

2017 IL App (1st) 170268WC-U

NO. 1-17-0268WC

Order filed: September 29, 2017

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

UNIVERSITY OF CHICAGO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 16-L-50410
)	
THE ILLINOIS WORKERS')	Honorable
COMPENSATION COMMISSION, <i>et al.</i>)	James M. McGing,
(Todd M. Kryger, Appellee).)	Judge, presiding.

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

ORDER

¶ 1 *Held:* The Commission's decision to award the claimant benefits pursuant to the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq* (West 2012)) did not rely on “a flawed causal connection opinion,” and was not against the manifest weight of the evidence. The employer has forfeited consideration of its final issue on appeal.

¶ 2 The employer, the University of Chicago, appeals the decision of the circuit court of Cook County that confirmed the unanimous decision of the Illinois Workers' Compensation Commission (Commission), in favor of the claimant, Todd Kryger. For the reasons that follow, we affirm.

¶ 3 **FACTS**

¶ 4 On March 13, 2012, the claimant filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), wherein he alleged that on June 25, 2011, while "in the course and scope of employment," he suffered an injury to his "left shoulder, left arm, left elbow." An arbitration hearing was conducted on the application on March 13, 2015, wherein the following evidence was presented. The claimant testified that he was employed by the employer as an actor on June 25, 2011, and was on that date portraying the character of Porgy, who is a physically disabled adult, in the employer's production of the opera "Porgy and Bess." He testified that portraying Porgy required that he spend "most of the performance sitting on [his] left hip and dragging [himself] around stage with [his] upper body, primarily [his] left arm." During his June 25, 2011, performance, at the beginning of the second act, he "felt a pop and felt pain" as he dragged himself with his left arm from one section of the stage to another. When asked where he felt the "pop or pain," he testified, "On my upper, left arm." He testified that he promptly informed the stage manager. At the direction of the employer, he reported to occupational therapy on June 27, 2011. An MRI was recommended for his left elbow, and was conducted on July 5, 2011. At the direction of the employer's insurance company, he followed up at Midwest

Orthopedics at Rush on July 8, 2011, where he was seen by Dr. Mark Cohen, and physical therapy was recommended. He participated in physical therapy from July 11, 2011, to September 11, 2011.

¶ 5 On September 12, 2011, he saw Dr. Brian Cole, who stopped his physical therapy and ordered an MRI of the claimant's shoulder, which was conducted thereafter. He followed up with Dr. Cole on September 19, 2011. Dr. Cole recommended formal physical therapy, in which the claimant participated from October 5, 2011, to November 23, 2011. The claimant testified that this physical therapy "helped" him in that "the symptoms lessened and [his] range of motion increased slightly." When asked which body part he was referring to, the claimant testified, "My left shoulder." He was asked how his left elbow was at that time, to which he responded, "It was the whole upper left arm, left bicep." He explained, "it was the shoulder primarily and the upper bicep." He was released at maximum medical improvement (MMI) by Dr. Cole on November 7, 2011, at which time, he "felt better – not a hundred percent, but my symptoms were manageable." When asked where the symptoms persisted, he testified, "Bicep, shoulder."

¶ 6 The claimant testified that he received no further medical care until February 2012, when he called the insurance company to inform them "that my symptoms had all come back and that I needed further medical attention." He was sent to Dr. Scott Sagerman for an independent medical examination (IME). After Dr. Sagerman "essentially" said he was fine, the claimant sought a second opinion from Dr. Ronald Silver of the Illinois Bone & Joint Institute, who he saw on April 25, 2012. He described his symptoms at that time as "[e]xtreme pain, complete lack of mobility at the shoulder

joint." He received a cortisone injection and followed up with Dr. Silver on May 9, 2012. He testified that at that time, Dr. Silver recommended left shoulder surgery.

¶ 7 The claimant testified that the surgery was performed on July 25, 2012, which was followed by physical therapy at the Oak Park Medical Center from August 7, 2012, until March 2013. He testified that the surgery and physical therapy made him feel "better." He was released at MMI on May 28, 2013, with the recommendation that he continue a home exercise program. He testified that as of the date of the arbitration hearing (March 13, 2015), his shoulder "still hurts a lot of the time," and that "[s]leeping is difficult, sleeping flat in the bed." He testified that he no longer played golf, and that "[g]oing to the gym is something that is difficult." He testified that he took Aleve when needed for pain, and that when he performed the home exercises recommended by Dr. Silver, they helped "[s]tretching temporarily to loosen it up, but it starts to ache a little bit." He testified that prior to June 25, 2011, he never had any issues with his left shoulder or elbow, and was "an active individual" prior to the accident.

¶ 8 On cross-examination, the claimant was asked if on June 27, 2011, he had told the medical providers who treated him that he heard a pop in his elbow; he testified, "I don't recall if I had said elbow or if I had said bicep." He subsequently disputed that he had complained of pain only in his left elbow, testifying, "I was complaining of pain in my lower bicep," and "I was telling them it was hurting here in my bicep." His counsel then asked that the record reflect that the claimant was indicating, to which the arbitrator responded that the claimant "was indicating the upper part of the bicep towards the lateral side of the elbow and above, so it's the bicep from what he's indicating." The claimant

testified that he agreed he complained of pain in his left elbow, but when asked a subsequent question, reiterated that "I was complaining of lower bicep pain near the elbow" and that "I wasn't saying my elbow was hurting. I was letting them know my bicep was hurting." Opposing counsel then asked, "So if the medical records indicate that you were complaining of left elbow pain, you would disagree with that?" The claimant testified, "Yes, I guess so." He agreed that the first round of physical therapy, prescribed by Dr. Cohen, was focused on his elbow, and that the MRI that was subsequently conducted on his shoulder was "essentially negative." The claimant testified that if the medical records indicated that he told Dr. Cole on November 23, 2011, that he was able to sleep on his left side at that time, and was "able to do all activities of daily living," he would not have any reason to disagree with the records. He agreed that there was no "precipitating event" that caused his symptoms to recur, testifying, "It just started hurting again without anything having caused it." On re-direct examination, the claimant testified that although Dr. Cohen had focused on the claimant's elbow, the reason he was referred to Dr. Cole was because the senior physical therapist for his elbow noticed a "huge bruise" on the inside of his bicep, which led to the treatment of his shoulder instead.

¶ 9 No other witnesses presented live testimony at the hearing. Numerous medical records and medical bills of the claimant were entered into evidence. Of relevance to this appeal, the records from his June 27, 2011, visit to the University of Chicago Medical Center—which occurred two days after the accident and was part of the claimant's first attempt to secure treatment for his injury—indicate that the claimant's "arrival complaint"

was "shoulder pain" and that his "chief complaint" was an "arm injury." The "nurses notes" that accompany the records state that the claimant presented "with a left arm injury." The records from the claimant's June 27, 2011, visit to the University of Chicago Hospitals Occupational Medicine department indicate that the claimant's "chief complaint" was "an injury to his left elbow" that caused pain "radiating up the arm to his neck and below the elbow to his hand."

¶ 10 Also admitted into evidence were the evidence depositions of Dr. Ronald Silver and Dr. Scott Sagerman. In his deposition, Dr. Silver testified that his practice was limited to orthopedic surgery of the shoulder and the knee. With regard to treating the claimant, Dr. Silver testified that the history he took from the claimant on April 25, 2012, revealed that on June 25, 2011, the claimant "felt a popping sensation occur in the region of the left elbow, and the pain radiated from the elbow into his shoulder." Dr. Silver continued that the claimant "was treated elsewhere initially for his elbow, but he kept complaining that his shoulder was more painful, and finally they did look at his shoulder." Dr. Silver's examination of the claimant revealed that the claimant "had painfully limited range of motion," with forward flexion at 90 degrees, rather than the normal 180 degrees. Dr. Silver continued that the claimant's "internal rotation motion was severely limited, and all motions were painful," and that the claimant's "impingement sign, Hawkins test[,] and drop arm test were all positive, and these are tests of rotator cuff damage."

¶ 11 Dr. Silver's ultimate diagnosis was "rotator cuff impingement with partial thickness tearing of the rotator cuff," which he concluded "was caused obviously by

dragging himself around the stage with his left arm during his performances which is a competent cause of damage to his rotator cuff." Dr. Silver recommended a cortisone injection as a possible means "to avoid the need for surgery and to relieve pain." He testified that he reviewed the claimant's MRI of the left shoulder prior to arriving at his diagnosis. The MRI revealed "[p]artial thickness tearing of the rotator cuff, signs of impingement[,] and possible damage to the biceps tendon." Because the injection did not work, he subsequently recommended arthroscopic surgery. When asked if "the need for this surgery" was "related to his work injury," Dr. Silver testified, "Absolutely. There's no other causality other than the work injury." When then asked if the "mechanism of injury, that of dragging himself across a stage," was consistent with his diagnosis, Dr. Silver testified, "Absolutely. That can do tremendous damage to the rotator cuff."

¶ 12 Dr. Silver testified that on July 25, 2012, he performed the surgery on the claimant, and that his findings were "just what we thought," with the claimant having "rotator cuff impingement with partial thickness tearing of his rotator cuff which we viewed surgically." He reiterated the reasons why the need for the surgery was causally related to the claimant's work injury and noted there was "no previous history of any dysfunction of his left shoulder." Following the surgery, the claimant improved his motion, and following physical therapy, the claimant "regained full forward flexion and full lateral abduction." Therapy continued, with the claimant's strength "slowly coming back." At the time of the deposition, the claimant was "still taking pain medication occasionally as well as still not strong enough to [return to] work." He expected the claimant to reach MMI "[o]ver the next couple of months."

¶ 13 On cross-examination, Dr. Silver was asked if his opinion on the causal connection between the accident and the injury was based on the claimant "telling [him] that ever since the date of accident he had ongoing pain in his shoulder." He testified, "Well, that's part of it," then explained that it was based on: (1) no prior history of shoulder problems; and (2) an appropriate mechanism of injury, because the claimant's "mechanism of injury makes perfect sense." He testified, "the entire clinical picture has to make sense in order to opine about causality in this matter." He agreed that the claimant had not told him that he had been released from treatment for the shoulder injury in November 2011, but that the pain had returned. He testified, however, that this was not inconsistent with reports of ongoing pain since the accident, because "[t]hese kind of things with a rotator cuff tear like this, it can temporarily improve and then worsen again. It's very common. It waxes and wanes. It's not unusual at all. So it's consistent with what I found." When counsel tried to press him on the issue, Dr. Silver testified, "You're misunderstanding. What happens is you could have good days and bad days." He reiterated that good days and bad days and variations in pain were quite common with an injury such as that suffered by the claimant.

¶ 14 In his deposition, Dr. Sagerman testified that he was a physician who was board-certified in orthopedic surgery. He testified that he conducted an IME of the claimant on February 15, 2012, and prepared a report thereafter. He testified that the claimant related a history wherein the claimant was injured on June 25, 2011, while at work, "when he was acting and he heard a pop in his left elbow with bruising in his left arm and pain in his left shoulder as he was dragging himself on the floor." He testified that he based his

diagnosis upon a physical examination of the claimant, as well as "outside films" of the claimant's left elbow (from July 8, 2011) and the claimant's left shoulder (from September 12, 2011), and a review of the claimant's medical records. Dr. Sagerman testified that his ultimate diagnosis of the claimant was "[c]hronic left arm pain of undetermined etiology." His treatment recommendations did not involve surgery at that time, and he commented that work restrictions should be "[t]o avoid heavy lifting and limit overhead use of the left arm." With regard to MMI, Dr. Sagerman testified that he "would allow two months of supervised therapy and conservative measures for the shoulder before deciding about surgical intervention." When asked his opinion of whether the claimant's "diagnoses or impression was related to his injury of June 25, 2011," Dr. Sagerman testified that he could not "confirm a causal relationship for the patient's left shoulder condition," and added that the "initial injury evaluation is confined to the left elbow, and the shoulder syndromes apparently began spontaneously approximately two months after work injury." He opined that the surgery performed by Dr. Silver was not consistent with a repair of the rotator cuff, because there "wasn't a full thickness tear," and "there was no suturing done to the rotator cuff to repair it or reattach it."

¶ 15 On cross-examination, Dr. Sagerman conceded that his examination revealed "impingement syndrome," and that the claimant's "moderate range of motion loss" could also be consistent with a possible rotator cuff tear. He agreed that his diagnosis was "[i]n part" consistent with the surgery Dr. Silver performed, but testified that the claimant "had other findings as well that would be distinct from pure impingement syndrome." He

agreed that if the claimant had complained of shoulder pain, as well as elbow pain, from the day of the accident forward, it "could" change his causation opinion. He testified that it was "hard to say" if the mechanism of injury was consistent with his physical findings because it was "kind of an unusual and vague mechanism." He opined that he believed the claimant "had an elbow injury as a result of that mechanism," but testified that because the claimant "didn't give complaints of his shoulder when he was seen initially," Dr. Sagerman did not "think any shoulder injury occurred." He conceded that if there were shoulder symptoms, the mechanism of injury "could" be consistent with a traumatic shoulder injury.

¶ 16 On September 22, 2015, the arbitrator issued his decision, in which he found, *inter alia*, that the claimant sustained injuries on June 25, 2011, that arose out of and in the course of his employment with the employer, and that the claimant's current condition of ill-being was causally related to the accident. The arbitrator further found that the claimant was entitled to: (1) payment by the employer for the claimant's reasonable and necessary medical services; (2) temporary total disability (TTD) benefits of \$466.67 per week for 79 weeks, from June 27, 2011, through November 27, 2011, and from April 25, 2012, through May 28, 2013; and (3) permanent partial disability (PPD) benefits of \$420.00 per week for 50 weeks, because the injury "caused the 10% loss of the person as a whole" for the shoulder injury, and PPD benefits of \$420.00 per week for 6.325 weeks, because the injury "caused the 2.5% loss of the Left Arm." In the "Conclusions of Law" section of his decision, the arbitrator noted his finding that the claimant's "left shoulder and left elbow/distal biceps tendon conditions are causally related to the injury, based

upon the credible testimony of [the claimant], the medical records, and the opinion of Dr. Silver." He further noted that Dr. Sagerman's opinion was "not persuasive," in light of the claimant's testimony and medical documentation that showed that the claimant did in fact complain of more than just an elbow injury when he first sought treatment.

¶ 17 The employer sought review of the arbitrator's decision before the Commission. On May 23, 2016, the Commission issued its unanimous decision and opinion on review, in which it summarily affirmed and adopted, without modification, the arbitrator's decision. The employer sought review in the circuit court of Cook County. On January 5, 2017, the circuit court issued a handwritten order in which it ruled that "[t]he decision of the Commission dated May 23, 2016, is confirmed." The employer now timely appeals.

¶ 18 ANALYSIS

¶ 19 The employer raises the following three issues on appeal: (1) whether the Commission's finding of a causal relationship between the work accident and the claimed shoulder condition was contrary to the manifest weight of the evidence; (2) whether the Commission incorrectly relied on "a flawed causal connection opinion;" and (3) whether the Commission's permanency award is inconsistent with awards to similarly situated petitioners, and is therefore contrary to section 19(e).

¶ 20 With regard to the first issue raised by the employer, we begin with our standard of review. "It is well settled that in workers' compensation cases it is the function of the Commission to decide questions of fact and causation, to judge the credibility of witnesses and to resolve conflicting medical evidence." *Teska v. Industrial Comm'n*, 266

Ill. App. 3d 740, 741 (1994). A reviewing court will not overturn findings of the Commission unless the findings are against the manifest weight of the evidence. *Id.* Findings are against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Id.* at 742. A reviewing court considers "whether there is sufficient evidence in the record to support the Commission's finding, not whether [the reviewing court] might have reached the same conclusion." *Metropolitan Water Reclamation Dist. of Greater Chicago v. Illinois Workers' Compensation Com'n*, 407 Ill. App. 3d 1010, 1013 (2011).

¶ 21 In this case, the employer first argues that "the record clearly demonstrates" that the claimant "sustained an acute injury to his elbow" and that the claimant "made no mention of any shoulder issues until two months later." According to the employer, the first mention of a shoulder issue came on "August 29, 2011, more than two months after his June 25, 2011, work injury." It is simply not true that the claimant complained of an injury to only his elbow. As explained above, on cross-examination at the arbitration hearing, the claimant testified extensively about reporting his injury. He was asked if on June 27, 2011, he had told the medical providers who treated him that he heard a pop in his elbow; he testified, "I don't recall if I had said elbow or if I had said bicep." He subsequently disputed that he had complained of pain only in his left elbow, testifying, "I was complaining of pain in my lower bicep," and "I was telling them it was hurting here in my bicep." His counsel then asked that the record reflect that the claimant was indicating, to which the arbitrator responded that the claimant "was indicating the upper part of the bicep towards the lateral side of the elbow and above, so it's the bicep from

what he's indicating." The claimant testified that he agreed he complained of pain in his left elbow, but when asked a subsequent question, reiterated that "I was complaining of lower bicep pain near the elbow" and that "I wasn't saying my elbow was hurting. I was letting them know my bicep was hurting." Opposing counsel then asked, "So if the medical records indicate that you were complaining of left elbow pain, you would disagree with that?" The claimant testified, "Yes, I guess so."

¶ 22 However, the medical records in fact substantiate the testimony of the claimant. The records from his June 27, 2011, visit to the University of Chicago Medical Center—which occurred two days after the accident and was part of the claimant's first attempt to secure treatment for his injury—indicate that the claimant's "arrival complaint" was "shoulder pain" and that his "chief complaint" was an "arm injury." The "nurses notes" that accompany the records state that the claimant presented "with a left arm injury." The records from the claimant's June 27, 2011, visit to the University of Chicago Hospitals Occupational Medicine department indicate that the claimant's "chief complaint" was "an injury to his left elbow" that caused pain "radiating up the arm to his neck and below the elbow to his hand." In addition, when asked if the "mechanism of injury, that of dragging himself across a stage," was consistent with his diagnosis, Dr. Silver testified, "Absolutely. That can do tremendous damage to the rotator cuff." Dr. Silver explained that his opinion on the causal connection between the accident and the injury was also partially based on the fact that the claimant had no prior history of shoulder problems, and that nothing else explained the injury. He testified that on July 25, 2012, he performed surgery on the claimant, and that his findings were "just what we thought,"

with the claimant having "rotator cuff impingement with partial thickness tearing of his rotator cuff which we viewed surgically." He explained again the reasons why the need for the surgery was causally related to the claimant's work injury and noted again that there was "no previous history of any dysfunction of his left shoulder."

¶ 23 We reiterate that it is axiomatic that "it is the function of the Commission to decide questions of fact and causation, to judge the credibility of witnesses and to resolve conflicting medical evidence." *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 741 (1994). Our duty is to review the evidence and determine if an opposite conclusion is clearly apparent. We find that an opposite conclusion is not clearly apparent from the evidence in this case. The claimant presented ample evidence that supports the Commission's finding of a causal relationship between the work accident and the claimant's injury. Accordingly, the Commission's decision is not against the manifest weight of the evidence and we will not disturb it.

¶ 24 The employer next argues that the Commission relied "on a flawed causal connection opinion," and that such reliance "is contrary to law." In support of this proposition, the employer contends that "Dr. Silver's opinion suffered from an unsupportable assumption, namely that [the claimant] suffered an immediate onset of shoulder pain that continued unabated from the date of accident." For the reasons explained above, we have already rejected, as did the arbitrator and the Commission, the employer's contention that the initial injury and pain was limited to the claimant's elbow. Moreover, Dr. Silver vigorously contested the idea that there was an inconsistency with regard to reports of ongoing pain since the accident, because "[t]hese kind of things with

a rotator cuff tear like this, it can temporarily improve and then worsen again. It's very common. It waxes and wanes. It's not unusual at all. So it's consistent with what I found." When counsel tried to press him on the issue, Dr. Silver testified, "You're misunderstanding. What happens is you could have good days and bad days." He reiterated that good days and bad days and variations in pain were quite common with an injury such as that suffered by the claimant. The issue the employer now raises was fully aired before the arbitrator, and the Commission. The Commission was entitled to find Dr. Silver more credible on the issue than Dr. Sagerman, as Dr. Silver's opinion was not flawed and was in no other way deficient as a matter of law. The Commission's finding is not against the manifest weight of the evidence, and we decline to disturb it.

¶ 25 The employer's final argument on appeal is that the Commission's permanency award is inconsistent with awards to similarly situated petitioners, and is therefore contrary to section 19(e) of the Act. However, the employer has cited no authority, and presented no coherent argument, in support of the proposition that the Commission's permanency award is inconsistent with awards to similarly situated petitioners. Accordingly, the employer has forfeited consideration of this claim. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing); see also, *e.g.*, *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208 (2009) (when party fails to support argument with citation to authority, party has forfeited claim on appeal). Forfeiture notwithstanding, we

agree with the claimant that the Commission's decision on this point is not against the manifest weight of the evidence presented to the Commission, and therefore must be affirmed.

¶ 26

CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the Commission's unanimous decision.

Affirmed.