Workers' Compensation
Commission Division
Order Filed: December 23, 2016

No. 1-15-3432WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DOUGLAS HOLLERAN,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 15 L 50279
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*	)	Honorable
	)	Edmund Ponde de Leon,
(ND Industries, Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* We affirmed the judgment of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission, awarding the claimant benefits pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010)) for a work-related injury to his spine, but denying him benefits for an alleged injury to his right hip. We rejected the claimant's arguments that the arbitrator considered evidence outside of the record and relied upon personal knowledge in reaching her decision which the Commission affirmed and adopted. We also rejected the claimant's argument that the arbitrator erred in admitting a surveillance video of him into evidence.

¶ 2 The claimant, Douglas Holleran, appeals from an order of the circuit court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding him benefits pursuant to the Workers Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)) for injuries sustained to his spine while working for ND Industries (ND), but denying him benefits for the condition of his right hip. The claimant argues that the arbitrator, whose decision the Commission affirmed and adopted, relied upon her personal knowledge of disputed evidence and considered evidence outside of the record. The claimant also argues that a surveillance video of him was erroneously admitted into evidence. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing.

¶ 4 The claimant was employed by ND as a shipping and receiving coordinator. He testified that, as he was lifting 60-pound boxes of paper while working on February 23, 2011, he felt a shooting pain in his groin, back, hip, and tailbone. According to the claimant, he reported the incident to his supervisor and was told to go home.

¶ 5 On that same day, the claimant went to the Northwest Community Hospital Medical Group (Northwest) where he was seen by Dr. Nancy Koch. The records of that visit reflect that the claimant complained of pain in his lower back. Dr. Koch prescribed medication, advised the claimant to remain off of work, and scheduled a follow-up appointment.

¶ 6 The claimant returned to Northwest for follow-up care on February 28, 2011, complaining of pain in his lower back which radiated into his right buttock. Dr. Ronnie Ghuneim ordered an MRI of the claimant's thoracic and lumbar spine which was performed on that same day. The scan revealed a slender right paramedian T12-L1 disc extension, an

encroachment on the thecal sac, and a disc dissection and bulge with small spurs at L3-L4. The scan also revealed that the L5-S1 space appeared relatively preserved without stenosis or nerve displacement.

¶ 7 The claimant continued under the care of the physicians at Northwest in March 2011. He reported persistent back pain, radiating into his right thigh, and was prescribed pain medication. The treating physicians diagnosed a herniated lumbar disc and advised the claimant to remain off of work.

¶ 8 When the claimant was examined by Dr. Koch on April 8, 2011, she noted that the medication which had been prescribed for the claimant offered only minimal relief. Dr. Koch prescribed physical therapy and referred the claimant for pain management.

¶ 9 On April 21, 2011, the claimant was seen by Dr. Luz Feldmann, a pain management specialist. The notes of that visit state that the claimant complained of pain in his lumbar spine, radiating to the right buttock and groin. Dr. Feldmann diagnosed a herniated lumbar disc and administered an epidural steroid injection.

¶ 10 When the claimant next saw Dr. Feldmann on May 12, 2011, he was still complaining of back pain. Dr. Feldmann prescribed pain medication and advised the claimant to remain off of work until his next appointment.

¶ 11 When the claimant returned to see Dr. Feldmann on June 9, 2011, he complained of continuing back pain and itching in both hands and arms. Dr. Feldmann adjusted the claimant's medications.

¶ 12 On July 7, 2011, Dr. Feldmann authored a letter in which he recommended that the claimant complete physical therapy and then enter a work-hardening program. The doctor wrote

that he had no further options for treating the claimant and advised him to follow up with his primary care physician for a release back to work.

¶ 13 On July 22, 2011, Dr. Koch authored a note stating that the claimant was unable to return to work until further notice. She referred the claimant to Dr. Richard Rabinowitz at Barrington Orthopedic Specialists (Barrington Orthopedics).

¶ 14 On July 27, 2011, the claimant was examined by Dr. Alexander Ghanayem, an orthopaedic surgeon, at the request of ND. In his report of that date, Dr. Ghanayem wrote that he reviewed the claimant's medical records and radiographs and conducted a physical examination of the claimant. He noted his disagreement with the diagnosis that the claimant had a disc herniation at T12-L1; he believed that the finding at that level was of a degenerative condition. According to his report, Dr. Ghanayem found that the claimant's low back pain could be related to an aggravation of his underlying disc degeneration. He recommended that the claimant continue physical therapy and conservative treatment for the following four to six weeks after which he believed that the claimant should be able to return to regular work activities. As of the date of his report, however, Dr. Ghanayem recommended that the claimant be restricted from lifting no more than 15 pounds with no repetitive bending or stooping.

¶ 15 The claimant was examined by Dr. Rabinowitz on August 9, 2011. As a result of that examination, Dr. Rabinowitz concluded that the claimant's complaints of low back pain represented a non-surgical problem, best managed with non-surgical treatment. He recommended that the claimant remain off of work and referred him to a physical medicine and rehabilitation specialist.

¶ 16 The claimant was seen by Dr. Koch on both September 1 and 2, 2011, still complaining of low back pain. Dr. Koch prescribed a TENS unit. When the claimant returned for follow-up

treatment on September 21, 2011, he reported no improvement in his symptoms. Dr. Koch referred the claimant back to Dr. Feldmann for another epidural steroid injection.

¶ 17 When the claimant saw Dr. Koch on October 7, 2011, he again reported persistent low back pain. Dr. Koch's note of that date states that the claimant had not improved despite physical therapy, work conditioning, medication, and placement of a TENS unit. Dr. Koch again authored a note stating that the claimant was unable to work. She referred the claimant to Dr. Brooke Belcher, a pain management specialist at Barrington Orthopaedics.

¶ 18 Dr. Ghanayem again examined the claimant at the request of ND on October 27, 2011. In his report of that examination, Dr. Ghanayem wrote that he did not believe that the claimant was at maximum medical improvement (MMI). He noted tenderness in the claimant's mid lower lumbar spine and "a lot" of stiffness with range of motion. According to the report, the claimant was able to stand with normal posture and walk with a slow but even gait. Dr. Ghanayem found it reasonable that the claimant have several more lumbar epidural injections and additional physical therapy after which he should be able to return to his regular work activities. As of the date of his examination, Dr. Ghanayem believed that the claimant could perform light-duty work with a 15 pound lifting restriction and no repetitive bending or stooping.

¶ 19 The claimant was first seen by Dr. Belcher on November 18, 2011. The doctor's notes of that visit reflect that the claimant complained of low back pain. Dr. Belcher administered an epidural steroid injection and prescribed additional injections and physical therapy. She also advised the claimant to remain off of work.

¶ 20 The claimant returned to see Dr. Belcher on December 9, 2011, and was given an additional epidural steroid injection. Dr. Belcher noted that the claimant continued to complain of lower right-sided lumbar pain and wrote that, if the claimant continues to experience groin and

thigh pain, "we may consider work up of hip including MRI/arthrogram." Dr. Belcher monitored the claimant by phone on December 12, 2011 and noted that he reported improvement. However, when she spoke to him by phone on December 19, 2011, the claimant reported that the pain in his low back and right groin area had increased.

¶ 21 When the claimant was next seen by Dr. Belcher on January 30, 2012, he complained of continued low back pain, and pain in his groin, right buttock and upper anterior thigh. He also reported muscle spasms in his back and hip after prolonged sitting. Dr. Belcher ordered an MRI arthrogram of the claimant's right hip "to evaluate for labral tear given persistent hip symptoms not explained by lumbar MRI."

¶ 22 The claimant underwent an MRI arthrogram of his right hip on February 24, 2012. According to the report of that procedure, a linear high signal extending into the substance of the superior labrum and the bony acetabulum was detected, consistent with a superior intrasubstance labral tear. Dr. Belcher's review of the MRI on February 27, 2012, confirmed her diagnosis of a labral tear of the right hip. She recommended an injection and, based upon the possibility that the claimant might need surgery, referred him to Dr. Benjamin Domb.

¶ 23 On March 5, 2012, Dr. Ghanayem again examined the claimant at the request of ND. Following his examination of the claimant, Dr. Ghanayem found him to be at MMI for his work injury, but noted that he observed "nonorganic pain behaviors." Dr. Ghanayem recorded that, on physical examination, he found that the claimant was able to stand with a normal posture and at times walked with a limp. However, when he left the office suite, the claimant exhibited a normal gait pattern before returning to limping. He also noted that the claimant had no hip pain with internal rotation in the groin. Dr. Ghanayem wrote that, from both a mechanism standpoint and a physical examination standpoint, he found no structural issues which he could point to that

indicated a hip pathology related to his work injury. As of that examination, Dr. Ghanayem found that the claimant was able to return to work at regular duty.

¶ 24 On April 16, 2012, Dr. Ghanayem wrote a letter in which he stated that he had reviewed a video tape of the claimant. He reported that, after viewing the video, his clinical impression that the claimant should return to regular work activities was confirmed.

¶ 25 When the claimant was examined by Dr. Domb on April 23, 2011, he gave a history of back pain and pain in his hip when he lifted cases of paper at work. Following his examination of the claimant, Dr. Domb diagnosed a right hip labral tear which he believed was caused by the claimant's work-related accident. Dr. Domb noted a CAM lesion in the claimant's hip and pincer morphology, but did not believe that the CAM lesion or the pincer morphology were the cause of his hip condition. Dr. Domb administered an injection into the claimant's hip, recommended arthroscopic surgery, and ordered the claimant to remain off of work.

¶ 26 On July 25, 2012, the claimant was examined by Dr. Walter Virkus at ND's request. Following his examination of the claimant and a review of his medical records, Dr. Virkus authored a report in which he stated that he diagnosed a right hip labral tear with an underlying CAM deformity of the femoral head and neck. He did not believe, however, that the claimant's hip condition was the result of an injury at work. According to Dr. Virkus, bending and lifting mechanisms are not typical for the type of condition of which the claimant suffers. Additionally, he found it extremely remote that one would sustain a low back sprain and a labral tear at the exact same time as they require two separate mechanisms of injury. Dr. Virkus found very little mention of right hip pain in the claimant's early medical records; his chief complaint being back pain. He also found that the symptoms which the claimant related far exceed those one would expect from a labral tear and a CAM lesion. Finally, Dr. Virkus noted that the claimant's

minimal response to hip injections suggests a non-hip etiology for his symptoms. Dr. Virkus also noted that, although he believed that the claimant was incapable of working in shipping and receiving due to the condition of his hip, he did not believe that the condition of the claimant's hip is work related.

¶ 27 Both Dr. Ghanayem and Dr. Virkus were deposed. Dr. Ghanayem testified consistently with his written reports. He stated that it was his belief that the claimant hurt his back and aggravated his disc degeneration at work. He also stated that the mechanism of injury described by the claimant caused the injury to his back.

¶ 28 Dr. Virkus also testified consistently with his written reports. He admitted that the claimant had a right hip labral tear. However, he did not believe that the claimant's hip condition is work related.

¶ 29 During the course of the arbitration hearing on November 5, 2013, which was conducted pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2012)), Anthony Filipello, an investigator engaged by ND's insurance carrier testified that he took a video of the claimant's activities on March 5, 2012, and also prepared a report of what he observed. Filipello took an eight minute video on that date which was shown to the arbitrator during the hearing. The video depicts the claimant walking and moving without any discernible difficulty. Filipello admitted that the claimant had been followed by a number of investigators over a nine month period. He also admitted that he had followed the claimant for hours on March 5, 2012, but only recorded eight minutes of the claimant's activities.

¶ 30 When ND's attorney moved for the admission of the video into evidence, the claimant's attorney objected on the basis that there were other surveillance videos of the claimant which had not been produced. He argued that admission of only the eight minute video taken by Filipello

would be prejudicial. The arbitrator overruled the objection. However, having been informed that there were other videos of the claimant, the arbitrator directed ND's attorney to provide the claimant's attorney with the other videos and stated "if there's anything on those videos that you think might support your case, counsel can put those in as [the claimant's] exhibits." The arbitrator made clear to the claimant's attorney that, after seeing the additional video footage, he could decide whether to submit the additional footage as a "[the claimant's] exhibit." The arbitrator also stated that she was willing to view the additional videos. Following Filipello's testimony, the arbitration hearing was adjourned.

¶ 31 The hearing reconvened on December 4, 2013. The arbitrator inquired as to whether the matter was on the call "to close proofs." Both the attorney for the claimant and the attorney for ND answered in the affirmative. At that point, the attorneys offered their respective exhibits into evidence. When ND's attorney offered the eight minute video of the claimant recorded by Filipello into evidence, the claimant's attorney again objected on grounds of completeness and lack of foundation. The arbitrator overruled the objection and admitted the exhibit. The claimant never attempted to introduce any of the other surveillance videos into evidence.

¶ 32 On February 26, 2014, the arbitrator issued her written decision. She found that the claimant sustained an accident on February 23, 2011, which arose out of and in the course of his employment with ND that resulted in injuries to his spine. However, she found that the claimant had reached MMI for his back injury in March of 2012 and could have returned to work. The arbitrator also found that the current condition of ill-being in the claimant's right hip is not causally related to his work accident of February 23, 2011. Based upon her factual findings, the arbitrator awarded the claimant temporary total disability (TTD) benefits under the Act for a period of 59 5/7 weeks, covering the period from February 24, 2011, through April 24, 2012, and

ordered ND to pay for all reasonable and necessary medical services rendered to the claimant for treatment of his low back injury. The arbitrator declined to award the claimant any benefits under the Act as a consequence of his right hip condition and declined to award him penalties under sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2012)) or attorney fees under sections 16 of the Act (820 ILCS 305/16 (West 2012)).

¶ 33 The claimant sought review of the arbitrator's decision before the Commission. On April 6, 2015, the Commission issued a unanimous decision affirming and adopting the arbitrator's decision and remanding the matter back to the arbitrator for further proceedings.

¶ 34 The claimant filed a petition for judicial review of the Commission's decision in the circuit court of Cook County. On November 19, 2015, the circuit court issued a written memorandum opinion and order, confirming the Commission's decision. This appeal followed.

¶ 35 We comment at the outset that the claimant has made no argument before this court that Commission's decision is, in any respect, against the manifest weight of the evidence. He argues only that the Commission erred in affirming the decision of an arbitrator who had personal knowledge of disputed evidentiary facts, considered evidence outside of the record, and admitted an incomplete version of surveillance footage into evidence. As a consequence, he requests that we reverse the circuit court's order confirming the Commission's decision, vacate the Commission's decision, and remand this matter back to the Commission for a new hearing before a different arbitrator.

¶ 36 For his first assignment of error, the claimant argues that, by reason of the arbitrator's violation of section 7030.30 if the Rules Governing Practice Before the Illinois Workers' Compensation Commission (Commission's Rules) (50 Ill. Adm. Code 7030.30 (1996)), the Commission erred by failing to vacate the arbitrator's decision which it adopted and affirmed.

He argues that by viewing surveillance footage which was not introduced in evidence, the arbitrator acquired personal knowledge of disputed facts, mandating that she disqualify herself. We disagree.

¶ 37 The existence of surveillance videos of the claimant other than the eight minute video offered into evidence during Filipello's testimony was first mentioned by the claimant's attorney as part of his objection to the introduction of the eight minute video. In response to that objection, the arbitrator fashioned a procedure whereby the claimant's counsel, as well as the arbitrator herself, would be furnished with copies of the surveillance videos other than the one offered into evidence so that the claimant might have an opportunity to place into evidence any of those videos which might support his case. Nothing in the record suggests that the arbitrator possessed knowledge of any disputed evidentiary facts other than the knowledge that she acquired during the course of the arbitration hearings, including her *in camera* review of the surveillance videos which were never introduced in evidence. There is no evidence even suggesting that the arbitrator possessed personal knowledge of disputed evidentiary facts acquired from an extrajudicial source. We believe that to justify disqualification of an arbitrator or commissioner under section 7030.30 their personal knowledge of disputed evidentiary facts must have come from some extrajudicial source, rather than having been acquired in a judicial capacity. See *United States v. Sims*, 845 F.2d 1564, 1570 (11th Cir. 1988); *United States v. Johnson*, 658 F.2d 1176, 1178-79 (7th Cir. 1981). If the rule were anything other, no arbitrator could ever conduct an *in camera* review of evidence to determine admissibility.

¶ 38 The claimant next argues that the Commission erred in affirming and adopting the decision of the arbitrator because she considered evidence outside of the record; namely, the surveillance videos which were not introduced in evidence. We find no merit in the argument.

¶ 39 We presume that the arbitrator and the Commission considered only competent evidence in reaching their decisions. *Presson v. Industrial Comm'n*, 200 Ill. App. 3d 876, 880 (1990); *English v. Industrial Comm'n*, 151 Ill. App. 3d 682, 685 (1986). In this case, there is not a scintilla of evidence in the record that either the arbitrator or the Commission considered the content of the videos which the arbitrator viewed *in camera* in arriving at their decisions. The arbitrator's decision which the Commission adopted gives the reasons underlying the decision and makes no reference to the videos which were not admitted.

¶ 40 Finally, the claimant argues that it was error to admit the eight minute surveillance video into evidence. He appears to argue that the video is unduly prejudicial, that it is incomplete, and that it was lacking in foundation.

¶ 41 As to the issue of foundation, Filipello testified that he recorded the video and described the camcorder in which he used. He identified the claimant as the person depicted in the video, and the claimant himself acknowledged that he was the individual seen in the video. Further, Filipello denied editing the video.

¶ 42 A sufficient foundation for the admission of a videotape into evidence is laid when witnesses testify that the video represents what it purports to show. *People ex rel. Sherman v. Cryns*, 327 Ill. App. 3d 753, 760 (2002). Based upon the testimony of Filipello and the claimant's acknowledgement, we are at a loss to understand what was lacking in the foundation for admission of the eight minute video into evidence.

¶ 43 The claimant argues that it was an abuse of discretion to admit the eight minute video into evidence because it contains selective footage from a single day, with several breaks in the recording. The claimant also appears to argue that it was error to admit the eight minute video by reason of ND's failure to offer all of the surveillance footage taken of him into evidence.

¶ 44 The admission of evidence in a workers' compensation case will not be disturbed on review absent an abuse of discretion. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010 (2005). An abuse of discretion occurs when an evidentiary ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the Commission. *Oliver v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 143836WC, ¶ 50. We find no abuse of discretion in this case.

¶ 45 Although Filipello admitted that he conducted surveillance on the claimant for some hours on March 5, 2012, he testified that the eight minutes of video was as much as he could possibly obtain on that day. He also denied editing the video. According to Filipello, the video was an accurate portrayal of what he observed on March 5, 2012. It was the Commission's function to judge the credibility of his testimony (*O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980)), and the arbitrator's decision which the Commission adopted makes specific mention of the fact that the video taken of the claimant by Filipello on March 5, 2012, shows the claimant walking and moving without any discernible problem. There is nothing in the record before us which could support a finding that the Commission's determination in this regard or its reliance upon Filipello's testimony is against the manifest weight of the evidence.

¶ 46 The claimant next argues that the video should not have been admitted in evidence as its probative value is outweighed by its prejudice. However, contrary to the facts in one of the cases relied upon by the claimant, there is no evidence in this case that the video recorded by Filipello was an inaccurate portrayal of the claimant's ability to ambulate on March 5, 2012, or that the video was edited. See *Carroll v. Preston Trucking Company, Inc.*, 349 Ill. App. 3d 563, 566-67 (2004). The video at issue in this case is certainly probative to counter the claimant's assertions of constant pain. *Donnellan v. First Student, Inc.*, 383 Ill. App. 3d 1040, 1056 (2008); *Carroll,*

349 Ill. App. 3d at 563-67. Whether the danger of unfair prejudice to the claimant outweighed the probative value of the video and it, therefore, should not have been admitted in evidence was a matter committed to the sound discretion of the Commission. We cannot say that the Commission abused its discretion by admitting the video into evidence, especially in light of Dr. Ghanayem's report of his examination of the claimant conducted on the same day that the video was taken. In that report, Dr. Ghanayem made note of the fact that, although the claimant at times walked with a limp, when he left the office suite on March 5, 2012, the claimant exhibited a normal gait pattern. We also note that the cases relied upon by the claimant were jury trials in which the trial court refused to allow the introduction of surveillance films of the plaintiffs. See *Donnellan*, 383 Ill. App. 3d at 1042-44; *Carroll*, 349 Ill. App. 3d at 563-67. This case was not tried before an impressionable jury; rather, it was tried before an experienced arbitrator who was well able to balance probative value against undue prejudice.

¶ 47 Finally, the claimant also asserts that ND's failure to introduce the surveillance videos made of the claimant on dates other than March 5, 2012, should have created a presumption that those videos would be adverse or unfavorable to ND. What the claimant fails to acknowledge is that the arbitrator ordered ND to make those videos available to the claimant's attorney and stated that she would allow those video's to be introduced as claimant's exhibits in the event that his attorney thought that they would support the claimant's case. The claimant has made no allegation that those videos were not produced as ordered, and as a consequence, cannot claim that they were not equally available to him. What we do know from the record is that the claimant made no motion to introduce any of those videos into evidence. Under these circumstances, we find no basis for an adverse inference as the result of ND's failure to offer the videos into evidence.

¶ 48 In summary, we reject the claimant's assertion that the arbitrator had personal knowledge of disputed evidentiary facts within the meaning of section 7030.30 of the Commission's Rules or that she considered evidence outside of the record in rendering her decision which the Commission adopted. We also reject the argument that it was an abuse of discretion to admit into evidence the eight minute surveillance video taken of the claimant on March 5, 2012. As the claimant has raised no other assignments of error on the part of the Commission, we affirm the judgment of the circuit court which confirmed the Commission's decision.

¶ 49 Affirmed.