Service: Get by LEXSEE®
Citation: 371 Ill. 590

*371 Ill. 590, *; 21 N.E.2d 741, **;*
*1939 Ill. LEXIS 651, ****

SANTIAGO RODRIGUEZ, Defendant in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (THE CARNEGIE-ILLINOIS STEEL CORPORATION, Plaintiff in Error)

No. 25062.

Supreme Court of Illinois

371 Ill. 590; 21 N.E.2d 741; 1939 Ill. LEXIS 651

June 19, 1939.

PRIOR HISTORY: [*1]** WRIT OF ERROR to the Circuit Court of Cook county; the Hon. MICHAEL FEINBERG, Judge, presiding.

DISPOSITION: *Reversed and remanded, with directions.*

CASE SUMMARY

PROCEDURAL POSTURE: Defendant employer filed a writ of error to the Circuit Court of Cook County (Illinois). The circuit court reversed a ruling of defendant Industrial Commission, which itself had reversed an arbitrator's award in favor of plaintiff employee on a claim under the Workmen's Occupational Diseases Act.

OVERVIEW: The employee filed a claim for compensation under the provisions of the Workmen's Occupational Diseases Act. He claimed he was suffering from an occupational disease caused by inhaling dust. He worked as a chipper for the employer, a steel company, in the billet dock. However, there was nothing either in the pickling operation or the chipping which created dust. A doctor testified that the employee's condition was "far advanced tuberculosis" and that there was no connection between that pathology and his employment. The arbitrator found for the employee, but the Commission reversed. The circuit court held that the Commission was obligated to uphold the arbitrator's findings unless they were unsupported. The court on appeal disagreed, finding that the Commission was not bound by the arbitrator's decision. This was true regardless of whether the Commission heard new testimony. Instead, only the Commission's decision was subject to judicial review. The court found that the Commission's decision in favor of the employer was not against the manifest weight of the evidence. Thus, the circuit court's ruling was reversed.

OUTCOME: The court reversed the judgment of the circuit court. The cause was remanded to the circuit court, with instructions to confirm the decision of the Industrial Commission in favor of the employer.

CORE TERMS: arbitrator, air, dust, hose, manifest, billet, burst, lung, occupational disease, original jurisdiction, tuberculosis, disability, steel, advisory, chipper, feet, judicial review, contested, chancery, disease, writ of error, hypothetical question, pulmonary tuberculosis, destruction, sanitarium, suffering, surface, exhaust, naught, tissue

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Alternative Dispute Resolution > Judicial Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Occupational Diseases
HN1 Under the provisions of the Workmen's Occupational Diseases Act, the decision of the Industrial Commission, not of the arbitrator, is the significant finding. It is that decision which constitutes the award and is subject to judicial review. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction
HN2 Regardless of whether the Industrial Commission hears testimony in addition to that heard by the arbitrator, it exercises an original jurisdiction and is in no way bound in cases under the Workmen's Occupational Diseases Act by the arbitrator's findings. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > General Overview
Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
HN3 It is not within the province of a court to disturb findings of fact made by the Industrial Commission unless manifestly against the weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: KNAPP, ALLEN & CUSHING, (JOSEPH L. EARLYWINE, and HARLAN L. HACKBERT, of counsel,) for plaintiff in error.

SOL ANDREWS, for defendant in error.

OPINION BY: FARTHING

OPINION

[*591] [742]** Mr. JUSTICE FARTHING delivered the opinion of the court:

Santiago Rodriguez filed a claim for compensation under the provisions of the Workmen's Occupational Diseases act. He claimed he was suffering from an occupational disease caused by inhaling dust during the course of his employment with the Carnegie-Illinois Steel Company, plaintiff in error. After a hearing the arbitrator found that Rodriguez's disability arose out of and in the course of his employment and awarded compensation. A physicianj who had testified before the arbitrator was recalled before the Industrial Commission. After hearing oral arguments, the commission set aside the arbitrator's award and found the disability did not arise out of and in the course of Rodriguez's employment. On *certiorari* the circuit court of Cook county set aside this decision and entered the **[***2]** following order:

"This cause coming on to be heard on a writ of *certiorari* and the court having heard arguments of both sides and being fully advised in the premises, finds that the Industrial Commission heard no evidence in addition to the evidence heard on arbitration and therefore being in no better position to judge the weight of the evidence than this court should not have set aside and held for naught the decision of the arbitrator for the reason that the decision of the arbitrator was not contrary to the manifest weight of the evidence.

"Now Therefore, it is hereby ordered, adjudged, and decreed that the decision of the Industrial Commission in the above entitled cause setting aside and holding for naught the decision of the arbitrator be and the same is hereby set aside and the decision of the arbitrator affirmed."

We granted a petition for writ of error, and the cause is here for further review.

By its order the circuit court held that where all or substantially all of the evidence is heard by the arbitrator, the Industrial Commission has no power to set aside the decision **[*592]** of the arbitrator and make a contrary finding unless that decision is against **[***3]** the manifest weight of the evidence. The company contends that since the commission found the disability did not arise out of and in the course of the employment, the circuit court on writ of *certiorari,* and this court on writ of error, are limited to an examination of the record to determine whether that finding is against the manifest weight of the evidence. In other words, the company says only the decision of the commission is subject to judicial review; that the decision of the arbitrator is advisory and in no way binding on the commission.

The statute provides: "All questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the Industrial Commission." (Ill. Rev. Stat. 1937, chap. 48, par. 172.18.) The exception referred to is that an arbitrator or arbitrators may be appointed (par. 172.19(a)) whose decision "shall become the decision of the Industrial Commission" if no petition for review is filed by either party within fifteen days after receipt of a copy of the decision. (par. 172.19(b)). However, in the case before us a petition for review and transcript of evidence was filed **[***4]** within the designated period, and in such case, the statute says "if a petition for review and * * * transcript of evidence is filed, as provided herein, the Industrial Commission shall promptly review the decision of the arbitrator * * * and all questions of law or fact which appear from the said * * * transcript of evidence, and such additional evidence as the parties may submit. After such hearing upon review, the commission shall file in its office its decision thereon" and notify the parties thereof. (par. 172.19(e)). By paragraph 172.19(f), "The decision of the Industrial Commission * * * shall, **[**743]** in the absence of fraud, be conclusive unless reviewed as * * * hereinafter provided." That paragraph then provides for a review of the decision of the Industrial Commission by writ **[*593]** of *certiorari* to the commission. Therefore, HN1 under the provisions of the Workmen's Occupational Diseases act the decision of the commission, not of the arbitrator, is the significant finding. It is that decision which constitutes the award and is subject to judicial review. In cases under the Workmen's Compensation act which is similar to the Workmen's Occupational Diseases **[***5]** act, we have held that the function of the arbitrator is merely advisory. In *Pocahontas Mining Co. v. Industrial Com.* 301 Ill. 462, page 473, we said: "A review of an arbitrator's decision by the commission, as stated in the *Andrus case, supra,* is *sui generis,* since it is neither a review of the record made by the arbitrator nor a trial *de novo* but a combination of the two. The transcript of the record is to be reviewed by the commission, and the parties have the right to introduce further evidence, which, when taken and properly filed before the commission, must be also considered by it along with the evidence taken before the arbitrator. The jurisdiction of the commission to review the evidence before the arbitrator and to consider any further evidence properly presented to it is original jurisdiction as distinguished from appellate jurisdiction. As suggested by counsel for *amici curiae,* the Industrial Commission appoints the arbitrator, and the arbitrator in his consideration of the case is but the agent of the commission, similar in character to that of a master in chancery or a referee in bankruptcy, so far as the character of the functions performed **[***6]** by the arbitrator is concerned. The award of the arbitrator, like the report of the master in chancery, may become final by its entry upon the records of the commission, and does become final it it is not contested, but if it is contested before the commission the jurisdiction of the commission to review is original jurisdiction as certainly as the action of the circuit court in reviewing or passing upon the master's report and entering final decree is original jurisdiction." See, also, *City of Chicago v. Industrial Com.* 363 Ill. 298, 301; *Olson v.* **[*594]** *Carlton,* 178 Minn. 34; *Rasmus v. Workmen's Compensation Appeal Board,* 117 W. Va. 55; *Fontaine's Case,* 246 Mass. 513.

In support of his contention that the decision of the arbitrator is not merely advisory, defendant in error cites *Illinois Bell Telephone Co. v. Industrial Com.* 325 Ill. 102, 109, but that case is not in point. We there held that the award of the commission was against the manifest weight of the evidence. We are of the opinion that HN2 regardless of whether the commission hears testimony in addition to that heard by the arbitrator, it exercises an original jurisdiction and is **[***7]** in no way bound in such case as this by the arbitrator's findings.

The remaining question, then, is whether the commission's finding that the disability did not arise out of and in the course of the employment is against the manifest weight of the evidence. This requires a consideration of the testimony, which is conflicting.

Rodriguez worked as a chipper for the steel company in the billet dock, a building about 900 feet long and 80 feet high. It is

ventilated by windows which run the length of the east wall. These are usually kept open. The manufacturing process carried on there is the removal of scale and surface defects from steel billets. These billets vary in length from 10 to 12 feet, in width from 4 to 8 inches, and weigh from 375 to 2000 pounds. They are first "pickled" in vats containing a ten per cent solution of sulphuric acid, and then washed with water and steam to remove the scale. An inspector marks the surface defects. The chipper's job is to remove these defects with a chisel operated by compressed air supplied by an air gun. The chips chiseled off the billets are 3/4 of an inch in width and from 3/4 to 10 inches in length. There is nothing either **[***8]** in the pickling operation or the chipping which creates dust. The floor of the billet dock is composed of granulated cinders. Dust is raised when the doors in the east wall are opened or when **[*595]** one of the air hoses bursts. Rodriguez testified that some dust was raised by the exhaust from the air hammer, but the arbitrator who visited the plant, found "the exhaust itself does not throw up any dust whatsoever." There was a conflict in the evidence as to how often an air hose burst. Rodriguez testified that an air hose would break two or three times a day and Chavez, a fellow **[**744]** employee, testified for Rodriguez that "every day there were one or two air hoses that would break, but they were immediately repaired." Witnesses for the steel company testified that an air hose would not burst more than once a month. When an air hose would burst the employee using that chipper would either shut off the valve or pick up the hose, and by doubling it back upon itself and slipping a ring over it, cut off the air. This took only a minute and the dust from the floor which had been raised by the current of air would soon settle. Rodriguez testified that he had never had an **[***9]** air hose he was using burst, and that when one near him broke he immediately ran away from the dust.

For the defendant in error, Dr. Louis K. Eastman, a general practitioner who had examined Rodriguez, testified that he had suffered marked destruction of the lung tissue. In answer to a hypothetical question he gave his opinion that there was a causal connection between the condition of the chest and Rodriguez's occupation due to the fact that he was "constantly working in the presence of dust." He testified that he could not name the condition of the man's lung and, upon cross-examination, refused to characterize the condition as tuberculosis, pneumonoconiosis or silicosis, and replied to all questions as to what was shown by the X-ray: "That picture shows destruction of the lungs."

On behalf of the respondent, Dr. Henry C. Sweany testified that he had been medical director of research for the Municipal Tuberculosis Sanitarium in Chicago since July, 1922. His duties at the sanitarium were to make diagnoses of tuberculosis patients who entered the institution, and he **[*596]** had done a good deal of research work in cases where dust was found in the lungs. He examined Rodriguez **[***10]** and testified as to the symptoms which he found upon that examination and as to the conditions disclosed by the X-rays which had been taken. He testified that in his opinion Rodriguez "is suffering from pulmonary tuberculosis and has been for many years;" that "pulmonary tuberculosis is a disease of the human body caused by a microscopic parasite known as tubercular bacilli accumulating in various tissues, principally in the lungs" and that this disease can attack any one. In answer to a hypothetical question he testified that the conditions under which Rodriguez worked would in no way contribute or lead to his present physical condition. On review before a commissioner, Dr. Sweany again testified on behalf of defendant, reading an X-ray which had been submitted to him at the time of his examination of Rodriguez but which counsel for Rodriguez failed to produce at the hearing before the arbitrator. Dr. Sweany again testified that his diagnosis of Rodriguez's condition was "far advanced tuberculosis" and that there was no connection between that pathology and his employment.

HN3 It is not within the province of a court to disturb findings of fact made by the Industrial Commission **[***11]** unless manifestly against the weight of the evidence. (*Donk Bros. Coal and Coke Co. v. Industrial Com.* 325 Ill. 193; *Green v. Industrial Com.* 337 id. 514.) Since we cannot say that the decision of the commission was without ample competent evidence to support it, the judgment of the circuit court must be reversed and the cause remanded to the circuit court, with instructions to confirm the decision of the Industrial Commission.

Service: Get by LEXSEE®
Citation: 99 Ill. 2d 401, 405

*99 Ill. 2d 401, *; 459 N.E.2d 963, **;*
*1984 Ill. LEXIS 228, ***; 76 Ill. Dec. 828*

DENNIS BERRY, Appellee, v. THE INDUSTRIAL COMMISSION et al., (A.O. Smith Corporation, Appellant)

No. 58332

Supreme Court of Illinois

99 Ill. 2d 401; 459 N.E.2d 963; 1984 Ill. LEXIS 228; 76 Ill. Dec. 828

January 20, 1984, Filed

PRIOR HISTORY: [***1] Appeal from the Circuit Court of Madison County, the Hon. Thomas Hildebrand, Judge, presiding.

DISPOSITION: Judgment reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent employer appealed a judgment of the Circuit Court of Madison County (Illinois), which set aside a decision of the Industrial Commission as against the manifest weight of the evidence under the Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1979). The judgment was in favor of claimant employee.

OVERVIEW: The employee hurt his back in a motor vehicle accident and one-and-half-years later suffered a lifting injury at work, coincidentally on the day the employer stopped operations. The employee's doctor said the lifting incident aggravated the preexisting injury, leaving the employee unable to work. A doctor hired by the employer found a congenital deformity of the lumbar spine, conceded the lifting incident could have aggravated the condition, and said there was no reason for a work restriction. The Industrial Commission found that the employee failed to prove that the accident caused any temporary or permanent disability, or need for medical care. The employee contended that there was no testimony contradicting his doctor's statement that the industrial accident aggravated his preexisting condition. Therefore, as the evidence on this issue was uncontradicted, the employee argued, the decision of the Commission should be set aside. The court held that the evidence and the inferences that could have been drawn from it supported the decision of the Industrial Commission, and its decision was not contrary to the manifest weight of the evidence.

OUTCOME: The judgment for the employee was reversed.

CORE TERMS: claimant's, industrial accident, arbitrator's, Industrial, preexisting, automobile accident, spasm, spine, osteoarthritis, disability, muscle, lumbar, medical testimony, credibility of witnesses, weigh, pain pills, unable to work, neurological, dispensary, aggravated, consulted, manifest, custom, x-rays, temporary, pain, ray

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses

HN1 It is the peculiar province of the Industrial Commission to determine the credibility of witnesses, to weigh the testimony, and to determine the weight to be given to the evidence. Regardless of whether or not the Commission hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN2 Resolving conflicts in the evidence, drawing inferences from the testimony, and determining the credibility of witnesses and the weight to be given their testimony are matters within the province of the Industrial Commission. The Commission is entitled to draw reasonable inferences from both direct, and circumstantial, evidence. A court will not disregard those permissible inferences merely because other inferences might have been drawn. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Preexisting Conditions

HN3 Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones. Therefore, a finding of fact by the Industrial Commission on this issue, based on any medical testimony or on inferences to be drawn from medical testimony, should be given substantial deference because of the expertise acquired by the Commission in

this area. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Eric Robertson and Edward C. Fitzhenry, Jr., of Lueders, Robertson & Konzen, of Granite City, for appellant.

Andrew T. Nalefski, of Lakin & Herndon, P.C., of East Alton, for appellee.

JUDGES: CHIEF JUSTICE RYAN delivered the opinion of the court.

OPINION BY: RYAN

OPINION

[*403] **[**964]** In this workers' compensation case, an arbitrator found that claimant, Dennis Berry, suffered accidental injuries while employed by the A.O. Smith Corporation and awarded him medical payments, a sum representing 44 weeks of temporary total disability, and compensation for permanent loss of 5% of the man under the Workers' Compensation Act (Ill. Rev. Stat. 1979, ch. 48, par. 138.1 *et seq.*). On review, without taking additional evidence, the Industrial Commission reversed the arbitrator's award, finding that the claimant had failed to prove that the accident caused any temporary or permanent disability, or need for medical care. The circuit court of Madison County set aside the Commission's decision as against the manifest weight of the evidence and ordered **[***2]** that the claimant "have judgment against the [employer] in the amounts stated in the arbitrator's decision, together with all taxable interest, costs and fees." The employer appealed under our Rule 302(a) (87 Ill. 2d R. 302(a)).

The claimant was involved in an automobile accident in September 1978. In that accident he suffered injuries **[*404]** to his back. He received treatment for those back injuries from Dr. Robert Bolton and had consulted Dr. Bolton for those injuries as late as November 21, 1979. Claimant had obtained pain pills for those problems from the employer's dispensary on December 13, 1979, approximately three weeks before his industrial accident.

The claimant testified that on January 2, 1980, while at work, he felt a "pop" and pain in his back after lifting one of the 28-pound bars which he routinely lifted on his job. He received pain pills for this from the employer's dispensary on the day of the accident. The employer's operation shut down at the close of work that day and did not reopen. The claimant consulted his physician, Dr. Bolton, on January 4, 1980. Dr. Bolton testified that on that date, the claimant complained that the weather was aggravating **[***3]** his back, however, claimant denied making such a statement. The claimant also denied that his back problems before the industrial accident included his lower back.

Dr. Bolton testified, however, that the lower back was injured by the automobile accident. Dr. Bolton recalled finding muscle spasms in the lumbar-spine area during the January 4, 1980, consultation, but conceded that this finding was not noted on claimant's chart despite his custom of noting significant, objective findings, such as spasms. He did not X ray claimant's lumbar spine until February 1, 1980. Dr. Bolton **[**965]** stated it was his considered medical opinion that the industrial accident could have aggravated the preexisting injury, rendering the claimant unable to work. He also was of the opinion that the industrial accident would be a cause of permanent injury, osteoarthritis, in the "distant future." He conceded that there were no objective findings to support this conclusion. He admitted that he had previously, before the industrial accident, predicted that claimant would in the future suffer from osteoarthritis as a result of the automobile **[*405]** accident.

Dr. Charles I. Mannis **[***4]** testified for the employer based upon his single examination of the claimant on April 12, 1980. He found no muscle spasms. Dr. Mannis took an X ray of claimant's back which revealed a congenital deformity of the lumbar spine. He found no reason to limit the claimant's work. Dr. Mannis testified that the prior back injuries could be the cause of the post-January 2, 1980, pain complained of by the claimant. He conceded that the industrial accident might also be a cause. It was Dr. Mannis' opinion that there was no objective evidence to support an opinion that claimant suffered a permanent injury.

In its order setting aside the decision of the Commission, the circuit court commented that the arbitrator was in a significantly better position to view witnesses, to weigh the testimony, and to determine the weight to be given to the evidence than was the Commission. This comment ignores the fact that HN1 it is the peculiar province of the Industrial Commission to determine the credibility of witnesses, to weigh the testimony, and to determine the weight to be given to the evidence. Regardless of whether or not the Commission hears testimony in addition to that heard by the arbitrator, **[***5]** it exercises original jurisdiction and is in no way bound by the arbitrator's findings. *Seiber v. Industrial Com.* (1980), 82 Ill. 2d 87, 97; *Orr v. Industrial Com.* (1970), 47 Ill. 2d 242, 243.

Claimant argues that there is in fact no testimony contradicting Dr. Bolton's statement that the industrial accident aggravated claimant's preexisting back condition. It is his contention that Dr. Mannis' testimony does not contradict this opinion. Therefore, since the evidence on this issue is uncontradicted, claimant argues, the decision of the Commission must be set aside. We do not view the evidence in this light. Dr. Mannis testified that the automobile accident may have caused the problems **[*406]** which claimant now complains of. Also, Dr. Mannis found no reason to limit the claimant's work. In addition to this contradictory testimony, there were several matters relating to claimant's and Dr. Bolton's testimony that could be viewed by the Commission as detracting from its credibility. The Commission made specific findings of fact. Its findings as to Dr. Bolton's testimony highlight the parts of that testimony which cast doubts on the conclusions the doctor reached. **[***6]** As to Dr. Bolton's testimony, the Commission found:

> "Petitioner testified that on January 4, 1980 he saw Dr. Bolton, who had previously treated him for back injuries sustained in a car accident. Although Dr. Bolton testified he found muscle spasm on January 4, he had no written record of any findings on that date, and although he said it was his custom to note any significant changes or findings or problems in his records, he did not record any results for straight leg raising, reflex, neurological, and sensory tests, because they were negative. On January 4, 1980 Dr. Bolton only took x-rays of Petitioner's thoracic spine, which was one of the areas involved in the earlier auto accident, and treated Petitioner for scoliosis. He did not take x-rays of the lumbar spine, which Petitioner claims he injured, until February 1. Dr. Bolton also said he performed no neurological examinations of Petitioner subsequent to January 4, 1980, and his records contained no notations of changes or problems found in his monthly reevaluation examinations, and while he testified that Petitioner had been and remained unable to work, and had sustained permanent disability because **[**966]** **[***7]** in 10 years he would develop osteoarthritis, he had no

objective findings to support these conclusions. Based on the above, the Commission finds Dr. Bolton's records show no change in Petitioner's preexisting back conditions as a result of the accident on January 2, 1980."

HN2 Resolving conflicts in the evidence, drawing inferences from the testimony, and determining the credibility of witnesses and the weight to be given their testimony are matters within the province of the Industrial Commission. The **[*407]** Commission is entitled to draw reasonable inferences from both direct, and circumstantial, evidence. A court will not disregard those permissible inferences merely because other inferences might have been drawn. (*Long v. Industrial Com.* (1979), 76 Ill. 2d 561.) In *Long*, this court stated:

> HN3 "Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones. Therefore, a finding of fact by the Commission on this issue, based on any medical testimony or on inferences to be drawn from medical testimony, should be given substantial deference because of the expertise acquired by the Commission in this area. (See 1 A. Larson, **[***8]** Workmen's Compensation sec. 12.20, at 3-316 to 3-329 (1978).)" *Long v. Industrial Com.* (1979), 76 Ill. 2d 561, 565-66.

We conclude that the evidence and the legitimate inferences that can be drawn from the evidence support the decision of the Industrial Commission, and that its decision is not contrary to the manifest weight of the evidence. The circuit court erred in setting aside the decision of the Industrial Commission. We therefore reverse the judgment of the circuit court of Madison County.

Judgment reversed.

*176 Ill. App. 3d 545, *; 531 N.E.2d 379, **;*
*1988 Ill. App. LEXIS 1481, ***; 126 Ill. Dec. 84*

ROBERT E. **COOK,** Appellee, v. THE INDUSTRIAL **COMMISSION** et al. (Caterpillar Tractor Company, Appellant)

No. 3-87-0047WC

Appellate Court of Illinois, Third District, Industrial **Commission** Division

176 Ill. App. 3d 545; 531 N.E.2d 379; 1988 Ill. App. LEXIS 1481; 126 Ill. Dec. 84

October 13, 1988, Filed

SUBSEQUENT HISTORY: [*1]** Rehearing Denied December 16, 1988.

PRIOR HISTORY: Appeal from the Circuit Court of Peoria County; the Hon. Robert E. Manning, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent employer sought review of an order of the Circuit Court of Peoria County (Illinois), which vacated the Industrial **Commission's** decision to reverse the **arbitrator's** judgment, awarding petitioner employee temporary total and permanent partial disability.

OVERVIEW: The employee filed for adjustment of claim under the **Workers' Compensation** Act (Act), Ill. Rev. Stat. ch. 48, para. 138.1 et seq., for a knee injury that he sustained during the course of his employment. The **arbitrator** awarded the employee temporary total and permanent partial disability. The **commission** reversed, holding that the decision was against the manifest weight of the evidence. The circuit court vacated the **commission's** decision and reinstated the award of the **arbitrator.** On appeal, the court affirmed. The court ruled that the employer received notice of the employee's injury within the statutory 45-day period. Based upon the testimony of the employee and his wife that he had no medical difficulties with his knees prior to the evidence, and the testimony of the doctors that the cause of injury suffered by the employee would have been related to his **work** activity; the **commission's** decision was against the manifest weight of the evidence.

OUTCOME: The court affirmed the judgment vacating the **commission's** decision, and the reinstatement of the **arbitrator's** award in favor of the employee.

CORE TERMS: knee, doctor, arbitrator's, bathtub, manifest, locked, disability, accidental injury, notice, hypothetical question, pain, right knee, disability benefits, petitioner testified, patient's, leg, knee injury, new evidence, arbitration hearing, work-related, cartilage, answered, weekly, arbitrator's decision, overturn, engine, bolts, cross-examination, hypothetical, wrench

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 Section 6(c) of the **Workers' Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.6(c), provides in pertinent part that oral or written notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN2 The Industrial **Commission** has original jurisdiction. It may both consider the presentation of evidence to its fact-finding agent, the **arbitrator,** and evidence that is first presented to the **commission.** More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 The Industrial **Commission** has authority to determine all unsettled questions and must accept the **arbitrator's** findings, even when it merely reviews the evidence presented at arbitration. Ill. Rev. Stat. ch. 48, paras. 138.18, 138.19 (1985). More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Factual Determinations
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN4 In cases where the Industrial **Commission** has rejected the **arbitrator's** factual findings without receiving any new evidence, it is the function of the court on review to examine the entire record and weigh the evidence to determine whether the factual findings of the **commission** were against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Forrest D. Serblin, of Peoria, for appellant.

Ronald E. Halliday, of Peoria, for appellee.

JUDGES: PRESIDING JUSTICE BARRY delivered the opinion of the court. WOODWARD and CALVO, JJ., Concur. JUSTICE McCULLOUGH, dissenting. McNAMARA, J., concurs.

OPINION BY: BARRY

OPINION

[*547] **[**380]** The petitioner, Robert E. **Cook,** filed an application for adjustment of claim under the **Workers' Compensation** Act (the Act) (Ill. Rev. Stat. 1985, ch. 48, par. 138.1 *et seq.*), for a knee injury suffered while he was employed by the respondent, Caterpillar Tractor Company. An **arbitrator** awarded the petitioner temporary total and permanent partial disability. The Industrial **Commission** (the **Commission)** reversed the **arbitrator's** award, finding that the petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment. The circuit court found the **Commission's** decision to be clearly against the manifest weight of the evidence, vacated the **Commission's** decision and reinstated the award of the **arbitrator**. The respondent has perfected **[***2]** this appeal.

At a hearing before the **arbitrator**, the petitioner gave the following testimony on direct examination. He began **working** for the respondent in November of 1977. For three months prior to March 25, 1978, the alleged date of injury, the petitioner had been **working** on the assembly line, hand-tightening engine bolts with a five-foot-long torque wrench. To tighten each of the 30 to 40 bolts per engine, the petitioner would have to brace himself to pull on the wrench. The process involved considerable use of his legs, including bending and twisting of the knees.

[381]** Approximately one month before March 25, the defendant began to notice that when he was using the torque wrench, his knees were stiff and in pain. During the ensuing month, the petitioner soaked his legs in a hot bath after **work** and applied a heating pad to his knees. In the morning, the petitioner had to **work** the stiffness out of his knees, especially the right knee. On Friday, March 25, 1978, the petitioner noticed that his right knee was more painful than usual. He did not stop **working** that day. The next morning, as the petitioner was getting out of the bathtub, his right knee locked in a bent position. **[***3]** He and his wife were eventually able to **work** the knee into a straight position. The following Monday, March 28, the petitioner testified that he called the respondent about his knee. He then saw Dr. Font, his family doctor. Dr. Font instructed the petitioner to stay off his leg for one week and to see Dr. Jay Alameda, an orthopedic surgeon. The petitioner saw Dr. Alameda sometime during that week and returned to **work** on the following Monday, April 4.

While at **work** on April 4, the petitioner's knee again locked up. He went to see the company nurse, who informed him that the injury was not **work**-related and that the company could do nothing about it. **[*548]** The petitioner did not return to **work** that day.

The petitioner again went to see Dr. Alameda. The doctor advised the petitioner that his knee required surgery. Surgery was performed on or about April 24, 1978. Thereafter, the petitioner returned to **work** but was restricted to light duty. The petitioner continued to see Dr. Alameda as his knee did not improve. On January 19, 1979, Dr. Alameda operated for a second time on the petitioner's knee.

The petitioner testified that at no time prior to March 25, 1978, had he experienced **[***4]** any knee or leg problems. Prior to March 25, he had not been engaged in any other strenuous physical activities. At the time of the arbitration hearing, the petitioner testified his knee would swell and cause him pain. He could only walk short distances. His knee clicked and popped when he bent it.

On cross-examination, the petitioner stated that he told Dr. Alameda that he had been getting around well until his knee locked up. He denied telling the doctor that his injury was caused by a fall when he was getting out of the bathtub.

The respondent presented into evidence a company claim form for weekly disability benefits. On the form, the defendant answered "no" to the question: "Was an accidental injury involved?" The petitioner explained that he thought that the term "accident" meant "something happening, * * * like a car accident is an accident."

Debra **Cook,** the petitioner's wife, testified that on March 26, 1978, she had to help the petitioner get out of the bathtub because he could not straighten his knee. Debra said that the petitioner was in pain. She knew that the petitioner had been taking hot baths for his knees. According to Debra, the petitioner had not participated **[***5]** in any sports activities prior to the day in question and did not have knee difficulties before **working** for the respondent.

The deposition of Dr. Gordon Shultz was admitted into evidence. Dr. Shultz, a board-certified orthopedic surgeon, testified that he examined the petitioner in May of 1982. His diagnosis was that the petitioner was suffering from traumatic arthritis of the right knee. In the doctor's opinion, the petitioner's condition was progressive and permanent. Dr. Shultz was asked a hypothetical question by the petitioner about the cause and source of a person's injury in a situation similar to that of the petitioner. The doctor replied that the cause of the injury would be torn cartilage in the knee and that the source of the injury was **work**-related. On cross-examination, when asked a hypothetical question by the respondent in which the knee of a person with no prior knee complaints locked up while he was stepping out of a bathtub, the doctor was still of the opinion that the injury was **[*549]** **work**-related. However, according to the doctor, if the petitioner fell first and then his knee locked, then the fall could have caused the injury. Dr. Shultz opined

that [***6] the petitioner's **work** [**382] activity was the type of activity that could have caused his knee problems.

Lastly, the deposition of Dr. Alameda was admitted into evidence. Dr. Alameda testified that he took a history from the petitioner following his admission into Proctor Hospital on April 21, 1978. According to the history, the petitioner stated that he had been doing well until two weeks earlier when he started to get out of the bathtub and fell from his knee being locked. The petitioner was in Dr. Alameda's office the following Monday, at which time the doctor believed that the petitioner had a sprained knee. The petitioner returned two weeks later on a Friday. Dr. Alameda examined the knee, discovering a loose body in the knee joint. On April 24, 1978, Dr. Alameda operated on the petitioner, removing a piece of loose cartilage from his knee.

During approximately the next nine months, Dr. Alameda saw the petitioner several times. On several of those occasions, the petitioner complained of right knee pain. Also, fluid had to be drained from that knee. On January 19, 1979, Dr. Alameda again operated on the petitioner's knee. The doctor found a cartilage tear in the knee. On subsequent [***7] visits to Dr. Alameda, the petitioner continued to complain of pain in his right knee.

On direct examination, the petitioner posed to Dr. Alameda a hypothetical question assuming facts similar to those presented by the petitioner. The doctor opined that the cause of the hypothetical person's knee injury could have been **work**-related.

On cross-examination, Dr. Alameda stated that his medical history suggested that the onset of the petitioner's knee problems would have been two weeks before his April 21, 1978, operation, or April 9 or 10. The doctor stated that in completing the back side of the petitioner's weekly disability benefits form, he had answered "no" to the question: "In your opinion was the patient's disability caused by an injury at **work?**" In response to a hypothetical question by the respondent regarding a patient who was healthy until April 9 or 10, 1978, when "he was getting out of the bathtub and he fell, and the knee was locked," the doctor opined that the injury would have occurred on April 9 or 10 and would not have been **work** connected. The record does not indicate any denial by Dr. Alameda that he saw the petitioner for a knee problem during the week of March [***8] 27.

Based on the above, the **arbitrator** awarded the petitioner 46.14 weeks of temporary total disability and **compensation** for a 35% permanent loss of use of his right leg. The award was reversed by the [*550] **Commission.** We note that the **Commission** on review based its decision solely on the evidence before the **arbitrator**. The parties presented no new evidence to the **Commission.**

The respondent's first argument on appeal is that the petitioner failed to give notice of the accident within the required statutory time period. The respondent contends that it first received notice of the accident when the petitioner filed his application for adjustment of claim on October 15, 1980. The petitioner responds that on March 28, 1978, he gave the respondent oral notice of the injury. The petitioner also asserts that he gave notice on April 4, 1978, when he saw the company nurse after his knee locked up while at **work.** The **Commission** did not make a finding on this issue.

HN1 Section 6(c) of the Act provides in pertinent part that oral or written notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. (Ill. Rev. Stat. 1985, [***9] ch. 48, par. 138.6(c).) The notice provision of the Act is to be liberally construed. *Atlantic & Pacific Tea Co. v. Industrial Comm'n* (1977), 67 Ill. 2d 137, 364 N.E.2d 83.

In the instant case, the petitioner testified that on March 28 he called the respondent regarding his injury on Friday, March 25. The disability benefits form indicates that the respondent approved benefits for the petitioner on April 17, 1978. The respondent offered no witnesses to [**383] dispute the petitioner's testimony regarding notice. Thus, liberally construing the Act with regard to the above evidence, we find that the respondent received notice of the petitioner's injury within the statutory 45-day period.

The respondent's recited issue on appeal is whether the Industrial **Commission's** finding that employee did not sustain accidental injuries arising out of and in the course of his employment is consistent with the manifest weight of evidence. The respondent contends that there is ample evidence to show not only that the petitioner's injury was not **work** related, but also that the injury did not actually occur on March 25, 1978.

The respondent emphasizes several elements of [***10] the record. First, the respondent argues that the petitioner's testimony conflicts with the history he gave Dr. Alameda. Based on that history, Dr. Alameda concluded that the petitioner was disabled because of a fall in the bathtub. Next, the respondent argues that in response to a hypothetical question where a patient with no prior knee complaints fell in a bathtub, resulting in his knee's locking up, Dr. Shultz agreed that the fall could have caused the injury. The respondent notes that in response to the same hypothetical question, Dr. Alameda stated that the [*551] injury would not be **work** related. And, further, the petitioner had stated that he performed his regular duties on March 25, 1978, without complaining of or receiving treatment for knee problems. Also, on the weekly disability benefits form, both the petitioner and Dr. Alameda indicated that an accidental injury at **work** was not involved.

The respondent also argues that according to the history which Dr. Alameda took from the petitioner on April 23 or April 24, 1978, the bathtub incident had occurred two weeks earlier. Thus, the respondent argues, the accident occurred approximately April 10 and not March 25 [***11] as the petitioner testified, thereby affecting the petitioner's credibility.

The petitioner counters that the circuit court correctly reversed the **Commission's** denial of **compensation.** The petitioner notes that Drs. Alameda and Shultz concurred that the injury to a hypothetical person in a situation akin to the petitioner's was **work** related. The petitioner also notes that he had been in pain and had not engaged in any other knee-threatening physical activities prior to March 25. Both the petitioner and his wife testified that on March 26, 1978, his knee locked up while he was getting out of the bathtub. At the hearing, the petitioner denied telling Dr. Alameda that he fell in the bathtub. As to the weekly disability benefits form, the petitioner argues that he indicated April 10, 1978, as the first day he was disabled because of his injury simply because that was the date he determined that he was unable to return to **work.** Also as to that form, the petitioner argues that he was unaware of the meaning of the term "accident" in relation to his condition.

In a long line of cases, appellate courts have held that HN2 the **Commission** has original jurisdiction; it may both consider evidence [***12] that was presented to its fact-finding agent, the **arbitrator**, and consider evidence that is first presented to the **Commission.** (See *Pocahontas Mining Co. v. Industrial Comm'n* (1922), 301 Ill. 462, 134 N.E. 160; *Dunker v. Industrial Comm'n* (1984), 126 Ill. App. 3d 349, 466 N.E.2d 1255.) The law is similarly well established that HN3 the **Commission** has authority to determine all unsettled questions and is not bound by the **arbitrator's** findings, even when it merely reviews the evidence presented at arbitration. Ill. Rev. Stat. 1985, ch. 48, pars. 138.18, 138.19; *Rodriguez v. Industrial Comm'n* (1939), 371 Ill. 590, 21 N.E.2d 741; *Dunker v. Industrial Comm'n* (1984), 126 Ill. App. 3d 349, 466 N.E.2d 1255.

HN4 In cases where the **Commission** has rejected the **arbitrator's** factual findings without receiving any new evidence, it is the function of this court on review to examine the entire record and weigh the **[*552]** evidence to determine whether the factual findings of the Industrial **Commission** were against the manifest weight of the evidence. (*Wirth v. Industrial Comm'n* **[**384]** (1974), 57 Ill. 2d 475, 312 N.E.2d 592.) **[***13]** While recognizing that the **Commission** is in no way bound by an **arbitrator's** decision, we note that the **arbitrator's** decision is not without legal effect. (See *Quick v. Industrial Comm'n* (1972), 53 Ill. 2d 46, 289 N.E.2d 617; see also *Lewandowski v. Industrial Comm'n* (1969), 44 Ill. 2d 204, 254 N.E.2d 520.) Further, we note that in performing its role as reviewer of the record, the **Commission** is at a practical disadvantage as compared to the **arbitrator**. The **arbitrator**, having heard the live testimony, is actually in a better position to evaluate that evidence. See *Luckenbill v. Industrial Comm'n* (1987), 155 Ill. App. 3d 106, 507 N.E.2d 1185; compare *Peabody Coal Co. v. Industrial Comm'n* (1924), 311 Ill. 338, 143 N.E. 90.

Accordingly, in cases where the **Commission** has rejected the **arbitrator's** factual findings without receiving any new evidence, we apply an extra degree of **scrutiny** to the record in determining whether there is sufficient support for the **Commission's** decision.

In the case at hand, the version of the petitioner's accident in Dr. Alameda's **[***14]** history is contradicted by the petitioner and his wife. They both state that the petitioner's knee locked as he was getting out of the bathtub. The petitioner denied falling in the tub. And, though it is true that in spite of his pain the petitioner did not stop **working** on March 25, 1978, the last day of his **work** week, Dr. Shultz testified that the petitioner could have torn a fragment of cartilage in his knee that day, and that the fragment could have remained loose until the next day when it lodged itself, causing the petitioner's knee to lock.

While Dr. Alameda indicated belief that there was no causal connection between the petitioner's injury and his job, he did state that the source of a knee injury suffered by a hypothetical person under circumstances similar to the petitioner's would be **work** connected. Further, Dr. Shultz strongly indicated that the cause of an injury suffered by a person placed similarly to the plaintiff would have been related to his **work** activity.

Of significance is the evidence that prior to March 25, 1978, the petitioner had no medical difficulties with his knees. A chain of events which demonstrates a previous condition of good health, an accident, **[***15]** and a subsequent condition of ill being resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n* (1982), 93 Ill. 2d 59, 442 N.E.2d 908.

Also, we note that the petitioner's negative answer to the **[*553]** question on the disability benefits form of whether an accidental injury was involved is not dispositive. It is only one factor to be considered in evaluating his claim. (*Atlantic & Pacific Tea Co. v. Industrial Comm'n* (1977), 67 Ill. 2d 137, 364 N.E.2d 83.) Certainly, the petitioner could not be expected to know the legal definition of the word "accident" as it is used in the Act. *Luckenbill v. Industrial Comm'n* (1987), 155 Ill. App. 3d 106, 507 N.E.2d 1185.

We further note that when a **worker's** physical structure gives way under repetitive job-related stresses on a body, the injury is considered to arise out of and in the course of employment. (*Interlake Steel, Inc. v. Industrial Comm'n* (1985), 130 Ill. App. 3d 269, 474 N.E.2d 402.) **[***16]** Here, the petitioner presented evidence that his knee injury was caused by the repetitive stress of tightening hundreds of large engine bolts.

Our consideration of the entire record, including the testimony of the petitioner, his wife and Drs. Alameda and Schultz, suggests that in the light of the **arbitrator's** contrary conclusions, and in the absence of any evidence before the **Commission** other than the arbitration record, the **Commission's** conclusions that the petitioner failed to prove that his accidental injuries arose out of and in the course of his employment were against the manifest weight of the evidence. We adopt Circuit Judge Robert Manning's cogent analysis that follows:

> **[**385]** "This Court is well aware of the requirement that in order to reverse the decision of the Illinois Industrial **Commission** that decision must be against the manifest weight of the evidence. In the case at bar, the only evidence considered by the **Commission** was that introduced before the **arbitrator**; no additional evidence was presented on review before the **Commission.** A careful consideration of that evidence indicates that there was a factual question before the **arbitrator** and thus before the **Commission.** **[***17]** However, simply because there was [a] question of fact before the **Commission** does not mean that the decision of the **Commission** must arbitrarily be followed. The decision of the Industrial **Commission** must be founded upon a sensible conclusion which cannot be considered contrary to the manifest weight of evidence in the case. It is not the test to simply state that there is a question of fact present, and the **Commission's** finding will stand; that finding of fact must not be against the manifest weight of the evidence. It is the opinion of the Court that * * * a concise reading of the testimony of the petitioner, his wife, the treating physician of petitioner, and the examining **[*554]** physician of petitioner shows by clear and convincing proof that the petitioner sustained an accidental injury as alleged in his petition. The **Commission's** decision to the contrary is clearly against the manifest weight of the evidence and must be reversed."

Accordingly, we find that the petitioner was entitled to **compensation.**

We affirm the decision of the circuit court vacating the **Commission's** decision and reinstating the **arbitrator's** award of benefits to the petitioner.

Affirmed.

DISSENT BY: McCULLOUGH

DISSENT

[*18]** JUSTICE McCULLOUGH, dissenting:

As pointed out, the law is clear that the reviewing court will not disturb the findings of the Industrial **Commission** when they are not against the manifest weight of the evidence. (*U.S. Industrial Chemical Co. v. Industrial Comm'n* (1986), 143 Ill. App. 3d 881.) The Industrial **Commission** has the responsibility for determining the facts and drawing inferences from the complete evidence and a court will not overturn the **Commission's** findings simply because a different inference could be drawn, or otherwise substitute its

judgment for that of the **Commission.** *Niles Police Department v. Industrial Comm'n* (1981), 83 Ill. 2d 528.

In this case, there is more than sufficient evidence for the Industrial **Commission** to determine that the petitioner should not recover. There was evidence that the petitioner on a company form indicated that an accidental injury was not involved. Petitioner on that disability form answered "no," an accidental injury was not involved. If he had answered "yes" to that question, "Was an accidental injury involved," he would have also been required by the form to show that "date," "place," **[***19]** "details of the accident," and "whether the accident happened while on the job at Caterpillar."

The only doctors to testify in this case were the doctors of the petitioner's choice. Dr. Alameda had been the petitioner's doctor before this particular incident. With respect to the history given by the patient, Dr. Alameda testified:

> "He gave a history that he was doing well until two weeks before the examination when he started to get out of the bath tub and fell from the knee being locked."

The doctor's testimony is not clear as to when he first saw the petitioner **[*555]** with respect to this accident. He first testified that he saw the petitioner on April 21, 1978. He then testified concerning seeing him on April 23, 1978, and also that he saw the petitioner on April 10, 1978. The doctor, on a disability form, checked that the **[**386]** patient's disability was not caused by an injury at **work.** His testimony also was not clear as to whether the incident that the petitioner related to him occurred two weeks prior to April 21 or April 24, 1978, or two weeks prior to April 10, 1978. The doctor did testify that there would be no connection between the injury and the **work** if the **[***20]** incident occurred on April 10, 1978. Regardless of the doctor's recollection and testimony as to dates, the **Commission** could determine according to the testimony of the doctor that the petitioner fell in the bathtub and the injury was not **work** related.

The respondent's arguments concerning the record in this case dictate against reversal of the **Commission.** Petitioner's testimony did conflict with the history he gave to Dr. Alameda. Dr. Alameda did conclude that a fall in the bathtub caused the disability. Both Dr. Shultz and Dr. Alameda, in answer to a hypothetical question, based upon facts in the record, stated the injury was not **work** related. As indicated by the majority, the petitioner performed his regular duties on March 25, 1978, made no complaints, and both he and Dr. Alameda indicated on the disability form an accidental injury at **work** was not involved.

In order to overturn the decision of the Industrial **Commission** in this case, we must find that it is against the manifest weight of the evidence. Whether evidence is conflicting or of such a nature that different inferences that may be drawn therefrom, a reviewing court will not disregard a permissible inference that **[***21]** may be drawn. (*Sterling Steel Casting Co. v. Industrial Comm'n* (1979), 74 Ill. 2d 273.) As the **Commission** is the judge of the credibility of the witnesses and the weight to be given to their testimony, it is for the **Commission** to decide which of the conflicting medical opinions in a case is to be accepted. *Caterpillar Tractor Co. v. Industrial Comm'n* (1983), 97 Ill. 2d 35.

Additionally, no importance should be given or any application of additional **scrutiny** to the record be made to the **Commission's** rejecting the **arbitrator's** factual findings without receiving any new evidence. Additional evidence may be presented to the **Commission** only when such evidence:

> "(1) relates to the condition of the employee since the time of the arbitration hearing, (2) relates to matters that occurred or conditions that developed after the arbitration hearing, or (3) **[*556]** was, for good cause, not introduced at the arbitration hearing." Ill. Rev. Stat. 1985, ch. 48, par. 138.19(e).

There are cases where the manifest weight of the evidence question is close. In this particular case, the question is not close and we should not overturn the decision **[***22]** of the Industrial **Commission.** Of equal importance, a reviewing court should also be wary of eroding the responsibility of the **Commission** as it pertains to **arbitrator's** decisions. Such action tends to destroy the legislative purpose of the Industrial **Commission's** responsibility.

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Citation: 1989 Ill. App. LEXIS 1622

*190 Ill. App. 3d 72, *; 545 N.E.2d 1046, **;*
*1989 Ill. App. LEXIS 1622, ***; 137 Ill. Dec. 285*

KRESS CORPORATION, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Donald J. Forbes, Appellee)

No. 3-89-0031WC

Appellate Court of Illinois, Third District, Industrial Commission Division

190 Ill. App. 3d 72; 545 N.E.2d 1046; 1989 Ill. App. LEXIS 1622; 137 Ill. Dec. 285

October 18, 1989, Filed

PRIOR HISTORY: **[***1]** Appeal from the Circuit Court of Peoria County; the Hon. William J. Voelker, Judge, presiding.

DISPOSITION: Order affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner employer challenged a decision of the Circuit Court of Peoria County (Illinois), which confirmed the decision of the Industrial Commission (agency) to award worker's compensation benefits to appellee employee.

OVERVIEW: The employee had not reported an industrial accident, which occurred on a Friday night while the employee worked alone. The employee finished his shift and had a few drinks with coworkers afterwards. The employee did not experience back pain until the next day and was unable to see his doctor until Tuesday. Two weeks after the injury, the employee saw the employer's doctor, who stated that the employee had suffered an industrial accident. On appeal, the employer argued that the agency's decision was against the manifest weight of the evidence. The court affirmed the judgment, holding that the agency's decision was not against the manifest weight of the evidence because the evidence supported more than one inference. The court further found that it was not error to have allowed the employee to prove his case by the use of double hearsay because both the employee's testimony to the employer's doctor and the doctor's statement fell within exceptions to the hearsay rule. The court held that the doctor was an agent of the employer, and therefore, the doctor's statement was an admission against interest.

OUTCOME: The order confirming the agency's award of benefits to the employer's employee was affirmed.

CORE TERMS: pain, lawnmower, credibility, arbitrator, extrusion, hearsay, doctor, steel, leg, deposition, claimant, manifest, conversation, started, symptoms, co-worker, morning, manager, push, beam, denied telling, industrial accident, double hearsay, experienced, industrial, backache, slipped, offer of proof, accidental injuries, medication

LEXISNEXIS® HEADNOTES Hide

Evidence > Hearsay > Rule Components > Statements
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
HN1 Hearsay evidence is defined as a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Hearsay Within Hearsay
Evidence > Hearsay > Rule Components > Statements
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
HN2 Hearsay within hearsay, often referred to as double level or multiple hearsay, is admissible if each of two or more statements falls within an exception to the hearsay rule. A statement made by a company doctor is admissible on the ground that the doctor was the agent of the employer, and thus, the statement constitutes an admission against interest. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Hearsay > Exceptions > Medical Diagnosis & Treatment
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
HN3 It is an exception to the hearsay rule that declarations of an injured person to his treating physician as to his physical condition, and the cause thereof are admitted in evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
HN4 It is the province of the Industrial Commission (Commission) to determine the facts and draw reasonable inferences from the evidence in workers' compensation cases. In reviewing the findings of the Commission, the function of the court is

limited to determining whether they are against the manifest weight of the evidence. The Commission is the judge of the credibility of the witnesses and the weight to be given to their testimony. Furthermore, the reviewing court will not substitute its judgment for that of the Commission, and it will not disregard permissible inferences drawn by the Commission merely because it might have drawn other inferences from such facts. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN5 Proof of the state of the health of the employee prior to and down to the time of the injury, and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. More Like This Headnote

COUNSEL: David B. Mueller, of Cassidy & Mueller, of Peoria, for appellant.

Arthur R. Kingery, of Strodel, Kingery & Durree Associates, of Peoria, for appellee.

JUDGES: JUSTICE WOODWARD delivered the opinion of the court. BARRY, P.J., and McNAMARA, McCULLOUGH, and LEWIS, JJ., concur.

OPINION BY: WOODWARD

OPINION

[*73] [1047]** The petitioner, Kress Corporation (Kress), appeals from an order of the circuit court confirming the decision of the Industrial Commission (Commission) awarding compensation to Kress' employee, Donald **[*74]** J. Forbes. The sole issue raised is whether the decision of the Commission was against the manifest weight of the evidence.

At the hearing before the arbitrator, Forbes testified that he had been employed since 1984 as a welder and material handler. On Friday, July 18, 1986, between 10:30 p.m. and midnight, he was getting ready to weld a large steel structure and was positioning it by the use of a crane. He felt he was losing control, and he grabbed the wrong chain on the crane, which caused the steel piece to start to come down on him. He pulled the other chain and lost even more **[***2]** control. The structure came over him, and he had to force it back into position. The steel structure was approximately 8 feet long and 2 1/2 feet wide, and three-quarters of an inch thick, weighing 1,000 pounds or better. After the incident, which was not witnessed by anyone other than Forbes, Forbes continued to work the rest of his shift.

The next day, Saturday, Forbes, had a mild backache. As he worked on his lawnmower, he noticed that the pain was starting to increase. By Sunday, the pain was so severe that it required two people to get him out of bed. The pain was in the mid-lower part of his back.

Forbes could not get in to see Dr. Mullin, his family doctor until Tuesday. At that time, the doctor examined him and treated him for a pulled muscle, giving him pain medication. Two weeks after the injury, at the employer's request, he saw Dr. Hart, Kress' company doctor. Dr. Hart examined Forbes and asked him what he had done to himself. Forbes told him he did not know and that the only thing he had done was to work on his lawnmower. Then Dr. Hart asked him if he had done anything at work in which he might have strained himself, and Forbes told him about losing control **[***3]** of the structure and how he had to push it back with all his strength. According to Forbes, that effort took a lot out of him, but he did not feel pain or hurt at the time. Dr. Hart then stated that Forbes had suffered an industrial accident and placed Forbes in the hospital where he remained for eight days. He was treated with traction and given medication for pain.

Following his release from the hospital, Forbes contacted Dr. Hart. Kress' hearsay objection to Forbes' testimony about the conversation with Dr. Hart was sustained. Forbes made an offer of proof that in his conversation with Dr. Hart, Forbes told him that the pain went from his back down to his leg and caused him to be up all night. Dr. Hart responded that he thought Forbes had a slipped disc and that Forbes should go to Methodist Hospital for a CAT scan. After the test, Dr. Hart informed Forbes that he had a slipped disc and that **[*75]** he would refer him to a specialist. Several days later, Dr. Hart called Forbes and told Forbes to call him back once his insurance problem (which Forbes was unaware of) was straightened out. Kress objected to the offer of proof but did not identify the basis for the objection.

[*4] [**1048]** Forbes testified further that he then saw Dr. Mullin, who supplied him with pain medication. About two months later, Dr. Hart called him. Again Kress' objection to Forbes' testimony regarding this conversation with Dr. Hart was sustained, and Forbes made another offer of proof, in which he stated that Dr. Hart informed Forbes that he was scheduling an appointment for him with Dr. Weinger, an orthopedic surgeon. Dr. Weinger operated on Forbes, after which his left leg was numb with no feeling, and he still suffered from backaches. Forbes continued under Dr. Weinger's care until March 1987, at which time Forbes was released to go back to work with some restrictions. However, when he reported to work, he was told by the day-shift foreman that he was laid off of work. At the time of the hearing, he had not yet returned to work, although he had applied for work elsewhere.

Forbes testified that his left leg is still numb and he has quite a few backaches. He cannot do anything strenuous around the house. By the end of the day, he feels completely worn out, without the stamina he used to have.

On cross-examination, Forbes testified that although he was aware of the company policy **[***5]** of reporting any accidental injuries taking place during work, he did not report the injury to anyone. He also admitted having had a couple of beers with his co-workers after work, and at that time, he had no problem sitting and did not notice anything unusual about his physical condition outside of the usual tiredness and stiffening he generally felt after working his shift.

Forbes testified further that when he got up on Saturday morning, he had a backache, but inasmuch as he had had this before, he did not pay much attention to it. He denied that he associated the pain he felt with his work on the lawnmower because he was in pain prior to working on the lawnmower. He also denied telling Dr. Mullin that he first experienced the pain while he was working on his lawnmower Saturday morning. He stated that he told the doctor he did not know what he had done to cause the pain in his back. He

also denied telling Dr. Mullin that the pain started on Sunday morning. He further denied telling anyone that his back problem started on July 14, 1986, after lifting a heavy object.

According to Forbes, after he got the steel structure back in position, he was exhausted and felt a strain in **[***6]** his back which went all the **[*76]** way down his back and legs but which went away after a few seconds. The first time he associated his back problems with the incident at work was when he saw Dr. Hart.

Kress then elicited the testimony from David McKinty and Gerald Simpson, co-workers of Forbes, that following work on Friday, July 18, 1986, they, Forbes, and other co-workers had a few beers together after work. Forbes appeared to have no difficulty sitting at a picnic table, although he had to climb over a cooler to sit down. Forbes made no complaints of pain or discomfort, and neither man noticed anything unusual about him.

Richard Merideth, manager of industrial engineering for Kress, testified as follows. According to Merideth, the steel structure Forbes was working on was a box beam and weighed 3,700 pounds. Based upon his experience and knowledge of the type of work Forbes was doing, Forbes would have had to lift the beam in order to push it as Forbes described, and it would have been literally impossible for a man to lift two tons of steel.

The medical records of Drs. Hart, Mullin, and Weinger were admitted into evidence, as were the evidence depositions of Drs. Hart **[***7]** and Mullin.

The arbitrator denied benefits, finding that Forbes had failed to prove that accidental injuries arose out of and in the course of his employment.

The Commission reversed the decision of the arbitrator and awarded benefits. The Commission found credible Forbes' testimony that he told Dr. Hart that he did not know the cause of his discomfort and that, upon questioning by Dr. Hart, he described his activities with the lawnmower and the incident at work, at which point Dr. Hart **[**1049]** informed him that his condition could not have been the result of his activities at home but was related to the incident at work. The Commission noted that Forbes was a relatively young man who had not previously experienced back problems. Based upon the testimony of both Forbes and Dr. Hart, the Commission found that the incident at work caused a small extrusion of disc material which gradually became larger, causing increasing symptomology, and thus, Forbes was found to have sustained accidental injuries to his lower back which arose out of and in the course of his employment.

On review, the circuit court found that the decision of the Commission was supported by the evidence and confirmed the **[***8]** decision. Kress now brings this appeal.

Kress contends that the Commission erred in permitting Forbes to prove his case through the use of double hearsay. In an October 27, **[*77]** 1986, letter to Forbes' attorney, Dr. Hart wrote:

> "He [Forbes] was seen in our office on August 8, 1986. He reported that while at work on July 20, 1986 at the Kress Corporation, he was doing some welding. He moved a sill. Then, he stated, he just could not get out of bed the next day. He entered with complaints of low back pain and pain radiating down the left leg."

During his deposition, Dr. Hart testified as follows:

> "Q. What history was given?
>
> A. He said while working on welding some sills he just couldn't get up and could not get out of bed the next day.
>
> Q. And --
>
> A. And he had some back and left leg pain.
>
> Q. Did he provide a date?
>
> A. He said the date of the accident was 20th of July, 1986.
>
> Q. Doctor, do you have an opinion whether this was a workrelated injury?
>
> A. No. I just assumed it was because he was sent to me as the company physician. The man was in trouble, and I didn't pursue it any further than that.
>
> Q. You only know what Mr. Forbes told you?
>
> A. Yes."

At the hearing before **[***9]** the arbitrator, over Kress' objection, Forbes testified as follows:

> "He [Dr. Hart] says, do you have any idea what you were doing? And I told him about working on my lawn mower. And he says well, what did you do the last day of work. And he says, tell me what you did or anything that you might have strained yourself. I said the only thing I can remember at work was when I was working on the structure and I lost control over it and I had to push it back up with all my strength. And it took a lot out of me. But I told him, I says, I wasn't, you know, later on after work I wasn't feeling nothing nor was I hurt at the time I did it. * * * He [Dr. Hart] told the nurse to put me in the hospital today. And this was a work industrial injury."

Although the arbitrator let the testimony stand over Kress' objection, the arbitrator also stated that she would take into consideration Dr. Hart's deposition and the history given to him at the time he examined Forbes.

HN1 "Hearsay evidence is defined as 'a statement made out of court, such statement being offered as an assertion to show the truth

of matters asserted therein, and thus resting for its value upon the **[*78]** credibility of the **[***10]** out-of-court asserter.' [Citation.]" (*Denny v. Burpo* (1984), 124 Ill. App. 3d 73, 75.) Kress concedes that Dr. Hart is Kress' company physician and therefore Kress' agent, whose statements would ordinarily be received into evidence as admissions. However, Kress argues, since Forbes' conversation with Dr. Hart is offered by Forbes to prove that the disputed accident took place, that objected testimony involves not only the statements of Dr. Hart but those of Forbes confirming the accident, which Kress maintains is double hearsay and inadmissible to prove that the accident took place.

We note that Dr. Hart's deposition testimony is at variance with Forbes' arbitration **[**1050]** testimony. According to his deposition, Dr. Hart "assumed" that Forbes suffered an industrial accident, while Forbes testified that after he described both his lawnmower activity and the incident at work, it was Dr. Hart who told him the incident at work had caused his injury.

HN2 "Hearsay within hearsay, often referred to as double level or multiple hearsay, is admissible if each of two or more statements falls within an exception to the Hearsay Rule." (E. Cleary & M. Graham, *Handbook of Illinois Evidence* **[***11]** § 805, at 472 (3d ed. 1979).) Our supreme court has held that a statement made by a company doctor is admissible on the ground that the doctor was the agent of the employer, and thus, the report constituted an admission against interest. *Nollau Nurseries, Inc. v. Industrial Comm'n* (1965), 32 Ill. 2d 190, 192.

Further, in *Shell Oil Co. v. Industrial Comm'n* (1954), 2 Ill. 2d 590, the supreme court stated:

> "Petitioner [employer] objects to a portion of Dr. Fritsch's testimony as hearsay and self-serving as obtained from the claimant, wherein claimant stated that he slipped on April 11, 1950, while working for the petitioner in the course of pulling on a pipe, and injured his back. HN3 It is an exception to the hearsay rule, however, that declarations of an injured person to his treating physician as to his physical condition, and the cause thereof are admitted in evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid." 2 Ill. 2d at 602.

We conclude, therefore, that Forbes' testimony regarding his conversation with Dr. Hart **[***12]** was double hearsay but properly admitted and, thus, properly considered by the Commission in its determination of causation of Forbes' condition.

Having determined that Forbes' testimony was properly admitted, **[*79]** we now must determine whether the decision of the Commission was against the manifest weight of the evidence.

HN4 It is the province of the Commission to determine the facts and draw reasonable inferences from the evidence in workers' compensation cases. In reviewing the findings of the Commission, the function of this court is limited to determining whether they are against the manifest weight of the evidence. (*United Airlines, Inc. v. Industrial Comm'n* (1980), 81 Ill. 2d 85, 95.) The Commission is the judge of the credibility of the witnesses and the weight to be given to their testimony. (*Caterpillar Tractor Co. v. Industrial Comm'n* (1983), 97 Ill. 2d 35, 43.) Furthermore, the reviewing court will not substitute its judgment for that of the Commission, and it will not disregard permissible inferences drawn by the Commission merely because it might have drawn other inferences from such facts. *City of Chicago v. Industrial Comm'n* (1975), 60 Ill. 2d 283, 286. **[***13]**

While acknowledging the accuracy of the foregoing statements of law, Kress maintains that while the Commission is not bound by the arbitrator's decision, recent decisions by this court demonstrate that the court will carefully scrutinize Commission decisions which are contrary to those of the arbitrator, especially where no new evidence is presented to the Commission, relying on ***Cook v. Industrial Comm'n* (1988), 176 Ill. App. 3d 545**, and *Orkin Exterminating Co. v. Industrial Comm'n* (1988), 172 Ill. App. 3d 753.

In *Orkin Exterminating Co.*, this court reinstated the decision of the arbitrator that the claimant, Apponey, was not entitled to benefits. We determined that the Commission's decision that Apponey was entitled to benefits was against the manifest weight of the evidence. Specifically, we noted:

> "Proof of either unwitnessed accident alleged in this case depended upon the petitioner's [Apponey's] testimony regarding the accident's circumstances and, thus, upon his credibility. His credibility **[**1051]** was contradicted by numerous elements in the evidence. For example, on the day of the alleged July 17 accident at Carnet Grain Company in **[***14]** Beardstown, although the petitioner and his manager after the incident drove together from Carnet to their Galesburg office, the petitioner did not mention to the manager that he had been injured. Additionally, on August 2 when the petitioner was first medically treated for the alleged July 17 injuries, he stated in his chiropractic admission form that his condition had begun approximately two months earlier, *i.e.*, at the beginning of June rather than in middle July as he claimed in seeking benefits. Further, he did not express **[*80]** to his chiropractor on August 2 a connection between his current pain and the July 17 accident and he indicated that he did not know the cause for his complaints.
>
> The petitioner's credibility was also challenged regarding the alleged August 6 accident at the Keeling residence. For example, when the petitioner called his manager from the Keeling job that day, after the alleged incident, he did not mention the injury which he now claims had occurred. Further, following that alleged disabling accident, the petitioner continued to work for approximately three weeks without giving any notice of the incident to the employer." 172 Ill. App. 3d at 757. **[***15]**

Kress contends that the facts of the case before us closely parallel the facts in *Orkin*. Both involved unwitnessed "accidents." In both cases, the claimants made no initial complaint of injury or pain, and although in the company of co-workers, made no mention of the occurrence, and nothing unusual about the claimant's condition was noted by a co-worker in either case. Kress also relies on the testimony of Richard Merideth that it would have been literally impossible for a man to lift two tons of steel, thus contradicting Forbes' description of the accident. Kress further relies on Dr. Hart's testimony that Forbes' condition would have produced an immediate onset of symptoms. Finally, Kress points to Forbes' statements to Dr. Mullin that he had been working on his lawnmower prior to the onset of the pain and to the report from the Institute of Physical Medicine and Rehabilitation, wherein Forbes reported low-back pain as of July 14, 1986, which preceded his alleged accident at work.

Despite the similarities, we find *Orkin* distinguishable from the case at bar. In *Orkin*, Apponey initially stated that his condition of leg pain started two months earlier and from an **[***16]** unknown cause; it was only after he had had surgery that he informed his employer that he had injured himself at work. In the present case, Forbes described both his work on the lawnmower and the incident at work in his visit to Dr. Hart, who, according to Forbes, then determined that his condition was the result of the incident at work, not his work on his lawnmower. Although Dr. Hart testified on deposition that he had no opinion as to whether Forbes' condition was the result of an industrial accident, as we have previously stated, credibility is for the Commission to determine. (Caterpillar Tractor Co., 97 Ill. 2d at 43.) Further, Apponey was impeached by evidence that he had omitted prior employments on his job application with Orkin and had, in fact, received a worker's compensation award for a prior back injury. No such attacks weakened Forbes' credibility. Although Merideth testified that **[*81]** Forbes would have to life and then push to maneuver the steel beam as Forbes described, Forbes testified that he only pushed the beam but that it took great effort. Again, this is a question of credibility from the Commission to resolve.

While Dr. Hart testified **[***17]** that Forbes' condition would have produced an immediate onset of pain, he also stated immediately thereafter as follows:

> "Q. In your opinion, Doctor, based upon a reasonable degree of medical certainty, could such an extrusion occur without producing immediate symptoms?
>
> A. Of course, you have all different degrees of extrusion and -- but I would have to say with the degree of extrusion **[**1052]** that was present at the time he was operated that would cause symptoms. *Now, I can't tell you, and I have no way of telling you if at the start it was that big or whether it wasn't, I don't know, I can't answer that.*" (Emphasis added.)

Since Dr. Hart could not testify as to how big the extrusion was at the time of the alleged injury, the fact that Forbes had no immediate symptoms does not eliminate his accident at work as the cause of his injury.

Finally, Kress argues that both Dr. Mullin's report and the institute report evidence that Forbes' pain was other than work related. Dr. Mullin testified at his evidence deposition as follows:

> "Q. And on July 22, 1986, when you saw Mr. Forbes, was a history taken?
>
> A. Yes.
>
> Q. And could you please describe for the arbitrator what that history was? **[***18]**
>
> A. He complained of a low back pain, was [*sic*] pain radiating down the outside of the left leg to the knee. This had started the previous Sunday morning, July 20, 1986.
>
> Q. Anything else?
>
> A. That was his chief complaint at the time.
>
> Q. Did he provide a history to you of what his activities were prior to Sunday when the low back pain first commenced?
>
> A. At that time, he told me he had been working on a lawnmower on Saturday."

Forbes denied telling Dr. Mullin that the pain he felt was associated with his work on the lawnmower; he did testify that it had started prior to his working on the lawnmower and grew worse while he was working on it. He also denied that he had told him that it was Sunday morning when the pain began. Likewise, he also denied that he told **[*82]** the institute that his pain commenced on July 14, 1986, which was four days prior to the date on which he alleged he was injured at work. We also note that the report from the institute states "PT states he was working and was lifting heavy objects." The Commission could properly infer from this statement that Forbes was indeed injured at work but confused the dates.

Kress argues that there is no testimony in **[***19]** the record to support the Commission's finding that Forbes' alleged accident caused "a small extrusion of disc material which gradually became larger causing increasing symptomatology in the days following the accident." Kress acknowledges that in Union Starch & Refining Co. v. Industrial Comm'n (1967), 37 Ill. 2d 139, quoting from Plano Foundry Co. v. Industrial Comm'n (1934), 356 Ill. 186, 198-99, our supreme court stated:

> HN5"'Proof of the state of the health of the employee prior to and down to the time of the injury, and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. [Citation.]'" (37 Ill. 2d at 143.)

However, Kress argues that the change was not immediate, since Forbes did not feel pain until the next day. The term "immediate" is a relative one. In the case before us, Forbes testified that the accident occurred between 10:30 p.m. and midnight. He awoke the next day at 8 a.m. with a backache, which progressively worsened. Further, it was Dr. Hart's testimony that it would depend on the size of the extrusion **[***20]** as to when the first symptoms might occur. Since Forbes had experienced no prior back problem, the Commission could reasonably draw the inference from the record that Forbes' incident at work had caused a small extrusion which grew larger and more symptomatic.

Kress' reliance on Lyons v. Industrial Comm'n (1983), 96 Ill. 2d 198, Johnson v. Industrial Comm'n (1982), 89 Ill. 2d 438, and Banks v. Industrial Comm'n (1985), 134 Ill. App. 3d 312, is misplaced. In *Lyons*, there were no witnesses to the employee's accident, and he continued to work for some days th ereafter. The Commission's decision denying benefits was upheld by the reviewing court, which ruled that it was possible that this was a case of **[**1053]** a loyal and dedicated employee who did suffer an accident, and who, instead of complaining, continued to work as long as he was able; however, since the Commission was the fact finder and its decision was not against the manifest weight of the evidence, it must be affirmed.

In *Banks*, there was evidence that the employee had injured his **[*83]** back in two separate work-related injuries for which he had received compensation. **[***21]** The reviewing court again confirmed the decision of the Commission since, based upon the

evidence, the Commission could have reached a decision that the employee failed to meet his burden of proof.

Finally, in *Johnson*, the reviewing court set aside the award of benefits to the employee by the Commission. However, in that case, the reviewing court found against the employee's argument that she proved an accidental injury under a theory of repetitive trauma because she had failed to prove that the condition was traceable to a definite time, place, and cause.

The cases relied on by Kress illustrate situations in which the employee's testimony establishing causation has been impeached or his or her credibility has been effectively challenged or the decisions are the result of permissive inferences from the records. In the case before us, Forbes' credibility has not been contradicted to the extent that the claimants in the cases relied on by Kress were. While Kress sought to contradict Forbes' testimony by the testimony of other witnesses, the Commission, as we have repeatedly stated, is the judge of the credibility of the witnesses, and we can find no reason in this case why the **[***22]** Commission could not find Forbes to be a credible witness.

In the case at bar, the evidence supported more than one inference. That the claimant suffered a compensable accident is a permissible inference from the record, and, therefore, we have no basis for overruling the Commission. We conclude, therefore, that the decision of the Commission is not against the manifest weight of the evidence.

The judgment of the circuit court is affirmed.

Judgment affirmed.

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Citation: 1990 Ill. App. LEXIS 91

*193 Ill. App. 3d 814, *; 550 N.E.2d 1148, **;*
*1990 Ill. App. LEXIS 91, ***; 141 Ill. Dec. 102*

ADAMS TRUCK LINES, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Herbert Harney, Appellee)

No. 3-88-0652WC

Appellate Court of Illinois, Third District, Industrial Commission Division

193 Ill. App. 3d 814; 550 N.E.2d 1148; 1990 Ill. App. LEXIS 91; 141 Ill. Dec. 102

January 23, 1990, Filed

SUBSEQUENT HISTORY: [*1]** Rehearing Denied March 7, 1990.

PRIOR HISTORY: Appeal from the Circuit Court of La Salle County; the Hon. William P. Denny, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant employer sought review of a decision by the Circuit Court of La Salle County (Illinois), which confirmed a decision of the Industrial Commission reversing an arbitrator's decision denying claimant employee benefits based on his application alleging injuries received in the course of his employment with the employer.

OVERVIEW: The employer appealed the awarding of benefits to the employee arguing that the decision of the Commission was against the manifest weight of the evidence because the Commission reversed an arbitrator's decision although no other evidence was presented. Since the accident was unwitnessed the case depended upon the credibility of the employee, which the employer argued was severely damaged by other evidence presented. The court held that the Commission was the judge of the credibility of witnesses. Although the court acknowledged that claimant denied receiving workers' compensation benefits on his job application form, he did admit that he had in fact received them. Furthermore, the court noted that the dispute in this case was whether the employee suffered an accidental work-related injury. The foregoing matters were collateral and could not have been used to impeach the employee. The employer further requested that the court to establish a rule authorizing the Commission to reverse the decision of an arbitrator as to compensability if that decision was against the manifest weight of the evidence. This request was beyond the court's authority.

OUTCOME: The court affirmed the judgment of the circuit court, which awarded the employee benefits for injuries, received during the course of his employment with the employer.

CORE TERMS: claimant, arbitrator's, truck, arbitrator's decision, credibility, manifest, Compensation Act, standard of review, pain, arbitration hearing, trailer, new evidence, doctor, pallet, leg, Public Act, manager, experienced, dispatcher, driver, loaded, clerk, empty, hurt, compensation benefits, overturning, confirmed, severely, overturn, expedite

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HN1 The Industrial Commission is the judge of the credibility of the witnesses. More Like This Headnote

COUNSEL: R.J. Lannon, Jr., of Herbolsheimer, Lannon, Henson, Duncan & Reagan, of La Salle, for appellant.

Mark A. Schindler and Peter F. Ferracuti, both of Law Offices of Peter F. Ferracuti, P.C., of Ottawa, for appellee.

JUDGES: JUSTICE WOODWARD delivered the opinion of the court. McNAMARA and LEWIS, JJ., concur. JUSTICE McCULLOUGH, specially concurring. PRESIDING JUSTICE BARRY, specially concurring.

OPINION BY: WOODWARD

OPINION

[*815] [1149]** Claimant, Herbert Harney, filed an application for benefits based upon an injury he allegedly received on October 7, 1985, while employed by Adams Truck Lines, Inc. The arbitrator denied benefits. The Industrial Commission (Commission)

reversed the decision of the arbitrator and awarded benefits to the claimant. The circuit court confirmed the Commission's award. The employer appeals.

Claimant is an over-the-road truck driver. On the morning of October 7, 1985, he drove his truck, which was loaded with 19 pallets of mayonnaise, from his home in Sheridan, Illinois, to Melrose Distribution Company in Melrose Park, Illinois. On the **[***2]** way there, he stopped at a restaurant on Mannheim Road to ask for directions. When claimant arrived at the Melrose Distribution Center, he checked in and waited for an opening to unload the truck. About one-half hour after he arrived, the receiving clerk told him to back his truck into door 6. At the clerk's directions, claimant broke the seal on the truck, backed the truck in, and proceeded to throw out the empty pallets that were at the very back of the trailer portion of the truck. The pallets, empty, weigh about 40 to 50 pounds apiece, depending on what they are made out of. When claimant picked up the fourth pallet and turned to straighten, he experienced a sharp pain down his lower back and down his right leg. Claimant sat down for a few minutes. He then went to his truck, had a cup of coffee, and took a couple of aspirins. He started to climb up the dock, and he then told the forklift operator that he had hurt his back. He placed a call to his employer, and he informed the dispatcher that he had hurt his back and his leg. In response to the dispatcher's questions, he informed him that he preferred to see his own doctor but that he felt well enough to drive the truck. **[***3]** At the dispatcher's direction, he took his empty truck over to another Chicago plant. He then went to his employer's Chicago office, where he informed the manager that he had hurt his back, and he was going to pick up a loaded trailer and go home and see his doctor. When he went to pick up the loaded trailer, he also telephoned his wife and told her to inform his doctor that he had injured his back and to make an appointment for him. He then drove the loaded trailer home. On the way home, he noted that he had a lot of pain in his **[*816]** lower back and right leg. He was also experiencing muscle spasms.

The next day, October 8, 1985, claimant was examined by Dr. Michael Harney (no relation to claimant). Dr. Harney manipulated him and gave claimant medication for the muscle spasms. Claimant rested the remainder of the day. He left the next day, October 9, 1985, with another load. He noted that he still had quite a bit of lower back pain and muscle spasms.

After resting for a few days, claimant was on his way to deliver a load in Kansas when his condition began to worsen. He called the dispatcher and arranged to switch trailers with a driver in St. Louis. He subsequently **[***4]** returned home with an empty trailer.

Gracelene Dorsett, claimant's sister-in-law, testified for claimant that she and her husband had spent six or seven hours with claimant on October 5 and 6, 1985. She noticed nothing unusual about the claimant.

Dr. Michael Harney testified in his evidence deposition that in his opinion, given the claimant's prior history of back pain, claimant had ruptured a disc which was putting pressure on the root nerve at the level of L5, necessitating disc surgery. It was Dr. Harney's opinion that considering the claimant's prior history of back pain, the accident of October 7, 1985, produced claimant's ruptured disc. Dr. Robert Beatty also was of the opinion that the accident **[**1150]** of October 7, 1985, was the cause of claimant's ruptured disc.

David Grant testified on behalf of the respondent. On October 7, 1985, he was employed as a window clerk at the Melrose Distribution Company, Melrose Park, Illinois. On that date, he was working when a man he identified as claimant approached the window in a position as if he were bending down to tie his shoe, hunched over. Claimant informed him that he had hurt his back at a previous stop that morning. Claimant also **[***5]** stated that he had informed his company, and they were sending over a relief driver to take over his position. Grant then assigned him a door so that his truck could be unloaded. The truck was still sealed at that time.

In the afternoon, Grant's immediate supervisor asked if anyone had been injured at Melrose Park during the day. At his supervisor's instruction, he documented the incident with claimant.

Following the hearing, the arbitrator denied benefits to the claimant, finding that he had "failed to prove that accidental injuries arose out of and in the course of the employment."

The claimant appealed the arbitrator's decision to the Commission. Neither party introduced any additional evidence. The Commission reversed the decision of the arbitrator and awarded benefits, **[*817]** finding as follows:

> "Petitioner, a 47-year old over the road driver sustained an injury to his lower back on October 7, 1985 when he picked up a wooden pallet and twisted to stack it. Although he had previously experienced episodes of back pain, the symptoms for which he was treated subsequent to this accident commenced contemporaneously with the accident. The Commission relies on the testimony **[***6]** of Dr. Harney and Dr. Beatty and finds that the accident caused the herniation of the L4-L5 disc for which they have treated him."

Because there was no evidence in the record as to claimant's average weekly wage, the case was remanded to the arbitrator for further hearings.

The employer appealed the Commission's decision to the circuit court of La Salle County, which confirmed the Commission's decision. This appeal followed.

The first issue on appeal is whether the decision of the Commission was against the manifest weight of the evidence.

The employer notes that in ***Cook v. Industrial Comm'n* (1988), 176 Ill. App. 3d 545**, this court held that when the arbitrator's factual findings are rejected by the Commission without new evidence, an extra degree of scrutiny is required to determine if there is sufficient basis for the Commission's decision.

In the case before us, the Commission reversed the arbitrator's decision although no other evidence was presented. The employer argues, therefore, that the Commission found claimant a more credible witness than Grant, whom the employer describes as a disinterested party. Further, the employer asserts that **[***7]** claimant's testimony was impeached, which casts severe doubts on his credibility.

The employer contends that the case before us presents a set of facts similar to those in *Orkin Exterminating Co. v. Industrial Comm'n* (1988), 172 Ill. App. 3d 753, recently decided by this court. In *Orkin Exterminating Co.*, we reinstated the decision of the arbitrator finding that the claimant, Apponey, was not entitled to benefits. The Commission had reversed the arbitrator's finding and awarded benefits, which decision was confirmed by the circuit court. We determined that the Commission's decision was against the manifest weight of the evidence. Specifically, we noted:

> "Proof of either unwitnessed accident alleged in this case depended upon the petitioner's [Apponey's] testimony regarding the accident's circumstances and, thus, upon his credibility. His credibility was contradicted by numerous elements in the evidence. **[*818]** For example, on the day of the alleged July 17 accident at the Carnet Grain Company in Beardstown, **[**1151]** although the petitioner and his manager after the incident drove together from Carnet to their Galesburg office, the petitioner did **[***8]** not mention to the manager that he had been injured. Additionally, on August 2 when the petitioner was first medically treated for the alleged July 17 injuries, he stated in his chiropractic admission form that his condition had begun approximately two months earlier, *i.e.*, at the beginning of June rather than in [the] middle [of] July as he claimed in seeking benefits. Further, he did not express to his chiropractor on August 2 a connection between his current pain and the July 17 accident and he indicated that he did not know the cause for his complaints.
>
> The petitioner's credibility was also challenged regarding the alleged August 6 accident at the Keeling residence. For example, when the petitioner called his manager from the Keeling job that day, after the alleged incident, he did not mention the injury which he now claims had occurred. Further, following that alleged disabling accident, the petitioner continued to work for approximately three weeks without giving any notice of the incident to the employer." (*Orkin Exterminating Co.*, 172 Ill. App. 3d at 757.)

The employer contends that, like Apponey in *Orkin Exterminating Co.*, the **[***9]** claimant's credibility was severely damaged. The employer points out that one month before his alleged injury, claimant filled out an application for employment with the employer in which he denied having ever suffered a job-related injury, or a back injury, ever receiving workers' compensation benefits for medical expenses or lost time, or having lost time within the last three years because of an injury. However, on cross-examination, he testified that he had suffered a back injury in Idaho in 1980 while employed by a moving company, for which he received benefits. He also received workers' compensation benefits for one week in 1984 when he was injured while working in Illinois. Also in 1984, he had applied for a job with Schneider Transportation. On the job application form, the doctor had written slipped disc, 1981, although the claimant recalled telling the doctor only that he had had a back injury, not a slipped disc.

The employer also contends that claimant's testimony was impeached by that of Dr. Michael Harney. Claimant testified that following the October 7, 1985, injury, he experienced "Charley horses" in his legs. He denied telling Dr. Harney that he had also experienced **[***10]** them after the 1984 injury or that he was experiencing them in both **[*819]** his feet and his legs in August 1985, a month before he applied for work with the employer. Dr. Harney, however, testified that claimant complained of Charley horses on those prior occasions and, further, that he had treated claimant for back problems since 1981.

Finally, employer argues that claimant's story of being injured in an unwitnessed accident is uncorroborated except for the testimony of his sister-in-law. Moreover, the testimony of David Grant, the window clerk, conflicts with claimant's version of the accident.

It is well settled that HN1 the Commission is the judge of the credibility of the witnesses. (*Caterpillar Tractor Co. v. Industrial Comm'n* (1983), 97 Ill. 2d 35, 43.) While we acknowledge that claimant denied receiving workers' compensation benefits on his job application form, he did admit that he had in fact received them. We note further that claimant and his treating physician, Dr. Harney, presented differing testimony as to when claimant first began to suffer from "Charley horses." The dispute in this case is whether the plaintiff suffered an accidental work-related **[***11]** injury. In this case, the foregoing matters are collateral and may not be used to impeach the claimant here. *Pagel v. Yates* (1984), 128 Ill. App. 3d 897, 901.

Moreover, a review of the case before us and *Orkin Exterminating Co.* shows that there is no comparison between the amount of contradiction and impeachment that served to destroy Apponey's credibility in **[**1152]** that case and the minor amount of the same in the case before us.

It bears repeating that the issue here is whether claimant suffered a work-related injury. Even David Grant, whose testimony the employer would have us believe over that of the claimant, testified that claimant approached him, hunched over, and told him that he had *injured* himself at a previous stop. While the decision of the Commission makes no suggestion that this case was decided based upon the respective credibility of the claimant and David Grant, assuming as the employer does that this was the case, we can find no reason to disturb the Commission's decision to believe claimant's testimony in this case.

In its second issue on appeal, the employer asks this court to establish a rule authorizing the Commission to reverse the decision **[***12]** of an arbitrator as to compensability if that decision is against the manifest weight of the evidence. In support of this proposition, the employer relies on a 1984 amendment to the Workers' Compensation Act (Ill. Rev. Stat. 1985, ch. 48, par. 138.19(e)), two decisions of this court, to wit, ***Cook v. Industrial Comm'n* (1988), 176 Ill. App. 3d 545**, and *Orkin Exterminating Co. v. Industrial Comm'n* (1988), 172 Ill. App. 3d 753, **[*820]** and the origins of the rule that governs review by the Commission.

The employer relies on our statement in *Orkin Exterminating Co.* that an arbitrator's decision is not without legal effect when determining if a decision of the Commission is against the manifest weight of the evidence (172 Ill. App. 3d at 757), and our statement in *Cook* that an extra degree of scrutiny will be applied to the record when the Commission overturns an arbitrator's decision without receiving any additional evidence. (***Cook*, 176 Ill. App. 3d at 552**.) Neither of these decisions establishes any basis for changing the standard of review presently **[***13]** employed by the Commission. Further, the amendment to section 19 (e) of the Workers' Compensation Act makes no change in the standard of review but merely sets forth procedural requirements governing matters on review.

Even if we wished to do so, this court may not refashion a rule of review of our own accord, for any such change would be contrary to the holdings in supreme court cases, which are controlling on appellate court cases. Such a change must come either from our supreme court or from our legislature.

The judgment of the circuit court is affirmed.

Affirmed.

CONCUR BY: McCULLOUGH; BARRY

CONCUR

JUSTICE McCULLOUGH, specially concurring:

Although the facts and circumstances surrounding the incident giving rise to this claim present serious credibility questions insofar as the claimant is concerned, it is the responsibility and duty of the Commission to determine that credibility and to make its decision. We should reverse as pointed out by the majority only when that decision is against the manifest weight of the evidence.

I write this special concurrence because the majority cites *Cook v. Industrial Comm'n* for the proposition that when the arbitrator's actual findings are rejected by the **[***14]** Commission without new evidence, an extra degree of scrutiny is required to determine if there is sufficient basis for the Commission's decision. As stated in my dissent in *Cook*, I continue to disagree that this should be the law of the State of Illinois. The Industrial Commission has no responsibility to accept additional evidence during its review process except as set forth specifically in the statute, chapter 48, section 19(e). Additional evidence is to be presented to the Commission only when such evidence: "(1) **[*821]** relates to the condition of the employee since the time of the arbitration hearing, (2) relates to matters that occurred or conditions that developed after the arbitration hearing, or (3) was, for good cause, not introduced at the **[**1153]** arbitration hearing." Ill. Rev. Stat. 1985, ch. 48, par. 138.19(e).

If we are to give additional credence to the arbitrator's decision where the statute requires the authority and decision-making process be in the Industrial Commission, we are again attempting to destroy the legislative purpose of the Industrial Commission's responsibility.

Likewise as pointed out in the majority decision, we should not accept the employer's **[***15]** argument that we establish a new rule authorizing the Commission to reverse the decision of the arbitrator if that decision is against the manifest weight of the evidence. This is not provided for in the Workers' Compensation Act, and any decision to the contrary would be in direct contravention of supreme court cases.

Although I disagree with the Commission's decision with respect to this incident, it cannot be said to be against the manifest weight of the evidence.

PRESIDING JUSTICE BARRY, specially concurring:

While I concur with the majority's conclusion that the Commission did not err in overturning the arbitrator's decision, I disagree with the majority's finding that the Commission's power of review has not changed. The majority rests its position on three conclusions: (1) that *Orkin Exterminating Co. v. Industrial Comm'n* (1988), 172 Ill. App. 3d 753, 526 N.E.2d 861, and ***Cook v. Industrial Comm'n* (1988), 176 Ill. App. 3d 545, 531 N.E.2d 379**, did not establish any basis for changing the standard of review employed by the Commission; (2) that the amendment to section 19(e) of the Workers' Compensation Act (Ill. **[***16]** Rev. Stat. 1987, ch. 48, par. 138.19(e)) did not change the standard of review; and (3) that this court's refashioning of the standard of review would amount to an impermissible overturning of supreme court decisions by an appellate court.

Historically, the law in Illinois has been that on review the Industrial Commission could hear any new evidence the parties cared to introduce and that it was not bound by the decisions of its arbitrators. In 1921, the Illinois Supreme Court ruled that the Commission's review of an arbitrator's decision is *sui generis*, being neither a mere review of the written record made before the arbitrator nor a trial *de novo*, but a combination of the two. (*People ex rel. Oelsner v. Andrus* (1921), 299 Ill. 50, 132 N.E. 225.) Subsequently, in *Rodriguez v. Industrial Comm'n* (1939), 371 Ill. 590, 21 N.E.2d 741, the supreme **[*822]** court held that regardless of whether the Commission hears any testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings. The supreme court reiterated that holding in *Garbowicz v. Industrial Comm'n* (1940), 373 Ill. 268, 26 N.E.2d 123, **[***17]** and more recently in *Berry v. Industrial Comm'n* (1984), 99 Ill. 2d 401, 459 N.E.2d 963.

Times change. The Commission's 1988 in-house study, "Workers' Compensation Overview 1972-1988," showed that while in 1950 only 2,951 workers' compensation claims were pending, by 1988 over 71,000 claims were pending. The study noted that 55% to 60% of the arbitrators' decisions were appealed to the Commission. It further noted that in 1979, for the first time in its history, the number of cases pending at the Commission had exceeded the number of new cases filed. In a pessimistic discussion of its ability to meet its workload, the Commission stated that the 9- to 18-month delay for oral arguments on review could quickly grow to a 30- to 36-month delay by the end of the fiscal year.

Against this backdrop of an increasing caseload and a lengthening delay between the filing of cases and their final resolution, the legislature amended the Workers' Compensation Act (Pub. Act 83 -- 1125, eff. June 30, 1984). Among other things, Public Act 83 -- 1125 increased the number of Commissioners, provided for an expedited hearing procedure for certain cases, and amended section **[***18]** 19(e) to severely limit the types of evidence which could be introduced on review before the Commission. Prior to June 30, 1984, section 19(e) had **[**1154]** provided that on review the Commission could consider any evidence the parties cared to submit. (Ill. Rev. Stat. 1983, ch. 48, par. 138.19(e).) The amended section 19(e) provided in relevant part: "Additional evidence may be adduced where such evidence (1) relates to the condition of the employee since the time of the arbitration hearing, (2) relates to matters that occurred or conditions that developed after the arbitration hearing, or (3) was, for good cause, not introduced at the arbitration hearing." Ill. Rev. Stat. 1987, ch. 48, par. 138.19(e).) In enacting Public Act 83 -- 1125, Senator Collins stated that the bill "made some great stride[s] in resolving * * * the problem that labor had with [the] speedy expedition of claims." (83d Ill. Gen. Assem., Senate Proceedings, June 30, 1984, at 83.) In the House, Representative McPike stressed the fact that the amendment provided for an expedited hearing and increased the number of Commissioners to seven, which would "hopefully provide swift answers to the cases before the Commission." **[***19]** 83d Ill. Gen. Assem., House Proceedings, June 30, 1984, at 150.

[*823] The supreme court took notice of this change in *Yellow Cab Co. v. Industrial Comm'n* (1985), 108 Ill. 2d 330, 483 N.E.2d 1278, where it upheld its own decision to create a special Industrial Commission Division of the Appellate Court (113 Ill. 2d R. 22(g)). There, the supreme court stated:

> "[U]nder the existing statutory scheme and the provisions of Rule 302(a) prior to its amendment, claims for compensation were not being adjudicated in the expeditious manner contemplated by the Workers' Compensation Act [citations]. For the most part the delays [were] encountered prior to the cases reaching the circuit courts, but it is anticipated that the amendments to the Workers' Compensation Act effected by Public Act 83 -- 1125 (eff. June 30, 1984) will expedite the decision of cases by the Commission. In view of the number of times the issues are decided prior to reaching that stage,

> we are of the opinion that any further extension of the litigation beyond the decision of the appellate court is warranted only if at least two members [now one member] of the appellate panel make the **[***20]** statements required under Rule 315(a)." *Yellow Cab*, 108 Ill. 2d at 341, 483 N.E.2d at 1283.

This court thereafter decided *Orkin Exterminating Co.* and *Cook*. It is true that neither case changed the Commission's standard of reviewing arbitrators' decisions to one of manifest weight of the evidence. However, contrary to the majority's assertion, the cases did in fact change the standard by which the Commission is to review its arbitrators' factual findings. When this court stated that an arbitrator's factual findings are not without legal effect and that it would apply an extra degree of scrutiny to cases in which the Commission had overturned an arbitrator's findings without hearing new evidence, the Commission's standard in reviewing arbitrators' findings was resultantly changed, since it then could only overturn its arbitrators' findings when its decision could withstand the extra scrutiny of this court. (I would note that in the *Orkin* and *Cook* cases the supreme court denied the parties' petitions for leave to appeal.)

The legislature, the supreme court, and the Commission itself have taken notice of the caseload now overwhelming **[***21]** the Commission. The legislature has sought to lessen this burden and expedite the appeal process by, among other things, severely limiting the nature of the hearing before the Commission. The supreme court has recognized the legislature's desire to expedite appeals and in *Yellow Cab* partly justified its creation of this court by that need. This court in *Orkin Exterminating Co.* and *Cook* has effectively recognized the reality **[*824]** that the modern Industrial Commission must rely more and more on the record compiled before the arbitrator and that the Commission has less and less time to devote to an in-depth review of that record.

Accordingly, I find that *Orkin Exterminating Co.* and *Cook* set forth a new standard of review in cases in which the Commission overturns an arbitrator's factual findings without hearing new evidence and that this in turn means that the Commission **[**1155]** must accord reasonable weight to the arbitrators' findings. In other words, the Commission must now apply a "due deference" standard of review to its arbitrators' decisions, taking into account that in most cases only the arbitrators actually view the witnesses and hear their testimony. **[***22]** I further find that this change in the law was in effect fully sanctioned by the legislature in Public Act 83 -- 1125 and by the supreme court in *Yellow Cab* and that it therefore does not usurp the supreme court's authority over this court.

In the instant case, however, I find that even under the due deference standard the Commission did not err in overturning the arbitrator's decision. The petitioner presented sufficient evidence to prove that his injury arose out of and in the course of his employment.

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Citation: 1990 Ill. App. LEXIS 299

*195 Ill. App. 3d 599, *; 552 N.E.2d 1082, **;*
*1990 Ill. App. LEXIS 299, ***; 142 Ill. Dec. 341*

WILLIE PEARL DILLON, Mother and Next Friend of Jamiqua Dillon Dorris, a Minor, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Maislin Gateway Trucking et al., Appellees)

No. 1-89-0258WC

Appellate Court of Illinois, First District, Industrial Commission Division

195 Ill. App. 3d 599; 552 N.E.2d 1082; 1990 Ill. App. LEXIS 299; 142 Ill. Dec. 341

March 9, 1990, Filed

PRIOR HISTORY: [***1] Appeal from the Circuit Court of Cook County; the Hon. Alexander P. White, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Claimant mother sought review of the judgment of the Circuit Court of Cook County (Illinois), confirming the decision of respondent Illinois Industrial Commission that the mother was not entitled to death benefits on behalf of her daughter after the work-related injury of a decedent.

OVERVIEW: The mother sought death benefits on behalf of her daughter after the decedent was killed in a work-related injury. While the mother was married to another man, she claimed to have been living with the decedent at the time of his death and that the decedent was the father of her daughter. An arbitrator originally ordered that benefits be paid and on review the commission reversed the decision. The circuit court affirmed the denial of benefits, and the mother sought further judicial review. The court determined that the commission, as the judge of the credibility of witnesses, was in no way bound by the original decision by the arbitrator, and that the commission's decision would be overturned only if it was against the manifest weight of the evidence. The court concluded that the mother failed to offer evidence sufficient to rebut the strong presumption that her legal husband was the father of her daughter. Her testimony that she was living with him, despite being married to another man, was self-serving and lacked credibility, especially in the absence of any evidence that the mother ever lived with the decedent, or blood tests excluding her legal husband as the child's father.

OUTCOME: The court affirmed the judgment of the circuit court denying death benefits to the mother on behalf of her daughter.

CORE TERMS: decedent, claimant's, arbitrator, married, paternity, lived, signature, sexual relations, manifest, lawful, rebut, credibility, credible, minor child, child's father, blood tests, daughter, rebutted, widow, best position, conclusively, woman, birth, space, accidental injuries, strong presumption, convincing evidence, failed to prove, statutory presumption, new evidence

LEXISNEXIS® HEADNOTES Hide

Evidence > Inferences & Presumptions > Rebuttal of Presumptions
Family Law > Marriage > Validity > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 If a woman is lawfully married at the time a child is born to her, there is a strong presumption that the lawful husband is the father of the child. A party seeking to rebut that presumption has the burden of introducing evidence which clearly and conclusively proves that the child's father is someone other than the mother's lawful husband. Section 5 of the Illinois Parentage Act of 1984, Ill. Rev. Stat. ch. 40, para. 2505 (1985), effective July 1, 1985, provides, in part concerning a presumption of paternity, as follows: (a) a man is presumed to be the natural father of a child if: (1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage. Subsection (b) of the section provides that a presumption under that section may be rebutted only by clear and convincing evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN2 The Illinois Industrial Commission (Commission) is the judge of the credibility of the witnesses appearing in proceedings before it. It is the peculiar province of the Commission not only to determine the credibility of witnesses but also to weigh the testimony and to determine the weight to be given to the evidence. Regardless of whether the Commission hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings. More Like This Headnote | *Shepardize:* Restrict By Headnote

Family Law > Paternity & Surrogacy > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 If blood tests show that a mother's husband is not the father of her child, the presumption of legitimacy is overcome. More Like This Headnote | Shepardize: Restrict By Headnote

Family Law > Parental Duties & Rights > Nonmarital Children > General Overview
Family Law > Paternity & Surrogacy > Establishing Paternity > General Overview
Family Law > Paternity & Surrogacy > Proof of Paternity > General Overview

HN4 An illegitimate child of a deceased employee may recover compensation under section 7 of the Illinois Worker's Compensation Act under some circumstances. However, an award of compensation is not to be made to an illegitimate child unless paternity is proved. More Like This Headnote | Shepardize: Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN5 The determination of disputed questions of fact is primarily a function of the Illinois Industrial Commission and it is the province of the Commission to weigh the evidence and to draw reasonable inferences therefrom. The findings of the Commission will not be set aside on review unless they are against the manifest weight of the evidence. More Like This Headnote | Shepardize: Restrict By Headnote

COUNSEL: Gerald M. Sachs & Associates, Ltd., of Chicago (Charles Levy, of counsel), for appellant.

George J. Cullen & Associates, Ltd. (Charles G. Haskins, Jr., of counsel), for appellee.

JUDGES: JUSTICE LEWIS delivered the opinion of the court. McNAMARA, WOODWARD, and McCULLOUGH, JJ., concur. PRESIDING JUSTICE BARRY, specially concurring.

OPINION BY: LEWIS

OPINION

[*601] [1083]** It is undisputed that James Dorris was employed as a truck driver by Maislin Gateway Trucking on October 3, 1981, when he sustained accidental injuries that arose out of and in the course of his employment and caused his death on that date. The dispute in this cause relates to the dependency of a minor child, Jamiqua Dillon Dorris, born on December 13, 1981.

In an amended application for adjustment of claim filed with the Illinois Industrial Commission (hereafter referred to as the Commission) in case Number 82 -- WC -- 34144, the claimant, Willie Pearl Dillon, as mother and next friend of Jamiqua Dillon Dorris, a minor, alleged that the minor was the daughter of the decedent, James Dorris. In an application for adjustment of claim **[***2]** filed with the Commission in case Number 81 -- WC -- 46256, the claimant, Carletha Dorris, alleged that she was the surviving dependent widow of the decedent. The cases were consolidated by the arbitrator, who, following a hearing, awarded benefits to both claimants pursuant to section 7(a) of the Workers' Compensation Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.7(a)) (hereafter referred to as the Act). At the hearing before the arbitrator Willie Pearl Dillon acknowledged that Carletha Dorris was the wife of James Dorris at the time of his death and **[*602]** that she herself was at the time still married to William H. Dillon.

Case law has long held that, HN1 if a woman is lawfully married at the time a child is born to her, there is a strong presumption that the lawful husband is the father of the child (*Jones v. Industrial Comm'n* (1976), 64 Ill. 2d 221, 356 N.E.2d 1; *Sugrue v. Crilley* (1928), 329 Ill. 458, 160 N.E. 857) and that a party seeking to rebut that presumption has the burden of introducing evidence which clearly and conclusively proves that the child's father is someone other than the mother's lawful husband **[***3]** (*Jones*, 64 Ill. 2d 221, **[**1084]** 356 N.E.2d 1; *Sugrue*, 329 Ill. 458, 160 N.E. 857). Section 5 of the Illinois Parentage Act of 1984 (Ill. Rev. Stat. 1985, ch. 40, par. 2505), effective July 1, 1985, provides in pertinent part concerning a presumption of paternity as follows:

> "(a) A man is presumed to be the natural father of a child if:
>
> (1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage * * *."

Subsection (b) of this section provides that a presumption under this section may be rebutted only by clear and convincing evidence.

Upon review, sought by Carletha Dorris, the Commission found that the claimant Willie Pearl Dillon had failed to prove that Jamiqua Dillon Dorris was the minor daughter of the decedent and, therefore, denied her claim for compensation, entering an award for the claimant Carletha Dorris. Upon further review the circuit court confirmed the decision of the Commission, and this appeal by Willie Pearl Dillon followed.

The claimant presents two issues for our review: **[***4]** whether the trier of fact, the arbitrator, is in the best position to judge the character and veracity of a witness' testimony and whether the Commission applied the evidence used to rebut the statutory presumption of legitimacy to the issue of the decedent's paternity.

At the hearing before the arbitrator, conducted on July 26, 1985, Carletha Dorris testified that she had married James Dorris on May 23, 1970, that no children had been born of their marriage, and that while she was married to the decedent she had had no income as the result of her own employment and the decedent had been her sole support. She testified that from 1974 until the time of his death she had been living with James Dorris at 15639 Dixie Highway in Harvey, Illinois.

Willie Pearl Dillon testified that she had met James Dorris on December 31, 1980, and that he had begun living with her on January **[*603]** 1, 1981, in an apartment she was renting at "3625 Lake Park." She lived there with him and her two sons, about 8 and 10 years of age at the time. On about April 1 or May 1, 1981, the four of them moved to a single-family house located at 5129 South Emerald, apparently in Chicago, where they were living at **[***5]** the time of James Dorris' death. She indicated that between January 1, 1981, and October 3, 1981, on the days when he was not on the road driving he was living with her. She said that to her knowledge James Dorris did not stay anywhere else during that time. She estimated that as a result of his work he was away from the city approximately three or four days per week. The apartment and the house were leased in her name. She testified that she had paid the rent on the apartment and that the decedent had then done so "once he was there." She stated that when she lived with the decedent he paid the rent of $ 250 per month in "[c]ash" and received a receipt for the payment; no receipts were offered into evidence. He also paid the utilities, she said, as well as the expenses of food, clothing, and medication.

She testified that she and Dorris shared a common bedroom and had sexual relations while they lived together. When she met Dorris she was married to William H. Dillon, having married him on September 23, 1972, and lived with him until sometime in 1978, after the birth of their two sons. She stated that between 1978 and 1980, from the time she left William Dillon until she **[***6]** began to live with Dorris, she did not live with any other adult male. Asked whether, during the two-year time period after she had left William Dillon and before she lived with James Dorris, she had had sexual relations with any adult male, she answered, "Yes." Later, asked, "Had you had sexual relations with any other male other than James Dorris between the date that you learned that you were pregnant back to the time that you last lived with your husband?" she answered, "No." She denied having had sexual relations with anyone other than James Dorris during the time that she lived with him. She said she had learned she was pregnant on about **[**1085]** April 8, 1981, and gave birth to Jamiqua on December 13, 1981.

She testified that about three months before Jamiqua was born she was having "contractions, stomach crampings" and was admitted to Northwestern Memorial Hospital in Chicago. She appears to have been admitted to the hospital on September 27, 1981. She said that the hospitalization was to be paid for by insurance "through his [decedent's] job." She stated that she knew who was to pay for her inpatient stay because James Dorris "had given the hospital a little paper, so if I had **[***7]** the baby and he wasn't at home that information **[*604]** would be there." "He had given the hospital the letter," she testified, "since he was on the road." Admitted into evidence as claimant's exhibit No. 16 are copies of two documents, one of which is labeled "Group Hospital Insurance Report" and the other of which is labeled "Admission Agreement and Authorization." She identified the signature "James Dorris" in the space for "Insured Person" on the Group Hospital Insurance Report as that of the decedent. Appearing beneath the signature "James Dorris" in the space for "Insured Person" is the signature "Willie Dillon Dorris" in the space for "Patient." The letters "JD" appear beside the signature. Elsewhere on this document James Dorris' relationship to the patient, listed as "Willie Dorris," is described as "Spouse." On cross-examination she denied that the signature "Willie Dillon Dorris" was hers; asked why she had signed her name "Willie Dillon Dorris," she answered that she had not done so. On the Admission Agreement and Authorization the signature "James Dorris" appears three times. She said that none of the writing on either document was hers and indicated that she had **[***8]** "had nothing to do with what was put on that paper," referring to the Group Hospital Insurance Report. She added, "[I]t belonged to him [decedent], he signed it." She stated that she did not know who paid the bills incurred for the hospitalization in September of 1981, adding, "I guess it was the insurance. Mr. Dorris' insurance company." She testified that she provided the names "Jamiqua Dillon Dorris" as it appears on the minor's birth certificate. A copy of the child's birth certificate, which is in evidence, bears the signature of the mother as "Willie P. Dillon"; the space for the name of the child's father is blank.

William H. Dillon testified that he was married to Willie P. Dillon on September 23, 1972, and is still married to her but has not lived with her since sometime in 1978 and has not had sexual relations with her since their separation in 1978.

Carietha Dorris testified concerning her familiarity with James Dorris' signature and stated that she did not know whether the signature "James Dorris" on the Group Hospital Insurance Report was that of the decedent but that of "James Dorris" appearing three times on the Admission Agreement and Authorization was not that **[***9]** of the decedent. She testified that the signature of "James Dorris" appearing on a copy of a check, admitted into evidence, made out to her was that of the decedent.

In his decision the arbitrator concluded that at the time of his injury the decedent was 45 years of age, was earning an average weekly wage of $ 661.13, was married, and had a posthumous child **[*605]** born on December 13, 1981, finding in relevant part as follows:

> "The Arbitrator adopts the credible testimony of Willis [*sic*] Pearl Dillon that she conceived the minor child, Jamiqua, with the decedent, James Dorris, during the time that they resided together in Chicago. Further, the Arbitrator notes that the child, Jamiqua, was born in Chicago, Illinois, on December 13, 1981, and that Willie Pearl Dillon's testimony that she had sexual intercourse with the defendant exclusively during the accepted biological conception period was credible and truthful.
>
> The Arbitrator also adopts the testimony of Carietha Dorris that she was the legal widow of James Dorris, deceased, on the date of death as credible and as evidenced by [certain exhibits]. The Arbitrator further finds that as the result of the aforesaid accidental **[***10]** injuries James Dorris departed this life on to-wit: October 3, 1981, leaving him surviving at the **[**1086]** time of his death Carietha Dorris, his widow, and a minor child, namely: Jamiqua Dillon Dorris, born December 13, 1981[,] all of whom said decedent was under legal obligation to support and entitled to compensation on account of the death of said decedent, as provided in Section 7(a) of the Act."

Upon review the Commission, without hearing further evidence, found that the claimant Willie Pearl Dillon failed to prove that Jamiqua Dillon Dorris was the minor daughter of decedent and denied her claim for compensation on the basis of the following express findings:

> "1. Decedent, a 45 year old truck driver, sustained fatal accidental injuries arising out of and in the course of his employment when his tractor-trailor [*sic*] overturned on October 3, 1981.
>
> 2. On December 13, 1981, a daughter, Jamiqua, was born to [claimant] Willie Pearl Dillon. [Claimants] Carietha Dorris, widow of Decedent, and Willie Pearl Dillon each testified that she was living with Decedent at the time of the accident and Willie Pearl Dillon stated that although she was married to William Dillon since 1972, still **[***11]** married to him at the

time of the conception of Jamiqua and remained married thereafter, she had sexual relations with no one other than Decedent since she began living with him on January 1, 1981, after meeting him on December 31, 1980. Although Willie Pearl Dillon testified that Decedent had paid her rent and utilities since January 1, 1981, no receipts were introduced showing that Decedent paid these expenses.

3. William Dillon testified that he was the husband of Willie **[*606]** Pearl Dillon and that he had not had sexual relations with his wife since 1978.

4. The Commission notes that in *Jones v. Industrial Commission*, 64 Ill. 2d 221, 356 N.E.2d 1 (1976), the Illinois Supreme Court stated that if a child is born while a woman is lawfully married, there is a strong presumption that the lawful husband is the father of that child and a party seeking to rebut that presumption has the burden to introduce evidence that clearly and conclusively proves that the child's father is someone other than the mother's lawful husband. ILL. REV. STAT., ch. 40, § 2505 now provides that this presumption of paternity can be rebutted only by clear and convincing **[***12]** evidence. Expert witness' testimony as to the results of blood tests is sufficient for rebuttal. The Commission finds that Petitioner Willie Pearl Dillon has failed to meet this burden because her testimony that she lived with Decedent at the same time Decedent's widow, Carietha Dorris[,] claimed to have lived with Decedent was self-deserving and lacks credibility, that her use of the name 'Dorris' for herself and Jamiqua on documents is also self-serving and that no blood test was introduced establishing that Willie Pearl Dillon's husband, William Dillon, was not the father of Jamiqua. Even if the Commission found the testimony of William Dillon that he had not had sexual relations with his wife since 1978 to be credible, this testimony has no probative value as to whether Decedent was the father of Willie Pearl Dillon's child."

Upon review, the circuit court in a 13-page memorandum decision and judgment confirmed the decision of the Commission, noting that

"[i]mplicit in the Arbitrator's determination is a finding that [claimant] Dillon overcame the strong presumption that her husband was the father of Jamiqua. The Commission reviewed the evidence and determined that [claimant] **[***13]** Dillon had failed to rebut the presumption, clearly and conclusively, that the child's father is someone other than [claimant] Dillon's husband, William Dillon."

The circuit court determined that the Commission "reviewed the facts and drew reasonable inferences from the facts," stating further by way of conclusion,

"The determination of the Arbitrator, especially those findings in respect to credibility, are to be given weight; however, the Commission has the responsibility of reviewing and evaluating **[*607]** the evidence and making findings which are supported **[**1087]** by the evidence. In the instant case the Court determines the findings of the Commission are not contrary to the law or against the manifest weight of the evidence."

In the circuit court the respondent employer stated that it has taken no position in the dispute with regard to either claimant Dorris or claimant Dillon, describing the dispute between these two litigants as "whether the death proceeds are payable to one or both of them." It described itself as remaining ready to pay the proceeds of the death award "once it has finally been determined which of the parties (and in what proportion) should receive said funds."

[*14]** With regard to the first issue presented for review, claimant Dillon contends, citing no authority for the proposition, that the arbitrator is "clearly in the best position to observe the witness and determine whether the testimony is credible and truthful. His decision must stand unless it is clearly against the manifest weight of the evidence." She concludes that the arbitrator, rather than the Commission, was in the best position to judge the character and veracity of the testimony of the witnesses. It is well settled that HN2 the Commission is the judge of the credibility of the witnesses. (*Caterpillar Tractor Co. v. Industrial Comm'n* (1983), 97 Ill. 2d 35, 454 N.E.2d 252.) It is the peculiar province of the Commission not only to determine the credibility of witnesses but also to weigh the testimony and to determine the weight to be given to the evidence. (*Berry v. Industrial Comm'n* (1984), 99 Ill. 2d 401, 459 N.E.2d 963; *Dunker v. Industrial Comm'n* (1984), 126 Ill. App. 3d 349, 466 N.E.2d 1255.) Regardless of whether the Commission hears testimony in addition to that heard by the **[***15]** arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings. (*Berry*, 99 Ill. 2d 401, 459 N.E.2d 963; *Dunker*, 126 Ill. App. 3d 349, 466 N.E.2d 1255.) Claimant Dorris suggests that, in urging that the arbitrator was in the best position to observe the witnesses and to determine whether their testimony was credible and truthful, claimant Dillon appears to be alluding to the cases of ***Cook v. Industrial Comm'n* (1988), 176 Ill. App. 3d 545, 531 N.E.2d 379**, and *Luckenbill v. Industrial Comm'n* (1987), 155 Ill. App. 3d 106, 507 N.E.2d 1185. In *Cook*, referring to *Luckenbill*, it was indicated that the arbitrator who has heard the live testimony, as opposed to the Commission if it has not, is actually in a better position to evaluate that evidence. In *Cook* it was stated that, in cases where the Commission has rejected the arbitrator's factual findings without receiving any new evidence, an extra degree of scrutiny is applied to the record in determining **[*608]** whether there is sufficient support for the Commission's **[***16]** decision. Even if an extra degree of scrutiny is applied to the record in making such a determination, that application does not establish a basis for the rule proposed by claimant Dillon that the decision of the arbitrator must stand unless it is clearly against the manifest weight of the evidence. The rule claimant Dillon advances is a misstatement of the standard of review expressed above and properly employed by the Commission.

With respect to the second issue raised for review, claimant Dillon maintains that the evidence presented "clearly demonstrated that decedent is the father of the minor child." She claims that the Commission improperly mixed two issues and failed to apply the requisite standards of law, the two issues being whether claimant Dillon's evidence rebutted the presumption that a child born to a married woman is that of her husband and whether the evidence shows that the decedent is the father of the minor child. She asserts that "[i]t is this mixture of the vital issues that calls for the reversal of the Commission's Decision on Review." Citing no authority, she argues, "It is the province of the Arbitrator to make findings of fact and to weigh these facts **[***17]** to determine if the statutory presumption has been rebutted." She relies upon *Santiago v. Silva* (1980), 90 Ill. App. 3d 554, 413 N.E.2d 139, as sustaining a paternity decree "based primarily," she says, "upon the testimony **[**1088]** of the mother." She overlooks the fact that in *Santiago* the court relied upon the testimony of the mother together with evidence of blood tests excluding the mother's husband from paternity of the child. The other case claimant Dillon relies upon is *People ex rel. Jones v. Schmitt* (1968), 101 Ill. App. 2d 183, 242 N.E.2d 275, in which, she states, "the testimony of the wife and husband that they were not having intercourse and were occupying separate bedrooms was sufficient to rebut the statutory presumption." She fails to note that in *Schmitt* the putative father had admitted having intercourse with the relatrix on or about the date of conception, had admitted "there is a chance I could be the

father,'" (101 Ill. App. 2d at 186, 242 N.E.2d at 276) and had stated, when told that the baby looked like him, "'[H]e ought to'" (101 Ill. App. 2d at 185, 242 N.E.2d at 276). **[***18]** Claimant Dillon concludes that, had the Commission properly reached the conclusion that the statutory presumption was rebutted, it should have weighed the evidence of paternity, which, she says, it failed to do.

As has already been indicated, a presumption exists that a child conceived during wedlock is legitimate; this presumption is rebuttable and can be overcome by irrefragable proof. (*Santiago*, 90 Ill. App. 3d 554, **[*609]** 413 N.E.2d 139; *Schmitt*, 101 Ill. App. 2d 183, 242 N.E.2d 275.) Otherwise stated, the rule is that, if a woman is lawfully married at the time a child is born to her, there is a strong presumption that the lawful husband is the father of her child. (*Jones*, 64 Ill. 2d 221, 356 N.E.2d 1.) A party seeking to rebut that presumption has the burden of introducing evidence that clearly and conclusively proves that the child's father is someone other than the mother's lawful husband. (*Jones*, 64 Ill. 2d 221, 356 N.E.2d 1.) HN3 If blood tests show that the mother's husband is not the father of the child, the presumption of legitimacy is overcome. **[***19]** (*Santiago*, 90 Ill. App. 3d 554, 413 N.E.2d 139.) Once the burden of producing clear and convincing evidence to rebut the presumption of the child's legitimacy has been met, the presumption of the lawful husband's paternity ceases to operate. (See *In re Paternity of Smith* (1989), 179 Ill. App. 3d 473, 534 N.E.2d 669.) HN4 An illegitimate child of a deceased employee may recover compensation under section 7 of the Act under some circumstances. (*Jones*, 64 Ill. 2d 221, 356 N.E.2d 1; *Yellow Cab Co. v. Industrial Comm'n* (1969), 42 Ill. 2d 226, 247 N.E.2d 601.) However, an award of compensation is not to be made to an illegitimate child unless paternity is proved (*Jones*, 64 Ill. 2d 221, 356 N.E.2d 1).

It is well established that HN5 the determination of disputed questions of fact is primarily a function of the Commission (*Jones*, 64 Ill. 2d 221, 356 N.E.2d 1) and that it is the province of the Commission to weigh the evidence and to draw reasonable inferences therefrom (*Niles Police Department v. Industrial Comm'n* (1981), 83 Ill. 2d 528, 416 N.E.2d 243). **[***20]** The findings of the Commission will not be set aside on review unless they are against the manifest weight of the evidence. (*U.S. Industrial Chemical Co. v. Industrial Comm'n* (1986), 143 Ill. App. 3d 881, 493 N.E.2d 646.) As stated above, the Commission is the judge of the credibility of the witnesses. *Caterpillar Tractor*, 97 Ill. 2d 35, 454 N.E.2d 252.

In the instant case, the Commission could reasonably infer, under the circumstances here and in the absence of blood tests excluding William Dillon from the paternity of Jamiqua, that the presumption of his paternity had not been overcome. As a consequence, the presumption of his paternity did not cease to operate, and the Commission properly concluded that claimant Dillon failed to prove that Jamiqua was the minor daughter of the decedent. Since matters of credibility are within the province of the Commission, which plainly resolved them against claimant Dillon, in view of the evidence presented we cannot say that the decision of the Commission was **[*610]** contrary to its manifest weight.

[1089]** The judgment of the circuit court confirming the decision of the Commission **[***21]** is affirmed.

Affirmed.

CONCUR BY: BARRY

CONCUR

PRESIDING JUSTICE BARRY, specially concurring:

I concur with the majority that the Commission's decision is not contrary to the manifest weight of the evidence. The majority's opinion is confusing, however, regarding the proper standard of review to be applied when the Commission overturns the arbitrator without hearing new evidence. The simple rule is that the Commission's decision will not be overturned unless it is against the manifest weight of the evidence; but when no new evidence is introduced, reviewing courts will apply an extra degree of scrutiny in making this determination. (***Cook v. Industrial Comm'n* (1988), 176 Ill. App. 3d 545, 531 N.E.2d 379**.) This standard applies whether the issue on review relates to an injury or to a claimant's paternity. Applied here, as the majority correctly notes, the circuit court's decision confirming the Commission's determination should be affirmed.

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*235 Ill. App. 3d 779, *; 601 N.E.2d 1339, **;*
*1992 Ill. App. LEXIS 1639, ***; 176 Ill. Dec. 641*

KOMATSU DRESSER COMPANY, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Peter J. Lishamer, Sr., Appellee).

No. 2-91-1237WC

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, INDUSTRIAL COMMISSION DIVISION

235 Ill. App. 3d 779; 601 N.E.2d 1339; 1992 Ill. App. LEXIS 1639; 176 Ill. Dec. 641

May 28, 1992, Submitted
October 8, 1992, Filed

SUBSEQUENT HISTORY: Released for Publication November 17, 1992.

PRIOR HISTORY: **[***1]** Appeal from the Circuit Court of Lake County. No. 91-MR-58. Honorable William D. Block, Judge, Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of a judgment of the Circuit Court of Lake County (Illinois), which affirmed the decision of appellee Industrial Commission, which determined that the employee had sustained an accidental injury and awarded him temporary total disability under the Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1989).

OVERVIEW: The employee filed for disability benefits under the Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1989). The Commission determined that the employee had sustained an injury and awarded temporary total disability. The trial court affirmed the decision, and the employer sought review. The court determined that, for an injury to arise out of employment, the injury must have occurred from some risk connected with the employment. The court determined that if the injury occurred when the employee was performing acts instructed to perform by the employer or if the employee was exposed to a risk to a greater degree than the general public, the injury was considered to have arisen out of the employee's employment. The court held that the Commission was to determine the credibility of the witnesses and that the Commission's decision was only to be overturned if it was against the manifest weight of the evidence. The court affirmed the judgment of the trial court.

OUTCOME: The court affirmed a judgment of the trial court, which affirmed a decision of the Commission, which awarded the employee temporary total disability and held that the employer was liable for the employee's injury under the Workers' Compensation Act.

CORE TERMS: claimant, doctor, pain, bending, preexisting condition, box, arbitrator's, pounds, sneezed, general public, manifest, spondylolisthesis, credibility, lumbosacral, foreman, lifting, pick, sneezing, machine, obesity, nurse, thigh, bent, knee, injury arose, arbitrator's decision, accidental injury, deference, exposed, physical therapy

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Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

HN1 For an injury to "arise out of" employment, the injury must have occurred from some risk connected with, or incidental to, the employment, in order to create a causal connection between the employment and the accidental injury. If the injury occurs when the employee was performing acts he was instructed to perform by his employer, acts he had a common-law or statutory duty to perform, or acts he might reasonably be expected to perform incident to his assigned duties, then the injury arose out of his employment. If the employee is exposed to a risk to a greater degree than the general public, the injury is similarly considered to have arisen out of his employment. However, if the employee's exposure to the risk is equal to that of the general public, his injury is not compensable. Additionally, under the law, an employer takes its employees as it finds them, and a preexisting condition does not bar compensation for an injury if the employment was also a causative factor. The only exception to this general rule is that if an employee's health has so deteriorated that any normal daily activity is overexertion, compensation will be denied. More Like This Headnote | *Shepardize:* Restrict By Headnote

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Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN2 The Commission is the judge of the credibility of the witnesses. It is the peculiar province of the Commission not only to determine the credibility of witnesses but also to weigh the testimony and to determine the weight to be given to the evidence. Regardless of whether the Commission hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings. The Commission's decision will only be overturned

on review if its decision is against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

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For Industrial Commission IL, Lishamer, Peter J., Sr., APPELLEES: Industrial Commission of Illinois, Attn: Chairman's Office, 100 West Randolph Street, Suite 8-272, Chicago, IL 60601, (312) 814-6559, Vito D. DeCarlo, P.C., Attorney at Law, 210 West Illinois Street, Chicago, IL 60610-4147, (312) 661-0088.

JUDGES: LEWIS, McCULLOUGH, WOODWARD, RAKOWSKI, STOUDER

OPINION BY: H. LEWIS

OPINION

[1340]** **[*780]** JUSTICE H. LEWIS delivered the opinion of the court:

Claimant, Peter J. Lishamer, Sr., filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Ill. Rev. Stat. 1989, ch. 48, par. 138.1 *et seq.),* for a lower-back injury incurred while in the course of his employment with the respondent, **[***2]** Komatsu Dresser Company. Subsequently, the claimant filed a section 19(b-1) (Ill. Rev. Stat. 1989, ch. 48, par. 138.19 (b-1)) petition. Following the hearings on his section 19(b-1) petition, the arbitrator held that the claimant failed to prove that his injury arose out of and in the course of his employment on March 22, 1989, and denied the claimant benefits. On appeal to the Industrial Commission (the Commission), the Commission reversed the decision of the arbitrator and held that the claimant had sustained an accidental injury arising out of and in the course of his employment and awarded the claimant temporary total disability (TTD) benefits for 37 and 6/7 weeks and medical expenses of $ 622. The circuit court confirmed the Commission's decision, and the respondent appeals.

On appeal, the respondent contends that the Commission's decision that the claimant's lower-back injury was causally connected to his employment was against the manifest weight of the evidence and that the Commission failed to give due deference **[**1341]** to the arbitrator's decision and, specifically, to the arbitrator's determination of the witnesses' credibility. We affirm for the reasons set forth below.

At the **[***3]** arbitration hearing on May 11, 1990, the claimant testified that he had worked as a machinist since 1973, and on March 22, 1989, he was so employed by the respondent. His job duties as a machinist consisted of turning raw metal into usable parts for tractors built at the respondent's plant. To accomplish this task, the claimant lifted parts weighing between 30 and 40 pounds from a box located next to his machine and placed the parts into the machine **[*781]** for processing. The box containing the parts was on a skid, which placed the box waist high and required the claimant to bend from his waist to lift the part out of the box.

The claimant testified that on March 22, 1989, he was working the second shift, *i.e.,* from 3:30 p.m. to midnight, and at about 10 p.m., he bent over to pick up a part out of the box, felt a sharp pain at the "bottom" of his back, and simultaneously sneezed, which caused the pain to spread throughout his entire lower back. At the time of the incident, the claimant explained that the box containing the parts was three-quarters empty as he had been at work for six hours. Following this incident, the claimant straightened up and sat down at his workbench.

Sometime between **[***4]** 10:30 p.m. and 11 p.m., the claimant's foreman, Les Lagoo, came by the claimant's machine to obtain a production count. At this time, the claimant advised the foreman that he had felt a sharp pain in his back when he bent over to obtain a part from the box and that he sneezed and felt the pain spread throughout his back. When the foreman asked if he was all right, the claimant responded that he thought so, but that he would just sit until his shift ended, if his production for the day was sufficient. The foreman agreed, so the claimant sat at his workbench the remaining hour of his shift.

When the claimant left work to go home, he was still in pain, and he had difficulty getting in and out of the car. The following morning, the claimant was unable to get out of bed due to the pain in his back. The claimant's wife arrived home from work around noon, helped him out of bed, and took him to St. Therese's Medical Center. At St. Therese's, he was given pain medication and muscle relaxants and was advised to alternate heat and cold packs on his back. He was also told to stay off work for a week.

That same day, the claimant called Jane Webber, the respondent's nurse, and told her he had injured **[***5]** his back the previous evening when he bent over and sneezed. Webber advised him to come in and see the company doctor, Dr. Loyd, on the following Tuesday, since the weekend was a holiday. The claimant saw Dr. Loyd as requested, and the doctor increased the dosage of his pain medication and his muscle relaxants. Dr. Loyd told him he could return to work on March 31, 1989.

The claimant returned to work on March 31, 1989, and the foreman assigned him to the floor sweeper that day. This work required the claimant to sit on the machine, but after a half hour, because the floor was rough and the sweeper had no suspension, the claimant **[*782]** stopped working due to the pain in his back. The claimant left work after four hours.

The following day, April 1, 1989, the claimant went to see Dr. Maniquis. Dr. Maniquis took X rays, prescribed medication, and recommended that he start physical therapy in a week or so. Dr. Maniquis released him for light-duty work as of May 29, 1989, with the restriction of no bending, twisting or stooping and with a lifting restriction of 20 pounds. The doctor also advised him not to work on the floor sweeper. The claimant called the company nurse and advised her that the **[***6]** doctor had released him for light-duty work; however, Webber told the claimant the respondent had no work for him with those restrictions.

In July 1989, both Dr. Maniquis and the company physician released the claimant for light-duty work, with a lifting restriction of 35 pounds and no bending, twisting or stretching. Again the claimant was advised **[**1342]** that the respondent had no work for him with these restrictions. The claimant had not returned to work at the time of the arbitration hearing. In addition to Dr. Maniquis and Dr. Loyd, the claimant had been to Drs. Apfelbach and Pawl at the respondent's request.

The claimant testified that, currently, he has constant pain at the base of his spine and in his left thigh. He explained that sometimes the pain is worse than others, and that there is no explanation as to the cause of the pain.

On cross-examination, the claimant admitted there were no witnesses to his accident. The claimant denied that he told the company nurse that he had hurt his back when he sneezed and before bending over to pick up a part. The claimant stated that at the time of his injury he weighed 330 pounds. Further, the claimant admitted that in November 1989 his back **[***7]** "went out" when he attempted to hang a picture frame at home. In addition, the claimant testified that he had had two prior back injuries, one in 1978 and one in 1987, but he had not missed any work and he had not filed a worker's compensation claim for these injuries.

Jane Webber, the respondent's nurse, testified that she had talked to the claimant in March 1989 about his medical condition. It was her recollection that the claimant had told her, in a phone conversation on March 23, 1989, that he had hurt his back when he had sneezed on the previous night and that he was unable to come to work. She instructed the claimant to see Dr. Loyd on the following Tuesday. She stated that it was her method of making notes **[*783]** when she placed the word "sneezed" in parenthesis above her written notes in the claimant's charts in March 1989.

Leslie Lagoo, the claimant's foreman, testified that on the evening of March 22, 1989, at about 11 p.m., the claimant told Lagoo that he had bent over the box to obtain a part, sneezed and felt a pain in his back. Lagoo corroborated the claimant's testimony that the claimant asked to sit the remainder of his shift. Lagoo's testimony also confirmed the claimant's **[***8]** testimony that the parts used in the claimant's machine were kept in a waist-high box and that the usual procedure to obtain a part was to bend over the box and pick up the part.

Two evidence depositions and various medical reports were admitted into evidence. Dr. Maniquis testified in his evidence deposition that he had treated the claimant in the past, when he was the respondent's physician from 1974 to 1987. He next saw the claimant on April 1, 1989, for a lower-back injury. At that time, the claimant told the doctor he had injured his back at work on March 22, 1989, when he bent over to pick up a part, sneezed and felt pain in his lower back. According to Dr. Maniquis, the claimant had attempted to return to work after a week but left when his back started hurting again.

When Dr. Maniquis saw the claimant, the claimant had leg pains and some numbness over the lateral aspect of his thigh. Dr. Maniquis' examination of the claimant revealed that he weighed 290 pounds, he had limited flexion in his back, he had tenderness on palpation of the left sacroiliac and in the lumbosacral area, and the muscles around the claimant's spine were tight on palpation. Dr. Maniquis had X rays taken **[***9]** of the claimant's lower back. The doctor took the claimant off work, and, subsequently, he ordered physical therapy for the claimant. The claimant's back pain improved, and in May 1989, the doctor released the claimant for work with the restrictions of a lifting limit of 20 pounds, and no bending, twisting or stooping. The doctor also advised the claimant not to drive a sweeper. The doctor was aware that the claimant did not return to work at that time because there was no job available with those restrictions.

The doctor again released the claimant for work in July 1989, but with a lifting restriction of 35 pounds and no bending, twisting or stooping, but again the respondent was unable to offer the claimant work with these restrictions. When the doctor saw the claimant in November 1989, the claimant told the doctor that his back started hurting again after he attempted to **[**1343]** hang a picture frame at **[*784]** home, so the doctor imposed a 25-pound lifting restriction. The doctor last saw the claimant in December 1989, but the doctor testified he had not lifted the claimant's work restrictions. Dr. Maniquis did not think the claimant could work without restrictions because of the numbness in the **[***10]** claimant's leg and his back pain. The doctor believed these symptoms indicated the claimant had a pinched nerve.

The doctor testified that the claimant had a preexisting condition of spondylolisthesis and spondylosis of the lower lumbar spine. However, his diagnosis of the claimant's condition was low-back-pain syndrome in addition to the preexisting conditions. Dr. Maniquis admitted on cross-examination that it was possible that a sneeze alone could bring about an onset of the claimant's symptoms because of his underlying condition, but he stated that bending and sneezing together placed more stress on the claimant's back than either event would separately. Dr. Maniquis was aware that the claimant's work required him to bend over and pick up parts on a daily basis.

Dr. Apfelbach testified in his evidence deposition that he is an orthopedic surgeon. He had seen the claimant on October 16, 1989, at the request of the respondent's insurance carrier. According to Dr. Apfelbach, his only objective finding of the claimant's condition was that of obesity. He noted that the claimant had a limited range of motion in his back, but he did not find this evidence reliable, as he felt the claimant **[***11]** had control over whether he did these motions to the fullest extent. The doctor did not observe any muscle spasm when the claimant did the range-of-motion tests. Dr. Apfelbach corroborated that the claimant had preexisting conditions of spondylolisthesis and spondylosis. It was Dr. Apfelbach's opinion that the claimant's "backache" was secondary to his spondylolisthesis with his obesity chronically irritating this condition. It was also the doctor's opinion that the claimant could perform his regular work. The doctor found no evidence of nerve irritation or radiculopathy. On cross-examination, the doctor admitted that the claimant's preexisting condition could be temporarily aggravated by bending over to pick up a part and sneezing, but he was of the opinion the aggravation would not be permanent. The doctor did state, "You're not supposed to be bending over all the time, you're supposed to bend your knees when you move."

The medical reports from St. Therese Medical Center indicated that the claimant came to the emergency room on March 23, 1989, for treatment of his lower back. The medical report gave the history **[*785]** of the claimant's accident at work. The diagnosis of the claimant's **[***12]** condition made at the medical center on March 23, 1989, was acute lumbosacral strain.

The notes from Dr. Loyd, the respondent's company physician, indicated that he had treated the claimant after March 22, 1989, for chronic lumbosacral strain, for which he prescribed medication and physical therapy. The physical therapy notes included in Dr. Loyd's records revealed that the claimant had limited range of motion in his lower back and that he had tenderness in the lumbosacral area upon palpation.

In Dr. Ronald Pawl's letter report of December 7, 1989, the doctor stated that he had examined the claimant on December 1, 1989. In this letter, Dr. Pawl's history of the claimant's accident was substantially similar to the claimant's testimony of his accident at the arbitration hearing. The doctor noted that the claimant complained of low-back pain and numbness and pain in the lateral aspect of his thigh radiating down from his hip to his knee. The doctor found the claimant's past medical and surgical history unremarkable, but the doctor noted the claimant was severely obese. Dr. Pawl reviewed the claimant's X rays, from which the doctor determined the claimant had a preexisting condition in **[***13]** his lower back which was unrelated to his injury. Dr. Pawl stated that "because he has symptoms that are significant in his lateral thigh, I think it is imperative to determine whether or not there is evidence for a nerve

root entrapment." The doctor stated in his letter that the claimant's obesity would prevent investigation by either computerized **[**1344]** tomographic scanning or magnetic resonance imaging, but that he recommended the claimant undergo a myelogram. Dr. Pawl concluded, "If there is no nerve root involvement, the only disorder in his spine are *[sic]* the pre-existing degenerative and congenital conditions."

In a letter from Dr. Barry L. Fischer dated June 23, 1989, Dr. Fischer indicated that he had seen the claimant on May 9, 1989. His history of the claimant's back injury was the same as the claimant's testimony of the accident. When Dr. Fischer saw the claimant, he complained of pain in his lower back with numbness in the left thigh. The doctor's examination of the claimant revealed that the claimant was 5 feet 11 inches tall, weighed 300 pounds, had tenderness and spasm to palpation and pressure in the left lumbosacral and paravertebral area, and had spasm radiating on **[***14]** the left side and down the posterior aspect of the left leg, which was indicative of left sciatic radiation. He, too, found the claimant to have limited **[*786]** range of motion in flexion of his lower back, but, in addition, the doctor determined that the claimant had a positive Lasegue sign on the left. After reviewing the claimant's X rays, Dr. Fischer determined that the claimant had a preexisting condition of spondylolisthesis. Dr. Fischer's diagnosis of the claimant's condition was a lumbosacral strain injury with sciatic radiation of spasm on the left and down the posterior of the left leg. He also stated there was a possible herniated-disc syndrome of the lumbar area.

From the foregoing evidence, the arbitrator held that the claimant failed to prove he had sustained an accidental injury during the course of his employment on March 22, 1989. As was noted previously, the Commission reversed and held that the claimant's injury did arise out of and in the course of his employment and awarded him TTD and medical expenses. The circuit court confirmed the Commission's decision.

On appeal, the respondent first contends that the Commission's decision was against the manifest weight of the evidence. **[***15]** Specifically, the respondent argues that because the claimant was engaged in a normal, daily activity, *i.e.,* bending over, and because the claimant was not exposed to a greater risk than the general public, his injury to his lower back was not an accidental injury for which compensation was payable. The respondent further argues that the claimant's preexisting conditions of his obesity and his spondylolisthesis were the cause of the claimant's current condition of ill-being. The respondent's second issue raised on appeal is that where, as here, the Commission did not consider additional evidence, the Commission failed to give due deference to the arbitrator's decision and, in particular, the Commission did not give weight to the arbitrator's assessment of the witnesses' credibility.

In considering the respondent's first contention that the Commission's determination that the claimant's injury arose out of and in the course of his employment was against the manifest weight of the evidence, we are cognizant that the law in this area is well established. HN1 For an injury to "arise out of" employment, the injury must have occurred from some risk connected with, or incidental to, the **[***16]** employment, in order to create a causal connection between the employment and the accidental injury. *(Caterpillar Tractor Co. v. Industrial Comm'n* (1989), 129 Ill. 2d 52, 541 N.E.2d 665, 133 Ill. Dec. 454; *Hopkins v. Industrial Comm'n* (1990), 196 Ill. App. 3d 347, 553 N.E.2d 732, 143 Ill. Dec. 25.) If the injury occurs when the employee was performing acts he was instructed to perform by his employer, acts he had a common-law or statutory duty to perform, or acts he might **[*787]** reasonably be expected to perform incident to his assigned duties, then the injury arose out of his employment. *(Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 541 N.E.2d 665, 133 Ill. Dec. 454; *Hopkins v. Industrial Comm'n,* 196 Ill. App. 3d 347, 553 N.E.2d 732, 143 Ill. Dec. 25.) Also, if the employee is exposed to a risk to a greater degree than the general public, the injury is similarly considered to have arisen out of his employment. *(Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 541 N.E.2d 665, 133 Ill. Dec. 454; *Hopkins v. Industrial* **[**1345]** *Comm'n,* 196 Ill. App. 3d 347, 553 N.E.2d 732, 143 Ill. Dec. 25.) **[***17]** However, if the employee's exposure to the risk is equal to that of the general public, his injury is not compensable. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 541 N.E.2d 665, 133 Ill. Dec. 454; *Hopkins v. Industrial Comm'n,* 196 Ill. App. 3d 347, 553 N.E.2d 732, 143 Ill. Dec. 25.

Additionally, under the law, an employer takes its employees as it finds them, and a preexisting condition does not bar compensation for an injury if the employment was also a causative factor. *(Quality Wood Products Corp. v Industrial Comm'n* (1983), 97 Ill. 2d 417, 454 N.E.2d 668, 73 Ill. Dec. 571.) The only exception to this general rule is that if an employee's health has so deteriorated that any normal daily activity is overexertion, compensation will be denied. *Quality Wood Products Corp. v. Industrial Comm'n,* 97 Ill. 2d 417, 454 N.E.2d 668, 73 Ill. Dec. 571.

In the instant case, the Commission stated its decision was based in pertinent part on the following:

"The objective findings in this case show that Petitioner had a preexisting condition of spondylolisthesis and that **[***18]** he was obese. The doctors all agreed and acknowledged that bending could aggravate this preexisting condition. Respondent's examining physician, Dr. Apfelbach, thought the back pain was secondary to the preexisting condition. Dr. Maniquis also acknowledged that the combination of lifting and sneezing would be stressful on the back and would be more stressful than just one or the other."

This paragraph of the Commission's decision reflected that the Commission found that the claimant's act of bending on March 22, 1989, aggravated his preexisting condition and caused his present condition of ill-being. This determination was not against the manifest weight of the evidence.

The medical evidence presented revealed that the claimant did have the preexisting condition of spondylolisthesis and spondylosis in his lower back; however, as the Commission found, Dr. Maniquis testified that bending, combined with sneezing, presented a stressful **[*788]** situation for the claimant's back. Dr. Apfelbach, the respondent's physician, acknowledged that these activities could temporarily aggravate the claimant's condition. None of the medical evidence presented established that the claimant's condition had **[***19]** so deteriorated that any activity would cause injury, and, in fact, although the claimant's preexisting conditions and his obesity were of a long-standing nature, the claimant had been able to do his work for years without difficulty.

Further, it was a reasonable inference that the claimant's acts of bending required by his work exposed the claimant to a greater degree of risk than that of the general public. Dr. Apfelbach testified that it is not a normal activity to bend from the waist, but that a person must bend his knees when he lifts a part. The claimant's testimony and Lagoo's testimony established that the claimant's work required him to regularly bend from the waist and lift parts weighing between 15 and 40 pounds out of a box and that the location of the box did not enable the claimant to bend his knees while doing this activity. The frequency of this activity and the method in which the claimant had to bend and lift without bending his knees increased the claimant's exposure to risk of injury from the bending than that of the general public, and, thus, the fact that bending is a normal activity did not preclude a finding that the claimant's injury arose out of his employment. **[***20]** The foregoing evidence was sufficient to support the Commission's decision.

The respondent's second contention is that this court must give extra scrutiny to the Commission's decision, since the Commission

considered the case without hearing additional evidence. The respondent argues that because the Commission overturned the arbitrator's decision, it is clear that the Commission did not give due deference to the arbitrator's decision and, in particular, the Commission did not give due deference to the arbitrator's determination of credibility. In support of this argument, the respondent cites to this **[**1346]** court's decision in ***Cook v. Industrial Comm'n* (1988), 176 Ill. App. 3d 545, 531 N.E.2d 379, 126 Ill. Dec. 84**. This argument is without merit.

In a subsequent case, *Dillon v. Industrial Comm'n* (1990), 195 Ill. App. 3d 599, 552 N.E.2d 1082, 142 Ill. Dec. 341, this court repudiated the statement in *Cook* that a court of review is required to give extra scrutiny" to a Commission's decision overturning the arbitrator's determination without considering additional evidence and reiterated the standard to be applied on review. In *Dillon,* **[***21]** we stated as follows:

"It is well settled that HN2 the Commission is the judge of the credibility of the witnesses. [Citation.] It is the peculiar province **[*789]** of the Commission not only to determine the credibility of witnesses but also to weigh the testimony and to determine the weight to be given to the evidence. [Citations.] Regardless of whether the Commission hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings." (*Dillon v. Industrial Comm'n*, 195 Ill. App. 3d at 607, 552 N.E.2d at 1087.)

This court further stated in *Dillon* that the Commission's decision will only be overturned on review if its decision is against the manifest weight of the evidence. *Dillon v. Industrial Comm'n*, 195 Ill. App. 3d 599, 552 N.E.2d 1082, 142 Ill. Dec. 341.

Here, the Commission set forth in its decision that it found the claimant to be credible, since the claimant's testimony about his injury at work was corroborated by the medical evidence. The Commission noted that the only contradiction to the claimant's testimony was provided by **[***22]** the respondent's nurse, which the Commission held was not persuasive in determining the claimant incredible. We do not find that the Commission's determination of credibility was against the manifest weight of the evidence.

For the foregoing reasons, the judgment of the circuit court of Lake County, confirming the Industrial Commission's decision, is affirmed.

Affirmed.

McCULLOUGH, P.J., and WOODWARD and RAKOWSKI, JJ., concur.

DISSENT BY: STOUDER

DISSENT

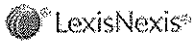
JUSTICE STOUDER, dissenting:

I disagree with the result reached by the majority of the court. I believe the decision of the commission is against the manifest weight of the evidence.

I have no quarrel with the rules as recited by my colleagues. It is the application of those rules to the facts of this case which disturbs me.

So far as I am concerned, the claimant was performing a normal activity at the time of the incident, and he conducted this activity for many years as a matter of course. The additional activity of sneezing, which the medical evidence indicates triggered the incident, is likewise a normal activity. These activities are no different from those of the general public. Even viewing the medical evidence **[*790]** most favorable to the claimant, the **[***23]** most that can be said is that the incident occurred while the claimant was working. Since the activities were normal, the incident could have occurred at some other time and place without being related to the claimant's employment activities. There seems to be a tendency to hold a compensable injury occurs if it happens on the employer's premises. This is not the rule.

I do not believe the evidence shows the activities of the claimant exposed him to risks different from those of the general public, and I would reverse the commission's result.



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*373 Ill. App. 3d 259, *; 870 N.E.2d 821, **;*
*2007 Ill. App. LEXIS 631, ***; 312 Ill. Dec. 377*

S&H FLOOR COVERING, INC., Appellant, v. THE **WORKERS' COMPENSATION COMMISSION,** et al. (Rick Gastineau, Appellee).

NO. 4-06-0245WC

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, **WORKERS COMPENSATION COMMISSION** DIVISION

373 Ill. App. 3d 259; 870 N.E.2d 821; 2007 Ill. App. LEXIS 631; 312 Ill. Dec. 377

February 16, 2007, Filed

PRIOR HISTORY: [*1]**
Appeal from Circuit Court McLean County. No. 05MR265. Honorable Charles G. Reynard, Judge Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of a decision of the Circuit Court McLean County (Illinois), which affirmed a decision of the Illinois **Workers' Compensation Commission.** The **Commission's** decision reversed the findings of an **arbitrator** as to notice and causal connection and awarded appellee claimant **workers' compensation** benefits for a knee injury.

OVERVIEW: The claimant **worked** as a carpet installer for the employer through a union. He began suffering debilitating knee pain while out-of-town. The employer claimed, inter alia, a lack of proper notice of the injury within the 45-day time limit in 820 Ill. Comp. Stat. Ann. 305/6(c) (2004). The court confirmed the circuit court decision. The **Commission** ruled that while the claimant did not provide proper notice of his injury until 49 days after his last day of employment with the employer, the employer was not prejudiced by the delay. That decision was not against the manifest weight of the evidence as the evidence established that the employer had some notice of the injury much earlier when the employer's project manager spoke to the claimant's wife and was informed that claimant was injured. The **Commission's** decision that the injury was **work** related was also supported by the evidence. The **Commission** found the testimony from the claimant's doctor in that regard to be credible. Further, the claimant testified that he had been experiencing progressively worsened pain while **working** for the employer.

OUTCOME: The circuit court's judgment was confirmed.

CORE TERMS: claimant, arbitrator's, knee, notice, pain, credibility, work-related, right knee, manifest, meniscus, surgery, tear, arbitrator's decision, arthritis, medial, telephoned, flooring, worsened, foreman, limping, per week, proper notice, conversation, spoke, drive, return to work, telephone, kneeling, wife testified, original jurisdiction

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Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN1 The findings of the Illinois **Workers' Compensation Commission** regarding notice will not be disturbed on review unless they are against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

HN2 The purpose of the notice requirement of the Illinois **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/6(c) (2004), is to enable employers to investigate alleged accidents. A claimant complies with the Act if, within 45 days, the employer possesses the known facts related to the accident. The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. However, the legislature has mandated a liberal construction on the issue of notice. More Like This Headnote

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HN3 Decisions of the Illinois **Workers' Compensation Commission** in unrelated cases have no precedential impact on cases before this court. More Like This Headnote

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Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
HN4 A reviewing court will not reverse a decision of the Illinois **Workers' Compensation Commission** unless that decision is contrary to law or its fact determinations are against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Agency Adjudication > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > General Overview
HN5 It is the province of the Illinois **Workers' Compensation Commission** to judge the credibility of witnesses, draw reasonable inferences from testimony, and determine the weight to be given testimony. More Like This Headnote

JUDGES: PRESIDING JUSTICE McCULLOUGH delivered the opinion of the court. HOFFMAN, GROMETER, and HOLDRIDGE, JJ., concur. JUSTICE DONOVAN, specially concurring.

OPINION BY: McCULLOUGH

OPINION

[822]** **[*260]** PRESIDING JUSTICE McCULLOUGH delivered the opinion of the court:

Employer, S&H Floor Covering, Inc., appeals from the February 22, 2006, decision of the circuit court of McLean County that affirmed the October 27, 2005, decision of the **Workers' Compensation Commission (Commission)**. The **Commission's** decision reversed the findings of the **arbitrator** as to notice and causal connection and awarded claimant $ 20,461 in medical expenses, temporary total disability (TTD) in the amount of $ 500 per week for a period of 16 3/7 weeks, and $ 450 per week for a period of 40 weeks, representing 20% loss of use of the right leg. Employer appeals, arguing the claimant did not provide employer with notice of his **work**-related accident within the 45-day period prescribed by section 6(c) of the **Workers' Compensation** Act (Act) (820 ILCS 305/6(c) (West 2004)) and (2) the **Commission's** decision that claimant suffered from a **work**-related accident **[***2]** arising out of **[*261]** and in the course of his employment was against the manifest weight of the evidence. For the reasons that follow, we affirm.

On September 16, 2002, claimant filed two applications for adjustment of claim--one for an accident occurring on July 23, 2001 (No. 02 WC 52682), while **working** for Cushing Commercial Carpet, and one for an accident occurring on August 2, 2002, while **working** for employer (No. 02 WC 52683). Claimant's claims were consolidated and heard before the **arbitrator**. The **arbitrator** denied each of claimant's applications. The **Commission** affirmed and adopted the **arbitrator's** decision with respect to No. 02 WC 52682 but reversed the **arbitrator's** decision as to No. 02 WC 52683. The latter is the subject of this appeal.

Before the **arbitrator**, claimant testified he laid commercial flooring as a member of a union for the past 12 years. Claimant testified he spent most of his **workday,** approximately five hours, kneeling. In the course of a day, he testified he would ascend from a kneeling position approximately 200 times. In addition, claimant testified he utilized a knee kicker on his right knee. Claimant testified he suffered an injury to his left knee in March 1999, **[***3]** while **working** for employer. Claimant testified he was treated by his family physician and received **workers' compensation** benefits for his injury.

Claimant testified he began **working** for employer in 1999. However, he was almost exclusively employed by Cushing Commercial Carpet from early 2001 until the end of July 2001, before returning to employer in August 2001. Claimant testified that in August 2001, he began experiencing aching in his right knee that progressively worsened. Claimant testified the pain was bad, but he continued to **work,** dealing with the pain.

[823]** Claimant testified he last **worked** for employer on August 2, 2002. After **work** that day, claimant testified he drove to Wichita, Kansas, to install flooring in his nephew's girlfriend's home. However, upon arriving in Wichita, claimant testified he was barely able to walk because of pain in his right knee and was not able to begin installation of the flooring for a week. Even then, claimant testified he was unable to finish the installation because of his knee pain. He testified he did not seek medical attention while in Wichita.

Claimant testified he returned to Illinois and saw Dr. Mark Hanson, an orthopedic surgeon on August 28, **[***4]** 2002. Claimant testified he telephoned Sandy at employer's office a few days after seeing Dr. Hanson and explained to her he was having knee problems that would require surgery. After knee surgery that was performed on October 29, 2002, claimant testified he still experiences constant pain in his right knee, can no longer kneel, and feels pain when walking. Claimant **[*262]** testified although he had been released to return to **work** without any restrictions, he has not done so. Claimant testified it is his desire to wait to return to **work** until his **workers' compensation** case is resolved.

Craig Jones, a foreman for Cushing Commercial Carpets, testified he **worked** with claimant in the summer of 2002. Jones testified claimant did not have any conversations with claimant regarding any problems claimant was having with his right knee. Jones testified he spoke with claimant via telephone in late September 2002. Claimant told Jones he was not **working** because he had hurt his knee **working** on a job for a relative in Tennessee. Jones testified he had seen claimant limp after standing from a kneeling position but that the limping would subside.

John Hunt, owner of employer, testified he saw claimant on August **[***5]** 2, 2002. Hunt testified he gave claimant his paycheck and attempted to persuade claimant to forgo his out-of-state trip and remain in Illinois to continue **working.** Claimant responded that he was committed to his trip. Hunt then told claimant that **work** would be waiting for claimant upon his return on August 12, 2002. Hunt testified claimant did not make any claims regarding his knees. Hunt did not speak to claimant again until September 20, 2002. Hunt testified this was the first notice he received that claimant was claiming he suffered a **work**-related injury. As owner of employer, Hunt testified had claimant notified anyone else in the company of his injury, Hunt would have been informed. During the course of employment, Hunt testified he had seen claimant limp immediately upon standing from a kneeling position.

Chris Schifeling, project manager for employer, testified he spoke to claimant before his trip to Wichita regarding the **work** claimant would begin on August 12, 2002. Claimant appeared normal and did not appear to limp. Schifeling testified he telephoned claimant on August 11, 2002, to confirm that claimant would indeed be able to **work** the next day. No one answered the telephone **[***6]** and Schifeling left a voice message. Schifeling testified claimant's wife telephoned on August 12, 2002. According to Schifeling, claimant's wife explained claimant would not be able to **work** "because he was still out of town. He got hurt and could not drive back."

Kathy Gastineau, claimant's wife, testified claimant did not suffer from knee problems when they married in 2000. Claimant began complaining of knee pain in 2001. Claimant's wife recalled speaking with Schifeling on the telephone but did not recall what she had told him other than that her husband was still in Wichita. Claimant's wife testified that prior to leaving for Wichita, claimant was limping and **[**824]** complaining that his knee was bothering him. She spoke to claimant **[*263]** after he arrived in Wichita. Claimant relayed he could barely walk because of the pain he was experiencing.

Dr. Hanson testified he first saw claimant on August 28, 2002. Dr. Hanson testified claimant presented with a history of knee pain for approximately one year. Claimant told Dr. Hanson he had been in the floor-covering business for 30 years, and the pain was getting worse. An X-ray of claimant's right knee was performed, and severe arthritis in the medial **[***7]** compartment with loss of the normal valgus alignment and moderal arthritis behind the patella were noted. Dr. Hanson testified he diagnosed claimant with osteoarthritis, medial compartment, and patellofemoral medial compartment. Dr. Hanson prescribed anti-inflammatories, Naprosyn, and an unloader brace. In addition, Dr. Hanson recommended claimant use a cane. Dr. Hanson next saw claimant on October 9, 2002. A magnetic resonance imaging (MRI) was performed, which revealed a medial meniscus tear and arthritis. As a result of these findings, Dr. Hanson testified he performed a arthroscopic partial medial meniscectomy and chondroplasty on October 29, 2002. Surgical findings included a medial meniscus tear, chondromalacia, and arthritis in the median joint and patellofemoral joint. Dr. Hanson testified that after surgery, claimant underwent physical therapy and a course of anti-inflammatories. Dr. Hanson testified claimant did fairly well in therapy but never returned to a normal state. Dr. Hanson last saw claimant on February 20, 2003. He testified claimant was in fair condition on that date. Within a reasonable degree of medical and surgical certainty, Dr. Hanson testified he was of the **[***8]** opinion that claimant's **work** as a commercial floor layer either contributed to or caused the need for his knee surgery. Similarly, Dr. Hanson was of the opinion that claimant's **work** contributed or caused the osteoarthritis as well as the meniscus tear in his right knee. Dr. Hanson stated he could not pinpoint a specific time when claimant's meniscus tear occurred but explained that a meniscus tear can be degenerative in nature.

On October 23, 2002, claimant presented to his family physician, Dr. Birge. Because of claimant's chronic high blood pressure, he needed Dr. Birge's clearance to undergo knee surgery. According to Dr. Birge's notes, claimant explained he had experienced chronic knee pain for approximately one year. The remainder of Dr. Birge's records document claimant's hypertension issues and do not mention any complaints regarding claimant's knees. In 1999, Dr. Birge removed fluid from claimant's left knee.

Based on the foregoing evidence and his visual assessment of claimant's credibility, the **arbitrator** found claimant did not suffer injuries arising out of and in the course of his employment. The **[*264]** **arbitrator** noted claimant was able to perform all of his job duties up to his **[***9]** last day of employment with employer. The **arbitrator** stated something happened to claimant after he left **work** on August 2, 2002, that dramatically changed his condition, preventing him from being able to walk, drive, or **work.** In addition, the **arbitrator** found claimant did not provide proper notice to employer of his alleged accident. Claimant's September 20, 2002, phone call to employer occurred more than 45 days after the onset of his alleged injury.

A majority of the commissioners on the **Commission** found claimant did sustain accidental injuries in the form of a cumulative knee condition arising out of and in the course of his employment as a flooring installer. The majority noted claimant testified his minor knee pain worsened considerably from August 2001 until August **[**825]** 2002. The majority found the drive to Kansas likely aggravated claimant's condition. Further, the majority noted Dr. Hanson opined that claimant's **work** more than likely accelerated his arthritis to the extent that treatment was necessary, and the meniscus tear was likely degenerative in nature due to the arthritis in claimant's knee. Employer presented no medical testimony to rebut Dr. Hanson's opinion. Finally, the **[***10]** majority found claimant provided proper notice to employer of his injury. Claimant telephoned Sandy at employer's office on September 20, 2002, 49 days after the injury occurred. The majority noted the employer suffered no prejudice in this delay, particularly in light of Schifeling's conversation with claimant's wife and employer's knowledge that claimant's knee pain had worsened to the point that he could no longer return to **work**. The **Commission** awarded claimant $ 20,461 in medical expenses, TTD in the amount of $ 500 per week for a period of 16 3/7 weeks, and $ 450 per week for a period of 40 weeks, representing 20% loss of use of the right leg. Commissioner Basurto dissented, stating the **arbitrator's** decision was well-reasoned. Specifically, Commissioner Basurto noted the **arbitrator** saw each of the witnesses testify and was in the best position to judge their credibility, and it would be illogical of the **Commission** to disregard the **arbitrator's** findings. This appeal followed.

Employer argues claimant failed to give any notice of his **work**-related accident within 45 days of his injury as required by section 6 (c) of the Act. 820 ILCS 305/6(c) (West 2004).

HN1 The findings of the **Commission** **[***11]** regarding notice will not be disturbed on review unless they are against the manifest weight of the evidence. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 95, 631 N.E.2d 724, 727, 197 Ill. Dec. 502 (1994). HN2 The purpose of the notice requirement of the Act is to enable employers to investigate alleged accidents. *Gano*, 260 Ill. App. 3d at 95, 631 N.E.2d at 727. A claimant **[*265]** complies with the Act if, within 45 days, the employer possesses the known facts related to the accident. *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 727. The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. *Ristow v. Industrial Comm'n*, 39 Ill. 2d 410, 413, 235 N.E.2d 617, 618 (1968); *Silica Sand Transport, Inc. v. Industrial Comm'n*, 197 Ill. App. 3d 640, 651, 554 N.E.2d 734, 742, 143 Ill. Dec. 799 (1990). However, the legislature has mandated a liberal construction on the issue of notice. *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 727.

The facts concerning injury and notice in *Gano* are easily distinguished from the instant case. In *Gano*, the claimant testified he immediately reported the accident and resulting injury to his foreman. *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 727. **[***12]** A coworker testified he saw the claimant and the foreman involved in a conversation shortly after the accident allegedly occurred, and the claimant was "messing with his shoulder" as he was speaking with the foreman and "had a nasty look on his face like something had happened." *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 727-28. The claimant testified that after speaking to his foreman, he told his coworkers he had injured himself. *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 728. Despite the employer's argument that it did not receive notice of the claimant's injury until he filed his application for adjustment of claim, this court found the **Commission's** findings as to notice were not against the manifest weight of the evidence. *Gano*, 260 Ill. App. 3d at 96, 631 N.E.2d at 728.

[826]** In this case, with regard to notice, the **Commission** found claimant provided employer proper notice of his **work**-related

injury on September 20, 2002. Although this notice occurred 49 days after claimant last **worked** for employer, the **Commission** found employer was not prejudiced by the delay, considering Schifeling's telephone conversation with claimant's wife and employer's knowledge that claimant's ongoing knee **[***13]** pain had worsened to the point that he could not return to **work**. This decision is not against the manifest weight of the evidence.

On August 12, 2002, Schifeling, employer's project manager, spoke to claimant's wife and was informed that claimant was injured and was not able to drive back to Illinois. Claimant testified that in early September, he telephoned Sandy at employer's office and informed her that he was having knee problems that were going to require surgery. Although this notice was not perfect, employer was possessed with the knowledge that claimant had suffered a knee injury that prevented him from returning to **work** and that surgery would be required. Further, employer could infer from the nature of claimant's injury and **[*266]** his position as a flooring installer that the injury was **work**-related. Because some notice was given to employer, it was then incumbent upon employer to show that it was unduly prejudiced. No such argument was made. See *Silica Sand Transport*, 197 Ill. App. 3d at 653, 554 N.E.2d at 743 (finding employer did not meet its burden of proof of demonstrating undue prejudice as it only speculated that it had been prejudiced and did not support its speculation with **[***14]** factual prejudice). In fact, employer presented no medical evidence that claimant's injury was not **work**-related. However, employer urges this court to adopt the reasoning set forth in three unrelated **Commission** cases wherein the **Commission** declined to find proper notice had been given where the employers had not been made aware that the claimants' accidents were **work**-related. HN3 Decisions of the **Commission** in unrelated cases have no precedential impact on cases before this court. *Young v. Industrial Comm'n*, 248 Ill. App. 3d 876, 881, 619 N.E.2d 773, 777, 189 Ill. Dec. 72 (1993). In this case, no opposite conclusion is clearly apparent, and therefore, the **Commission's** findings regarding notice are upheld.

Next, employer argues the **Commission's** decision that claimant suffered from a **work**-related accident arising out of and in the course of his employment with employer was against the manifest weight of the evidence. Employer argues claimant never complained to Dr. Birge or another doctor of any ongoing knee problems prior to August 2002. Further, employer notes that claimant's coworkers testified they had not noticed claimant limping despite claimant's claims he had been limping for nearly a year. Finally, **[***15]** employer submits that the evidence presented shows claimant was injured out-of-state.

HN4 A reviewing court will not reverse a decision of the **Commission** unless that decision is contrary to law or its fact determinations are against the manifest weight of the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924, 308 Ill. Dec. 715 (2006). HN5 It is the province of the **Commission** to judge the credibility of witnesses, draw reasonable inferences from testimony, and determine the weight to be given testimony. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 188, 707 N.E.2d 228, 231, 236 Ill. Dec. 383 (1999).

Dr. Hanson testified claimant's osteoarthritis and meniscus tear were degenerative in nature and likely caused by or aggravated by his **work** as a commercial floor layer. The **Commission** clearly found Dr. Hanson credible and placed **[**827]** great weight on his testimony. Employer did not provide any contradictory medical testimony. Further, claimant testified he experienced pain in his right knee that progressively worsened from August 2001 until August 2002. Claimant's wife testified claimant did not suffer any knee problems when they married in **[*267]** 2000. However, before he left for Wichita, she testified claimant **[***16]** was limping and complaining of pain in his right knee. This court will not overturn the **Commission's** decision merely because other testimony was presented from which other inferences could have been drawn. See *Gano*, 260 Ill. App. 3d at 95, 631 N.E.2d at 727.

Finally, employer argues we should review our precedent that the **Commission** is not required to give deference to the **arbitrator's** findings of credibility. In the recent past, this court has been presented with more than a few cases where the **Commission** has made credibility findings contrary to those of the **arbitrator**. It may very well be time to reconsider the **Commission's** prerogative to determine credibility regardless of the **arbitrator's** decision.

In *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 405, 459 N.E.2d 963, 965, 76 Ill. Dec. 828 (1984), the supreme court stated the **Commission** "exercises original jurisdiction and is in no way bound by the **arbitrator's** findings." This court in ***Cook*** *v. Industrial Comm'n*, 176 Ill. App. 3d 545, 551-52, 531 N.E.2d 379, 383-84, 126 Ill. Dec. 84 (1988), acknowledged the holding in *Berry*, stating:

> "In a long line of cases, appellate courts have held that the **Commission** has original jurisdiction; it may both consider evidence that was **[***17]** presented to its fact-finding agent, the **arbitrator**, and consider evidence that is first presented to the **Commission.** [Citations.] The law is similarly well established that the **Commission** has authority to determine all unsettled questions and is not bound by the **arbitrator's** findings, even when it merely reviews the evidence presented at arbitration. [Citations.]
>
> In cases where the **Commission** has rejected the **arbitrator's** factual findings without receiving any new evidence, it is the function of this court on review to examine the entire record and weigh the evidence to determine whether the factual findings of the Industrial **Commission** were against the manifest weight of the evidence. [Citation.] While recognizing that the **Commission** is in no way bound by an **arbitrator's** decision, we note that the **arbitrator's** decision is not without legal effect. [Citations.] Further, we note that in performing its role as reviewer of the record, the **Commission** is at a practical disadvantage as compared to the **arbitrator**. The **arbitrator**, having heard the live testimony, is actually in a better position to evaluate that evidence. [Citations.]
>
> Accordingly, in cases where the **Commission** has rejected **[***18]** the **arbitrator's** factual findings without receiving any new evidence, we apply an extra degree of **scrutiny** to the record in determining whether there is sufficient support for the **Commission's** decision."

Thereafter, several courts disagreed with ***Cook***'s reasoning. See *Dillon v. Industrial Comm'n*, 195 Ill. App. 3d 599, 607, 552 N.E.2d **[*268]** 1082, 1087, 142 Ill. Dec. 341 (1990) (finding "[r]egardless of whether the **Commission** hears testimony in addition to that heard by the **arbitrator**, it exercises original jurisdiction and is in no way bound by the **arbitrator's** findings"); *J & J Transmissions v. Industrial Comm'n*, 243 Ill. App. 3d 692, 700, 612 N.E.2d 877, 882, 184 Ill. Dec. 1 (1993) (finding ***Cook*** is an inaccurate statement of the law and citing *Dillon* as controlling); *Hartsfield v. Industrial Comm'n*, 241 Ill. App. 3d 1055, 1060, **[**828]** 610 N.E.2d 702, 706, 182 Ill. Dec. 833 (1993) (holding the standard announced in ***Cook*** was not followed by this court); *Boatman v. Industrial Comm'n*, 256 Ill. App. 3d 1070, 1071, 628 N.E.2d 829, 830, 195 Ill. Dec. 365 (1993) (finding ***Cook*** has been rejected as an incorrect statement of the law). Although not appropriate in this case, we will consider giving credence to ***Cook***, which provides for "an extra

degree of **scrutiny**" to be applied to **[***19]** the record in determining whether there is sufficient support for the **Commission's** decision, especially when the **Commission** makes credibility determinations regardless of the **arbitrator's** findings.

For the foregoing reasons, we confirm the circuit court's judgment.

Affirmed.

HOFFMAN, GROMETER, and HOLDRIDGE, JJ., concur.

CONCUR BY: DONOVAN

CONCUR

JUSTICE DONOVAN, specially concurring:

I concur in the decision to confirm the **Commission's** decision. I write separately to voice my concern regarding the majority's expression of its willingness to "consider giving credence" to a statement in ***Cook***, 176 Ill. App. 3d at 552, 531 N.E.2d at 384, which proposes that the **Commission's** decisions be subjected to "extra **scrutiny**" in cases where the **Commission** has overturned credibility findings of the **arbitrator**. As is evident from the majority's decision, a review of fixed precedent regarding the **Commission's** prerogative to decide credibility issues is unnecessary to a disposition of the issues in the case before us. Thus, the discussion in the majority's decision amounts to an advisory statement that will likely spur unhappy litigants to appeal merely because the **Commission's** findings are at odds with those of the **arbitrator**, **[***20]** without regard to whether the **Commission's** findings and conclusions are against the manifest weight of the evidence.

Since ***Cook*** was decided, numerous appellants have relied on it as authority to support their arguments that the **Commission's** decisions should be subject to "extra **scrutiny**" in cases where the **Commission** has overturned credibility findings of an **arbitrator**, and this court has largely declined to do so. See *Sleeter v. Industrial Comm'n*, 346 Ill. App. 3d 781, 784, **[*269]** 805 N.E.2d 1227, 1229, 282 Ill. Dec. 210 (2004); *Komatsu Dresser Co. v. Industrial Comm'n*, 235 Ill. App. 3d 779, 788-89, 601 N.E.2d 1339, 1345-46, 176 Ill. Dec. 641 (1992); *Dillon*, 195 Ill. App. 3d at 607-08, 552 N.E.2d at 1087. Moreover, throughout the years, the Illinois Supreme Court has been asked over the years to consider the functions of the **arbitrator** vis-a-vis the functions of the **Commission,** and that it has consistently held that the **Commission** exercises original jurisdiction and is in no way bound by the **arbitrator's** findings. See *Berry*, 99 Ill. 2d at 405, 459 N.E.2d at 965; *Esposito v. Industrial Comm'n*, 12 Ill. 2d 305, 306, 146 N.E.2d 65, 66 (1957); *Garbowicz v. Industrial Comm'n*, 373 Ill. 268, 269-70, 26 N.E.2d 123, 124 (1940).

It is worth **[***21]** noting that the argument that the hearing officer who actually observed the witnesses is in the best position to judge credibility issues is not unique to **workers' compensation** cases and that such arguments have been uniformly rejected where the responsibilities of fact-finding and decision-making are statutorily conferred on an administrative agency. See, *e.g.*, *Starkey v. Civil Service Comm'n*, 97 Ill. 2d 91, 100-01, 454 N.E.2d 265, 269, 73 Ill. Dec. 405 (1983); *Caracci v. Edgar*, 160 Ill. App. 3d 892, 896, 513 N.E.2d 932, 935, 112 Ill. Dec. 323 (1987); *Gregory v. Bernardi*, 125 Ill. App. 3d 376, 380-81, 465 N.E.2d 1052, 1055-56, 80 Ill. Dec. 706 **[**829]** (1984). The long-standing rule provides that while an agency is required to consider the findings and conclusions of its hearing officer, it is not bound to accept them, and that the agency must make its own decision based on the evidence in the record. *Starkey*, 97 Ill. 2d at 100-01, 454 N.E.2d at 269; *Gregory*, 125 Ill. App. 3d at 380-81, 465 N.E.2d at 1055-56. The rule has been applied even when the findings of fact depend on the credibility of witnesses and the hearing officer, rather than the agency, had the opportunity to observe and to assess the demeanor of the witnesses. *Starkey*, 97 Ill. 2d at 100-01, 454 N.E.2d at 269; **[***22]** *Gregory*, 125 Ill. App. 3d at 380-81, 465 N.E.2d at 1055-56.

I believe it is imprudent to revisit a clearly established precedent where the issue is not necessary to a disposition of the appeal and where the appellant has not established good cause or a novel theory to justify a departure from that precedent. In all other respects, I concur.