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2017 IL App (5th) 160553WC-U

FILED: November 1, 2017

NO. 5-16-0553WC

IN THE APPELLATE COURT

OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ROBERT LEYDEN,	)	Appeal from
Appellant,	)	Circuit Court of
	)	Madison County
v.	)	No. 15MR115
	)	
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Hoffman Transportation, Appellee).	)	Honorable
	)	John B. Barberis, Jr.,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's decision that claimant failed to establish that he sustained an accident in the course of his employment was not against the manifest weight of the evidence.

¶ 2 On September 27, 2011, claimant, Robert Leyden, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), seeking benefits from the employer, Hoffman Transportation. He alleged he sustained work-related injuries on August 23, 2011, to his right shoulder and right upper extremity. Following a hearing, the arbitrator found claimant failed to prove he sustained an

accident that arose out of and in the course of his employment and denied him benefits under the Act.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Madison County confirmed the Commission's decision. Claimant appeals, arguing the Commission erred in finding he failed to prove that he sustained an accidental, work-related injury. We affirm.

¶ 4 I. BACKGROUND

¶ 5 At the March 21, 2014, arbitration hearing, the 70-year-old claimant testified he worked for the employer, a company that was "in the business of hauling dry and liquid products in bulk tanks." Claimant stated he worked for the employer as a bulk truck driver and traveled throughout the country. His job duties included loading the trailer, driving to a destination, unloading the trailer, and then returning to the employer's terminal.

¶ 6 Claimant asserted he injured his right shoulder while working on August 23, 2011, a Tuesday. On that day, he traveled to Perry, Missouri, to deliver a load of plastic pellets. He stated he used air pressure to unload the plastic pellets and described the process as follows:

> "We have a [four]-inch hose that's mounted in a tube on the side of the trailer. We hook one end to the bottom line of the trailer, the other end to the fill line of usually a silo.
>
> And then we take what's referred to as a hot hose, and it goes from the blower that's mounted on the rear of the tractor to a connection on the trailer that allows the air pressure to go into the trailer to push the material out."

Claimant testified he experienced problems while trying to unload the pellets because he could not get pressure to build in the trailer. Ultimately, he noticed that one of the four hatches located

on the top of his trailer "was not clamped down and was laying [*sic*] loose." Claimant attempted to close the hatch but, twice, "it popped right back out." He stated he then "put the heel of [his] hand on the clamp and [he] leaned on it hard." The hatch stayed closed but he "felt a pain go through [his right] shoulder." Claimant testified he experienced tunnel vision and felt like he would black out. He stated he sat down for a few minutes but was then able to keep going and finished unloading the pellets using "pretty much" just one arm.

¶ 7 Following his accident, claimant drove to the employer's terminal in Channahon, Illinois, approximately 260 miles away. He testified he experienced problems while driving and did not have much mobility in his arm. During his drive, he called his wife, a registered nurse, and reported what had happened. Claimant then contacted Tom Oswald, the employer's dispatcher, and explained that he injured his shoulder while attempting to close a hatch on his trailer. He stated Oswald advised him to come in and "they would arrange to get [claimant] to a doctor or something." When claimant arrived at Channahon, he spoke with Oswald and Gerald Curl, the employer's manager of operations. Claimant asserted he told both Oswald and Curl about his work injury and was driven to urgent care at Morris Hospital (Morris) by a coworker.

¶ 8 Claimant testified, at Morris, he saw a nurse practitioner and provided a history of his work accident. However, records from Morris show that claimant was seen on August 23, 2011, and reported right shoulder pain as a result of "moving [four] days ago." Elsewhere, Morris's records identify claimant's chief complaint as "Rt shoulder pain – moving household items over weekend – thinks [*sic*] pulled something." Again, his pain was documented as beginning four days prior to his visit to Morris. Claimant was diagnosed with a right shoulder sprain or strain, provided restrictions of no use of his right arm, and told to follow up with an orthopedic doctor.

¶ 9 At arbitration, claimant denied that he reported to medical personnel at Morris that his shoulder problems began after lifting furniture at home. However, he acknowledged that he and his wife had moved in the weeks preceding his alleged work accident. Specifically, claimant testified his family moved on August 11, 2011, with the aid of a company called "Two Men And A Truck." He acknowledged boxing up items for the moving company and taking the week of his move, August 8 to August 12, 2011, off of work. Claimant denied that he moved any furniture or any of the boxes that he packed up for the moving company. He acknowledged moving a few of his belongings, but asserted he did not move heavy boxes. Claimant denied that he injured his shoulder at the time of his move on August 11, 2011. Additionally, he submitted into evidence an invoice from Two Men And A Truck, indicating the company was engaged to pick up, move, and deliver claimant's household items on August 11, 2011.

¶ 10 Claimant further testified that he worked the week following his move (and the week preceding his work accident) but took part of the day off on Friday, August 19, 2011. He stated he spoke with Oswald about his activities and reported that he "would probably *** finish up moving" that weekend. Claimant asserted that when he took half a day off on August 19, 2011, all of his furniture had already been moved into his new home and the majority of boxes had already been unpacked. He stated the only things left to do with respect to the move "possibly" included hanging pictures or putting away dishes and pots and pans. Claimant denied performing any heavy lifting on August 19, 2011. On cross-examination, he acknowledged there were "some things that [he] had to move" himself because he did not want the movers moving them. He agreed that he "may have moved a table or two once things got set" and that he "may have moved an end table or something."

¶ 11 Claimant testified, on Saturday, August 20, 2011, he relaxed and, on Sunday,

August 21, 2011, he went "back on the road" at approximately 7:30 p.m. to make a delivery on Monday in Fort Smith, Arkansas. He stated he had a Qualcomm system in his work truck, which he described as a communication or tracking device that showed where his truck was at various times. He identified a Qualcomm report that showed he stopped in Cuba, Missouri, at approximately 9:34 p.m. that Sunday evening. Claimant acknowledged, however, that his truck logbooks did not record him stopping in Cuba, but instead, in Bois D'Arc, Missouri, which was located approximately 100 miles "down the road" from Cuba. Claimant explained the discrepancy as follows:

> "Because by [Department of Transportation (DOT)] regulations I would be limited as to how much I could drive—how many hours I could drive on a given day.
>
> And if I had logged Cuba to Fort Smith, I would have used up the majority of my driving time and I would not have been able to work very much, if anything, after I delivered to Fort Smith on Monday.
>
> So I logged to Bois D'Arc in order to save some of my driving hours for the next day."

Claimant asserted other drivers did the same thing and supervisors were generally aware of the practice of logging more miles than had been driven. He asserted both Oswald and Curl were aware of the practice. Further, claimant denied that he had ever been reprimanded for recording incorrect information into his logbook.

¶ 12 Claimant testified on Monday, August 22, 2011, he left Cuba at approximately 3:45 a.m. and traveled to Fort Smith. After making his delivery, he picked up the load of plastic pellets to be delivered to Perry, Missouri, where he alleged he was injured on Tuesday, August

23, 2011.

¶ 13 On cross-examination, claimant acknowledged that records from Morris described his right shoulder pain as being caused by moving activities he performed the previous weekend. He agreed that the medical personnel at Morris did not know him and the nurse practitioner he saw would not have known that he moved on August 11, 2011. Additionally, claimant agreed that other personal information contained in Morris's records was correct, including his address, social security number, date of birth, and employer. Claimant testified he could not explain the accident history in Morris's records.

¶ 14 After receiving treatment at Morris, claimant returned to the employer's terminal. He stated he slept in his truck in the terminal parking lot and filled out paperwork the next morning. Claimant testified he spoke with Curl and another employee, Mike Tallaksen, about his injury and how his work accident occurred. At arbitration, he submitted an employer's first report of injury form prepared by Tallaksen. The report, dated September 2, 2011, stated claimant injured his right shoulder when "closing [a] dome lid" on August 23, 2011.

¶ 15 After obtaining treatment at Morris, claimant continued to seek medical treatment for his right shoulder condition. On August 26, 2011, he saw Dr. Robert Markenson, an orthopedic surgeon, and reported hurting his shoulder at work while pushing on a latch. Ultimately, Dr. Markenson diagnosed claimant with a rotator cuff tear and, on November 16, 2011, he performed surgery on claimant.

¶ 16 On April 16, 2012, Dr. Markenson released claimant from care but opined he was disabled from truck driving. He also determined claimant could not perform work that required overhead lifting or lifting out in front of him. Dr. Markenson opined claimant had reached maximum medical improvement with respect to his shoulder injury and his restrictions were

permanent.

¶ 17 Claimant submitted Dr. Markenson's deposition into evidence at arbitration. Dr. Markenson testified the history of accident claimant reported to him was consistent with the nature of claimant's injury. He testified his opinions could change if that history was incorrect. Dr. Markenson testified that claimant never reported to him that he was injured while moving furniture at home. Further, he stated claimant's shoulder injury would have made it difficult for him to move his shoulder and perform his work activities, including shifting his truck and performing overhead work. Dr. Markenson opined claimant's difficulties would have been visible to others.

¶ 18 On cross-examination, Dr. Markenson stated that lifting heavy or large objects could cause a rotator cuff tear. Further, he agreed that the history of injury contained in Morris's records was inconsistent with the history claimant provided to him.

¶ 19 On January 16, 2012, claimant was examined by Dr. Michael Milne, an orthopedic surgeon, at the employer's request. Dr. Milne's deposition was admitted into evidence at arbitration. He testified claimant provided a history of injuring his shoulder at work when pushing down a hatch. After examining claimant, Dr. Milne opined claimant's right shoulder condition was causally related to his employment. However, he testified that after reviewing claimant's medical records from Morris, he changed his causation opinion and found claimant was injured while working at home. Dr. Milne opined that moving furniture could cause a rotator cuff tear.

¶ 20 Further, Dr. Milne testified that a massive rotator cuff tear was "usually associated with a more chronic type of long-standing tear." He stated there could be a massive acute tear, but such circumstances usually required a large amount of trauma, like falling off of

scaffolding. Dr. Milne stated claimant had a massive rotator cuff tear, which he opined involved "some longer-term chronicity." Further, Dr. Milne testified he watched a video of a person opening and closing a hatch and did not believe it looked like an event that would cause a massive rotator cuff tear, "even if you were pushing hard" on it.

¶ 21 Finally, Dr. Milne agreed that claimant's work activities required him to climb on a truck, use a ladder, and carry a six-inch hose. He opined a person could have done those activities with a torn rotator cuff like claimant had, stating "I'm not sure it would have been exactly easy, but I think they probably could have done that."

¶ 22 At arbitration, claimant's wife, Darlene Leyden, testified. She stated that when she and claimant moved on August 11, 2011, they hired a moving company and claimant did not move any furniture or heavy boxes. Darlene denied that claimant complained of problems with his right shoulder at the time of the move. Further, she recalled that claimant took a half day off work on August 19, 2011, and stated the activities they did that day included "getting everything put in its place" like dishes and glasses. She denied that any furniture had to be repositioned or that claimant handled any boxes. Additionally, Darlene testified she drove claimant back to his truck on Sunday, August 21, 2011. She denied that he complained of pain in his right shoulder or that he appeared to be in pain.

¶ 23 Curl testified he worked for the employer as its director of operations. He oversaw the company's daily functions and was aware that claimant took time off work to move prior to his alleged accident date. Curl testified, on August 23, 2011, claimant reported that he injured himself on the job. Specifically, claimant reported that he was pushing hard on a latch that would not stay down and experienced pain. Curl testified he had claimant taken to Morris. He denied that he called Morris or told anyone at Morris what had happened to claimant. Further, Curl

testified that, at the time claimant went to Morris for treatment, he had no reason to question claimant's version of events.

¶ 24 Curl further testified that the trailer claimant had been using was brought in by the employer for inspection immediately after claimant reported being injured. He stated the latch was inspected to make sure it was operating properly. According to Curl, no work was performed on the trailer and nothing was found to be wrong with the latch. Additionally, after the employer became aware of the accident history contained in Morris's records, the trailer was looked at again and a video was taken of someone operating the latch. The employer submitted the video into evidence at arbitration. Curl denied that there were ever any problems with the latch on the trailer subsequent to claimant's alleged accident.

¶ 25 Further, Curl testified that neither he nor anybody with the employer approved of truck drivers "fudging" their locations on driver logs, stating such an action "would have been no benefit" to the driver. Curl testified the hours that claimant "would have had to work that day would have been more than enough hours to get to Fort Smith" if he left on Sunday at 7:30 p.m. Upon questioning by the employer's counsel, he explained the driving rules as follows:

> "A. At that time, I believe you could drive 11 hours and you could work 14 hours total through the whole day.
>
> So you could work 14. Of the 14[,] you had to only—or you were only allowed to drive 11. Then you had to take a 10-hour break, consecutive 10-hour break and then you could start your day again.
>
> Q. The clock started again?
>
> A. The clock started again for another 14.
>
> Q. All right.

So[,] this driving 2 hours to Cuba and Bois D'Arc, would that have benefited—

A. No. It wouldn't benefit—no. And that's a common battle with drivers on Sunday, and—you know, we know that. It's a battle that we fight."

¶ 26 On cross-examination, Curl agreed that when an employee was injured, someone with the employer would call Morris, the employer's "occupational medicine center," and let Morris know the employee was on his or her way and to give Morris "a brief description." He did not know if anyone called in claimant's case, but agreed that it could have been Tallaksen, the employer's safety director, who no longer worked for the company. Curl acknowledged it was "no secret" that claimant had moved to a new house and stated Tallaksen "very well could have" been aware of claimant's move. Curl also agreed that when he reviewed the accident report prepared by Tallaksen, it made no mention of claimant moving furniture or household items.

¶ 27 Following Curl's testimony, claimant testified in rebuttal. He stated, on August 24, 2011, he observed his trailer being worked on at the employer's terminal and saw "dogs on the top of [his] trailer" being changed. The employer then recalled Curl who disagreed with claimant's testimony, stating "[t]hat never happened." He testified such an action would have required paperwork and a work order and he doubted that the paperwork or work order could have been completed in the amount of time that claimant was present at the terminal. Curl testified the trailer was inspected that day and claimant possibly mistook the inspection for work being performed on the trailer.

¶ 28 Finally, the employer submitted Oswald's deposition into evidence. Oswald testified he had worked for the employer for 24 years and was currently its dispatcher. He

asserted he had daily contact with the employer's drivers and first became aware that claimant sustained an injury when claimant "called in" on August 23, 2011, and reported he "couldn't raise his arm." According to Oswald, claimant did not state whether he was injured at work or at home. He testified he knew claimant "was in the process of buying a house, selling a house, moving, whatever." Further, Oswald stated that the Thursday night prior to the alleged work accident, claimant told him "they were working on the house, you know, stuff with their houses"; however, he did not specifically recall what claimant stated he would be doing. Additionally, he stated he spoke with claimant on Monday, the day before claimant's alleged work accident, and claimant did not tell him that he was having problems with his arm.

¶ 29 On June 25, 2014, the arbitrator issued his decision in the matter, finding claimant did not sustain an accident that arose out of and in the course of his employment and denying him benefits under the Act. In reaching his decision, the arbitrator relied on claimant's medical records from Morris to find claimant did not suffer an accident arising in the course of his work for the employer. He determined the accident history in those records was inconsistent with the accident history asserted by claimant, was detail specific, and contained information that could have only been known to claimant. The arbitrator also found claimant's testimony lacked credibility.

¶ 30 On April 10, 2015, the Commission affirmed and adopted the arbitrator's decision without further comment. On December 2, 2016, the circuit court of Madison County confirmed the Commission's decision.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, claimant argues the Commission's finding that he did not sustain a

work place accident was against the manifest weight of the evidence. He contends that the accident history contained in Morris's records was incorrect and other evidence supported his testimony at arbitration that he was injured while forcefully closing a hatch on his trailer.

¶ 34 "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, "for an injury to be compensable, it generally must occur within the time and space boundaries of the employment." *Id.* "The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant shows "that the 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." *Id.* at 203, 797 N.E.2d at 672.

¶ 35 "As a general rule, the question of whether an employee's injury arose out of and in the course of his employment is one of fact for the Commission." *Bolingbrook Police Department v. Workers' Compensation Comm'n*, 2015 IL App (3d) 130869WC, ¶ 38, 48 N.E.3d 679. "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). On review, the Commission's factual determinations will not be overturned unless they are against the manifest weight of the evidence. *Bolingbrook*, 2015 IL App (3d) 130869WC, ¶ 38, 48 N.E.3d 679. "A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly

apparent." *Id*. Further, "[t]he appropriate test is whether there is sufficient evidence in the record to support the Commission's finding, not whether this court might have reached the same conclusion." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013, 944 N.E.2d 800, 803 (2011).

¶ 36 Here, the Commission's finding that claimant failed to prove that he sustained an accident in the course of his employment was supported by the record and not against the manifest weight of the evidence. Although claimant reported injuring himself at work while leaning hard on a hatch on his trailer, his initial medical records contain an inconsistent history of accident. Specifically, claimant's records from Morris reflect that he injured his right shoulder when "moving [four] days ago" and that claimant experienced pain and thought he "pulled something" after "moving household items over the weekend."

¶ 37 As noted by the Commission, claimant acknowledged having recently moved. Notably, he also admitted that, on August 19, 2011, four days prior to seeking treatment at Morris, he took time off work to finish up his moving activities. Relative to this testimony, the Commission adopted the following findings of the arbitrator:

> "[Claimant] admitted, grudgingly, that he did in fact move some end tables and other items that he did not let the movers to move [*sic*]. It is noteworthy that while [claimant] has entered into evidence that movers moved the family and moved the boxes during the week of August 11th, the focus in this case is not on that week. It is on the weekend after that."

As the Commission determined, claimant's testimony regarding his moving activities was consistent with Morris's records.

¶ 38 On appeal, claimant takes issue with the Commission's finding that his records

from Morris contained information that was only known to claimant. Rather, he contends Curl's testimony demonstrated that the employer's safety director, Tallaksen, would have known that claimant had recently moved and "would have contacted Morris *** to provide the history of injury." However, Curl's testimony showed only that claimant's move was "no secret" to his coworkers. Thus, while the employer's workers may have generally been aware that claimant had moved, there is no evidence of any specific knowledge by either Tallaksen or Curl of claimant's specific moving activities on August 19, which occurred more than one week after the date of his move. Further, Curl testified that he did not contact Morris and did not know if anyone else called regarding claimant. Again, adopting the arbitrator's decision, the Commission found as follows:

> "[Claimant] implies, in a roundabout way, that somehow the employer called Morris *** and gave them a contradictory history. However, *** Curl testified that he did not call *** and while someone else may have, this never arises beyond the level of speculation. Morris *** had all the other details of [claimant's] history correct, including his medications, his age, his past history, his throat cancer, and the history noted in two different places of moving furniture four days before.
>
> Logically, if the employer were to engage in some subterfuge and somehow infer to Morris *** that [claimant] really injured himself while moving, they would not have suggested that it occurred four days before but the week prior to that, when he actually took a week off to move."

The Commission's factual findings are supported by the record.

¶ 39 Claimant also argues on appeal that his performance and completion of all of his

job duties from Monday, August 22, 2011, until the morning of August 23, 2011, supports his assertion of a work-related accident. He contends that if he was injured prior to August 23, 2011, his injury would have caused problems with his ability to drive his truck and perform overhead work. However, as noted by the Commission, Dr. Milne testified claimant could have preformed his work activities with a torn rotator cuff. Further, claimant's own testimony belies his argument. Specifically, he asserted he was able to complete his job duties and drive 260 miles after allegedly sustaining an injury to his right shoulder on August 23.

¶ 40 Here, although claimant argues the Commission ignored his testimony, the record reflects that it, instead, found claimant was not credible. As support for that finding, the Commission noted claimant's testimony regarding the falsification of his driver's logs and repairs he asserted he observed the employer making to his trailer after the alleged accident. The Commission noted Curl's testimony contradicted claimant's testimony with respect to both issues and that it found Curl more credible. As stated, it was the Commission's function to assess the credibility of witnesses and we can find no error in its determinations.

¶ 41 In this instance, an opposite conclusion from that reached by the Commission is not clearly apparent and its decision that claimant failed to establish that he sustained an accident in the course of his employment was not against the manifest weight of the evidence. Because we agree with the Commission's finding of no accident, it is unnecessary to address the additional issues raised by claimant on appeal.

¶ 42 III. CONCLUSION

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

¶ 44 Affirmed.