2015 IL App (1st) 132857WC-U

Order filed: July 10, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JOSEPH KNEPPER, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Village of Winnetka, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County, Illinois. Appeal No. 1-13-2857WC Circuit No. 13-L-50231 Honorable Eileen O'Neil Burke, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission's finding that the claimant failed to establish the occurrence of an industrial accident arising out of and in the course of his employment was not against the manifest weight of the evidence.

¶ 2 The claimant, Joseph Knepper, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for neck, right arm and right shoulder injuries which he allegedly sustained while working for the Village of Winnetka (employer) on February 2, 2010. A section 19(b) hearing was held on February 16, 2012, before Arbitrator Milton Black at which the employer disputed whether an

industrial accident occurred on February 2, 2010, whether proper notice of that accident had been given, and whether a causal connection existed between the claimant's current condition of ill-being and an industrial accident. The arbitrator found that the claimant had failed to establish that an industrial accident had occurred on February 2, 2010, and that the claimant had given timely notice to the employer of an industrial accident on that date. Accordingly, the arbitrator denied the claim for benefits. The claimant sought review before the Illinois Workers' Compensation Commission (Commission), which unanimously affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the decision of the Commission. The claimant then filed a timely appeal with this court.

¶ 3 On appeal, the claimant maintains that the Commission's finding that he failed to give notice of an accident in a timely manner and its finding that he failed to establish that an industrial accident arising out of and in the course of his employment occurred on February 2, 2010, were against the manifest weight of the evidence.

BACKGROUND

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on February 16, 2012.

¶ 5 The claimant was employed as a Public Works Maintenance Worker by the Village of Winnetka. His job duties included seasonal snow plowing and shoveling on village streets, road repair and blacktopping, tree trimming, sewer maintenance, and general maintenance of the village hall and grounds. The claimant had worked for the employer since 1980, beginning as a street sweeper, later transferring to the village landfill, and then back to the general street maintenance.

¶ 6 The claimant testified that on February 2, 2010, he was operating a truck with an attached snowplow to clear streets of snow. The claimant testified that on several occasions he had to step down from the cab area of the snowplow in order to clear accumulated snow from the plow attachment. He further testified that, on one of those occasions, while stepping down from the cab, he slipped on ice and snow that had accumulated on the deck and fell off the deck. He also testified that as he fell he caught hold of the cab with his right arm and pulled himself to stop the fall. He maintained that he immediately felt a sharp pain in his neck and a sharp pain radiating down his right arm into his hand, as well as a sharp pain in the upper right portion of his back. On cross-examination, the claimant could not recall on what street the accident had occurred.

¶ 7 The claimant testified that he immediately parked the vehicle, and "went to get a cup of coffee" in the lunchroom at the village hall, where he happened to encounter Bill Willing. The claimant testified that Willing was his supervisor and that he informed Willing of the accident and his injury. He testified that twice he asked Willing to "mark it down" and both times Willing responded "sure." The claimant then returned to work and finished his shift.

¶ 8 The claimant testified that he continued to experience neck, back, and right arm pain, be he did not seek treatment immediately because he thought it was merely a pulled muscle which he could work out to see if it would go away. He testified that he took Motrin for pain. He also testified that on an unspecified date in March, 2010, he got a massage and the therapist told him that there was something wrong "deeper inside" his right shoulder. The record included a report from Health Awakenings indicating the claimant received massage services on March 13, 2010. The report noted that the claimant complained of "chronic pain" and did not contain any reference to falling a truck or slipping on snow the previous month.

¶ 9 On or about May 27, 2010, the claimant sought treatment at Omega Health Services because the pain had become 'unbearable" by that date. The record contains a report authored

by Dr. Susan Piazza from North Shore Omega. The report is dated May 27, 2010, and noted the claimant reported an injury on May 19, 2010, when he slipped while getting down from a truck and grabbed a rail with his right hand. The report did not contain any mention of snow or winter weather. The claimant admitted that he gave Dr. Piazza an injury date of May 19, 2010. Dr. Piazza noted positive range of motion and diagnosed cervical strain and radiculopathy.

¶ 10 The record also contains a report written by Dr. Stephen Vogel who was also affiliated with North Shore Omega. Dr. Vogel's records reflect an accident date of either May 15, or May 19, 2010. The claimant testified that it was possible that he gave Dr. Vogel an injury date of May 15, 2010. Dr. Vogel ordered an MRI which was performed on June 15, 2010. Dr. Vogel then diagnosed mild to moderate spondylosis with diffuse disc degeneration, mild narrowing at C6-C7 with a small broad based bulge and edema. Dr. Vogel opined that the findings might indicate a possible recent trauma and suggested physical therapy.

¶ 11 On June 25, 2010, the claimant began treating with Dr. Jeffrey Dixon, who agreed with the recommendation that the claimant undergo physical therapy. Dr. Dixon took the claimant off from work beginning June 25, 2010. The claimant began physical therapy on July 7, 2010, which continued through August 2010.

¶ 12 On August 11, 2010, the claimant was examined by Dr. Jay Levin. The claimant gave him a history of an accident on February 20, 2010. After a physical examination, Dr. Levin recommended a second MRI, primarily to rule out possible metastatic lesions. The second MRI was performed on August 25, 2010, and Dr. Levin wrote a report on September 14, 2010, reading the MRI to reveal degenerative disc changes at C6-C7. Dr. Levin could not rule out metastatic issues, and recommended a bone scan. The bone scan was performed on November 10, 2010, which revealed no metastatic presence, no herniated discs, and marginal disc changes.

¶ 13 On October 1, 2010, Dr. Dixon recommended an anterior cervical discectomy and fusion. The claimant then sought a second opinion from Dr. Martin Hermann, who confirmed a diagnosis of C6-C7 herniation possibly resulting from a traumatic event and concurred in the surgical recommendation. The claimant's employment was terminated on December 15, 2011. The claimant testified that he had not had surgery due to his termination.

¶ 14 On February 22, 2011, Dr. Levin issued a final report in which he opined that the claimant's condition was the result of a longstanding degenerative condition at C6-C7. He further opined that the claimant may have sustained a mild cervical sprain in February 2010, but his current condition of ill-being was not causally related to any traumatic event. In an evidence deposition, Dr. Levin was presented with a hypothetical consistent with testimony that the claimant may have suffered back and neck injuries while using a "slip and slide" in May 2010, and was asked if such activity could be an intervening accident giving rise to complaints consistent with the claimant's symptoms. Dr. Levin opined that use of a "slip and slide" would not merely constitute an intervening accident, but would more likely be the causative agent for a condition such as the claimant's when he first sought treatment on May 27, 2010.

¶ 15 The employer presented testimony from three of the claimant's coworkers: Paul Torres, Sean Fenzel, and Bob Dvorak, each of whom testified that they were present together with the claimant on a Monday morning in late May 2010, where each were talking about what they did over the previous weekend. The conversation occurred while the men were at work paving a utility area on a village street. Torres, Fenzel, and Dvorak each testified that the claimant told them he had hurt his neck and "chicken wing" area of his upper right arm and shoulder after hitting the ground "hard" while using a "slip and slide." Each testified that the claimant told them he had purchased the "slip and slide" for his young son, had tried it out himself, and had "bashed" his head and neck on the hard ground. Each testified that the claimant described the

pain as "brutal." Each man also testified that they heard about the claimant's workers' compensation claim sometime after that Monday morning conversation. Each also testified that they were not aware that the claimant incurred a snowplowing injury the previous February. Dvorak testified that the claimant subsequently had a conversation with the claimant wherein the claimant asked Dvorak to remember that he had told Dvorak about the February snowplow accident shortly after it allegedly occurred. Dvorak testified that he told the claimant that he did not remember such a conversation. The arbitrator found that each of these individuals testified truthfully.

¶ 16 The claimant testified in rebuttal, denying that he told Torres, Fenzel, or Dvorak that he injured himself in May 2010 on a "slip and slide."

¶ 17 The employer also presented the testimony of Steve Saunders, the Director of Public Works. Saunders testified that Bill Willing had been a supervisor for the village but had retired in 2011. Saunders testified that he was Willing's immediate supervisor on February 2, 2010, and if Willing had received any kind of injury or accident report he would have informed Saunders of such a report immediately. Saunders testified that Willing did not inform him of any accident report communicated to him by the claimant in February 2010. Saunders further testified that Mike Mahoney, not Willing was the claimant's immediate supervisor in February 2010. According to Saunders, Willing was Mahoney's supervisor.

¶ 18 Michael Mahoney testified that, as Street Department Supervisor, he was in charge of day-to-day operations of the department including the processing of all accident reports emanating from the department. Mahoney testified that protocol required the immediate reporting of all injuries as either "incident reports" (injuries that did not require immediate medical attention) and "injury reports" (injuries requiring immediate medical attention). Mahoney testified that all employees were routinely instructed that all accidents are to be

reported as soon as possible. He further testified that written reports are required to be forwarded from supervisors to the village finance department within 24 hours. Mahoney testified that the claimant had filed two incident reports in the past and on both previous occasions, filed the report on the same day as the incident. Mahoney further testified that the claimant worked from February 2, 2010, through the end of May without any restrictions or report of difficulty performing any of his assigned duties. Mahoney also testified that he received no report regarding the claimant being injured on February 2, 2010, until May 27, 2010. Mahoney testified that, on May 27, 2010, the claimant gave him a report alleging an injury on February 2, 2010. Mahoney testified that he sent the claimant to Willing, since the claimant told him that he had previously reported it to Willing. Mahoney testified that Willing sent the claimant back to him and instructed him to write a report and "write down whatever" the claimant told him. Mahoney identified the injury report generated by him pursuant to Willing's instruction as showing an accident date of February 2, 2010, and describing the nature of the accident as the claimant injuring himself while exiting a truck, slipping and catching himself.

¶ 19 The arbitrator found that the claimant had failed to establish that an industrial accident occurred on February 2, 2010. The arbitrator found several facts supported a conclusion that no accident occurred on that date. He noted that the medical records did not support the claimant's testimony regarding the alleged accident. There was no indication that the claimant sought treatment of any kind until over a month after the alleged accident when he sought a massage. The records from that treatment indicated that the claimant complained only of "chronic pain." The arbitrator further noted that claimant waited almost four months to seek medical treatment and records of the treating physicians contained different reported injury dates: Dr. Piazza reported an accident date of May 19, 2010; Dr. Vogel reported a date of May 15 or May 19, 2010; and Dr. Levin reported the injury date as February 20, 2010. The arbitrator also noted that

the claimant did not report his injury until May 27, 2010, the same day on which he first sought treatment from Dr. Piazza. In addition, the arbitrator credited the testimony of the claimant's three co-workers regarding the "slip and slide" incident and found the claimant not credible regarding that incident. The arbitrator likewise found that the claimant had failed to give timely notice of the alleged industrial accident on February 2, 2010. The arbitrator made this observation both as a fact tending to establish that no accident occurred on that date, and in support of a finding that the claimant failed to give at least 45 day notice of the accident as required by the Act. 820 ILCS 305/6(c) (West 2008). Finding both that the claimant had failed to establish that an industrial accident occurred on February 2, 2010, and that the claimant failed to give the required notice to the employer, the arbitrator denied the claim for benefits. The claimant sought review of the arbitrator's decision before the Commission, which unanimously affirmed and adopted the arbitrator's decision. The claimant sought judicial review of the Commission's decision in the circuit court of Cook County which confirmed the decision of the Commission. The claimant now appeals.

¶ 20 ANALYSIS

¶ 21 The claimant argues first that the Commission erred in finding that he failed to give statutorily sufficient notice to the employer and second that the Commission erred in finding that he failed to establish that an industrial accident occurred on February 2, 2010. We chose to address the accident issue first.

¶ 22 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. Moreover, it is the province of the Commission alone to

judge the credibility of witnesses, and, while the claimant's testimony alone is sufficient to establish the fact that an accident occurred, the Commission can find the claimant not credible and disregard that testimony. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 396 (1996). 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 determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567 (1993).

¶ 23 The claimant testified that he slipped on wet snow while dismounting from a truck to clear the plow while he was plowing snow on February 2, 2010. The record established that the claimant gave a consistent description to each of his treating physicians of injuring himself while dismounting a truck at work. He maintains that his own testimony and the fact that he gave a consistent description of the accident to treating physicians is sufficient to establish that an industrial accident occurred on February 2, 2010. While it is true that the Commission could have found his testimony to be credible, it was not required to do so. *Parro*, 167 Ill. 2d at 396. Here, the Commission chose not to accept that claimant's testimony as credible. In so doing, it noted several factual findings by the arbitrator that discredited the claimant's testimony, including: (1) he could not remember where the accident allegedly occurred; (2) the fact that he did not seek medical attention for his injuries until May 27, 2010 (nearly four months after the

alleged accident); (3) when he had a shoulder massage in March he did not mention the February accident and only described "chronic pain" to the massage therapist; (4) when he did seek medical treatment for his neck, right arm and shoulder pain from three different treating physicians, he told each that his injuries occurred in May, not February of 2010; (5) credible evidence existed to establish that he did not report the February 2, 2010, accident until May 27, 2010, despite the fact that the claimant had reported two prior accidents immediately in accordance with the employer's accident reporting requirements; (6) credible evidence existed that the claimant injured himself on a "slip and slide" the weekend before he reported his injury to the employer; and (7) medical opinion testimony existed that the claimant's injuries were more likely the result of a "slip and slide" injury. Given the Commission's finding that each of these facts were true, and given the Commission's determination to discredit the claimant's testimony while crediting the testimony of his co-workers regarding his statements relating to a "slip and slide" injury on a weekend in May 2010, the Commission's finding that the claimant failed to establish that he was injured on the job on February 2, 2010, was not against the manifest weight of the evidence.

¶ 24 The claimant's argument that the Commission erred in finding that he failed to give the required notice of his injuries resulting from a February 2, 2010, accident need not be addressed as a result of our holding that the Commission's finding that the claimant failed to establish that an industrial accident occurred on that date was not against the manifest weight of the evidence. However, as the issue of notice is related to the issue of whether an accident occurred on February 2, 2010, we find the Commission's finding that the claimant failed to give notice of the alleged accident was also not against the manifest weight of the evidence.

¶ 25 Whether a claimant gave timely notice of his injuries to his employer is question of fact and the Commission's determination on that question will not be overturned on appeal unless it

is against the manifest weight of the evidence. *Gano Electric Contracting Co. v. Industrial Comm'n*, 260 Ill. App. 3d 92, 98 (1994). Here, it cannot be said that the Commission's finding that the claimant did not give notice within 45 days, as required under the Act, was against the manifest weight of the evidence. 820 ILCS 305/6(c)(West 2008). As with the issue of whether an accident occurred on February 2, 2010, the question of whether the claimant gave timely notice of the accident is entirely one of credibility. The claimant maintains that he give sufficient notice of the accident when he verbally informed Willing the day of the accident. The employer presented the testimony of Saunders and Mahoney that the claimant did not report the alleged February 2, 2010, accident until May 37, 2010. The claimant argues that the employer's failure to present Willing's testimony should conclusively establish the veracity of the claimant's testimony. He cites no authority for the proposition that the employer had to present Willing's testimony and we are aware of none. Given that the Commission expressly found that the claimant lacked credibility, the finding that the claimant did not give notice until May 27, 2010, was not against the manifest weight of the evidence.

¶ 26 CONCLUSION

¶ 27 The judgement of the circuit court which confirmed the decision of Commission is affirmed.

¶ 28 Affirmed.