2017 IL App (5th) 160331WC-U

Order filed December 8, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

GILSTER-MARY LEE CORPORATION,	)	Appeal from the Circuit Court
	)	of the Twentieth Judicial Circuit,
	)	Randolph County, Illinois
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 5-16-0331WC
	)	Circuit No. 15-MR-136
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (William Bunn, Appellees).	)	Honorable Eugene Gross, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Although the Commission's finding that the last act establishing a contract for hire between the claimant and the employer occurred in Illinois was not against the manifest weight of the evidence, the Commission's finding that claimant gave proper notice of the accident within 45 days as required for its jurisdiction was erroneous as a matter of law.

¶ 2 The claimant, William Bunn, filed an application for adjustment of claim seeking benefits from Gilster-Mary Lee Corporation (employer) under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)) for injuries to his neck alleged to have resulted from an industrial accident occurring on August 13, 2009. The accident occurred in McBride, Missouri.[1] The matter proceeded to a hearing before Arbitrator Nancy Lindsey, who determined that Illinois was not the proper jurisdiction for the claim. The arbitrator's decision further determined that, even if jurisdiction were proper in Illinois, the claimant had failed to give timely notice to the employer. The arbitrator dismissed all remaining contested issues as moot. The claimant sought review of the arbitrator's award before the Illinois Workers' Compensation Commission (Commission), which by divided decision, vacated the arbitrator's decision and awarded temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, as well as medical expenses related to treatment of the claimant's neck injuries. The employer sought judicial review of the Commission's decision in the circuit court of Randolph County, which confirmed the decision of the Commission. The employer then brought this timely appeal.

¶ 3 FACTS

¶ 4 The following factual recitation is from the evidence presented at the arbitration hearing held before Arbitrator Lindsay in Herrin, Illinois, on June 3, 2014, and the Commission's Corrected Decision and Opinion on Review dated October 15, 2015.

¶ 5 The claimant was employed by the employer as a truck driver. He began working for the employer in June 2002. It is undisputed that the claimant sustained a traumatic injury on August 13, 2009, while he was attempting to pull a fifth wheel pin while on a truck route assignment. The claimant described experiencing a sharp pain akin to an electrical shock when he pulled on

[1] The claimant has a claim pending in Missouri for the same accident.

the pin. He testified that after the pain subsided he finished de-coupling the trailer from the tractor and finished the day's work. He worked the following day. On Saturday, August 15, 2009, he awoke to numbness in his left hand, arm, and thumb. He also felt "tingling" in his entire left arm as well. On Sunday, he noticed numbness in his fingers. On Monday, he left for a previously scheduled vacation in Florida. He continued to notice a numb "cold" feeling in both arms. He continued to notice pain and a "freezing sensation" when he returned from work and for approximately two weeks thereafter.

¶ 6 On September 14, 2009, the sought treatment from his primary care physician, Dr. Laurie Womack. During the examination, the claimant told Dr. Womack that he was experiencing numbness and tingling in his left arm, along with progressive weakness in both arms. Dr. Womack ordered an MRI and arranged for a consultation with Dr. Kyle Colle, an orthopedic neurosurgeon, in Cape Girardeau, Missouri. The claimant testified that, immediately after his examination by Dr. Womack, he reported the injury to his supervisor.

¶ 7 On October 15, 2009, the claimant was seen by Dr. Colle. The claimant gave a history of removing the pin on the fifth wheel of his tractor-trailer on August 13, 2009, when he felt a "shock" going down from his neck through his spine. He described a burning sensation and weakness in his arms that was worse in his left arm. He also reported intermittent gait abnormalities. Dr. Colle noted that the claimant reported his symptoms had "significantly progressed" since August 13, 2009. Dr. Colle noted the claimant's history of cervical disc disease, stenosis, and spondylosis. The claimant also reported a work-related neck injury in 2005, from which he had been released to full duty with only a 50-pound lifting restriction. The claimant also reported being relatively symptom free since 2006. Dr. Colle also had available cervical spine MRIs from 2005 and 2006. He diagnosed the claimant with severe multilevel

cervical spondylosis, stenosis, and a recent exacerbation of upper extremity dysesthesias. Dr. Colle opined that the claimant's symptoms were consistent with anterior cord syndrome likely due to a traumatic injury on August 13, 2009, as described by the claimant. Dr. Colle ordered an EMG/Nerve Conduction study and, pending the result of the study, surgery. Dr. Colle took the claimant off work.

¶ 8 On October 16, 2009, the claimant underwent the EMG/Nerve Conduction study. Dr. Colle read the results as consistent with a spinal cord injury at multiple levels of the cervical spine as well as acute denervation from C3 to C8. Dr. Colle recommended surgery. He prescribed a neck brace and continued to keep the claimant off work.

¶ 9 On October 19, 2009, the claimant reported the August 13, 2009, accident and injury to the employer by filling out and submitting a written accident report. The employer maintained that the written report was the first notice it received regarding the claimant's alleged injuries. On October 21, 2009, the claimant provided a recorded statement to the employer's workers' compensation coordinator describing the mechanism of the accident on August 13, 2009, and the gradual onset of his symptoms. The Commission found, based on the written accident report and the recorded statement, that the first notice the employer received of the claimant's work-related injuries was on October 19, 2009.

¶ 10 On October 28, 2009, the claimant was examined at the request of the employer by Dr. Donald deGrange, a board certified orthopedic spinal surgeon. Dr. deGrange opined that the claimant suffered a mild cervical sprain as a result of the August 13, 2009, accident and that the claimant was at maximum medical improvement (MMI) relative to the cervical strain. He further opined that the August 13, 2009, accident was not a "predominant factor" in his current condition, which he opined was the result of congenital stenosis and acquired degenerative

progression following the 2005 injury.

¶ 11 On November 2, 2009, the claimant was examined by Dr. Daniel Riew, an orthopedic surgeon. Dr. Riew opined that the claimant was born with pronounced congenital spinal stenosis. He diagnosed compression at C3 and C4, and recommended surgery. On November 13, 2009, the claimant was given an MRI of the cervical spine that Dr. Riew read to show significant congenital narrowing at C3 and C4, as well as moderate to severe multilevel degenerative spondylosis at C3-C4 and C6-C7. On November 23, 2009, Dr. Riew performed multiple surgical procedures at C3, C4, C5, C6, and C7.

¶ 12 The claimant reported post-operative improvement of all symptoms following surgery. On January 3, 2011, Dr. Riew performed additional surgical procedures at C3 through C7.

¶ 13 On August 24, 2012, Dr. Riew gave an evidence deposition in which he opined that the accident on August 13, 2009, was "the main instigating factor" in the progression of the claimant's symptoms and his ultimate need for the two surgical interventions. He recognized that the claimant's congenital condition and degeneration following the 2005 accident "contributed" to the claimant's condition, but he further noted that the claimant had a significantly lesser degree of symptoms prior to the accident, and the degeneration resulting from the 2005 accident appeared to be minimal prior to the accident. Dr. Riew further opined that the claimant had yet to reach MMI.

¶ 14 On March 24, 2014, Dr. deGrange gave an evidence deposition in which he opined that the claimant's cervical spinal maladies were caused solely by the severe congenital, chronic, and progressive conditions, and the accident on August 13, 2009, played absolutely no role in his subsequent condition of ill-being and his need for surgical intervention. Dr. deGrange testified that, to a reasonable degree of medical certainty, the only injury the claimant received after the

August 13, 2009, accident was a mild sprain that had completely resolved "within a couple of weeks."

¶ 15 On June 3, 2014, the date of the hearing, the claimant testified that he had returned to truck driving, for a different employer, and that he was now working under the same 50-pound weight restriction that he was working under prior to the August 13, 2009, accident.

¶ 16 Regarding how he came to be hired by the employer, the claimant testified that in early 2002, he contacted Bob Hoh, the claimant's trucking manager, after he heard that the employer was looking for truck drivers. The claimant testified he lived in Perryville, Missouri, at the time. Hoh called the claimant and told him to come to the company headquarters in Chester, Illinois, to fill out an application. The claimant testified that he had an interview with Hoh at the Chester office, and took a drug test there as well. After being told that he was hired, the claimant underwent an orientation session in the basement of the Chester office conducted by Mike Welker, Mr. Hoh's assistant. The claimant testified that he did not meet with anyone at the Perryville, Missouri, facility prior to his being hired. The claimant testified that for the first three years of his employment, he drove his personal vehicle to the employer's facility in Steeleville, Illinois, where he was assigned a tractor/trailer for different routes. After 2006, he picked up his tractor/trailer and began his routes at the employer's Perryville, Missouri, terminal.

¶ 17 Richard Welker, the employer's traffic manager and human resource coordinator, testified for the employer. Welker acknowledged that all employment applications are received at the Chester, Illinois, headquarters, and that all interviews of prospective employees occur at the same facility. Welker further acknowledged that successful interviewees are then sent to the medical center in Chester for drug testing and an employment physical. Welker testified that, after the medical testing, all applicants are routinely sent to the company's Perryville, Missouri,

facility where their driver's license and record is checked, and the employer's operational policies are reviewed with the employee. Welker testified that the hiring process is not complete until after the meeting in Perryville.

¶ 18 The arbitrator found that the Commission had no jurisdiction over the claim as the final action taken in the formation of the employment relationship occurred in Missouri. The arbitrator further noted that, while the jurisdiction issue was dispositive, she further determined that the claimant had not given proper notice of the accident to the employer. The arbitrator issued a decision denying the claim.

¶ 19 The claimant sought review with the Commission, which vacated the arbitrator's award. The Commission, with one dissent, found that it did have jurisdiction over the claim as the last act necessary in the formation of the employment contract occurred in Illinois. The Commission then found that the claimant had given notice as required under the Act. Specifically, the Commission found that notice had been given on October 19, 2009. It determined, however, that the triggering date for determining the 45-day notice period was not the date of the accident, but the date the claimant first reported his symptoms to Dr. Womack, *i.e.*, September 14, 2009. The Commission supported its determination that September 14, 2009, was the initial date for notice to the employer by noting that was the date "[claimant] became aware of the connection of his then-concurrent condition of ill-being and his August 13, 2009, injury." The Commission then found that the claimant's current condition of ill-being of the cervical spine was causally related to the August 13, 2009, accident. This determination was based, primarily, on the fact that the claimant's congenital degenerative condition had been relatively asymptomatic prior to the accident. The Commission also determined that the claimant was entitled to a PPD award equal to 25% of the person as a whole, based on the claimant's testimony regarding the "lingering

effects" of the accident. The dissenting commissioner would have affirmed and adopted the arbitrator's award in total.

¶ 20 The employer then sought judicial review of the Commission's decision in the circuit court of Randolph County. The circuit court confirmed the decision and award of the Commission. The employer then filed this timely appeal.

¶ 21 ANALYSIS

¶ 22 1. Jurisdiction

¶ 23 We first address the employer's argument that the Commission had no jurisdiction over the claim. Under the Act, Illinois has jurisdiction over all workers' compensation claims if: 1) the accident occurred in Illinois; 2) the claimant's employment was principally located in Illinois; or 3) the contract for hire was made in Illinois. 820 ILCS 305/1(b) (West 2008). In the instant matter, the only issue is whether the contract for hire was made in Illinois. The place of contracting for hire is where the last act necessary to give validity to the contract was accomplished. *Youngstown Sheet & Tube Co. v. Industrial Comm'n*, 79 Ill. 2d 425, 433 (1980). The determination of whether a contract for hire was made in Illinois is a question of fact and the Commission's determination of the location of the contract will not be overturned on appeal unless it is against the manifest weight of the evidence. *Hunter Corp. v. Industrial Comm'n*, 268 Ill. App. 3d 1079, 1083 (1994). For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 539 (2007).

¶ 24 Here, the disputed question of fact is whether the last act necessary to validate a contractual relationship occurred at the employer's Chester, Illinois, headquarters, or at its facility in Perryville, Missouri. The claimant maintained that he was under contract when he left

Chester after completing the drug test and physical. The employer maintains that the claimant was not hired until after he appeared at the Perryville facility where his driving record was checked and he was informed of "work policies." The employer was not able to provide testimony from an individual present at the interview in Perryville. Instead, Welker testified from his personal knowledge as to what would have been the procedure. The claimant testified that he did not have a meeting or interview with any company official at Perryville after he completed the process in Chester. He further testified that the next time he met with any company official was at the employer's Steeleville, Illinois, facility.

¶ 25 Reviewing the record, we find that the matter of whether the claimant met with a company official in Perryville, Missouri, to finalize the contract for hire began in Chester, Illinois, is a matter of disputed facts and credibility. The employer's evidence consisted of testimony from an individual who was not present in 2002 when the claimant was hired, but who was able to testify from personal knowledge as to what the procedures were at the time. His testimony was that the hiring process would have been completed in Perryville. On the other hand, the claimant, who was present for the events in 2002 and can only testify as to what occurred in his individual case, testified that he never met with any official in Perryville after completing all the steps required of him in Chester. His further testimony was that any second meeting he would have had to finalize his contract for hire would have been in Steeleville, Illinois. The record supports either conclusion, depending upon which testimony is accorded greater credibility. Given that either conclusion is supported by the record, we cannot say that the conclusion opposite that reached by the Commission was clearly apparent. Therefore, the Commission's finding that the last act necessary to complete the contract for hire occurred in Illinois is not against the manifest weight of the evidence.

¶ 26 2. Notice

¶ 27 The employer next maintains that the Commission erred in finding that the claimant had given proper notice of the accident. An employee's claim for benefits under the Act is barred unless notice of the injury is provided to the employer within 45 days of the accident. 820 ILCS 305/6(c) (West 2008) ("Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident."). The requirement that a claimant give proper notice of a workplace accident within 45 days is jurisdictional and the failure of the claimant to give notice within 45 days will bar his claim. *Tolbert v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130523WC, ¶ 67.

¶ 28 The date upon which a claimant gave notice to the employer is a question of fact for the Commission to determine and its finding regarding the date of notice issue will not be overturned on appeal unless it is against the manifest weight of the evidence. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 95 (1994). In the instant matter, the Commission determined that the claimant gave notice on October 19, 2009, rejecting the claimant's argument that he gave notice on September 14, 2009. The Commission based its finding on the written notice submitted by the claimant on October 19, 2009, and the recorded statement the claimant gave two days later. We cannot say that the Commission's determination that notice was given on October 19, 2009, was against the manifest weight of the evidence.

¶ 29 In the instant matter, however, even though the Commission set the date of notice as October 19, 2009, a date more than 45 days after the August 13, 2009, accident, the Commission still found the claimant had given timely notice. The Commission held that because the claimant was not aware of the causal link between the accident on August 13, 2009, and his neck injuries until after he sought medical treatment on September 14, 2009, he was permitted under section

6(c) of the Act to give notice within 45 days of discovering the link between his employment and his injurious condition. Since the Commission relied upon its interpretation of the statutory language of the Act's notice requirement in reaching its finding of timely notice, our standard of review in the instant matter becomes *de novo*. *PPG Industries v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130698WC, ¶ 14 (where the Commission interprets provisions of the Act, we will apply *de novo* review).

¶ 30 Here, the Commission acknowledged that the "date of the accident" was August 13, 2009. It determined however that it would not start the clock until September 14, 2009, the date the claimant sought treatment for his injuries. The Commission's finding was erroneous as a matter of law. The Act requires notice be given "not later than 45 days after *the accident*." 820 ILCS 305/6(c) (West 2008). Here there is no question that the accident occurred on August 13, 2009, and notice was required under the Act on or before September 27, 2009. The Commission determined that notice was not given until October 19, 2009. The Commission relied upon the concept of "manifestation date" applicable to repetitive trauma cases to determine that the claimant was not required to provide notice until after consulting with his physician at which time he was considered to be first made aware of the fact that his condition of ill-being was causally related to his employment. See *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987).

¶ 31 The Commission's reliance upon the "manifestation date" concept in the instant matter was erroneous as a matter of law. The concept of the manifestation date is unique to claims presented under repetitive trauma theory of recovery. In repetitive trauma cases, unlike specific trauma cases, the very nature of "the accident date" for purposes of giving the statutorily required notice is fluid, as the injury is not traceable to definite time, place, or cause. *Durand v. Industrial*

Comm'n, 224 Ill. 2d 53, 68 (2006). The date upon which the injury manifests itself, therefore, is presumed to be the "date of an accidental injury in a repetitive-trauma compensation case." *Peoria Belwood*, 115 Ill. 2d at 531. It is clear that where there is a traumatic injury traceable to a definite time, place, and cause, the date of "the accident" is the date on which the injury occurred and the date on which the claimant may have been made aware of a causal connection between his employment and his condition of ill-being (*i.e.*, the manifestation date) has no relevance. We find, therefore, that the Commission erred as a matter of law in finding that the claimant had given notice of the accident within 45 days as required by the Act. We find that the Commission lacked jurisdiction under the Act based upon the claimant's failure to give proper notice of the accident. On that basis, we reverse the judgment of the circuit court of Randolph County confirming the decision of the Commission, and we vacate the Commission's award due to its lack of jurisdiction.

¶ 32 3. Remaining Issues

¶ 33 Based upon our determination that the Commission lacked jurisdiction over the claim, we find the employer's remaining issues as to causation and benefits are moot and need not be addressed.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Randolph County, which confirmed the decision of the Commission, is reversed. The Commission's decision and opinion on review is vacated.

¶ 36 Judgment reversed; Commission decision vacated.