2012 IL App (2nd) 110766WC-U
No. 2-11-0766WC
Order filed June 25, 2012

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CHICAGO WHITE METAL CASTING, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION and LUDWIK KULIG, Defendants-Appellees.	) Appeal from) Circuit Court of) DuPage County) No. 10MR1545)) Honorable) Terence M. Sheen,) Judge Presiding.

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

ORDER

¶ 1 *Held*: Commission's decision finding claimant proved he sustained repetitive trauma injuries, which arose out of and in the course of his employment with employer, was not against the manifest weight of the evidence; Commission's determination that employer received timely notice of claimant's injury was not against the manifest weight of the evidence; and Commission's award of permanent total disability to claimant was not against the manifest weight of the evidence.

¶ 2 On April 13, 2006, claimant, Ludwik Kulig, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 through 30 (West 2004)), seeking benefits from employer, Chicago White Metal Casting, for repetitive trauma injuries suffered to his right shoulder on November 5, 2005. After a hearing, an arbitrator found claimant proved he sustained repetitive trauma injuries arising out of and in the course of his

employment with employer and awarded claimant total temporary disability (TTD) benefits in the amount of $283.27 per week for a period of 44 1/7 weeks; permanent total disability (PTD) benefits under section 8(f) of the Act (820 ILCS 305/8(f) (West 2004)) in the amount of $404.37 per week; and medical expenses in the amount of $63,846.02.

¶ 3 Employer filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On review, the Commission affirmed and adopted the arbitrator's decision. Thereafter, employer filed a petition seeking judicial review in the circuit court of DuPage County and the circuit court confirmed the Commission's decision.

¶ 4 Employer appeals, arguing the Commission's (1) decision finding claimant proved he sustained repetitive trauma injuries to his right shoulder on November 5, 2005, which arose out of and in the course of his employment with employer, is incorrect as a matter of law; (2) determination that employer received timely notice of claimant's injury is against the manifest weight of the evidence; and (3) award of PTD benefits to claimant is against the manifest weight of the evidence. We affirm the judgment of the circuit court confirming the Commission's decision.

¶ 5 The parties are aware of the facts taken from the evidence presented at the arbitration hearing on November 3, 2009, and they will not be reviewed in detail. Following the hearing, the arbitrator issued a decision in which he found that claimant sustained repetitive trauma injuries to his right shoulder on November 5, 2005, which arose out of and in the course of his employment with employer. The arbitrator awarded claimant TTD benefits, PTD benefits, and medical expenses. Although the arbitrator questioned the credibility of both claimant and his

supervisor, Tony Agrela, he found "on balance, the facts are more in petitioner's favor." The arbitrator found claimant permanently totally disabled, stating:

> "The petitioner was released to sedentary duty below shoulder level. Work within those restrictions was never offered to the petitioner by the respondent. The petitioner never returned to work."

Further, claimant testified with the assistance of a Polish language interpreter. He did not speak English. Claimant had a grammar school education and attended trade school in Poland.

¶ 6 Employer sought a review of the arbitrator's decision. On September 28, 2010, the Commission issued a decision affirming and adopting the arbitrator's decision. The Commission noted that "videotape was viewed as evidence." Thereafter, employer sought judicial review of the Commission's decision in the circuit court of DuPage County. On July 26, 2011, the circuit court confirmed the Commission's decision and this appeal followed.

¶ 7 Employer first argues that the Commission's decision finding claimant proved he sustained repetitive trauma injuries to his right shoulder on November 5, 2005, which arose out of and in the course of his employment with employer, is incorrect as a matter of law. Contrary to employer's argument, whether an injury arose out of and in the course of one's employment is a question of fact for the Commission to decide, and its determination will not be disturbed unless it is against the manifest weight of the evidence. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 944, 856 N.E.2d 602, 608 (2006). 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, 837 N.E.2d 937, 940 (2005).

¶ 8 An employee's injury is compensable under the Act only if it arises out of and in the course of his employment. 820 ILCS 305/2 (West 2004). "In the course of" employment refers to the time, place and circumstances under which the accident occurred. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 81, 656 N.E.2d 1084, 1086 (1995). "For an injury to 'arise out of ' the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989). Additionally, an injury arises out of the employment if the claimant was exposed to a risk of harm beyond that to which the general public is exposed. *Brady v. L. Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 548, 578 N.E.2d 921, 923 (1991).

¶ 9 An employee who suffers a repetitive-trauma injury still may apply for benefits under the Act, but must meet the same standard of proof as an employee who suffers a sudden injury. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 65, 862 N.E.2d 918, 924 (2006).

¶ 10 In the case at bar, there was sufficient evidence to support the Commission's finding that claimant's injuries arose out of and in the course of his employment with employer. Claimant worked as a machine operator for employer since 1995. His testimony that he did not experience right shoulder pain prior to his employment with employer is unrebutted. His work required him to lift boxes of metal pieces, remove the various pieces from a box, process each piece of metal, return the completed metal pieces to a box, and restack the boxes. Claimant processed from 6 to 100 parts per hour.

¶ 11 Claimant testified that each box weighed approximately 20 pounds or more. Agrela's testimony suggested that the contents of a box could weigh as much as 82 pounds.

Claimant further testified that approximately 20% of his day was spent working with his arms at shoulder or above shoulder level. The record shows that claimant worked substantial overtime. Claimant testified that he worked more than eight hours a day, Monday through Friday, and eight hours on Sunday.

¶ 12 Claimant testified that he began experiencing right shoulder pain as he worked in approximately September or October 2005. Claimant sought treatment on November 5, 2005, with Dr. Walt Bajgrowicz. Claimant complained of right shoulder pain for approximately three months and Dr. Bajgrowicz attributed the pain to repetitive use at work. Dr. Bajgrowicz provided claimant with a "Work Qualification Report" stating claimant's right shoulder pain was work related. Dr. Bajgrowicz referred claimant to Dr. Steven Levin. Claimant complained of significant right shoulder pain. Dr. Levin noted that claimant worked quite a bit and performed a lot of "labor work" with resulting disability in the shoulder.

¶ 13 We note it is undisputed that claimant worked on 23 different machines, only two of which are demonstrated in the DVD offered by employer, and by an individual who is not claimant.

¶ 14 It is the function of the Commission to judge the credibility of witnesses and resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223-24 (1980). Here, the Commission weighed the inconsistencies in the testimony and found that claimant was the more credible witness. Claimant provided a consistent history of his right shoulder pain to his medical providers. There is sufficient evidence in the record to support the Commission's findings. The Commission's finding that claimant suffered a repetitive

trauma injury was not against the manifest weight of the evidence because a contrary finding was not clearly apparent from the evidence presented.

¶ 15 Employer next argues the Commission's determination that employer received timely notice of claimant's injury is against the manifest weight of the evidence. We disagree.

¶ 16 Simply because claimant's injury was not sudden does not deprive claimant of the Act's coverage. "Requiring complete collapse in a case like the instant one would not be beneficial to the employee or the employer because it might force employees needing the protection of the Act to push their bodies to a precise moment of collapse." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529, 505 N.E.2d 1026, 1028 (1987). Simply because an employee's work-related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits. *Peoria County Belwood*, 115 Ill. 2d at 529, 505 N.E.2d at 1028. The Act was intended to compensate workers who have been injured as a result of their employment. *Peoria County Belwood*, 115 Ill. 2d at 529-30, 505 N.E.2d at 1028. "To deny an employee benefits for a work-related injury that is not the result of a sudden mishap or completely disabling penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Peoria County Belwood*, 115 Ill. 2d at 530, 505 N.E.2d at 1028.

¶ 17 A claimant seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a claimant alleging a single, definable accident. *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47, 556 N.E.2d 261, 264 (1990). A claimant must prove a precise, identifiable date when the accidental injury manifested itself. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264. "Manifested itself" means the date on

which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264. The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264. A reviewing court may overturn the Commission's factual determinations only when they are against the manifest weight of the evidence. *Three "D"*, 198 Ill. App. 3d at 47, 556 N.E.2d at 264.

¶ 18 In making this argument, employer contends that the earliest onset of symptoms is the manifestation date. We disagree. The manifestation date is a question of fact and (1) the onset of pain and (2) the inability to perform one's job, are among the facts which may be introduced to establish the date of injury. See *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 138 Ill. App. 3d 880, 887, 487 N.E.2d 356, 362 (1985), see also *Durand*, 224 Ill. 2d at 72, 862 N.E.2d at 929 ("In short, courts considering various factors have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities")

¶ 19 In the instant case, claimant first sought medical treatment for his right shoulder pain on November 5, 2005. The notes of that visit state that claimant complained of right shoulder pain for approximately three months and Dr. Bajgrowicz attributed the pain to repetitive use at work. Dr. Bajgrowicz ordered x-rays and a MRI of claimant's right shoulder. Dr. Bajgrowicz provided claimant with a "Work Qualification Report" stating claimant's right shoulder pain was work related. Claimant provided the report to employer.

¶ 20 In further support, when claimant filed his application for adjustment of claim on April 13, 2006, he alleged an accident date of November 5, 2005, the date on which Dr. Bajgrowicz provided claimant with a "Work Qualification Report" stating claimant's right shoulder pain was work related. The Commission's finding that the manifestation date was November 5, 2005, was not against the manifest weight of the evidence.

¶ 21 We note employer's assertion that claimant "continually expressed" to Agrela that his right shoulder pain was not work related. Claimant denied he made those statements and the Commission found claimant to be the more credible witness.

¶ 22 Under the applicable statute, claimant was required to provide notice of the accident to employer not later than 45 days after the accident. See 820 ILCS 305/6(c) (West 2004). Claimant provided proper notice of the November 5, 2005, accident/manifestation date to employer on November 5, 2005. Further, Agrela admitted he was provided the report the following week.

¶ 23 Accordingly, the Commission's determination of the date of accidental injury in the instant case is not against the manifest weight of the evidence. Further, the Commission's determination that employer received adequate and timely notice of claimant's injury is not against the manifest weight of the evidence.

¶ 24 Employer next argues that the Commission's award of PTD benefits to claimant is against the manifest weight of the evidence. We disagree.

¶ 25 In a workers' compensation case, the claimant has the burden of establishing, by a preponderance of the evidence, the extent and permanency of his injury. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843, 635 N.E.2d 770, 776 (1994). The extent of a

claimant's disability is a question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256, 402 N.E.2d 607, 608 (1980). 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, 1008 (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, 896 (1992).

¶ 26 The rules governing entitlement to odd-lot PTD benefits are well-established. " '[A] person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists.' " *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546, 419 N.E.2d 1159, 1163 (1981), quoting *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 361-62, 376 N.E.2d 206, 210 (1978). The claimant has the burden to prove all the essential elements of his claim, including the burden to initially establish that he falls into the odd-lot category, by a preponderance of the evidence. *Courier v. Industrial Comm'n*, 282 Ill. App.3d 1, 5-6, 668 N.E.2d 28, 30-31 (1996). The claimant need not be reduced to total physical incapacity but "must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357 (2007). "The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." *Westin Hotel*, 372 Ill. App. 3d at 544, 865 N.E.2d at

357. If the claimant establishes that he fits into the odd-lot category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Westin Hotel*, 372 Ill. App. 3d at 544, 865 N.E.2d at 357.

¶ 27 In the present case, the Commission awarded claimant PTD benefits based on a finding that he was unable to engage in stable and continuous employment because of his age, training, education, experience, and condition. Claimant underwent a functional capacity evaluation (FCE) on November 27, 2006. The report of that test states that claimant provided "full physical effort but was inhibited due to lack of range of motion and strength within his upper right extremity." Claimant demonstrated the physical capability and tolerance for work in the sedentary category and not the medium category required by his work as a machine operator. Although employer argues that claimant "could still perform, under his restrictions, many of the same tasks he performed while employed by employer," employer refused claimant employment within his restrictions.

¶ 28 The record includes a labor market survey performed by a vocational rehabilitation counselor. The report dated October 5, 2009, summarized claimant's physical restrictions as set forth in his FCE, his age, his education, and the claimant's work experience. The vocational rehabilitation counselor found claimant not employable based upon "[t]he severe limitations of his right upper extremity." Further, claimant's "inability to write or speak the English language, limited education, and absence of transferable skills" contributed to the "bleak vocational prognosis." Additionally, the report noted that claimant was found eligible for social security disability benefits.

¶ 29 The Commission noted that claimant testified with the assistance of a Polish language interpreter. The record shows that Dr. Levin also made use of an interpreter when advising claimant and further, the occupational therapy evaluator noted: "Obtaining history from patient is difficult secondary to patient primarily Polish speaking." The Commission further noted that claimant completed grammar school in Poland and attended a trade school. Claimant "remains on medication and continues to have problems with his shoulder." The Commission concluded that "no reasonably stable job market exists for this petitioner's limited abilities." In contrast, employer failed to introduce any evidence that claimant is employable in a stable labor market and that such a market exists. Therefore, the Commission's finding that claimant is entitled to PTD benefits under section 8(f) of the Act (820 ILCS 305/8(f) (West 2004)) is not against the manifest weight of he evidence. There is sufficient evidence to support the decision of the Commission. An opposite conclusion is not clearly apparent from the record.

¶ 30 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision.

¶ 31 Affirmed.