

NOTICE

Decision filed 11/07/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

Workers' Compensation
Commission Division
Filed: November 7, 2011

2011 IL App (1st) 103429WC-U

NO. 1-10-3429WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

HEATMASTERS, INC.,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Cook County
WORKERS' COMPENSATION COMMISSION and)	No. 10L50491
JEROME KASPER,)	
Defendant-Appellee.)	Honorable
)	James C. Murray, Jr.,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The Commission committed no error in awarding claimant PTD benefits and the circuit court acted correctly in confirming the Commission's decision.

¶ 2 On March 2, 2005, claimant, Jerome Kasper, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), seeking benefits from employer, Heatmasters, Inc. Following a hearing, the arbitrator found claimant sustained accidental injuries that arose out of and in the course of his employment on February 1, 2005. He noted employer had paid claimant's necessary medical expenses, as well as \$176,152.80 in temporary total disability (TTD) benefits. The arbitrator awarded claimant permanent and total disability (PTD) benefits of \$927.12 per week for life pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2006)).

¶ 3 On review, the Workers' Compensation Commission (Commission), with one commissioner dissenting, corrected several factual errors and clarified certain factual findings made by the arbitrator but otherwise affirmed and adopted his decision. On judicial review, the circuit court of Cook County confirmed the Commission. Employer appeals, arguing (1) the Commission erred by finding claimant proved he was permanently and totally disabled and entitled to lifetime PTD benefits, (2) termination of claimant's benefits was warranted due to his noncompliance with vocational rehabilitation services and because he removed himself from the work force, and (3) the causal connection between claimant's work accident and his condition of ill-being after April 20, 2007, was severed due to claimant's noncompliance with his treating doctor's recommendations. We affirm.

¶ 4 The parties are familiar with the evidence presented and we will discuss it only to the extent necessary to put their arguments in context. Claimant worked for employer repairing, servicing, and installing heating and air-conditioning equipment. He worked in the heating, ventilation, and air conditioning trade for 38 years and specifically for employer for about 2 1/2 years. Claimant was also a member of the Pipefitter's union. At arbitration, employer did not dispute that claimant sustained a work-related injury to his right foot on February 1, 2005, when he fell from a ladder. Instead, the parties disagreed regarding the nature and extent of claimant's injury. Employer also argued that causation was severed by claimant's non-compliance with certain instructions from his treating doctor. As stated, the arbitrator awarded claimant lifetime PTD benefits, the Commission affirmed the arbitrator's award, and the circuit court confirmed the Commission.

¶ 5 This appeal followed.

¶ 6 On appeal, employer first argues the Commission erred by finding that claimant proved he was permanently and totally disabled and entitled to lifetime benefits pursuant to

section 8(f) of the Act (820 ILCS 305/8(f) (West 2006)). It argues claimant failed to prove his entitlement to such benefits and the Commission's decision is against the manifest weight of the evidence. More specifically, employer maintains claimant is not permanently and totally disabled because he is employable in at least a sedentary capacity. It argues claimant could find work within his restriction but put forth little to no effort toward finding employment, had retired, and demonstrated that he did not want to return to work in any capacity.

¶ 7 Under the Act, a claimant is entitled to lifetime benefits when he suffers "complete disability" which renders him "wholly and permanently incapable of work." 820 ILCS 305/8(f) (West 2006). Regarding total and permanent disability the supreme court has stated as follows:

"This court has frequently held that an employee is totally and permanently disabled when he 'is unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations.] The claimant need not, however, be reduced to total physical incapacity before a permanent total disability award may be granted. [Citations.] Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonably stable market. [Citation.] Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. [Citation.] In determining a claimant's employment potential, his age, training, education, and experiences should be taken into account. [Citations.]"

Ceco Corp. v. Industrial Comm'n, 95 Ill. 2d 278, 286-87, 447

N.E.2d 842, 845 (1983).

¶ 8 "If *** a claimant's disability is not so limited in nature that he his not obviously unemployable, or if there is no medical evidence to support a claim of total disability, *** the claimant has the burden of establishing the unavailability of employment to a person in his circumstances; that is to say that he falls into the "odd-lot" category." *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 204, 904 N.E.2d 1122, 1133 (2009). "An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market." *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1089, 871 N.E.2d 765, 773 (2007). A claimant may satisfy his burden of proving that he fits into the "odd-lot" category by showing (1) a diligent but unsuccessful job search, or (2) that he is unable to engage in stable and continuous employment because of his age, training, education, experience, and condition. *Economy Packing Co. v. Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 283, 293, 901 N.E.2d 915, 924 (2008). "Once the employee has initially established the unavailability of employment to a person in her circumstances, the burden then shifts to the employer to show that suitable work is regularly and continuously available to the employee." *Economy Packing*, 387 Ill. App. 3d at 293, 901 N.E.2d at 924.

¶ 9 "The question of whether a claimant is permanently and totally disabled is one of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Ameritech*, 389 Ill. App. 3d at 203, 904 N.E.2d at 1133. "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Ameritech*, 389 Ill. App. 3d at 203, 904 N.E.2d at 1133. Additionally, the pertinent question is not whether a reviewing court might reach the same conclusion but, instead, whether the record contained sufficient evidence to

support the Commission's decision. *Ameritech*, 389 Ill. App. 3d at 203, 904 N.E.2d at 1133.

¶ 10 Here, the dispute between the parties centers around whether claimant is entitled to PTD benefits on the basis that he falls into the "odd-lot" category. Claimant is not "obviously unemployable" and his medical evidence showed only that he was permanently disabled from working as a pipefitter and restricted to sedentary-type work. As a result, he had the burden of proving "the unavailability of employment to a person in his circumstances" by showing either the performance of a diligent but unsuccessful job search or that he was unable to engage in stable and continuous employment because of his age, training, education, experience, and condition. In this case, the record contained sufficient evidence of the latter requirement.

¶ 11 Evidence showed claimant worked in the heating, ventilation, and air conditioning trade for 38 years and was a member of the pipefitter's union. He performed heavy-duty work for employer, repairing, servicing, and installing heating and air-conditioning equipment. It was undisputed that, on February 1, 2005, claimant sustained a serious, work-related injury to his right foot. He underwent two surgeries related to his injury. Additionally, claimant's medical providers, including Dr. Kevin Walsh, who examined claimant at employer's request, found him permanently disabled from returning to work as a pipefitter and recommended he work in only a sedentary capacity.

¶ 12 Additionally, Joseph Belmonte, claimant's Vocamotive rehabilitation counselor opined claimant was totally disabled and "most probably" permanently disabled given his age and other situational factors. In his report, Belmonte noted claimant was a 61-year-old high-school graduate with no college-level training. Claimant's only significant work experience was as a pipefitter with the union. Belmonte noted claimant was not computer literate and had no history of supervisory, managerial, administrative, or sales related duties. Belmonte opined claimant was disabled, resulting in "severely limited labor market access." He noted claimant

could only work in a sedentary-duty occupation but based upon claimant's education, training, experience, and lack of computer literacy he was not qualified for those types of positions. Belmonte stated that with a sedentary level of physical demand claimant would not have significant transferability of skill. The arbitrator and Commission adopted Belmonte's findings.

¶ 13 Employer counters Belmonte's opinions with the December 2006 and January 2007 vocational reports it submitted from Edward Rascati, its rehabilitation consultant, arguing Rascati's reports evidenced the availability of employment within claimant's physical restrictions. Additionally, as a separate issue on appeal, it argues the benefits awarded to claimant under section 8(f) of the Act should be terminated because claimant failed to cooperate in good faith with its vocational rehabilitation efforts and removed himself from the work force. Employer cites case law for the proposition "that in attempting rehabilitation of the injured employee there are 'boundaries which reasonably confine the employer's responsibility,' including a requirement that the claimant make good-faith efforts to cooperate in the rehabilitation effort." *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 115-16, 561 N.E.2d 623, 626 (1990).

¶ 14 Here, the Commission found claimant's permanent and total disability status was not due, in any way, to a lack of cooperation with the vocational rehabilitation services employer offered. It found it was unrealistic for employer to attempt vocational and job placement services when claimant was undergoing treatment with Dr. George Holmes and contemplating a further surgical procedure. The record contains sufficient evidence to support the Commission's decision as it shows claimant was receiving treatment from Dr. Holmes and contemplating surgery during the same time frame that employer was providing him with vocational and job placement services.

¶ 15 Employer provided services for claimant from September 2006 through January

2007. However, in October 2006, claimant saw Dr. Holmes for the first time at employer's request. Dr. Holmes recommended a trial casting with a short-leg cast for a period of one to two weeks and surgery on the condition that claimant saw improvement from the trial casting. Claimant began treating with Dr. Holmes and followed through with his recommendations. In a record dated February 12, 2007, Dr. Holmes noted claimant was doing well, had almost complete relief of pain with the use of a cast. Claimant reported that he wished to proceed with surgery. As noted by the Commission, employer offered no further vocational rehabilitation to claimant after his surgery and rehabilitation.

¶ 16 Additionally, the Commission committed no error in relying on Belmonte's opinions over the evidence presented through Rascati's reports. Unlike Belmonte's report, Rascati's reports do not contain information about claimant's age, training, education, or work experience.

¶ 17 Here, the record contained sufficient evidence to support the Commission's finding that claimant was unable to engage in stable and continuous employment because of his age, training, education, experience, and condition. We find no error in its reliance on Belmonte's opinions over the evidence presented through Rascati's reports. An opposite conclusion from the one found by the Commission is not clearly apparent and it is not the function of this court to re-weigh the evidence presented. The Commission's decision that claimant was permanently and totally disabled and entitled to lifetime benefits pursuant to section 8(f) of the Act was not against the manifest weight of the evidence.

¶ 18 On appeal, employer also argues the causal connection between claimant's work accident and his condition of ill-being after his April 2007 surgery was severed due to claimant's noncompliance with his treating doctor's recommendations. It complains that claimant repeatedly ignored express instructions from Dr. Holmes to avoid bearing weight on his right foot.

Employer maintains claimant's "weight bearing activity retarded his recovery to the point of being an injurious practice within the meaning of the Act and served as an independent intervening cause sufficient to break the chain of causation between [claimant's] current condition and the accident in question."

¶ 19 Under Section 19(d) of the Act (820 ILCS 305/19(d) (West 2008)), "[i]f any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery *** the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee." Initially, we note employer cites section 19(d) of the Act but also argues claimant's weight-bearing activity was an intervening cause of his condition of ill-being that broke the chain of causation. As stated in *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411, 911 N.E.2d 1042, 1046 (2009), these are principles of law that are governed by different standards. In that case, we stated as follows:

"One difference is the standard of review. Causation, including the existence of an intervening cause, is a question of fact subject to the manifest-weight standard of review. [Citation.] Conversely, section 19(d), by its plain terms, vests the Commission with discretion to reduce an award where a claimant engages in an injurious or unsanitary practice. [Citations.]

Another difference involves the relationship between a claimant's current condition of ill being and the accident. For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition. [Citation.] Employment need only remain a cause, not

the sole cause or even the principal cause, of a claimant's condition. [Citation.] So long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable. [Citations.] ***

Unlike an intervening cause, there is no requirement that an injurious practice be the sole cause of a claimant's condition of ill-being for the Commission to reduce or deny compensation. [Citation.] Rather, the Commission may, in its discretion, reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery. [Citation.] Section 19(d) vests the Commission's discretion on this subject, so we will only overturn its decision if that discretion is abused. [Citation.] An abuse of discretion occurs only where no reasonable person could agree with the position adopted by the Commission. [Citation.]" *Global Products*, 392 Ill. App. 3d at 411-12, 911 N.E.2d at 1046-47.

¶ 20 Here, the evidence presented was more than sufficient to support a finding by the Commission that claimant's employment was a causative factor in his condition. It is undisputed that claimant was involved in a work-related accident that resulted in serious injuries to his right foot. Dr. Holmes only asserted the *possibility* that *some* part of claimant's condition of ill-being following his April 2007 surgery was attributable to his weight-bearing activities. Specifically, Dr. Holmes stated claimant's weight-bearing activities "may have" been a "contributory factor as well" to the nonunion in claimant's right foot. His opinion certainly does not exclude the existence of other contributing factors, including claimant's work-related accident. Dr. Walsh, who examined claimant at employer's request, provided the opinion that claimant's nonunion was

"more likely than not" the result of claimant's noncompliance during his postoperative period. However, it was within the province of the Commission to rely on other evidence, including Dr. Holmes' opinions, over those of Dr. Walsh. The Commission's decision was not against the manifest weight of the evidence.

¶ 21 Additionally we find no abuse of discretion by the Commission in failing to reduce its award, in whole or in part, pursuant to section 19(d). In particular, we note the arbitrator and, by adoption, the Commission found as follows:

"[Employer] intimates that [claimant's] activities somehow prevented the healing process from occurring. If this were a simple fracture of the fibula or the tibia, [its] argument might hold some water. But it was not. [Claimant] fell from a height of about 11 feet to a floor that did not give. He fell directly on his right foot. All of his 280 pounds came to bear on his leg, ankle and foot. Not only did he fracture the distal fibula, but the impaction is [*sic*] essence ground up all the bones in his ankle, so much so that the doctor was unable to separate the fibrous material from the bony material. [Citation.] How do you fixate mush??? Dr. Holmes seems to be blaming [claimant] for his failure to heal. But the prior doctors already anticipated that given the severity of the injury, that he was smoker and a diabetic, that he was slightly obese, there was a strong possibility of 'malunion or nonunion' of the ankle."

Further, we note claimant's testimony that he lived alone and had "functions in life to maintain." He characterized his weight bearing as "minor" and stated he never put his full weight on his

foot. Medical records also document claimant's use of both crutches and a Roll-a-Bout cart. Given these circumstances, it was not inappropriate for the Commission to find that a reduction of its award was unwarranted.

¶ 22 As discussed, the record contains sufficient support for the Commission's findings and its ultimate decision. This court will not reweigh the evidence presented. The Commission neither abused its discretion nor made factual findings that were against the manifest weight of the evidence.

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

¶ 24 Affirmed.