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No. 5--10--0345WC

Order filed April 22, 2011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BRAD KING,	)	Appeal from the Circuit Court
	)	of the 3rd Judicial Circuit,
Appellant,	)	Madison County, Illinois.
	)	
v.	)	No. 09--MR--695
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.* (Millennium Rail, Inc.,	)	Honorable
Appellee).	)	Clarence W. Harrison II,
	)	Judge, Presiding.

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

ORDER

Held: The Commission's award of workers' compensation benefits was not against the manifest weight of the evidence.

The claimant, Brad King, filed an application for adjustment of claim under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq*. (West 2004)), alleging injury to his lower back arising out of an industrial accident on March 22, 2005. The case went to

arbitration on December 18, 2007. On January 28, 2008, the arbitrator determined that the claimant suffered an accidental injury arising out of and in the course of his employment and awarded temporary total disability (TTD) benefits for 30 3/7 weeks (March 23, 2005, through March 29, 2005, and April 15, 2005, through November 7, 2005), permanent partial disability (PPD) benefits equal to 5% loss of the person as a whole, and reasonable and necessary medical expenses incurred through November 7, 2005. The claimant sought review of the arbitrator's decision from the Illinois Workers' Compensation Commission (Commission). The claimant maintained that he was entitled to TTD benefits totaling 60 3/7 weeks (extending beyond November 7, 2005, up to June 12, 2006), PPD benefits equal to 10% loss of the person as a whole, and medical expenses incurred through June 12, 2006. The Commission affirmed and adopted the decision of the arbitrator. The claimant then sought review in the circuit court of Madison County, which confirmed the decision of the Commission. The claimant then appealed to this court.

BACKGROUND

The claimant, a 32-year-old "car man" employed by Millennium Rail, testified that his job duties included minor and major repairs to railcars and required a certain degree of heavy lifting. On March 22, 2005, the claimant was working underneath a railcar in the process of removing a gear assembly. The claimant noticed the gear start to fall, and while attempting to get out of the way of the falling gear, he struck his mid back on a dangling piece of angle iron. The claimant immediately experienced mid- and low back pain.

On March 30, 2005, the claimant sought medical care from the company physicians at Midwest Occupational Medicine. The claimant gave a history of the accident and was diagnosed

with thoraco-lumbar junction contusion and sprain. The claimant was placed upon light duty with restrictions of limited bending and no lifting over 30 pounds. It was recommended to the claimant that he seek an evaluation from an orthopedic surgeon. The claimant reported for light duty on March 30, 2005.

On March 31, 2005, the claimant sought treatment from Dr. Blake Dugger, a chiropractor. A thoracic MRI, taken on April 5, 2005, was interpreted by Dr. Dugger to show a disc prolapse and an osteophyte at T7-8 without impingement. On April 6, 2005, Dr. Dugger added no crouching or flexion to the light-duty restrictions. On April 14, 2005, the claimant reported that the employer was not honoring his light-duty restrictions, so Dr. Dugger authorized an off-work restriction for the claimant.

On April 28, 2005, the claimant was examined by Dr. David Kennedy, a neurosurgeon, who diagnosed local trauma to the musculature in and around the thoracic spine along with possible sciatica. An MRI, ordered by Dr. Kennedy, showed degenerative disc disease at L5-SA1 with minimal central protrusion. Dr. Kennedy authorized the claimant to remain off work and recommended a referral for physical therapy, pain management, and trigger-point injections. The record indicated that the claimant did not follow up on Dr. Kennedy's treatment recommendations until August 16, 2005.

The employer introduced into evidence surveillance videos of the claimant taken on June 3, 2005, and June 21, 2005, wherein the claimant is observed loading a bag of ice into a cooler and then lifting the cooler into the bed of a pickup truck, all without any noticeable disability. The video also depicts the claimant and a friend launching a johnboat from a trailer into the water. The claimant is observed climbing into the boat and manipulating it into the water.

The claimant testified that, during the time he was under surveillance, he was taking Vicodin and wearing a back brace. He further testified that he was careful in how he climbed into and sat in the boat so as to avoid pain.

On September 20, 2005, the claimant was examined at the request of the employer by Dr. Robert Bernardi, a neurosurgeon. The claimant gave a history of a March 22, 2005, work accident and told Dr. Bernardi that he felt immediate pain in his back that grew worse as the day progressed. The claimant told Dr. Bernardi that his pain affected not only his ability to work but also his daily activities. The claimant also gave a history of a motor vehicle accident in 2003. Dr. Bernardi reviewed the treatment records from Dr. Dugger and Dr. Kennedy. Dr. Bernardi expressed some concern in his IME report regarding the apparent lack of progress in the claimant's treatment. He noted that Dr. Dugger's notes indicated "significant improvement" yet the claimant reported to Dr. Bernardi that he was unable to perform any work due to the pain. He also found it "troublesome" that the claimant waited from April 28 to August 16 to begin physical therapy and trigger-point injections. Dr. Bernardi opined that the claimant's injuries were probably soft tissue in nature, but he wanted to secure a CT scan and a functional capacity evaluation (FCE) before rendering an opinion as to whether the claimant had reached maximum medical improvement (MMI) or would respond to further treatment. He noted that the likelihood that the CT scan would reveal any significant spinal injury was low. However, if the CT and FCE indicated no disc damage, he would concur in Dr. Kennedy's recommendation of physical therapy and trigger-point injections.

After Dr. Bernardi prepared his report in which he withheld judgment as to MMI pending further testing, the employer provided copies of the surveillance videos to Dr. Bernardi. After

viewing the video, Dr. Bernardi issued a supplemental report dated November 7, 2005, in which he indicated no need for further diagnostic testing and opined that the claimant had reached MMI and was capable of at least medium work without restriction. Dr. Bernardi noted that, contrary to the claimant's previous statements that the pain impacted daily life functions, the video showed that the claimant was able to perform tasks such as walking, lifting, sitting, and getting in and out of the boat without any pain. Dr. Bernardi also noted:

> "It would certainly seem to me that the concerns I had about [the claimant] in which I expressed in my IME report were well founded. This gentleman can return to work without restrictions. As I noted in my IME report, I thought the yield from a CT scan was going to be low in the best of situations. Considering my review of this tape, the negative MRI scan of the thoracic spine and the unremarkable plain films, I do not see any reason to proceed with the CT scan at this time."

Dr. Bernardi further opined that any further treatment for the claimant, including physical therapy and trigger-point injections, would be medically unnecessary.

On January 17, 2006, the claimant again sought treatment from Dr. Kennedy for pain in the mid-thoracic spine area. Dr. Kennedy referred the claimant to Dr. Barry Feinberg for physical therapy and trigger-point injections.

On January 31, 2006, the claimant began treatment with Dr. Feinberg, a board-certified anesthesiologist and pain-management specialist, who treated him with physical therapy and injections. The claimant treated with both Dr. Barry Feinberg and Dr. Rachel Feinberg, who

together administered approximately 30 facet, trigger-point, and epidural injections. The doctors continued the claimant's off-work restriction. The claimant testified that the treatments administered by these doctors help alleviate his pain.

The claimant remained off work until June 13, 2006, when he was released for full-duty work without restrictions. He testified that he routinely lifts 10 to 40 pounds and, on occasion, lifts up to 80 pounds. He further testified that, since he returned to work, he performs the full range of his regular duties but is in constant pain while doing so. He testified to experiencing tenderness in his back in the area where the iron bar impacted him and feeling increased pain while performing lifting activities at work.

The claimant's supervisor, Steve Prokopich, testified that, contrary to the claimant's testimony, light duty with Dr. Dugger's restrictions was available to the claimant even after he was placed on full-duty restrictions on April 14, 2005. Prokopich also testified that the claimant reported no complaints of pain since he returned to work on June 13, 2006.

The arbitrator found, based largely upon Dr. Bernardi's opinions, that the claimant's injuries sustained on March 22, 2005, were soft tissue injuries and that the claimant had reached MMI as of November 7, 2005, and he awarded medical expenses only up to that date. The arbitrator further determined that the claimant was entitled to additional TTD benefits only up to the date of MMI (November 7, 2005) and that the claimant was entitled to PPD benefits equal to 5% of the person as a whole. The Commission affirmed and adopted the decision of the arbitrator and the circuit court confirmed the decision of the Commission.

The claimant raises four issues on appeal: (1) whether the Commission's finding that Dr. Bernardi's opinions regarding the claimant's ability to work and his need for further medical

treatment after November 7, 2005, were more persuasive than other medical opinion testimony was against the manifest weight of the evidence; (2) whether the Commission's award of TTD benefits only through November 7, 2005, in reliance upon Dr. Bernardi's opinions was against the manifest weight of the evidence; (3) whether the Commission's award of medical expenses only through November 7, 2005, in reliance upon Dr. Bernardi's opinions was against the manifest weight of the evidence; and (4) whether the Commission's award of PPD benefits equal to 5% loss of the person as a whole was against the manifest weight of the evidence.

DISCUSSION

1. Dr. Bernardi's Addendum Report

The claimant first maintains that the Commission erred in giving weight to Dr. Bernardi's opinions expressed in his November 7, 2005, addendum report. Specifically, he maintains that Dr. Bernardi placed undue reliance upon the surveillance video in reaching his opinions regarding his ability to work and his need for further medical treatment. He further points out that Dr. Bernardi's opinion in his addendum report is not only in stark contrast to the opinions of Dr. Kennedy and Dr. Barry Feinberg, but it is also at odds with Dr. Bernardi's original IME report. The claimant posits that the activities depicted on the surveillance video simply cannot be as conclusive as Dr. Bernardi opined. With regard to the activities depicted in the surveillance video, the claimant points out that the video was limited to selected minutes from two days even though the evidence established that he was under surveillance for several months. The claimant also takes issue with Dr. Bernardi's interpretation of the extent of physical exertion required of the various activities depicted on the video.

In a workers' compensation case, the claimant has the burden of proving entitlement to compensation by a preponderance of the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *Id*. The Commission's determination on questions of fact, including the proper weight to be given to conflicting medical evidence, will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). Moreover, the weight to be accorded surveillance videos in medical opinion testimony is a question of fact for the Commission to determine subject only to the manifest weight standard of review. See *Ross v. Industrial Comm'n*, 353 Ill. App. 3d 193, 196 (2004). A Commission decision is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent; the test is not whether any tribunal might reach the opposite conclusion, but whether there was sufficient factual evidence in the record to support the Commission's determination. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 183 (2001).

Here, the Commission considered Dr. Bernardi's addendum opinion that the claimant had reached MMI and thus was in need of no further medical treatment to be more persuasive than the opinions of the claimant's treating physicians. The Commission was satisfied that Dr. Bernardi's reliance upon the video surveillance tapes was not misplaced. In his original report, Dr. Bernardi expressed concerns about the claimant's case. He noted that Dr. Dugger's treatment reports that the claimant was improving with treatment did not appear to mesh with the claimant's report to Dr. Bernardi that daily activities caused persistent pain. Additionally, Dr. Bernardi questioned why, if the claimant's pain was so significant, he waited nearly four months

to begin the treatment that Dr. Kennedy had recommended. Also in his initial report is Dr. Bernardi's supposition that the claimant's condition was soft tissue in nature and that a CT scan would likely confirm this diagnosis. Given these observations contained in Dr. Bernardi's initial report, the conclusions expressed in the addendum report following his viewing of the video are not unexpected. The activities depicted on the video seem to address the "concerns" that Dr. Bernardi raised in the initial report. Moreover, the claimant's objections to Dr. Bernardi's interpretation of the events depicted on the video go to the weight the doctor chose to give his observations in reaching his medical opinion. The record is clear that Dr. Bernardi did not base his opinion entirely upon the surveillance video; rather, the video appears to have merely confirmed the suspicions that he had regarding whether the claimant was in need of further medical treatment. The video appears to have essentially taken the place of a CT scan as a diagnostic tool. While other medical experts might have found the videotape to be less significant in rendering an opinion, it cannot be said that the Commission's reliance upon Dr. Bernardi's interpretation of the video in reaching his opinion was against the manifest weight of the evidence.

2. TTD

The claimant next maintains that the Commission erred in finding that he was no longer entitled to TTD benefits after November 7, 2005, the date on which, according to Dr. Bernardi, he reached MMI. A claimant's right to TTD benefits is a factual question within the purview of the Commission, which will only be reversed on appeal where the finding is against the manifest weight of the evidence. *Owens-Corning Fiberglas Corp. v. Industrial Comm'n*, 66 Ill. 2d 247, 256 (1977). A claimant is temporarily totally disabled for the time an injury incapacitates him

from work until such time as he is as recovered or restored as the permanent character of his injury will permit. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). The dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached MMI. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2005). Once a claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004).

Here, the claimant's argument that the Commission erred in terminating TTD benefits on November 7, 2005, is based upon his disagreement with the Commission's finding that he had reached MMI on that date. The Commission based its determination upon Dr. Bernardi's medical opinion that the claimant could return to work and that no further medical treatment was medically necessary. While the claimant's treating physicians disagreed with Dr. Bernardi's opinion, the Commission's decision to give Dr. Bernardi's opinion greater weight, for the reasons previously stated, is not against the manifest weight of the evidence.

3. Medical Expenses

The claimant next maintains that the Commission erred in not awarding medical expenses incurred after November 7, 2005. Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2004)), an employer is required to provide or pay for "all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury." The claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses under the Act. *Max Shepard, Inc. v.*

Industrial Comm'n, 348 Ill. App. 3d 893, 903 (2004). "Questions as to the reasonableness of medical charges or their causal relationship to a work-related injury are questions of fact to be resolved by the Commission, and its resolution of such matters will not be disturbed on review unless against the manifest weight of the evidence." *Id.*

Here, after reviewing the record, we cannot say that the Commission's decision that no medical expenses incurred after November 7, 2005, was against the manifest weight of the evidence. Again, relying upon the weight accorded to Dr. Bernardi's opinion, the Commission determined that the claimant had achieved MMI as of that date. In other words, the claimant had reached the point where no further medical treatment would be necessary. Dr. Bernardi's opinion supported a finding that the claimant was engaged in symptom magnification and, thus, that further pain management treatment would not be required. While other evidence existed to the contrary, it cannot be said that the opposite conclusion was clearly apparent.

4. PPD

The claimant lastly maintains that the Commission erred in awarding him PPD benefits equal to 5% loss of the person as a whole. The claimant believes that an award of 10% would be a more appropriate PPD award. The determination of the nature and extent of a claimant's disability is a question of fact for the Commission to decide, and its decision in that regard will not be overturned on appeal unless it is against the manifest weight of the evidence. *Peabody Coal Co. v. Industrial Comm'n*, 355 Ill. App. 3d 879, 883 (2005).

Here, the claimant maintains that the Commission placed too much weight on the medical opinion of Dr. Bernardi. The interpretation of medical testimony is particularly within the purview of the Commission (*Freeman United Coal Mining Co. v. Industrial Comm'n*, 386 Ill.

App. 3d 779, 784 (2008)), and when conflicting medical evidence is presented, it is for the Commission to determine the weight to give to the evidence. *Peabody Coal Co.*, 355 Ill. App. 3d at 883. The Commission PPD award is supported by Dr. Bernardi's opinion that the claimant suffered only soft tissue injuries, the fact that the claimant had only subjective manifestations of pain that appeared to have been exaggerated, and the fact that there was no objective diagnostic evidence of disc damage. Given this record, it cannot be said that the Commission's finding that the claimant was entitled to PPD benefits equal to 5% of the person as a whole was against the manifest weight of the evidence.

CONCLUSION

For the foregoing reasons, the judgment of the Madison County circuit court, which confirmed the Commission's decision, is affirmed.

Affirmed.