. Along with the observation regarding the "area above the belt" comment, the arbitrator found that the claimant had failed to establish that his condition of ill-being regarding the lumbar spine was casually related to the August 10, 2009, accident.

¶ 30 The claimant sought review of the arbitrator's award from the Commission. The Commission majority reversed the decision of the arbitrator. Specifically, the Commission found the testimony of Dr. Michael regarding the claimant's lumbar spine pathologies to be credible and consistent with the diagnostic testing. The Commission credited Dr. Michael's testimony regarding the diagnostic value of the post-discogram CT scan in reaching the

conclusion that the claimant suffered from traumatic injury rather than degenerative disc disease, particularly at L5. Further, the majority found evidence in the record that the claimant had reported post-accident lumbar pain on more than one occasion prior to treating with Dr. Michael. Moreover, the Commission inferred that it was reasonable to believe that the claimant injured both his thoracic and lumbar spine given the claimant's unrebutted testimony that his entire back was pinned against the wall. Also, the Commission specifically disagreed with the arbitrator's interpretation of the claimant's "above the belt line" statement as excluding the lumbar region, finding that "it is reasonable to believe that 'above the belt line' encompasses the lumbar spine." Based upon the totality of the evidence, the Commission found that the claimant had met his burden of establishing that his current condition of ill-being of the lumbar spine was causally related to the August 10, 2009, industrial accident.

¶ 31 The employer then sought review in the Circuit Court of Cook County, which ultimately confirmed the decision of the Commission. The employer then filed this timely appeal.

¶ 32 ANALYSIS

¶ 33 I. Circuit Court Rulings as Possible Prejudice

¶ 34 The employer first maintains that the actions of the circuit court in twice remanding the matter to the Commission and issuing a *sua sponte* Order to Show Cause to the Commissioners somehow prejudiced its position on the ultimate issues. This argument has no merit. While the actions of the circuit court were highly unusual, it is well settled that this court reviews the decision of the Commission, not the order of the circuit court. *Roadway Express, Inc. v. Industrial Comm'n*, 347 Ill. App. 3d 1015, 1020 (2004).

¶ 35 II. Causation

¶ 36 The employer next maintains that the Commission erred in finding that the claimant had established a causal connection between his current condition of ill-being of the lumbar spine and the industrial accident of August 10, 2009. Whether a claimant has established the requisite causal connection between his current injuries and an industrial accident is a question of fact for the Commission to determine and that determination will not be overturned on appeal unless it is against the manifest weight of the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). Where the Commission rejects the determinations of the arbitrator, our inquiry remains whether the Commission's determination is against the manifest weight of the evidence. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866 (2010). The appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Id*. In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact 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 (1992).

¶ 37 In the instant matter, the employer maintains that the Commission erred in rejecting the opinion of Dr. Fardon and crediting the opinion of Dr. Michael. It further maintains that the arbitrator correctly determined that the record was void of evidence of complaints of lumbar pain prior to the claimant treating with Dr. Michael. We find, to the contrary, that the record contains sufficient evidence from which the Commission could reasonably conclude that the claimant had reported lumbar pain prior to treating with Dr. Michael. There are notations in Dr. McKnight's records as well as the physical therapy records that record complaints or observations of lumbar pain. Her first treatment record noted the claimant reported pain "down the back." Dr.

McKnight's records contain a diagnosis of lumbar strain. The emergency department records reported "back pain [with] L4 radiculopathy."

¶ 38 Additionally, the Commission noted the unrebutted testimony of the claimant that his entire back was involved in the accident, and inferred from that testimony that the injury to the lumbar region was extremely likely. It cannot be said that this inference was beyond the purview of the Commission. The Commission's determination that "above the belt line" included the lumbar region was likewise an inference that was not against the manifest weight of the evidence.

¶ 39 Regarding the Commission's decision to credit the opinion testimony of Dr. Michael over that of Dr. Fardon, it is well-settled that it is for the Commission to determine which medical opinion is to be accepted or given greater weight. *Piasa Motor Fuels v. Industrial Comm'n*, 368 Ill. App. 3d 1197, 1206 (2006). We note that the only physicians to opine on the causation of the claimant's lumbar condition were Drs. Michael and Fardon. Because Dr. Michael's opinion included a more substantial discussion of the diagnostic testing than did Dr. Fandon's opinion, the Commission decided to give greater weight to Dr. Michael's opinions. Additionally, given the Commission's factual finding that the claimant's entire back, including the lumbar spine, was crushed between the wall and the load, the Commission could reasonably infer that Dr. Fandon's opinion of no lumbar injury was less credible. Viewing the record in its entirety, we cannot say that the Commission's decision regarding causation was against the manifest weight of the evidence.

¶ 40 III. Two Physician Rule

¶ 41 The employer next maintains that Dr. Michael was the claimant's third choice of physician, thus his expenses are not payable under section 8(a) of the Act. 820 ILCS 305/8(a)

(West 2008). An employer's liability to pay for medical services is limited to first aid and emergency treatment plus two additional physicians chosen by the claimant as well as those providers recommended by the claimant's two physicians. The determination as to whether a medical provider is the choice of the claimant or within a chain of referral from a chosen provider is a question of fact for the Commission to determine subject to the manifest weight of the evidence standard of review. *Bassgar, Inc. v. Illinois Workers' Compensation Comm'n*, 394 Ill. App. 3d 1079, 1085 (2009).

¶ 42 We note that the issue of whether Dr. Michael was the claimant's third chosen physician was not raised by the employer before the Commission. Issues or defenses not raised before the Commission are deemed forfeited and will not be considered upon judicial review. *Carter v. Illinois Workers' Compensation Comm'n*, 2014 IL App. (5th) 130151WC, ¶32. We therefore deem the issue to have been forfeited.

¶ 43 Were we to address the employer's argument, we note that the employer maintains that Concentra constituted the claimant's first choice, even though Concentra and its physicians were clearly chosen by the employer. Without citation to authority, the employer maintains that by continuing to treat with Concentra physicians after the first aid phase, the claimant adopted Concentra physicians as his "first choice." Given that the employer presents no authority for this argument, we decline to address it. *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC ¶ 33.

¶ 44 IV. TTD Benefits, Medical Expenses, Prospective Treatment

¶ 45 The employer next maintains that the Commission erred in awarding TTD benefits after November 5, 2009, medical expenses incurred after that date, and prospective treatment for the claimant's lumbar spine condition. This argument is based entirely upon the supposition that the

Commission erred in finding that the claimant's condition of ill-being of the lumbar spine was against the manifest weight of the evidence. As we have upheld the Commission's finding on causation, we need not address this issue further. *Tower Automotive v. Illinois Workers' Compensation Comm'n,* 407 Ill. App. 3d 427, 436 (2011).

¶ 46 For the foregoing reasons, the Commission's determination that the claimant established that his current condition of ill-being related to the lumbar spine was causally related to an industrial accident on August 10, 2009, was not against the manifest weight of the evidence.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the Commission's decision, and we remand the matter to the Commission for further proceedings.

¶ 49 Affirmed; cause remanded.