2013 IL App (2nd) 120494WC-U

NO. 2-12-0494WC

Order filed June 3, 2013

IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MICHAEL DAVILA, Petitioner-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Search Developmental Center, Appellee).	)	Appeal from Circuit Court of Lake County No. 11MR1794 Honorable David M. Hall, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The Commission committed no error in failing to draw adverse inferences from the employer's failure to call witnesses or present documentary evidence.

(2) The Commission's factual findings were supported by the record and not against the manifest weight of the evidence.

¶ 2 On January 26, 2009, claimant, Michael Davila, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), alleging he suffered work-related injuries on January 5, 2009, and seeking benefits from

the employer, Search Developmental Center. Following a hearing, the arbitrator denied claimant benefits, finding he did not sustain an accident that arose out of and in the course of his employment. On review, the Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Lake County confirmed the Commission. Claimant appeals, arguing (1) the Commission misapplied the rule of evidence regarding adverse inferences to be drawn from a party's failure to call witnesses within its control, (2) the Commission should have applied an adverse inference to the employer's failure to produce specific documentary evidence within its control, and (3) the Commission's factual determinations were against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At arbitration, evidence showed claimant performed maintenance duties for the employer, a social service agency that provided daily-living-skills training and vocational training to developmentally disabled adults. Claimant testified, on January 5, 2009, he was injured while performing his job duties. On that date, he was required to move furniture using a dolly. Claimant stated he loaded three or four tables on to the dolly and began pulling it behind him. As he went through a doorway the dolly began tipping. Claimant testified that, before he could turn around and grab the tables, they hit him on the back and he fell to the ground with the tables on top of him. Following his accident, he noticed a throbbing or pumping pain in his back.

¶ 5 Claimant stated he was alone at the time of his accident but other individuals were nearby. His fall caused a loud noise and two of his coworkers, David and Duncan, found him, lifted the tables off of him, and helped him off the floor. Claimant testified a third coworker named Gloria, who was with a client, looked around the corner and saw claimant with the tables. He noted Gloria was unable to assist him because she could not leave the client alone. The three coworkers did not testify at arbitration.

¶ 6 Claimant testified he contacted his manager, Carolyn Bernett, by telephone and reported that he had an accident. In response to Bernett's inquiries, claimant reported that he was not okay and wanted to go to the hospital. After speaking with Bernett on the telephone, claimant saw her in the employer's office. He then drove himself to the hospital.

¶ 7 Medical records show claimant sought emergency-room care on January 5, 2009. Initially, records state claimant reported that "a stack of tables fell off a dolly and knocked [him] to the ground", hitting him on the "back of r[ight] neck and upper back and r[ight] flank." Later, his records show he reported a history of "pulling a dolly with [two] tables" when the tables dislodged after hitting a door frame and fell on his "right posterior side," causing claimant to fall to the "floor onto [his] knees." Finally, claimant also provided a history of having two tables fall "and hit him on the right side of [his] mid and low back." X-rays were taken, showing "[a]nterior subluxation of L5 on S1, less than grade 1, with lysis of the interarticularis of L5." Claimant was diagnosed with a contusion on his lower back, prescribed medication, and instructed to obtain follow-up care. He was also told to remain off work for one to two days and then return to work on January 7, 2009, with lifting restrictions.

¶ 8 On January 12, 2009, claimant received follow-up care from Dr. Anna Piortrowski, his family doctor. He noted back pain that began approximately one week before after pulling and moving tables at work. Dr. Piortrowski's notes reflect claimant's symptoms had recently been improving. He reported his pain was at a 3 on a scale of 1 to 10. She assessed claimant as having an acute back strain and determined he could return to work without restriction. She also noted "hx of back strain several months ago."

¶ 9 Claimant denied experiencing back problems prior to January 5, 2009. He testified he had no health problems and was working every day prior to his injury. Claimant

noted he once had a bruise on his back for which he sought treatment from Dr. Piortrowski. He was unsure when that injury occurred.

¶ 10 On January 13, 2009, claimant returned to work for the employer. He testified he "started doing a little bit of work" but then was discharged by Bernett for falsifying his arrival and departure times. Claimant acknowledged the employer accused him of signing in to work before he actually began working and agreed that he recorded incorrect arrival times on a couple of days during the Christmas vacation period. He testified he signed in earlier than he should have so that the employer would not be mad at him for arriving late. Claimant stated he was sometimes about 10 or 15 minutes late to work.

¶ 11 On cross-examination, claimant estimated he wrote the incorrect time on time sheets for at least four days. However, he denied that he wrote the incorrect time because he wanted to mislead the employer. Instead, claimant asserted he wrote his time down for those four days in advance so that he would not "have to go back to the office every morning to write in [his] times." Claimant agreed he had a previous problem with tardiness while working for the employer but stated he believed there had been only one prior issue. On redirect, claimant denied that it was his intention to falsify information on his time sheets. On re-cross, he agreed that he did not actually work the hours reflected on the time sheets at issue but asserted he intended to correct his time sheets on the day of his accident. Claimant acknowledged he never actually spoke with anyone about correcting his time sheets.

¶ 12 On January 14, 2009, claimant returned to Dr. Piortrowski and complained that his low back pain had worsened. She noted he "went back to work and had to do shoveling yesterday" and "re-injured his back." Dr. Piortrowski recommended x-rays and that claimant remain off work pending further evaluation. Her working diagnosis was acute back strain. Dr. Piortrowski also noted her differential diagnosis was sciatica and herniated disk. The same date,

claimant underwent additional x-rays, revealing "[g]rade 1 spondylolisthesis of L5 on S1 secondary to bilateral spondylolysis." On January 26, 2009, claimant returned to Dr. Piortrowski and reported his pain was slightly improved but persistent. Dr. Piortrowski diagnosed claimant with acute back strain, spondylolisthesis, and spondylosis.

¶ 13 Claimant continued to follow up with Dr. Piortrowski. On March 16, 2009, he reported his pain "flared up" while he was cleaning an apartment. He was very stiff the next day and had to call 9-1-1. Dr. Piortrowski recommended he see an orthopedist for a second opinion. Thereafter, claimant saw Dr. Michael Kornblatt on two occasions. Dr. Kornblatt's records reflect a diagnosis of L5-S1 spondylolisthesis on April 2, 2009, and work restrictions of no lifting or carrying over 25 pounds. Claimant testified Dr. Kornblatt did not do much for him and, during that time frame, he continued to experience pain in his leg, toes, and all the way down the side of his back.

¶ 14 On June 5, 2009, claimant saw Dr. Piortrowski and reported persistent low back pain. Thereafter, the record reflects no further medical care until January 25, 2010. At that time, claimant returned to Dr. Piortrowski and reported persistent low back pain. Dr. Piortrowksi recommended a magnetic resonance imaging (MRI). On February 19, 2010, she noted claimant's MRI revealed "progressive grade 1 anterolisthesis L5-S1."

¶ 15 Claimant also sought medical treatment from Dr. Juan Alzate. On February 24, 2010, Dr. Alzate authored a letter noting claimant's accident history involved "putting some tables up" at work when "those tables collapsed on top of him and he fell to the floor." He stated claimant experienced trauma to his lower back and, since that time, complained of lower back pain with radiation to the right lower extremity. Dr. Alzate noted claimant's pain was persistent and severe and that claimant did not respond to medical treatment. Claimant reported using a cane to walk for three to four months. Dr. Alzate reviewed claimant's MRI and stated it revealed

"grade 1 anterolisthesis at L5-S1 with bilateral pars defect." He determined that finding "happened because of the trauma and [was] related to [claimant's] work." Dr. Alzate opined claimant required a fusion with instrumentation at L5-S1. On April 16, 2010, he prescribed a cane for ambulation.

¶ 16 The employer presented the testimony of Carolyn Bernett. Bernett worked for the employer as an adult learning program manager and was claimant's direct supervisor. Bernett stated, early on in claimant's employment, there were "frequent instances of coming in late or calling off sick and/or recording the incorrect or inaccurate time on his timesheet." She described claimant's conduct as excessive and noted she had "many verbal conversations" with claimant regarding his actions. Bernett identified a memo, dated October 16, 2008, concerning claimant's tardiness and absenteeism. On that date, she reviewed the employer's requirements with claimant and he signed the document to acknowledge his receipt of that information.

¶ 17 Bernett was aware claimant alleged a work-related injury on January 5, 2009. She testified, on that date, claimant reported he was injured while moving tables. Bernett stated no one reported witnessing claimant's accident. Further, Bernett visited the location of claimant's alleged accident but saw nothing indicating an accident had occurred there. She acknowledged that she did not recall what time she viewed the accident site and that, although she did not see tables on the floor, she assumed someone had already moved them. Bernett testified the matter was investigated by asking claimant what happened and determining that no one else saw the accident occur.

¶ 18 Larry Brothers also testified for the employer. In December 2009, Brothers worked for the employer and performed maintenance duties with claimant. On January 9 and 29, 2009, Brothers had conversations with Greg Petersen, the employer's chief administrative officer, regarding claimant. During those conversations, Brothers reported claimant's arrival times on

December 29 and 30, 2009. Additionally, he reported that, on Wednesday, December 31, 2009, claimant came to the work site and stated he would not be working that day due to a backache.

¶ 19 Brothers testified he had conversations with claimant prior to January 5, 2009, during which claimant described having back problems and stated he had been seeing a doctor for back pain. Brothers stated claimant was frustrated that his doctor would not prescribe medication stronger than Ibuprofen. According to Brothers, claimant stated he was going to go to his doctor for stronger medication "even if he had to fake it." Claimant indicated his intent to stage a more severe back injury. Brothers testified he reported the forgoing information to Petersen. On January 29, 2009, he signed a statement, which he identified at arbitration, documenting their conversations. On cross-examination, Brothers testified he was also asked to write a statement in longhand. He did not have a copy of his handwritten statement and did not know what happened to it. However, Brothers asserted the typewritten statement was an accurate reflection of information contained in his handwritten statement.

¶ 20 Petersen testified for the employer. He stated Brothers approached him regarding conversations he had with claimant. According to Petersen, Brothers had a handwritten report from which Petersen made the typewritten statement introduced at arbitration. Petersen testified he showed the typewritten statement to Brothers and asked him to review it and confirm its accuracy. Petersen testified the typewritten statement accurately reflected the information contained in the handwritten statement. Further, Petersen was aware that claimant reported a work accident on January 9, 2009. From Bernett, he learned that no one ever came forward to report witnessing claimant's alleged accident.

¶ 21 Claimant testified, in the week preceding his accident, he spoke with Brothers once or twice. On one of those occasions, he reported to Brothers that he was going home early because his stomach hurt. Claimant denied that he told Brothers he experienced back pain prior

to his alleged accident date. On rebuttal, claimant denied that he talked with Brothers about his physical conditions.

¶ 22 On September 1, 2010, the arbitrator denied claimant benefits under the Act, finding he failed to prove he sustained an accident that arose out of and in the course of his employment. The arbitrator determined claimant was not credible in his testimony and the medical findings did not support his subjective complaints. He also found Dr. Alzate's opinions were not credible, noting he saw claimant more than a year following the alleged accident. On September 15, 2011, the Commission affirmed and adopted the arbitrator's decision without further comment. On April 11, 2012, the circuit court of Lake County confirmed the Commission's decision.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, claimant argues the Commission erred in finding he failed to prove accidental, work-related injuries that arose out of and in the course of his employment. He contends the Commission's decision was against the manifest weight of the evidence and it improperly failed to draw adverse inferences against the employer for failing to present evidence within its exclusive control.

¶ 26 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). " 'In the course of employment' refers to the time, place and circumstances surrounding the injury" and an injury will generally be compensable where it occurs "within the time and space boundaries of the employment." *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 671. "The 'arising out of' component is primarily concerned with causal connection"

and is satisfied where the claimant shows his or her injury "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 204, 797 N.E.2d at 672.

¶ 27 "In resolving disputed issues of fact, *** it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence." *Shafer v. Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 38, 976 N.E.2d 1. "Whether an injury arises out of and in the course of the claimant's employment is a question of fact to be resolved by the Commission, and we will not disturb its determination unless it is against the manifest weight of the evidence." *Metropolitan Water Reclamation District of Greater Chicago v. Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013, 944 N.E.2d 800, 803 (2011). "A finding of fact is contrary to the manifest weight of the evidence only where an opposite conclusion is clearly apparent." *Metropolitan*, 407 Ill. App. 3d at 1013, 944 N.E.2d at 803.

¶ 28 On review, the appropriate test is not whether this court might have reached the same conclusion but whether there is sufficient evidence in the record to support the Commission's decision. *Metropolitan*, 407 Ill. App. 3d at 1013, 944 N.E.2d at 803. "We will affirm a decision of the Commission if there is any basis in the record to do so, regardless of whether the Commission's reasoning is correct or sound." *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208, 904 N.E.2d 1122, 1136 (2009).

¶ 29 Initially, claimant argues the Commission erred in failing to draw adverse inferences against the employer based upon its failure to present both witnesses and documentary evidence within its exclusive control. Specifically, he contends the Commission improperly drew an adverse inference against his failure to present the testimony of the coworkers whom he alleged observed his accident rather than against the employer by whom those individuals were

employed. Additionally, claimant argues an adverse inference must be drawn from the employer's failure to present the handwritten note described by both Brothers and Petersen.

¶ 30 "Except when the Act provides otherwise, the Illinois rules of evidence govern proceedings before an arbitrator or the Commission." *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 590, 834 N.E.2d 583, 590 (2005) (citing 50 Ill. Adm. Code 7030.70(a) (1996) ("The Illinois common law rules of evidence and the Illinois Evidence Act *** shall apply in all proceedings had before the *** Commission, either upon arbitration or review, except to the extent they conflict with the ***Act")). Claimant cites to the Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011) (hereinafter, IPI Civil (2011) No. 5.01), stating it sets forth the common law rule of evidence that a party's failure to produce testimony or physical evidence within its control creates a presumption that the evidence would have been unfavorable to that party. That instruction states as follows:

> "If a party to this case has failed [to offer evidence] [to produce a witness] within his power to produce, you may infer that the [evidence] [testimony of the witness] would be adverse to that party if you believe each of the following elements:
>
> 1. The [evidence] [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence.
>
> 2. The [evidence] [witness] was not equally available to an adverse party.
>
> 3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] [produced the

witness] if he believed [it to be] [the testimony would be] favorable to him.

4. No reasonable excuse for the failure has been shown."

IPI Civil (2011) No. 5.01

¶ 31 The instruction's "notes on use" section provides that before the instruction is given, "the trial court must first determine that in all likelihood a party would have produced the witness/document under the existing facts and circumstances except for the fact that the testimony/contents would be unfavorable. IPI Civil (2011) No. 5.01 (citing *Tuttle v. Fruehauf Corp.*, 122 Ill. App. 3d 835, 843, 462 N.E.2d 645, 652 (1984)). "The instruction is not warranted when the unproduced witness's testimony would be merely cumulative." IPI Civil (2011) No. 5.01 (citing *Chuhak v. Chicago Transit Authority*, 152 Ill. App. 3d 480, 489, 504 N.E.2d 875, 881 (1987)). Further, the comments to IPI Civil (2011) No. 5.01 provide that "[t]he adverse presumption depends on the lack of a reasonable excuse for the nonproduction." IPI Civil (2011) No. 5.01.

¶ 32 Here, the Commission committed no error in failing to draw an adverse inference from the employer's failure to call witnesses. We note an adverse inference does not automatically arise from the failure to present evidence within one's control. Instead, as IPI Civil (2011) No. 5.01 and its notes and comments sections show, certain elements must be found before the inference may be applied and certain circumstances do not warrant its application. In this instance, the evidence presented failed to establish that the witnesses were under the employer's exclusive control and not equally available to claimant. Although clamant identified the three witnesses as coworkers on the date of his injury, there is nothing in the record that shows those individuals remained so employed at the time of arbitration, over a year and half later. See *Wood*

v. Mobil Chemical Co., 50 Ill. App. 3d 465, 474, 365 N.E.2d 1087, 1093-94 (1977) (holding IPI Civil, No. 5.01 was given in error where there was no evidence in the record that, at the time of trial, the witness remained employed by the party against whom the adverse inference was sought to be applied).

¶ 33 Further, through testimony from Bernett and Petersen, the employer presented evidence that it was unaware of any witnesses to claimant's alleged accident. In fact, claimant acknowledged that he was alone when his alleged accident occurred and that the coworkers he identified as witnesses did not actually see the accident happen. That the witnesses did not actually observe claimant's accident presents a reasonable excuse for the employer's failure to call them, particularly where its position at arbitration was that claimant had a prior back condition of ill-being and intended to stage a more severe injury.

¶ 34 Additionally, we find an adverse inference based upon the employer's failure to produce the handwritten note is unwarranted because such evidence would have been cumulative. Brothers testified he wrote the handwritten statement at issue and provided testimony regarding its contents. Further, both Brothers and Petersen testified the typewritten statement that was submitted at arbitration was an accurate representation of information contained in Brothers' handwritten statement. Given that the employer presented the testimony of the individual who authored the handwritten statement, it was unnecessary for it to submit the actual statement.

¶ 35 As always in workers' compensation cases, it is the Commission that is charged with drawing reasonable inferences from the evidence. The record in this case fails to reflect any reversible error.

¶ 36 On appeal, claimant further argues the Commission's decision was against the manifest weight of the evidence. He contends the Commission's credibility determination was unsupported, his alleged accident and injury were well documented in medical records, Dr. Alzate offered credible opinions relating claimant's injury to his alleged work accident, and the employer offered no contrary medical opinion.

¶ 37 Here, in denying claimant benefits, the arbitrator relied heavily on his finding that claimant's testimony was not credible. The Commission relied upon the arbitrator's findings, affirming and adopting his decision without further comment. As stated, it is within the province of the Commission to make credibility determinations, draw reasonable inferences from the evidence, determine the weight to give testimony, and resolve conflicts in the evidence. In this instance, the record reflects several ways in which claimant's testimony was inconsistent with, or contradictory to, other evidence presented. The arbitrator had the opportunity to observe claimant's testimony and that of the other witnesses. His findings, and the Commission's reliance on those findings, were supported by the record and not against the manifest weight of the evidence.

¶ 38 The arbitrator's decision states as follows:

> "The Arbitrator finds [claimant] to be not credible in his testimony. First of all, his description of the accident does not seem plausible. [Claimant] testified that he was pulling a dolly behind him through a door. It was loaded with three or four tables (the medical records indicate two). The tables struck the door jam, and they fell on top of him knocking him to the ground. The initial medical records indicate they struck him and say nothing about

them landing on top of him. The alleged accident was un-witnessed."

The arbitrator's findings accurately set forth inconsistencies between claimant's testimony and his emergency-room records. Those records further reflect claimant provided at least three separate accident histories while seeking emergency medical care and each history contained discrepancies regarding the area of his back that was struck by the tables. One history reflects that claimant only fell to his knees.

¶ 39 Claimant's testimony was also inconsistent with Dr. Piortrowski's medical records. Notably, her records reflect she saw claimant on January 14, 2009, and he reported his condition worsened after he returned to work the previous day, January 13, 2009, and re-injured his back while shoveling at work. At arbitration, claimant testified only that he returned to work on January 13, "started doing a little bit of work," and was then discharged from his employment. Claimant did not describe a worsening of his condition following a work-related, shoveling injury. Additionally, claimant denied back problems prior to January 2009, and asserted, prior to that time, he sought medical treatment from Dr. Piortrowski for only a bruise on his back. However, Dr. Piortrowksi's records reflect claimant had a history of a back strain several months prior to January 2009.

¶ 40 Further, claimant's testimony was internally inconsistent. Initially, when testifying at arbitration regarding inaccuracies in his time sheets, claimant agreed that he recorded incorrect arrival and departure times and stated he misrepresented his time so the employer would not be mad at him for arriving late to work. Later, during cross-examination and re-direct, he denied writing the incorrect time to mislead the employer and asserted it was not his intention to falsify information. Claimant's testimony was also inconsistent with Bernett's regarding his prior

instances of work misconduct. Specifically, Bernett testified claimant frequently was late to work, called off sick, or recorded inaccurate times on his time sheets. She described his conduct as excessive and stated it resulted in "many verbal conversations" with claimant. However, claimant testified he had only one prior issue with tardiness before the events that resulted in his termination.

¶ 41 Finally, Brothers provided testimony that claimant reported having back problems immediately prior to his alleged work accident. According to Brothers, claimant also asserted his intention to "fake" a more severe injury to obtain stronger medication.

¶ 42 Although claimant points to Dr. Alzate's opinion that his back condition was related to his alleged work accident, Dr. Alzate's opinions were based upon information claimant provided regarding his accident and symptoms. The Commission was entitled to make credibility determinations and it committed no error in finding claimant was not credible on those issues. Further, the record reflects claimant was not evaluated by Dr. Alzate until over a year after his alleged accident date and, although claimant reported to Dr. Alzate that he experienced persistent and severe pain, the record reflects an absence of medical care related to his back over a seven-month period between June 5, 2009, and January 25, 2010, shortly prior to when he began seeing Dr. Alzate.

¶ 43 Here, the record contains support for the Commission's findings. In particular, it supports the finding that claimant's testimony was not credible. The Commission's decision was not against the manifest weight of the evidence.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the circuit court's judgment.

¶ 46 Affirmed.