Workers' Compensation Commission Division
Filed: March 21, 2011

No. 1-09-2748WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

DAN HOWARD,	)	Appeal from the Circuit Court of
	)	Cook County, Illinois
Appellant,	)	
	)	
v.	)	No. 08--L--50510
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al*. (Chicago Bridge & Iron	)	Sanjay Tailor,
Services, Appellee.)	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

Held: The Commission's finding that the claimant failed to prove that he sustained accidental injuries arising out of and in the course of his employment was not against the manifest weight of the evidence.

The claimant, Dan Howard, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 1992)) seeking benefits for

injuries he allegedly sustained during his employment with Chicago Bridge & Iron Services (employer). Following a hearing, an arbitrator found that the claimant had failed to prove that he sustained accidental injuries arising out of and in the course of his employment. Accordingly, the arbitrator declined to award the claimant any benefits under the Act.

The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission affirmed and adopted the decision of the arbitrator. The claimant then sought judicial review in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

ISSUE

The claimant raises the following issue on appeal:

Whether the Commission erred in finding that the claimant failed to prove accidental injuries that arose out of and in the course of his employment.

BACKGROUND

The claimant testified that he was injured on June 5, 1992, while working as a welder for the employer. The claimant stated that he was attempting to put a piece of metal on a horse when the steel fell through the horse and the horse moved away, jerking the claimant's right arm. At that point, the claimant alleged that he let go, stepped backwards, and tripped back. He claimed that his heel caught on something, causing him to fall backwards. The claimant testified that his coworkers approached him immediately after he fell and that he told a coworker named Chuck that he had "snapped his neck" and that his shoulder hurt. However, the claimant did not call

Chuck or any other alleged witnesses to the accident during the arbitration hearings. The claimant testified that he reported the alleged accident at work and finished his shift.

Beth Bertrand, a manager in the employer's workers' compensation department, testified that the claimant reported an injury to her on the afternoon of June 5, 1992, involving his left shoulder. The claimant pointed to a specific spot on Bertrand's shoulder where he claimed he was injured but did not claim any injuries to his neck or to any other part of his body. The claimant told Bertrand that, at the time of the alleged injury, he felt a pop in his shoulder along the collarbone. According to Bertrand, the claimant declined treatment, stating that he thought the problem would work itself out. Bertrand testified that she had several conversations with the claimant during the month of June 1992 and the claimant did not complain of neck pain or pain radiating down his arm during that period. Bertrand also stated that the claimant canceled or failed to show up for several doctor's appointments that the employer had arranged on his behalf.

Randy Hynek, the employer's manager of safety and regulatory affairs in 1992, testified regarding the initial accident report that was prepared by the claimant's supervisor, Gary Logan, on June 5, 1992. The accident report notes that Logan did not witness the alleged accident but was notified about it one hour after it allegedly occurred. The report listed no other witnesses to the alleged accident. Hynek also testified that the claimant canceled or failed to report for several medical appointments throughout the ensuing three months. Moreover, although the claimant complained of soreness in his shoulder during this time period, Hynek could not recall him complaining of any problems with his neck or pain radiating down his arms. From the time of

his alleged injury until he was laid off with other employees on August 28, 1992, the claimant worked lighter duties and worked overtime on a consistent basis.

Over the next several years, the claimant was treated for various conditions by several doctors. The claimant first visited the company doctor, Dr. Wroblewski, on June 9, 1992, three days after his alleged work accident. At that time, he complained of pain in his right shoulder and left elbow. He made no mention of neck pain or numbness to his left side. Dr. Wroblewski diagnosed AC arthritis and lateral epicondylitis and released the claimant to work with a 10-pound lifting restriction, noting that he could resume full duties on June 15, 1992.

Between June 26 and August 28, 1992, the claimant was treated by Dr. Choy, an orthopedic surgeon. Based on x-rays and an arthogram, Dr. Choy diagnosed rotator cuff tendonitis. Although the claimant testified that he was also treated for neck pain, headaches, and numbness to his left side between August and November of 1992, he could not recall a doctor or facility that treated him and he did not produce a medical record showing any treatment during that time period.

In November 1992, the claimant reported to the Olympia Fields Osteopathic Center complaining of pain in his neck as well as his shoulder and numbness on his left side. His treating doctor at the center was Dr. Thapedi. Dr. Thapedi's treatment notes and other records from the Center indicate that the claimant "denied any recent illness or injury" and reported that his symptoms of numbness and weakness on his left side began "suddenly yesterday"and were of "recent onset." Dr. Thapedi's records do not mention a work-related accident. Dr. Thapedi diagnosed ruptured cervical disks at C4-5 and C5-6 with myelopathy. On November 18, 1992,

Dr. Thapedi performed neck surgery on the claimant consisting of an anterior cervical discectomy and interbody fusion with allografts at C4-5, C5-6.

Dr. David Mehl, an orthopedic surgeon, began treating the claimant's shoulder condition on July 11, 1996. The claimant told Dr. Mehl about his alleged work injury and his neck surgery. He complained of persistent shoulder pain and lower back pain. Dr. Mehl diagnosed impingement and referred the claimant for an MRI, which was performed on July 30, 1996. The MRI revealed fluid with mild impingement. On October 2, 1996, Dr. Mehl performed surgery on the claimant's right shoulder. During the surgery, Dr. Mehl found an anterior tear of the claimant's labrum.

The claimant called Ann Wiszowaty to testify on his behalf. The claimant and Ms. Wiszowaty were in a romantic relationship for approximately seven years and had a child together. They lived together from approximately 1992 until their relationship ended October 31, 1995. On that date, legal authorities forced the claimant to leave the apartment he shared with Ms. Wiszowaty due to a domestic disturbance. A restraining order and order of protection were entered against the claimant due to bodily harm and abuse. On direct examination, Ms. Wiszowaty testified that the claimant had told her that he was injured, but she could not recall how the injury occurred. Nor could she recall which body parts the claimant had injured, except that the claimant complained of numbness on his left side. She did not recall the claimant ever getting injured at home, and she denied that the claimant told her that he was going to claim any such injury as a work injury. On cross examination, Ms. Wiszowaty testified about the

restraining order that had been entered against the claimant, and she alleged that the claimant had contacted her one week prior to her testimony and asked her if she was going to testify.

The employer called Leo Dunn, an investigator retained by the employer who had interviewed Ms. Wiszowaty in November 1996.[1] Dunn testified that Ms. Wiszowaty would not give him permission to have her statement recorded and transcribed because she feared the claimant. However, Ms. Wiszowaty gave Dunn permission to take notes while she talked about the claimant's injury, and Dunn's notes of his conversation with Ms. Wiszowaty were admitted into evidence.

Dunn testified that Ms. Wiszowaty told him that the claimant's injury had actually occurred at her residence while the claimant was demonstrating a military-style push up for her son, Joey. As Ms. Wiszowaty described it, a military-style push up entailed starting from a standing position and dropping straight down to the ground, catching oneself with one arm and going right into a push up. At the time the claimant performed the push up, she stated that she heard a crack that was loud enough for both her and her son to hear. She testified that the claimant told her that he was going to claim that the injury took place at work, which she advised against. She stated that the following day, or whenever he had returned to work, the claimant had reported this as a work injury.

Dunn testified that Ms. Wiszowaty also stated that the claimant tried to convince her to stage a slip-and-fall accident at a Venture store, but she refused. Ms. Wiszowaty also told Dunn

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[1] The claimant objected to Dunn's testimony on hearsay grounds, but the arbitrator overruled the objection.

that she had seen the claimant with another woman two weeks prior to her conversation with Dunn and that she believed that the claimant was dating this woman. However, Dunn testified that Ms. Wiszowaty did not appear to be upset with the claimant or motivated by jealousy or revenge.

The employer also called Ms. Wiszowaty's brother, Robert, as a witness. Robert Wiszowaty testified that, during the summer of 1992, the claimant told him that he had injured himself at home while trying to impress Ms. Wiszowaty's son by dropping to the ground from a standing position and doing a military push up. At the time of the arbitration hearing, Mr. Wiszowaty could not recall whether the claimant told him that he planned to claim that his injury was the result of a work-related accident. However, in a statement that he gave to an investigator approximately six years earlier, Mr. Wiszowaty stated that the claimant had bragged about the incident and that he had reported to work afterwards and "claimed it almost immediately when he got there." At the hearing, Mr. Wiszowaty testified that he had reviewed this prior statement and that it accurately reflected his testimony.

Mr. Wiszowaty also stated that the claimant had asked him to participate in insurance fraud by misrepresenting what happened in a motor vehicle accident, and he testified that the claimant admitted to using the alias Jack Quaid. Mr. Wiszowaty also stated that his sister had obtained a restraining order against the claimant because she feared for her life.

There was conflicting medical testimony regarding whether the claimant's injuries could have been caused by his performing a military-style push up rather than by his alleged work injury. Dr. Richard Zipnick, an orthopedic surgeon who performed an independent examination

of the claimant in 2001 at the request of the claimant's attorney, testified by deposition that the claimant's work injury caused his neck condition and necessitated his cervical surgery in November 1992. However, Dr. Zipnick admitted that, in reaching this conclusion, he was relying on the history given by the claimant and the accuracy of that history. He also conceded that the claimant's cervical injuries could have been caused by a military-style push up or by other means, such as "violent coughing" or "sleeping wrong."

Dr. Mehl testified regarding the medical causation of the claimant's shoulder injuries. Although Dr. Mehl conceded that some types of falls could cause some of the types of injuries suffered by the claimant, he opined that it was extremely unlikely that the claimant's injuries could have been caused by a military-style push up.

Dr. Mehl's opinions were contradicted by the medical opinions of Dr. Charles Carroll, an orthopedic surgeon who performed an independent medical examination of the claimant on behalf of the employer. Dr. Carroll prepared a written report which was admitted into evidence. In his report, Dr. Carroll concluded that the claimant's shoulder injuries—including both the impingement and the labral tear—could have been caused by a military-style push up. Dr. Carroll also concluded that any rotator cuff impingement was caused by "acromioclavicular changes" and arthritis.

When asked during cross-examination whether he recalled injuring himself shortly before his alleged work injury and telling anyone that he was "going to go and claim a work injury," the claimant said that he did not recall but that it was "a possibility."

The arbitrator found that the claimant had failed to prove that he sustained accidental injuries arising out of and in the course of his employment. The arbitrator rejected the claimant's account of the alleged work accident because she found that the claimant was "not credible." In support of this conclusion, the arbitrator cited several instances where the claimant's testimony was contradicted or called into question by other record evidence. For example, the arbitrator noted that the claimant's statement that he complained of numbness to his left side and problems with his neck immediately after the alleged injury was contradicted by the medical records. In addition, the arbitrator found that the fact that the claimant repeatedly postponed treatment and missed follow-up appointments raised questions regarding the severity of his alleged injuries. Moreover, although the claimant testified that he received medical treatments between August and November of 1992, he did not produce any medical records documenting any such treatment and he was unable to name any of the alleged treating physicians. Further, the claimant's testimony that he told Dr. Thapedi about his alleged work accident in 1994 was contradicted by Dr. Thapedi's records, and the claimant's denials that he subsequently sustained a shoulder injury while playing racquetball and a cervical injury while living in Arizona were contradicted by Dr. Mehl's records and by records from the Arizona Workers' Compensation Commission, respectively. Moreover, the arbitrator noted that the claimant had admitted to lying to a medical provider by using the alias Jack Quaid when receiving medical treatment.

By contrast, the arbitrator found Dunn's and Mr. Wiszowaty's testimony to be both credible and supported by corroborating evidence.[2] As noted, Dunn testified that Ms. Wiszowaty

[2] Although Ms. Wiszowaty testified that she could not recall any specifics about the

told him that the claimant was injured at home while performing a military-style push up for his stepson Joey and that the claimant told her that he was going to report it as a work injury. This testimony—including the particular details of how and where the claimant performed the push up—was corroborated by Robert Wiszowaty's testimony. Moreover, the arbitrator noted that the claimant's own testimony "point[ed] to an injury at home" because when the claimant was asked whether he had told anyone that he had injured himself at home and intended to claim a work-related injury, he admitted that it was a "possibility." The arbitrator concluded that "[i]t makes absolutely no sense that the [claimant] would have testified that it is possible he made this statement if, in fact, he had not been injured doing this push up."

Because the arbitrator found that the claimant failed to prove a work-related accident, she denied the claimant's claims for medical expenses, compensation for lost time, temporary total disability benefits, permanent disability benefits, penalties, and attorney fees.

The claimant appealed the arbitrator's decision to the Commission, which affirmed and adopted the arbitrator's decision. The claimant then sought judicial review in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

ANALYSIS

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claimant's accident other than that he told her that he had hurt himself at work, the arbitrator found that "her memory loss could be explained by her abusive history with the [claimant]." In support of this conclusion, the arbitrator noted that Ms. Wiszowaty had obtained a three-year restraining order against the claimant after an incident of domestic violence and that she would not allow her statement to Dunn to be recorded because she was afraid of the claimant.

An injury is compensable under the Act only if it "arises out of" and "in the course of" one's employment. 820 ILCS 305/2 (West 2008); *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009). Both elements must be present at the time of the employee's injury in order to justify compensation, and it is the employee's burden to establish these elements by a preponderance of the evidence. *Sisbro*, 207 Ill. 2d at 203; *Hosteny*, 397 Ill. App. 3d at 675. An injury is said to "arise out of" one's employment when there is a causal connection between the employment and the injury. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548 (1991). A causal connection exists if the injury's origin lies in some risk connected with the claimant's employment. *Brady*, 143 Ill. 2d at 548. Typically, an injury arises out of one's employment if, at the time of the occurrence, the claimant was performing acts the employer instructed the claimant to perform, acts incidental to the claimant's assigned duties, or acts which the claimant had a common law or statutory duty to perform. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989); *Hosteny*, 397 Ill. App. 3d at 676. An injury occurs "in the course of" employment when it happens within the period of employment at a place where the employee can reasonably be expected to be in the performance of his or her duties and while he or she is performing these duties or a task incidental thereto. *Elmhurst Park District v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 404, 407-08 (2009).

The determination of whether an injury arose out of and in the course of one's employment is a question of fact. *Hosteny*, 397 Ill. App. 3d at 674. In resolving questions of fact, it is solely within the Commission's province to assess the credibility of witnesses, draw

reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicting evidence, including conflicting medical testimony. *Hosteny*, 397 Ill. App. 3d at 674; *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999).

We will not overturn the decision of the Commission regarding whether an injury arose out of and in the course of employment unless the Commission's decision is contrary to the manifest weight of the evidence. *Hosteny*, 397 Ill. App. 3d at 674; *Jensen v. Industrial Comm'n*, 305 Ill. App. 3d 274, 277-78 (1999). A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Hosteny*, 397 Ill. App. 3d at 675. This occurs "only when the court determines that no rational trier of fact could have agreed with the Commission's decision." *Fickas*, 308 Ill. App. 3d at 1041. The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

Applying these standards, we cannot say that the Commission's conclusion that the claimant failed to prove a work-related accident was against the manifest weight of the evidence. Although the claimant maintained that he suffered an accidental injury at work on June 5, 1992, the only direct evidence of this alleged accident was the claimant's own testimony. The accident report prepared by the claimant's supervisor on the day of the alleged accident relied upon the claimant's report of the alleged incident and listed no witnesses to the accident. Although the claimant testified that some of his coworkers witnessed the accident, he did not call any of those alleged witnesses to testify or produce affidavits from any such witnesses. The medical records

describing the incident relied upon the account provided by the claimant. Thus, the success or failure of the claimant's claim for benefits hinged entirely on the credibility of his testimony.

The Commission found that the claimant was not credible. As noted above, it is the Commission's task to judge the credibility of witnesses, and we will not overturn a credibility determination made by the Commission unless it is against the manifest weight of the evidence. *Hosteny*, 397 Ill. App. 3d at 674; *Gust K. Newberg Construction v. Industrial Comm'n*, 230 Ill. App. 3d 96, 111 (1992). We may not substitute our judgment for that of the Commission or overturn the Commission's credibility findings simply because different inferences could be drawn. *Kropp Forge Co. v. Industrial Comm'n*, 225 Ill. App. 3d 244, 250 (1992). When there is sufficient evidence in the record to support the Commission's credibility determination, we must affirm. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866 (2010).

Here, there is ample evidence in the record to support the Commission's finding that the claimant was not credible. Certain portions of the claimant's testimony were contradicted by medical records and other evidence. For example, the claimant's assertion that he had problems with his neck and numbness on his left side immediately after the alleged work injury is contradicted by the medical records and by Bertrand's and Hynek's testimony. In addition, the claimant's testimony that he told Dr. Thapedi about the alleged work accident in 1994 is contradicted by Dr. Thapedi's records. Moreover, although the claimant testified that he received medical treatments between August and November of 1992, he did not produce any medical records documenting any such treatment and he was unable to name any of the alleged treating

physicians. Other evidence cast further doubt upon the claimant's credibility. For example, the claimant admitted to using an alias while receiving health care services, and Mr. Wiszowaty testified that the claimant asked him to participate in insurance fraud by misrepresenting what happened in a motor vehicle accident.

Even more significantly, two other witnesses testified that the claimant had fabricated the alleged work accident. Dunn testified that Ms. Wiszowaty told him that the claimant was injured at home while performing a military-style push up and that the claimant told her that he was going to report it as a work injury.[3] Mr. Wiszowaty corroborated this testimony. During the arbitration hearing, Mr. Wiszowaty testified that the claimant told him that he had injured himself at home while trying to impress Ms. Wiszowaty's son by dropping to the ground from a standing position and doing a military-style push up. In a statement that he gave to an investigator in 1998, Mr. Wiszowaty indicated that the claimant had bragged about the military-style push up incident and claimed a work accident when he returned to work.

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[3] In his briefs on appeal, the claimant asserts in passing that Dunn's testimony was inadmissible hearsay. However, the claimant does not argue the issue or cite to any pertinent authority. Accordingly, the issue is forfeited. *Eisenberg v. Industrial Comm'n of Illinois*, 337 Ill. App. 3d 373, 383 (2003) (ruling that "[a] failure to provide proper argument and authority results in a forfeiture of the argument"); see also *Jones v. Industrial Comm'n*, 335 Ill. App. 3d 340, 346 (3d Dist. 2002); *Lozman v. Putnam*, 379 Ill. App. 3d 807, 824 (2008) ("A point raised in a brief but not supported by citation to relevant authority is forfeited.").

The Commission found that Dunn and Mr. Wiszowaty were more credible than the claimant, and there is sufficient evidence in the record to support this finding. As noted above, there was ample evidence that the claimant lacked credibility. For one thing, his testimony was often inconsistent with medical records and other apparently credible testimony. Dunn's testimony, on the other hand, was consistent with (and corroborated by) Mr. Wiszowaty's testimony. In addition, some of the medical opinion testimony supported Dunn's and Mr. Wiszowaty's testimony. For example, Dr. Zipnick testified that the claimant's cervical injuries could have been caused by a military-style push up, and Dr. Carroll concluded that the claimant's shoulder injuries—including both the impingement and the labral tear—could have been caused in the same manner. Although Dr. Mehl disagreed with Dr. Carroll's conclusions, it is the Commission's province to resolve conflicts in medical testimony and the Commission was entitled to credit Dr. Carroll's opinion over Dr. Mehl's. See, *e.g.*, *Hosteny*, 397 Ill. App. 3d at 674. Further, the claimant's own testimony suggested that Dunn and Mr. Wiszowaty had testified truthfully. When the claimant was asked during cross-examination whether he had told anyone that he had injured himself at home and intended to claim a work-related injury, he admitted that it was a "possibility." We agree with the arbitrator that there is no plausible reason why the claimant would have made this statement unless he had actually been injured at home as described by Dunn and Mr. Wiszowaty.

The claimant argues that the Ms. Wiszowaty's and her brother's testimony regarding the military-style push up incident is not credible because both witnesses were biased against him. In support of this argument, the claimant notes that Ms. Wiszowaty had seen him with another

woman shortly before she gave her statement to Dunn, and he speculates that Mr. Wiszowaty might have been upset with the claimant for hurting his sister. However, Dunn testified that Ms. Wiszowaty did not appear to be upset with the claimant or motivated by jealousy or revenge. The Commission was entitled to credit this testimony. Moreover, the claimant's suggestion that Mr. Wiszowaty was biased against him is speculative. There was no evidence suggesting any such bias. In fact, Mr. Wiszowaty testified that he had a "cordial" relationship with the claimant and that the claimant had helped him move his other sister into a treatment facility in Arizona six months before the arbitration hearing.

Accordingly, the Commission's decision to credit Dunn's and Mr. Wiszowaty's testimony over the claimant's and its conclusion that the claimant failed to prove a work-related accident were not arbitrary, irrational, or otherwise contrary to the manifest weight of the evidence. We therefore affirm.[4]

CONCLUSION

[4] The claimant raises additional issues in his brief on appeal, but we do not need to address these issues because they are not properly before us. For example, the claimant makes arguments regarding causation, the nature and extent of his injuries, the reasonableness and necessity of the medical services he received, whether the arbitrator should have awarded him temporary total disability benefits, and whether penalties should have been imposed against the employer. The arbitrator did not address any of these issues, however, because it ruled that the claimant had failed to prove a work-related accident. That ruling is the only issue before us.

The Commission's conclusion that the claimant failed to prove that he sustained accidental injuries arising out of and in the course of his employment was not against the manifest weight of the evidence. We therefore affirm the judgment of the Cook County circuit court, which confirmed the Commission's decision.

The judgment of the circuit court of Cook County confirming the Commission's decision is affirmed.

Affirmed.