Workers' Compensation
Commission Division
Order Filed: July 20, 2018

No. 1-17-1084WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ZENO PIECHOWICZ, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*, (E.B. Commercial, Inc.; American Property Management Company of Illinois, Inc.; and Brittany Place Condominium Association, Appellees).	)))))))))))	Appeal from the Circuit Court of Cook County No. 2016 L 050629 Honorable James M. McGing, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The decision of the Illinois Workers' Compensation Commission finding that the claimant failed to prove that he sustained an employment-related accident and denying him benefits under the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2012)) is not against the manifest weight of the evidence.

¶ 2 The claimant, Zeno Piechowicz, appeals from an order of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) finding

that he failed to prove that he sustained an accident which arose out of and in the course of his employment with E.B. Commercial, Inc. (E.B. Commercial), and as a consequence, denying him benefit under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2012)). 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 hearings conducted on July 31, 2014, September 23, 2014, and November 21, 2014.

¶ 4 The claimant was employed by E.B. Commercial as a maintenance worker since February 1, 2012. He was assigned to work at Brittany Place Condominium Association (Brittany Place), which is comprised of 11 residential buildings and located at 2319 South Goebbert Road in Arlington Heights, near the border of Elk Grove Village. His job duties included making repairs, checking boilers and heaters, removing snow and ice, changing electrical fuses, and performing miscellaneous tasks assigned to him by his boss, Eva Ayres.[1] The claimant testified that he was given a business cell phone so that he could respond to and take care of any maintenance duties that occurred during his daytime shift.

¶ 5 On December 24, 2013, the date of the accident, the claimant testified that his only job assignment came from Scott Walczak of APMC, who instructed him to check the "heating elements" in each building and disburse fliers before leaving work. The claimant stated that, because it was Christmas Eve, Ayres told him he could leave work at 3 p.m. if all of his work was completed. According to the claimant, shortly after 3 p.m., he exited the basement maintenance office to check the heating elements in the "last building" when he slipped and fell

[1] In addition to the tasks assigned to him by Ayres, the claimant would also receive work orders from American Property Management Company (APMC), a company hired by Brittany Place to help manage its day-to-day operations.

on icy stairs. He explained that, as he was walking up the stairs, his business phone rang and he lost his balance and "fl[ew] backwards" as he attempted to answer the call. The claimant stated that he broke his glasses, watch, and cell phone, and felt immediate pain in his right hand, elbow, and ribs. After lying on the ground for 10 or 15 minutes, he gathered his watch, glasses and the broken phone pieces, and returned to the maintenance office where he washed the blood off his hands, attempted to put the phone back together, and eventually used a landline or his personal cell phone to call Ayres and his wife. Approximately 10 or 20 minutes later, the claimant closed the maintenance office and was walking toward the parking lot when he was approached by Joanna Wietocha, a realtor and former resident of Brittany Place, who asked if he was okay. The claimant told Wietocha about the accident and declined her offer to drive him home or to the hospital.

¶ 6 At 4:29 p.m., the claimant called Ayres and left the following voice mail:

> "Hi, boss. I have bad news. I fell the f*** down the stairs and almost my entire right hand is swollen. At that time, Natalia was calling me, and she heard this whole incident. My son-in-law drove here. I went; thought that everything will be ok. I left. My entire hand got swollen. Call me because I am by the hospital, and I don't know if I should go to emergency room or not. The whole right hand and this wrist. I am sorry. I am—okay. Call me. Call me on my private number because I cannot answer this one. Okay. See you. Bye-bye. Sorry."

¶ 7 At approximately 5:17 p.m. on December 24, 2013, the claimant presented to the emergency department of Lutheran General Hospital. The records of that visit stated that the claimant "presents almost 2 hr after fall from 5 steps onto ground floor. Mech fall after slip on ice." The claimant reported striking his head on the ground and briefly losing consciousness. A

CT scan of the brain revealed no abnormalities. The claimant was diagnosed with a displaced distal radius fracture at the right wrist and rib fractures were suspected but not confirmed by the x-ray.

¶ 8 The claimant sought follow-up care and, on January 3, 2014, Dr. Josephine Mo of Good Shepherd Hospital performed two surgeries on the claimant's right hand. The first surgery was a closed reduction with percutaneous pinning and placement of an external fixation for the right distal radius fracture. The second surgery was an adjustment of the fixation and a carpal tunnel release. The claimant treated with Dr. Mo post-operatively and underwent a course of physical therapy.

¶ 9 On July 11, 2014, Dr. Michael Vender performed an independent medical examination of the claimant. He diagnosed the claimant as having a comminuted inter-articular fracture of the right distal radius with a carpal tunnel release. Dr. Vender noted that the claimant had degenerative arthritis with diffuse flexor stenosing tenosynovitis. The doctor also noted that the claimant might need intrinsic releases of the digits of the right hand as well as additional surgery on the wrist. He opined that the mechanism of the slip and fall on ice was consistent with the injury. Dr. Vender also believed that the claimant could do one-handed work, with no forceful or repetitive lifting.

¶ 10 During the July 31, 2014, arbitration hearing, the claimant introduced cell phone records from his business cell phone through Sprint (Petitioner's Exhibit No. 2) and his personal cell phone through Verizon (Petitioner's Exhibit No. 3). The phone records from Verizon are one page in length and contain information regarding the date, time, and duration of each call; the phone number involved; as well as the origination and destination locations of where the call was placed. For example, the Verizon phone records state, in pertinent part, as follows:

Date	Time	Number	Rate	Usage Type	Origination	Destination	Min.
12/24	1:27P	***0165	Peak	M2MAllow	Elk Grove IL	Chicago IL	2
12/24	2:34P	***0408	Peak	PlanAllow	Arlington IL	Chicago IL	2
12/24	2:37P	***4328	Peak	PlanAllow	Arlington IL	Chicago IL	2
12/24	2:38P	***0136	Peak	PlanAllow	MT Prospec IL	Benton Hbr MI	2
12/24	2:40P	***0977	Peak	PlanAllow	Des Plaine IL	Chicago IL	5
12/24	3:11P	***9126	Peak	PlanAllow	Glenview IL	Incoming CL	1
12/24	3:43P	***6263	Peak	PlanAllow	Morton Gro IL	Incoming CL	3
12/24	4:10P	***9182	Peak	M2MAllow	Skokie IL	Incoming CL	1
12/24	4:16P	***4266	Peak	PlanAllow	Morton Gro IL	Incoming CL	2
12/24	4:37P	***5022	Peak	PlanAllow	Des Plaine IL	Incoming CL	3
12/24	4:57P	***0136	Peak	PlanAllow	Glenview IL	Incoming CL	3

The claimant testified that the phone records show that he called his daughter, wife, and Ayres at 4:10 p.m., 4:16 p.m., and 4:37 p.m., respectively. The phone records from Sprint contain similar information regarding the claimant's cell phone activity on December 24, 2013; however, it does not include cell phone location data.[2]

¶ 11 During cross-examination, the claimant was extensively questioned about the "origination" location identified in the Verizon phone records. The claimant's phone bill states that a phone call originated in Elk Grove Village at 10:40 a.m., but the claimant disputed being in Elk Grove Village, stated that it "is very close to Brittany Place" and "it depends on what tower I catch." The claimant admitted he ran an errand at lunchtime to PNC Bank and that a phone call placed at 11:55 a.m. originated in Morton Grove, Illinois, which is near the PNC

[2] The cell phone records were admitted into evidence without objection or redaction. At no time did any of the parties present expert witness testimony to explain the significance of Verizon's cell phone "origination" location data.

Bank. The claimant also stated it was "possible" that he was driving back to work when he placed calls at 12:14 p.m. and 12:19 p.m., both of which originated in Des Plaines. Between 12:48 p.m. and 1:27 p.m., the claimant placed six additional calls from his personal cell phone, which originated in Elk Grove Village, near Brittany Place; the claimant confirmed that he made those calls while at Brittany Place.

¶ 12 The phone records further show that the claimant placed calls at 2:37 p.m. originating in Arlington Heights, at 2:38 p.m. originating in Mount Prospect, at 2:40 p.m. originating in Des Plaines, and at 3:11 p.m. originating in Glenview. The claimant again admitted that it was "possible" he was driving away from Brittany Place at the time those calls were made. He also conceded that he was not at Brittany Place, but "had already left for the hospital" when he received three phone calls originating in Morton Grove and Skokie at 3:43 p.m., 4:10 p.m., and 4:16 p.m. When asked why his cell phone never "hit a cell phone tower near Elk Grove Village or Arlington Heights after 2:30 p.m.," the claimant stated "I don't know how that is, the telephone—how they transfer the stations. I don't know how they do that, but I was at work."

¶ 13 The claimant also provided inconsistent testimony about whether his accident resulted in his business cell phone breaking and becoming inoperable. In particular, the claimant acknowledged that the cell phone records from Sprint show that he used his business phone to call his wife at 4:05 p.m. and Ayres at 4:28 p.m. He explained, however, that only the battery fell off his phone and he was able to "put it together."

¶ 14 The claimant further provided varying testimony as to whether Walczak called him or saw him in person at Brittany Place when he instructed him to check the boilers and distribute flyers. The claimant acknowledged, however, that the boilers were checked twice a week, on Mondays and Thursdays. He also admitted that the boiler room logs show that he checked the

boilers and heaters in all eleven buildings on December 23, 2013, the day before the alleged accident, and the boiler logs have no entries on December 24, 2013. And, when the claimant was asked why he returned to the maintenance office before checking the boilers in the final building, he stated that he was retrieving a step ladder and light bulbs to replace the lights in an exit sign. He stated that he "always" takes light bulbs and a ladder when "check[ing] a building," though he was not carrying either of these items at the time of his fall. Instead, he stated that he set the stepladder down at the bottom of the stairs.

¶ 15 Wietocha testified that she works as a real estate agent and was scheduled to show a unit at Brittany Place on December 24, 2013, at 4 p.m. As she was walking toward one of the buildings, she noticed the claimant holding his hand and asked him what happened. The claimant stated that he slipped on some stairs and injured his arm and hand. Although Wietocha offered to drive the claimant home or to the hospital, he refused, stating he could drive. Wietocha confirmed that it was "freezing" that day and there was "ice" on the "grassy area," but not on the sidewalk. She admitted she did not witness the claimant's accident and does not know where he fell.

¶ 16 At the November 21, 2014, arbitration hearing, Ayres testified that she advised the claimant on December 23, 2013, the day before the accident, that APMC was closing its office at 1 p.m. on Christmas Eve and that he would likely be able to leave work early. She stated that she called the claimant at approximately 2 p.m. on December 24, 2013, and told him he could go home, as he confirmed that "nothing was going on." According to Ayres, there was no reason for the claimant to be at Brittany Place after 2 p.m. Ayres also testified that, on December 26, 2013, she went to the maintenance office and did not see a stepladder or any debris from a broken phone, watch or glasses, or any other evidence that the claimant's accident had occurred.

¶ 17 Walczak testified that he did not speak to the claimant on December 24, 2013, and never asked him to check the boilers or heaters. He explained that the boilers and heaters are checked two times per week and, according to the boiler room logs, the claimant checked the boilers and heaters for all 11 buildings on December 23, 2013, and had no reason to check them on December 24, 2013. Walczak also denied traveling to Brittany Place to drop off fliers or otherwise asking the claimant to distribute fliers. He explained that he had the flu and a "terrible" sore throat and he distinctly recalled working from his desk at APMC's office in Schaumburg from 8 a.m. to 1 p.m. before going home. He stated that his only communication with E.B. Commercial on December 24, 2013, was an e-mail he sent to Ayres requesting that certain tasks be performed. None of the tasks, however, included checking the boilers or heaters, or distributing fliers.

¶ 18 Following the hearing, the arbitrator issued a decision, finding that the claimant did not sustain an accident arising out of and in the course of his employment. In reaching this decision, the arbitrator reasoned that the claimant "lack[ed] credibility" as he offered "multiple versions of events" and provided "inconsistent" testimony." The arbitrator further noted that the claimant's cell phone records show that he left Brittany Place shortly after 2 p.m. on December 24, 2013, and the claimant admitted "it was possible he was driving east, away from [Brittany Place]" at 2:38 p.m. Although the accident occurred "shortly after 3 p.m.," the arbitrator concluded that the claimant was not at work at the time of the alleged accident. As a consequence, the arbitrator denied the claimant benefits under the Act.[3]

[3] The arbitrator also determined that the claimant was a "direct employee of E.B. Commercial," and APMC and Brittany Place were not statutory employers under section 1(a)(3) of the Act.

¶ 19 The claimant sought review of the arbitrator's decision before the Commission. On September 7, 2016, the Commission issued a unanimous decision affirming and adopting the arbitrator's decision.

¶ 20 The claimant filed a petition for judicial review of the Commission's decision in the circuit court of Cook County. On April 10, 2017, the circuit court entered an order confirming the Commission's decision. This appeal followed.

¶ 21 We first address the claimant's contention that the Commission's determination that he failed to prove that he sustained a work-related accident on December 24, 2013, is against the manifest weight of the evidence.

¶ 22 To obtain compensation under the Act, a claimant bears the burden of proving, by a preponderance of the evidence, that he suffered an accident arising out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). Whether a work-related accident occurred is a question fact, and the Commission's resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Pryor v. Industrial Comm'n*, 201 Ill. App. 3d 1, 5 (1990). 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 v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). 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). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 23 Applying these standards, we cannot conclude that the Commission's finding that the claimant failed to prove that he sustained a work-related accident on December 24, 2013, is against the manifest weight of the evidence. The Commission, adopting the decision of the arbitrator, specifically found the claimant's testimony that he injured his right hand and ribs after he slipped and fell on icy stairs at work to be not credible. In assessing the claimant's credibility, it noted that the claimant "offer[ed] multiple versions of events concerning [his] accident" and failed to provide consistent testimony regarding the events that took place before, during, and after the alleged accident. For example, the claimant initially testified that the accident occurred shortly after 3 p.m. when he received a phone call from Natalia causing him to lose his balance. He later admitted, however, that it was "possible" that he was driving away from Brittany Place when he placed four calls between 2:37 p.m. and 3:11 p.m., which originated in Arlington Heights, Mount Prospect, Des Plaines, and Glenview. He also conceded that he was not at Brittany Place, but "had already left for the hospital" when he received three phone calls between 3:43 p.m. and 4:16 p.m. that originated in Morton Grove and Skokie. And, although the claimant initially testified he was in the maintenance office when he received a phone call from Natalia at 3:43 p.m., he later claimed that he was going to the hospital. On this record, the Commission could reasonably find that the claimant's inconsistent history of events belied the veracity of his testimony.

¶ 24 The Commission also supported its decision by relying on the testimony of Ayres, who stated that she called the claimant around 2 p.m. on December 24, 2013, and told him he could go home as there was "nothing going on." Likewise, the Commission found the testimony of Walczak, who denied telling the claimant to check the boilers and distribute fliers, to be credible. In fact, E.B. Commercial produced logs showing that the boilers and heaters are checked two

times per week and that the claimant checked them on December 23, 2014, the day before the accident. Based on the claimant's phone records and the testimony of Ayres and Walczak, the Commission's finding that the claimant was not at Brittany Place when the accident allegedly occurred is supported by the evidence of record.

¶ 25 Nonetheless, the claimant argues that an opposite conclusion is clearly apparent. He maintains that the Commission drew improper inferences from the location data contained within Verizon's phone records without any supporting expert witness testimony establishing the significance of that data. We disagree.

¶ 26 Initially, we note that the claimant does not challenge the Commission's evidentiary ruling, which admitted the cell phone records into evidence without objection from any of the parties. Indeed, it was the claimant himself who introduced the cell phone records to establish his telephone activity on the date of the accident and to corroborate his timeline of events. Not only did the claimant introduce the cell phone records, our review of the record reveals that the claimant never objected to any of the questions asked of him during cross-examination, regarding the location of his cell phone. Under these circumstances, the claimant cannot now complain that the Commission erred in considering evidence that was properly before it. See *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002) (plaintiffs cannot complain that the court erred in admitting evidence where they not only failed to object at trial, but introduced the evidence themselves); *Smith-Lohr Coal Mining Co. v. Industrial Comm'n*, 286 Ill. 34, 43 (1918) (a party cannot predicate error on the admission of evidence introduced by himself). Having introduced the cell phone records *in toto*, and without objection or redaction, we do not see how the claimant can shield the cell phone location data, contained within the cell phone records, from consideration by the Commission. See *Luby v. Industrial Comm'n*, 82 Ill. 2d 353, 363 (1980)

("since the exhibit which included the report was introduced *in toto* by the claimant *** [w]e do not see how he can shield the report from consideration by the Commission because of its lack of authentication").

¶ 27 And, even if the Commission erred by considering the cell phone location data, any error was harmless. In *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1013 (2005), we noted that when an examination of the record as a whole demonstrates that the "evidence is cumulative and does not otherwise prejudice the objecting party, error in its admission is harmless." Having reviewed the cell phone records and having examined the record as a whole, it is clear that the cell phone location data was cumulative and did not prejudice the claimant. Specifically, and as discussed more thoroughly above, the Commission's finding that the claimant lacked credibility and failed to prove he sustained an accident arising out of and in the course of his employment is supported by other competent evidence.

¶ 28 Next, the claimant maintains that the Commission abused its discretion when it excluded photographs of the scene of the accident. He argues that the photographs were "properly authenticated" and should have been admitted on relevance grounds.

¶ 29 The admissibility of evidence is a matter committed to the discretion of the Commission, and its decision in the matter will not be disturbed on review absent an abuse of that discretion. *RG Construction Services v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 132137WC, ¶ 35. An abuse of discretion occurs when the Commission's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the Commission. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 44.

¶ 30 Photographs are admissible if they have a reasonable tendency to prove or disprove a fact at issue but may be excluded when irrelevant or immaterial or if their prejudicial nature outweighs their probative value. *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 255 (2008). As demonstrative evidence, photographs should not be admitted if they are inaccurate or would mislead or confuse the trier of fact. *Id*. Before a photograph may be admitted, a proper foundation must be offered establishing: (1) the photo is a true and accurate representation of what it purports to portray; and (2) the subject of the photo was in substantially the same condition it was in at the time of the accident. *Reid v. Sledge*, 224 Ill. App. 3d 817, 821 (1992).

¶ 31 In this case, during the July 31, 2014, arbitration hearing, the claimant introduced photographs, marked as Petitioner's Exhibit Nos. 1A-D, showing the area where the alleged accident occurred. He testified that he took the photographs on January 6 or 7, 2014, and they fairly and accurately depicted the building and stairwell leading to his basement office. More specifically, the claimant stated that photographs 1A and 1D depict the eastern side of "building 2319" where his basement office is located, and shows icicles hanging from the roof. He further explained that photographs 1B and 1C show the stairs leading to the maintenance office and a handrail covered in ice. He acknowledged, however, that the photographs "do not show what [he was] actually seeing on December 24th," but that the icicles hanging from the roof and the ice on the handrail were both present on December 24, 2013. In our view, the claimant's testimony provided an adequate foundation because he has personal knowledge of the subject matter depicted in the photographs and testified that they are a fair and accurate representation of the subject matter at the relevant time. *Id.* Moreover, the photographs were relevant because they gave the Commission a basic visual sense of the area where the alleged accident occurred and corroborated the claimant's testimony. See *People v. Kubat*, 94 Ill. 2d 437, 495 (1983)

(photographs are admissible where they are relevant to corroborate oral testimony on the same subject).

¶ 32 E.B. Commercial argues that the Commission correctly excluded the photographs from evidence on grounds they were not taken on the day of the accident. We note, however, a disparity between a photograph and the object as it appeared at the time in question does not render the photograph inadmissible if the authenticating witness acknowledges the disparity and the trier of fact is not misled by it. *People v. Peeples*, 155 Ill. 2d 422, 474 (1993); *Warner v. City of Chicago*, 72 Ill. 2d 100, 105 (1978). Here, the claimant acknowledged that the photographs were taken on January 6 or 7, 2014, approximately two weeks after the alleged accident, and they "[did] not show what [he was] actually seeing on December 24th." The Commission's comment that "it was considerably colder in January than it was on the day of the accident," goes to the evidentiary weight the photographs should be given, not to their admissibility. See *id*. at 105 (photograph of sidewalk admissible to show nature of alleged defect even though it did not depict snow that was present when the plaintiff fell). Therefore, the Commission abused its discretion when it refused to admit the photographs. See *Reid*, 224 Ill. App. 3d at 821-22.

¶ 33 While we conclude that the Commission erred in refusing to admit the photographs, we consider the error to be harmless. The purpose of the photographs was to show the Commission the stairwell in which the claimant fell, and this was accomplished by the claimant's own testimony. As such, the claimant suffered no prejudice as a result of this error. See *id*. at 822 (any error in trial court's refusal to admit photographs was harmless where the purpose of the photographs was to show the jury the extent of the damage to the vehicle, and this was accomplished by the testimony of two witnesses).

¶ 34 Having found that the Commission's finding that the claimant failed to prove that he sustained a workplace accident on December 24, 2013, was not against the manifest weight of the evidence, we need not address the claimant's arguments regarding whether an employment relationship existed between the claimant and APMC and Brittany Place.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which confirmed the Commission's decision denying the claimant benefits under the Act.

¶ 36 Affirmed.