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disposition of the same.

Workers' Compensation
Commission Division
Filed: January 24, 2011

No. 1-09-3196WC

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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

BARRINGTON ORTHOPEDIC SPECIALISTS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Appellant,)	COOK COUNTY
)	
v.)	No. 09 L 50520
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <u>et al.</u> ,)	
(KATHLEEN SANBORN,)	HONORABLE
)	LAWRENCE O'GARA,
Appellee).)	JUDGE PRESIDING.

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

O R D E R

HELD: The finding to the Illinois Workers' Compensation Commission that the claimant's current condition of ill-being is causally related to her work injury is not against the manifest weight of the evidence.

The Illinois Workers' Compensation Commission's order directing the employer to pay for the claimant's medical expenses, including a surgical procedure originally prescribed before her work-related injury, is not erroneous as a matter of law.

Barrington Orthopedic Specialists (Barrington) appeals from an order of the Circuit Court of Cook County, confirming a decision of the Illinois Workers' Compensation Commission (Commission) which awarded the claimant, Kathleen Sanborn, benefits pursuant to the Workers's Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2004)) for injuries she allegedly received on November 17, 2006. For the reasons which follow, we affirm the judgment of the circuit court and remand the matter back to the Commission for further proceedings.

The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on June 23, June 30, and August 15, 2008.

The claimant, who began working for Barrington on August 3, 2006, was a Workers' Compensation and personal injury intake coordinator, a 40-hour-per-week office job that required her to sit for most of the day. Although her work accident occurred on November 17, 2006, the claimant agreed that she had suffered from back problems prior to her employment with Barrington.

The claimant testified that, beginning in 2000, she experienced "sporadic" low-back pain that consisted of "[c]ramping" and a "dull ache" and occasionally included pain radiating to her upper-right leg. She said that she endured this sporadic pain, which was often triggered by specific activities or incidents, until May 2005, when she fell and twisted her back at home. At that time, she felt her back "pop," and she felt a

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"sharp and constant" pain that eventually radiated down her left leg.

A November 10, 2005, treatment note from Dr. Jesse Butler describes numbness in the claimant's L4 and L5 disc area, "marked osteoarthritic changes" in the claimant's L5-S1 area, and "far-lateral disc herniation with severe nerve compression." He proposed "decompression of the existing nerve root at the L4-5 level."

On December 5, 2005, the claimant underwent a discectomy. According to Dr. Butler's notes of monthly visits from December 2005 to February 2006, the claimant reported that her back pain had not improved after the surgery. The claimant testified that, in the months following the surgery, her back pain was no longer "intensely sharp" but became a "dull ache," and her left-leg pain was limited to only her calf area.

In her testimony, the claimant explained that, at Dr. Butler's suggestion, she pursued pain-management treatment beginning February 16, 2006, and continuing through June, 2006. A February 16 treatment note states that the claimant's pain had actually increased since her December 2005 surgery; during the visit, the claimant rated her resting pain as a 5 and her "[d]ynamic" pain as a 9 to 10 on a 10-point scale. The note states that "[t]he symptoms are better in the early afternoon and late morning only of a burning, stabbing sharp, cramping, spasm, aching, heavy, numbing quality as well as aforementioned." The

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note describing her pain-management treatment the following week indicates that the claimant reported "marked[]" improvement, and a March 23 note states that her dynamic-pain score had decreased to a 4. On April 13, the claimant reported overall improvement in her lower-back and left-leg pain, but she rated her resting pain as a 6 and her dynamic pain as a 7. At the April 13 pain management visit, the claimant agreed to undergo a steroid injection and a nerve root block. At a May 19 pain-management treatment, the claimant reported that her back and leg pain had improved, so that her resting pain score was a 3 and her dynamic pain score was 5 to 7. According to a treatment note of her May 19 visit, the claimant described her pain as "constant" but said that she was "80 percent of the time pain free." The claimant testified that the pain management changed her symptoms in that they were "much improved." She elaborated: "My low back pain was nearly non-existent. I had very little pain in my left leg, only the numbness remained."

The claimant testified that, in late June 2006, she reinjured her back while on vacation and that the new injury caused her low-back pain to increase from a 1 or a 2 to a 5 or a 6. After the vacation injury, she also felt pain in both legs; she testified that the right-leg pain and the back pain were "constant" and that the left-leg pain was "intermittent."

According to treatment notes, the claimant attended a pain-management appointment on July 13, 2006, complaining of an

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"exacerbation of her low back pain" after what had been "an excellent outcome in her pain management." She rated her resting pain as a 5 and her dynamic pain as an 8.

In an August 2, 2006, treatment note, Dr. Butler stated that the claimant reported "continued left leg discomfort since" her December 2005 surgery. Dr. Butler noted that an x-ray taken on August 2 showed "disc space narrowing at the level of L4-L5, as well as significant disc space narrowing at the level of L5-S1;" he also noted that a July 2006 MRI revealed "changes along the posterior and left lateral aspect of the L4-L5 disc and prominent disc space narrowing with bilateral neuroforaminal narrowing at the level of L5-S1." Dr. Butler diagnosed "[l]umbar spinal stenosis and lumbar disc." His treatment note indicates that he recommended that the claimant undergo a "posterior spinal fusion, L4-S1." In his deposition testimony, Dr. Butler explained that he viewed this surgery as an "elective" way to address the claimant's pain. The claimant testified that she declined the surgery because she "preferred to continue with the conservative route, medications, injections." She explained that she wanted "to put the surgery off as long as [she] could" and she noted that she was starting employment with Barrington the next day. The claimant testified that, when she started work with Barrington, she did not plan to have the surgery.

An August 24 pain-management treatment note states that the claimant was "told she needed a spinal fusion" and that she

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reported resting pain of 4 and dynamic pain of 7 to 8. The note further states that the claimant had discontinued physical therapy because she had "plateaued" and that her pain was "constant."

On September 26, 2006, the claimant underwent another steroid injection and nerve-root block. According to a note regarding her October 26 pain-management visit, the claimant reported "overall improvement" that she attributed to the September 26 procedure. She rated her resting pain as a 1 and her dynamic pain as a 4, and she said that she was pain-free approximately "50 percent of the time." In her testimony, the claimant recalled that, after the September 26 treatment, her low-back pain was reduced "[b]ack to a 2," that the radiating pain in her left leg was again confined to her lower leg, and that her right-leg pain was "completely gone." The claimant testified that the pain was also no longer constant but that it nevertheless occurred "[d]aily" when she was "overtired, sitting for long periods." She said that she would alleviate the pain by walking around. She further testified that her back problems did not preclude her from performing her job duties for Barrington.

In his deposition testimony, after reviewing the records of her pain-management progress, Dr. Butler opined that the claimant was at that point "recovering from that flare-up and had recovered from the flare-up, at least 50 percent from *** that [vacation] exacerbation." Dr. Butler said that, if he had seen

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the claimant at that time, he would not have recommended surgery. He explained that, since the claimant appeared to have no neurological problems, he recommended surgery only as a means to relieve the claimant's pain; he said that the success of medical pain treatments removed the need for surgery.

The claimant explained that she did not pursue surgical treatment just before starting with Barrington because "[t]he conservative treatment *** was working" and, as "long as the conservative treatment worked, [she] wasn't going to have the surgery." On cross-examination, when asked if she began work at Barrington hoping to "delay the need to have surgery," she responded that she "was trying to not have surgery at all."

A woman who worked with the claimant at Barrington testified that she spoke often with the claimant and that "[p]retty much on a daily basis [the woman] knew [the claimant] was having back pain." According to the coworker, the claimant told her "that she knew she was going to need another back surgery, but she didn't want to have it right away, she was trying to hold off as long as possible because the outcome of her first [surgery] wasn't that good and it was a difficult recovery." In her testimony, the claimant disputed her coworker's recollection of the frequency of their discussions about her back condition.

On November 17, 2006, the claimant twisted her back at work and "felt a sharp pain immediately and spasms." She testified that this pain was different from her previous pain "in that it

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was a grinding feeling" and "[a] raw bone on bone type and very intense;" she testified that she had never experienced that grinding feeling prior to her November 2006 injury. She also testified that the new pain was lower in her back than her previous pain. The claimant described the pain as amounting to an 8 on a 10-point scale, and she said she had not felt that degree of pain since just after her 2005 home injury. Her leg pain also returned, and her right-leg pain extended farther down than it had before. She did not work after the November 17 injury, partly because Barrington terminated her employment during her absence.

A November 20, 2006, MRI report listed the claimant's back problems and concluded that the new MRI showed "[n]o significant change in lumbar spine ***, with degenerative changes at the lower lumbar levels. Mild disc bulges and facet degenerative changes at L4-L5 and L5-S1 are stable, with mild left L4 and mild bilateral L5 neural foraminal stenoses." A November 20 note regarding the claimant's pain management repeated her report that she had "re-exacerbated her existing pain so much that she [was] having difficulty working." The pain-management note recited her resting pain as a 5 and her dynamic pain at a 9, and it said that, "[p]rior to this [her pain ratings] had only been at a low level."

In his November 22 treatment note, Dr. Butler stated that the claimant was "actually somewhat stable prior to" her accident

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at Barrington. The note further explains that, during her August 2006 visit, they "had discussed the option of surgery but given the financial situation she was *** in, she was trying to prolong the need for surgery as much as possible." Dr. Butler's history said that the claimant's left-leg pain was "essentially unchanged" and that "[i]f anything, the numbness" in her calf had "intensified." Dr. Butler's history continued: "She has more pain, and she now has some new anterior thigh pain on the right that radiates down to the knee." In his deposition testimony, Dr. Butler noted that, unlike in previous visits, the claimant demonstrated more limited range of lumbar motion and paraspinal muscle spasm in the lower back. On cross-examination, however, he agreed that there were "no changes in the findings when [he] compared the July 2006 study to the November[] 2006 study."

In his treatment notes, Dr. Butler reported that a November 20 MRI "reconfirm[ed] the degenerative disease at L4-L5 and L5-S1 without any new herniation." His recommendations were as follows:

"While the patient has a significant preexisting condition and was likely to require surgery even without this work incident, it does appear that the work incident has at least temporarily aggravated the situation. *** As far as causality is concerned, it does appear that the work incident has become an aggravation and it is yet to be determined whether this is a temporary or permanent "

In his deposition, Dr. Butler said that he diagnosed the claimant with "reaggravation of her lumbar disc degeneration." Dr. Butler recommended conservative treatment for one to two weeks, after which time he planned to recommend further surgery if her condition did not improve.

The claimant testified that her symptoms did not abate in the weeks following her November 22 visit to Dr. Butler, and that her pain was in fact "excruciating," or a 9 on a 10-point scale. She also said that she experienced a new symptom: weakness in her left leg. A December 7, 2006, pain-management treatment note indicates that conservative treatment was no longer ameliorating her condition, and, in his deposition, Dr. Butler explained that the claimant's new left-leg weakness was a very significant development that indicated a neurological problem. Dr. Butler recommended that she undergo the previously recommended surgery, which was performed on February 13, 2007. The claimant said that she saw gradual improvement in her symptoms after the February 2007 surgery.

In his deposition, Dr. Butler opined that there was a causal relationship between the claimant's work-related injury and the deterioration in the claimant's well-being that led to her February 2007 surgery. He explained that the claimant was working and was "heading in the opposite direction of surgery" before the work incident but then deteriorated neurologically after the incident. Dr. Butler acknowledged in his deposition

that his November 22 treatment note indicated that the claimant "likely" would have required surgery even without the work incident, but he clarified that he did not know at the time whether she would actually require surgery. Dr. Butler reiterated that the claimant developed a new neurological deficit after the work incident and that it was clear that the incident "accelerate[d] the need for this surgery." He emphasized that, although the claimant's MRI results did not change after the work incident, her increased pain, inability to function, and new neurological deficit constituted significant changes.

In her deposition testimony, Dr. Julie Wehner, a medical expert who examined the claimant on Barrington's behalf, opined that the claimant's back MRI films before and after her work accident showed no changes. Dr. Wehner disputed the notion that the claimant was "moving away" from surgery just prior to her workplace accident; she said that the claimant's pain management could offer only a "temporary" cure. As for the claimant's purported new neurological deficit following the workplace accident, Dr. Wehner opined that the only evidence of such a deficit was the claimant's "subjective complaints," which "tend[ed] to wax and wane." Dr. Wehner concluded that the claimant's workplace accident did not cause her later state of ill-being, because the claimant's condition preexisted the accident and because the surgery the claimant eventually underwent was recommended prior to the accident. Dr. Wehner also

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opined that the claimant's workplace accident did not accelerate her need for surgery.

Following a hearing held pursuant to section 19(b) of the Act, the arbitrator found that the claimant's injury caused her to be temporarily disabled, and awarded her temporary total disability (TTD) benefits for a total of 23 3/7 weeks, for the period from November 18, 2006, through April 29, 2007. The arbitrator further ordered Barrington to pay \$148,560.43 for the claimant's medical expenses.

After the close of evidence, the arbitrator found as follows on the issue of causation:

"[The claimant] was credible in her testimony. [Her coworker] was well meaning but not entirely helpful in her testimony. Dr. Butler was convincing and credible in his testimony. Dr. Wehner was advocating for [Barrington] and was not credible in her testimony.

The evidence *** is that the [claimant] was improving before her accident. We will never know if or when [the claimant] would have had the surgery if there were no accident on November 17, 2006. However, the medical records corroborate that the accident accelerated the need for surgery."

Barrington sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (the Commission), which unanimously upheld and adopted the arbitrator's decision.

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Barrington filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and Barrington now appeals.

Barrington first argues that the Commission erred in finding that the claimant's condition of ill-being was causally related to her November 17, 2006, work accident. We disagree.

A prerequisite to the right to recover benefits under the Act is some causal relationship between the claimant's employment and the injury suffered. *Schwartz v. Industrial Comm'n*, 379 Ill. 139, 144-45, 39 N.E.2d 980 (1942). Compensation may be awarded under the Act even though the conditions of employment do not constitute the sole or principal cause of the claimant's injury. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548, 578 N.E.2d 921 (1991). The claimant need only show that some act or phase of the employment was a causative factor. *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 417, 729 N.E.2d 523 (1990). Because "[i]t is axiomatic that employers take their employees as they find them," these rules will allow an employee with a preexisting condition to recover under the Act for an accidental work injury "as long as it can be shown that the employment was also a causative factor." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003). "[I]n preexisting condition cases, recovery will depend on the employee's ability to show that a

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work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of the preexisting condition." *Sisbro*, 207 Ill. 2d at 204-05.

"Whether a claimant's disability is attributable solely to a degenerative process of [a] preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by" the Commission. *Sisbro*, 207 Ill. 2d at 205. The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987). 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, 591 N.E.2d 894 (1992). Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence only if no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175 (1996).

Barrington argues that the evidence here demonstrated that the claimant's condition of ill-being predated her workplace accident. In support of its argument, Barrington emphasizes that the claimant "was symptomatic before and after the work

incident," that the claimant's diagnosis was the same both before and after the incident, and that Dr. Butler recommended the same surgery before and after the incident. However, there was also significant evidence that the claimant's workplace incident exacerbated her condition. Barrington is correct that the claimant was "symptomatic" before and after the incident, but Barrington omits that the claimant reported new symptoms--leg weakness and "grinding" pain--after the incident. Barrington also overlooks the claimant's testimony, supported by medical records and Dr. Butler's testimony, that her pain-management treatment was successfully treating her symptoms prior to the employment accident. Although Dr. Wehner testified that the pain management was only a temporary solution and that surgery might have been inevitable, Dr. Butler testified that he would not have continued to recommend surgery if he had seen the claimant following her successful pain-management treatment. Further, even if the claimant might have someday undergone surgery, her testimony, which was again supported by medical evidence, established that her workplace accident severely aggravated her condition and thus accelerated the need for surgical intervention. This evidence provides more than sufficient basis for the Commission's finding that the claimant's condition was either aggravated or accelerated by the November 17, 2006, workplace accident.

To urge the opposite result, Barrington directs us to three

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decisions: one supreme court decision, one appellate court decision, and one Commission decision. See *Greater Peoria Mass Transit District v. Industrial Comm'n*, 81 Ill. 2d 38, 405 N.E.2d 796 (1980); *Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991); *Coats v. E.W. Olson Roofing Co.*, 08 I.W.C.C 0782 (Ill. Indus. Comm'n 2008). We may dispense quickly with the Commission decision. As a Commission decision, it tells us nothing regarding the quantum of evidence needed to overturn a Commission finding, and, in any event, decisions of the Commission are not precedential and thus should not be cited. *Global Products v. Worker's Compensation Comm'n*, 392 Ill. App. 3d 408, 413, 911 N.E.2d 1042 (2009). The remaining two cases are distinguishable from this case.

In *Greater Peoria*, the claimant sought benefits for a shoulder dislocation. She argued that she sustained the injury when she lost her balance, but apparently did not fall, at work; the employer argued that her preexisting shoulder condition had degenerated to the point that any minor trauma could have caused her injury. In her testimony, the claimant could not say whether her arm had come into contact with anything when she lost her balance, and there were no bruises or contusions on her body to indicate trauma. *Greater Peoria*, 81 Ill. 2d 38, 40-41. Although the Commission found that the claimant's injury had been caused by the workplace incident, the supreme court observed that the claimant's shoulder condition could have been exacerbated by any

normal daily activity and that evidence that her work somehow affected her shoulder was "completely absent" from the record. *Greater Peoria*, 81 Ill. 2d at 43. Here, unlike in *Greater Peoria*, the claimant very specifically described the workplace accident and its immediate effect on her condition. Further, the record does not establish that the claimant's condition was expected to be exacerbated by everyday activity. Quite to the contrary, the claimant testified that her condition was improving and that she hoped to avoid surgery, and Dr. Butler characterized her pre-accident condition as "stable" and said that she was "heading in the opposite direction of surgery."

In the final decision upon which Barrington relies, *Hansel & Gretel*, the claimant sought compensation after suffering knee pain while standing from a chair at work. She testified that she had injured the knee many years prior, and evidence revealed a consensus medical opinion that the claimant probably had a cartilage injury prior to the work incident. *Hansel & Gretel*, 215 Ill. App. 3d at 286-92. Although the Commission awarded the claimant benefits based on her treating doctor's testimony that the workplace incident likely aggravated her preexisting condition, this court reversed on the ground that the evidence, including her doctor's testimony, established that the claimant's knee "could have locked or gone out while she was *** performing the activities of everyday life." *Hansel & Gretel*, 215 Ill. App. 3d at 294. Here, by contrast, as we explained above, the record

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does not establish that the claimant's condition was destined for sudden aggravation during daily activity. Accordingly, neither *Hansel & Gretel* nor *Greater Peoria* controls our outcome here.

Based on the above analysis, we conclude that there was ample evidence to support the Commission's conclusion that the claimant's workplace incident exacerbated her back problems to the extent that it caused her to have surgery that she otherwise would have avoided or delayed. We therefore reject Barrington's argument that the Commission's decision on the issue of causation contravened the manifest weight of the evidence.

Barrington's second argument, that we should decide as a matter of law that an employer may not be held liable for a surgical procedure originally prescribed and deemed necessary before a work injury, is no more than a repackaging of its first argument. As the claimant observes in her brief, the premise of Barrington's argument is that the claimant's condition did not change after her workplace injury. We reject this premise for the same reasons we rejected Barrington's first argument.

For these reasons, we affirm the judgment of the circuit court, which confirmed the Commission's decision, and remand the cause to the Commission for further proceedings.

Affirmed and remanded to the Commission.