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IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

AMERICAN STEEL FOUNDRIES,)	Appeal from the Circuit Court
)	of Madison County.
Appellant,)	
)	
v.)	No. 09-MR-488
)	
WORKERS' COMPENSATION COMMISSION)	
<i>et al.</i>)	Honorable
)	Clarence W. Harrison II,
(Elliot Blaylock, Appellee).)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman, Holdridge, and Stewart concurred
in the judgment.

Supplemental Order on Denial Of Rehearing

Held: Having failed to prove he was entitled to a wage-differential award, it is necessary to determine whether claimant is entitled to an award under section 8(d)(2) of the Workers' Compensation Act (820 ILCS 305/8(d)(2) (West 2006)).

¶ 1 Respondent, American Steel Foundries, previously, appealed an order of the circuit court of Madison County confirming a decision of the Illinois Workers' Compensation Commission (Commission). The Commission awarded claimant, Elliot Blaylock, certain benefits under the

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Workers' Compensation Act (Act), including a wage-differential award (820 ILCS 305/8(d)(1) (West 2006)). We reversed the Commission's order regarding the wage-differential award and otherwise affirmed. See *American Steel Foundries v. Workers' Compensation Comm'n*, No. 5-10-0327WC-U (July 28, 2011). Claimant then filed a petition for rehearing, asserting that he is entitled to a remand so that the Commission can consider whether an award of permanent partial disability (PPD) is warranted. On our own motion, we requested respondent to answer claimant's petition for rehearing. Respondent has done so, and claimant has filed a reply. After considering the submissions of the parties, we agree with claimant. Accordingly, our initial disposition remains unchanged; however, we now remand this cause to the Commission so that it may consider claimant's contention that he is entitled to an award of PPD. Claimant's petition for rehearing is denied, and our initial order is supplemented as follows.

¶2 We will first set forth claimant's argument. He relies on the following language from section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)):

"If *** the employee sustains serious and permanent injuries not covered by paragraphs (c) and (e) of this Section ***, he shall have sustained in addition thereto other injuries which injuries do not incapacitate him from pursuing the duties of his employment but which would disable him from pursuing other suitable occupations, or which have otherwise resulted in physical impairment; *** [and] the employee elects to waive his right to recover [a wage-differential award] then in any of the foregoing events, he shall receive *** [an award pursuant to this subsection]."

Claimant then relies on *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729 (2000), citing a passage which holds that "If *** [a] claimant has failed to present any evidence regarding his

entitlement to a wage-differential award, he will be deemed to have implicitly waived his right to such award." Claimant then argues that, having failed to prove that he was entitled to a wage-differential award, he had waived his claim to one pursuant to *Gallianetti*. Therefore, claimant continues, he is entitled to an award under the plain language of section 8(d)(2), which states a claimant who waives his or her right to a wage-differential award shall receive an award under that subsection. We find claimant's reasoning sound.

¶ 3 Respondent replies that claimant waived his ability to pursue an award under section 8(d)(2), pointing to the following exchange:

"THE ARBITRATOR: It's my understanding that [claimant] elected to obtain a wage differential award as opposed to a man as a whole award?

[CLAIMANT'S COUNSEL:] Yes, Your Honor, if Your Honor—

THE ARBITRATOR: Subject to proof?

[CLAIMANT'S COUNSEL:] Yes."

Initially, we note that this purported waiver is not the waiver contemplated by *Gallianetti*, under which waiver of the wage-differential award leads to the award under section 8(d)(2). Rather, here, we are confronted with a purported waiver of the award under section 8(d)(2) itself. Read in context, it is amply clear that claimant was not waiving his ability to pursue that award. This passage indicates that claimant was pursuing a wage-differential award "[s]ubject to proof." The question of what was to occur in the failure of proof is not addressed here. Rather, that is addressed in section 8(d)(2) and *Gallianetti*, namely, an award under section 8(d)(2) is to be contemplated. Hence, we find respondent's assertion of waiver unpersuasive.

¶ 4 Respondent also claims that we need not remand this action because there was no evidence

of a permanent injury. This issue, however, raises questions of fact about medical matters best addressed by the Commission. See *Yaeger v. Industrial Comm'n*, 232 Ill. App. 3d 936, 942 (1992) (recognizing the Commission's expertise regarding medical issues). It would therefore be inappropriate for us to address in the first instance whether an award under section 8(d)(2) is warranted.

¶ 5 For the reasons explained in our original disposition of this appeal, we reverse the portion of the trial court order confirming the Commission's wage-differential award, and we affirm in all other respect. However, in light of our foregoing discussion, we remand this cause to the Commission so that it may consider the propriety of an award under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)). Finally, claimant's request that we certify this case in accordance with Supreme Court Rule 315 is denied.

¶ 6 Affirmed in part and reversed in part; cause remanded with directions.