Workers' Compensation
Commission Division
Filed: March 21, 2011

No. 1-10-0041WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BONNIE J. GONZALES,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-50733
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and UNITED AIRLINES,	)	Honorable
	)	Lawrence O'Gara,
Defendants-Appellees.	)	Judge, Presiding

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

ORDER

Held: The Commission's findings that claimant failed to prove an accidental injury arising out of and in the course of her employment and that she failed to prove that her current condition of ill-being is causally related to her employment are not against the manifest weight of the evidence.

Claimant, Bonnie J. Gonzales, filed an application for adjustment of claim pursuant to the

Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2002)) alleging that she sustained a repetitive-trauma injury while working as a reservations agent for respondent, United Airlines. The arbitrator denied benefits, concluding that claimant failed to establish either that she sustained an accidental injury arising out of and in the course of her employment or that her current condition of ill-being is causally related to her employment. The Illinois Workers' Compensation Commission (Commission) affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Cook County confirmed. Claimant now appeals *pro se*. We affirm.

I. BACKGROUND

Claimant was first employed by respondent in 1990 as a kitchen worker. In 1992, claimant settled a prior workers' compensation claim arising out of her employment with respondent. That accident resulted in injuries requiring lower-back surgery and was settled for $38,000, representing 40% loss of use of the person as a whole. Thereafter, claimant was off of work until 1996, when she returned to respondent's employ as a reservations agent. In that position, claimant's duties included speaking with customers on the telephone using a hands-free headset and typing information into a computer. Claimant initially worked as a reservations agent full time, but changed to part time (20 hours per week) in 1997. While working as a reservations agent, claimant's doctor recommended that she take a 10-minute break every hour because of her low-back injury. Respondent accommodated this restriction even after claimant switched to a part-time schedule.

A hearing on claimant's application for adjustment of claim commenced on September 8, 2008. At the hearing, claimant testified that each reservations agent works from a station containing a computer, a desk, and a chair. Claimant stated that the facility in which she worked had between

500 and 1,000 chairs. According to claimant, although each employee was permitted to choose his or her own chair and workstation, "all" of the chairs were broken. Claimant explained that the chairs would "slant[] either to the front or to the side" and they would "never sit flat." Claimant stated that unless she positioned herself in an awkward manner, "gravity" would cause her to fall out of her chair. Claimant further related that in constantly "fighting gravity," she would hold herself in place by leaning forward or to the side and supporting herself on her work surface with her right upper extremity. Claimant testified that as a result of her positioning, she began to experience headaches, back pain, wrist pain, elbow pain, leg pain, neck pain, and tingling and numbness in her fingers. Claimant stated that she complained about the chairs to her supervisors, and that while some of the chairs were repaired, "there were never enough fixed."

On February 20, 2003, claimant consulted Dr. Per Freitag about her symptoms. Claimant testified that she did not discuss her job duties with Dr. Freitag, rather she "just assumed he knew." Claimant continued to work while being treated by Dr. Freitag. Claimant testified that by March 14, 2003, the pain, tingling, and numbness had became so bad that she reported her condition to respondent and completed an accident report. Claimant testified that due to ongoing pain and respondent's expectation that she increase the number of hours that she worked to 30 per week, she retired from respondent's employ as of June 18, 2003. During the arbitration hearing, claimant testified that she continues to experience headaches, neck pain, back pain, and tingling and numbness in her upper extremities.

On cross-examination, claimant acknowledged that she did not have any pictures of the broken chairs, that none of her former coworkers were present at the arbitration hearing to testify

about the condition of the chairs, and that the accident report she filed with respondent does not mention anything about broken chairs.

Eve Haddad, a former reservations agent who subsequently became a supervisor, testified on respondent's behalf. Haddad recalled that in 2003, the facility where claimant worked had about 800 work stations. Haddad, who testified with the aid of a picture of the type of chair claimant would have used in 2003, noted that all chairs at the facility were adjustable. Haddad added that each desk is also adjustable and that building maintenance would make necessary adjustments to a particular workstation upon receipt of a doctor's note. Haddad testified that she sat in the same type of chair in which claimant would have sat at or near the time of the accident. Haddad stated that she never had any personal complaints regarding the chairs and that she has not heard others voice issues with the chairs. She also pointed out that claimant's personnel file is devoid of any written complaints about broken chairs. Moreover, Haddad did not believe an assertion that *every* workplace chair was broken. Haddad stated that had a chair been reported to be broken, respondent's policy dictated that it would not be repaired. Rather, it would be removed and destroyed.

Dr. Freitag testified by evidence deposition that he had previously treated claimant for a low-back condition in the early nineties. With respect to the injury at issue, Dr. Freitag recalled that he first saw claimant on February 20, 2003. At that time, claimant's complaints included numbness, tingling, neck discomfort, and headaches. Although claimant did not provide Dr. Freitag with a formal job restriction, Dr. Freitag testified that he believed that claimant's job duties included "basically doing a lot of sitting and talking to people on the phone and using the computer." He also "vaguely" remembered that claimant reported having "an uncomfortable chair." Dr. Freitag

eventually diagnosed claimant with cervical radiculitis, *i.e.*, pain coming from the neck radiating into the upper extremities. Following claimant's February 20, 2003, consultation, Dr. Freitag referred claimant for an MRI of the cervical spine and an EMG/NCV.

Dr. Freitag testified that the EMG/NCV was normal. He further indicated that while a May 2, 2003, MRI showed no disc herniation (only osteophytes narrowing the left foramen at C5-C6), an MRI taken on September 21, 2004, was read as showing a small, left-sided disc herniation at C5-C6. Dr. Freitag noted that most of claimant's subjective complaints involved pain of the ulnar nerve, or the C6-C7 level, which would be one level below the area of disc herniation. He also pointed out that claimant had bilateral symptoms while the disc herniation was primarily on the left side. Nevertheless, he explained that a disc protrusion can cause both mechanical irritation and chemical irritation and that some patients complain more from chemical irritation than from mechanical irritation. He also testified that chemical irritation can affect a level other than the level at which the herniation is present. Dr. Freitag believed that the cervical radiculitis was "most likely" aggravated by claimant's work activities, noting that claimant's duties required her to sit in a relatively stationary position for a significant length of time and that he was not aware of any other incident that could have caused the condition. On October 23, 2003, Dr. Freitag took claimant off work. As to claimant's cervical condition, Dr. Freitag testified that claimant would require future neck surgery.

Dr. Freitag further testified that during the course of his care of claimant he diagnosed cubital tunnel syndrome. Dr. Freitag opined that this condition could have been caused by "double crush syndrome," which he described as an irritation in the cervical area and a second area of irritation at the elbow or carpal tunnel area. He noted that the condition "could be" work related, inasmuch as

it was related to claimant's cervical condition and that sitting and resting one's elbow at a workstation could aggravate such a condition.

Finally, Dr. Freitag testified that claimant suffered a right rotator cuff tear for which he did not treat claimant. Dr. Freitag did not offer a causal connection opinion with respect to that injury. For that condition, he referred claimant to Dr. James Bresch, who examined claimant once, on October 27, 2004. While Dr. Bresch's records indicate that claimant related her feeling that the condition was work related, Dr. Bresch offered no opinion as to causal connection. Ultimately, the shoulder ailment was treated conservatively with therapy.

On cross-examination, Dr. Freitag admitted that his causal connection opinion with respect to claimant's cervical spine complaints is based only on the fact that the timing of the complaints corresponded with claimant's work as a reservations agent. He also testified that it was his understanding that claimant was working five eight-hour shifts a week, or the equivalent of a forty-hour workweek. Nevertheless, Dr. Freitag admitted that claimant, who was 61 years old in February 2003, was in an age group in which it was "very common" to have some form of degenerative condition of the cervical spine. Dr. Freitag also stated that the primary basis for claimant's inability to return to work in 2003 was her preexisting lower back condition.

Respondent requested that claimant report to Dr. Alexander Ghanayem, an orthopaedic surgeon specializing in spinal disorders, for an independent medical evaluation pursuant to section 12 of the Act (820 ILCS 305/12 (West 2002)). Dr. Ghanayem examined claimant on December 16, 2005. At his evidence deposition, Dr. Ghanayem, citing the negative diagnostic findings, testified that any neck issues from which claimant suffered were muscular in nature. While claimant

complained of numbness in her right arm, Dr. Ghanayem testified that this could not have been caused by any cervical pathology because claimant's MRIs did not reveal any right-sided compression at C5-C6. In this regard, Dr. Ghanayem disagreed that the September 2004 MRI showed a disc herniation. Rather, he interpreted the film as showing a bone spur and degenerative disc disease. Dr. Ghanayem added that even if there is a disc herniation on an MRI film taken more than a year after the employee retires, the repetitive tasks of the job cannot be responsible for the herniation.

Dr. Ghanayem also denied that the pain could have come from chemical irritation, explaining that there is no medical evidence or literature that such irritation is possible. When asked whether claimant's neck pain was caused by her job tasks as a reservations agent for respondent, Dr. Ghanayem responded, "If she's making that claim that she developed neck pain from looking at a computer screen in the muscular regions of the back, I would accept that claim." Dr. Ghanayem added, however, that he did not believe that the muscular neck pain would affect claimant's ability to perform the sedentary work of a reservations agent. As of the date of his evaluation, Dr. Ghanayem did not believe that claimant was a surgical candidate.

Citing the negative EMG in 2003 and claimant's sedentary position, Dr. Ghanayem further testified that he did not feel that claimant's cubital tunnel syndrome was work related. Dr. Ghanayem rejected Dr. Freitag's opinion that claimant's cubital tunnel syndrome may have emanated from her cervical spine due to a phenomenon known as "double crush syndrome." He explained that cubital tunnel syndrome cannot be caused by problems at the C5-C6 level, because the "C6 nerve does not go by the elbow * * * it's basically two unrelated crushes, if you will, not a double crush.

So if that term is being used with reference to C5-6 and her cubital tunnel syndrome, then the person computing it has got their anatomy mixed up and needs to review it." Dr. Ghanayem also testified that he did not believe that claimant's alleged rotator cuff condition could have been caused by claimant's duties as a reservations agent given the sedentary nature of the position. Dr. Ghanayem concluded that irrespective of causation issues, none of claimant's conditions would preclude her from performing sedentary office work.

Based on the foregoing evidence, the arbitrator first found that claimant failed to prove accidental injuries arising out of and in the course of her employment with respondent. The arbitrator noted that claimant's theory of recovery was that sitting in a broken chair caused her to develop cervical pain, cubital tunnel syndrome, and a rotator cuff tear. The arbitrator, however, questioned claimant's credibility. He noted that there were between 500 and 1,000 chairs at respondent's facility, yet claimant testified that *every* chair was broken. More important, claimant offered no evidence to substantiate her claim that the chairs were in disrepair, such as photographs of the chairs or the testimony of coworkers, and she did not document a broken chair in her accident report. The arbitrator found more persuasive Haddad's testimony that the chairs and workstations were adjustable and that it was respondent's policy to replace chairs that were in disrepair. The arbitrator acknowledged Dr. Ghanayem's testimony that sitting at a computer may be sufficient to result in *muscular* neck pain. Nevertheless, the arbitrator still refused to find a compensable accident, explaining "the same would not conform to the proofs presented at trial."

The arbitrator noted that even if he had determined that claimant sustained her burden of showing an accident arising out of and in the course of her employment, the record did not support

a finding that claimant's injuries were causally connected to her employment. The arbitrator pointed out that a treating doctor's findings and opinions can be undermined or disregarded where it is premised on inaccurate or incomplete information. With respect to claimant's cervical spine complaint, the arbitrator noted that Dr. Freitag acknowledged that the sole basis for his opinion was the fact that the timing of claimant's complaints corresponded with the time she was working as a reservations agent. The arbitrator found, however, that Dr. Freitag did not express a detailed understanding of claimant's job duties or her work schedule. The arbitrator also pointed out that claimant's initial diagnostic tests were largely normal. For instance, an MRI taken in May 2003 showed no disc herniation. It was only an MRI taken 15 months *after* claimant's retirement which revealed a disc herniation at C5-C6. Further, the arbitrator noted that Dr. Freitag did not take claimant off work until about four months *after* her retirement. As such, the arbitrator concluded that Dr. Freitag's causation opinion was based on vague and erroneous assumptions regarding claimant's employment. The arbitrator stated that the finding regarding Dr. Freitag's causation opinion coupled with claimant's "less than credible testimony," precluded claimant from carrying her burden on the issue.

The arbitrator also concluded that claimant's rotator cuff injury was not causally connected to her employment. The arbitrator noted that neither Dr. Freitag nor Dr. Bresch offered a causation opinion with respect to the rotator cuff injury. Dr. Ghanayem, however, expressly opined that sedentary work as performed by claimant would not have caused a rotator cuff tear. Finally, the arbitrator concluded that claimant's cubital tunnel syndrome was not causally connected to her employment. With respect to this injury, the arbitrator found the testimony of Dr. Ghanayem more

persuasive than that of Dr. Freitag. Dr. Ghanayem testified that there is no medical basis for a finding that claimant's cubital tunnel syndrome was related to her cervical spine condition, as the C5-C6 nerve does not go by the elbow. Dr. Ghanayem also stated that sedentary-type work such as that performed by claimant may contribute to *carpal* tunnel syndrome, but would not contribute to *cubital* tunnel syndrome.

The Commission affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Cook County confirmed. This *pro se* appeal followed.

II. ANALYSIS

The purpose of the Act is to protect employees against risks and hazards which are peculiar to the nature of the work they are employed to do. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). An employee who suffers a repetitive-trauma injury must meet the same standard of proof as an employee who suffers a sudden injury. *City of Springfield v. Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 313 (2009). In this regard, it is the employee's burden to establish that his or her injury is compensable under the Act. *Malco, Inc. v. Industrial Comm'n*, 65 Ill. 2d 426, 430 (1976). For an injury to be compensable, it must "arise out of" and "in the course of" one's employment. 820 ILCS 305/2 (West 2002); *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 547 (1991). The arising-out-of prong refers to the causal connection between the employment and the injury. *Brady*, 143 Ill. 2d at 548. An injury may also be said to "arise out of" one's employment if the conditions or nature of the employment increase the employee's risk of harm beyond that to which the general public is exposed. *Brady*, 143 Ill. 2d at 548. "In the course of employment" refers to the time, place, and circumstances under which the accident occurred. *City*

of Springfield, 388 Ill. App. 3d at 313.

Whether an injury arises out of and in the course of one's employment is a question of fact for the Commission's determination. *City of Springfield*, 388 Ill. App. 3d at 312. In resolving questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of witnesses, and assign weight to the witnesses' testimony. *R & D Thiel v. Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 867 (2010); *Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). In assessing the Commission's decision, a court of review should not substitute its judgment for that of the Commission. *Jewel Food Companies, Inc. v. Industrial Comm'n*, 256 Ill. App. 3d 525, 534 (1993). Rather, the Commission's decision should be set aside only if it is against the manifest weight of the evidence. *Kishwaukee Community Hospital v. Industrial Comm'n*, 356 Ill. App. 3d 915, 920 (2005). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005).

In this case, claimant alleged three distinct injuries arose out of and in the course of her employment with respondent: (1) a cervical disc herniation; (2) cubital tunnel syndrome; and (3) a rotator cuff tear. At the hearing on her application for adjustment of claim, claimant attributed these injuries to sitting in a broken chair at work. In particular, claimant testified that despite the presence of between 500 and 1,000 chairs on respondent's premises, "all" of the chairs were broken, and, that as a result, she was required to sit in awkward positions. The Commission, who affirmed and adopted the decision of the arbitrator, found claimant's testimony questionable, noting that claimant offered no pictures of the chairs to support her claim, she did not present any testimony from

coworkers or other documentation that the chairs were in a state of disrepair, and she failed to mention a broken chair in her accident report. The Commission also noted that Haddad, a supervisor at respondent's facility and a former reservations agent herself, provided testimony to the contrary. Haddad testified that it was respondent's policy to remove and replace any broken chairs, not just repair them. Haddad further testified that all of the chairs and workstations were adjustable. Ultimately, the Commission rejected claimant's contention that "all" of the chairs were broken. As such, it determined that claimant failed to show an accidental injury caused by sitting in a broken chair while working for respondent. As noted above, in resolving questions of fact, it is the function of the Commission to judge the credibility of witnesses and resolve conflicting medical evidence. *R & D Thiel*, 398 Ill. App. 3d at 867. Given the conflicting testimony on the matter and its finding that claimant's testimony was not credible, we cannot say that the Commission's finding that claimant failed to establish an accidental injury arising out of and in the course of her employment is against the manifest weight of the evidence.

In so holding, we acknowledge Dr. Ghanayem did testify that sitting at a computer may be sufficient to result in *muscular* neck pain. However, as the Commission determined, a finding of accident on that basis would not conform to the proofs presented at the arbitration hearing, where claimant proceeded on the theory that her conditions resulted because the chairs at work were broken. We also emphasize that Dr. Freitag never diagnosed muscular neck pain.

The Commission alternatively concluded that claimant's current condition of ill-being is not causally related to her employment. Whether a causal relationship exists between one's employment and his current condition of ill-being is a question of fact to be resolved by the Commission. *P.I.*

& I. Motor Express, Inc./For U, LLC v. Industrial Comm'n, 368 Ill. App. 3d 230, 240 (2006). As noted above, in deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses, and assign weight to the witnesses' testimony (*R & D Thiel*, 398 Ill. App. 3d at 868; *Hosteny*, 397 Ill. App. 3d at 674) and we will not disturb the Commission's determination on a factual matter unless it is against the manifest weight of the evidence (*R & D Thiel*, 398 Ill. App. 3d at 868).

With respect to claimant's cervical condition, Dr. Freitag diagnosed a herniated cervical disc with radiculopathy. Dr. Freitag opined that claimant's cervical condition was "most likely" aggravated by claimant's work activities. However, there are several weaknesses in Dr. Freitag's testimony. First, Dr. Freitag acknowledged on cross-examination that the sole basis for his opinion was the fact that the timing of claimant's complaint corresponded with a time she was working as a reservations agent for respondent. Second, as the Commission pointed out, Dr. Freitag did not express a detailed understanding of claimant's work duties. Third, Dr. Freitag was under the impression that claimant worked 40 hours per week, when, in fact, she worked only 20 hours per week.

In addition, the evidence was disputed whether claimant even had a disc herniation at C5-C6, as Dr. Freitag testified. In May 2003, claimant underwent two diagnostic tests, an EMG/NCV and an MRI. The EMG/NCV came back normal. The MRI showed osteophytes narrowing the left foramen at C5-C6, but no disc herniation. Another MRI was taken in September 2004. Dr. Freitag testified that the September 2004 MRI showed a small, left-sided disc herniation at C5-C6. Dr. Freitag acknowledged that most of claimant's subjective complaints involved pain of the ulnar nerve

or the C6-C7 level (one level below the area of disc herniation) and that claimant had bilateral symptoms while the disc herniation was primarily on the left side. Nevertheless, he attributed claimant's symptoms to "chemical irritation," which, he explained, can affect a level other than the level at which the herniation is present. Dr. Ghanayem disputed the existence of a disc herniation on the September 2004 MRI. He interpreted the film as showing a bone spur and degenerative disc disease. Dr. Ghanayem denied that the pain could have come from chemical irritation, explaining that there is no medical evidence or literature that such irritation is possible.

Dr. Ghanayem also testified that even if the September 2004 MRI showed a disc herniation, the condition could not be attributable to the repetitive tasks of claimant's job given the gap between the time claimant ceased working for respondent (June 2003) and the date the MRI was taken (September 2004). Indeed, Dr. Freitag acknowledged that claimant was at an age in which it is "very common" to have some form of degenerative condition of the cervical spine.

As the foregoing evidence suggests, the Commission was presented with conflicting medical evidence whether claimant even had a cervical condition and, if so, whether the condition was causally connected to claimant's employment. In resolving this conflict, the Commission placed greater reliance on the testimony of Dr. Ghanayem. As noted above, it is within the province of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses, and assign weight to the witnesses' testimony. *R & D Thiel*, 398 Ill. App. 3d at 868; *Hosteny*, 397 Ill. App. 3d at 674. As such we cannot say that the Commission's finding that claimant failed to prove that her cervical spine pathology is causally connected to her employment is against the manifest weight of the evidence.

We further find that the Commission's conclusion that claimant's two other conditions–a rotator cuff injury and cubital tunnel syndrome–are not causally related to her employment is not against the manifest weight of the evidence. As to claimant's rotator cuff pathology, neither Dr. Freitag nor Dr. Bresch (to whom claimant was referred by Dr. Freitag) offered a causation opinion. Dr. Ghanayem, however, opined that given the sedentary nature of claimant's position, her duties at work could not have caused a rotator-cuff injury. Thus, the only causation opinion was that claimant's rotator cuff injury was not causally connected to her employment. As such a conclusion opposite to the one reached by the Commission is not clearly apparent.

With respect to claimant's cubital tunnel syndrome, Dr. Freitag testified that this condition could have been caused by "double crush syndrome," which he described as an irritation in the cervical area and a second area of irritation at the elbow or carpal tunnel area. He then opined that the condition "could be" work related, inasmuch as it was related to claimant's cervical condition and that sitting and resting one's elbow at a workstation could aggravate such a condition. However, as noted above the Commission expressly rejected a link between claimant's cervical condition and her employment, a finding with which we do not disagree. Moreover, Dr. Ghanayem rejected Dr. Freitag's opinion that claimant's cubital tunnel syndrome could be attributable to her cervical spine due to a phenomenon known as "double crush syndrome." He explained that cubital tunnel syndrome cannot be caused by problems at the C5-C6 level, because the "C6 nerve does not go by the elbow." Rather, citing the negative EMG in 2003 and claimant's sedentary position, Dr. Ghanayem testified that he did not believe that claimant's cubital tunnel syndrome was work related. Again, the Commission was presented with conflicting medical evidence regarding whether

claimant's cubital tunnel syndrome was work related. The Commission concluded that the weight of the evidence supported a finding that this condition was not connected to claimant's employment. Given the conflicting nature of the evidence presented, we cannot say that the Commission's finding is against the manifest weight of the evidence on this issue.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the circuit court of Cook County, which confirmed the decision of the Commission.

Affirmed.