

NOTICE
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No. 1-10-1090WC

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Workers' Compensation
Commission Division
Filed: June 27, 2011

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

AIRBORNE EXPRESS,)
) APPEAL FROM THE
) CIRCUIT COURT OF
 Appellant,) COOK COUNTY
)
 v.) No. 08 L 50960
)
 ILLINOIS WORKERS' COMPENSATION)
 COMMISSION, *et al.*,)
 (DANIEL HULTIN,) HONORABLE
) ELMER JAMES TOLMAIRE, III,
 Appellees).) JUDGE PRESIDING.

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

O R D E R

HELD: The findings of the Illinois Workers' Compensation Commission that the claimant is permanently and totally disabled under an "odd-lot" theory, that he is entitled to maintenance benefits, and that the employer, Airborne Express, is liable for attorney fees and penalties under sections 16, 19(k), and 19(l) of the Workers' Compensation Act are not against the manifest weight of the evidence.

Airborne Express appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding the

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claimant, Daniel Hultin, certain benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)) that included permanent total disability (PTD) payments, maintenance payments, attorney fees, and penalties. For the reasons which follow, we affirm the judgment of the circuit court.

The claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits for a back or neck condition allegedly caused by an injury he sustained while in the employ of Airborne Express. On May 20, 2004, following hearings held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2004)), the arbitrator awarded the claimant temporary total disability (TTD) benefits for 58 weeks, maintenance from the date the TTD benefits were to end through the date of the last arbitration hearing, and medical expenses. The arbitrator further ordered that Airborne Express pay "for all reasonable and related expenses pertaining to vocational rehabilitation."

Airborne Express sought review of the arbitrator's decision before the Commission. The Commission affirmed and adopted the arbitrator's decision and remanded the cause back to the arbitrator for determination of the claimant's entitlement to permanent disability or any further TTD. See *Thomas v. Industrial Comm'n*, 78 Ill. 2d 237, 399 N.E.2d 1322 (1980). The parties did not appeal the Commission's decision.

The following factual recitation is taken from findings of the Commission in its decision relating to the section 19(b)

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proceedings and the evidence presented at the arbitration hearing on remand from the Commission.

On November 4, 2002, the claimant was working for Airborne Express as a driver and dock worker when he sustained an accidental work injury, which resulted in neck and bilateral shoulder pain. The claimant was treated by Dr. John Stamelos, and he soon underwent an MRI that revealed both his previous C6-7 cervical fusion and a herniated disc at C5-6. Dr. Stamelos also noted that the claimant complained of low-back pain. He referred the claimant to Dr. E. Quinn Regan, who performed a C5-6 discectomy and fusion on the claimant in December 2002. The claimant thereafter pursued physical therapy and pain management.

On October 30, 2003, at Dr. Regan's suggestion, the claimant underwent a functional capacity evaluation (FCE), which indicated that the claimant had reached maximum medical improvement (MMI) and could work a sedentary-light job with a lifting restriction of 15 pounds. Dr. Regan's own assessment was that the claimant could perform only light-duty work. Dr. Regan concluded that the basis of the restrictions was a combination of the previous neck injury and surgery combined with the more recent neck injury and surgery. Dr. Regan, as well as a medical expert retained by Airborne Express, opined that the claimant's work accident was the cause of his C5-6 herniation and resulting surgery. Dr. Regan also testified that he was not pleased with the results of the claimant's surgery because, even though there was no

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diagnostic evidence of ongoing problems, the claimant was unable to return to his pre-accident state of well-being.

In its decision in the section 19(b) proceeding, the Commission found Dr. Regan's testimony to be credible and persuasive, and it concluded that the claimant's injury caused his permanent limitation to light-duty work. The Commission further concluded that, "[g]iven the [claimant's] permanent light duty work restriction and the [claimant's] sufficient independent job search," Airborne Express was required to pay for the claimant's reasonable and necessary vocational rehabilitation, as well as maintenance benefits from November 11, 2003, through April 12, 2004, the date of the last arbitration proceedings conducted under section 19(b) of the Act.

At the June 19, 2007, arbitration hearing on remand from the Commission, the claimant testified that, since April 2004, he had undergone pain management treatment with Dr. Gary Magee as well as with his family physician, Dr. George Gancayco. The claimant said that he used several types of pain medication and that, at the suggestion of Dr. Gancayco, he used a cane to help him walk. The claimant testified that, since 2004, his physical condition had "deteriorated at a pretty fast clip," as he had come to experience constant pain. On cross-examination, he said that he did not drive but admitted that he maintained a driver's license and was listed as an insured driver on his household's automobiles.

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The claimant said that, from April 2004 to September 2005, he independently, but unsuccessfully, pursued 300 to 400 job leads. He testified that, in September 2005, Kimberly Hoyet, a vocational counselor provided by Airborne Express, told him he should rely on job leads produced by her instead of independent job leads. The claimant recalled that, in the time Hoyet served as his counselor from September 2005 to May 2006, she provided him with no job leads. On cross-examination, he denied that Hoyet ever mentioned a job fair he should attend or that he ever declined to go to any job fair suggested by her.

A December 2005 treatment note from Dr. Racquel Ramirez (a doctor associated with the claimant's family physician) states that the claimant still complained "of chronic low-back pain and *** needs the assistance of a cane."

In May 2006, James Percic took over as the claimant's vocational counselor. The claimant testified that he applied unsuccessfully to four jobs recommended by Percic but that he declined to pursue two other leads in July 2006 because he was physically unable to tolerate the commute, which he estimated at over one hour. Regarding one of those two leads--a job fair interview--the claimant testified that he told Percic that he would be unable to travel to the job fair and asked if Percic would obtain job applications for him at the fair. Shortly after that job fair, the counseling agency terminated the claimant's vocational services. The claimant said that he stopped looking

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for work after his vocational services were terminated. On cross-examination, the claimant agreed that he brought his cane with him to job interviews.

In his testimony, Percic recalled that, in their first meetings, the claimant said that he would not be able to find a real job given his medical condition and that a Social Security judge had told him that he would never work again. In his own testimony, the claimant denied having made those statements to Percic. Percic said that, at the initial evaluation, the claimant listed work restrictions, such as a limitation that he sit for no more than two hours and stand no more than 20 to 30 minutes, that did not appear to match his FCE results. On cross-examination, Percic agreed that the FCE was undertaken in 2003; he stated that he saw nothing to indicate that the claimant's condition was degenerative.

Peric testified that he typically asked clients to produce 20 job leads per week but that the claimant produced only two job leads during the time they worked together. Percic stated that he provided several job leads to the claimant, including a job located near the claimant's home but for which the claimant would have to apply at a location far from his home, and vacancies for one company for which the claimant would have had to attend a job fair to apply. According to Percic, the claimant without prior warning failed to show for a scheduled appointment to apply for the first job, and informed Percic that he would not be able to

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travel to the job fair to apply for a job with the second company. On cross-examination, however, Percic agreed that the claimant asked him just before both events to pick up applications on the claimant's behalf. Percic testified that his agency stopped vocational services for the claimant shortly after the two appointments the claimant did not attend.

Percic opined that the claimant's use of a cane impeded his ability to get a job and that the claimant was not making a good faith effort to return to work. Percic further opined that, if the claimant had exerted a good faith effort, he could have obtained one of a number of available retail, security guard, sales, delivery driver, or light manufacturing positions. He agreed, however, that he did not conduct any job analyses that accounted for a restriction that the claimant was required to use a cane.

A December 2006 letter from Dr. Gancayo, the claimant's family physician, described the claimant's history of neck problems, stated that the claimant was undergoing pain management treatment, and noted that "[o]ccasionally, he has worsening of his pain and requires supplemental increases in his pain requirements." The note further stated that the claimant "was advised to use a cane to help his stability and ambulation during periods of acute exacerbation." Dr. Gancayo stated in the letter that the claimant had complied with all medical treatment, that the claimant's condition was chronic but stable, and that the

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claimant was "permanently disabled and ha[d] reached the limit of recommended intervention."

In a report of his April 5, 2007, examination of claimant at the request of Airborne Express, Dr. Alexander Ghanayem opined that the claimant had "global spine pain which [Dr. Ghanayem] [could not] attribute to any objective structural problem." Dr. Ghanayem concluded that the claimant's FCE, which assessed him as limited to sedentary or light work, was not an accurate representation of the claimant's abilities. Dr. Ghanayem believed that the claimant was capable of medium-level work and did not require the use of a cane.

Susan Entenberg, a vocational rehabilitation counselor who testified via deposition on the claimant's behalf, opined, based on her review of his FCE and later medical records, as well as on an interview with him, that his condition precluded him from being candidate for vocational rehabilitation or for obtaining work. In her related report, Entenberg concluded that a stable labor market did not exist for the claimant.

After the hearing on remand concluded, the arbitrator ordered that Airborne Express pay the claimant maintenance through January 10, 2007; medical expenses; PTD benefits from January 11, 2007, through the duration of his disability; and attorney's fees under section 16 of the Act (820 ILCS 305/16 (West 2007)) and penalties under both sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), (l) (West 2007)) predicated upon

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Airborne Express's delay in providing, and later early termination of, vocational benefits.

In reaching his ruling, the arbitrator deemed incredible the testimony of Dr. Ghanayem and vocational counselor Percic. Regarding Percic, the arbitrator noted that: he had failed to account for the claimant's use of a cane; important aspects of his testimony were not verified by his otherwise detailed progress notes; the claimant "clearly told Percic that he felt the drive" to the job fair would be too difficult; and that he failed to follow up on several issues related to the claimant's job search.

Airborne Express sought a review of the arbitrator's decision. The Commission unanimously affirmed and adopted the arbitrator's decision, with two clarifications. First, because it did not understand the claimant's treating physician's testimony to indicate that the claimant was permanently and totally disabled, the Commission clarified that the claimant was entitled to PTD benefits under an odd lot theory. Second, the Commission departed from "the Arbitrator's conclusion that the accident resulted in lower back injuries *** but note[d] that this [did] not in any way affect the ultimate award."

Airborne Express filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and Airborne Express filed the instant appeal.

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For its first assignment of error, Airborne Express argues that the Commission erred in concluding that the claimant was permanently and totally disabled. We disagree.

In *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842 (1983), the supreme court held that:

"[A]n 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 total permanent 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 reasonable 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.]

In considering the propriety of a permanent and total disability award, this court recently stated:

'Under *A.M.T.C.*, if the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to

support a claim of total disability, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the 'odd-lot' category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market [citation], then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant [citations].' "

"[T]he question of whether a claimant is permanently and totally disabled is a question of fact for the Commission, and its determination thereof will not be disturbed on review unless it is contrary to the manifest weight of the evidence." *ABB C-E Services v. Industrial Comm'n*, 316 Ill. App. 3d 745, 750, 737 N.E.2d 682 (2000). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992).

Airborne Express begins its argument regarding the claimant's permanent total disability by contesting the Commission's finding that the claimant's state of ill-being was caused by his neck injury. According to Airborne Express, "[o]ne need not spend years in medical school to know that a sore neck

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does not cause you to walk with a cane." However, Dr. Gancayo, the claimant's treating physician, attributed his state of ill-being to the neck injury, and the record indicates that Dr. Gancayo recommended that the claimant use a cane. Dr. Gancayo's assessment was consistent with that Dr. Regan, who testified at the original 19(b) hearing that he was disappointed at the outcome of the claimant's surgery and that the claimant's neck problems cause his physical limitations. To the extent the question of causation remained open after the first Commission decision, the Commission here could reasonably have relied on this evidence to find a causal relationship between the claimant's neck injury and his state of ill-being. Because the Commission had ample evidence on which to base a causation finding, we reject the claimant's causation argument.

For much of the remainder of its argument, Airborne Express highlights evidence that the claimant's state of ill-being derived from his neck problems, not from low-back problems. However, because the Commission's decision was expressly limited to the claimant's impairment caused by his neck problems, Airborne Express's argument does nothing to undercut the Commission's findings.

Aside from its causation arguments, Airborne Express asserts that PTD benefits were inappropriate here because the claimant did not establish that he fell within the "odd lot" classification. However, the claimant presented evidence, in the

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form of testimony from vocational expert Entenberg, to establish that his medical condition precluded his finding a job in any steady labor market. Entenberg's conclusion was based on her evaluation of the claimant's medical records and his FCE, and it was consistent with both. For its contrary position, Airborne Express cites Percic's testimony that the claimant was capable of work. However, the Commission discredited Percic's testimony on the grounds, among others, that his search did not account for the claimant's use of a cane and that he abruptly stopped assisting the claimant after the misunderstanding regarding the job fair.

It was the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980). We conclude that the Commission's decision to credit Entenberg's testimony over Percic's was not so unreasonable that we may now deem it against the manifest weight of the evidence. Consequently, we reject Airborne Express's argument that the Commission erred in concluding that the claimant was permanently totally disabled.

For its second contention of error, Airborne Express argues that the Commission erred in awarding the claimant maintenance benefits and vocational rehabilitation through January 2007. According to Airborne Express, the evidence established that the claimant did not cooperate in good faith with vocational services

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he was provided, and his vocational benefits should be limited to the point at which he ceased cooperation with his vocational counselors. The Commission, however, reached a different interpretation of the evidence. It concluded that the claimant conducted a diligent job search and that Percic unreasonably terminated the claimant's vocational assistance after a misunderstanding. This finding was supported by the claimant's testimony, as well as by the flaws the Commission identified in Percic's account. Because there was evidence in the record to support this determination, we must defer to the Commission's findings, which directly refute Airborne Express's argument.

For its final argument on appeal, Airborne Express asserts that the Commission erred in awarding the claimant attorney fees under section 16 of the Act and assessing penalties against it under sections 19(k) and 19(l) of the Act. Section 16 of the Act and section 19(k) allow for the award of attorney fees and penalties for "unreasonable or vexatious" delay of payment" (820 ILCS 305/16,19(k) (West 2007)), while section 19(l) authorizes penalties against an employer who "without good and just cause fail[s], neglect[s], refuse[s] or unreasonably delay[s] the payment of weekly compensation benefits" (820 ILCS 305/19(l) (West 2004)). In construing these sections of the Act, the supreme court has explained as follows:

"[I]mposition of section 19(k) penalties *** requires a higher standard than an award of additional compensation

under section 19(l). Although [both] provisions refer to unreasonable delay, the standard under section 19(l) must differ from that set forth in section 19(k) ***. Otherwise, whenever there was an 'unreasonable delay' for purposes of section 19(l) there would automatically be an 'unreasonable delay' for purposes of section 19(k). The two provisions would essentially be redundant.

Viewing the statute as a whole, we believe that section 19(k) and section 19(l) were actually intended to address different situations. The additional compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment 'without good and just cause.' If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory.

In contrast to section 19(l), section 19(k) provides for substantial penalties, imposition of which are discretionary rather than mandatory. [Citation.] The statute is intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely

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frivolous.' " *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15, 702 N.E.2d 545 (1998).

Penalties and attorney fees will not be assessed in circumstances where an employer reasonably could have believed that the claimant was not entitled to compensation. See *Board of Education v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861 (1982); *Complete Vending Services, Inc. v. Industrial Comm'n*, 305 Ill. App. 3d 1047, 1050, 714 N.E.2d 30 (1999). However, the standard is one of objective reasonableness. *General Refractories v. Industrial Comm'n*, 255 Ill. App. 3d 925, 931, 627 N.E.2d 1270 (1994). The question of whether an employer acted unreasonably or vexatiously in declining to pay benefits under the Act or whether it acted reasonably under the circumstances is one of fact to be resolved by the Commission. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579, 658 N.E.2d 838 (1995). The Commission's resolution of the matter will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *Continental Distributing Co. v. Industrial Comm'n*, 98 Ill. 2d 407, 415-16, 456 N.E.2d 847 (1983).

Here, the Commission based its award of attorney fees and penalties on Airborne Express's unreasonable delay in providing vocational benefits the Commission ordered following the initial 19(b) hearing, as well as its sudden termination of the claimant's vocational benefits after a misunderstanding with a vocational counselor who "ignored the restrictions of the

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[claimant's] treating physician." In its briefs, Airborne Express does not directly contest these points. Rather, it argues that it acted reasonably because there was conflicting evidence both as to the claimant's entitlement to PTD benefits and as to the diligence of his job search. Neither of these points, of course, addresses the Commission's finding that Airborne Express unreasonably delayed providing the claimant vocational benefits awarded by the Commission's first decision. Thus, we have no reason to disturb the Commission's imposition of penalties for that delay.

As for the Commission's imposition of penalties for Airborne Express's early termination of vocational benefits, Airborne Express offers only that the claimant "found every possible excuse, all centered on his undiagnosed, unrelated, untreated and unproven low back complaints, to avoid any semblance of a job hunt." The Commission, however, did not share Airborne Express's view of the evidence. It found that the claimant had conducted an adequate job search and that Percic's testimony was not credible. The Commission also strongly implied that Percic, and not the claimant, was at fault for any miscommunication about the job fair appointment. The Commission further noted that the opinion of Airborne Express's expert, Dr. Ghanayem, was not credible and, to the extent Airborne Express sought to rely on that opinion to deny the claimant vocational benefits, it did not receive Dr. Ghanayem's report until April 2007, over a year after

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it terminated the claimant's vocational benefits. The decision to discredit the testimony Airborne Express's witnesses on these issues, like the decision to discredit the same witnesses on other issues, was a matter within the Commission's fact-finding prerogative. *O'Dette*, 79 Ill. 2d at 253. Because the record provides evidentiary support for the Commission's factual conclusions that Airborne Express had no reasonable basis for delaying or terminating the claimant's vocational benefits, we will not now disturb those conclusions on appeal.

Based upon the foregoing analysis, we affirm the judgment of the circuit court, which confirmed the Commission's decision.

Affirmed.