2017 IL App (1st) 153648WC-U

Order filed: January 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ECOLAB, INC.,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
	)	
Defendant-Appellant,	)	
	)	
	)	
v.	)	Appeal No. 1-15-3648WC
	)	Circuit Nos. 15-L-50269
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*, (Sheny Segura,	)	Honorable
	)	Edmund Ponce DeLeon,
Plaintiffs-Appellees).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission abused its discretion in admitting certain testimony over a hearsay objection; however, the Commission's award of benefits, including medical expenses, was not against the manifest weight of the evidence.

¶ 2 The claimant, Sheny Segura, 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 her neck and left shoulder allegedly sustained on December 1, 2009, while she was

employed as an assembler in the plumbing department of Ecolab, Inc. (employer). Following a hearing on May 8, 2014, an arbitrator found that the claimant had established that her current condition of ill-being of the neck and shoulder was causally related an industrial accident occurring on December 1, 2009. Consequently, the arbitrator awarded temporary total disability (TTD) benefits for the time period June 6, 2010, through May 8, 2014, for a total of 204 4/7 weeks; reasonable and necessary medical expenses of $549,918.93; and permanent partial disability (PPD) benefits equal to 25% loss of the person as a whole pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2004). The employer sought review by the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's award. The employer filed a timely request for judicial review with the circuit court of Cook County. Judge Edmund Ponce DeLeon entered an order confirming the decision of the Commission. The employer filed this timely appeal.

¶ 3 BACKGROUND

¶ 4 The following factual recitation is taken primarily from the evidence presented at the arbitration hearing conducted on May 8, 2014.

¶ 5 The claimant testified that she was 57 years old on the date of the hearing. She had been employed in the employer's plumbing department since 2004. Her job duties consisted of breaking down, cleaning, and reassembling small to moderate sized plumbing parts.

¶ 6 The claimant testified that on December 1, 2009, she was working on an Apex machine, using a wrench to tighten a pipe on the machine when she felt a "snap in her neck." She further testified that she experienced an immediate sensation of pain in her neck and her left shoulder. She reported the incident to her supervisor, Hector Delgado, who had been working near her at the time. She testified that she cried out in pain and that Delgado must have heard her. She

testified that she completed a written report of the accident. Delgado was no longer employed by the employer at the time of the hearing and neither party sought his testimony at the hearing.

¶ 7 The claimant testified that the accident occurred at 2:30 p.m., and since her shift was scheduled to end at 3:00 p.m., she worked to the end of her shift. The claimant further testified that she went home and did not seek medical care as she hoped the pain would go away and she did not want to jeopardize her employment by seeking medical treatment. The claimant continued to work until seeking medical treatment on December 17, 2009.

¶ 8 On December 17, 2009, the claimant sought treatment from her primary care physician, Dr. Ramon Pla. Treatment records from Dr. Pla established that claimant reported fever, body aches, and right arm pain persisting for approximately two weeks. The records contained no report of neck pain or a work related injury. Dr. Pla's notes contained references to right arm pain, mid and upper back pain, and left arm pain dating back as far as 2005.

¶ 9 On December 18, 2009, the claimant was instructed by the employer's corporate services to report to the occupational health clinic at Alexian Brothers Health Center. Treatment records from Alexian indicate that the claimant reported shoulder and neck pain subsequent to a work incident. The records further reflect that the claimant underwent a short course of physical therapy followed by a brief return to light duty. The records further establish that the claimant's shoulder pain resolved by February 11, 2010.

¶ 10 The claimant continued treatment with Dr. Pla. The record contains a handwritten notation dated January 21, 2010, referencing a Dr. Prinz. The arbitrator observed that, similar to most of Dr. Pla's handwritten notes, the note referencing Dr. Prinz was largely illegible. However, the reference to Dr. Prinz was sufficient to support an inference that Dr. Pla referred the claimant to Dr. Prinz for treatment.

¶ 11 Treatment notes prepared by Dr. Prinz reflect a referral to Dr. Lawrence Frank. The record also contains a letter from Dr. Frank thanking Dr. Prinz for referring the claimant. Dr. Frank's treatment notes establish that he administered several injections for pain, but his treatment provided no relief. The record does not reflect any referral by Dr. Frank.

¶ 12 On February 20, 2010, the claimant underwent an MRI, which was subsequently interpreted to reveal mild central disc bulging at C3-4, with bulging and degeneration at C4, C4-5, and C5-6.

¶ 13 On April 27, 2010, the claimant was examined at the request of the employer by Dr. Mark Levin, a board certified orthopedic surgeon. In addition to a physical examination of the claimant, Dr. Levin reviewed all available medical records, including the February 20, 2010, MRI. Dr. Levin interpreted the MRI to reveal no herniation of the cervical spine. He noted that the claimant's initial complaints of right shoulder pain had completely resolved. He opined that the complaints of neck pain were more recent than the accident date and likely were not causally related to the December 1, 2009, accident.

¶ 14 On June 7, 2010, the claimant presented for treatment with Dr. Jose Castellanos. Nothing in the record suggested that the claimant was referred to Dr. Castellanos by any of her prior treating physicians. Dr. Castellanos's treatment records indicate a referral to "our neuro" for June 16, 2010.

¶ 15 On June 16, 2010, the claimant was examined by neurosurgeon, Dr. Michael Malek. The claimant gave a history describing the alleged work accident on December 1, 2009. Dr. Malek conducted a physical examination and found cervical radiculopathy. His review of the available MRI results led him to conclude the claimant had annular bulging and narrowing in the cervical spine. Dr. Malek recommended further MRI scans to determine the need for surgery.

¶ 16 On July 27, 2010, the claimant was again examined at the request of the employer by Dr. Levin. He again opined that the claimant's right shoulder injury was causally related to the December 1, 2009, accident, but was completely resolved. Dr. Levin released the claimant to full and unrestricted work.

¶ 17 On August 26, 2010, the claimant was again examined by Dr. Malek. Treatment notes from that examination indicate that Dr. Malek continued to diagnose cervical myelopathy with radiculopathy. Dr. Malek continued in his recommendation that further diagnostic testing was necessary. There is no indication of a referral for additional treatment or a second opinion.

¶ 18 On August 31, 2010, the claimant was examined by Dr. Anthony Rinella, a board certified orthopedic surgeon with a specialization in spinal treatment. Dr. Rinella noted the claimant reported neck pain extending into her trapezial area with pain and swelling down into her right leg. Dr. Rinella diagnosed preexisting spondylosis and cervical myelopathy aggravated by the December 1, 2009, accident. Dr. Rinella noted his agreement with Dr. Malek's diagnosis of cervical myelopathy. He recommended additional diagnostic MRI testing for a possible surgical recommendation. He opined that due to the progressive nature of the claimant's condition conservative management would ultimately be ineffective. Dr. Rinella continued the claimant's light-duty work restrictions.

¶ 19 On direct examination, the claimant testified that Dr. Malek "told her" to seek a second opinion from Dr. Rinella. The employer's counsel objected to the testimony as inadmissible hearsay. The objection was overruled.

¶ 20 On September 23, 2010, the claimant was again examined by Dr. Malek. Treatment notes from the visit indicate that Dr. Malek was aware of, and agreed with, Dr. Rinella's diagnosis, work restriction, and recommendation for additional testing.

¶ 21 On October 21, 2010, the claimant was again treated by Dr. Malek. He noted that the claimant's condition had remained the same. He further noted that the employer had refused the claimant's request for light duty.

¶ 22 On November 11, 2010, the claimant was again treated by Dr. Malek. His treatment notes indicated that, at the request of the claimant, he agreed to allow her to attempt unrestricted work duties for a period of two weeks. The claimant was unable to tolerate full duty work.

¶ 23 On December 3, 2010, the claimant was examined by Dr. Rinella, who opined that the claimant would benefit from anterior cervical disc fusion surgery at C4-5, C5-6, and C6-7. He further opined that the claimant's condition would not benefit from conservative treatment. He additionally suggested that the claimant remain off work until the employer approved her for surgery.

¶ 24 On January 4, 2011, the claimant was again examined at the request of the employer by Dr. Levin. He again opined that the work injury was related only to the right shoulder and not the cervical spine. He further opined that the claimant was engaged in symptom magnification. He opined that any cervical surgery would not be related to the December 1, 2009, accident.

¶ 25 On March 10, 2011, Dr. Rinella noted that C4-5, and C5-6 surgery should be initiated as soon as possible, while the C6-7 surgery was not immediately necessary. He opined that the claimant would be at maximum medical improvement (MMI) approximately one year after surgery. Dr. Rinella continued to keep the claimant off from work until May 5, 2011, when he imposed a 10 pound lifting restriction.

¶ 26 On June 24, 2011, Dr. Rinella noted that the claimant had attempted to return to work while taking pain medication, but was having difficulties due to decreased sensation in her right hand. He persisted in his opinion that surgery was the only option.

¶ 27 On August 1, 2011, Dr. Rinella performed a cervical discectomy and fusion at C4-5 and C5-6. He performed a second surgery on December 4, 2012, at which time he performed a fusion at C6-7. Thereafter, the claimant continued to complain of pain rated as an 8 on a scale of 1 to 10. The claimant would testify that her pain was only slightly diminished after the two rounds of surgery. Dr. Rinella placed the claimant on a five-pound lifting restriction with no repetitive bending or twisting.

¶ 28 On September 11, 2012, the claimant was again examined at the request of the employer by Dr. Levin. He reviewed the surgical procedures performed on the claimant and continued to opine that the surgeries were not causally related to the December 1, 2009, accident. Dr. Levin noted that he viewed a video of an employee of performing a "testing cleaning" job similar to the job performed by the claimant. Dr. Levin opined that after viewing the video he remained convinced that the claimant's job duties were not causally related to her current condition of ill-being. The same video was entered into evidence at the hearing. The claimant testified that the video depicted some, but not all, of her job duties.

¶ 29 Dr. Rinella gave two evidence depositions. The first deposition, on March 21, 2012, addressed the August 1, 2011, surgery. Dr. Rinella testified that he believed the claimant's condition of ill-being of the cervical spine was causally related to a work injury occurring on December 1, 2009, and that the surgery on the claimant's cervical spine were a medically appropriate effort to alleviate the claimant's pain. He diagnosed cervical myelopathy (spinal cord compression), which he described as progressive and taking a long time to develop. He further opined that this condition became symptomatic only after the December 1, 2009, accident, which aggravated the claimant's preexisting condition. He further opined that the onset of pain after the accident would have been gradual.

¶ 30 During the March 12, 2012, deposition, Dr. Rinella, when asked how the claimant came to be his patient, indicated that he believed that she was seeking a second opinion, but he did not recall any details as to how she came under his care. Dr. Rinella testified that the claimant brought copies of Dr. Malek's treatment notes with her to the initial consultation.

¶ 31 On August 14, 2013, Dr. Rinella gave a second deposition. He was again asked how the claimant came to be his patient. Dr. Rinella testified that there was no written indication in his files concerning whether Dr. Malek had referred the claimant to him. However, he testified that Dr. Malek had referred patients to him in the past.

¶ 32 The arbitrator found that the claimant had establish a causal connection between her condition of ill-being of the cervical spine and the December 1, 2009, industrial accident. In support of this conclusion, the arbitrator noted that: (1) the claimant credibly testified that an accident occurred in the manner she described and that she felt an immediate snap in her neck while engaged in a twisting motion; (2) the claimant's prior medical history was void of any findings of cervical myelopathy, radiculopathy, or stenosis prior to the accident; (3) the medical records of Dr. Pla, Dr. Prinz, Alexian Brothers, and Dr. Rinella all report findings of cervical myelopathy, radiculopathy, and stenosis appearing first the first time shortly after the accident; and (4) Dr. Rinella, the claimant's treating physician, opined that the claimant's cervical myelopathy was asymptomatic prior to the accident but became symptomatic as a result of the December 1, 2009, accident. The arbitrator noted that Dr. Rinella's opinion was contradicted by Dr. Levin's opinion that the claimant's condition was not causally related to her employment, but gave greater weight to Dr. Rinella's opinion because he was the claimant's treating physician and because Dr. Rinella's area of specialization was cervical/spinal surgeries and, as the claimant's treating physician, he was more familiar with the claimant's condition.

¶ 33 The arbitrator awarded TTD benefits from the date of the accident to the date of the hearing, finding that both Dr. Malek and Dr. Rinella had placed the claimant on job restrictions that the employer was not able to accommodate, and that the failure to accommodate was unrebutted.

¶ 34 The arbitrator awarded reasonable and necessary medical expenses based upon the finding that the claimant's symptomatic cervical myelopathy was causally related to the December 1, 2009, accident. The arbitrator found that the claimant had not exceeded the physician choice limitation under the Act. Specifically, the arbitrator noted:

"1st chain: Dr. Pla referred the [claimant] to Dr. Prinz, which is documented in writing her records. Dr. Prinz referred the [claimant] to Dr. Frank, which is evidenced by Dr. Frank's first treating record specifically thanking Dr. Prinz for the referral;

2nd chain: Dr. Castellanos referred the [claimant] to Dr. Malek, which was documented in writing to a 'neurosurgeon' for the same date as the first visit with Dr. Malek. Dr. Malek referred the [claimant] to Dr. Rinella, which is evidenced by the [claimant's] testimony and Dr. Rinella's testimony that Dr. Malek has referred him patients in the past."

¶ 35 The arbitrator further commented on the link between Dr. Malek and Dr. Rinella:

"Evidence can be in the form of an exhibit or testimony. Although there may not be a written referral from Dr. Malek to Dr. Rinella, there is testimony from the [claimant] that creates a *prima facie* presumption on the issue. There was no evidence to rebut the [claimant's] testimony and the resulting presumption." The arbitrator thus found that there was a valid referral from Dr. Malek to Dr. Rinella.

¶ 36 The arbitrator further determined that the claimant suffered a permanent partial disability and awarded the claimant a PPD benefit equal to 25% of the person as a whole. This

determination was based upon testimony from a vocational rehabilitation expert that the claimant would be capable of returning to the general labor market with light-duty restrictions.

¶ 37 The employer sought review of the arbitrator's award from the Commission, which affirmed and adopted the arbitrator's award on all issues. The employer then sought review in the Circuit Court of Cook County, which confirmed the decision of the Commission. The employer then filed this timely appeal.

¶ 38 ANALYSIS

¶ 39 On appeal, the employer maintains that the Commission erred in allowing the claimant's testimony that Dr. Malek "told her" to seek an appointment with Dr. Rinella over its hearsay objection. Assuming that the Commission erred in allowing this testimony, the employer then maintains that the Commission erred in finding that the claimant did not exceed her choice of physicians under section 8(a) of the Act. 820 ILCS 305/8(a) (West 2008). An evidentiary ruling of the Commission will not be disturbed absent an abuse of discretion. *Illinois Piping Co. v. Industrial Comm'n*, 156 Ill. App. 3d 955, 1110 (1987). The determination as to whether a claimant obtained medical treatment as the result of a valid referral is a question of fact for the Commission which will not be overturned unless it is against the manifest weight of the evidence. *Absolute Cleaning/SBMVL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 468 (2011). Thus, we must first determine whether the Commission abused its discretion in admitting the claimant's testimony regarding what Dr. Malek told her with reference to treating with Dr. Rinella. If we find that the Commission erred in admitting that testimony as proof of a valid referral, we must then determine whether the Commission's finding that the claimant established a valid referral to Dr. Rinella was against the manifest weight of the evidence.

¶ 40 Hearsay is an out-of-court statement offered to prove the truth of the matter contained therein. *Kress Corp. v. Industrial Comm'n*, 190 Ill. App. 3d 72, 77 (1989). Hearsay is generally inadmissible since the out-of-court declarant cannot be examined regarding the veracity of the out-of-court statement. *Id.* Here, the claimant's testimony that Dr. Malek "told her" to consult with Dr. Rinella was offered to prove that Dr. Malek *referred* the claimant to Dr. Rinella, and it is clear that the Commission viewed the testimony as proof of a valid referral. The claimant argues on appeal that the testimony was offered to establish the declarant's (Dr. Malek's) existing state of mind (Illinois Rule of Evidence 803(3) (eff. April 26, 2012)), or for the purpose of seeking medical treatment (Illinois Rule of Evidence 803(4) (eff. April 26, 2012). This argument ignores the fact that the testimony was admitted as proof of a valid referral and not to establish Dr. Malek's state of mind or the claimant's reasons for seeking treatment. We find that the Commission abused its discretion in admitting the claimant's testimony regarding Dr. Malek's out-of-court statement as proof that he referred the claimant to Dr. Rinella.

¶ 41 Having found that the Commission erred in admitting the claimant's testimony regarding Dr. Malek's statement, our analysis is not complete. The employer maintains the claimant's testimony regarding Dr. Malek's out-of-court statement was the only evidence supporting the Commission's finding that a valid referral was made to Dr. Rinella, and thus it was prejudiced by the Commission's erroneous evidentiary ruling. *United Electric Coal Co. v. Industrial Comm'n*, 93 Ill. 2d 415, 419 (1982) (evidentiary errors require reversal where prejudice is shown). In other words, absent the improperly admitted evidence, the Commission's finding that a valid referral from Dr. Malek to Dr. Rinella was erroneous.

¶ 42 The determination as to whether a claimant obtained medical treatment as the result of a valid referral is a question of fact for the Commission. *Absolute Cleaning/SBMVL*, 409 Ill. App. 3d at 468. On appeal, we will reverse the Commission's factual findings only if they are against

the manifest weight of the evidence. *Elmhurst-Chicago Stone Co. v. Industrial Comm'n*, 269 Ill. App. 3d 902, 906 (1995). In order for a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id.* Stated another way, the Commission's determination on a question of fact is against the manifest weight of the evidence only if no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120 (1996).

¶ 43 Here, there is no question that the Commission placed great reliance upon the testimony of the claimant in determining that a valid referral occurred between Dr. Malek and Dr. Rinella. However, there was other evidence in the record to support an inference that a valid referral occurred. Dr. Rinella testified that the claimant brought copies of Dr. Malek's treatment records with her to her initial appointment with him. Moreover, the Commission observed that Dr. Rinella testified that he had received referrals from Dr. Malek in the past. Thus, despite the lack of documentary evidence of a referral, it was possible to make an inference that such a referral existed in this case. In addition, the record is clear that from August 31, 2010, through at least November 11, 2010, the claimant was under the care of both Dr. Malek and Dr. Rinella at the same time. The record further established that each physician was aware of, and agreed with, the diagnosis and treatment being provided to the claimant by the other physician at the time. Given this record, the employer's assertion that the claimant's hearsay testimony was the *only* evidence supporting the Commission's chain of referral finding is incorrect. We find that the Commission's ultimate finding that a valid referral existed from Dr. Malek to Dr. Rinella was supported by properly admitted evidence and reasonable inferences therefrom. Therefore, the Commission's finding cannot be said to be against the manifest weight of the evidence, given that a rational trier of fact could conclude that a referral existed from this record.

¶ 44 The employer next maintains that the Commission erred in finding that the claimant's condition of ill-being was causally related to the December 1, 2009, accident. We disagree.

¶ 45 To obtain compensation under the Act, a claimant must prove by a preponderance of the evidence that "some act or phase of his employment was a causative factor in his ensuing injuries." *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). 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); *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866 (2010). In resolving disputed issues of fact, including issues related to causation, it is the exclusive purview of the Commission to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to be given to evidence and resolve conflicting evidence, including conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253; *Hosteny v. Illinois Workers Compensation Comm'n*, 397 Ill. App. 3d 665, 667 (2009). 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). The appropriate test is whether there is sufficient evidence in the record to support the Commission's determination, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzack v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 46 In the instant matter the Commission credited the claimant's unrebutted testimony regarding the accident. Likewise, the Commission credited that the claimant exhibited no cervical pathology prior to the accident. The Commission further credited Dr. Rinella's opinion

that the claimant's cervical myelopathy was asymptomatic prior to the December 1, 2009, accident, and that the accident caused the claimant's post-accident condition of ill-being.

¶ 47 The employer points to the fact that the claimant did not report any cervical pain until two weeks after the accident. While this might be evidence supporting a finding that the claimant's cervical condition was not causally connected to the accident, the Commission accepted Dr. Rinella's opinion that the accident caused an aggravation of the claimant's preexisting condition which manifested in the two weeks following the accident. Based on these facts and the reasonable inferences therefrom, the Commission's finding that the claimant proved a causal connection between her employment and her current condition of ill-being was not against the manifest weight of the evidence.

¶ 48 The employer lastly maintains that the Commission erred in awarding TTD benefits for the entire period of time from the date of accident up to the date of the hearing. A claimant is temporarily totally disabled from the time an injury incapacitates her from work until such time as she is as far recovered or restored as her injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). The duration of temporary total disability is a factual determination and the Commission's findings on TTD benefits will not be overturned unless they are against the manifest weight of the evidence. *Id.* Here, the record established that both Dr. Malek and Dr. Rinella had imposed work restrictions that the employer was unable to accommodate. The record further indicates that on at least one occasion the claimant attempted to work without restriction but was unable to do so. Given the record of the claimant's inability to work during the time period established by the Commission, it cannot be said that the Commission's TTD determination was against the manifest weight of the evidence.

¶ 49 CONCLUSION

¶ 50 The judgment of the circuit court, which confirmed the Commission's decision, is affirmed.

¶ 51 Affirmed.