

NOTICE
Decision filed 05/09/11. 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.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (e) (1).

Filed: March 21, 2011
Modified upon denial of rehearing: May 9, 2011

No. 1-10-0804WC

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

DEIRDRE THORNTON,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Cook County
ILLINOIS WORKERS' COMPENSATION)	No. 09L50870
COMMISSION and UNITED AIRLINES,)	
INC.,)	Honorable
Defendants-Appellees.)	Sanjay T. Taylor,
)	Judge Presiding.

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

ORDER

Held: Because the Workers' Compensation Commission's judgment denying the claimant benefits for permanent and total disability, permanent wage differential, and loss of use of her person as a whole were not against the manifest weight of the evidence, the circuit court's judgment confirming the Commission's award of benefits for temporary total disability and for partial loss of use of the claimant's left foot was affirmed.

Claimant, Deirdre Thornton, appeals from the judgment of the circuit court of Cook County confirming the Workers' Compensation Commission's awards of \$444.91 per week for 292 6/7

No. 1-10-0804WC

weeks for temporary total disability benefits (see 820 ILCS 305/8(b) (West 2008)) and \$400.42 per week for 93 weeks for 60% loss of use of the left foot (see 820 ILCS 305/8(e)(11) (West 2008)) and the Commission's denial of claimant's claims of permanent and total disability, permanent wage loss, and permanent loss of use of the person as a whole (see 820 ILCS 305/8(f), 8(d)(1), 8(d)(2) (West 2008)).

The issue on appeal is whether the Commission's judgment is against the manifest weight of the evidence with respect to its determination that claimant is not entitled to benefits for (1) permanent, total disability (see 820 ILCS 305/8(f) (West 2008)), (2) permanent wage loss (see 820 ILCS 305/8(d)(1) (West 2008)), and (3) loss of use of the person as a whole (see 820 ILCS 305/8(d)(2) (West 2008)).

The parties are aware of the facts presented and, therefore, it is unnecessary to repeat them in detail here.

After an arbitration hearing, the arbitrator found claimant proved she was entitled to benefits for temporary, total disability and for the 50% loss of the use of her left foot and found claimant failed to establish entitlement to benefits for permanent, total disability or wage loss. Accordingly, the arbitrator ordered respondent, United Airlines, Inc., to pay claimant \$444.91 per week for 292 6/7 weeks for temporary, total disability and \$400.42 per week for 77 1/2 weeks for partial loss of the use of her left foot. The arbitrator found respondent was

No. 1-10-0804WC

entitled to credit toward these totals for all payments already made for temporary, total disability and permanent, partial disability. The arbitrator found respondent had paid claimant \$172,588.36 since her injury.

The Commission affirmed the decision of the arbitrator as modified to reflect its finding that claimant was entitled to permanent, partial disability benefits for the 60% loss of the use of her left foot. As a result of this finding, the Commission adjusted claimant's permanent, partial disability award to \$400.42 per week for 93 weeks. The Commission rejected claimant's arguments for benefits for permanent, total disability, wage loss, and loss of use of the person as a whole. First, regarding permanent, total disability, the Commission found claimant failed to prove there would be no stable labor market for a person with her disability, skills, education, and employment history, "especially with no clear attempts evidenced to show a true job search and [with a] clear lack of cooperation with the second attempt at vocational rehabilitation." Claimant could not qualify as an "odd lot," the Commission found, because "there is no evidence or convincing testimony that [claimant] is not capable to obtain [sic] some employment in a stable job market within her *** restrictions."

Second, with respect to wage loss, the Commission concluded claimant "failed to prove wage loss as there is no job that she is currently working and any current wage she would be

No. 1-10-0804WC

making is unsupported." The Commission found claimant's withdrawal from vocational rehabilitation and failure to conduct a good-faith job search rendered any estimation of the amount of wage loss conjectural.

Third, with respect to loss of use of the person as a whole, the Commission concluded claimant failed to prove entitlement. It stated, "Petitioner does not prove entitlement to further award based on person as a whole. Petitioner never testified of any back problems for which she had some treatment."

On administrative review, the circuit court of Cook County confirmed the Commission's judgment.

Claimant appeals, arguing she is entitled to benefits for (1) permanent, total disability (see 820 ILCS 305/8(f) (West 2008)) as an "odd lot"; (2) permanent wage loss (see 820 ILCS 305/8(d)(1) (West 2008)); and (3) loss of use of her person as a whole (see 820 ILCS 305/8(d)(2) (West 2008)). Because the Commission's conclusions were not against the manifest weight of the evidence, we affirm the judgment of the circuit court confirming the judgment of the Commission.

Whether a claimant is entitled to an award under section 8 of the Workers' Compensation Act (Act) (820 ILCS 305/8 (West 2008)) is a question of fact. See, e.g., *City of Chicago v. Industrial Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1093, 871 N.E.2d 765, 776 (2007) (reviewing the Commission's decision regarding the claimant's entitlement to benefits

No. 1-10-0804WC

for permanent, total disability as a question of fact). "In deciding issues of fact, it is the function of the Commission to determine the weight to be given to the evidence, judge the credibility of the witnesses, and resolve conflicting medical evidence." (Internal quotation marks omitted.) *Id.* We will not overturn the Commission's resolution of a question of fact unless it is against the manifest weight of the evidence. *Id.* "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Id.*

First, claimant argues she is entitled to benefits under section 8(f) for permanent, total disability. An employee who "is unable to make some contribution to the work force sufficient to justify the payment of wages" is permanently and totally disabled. (Internal quotation marks omitted.) *Ceco Corp. v. Industrial Workers' Compensation Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 845 (1983). An employee can show permanent and total disability by proving he is obviously unemployable or by presenting medical evidence of his permanent and total disability. See, e.g., *City of Chicago*, 373 Ill. App. 3d at 1093-94, 871 N.E.2d at 776-77 (evaluating the evidence to determine whether the claimant was obviously unemployable or showed medical evidence that he was permanently and totally disabled).

If he is not obviously unemployable or if there is no medical evidence to support a claim of permanent, total disability, a claimant may qualify for benefits under section 8(f) of

No. 1-10-0804WC

the Act as an "odd lot." *Ceco*, 95 Ill. 2d at 287, 447 N.E.2d at 845. An odd lot is an employee "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." (Internal quotation marks omitted.) *Id.* at 287, 447 N.E.2d at 845-46. An employee can establish odd-lot status by either (1) presenting evidence of a diligent but unsuccessful attempt to find work or (2) showing that, due to his age, skills, training, experience, and education, the employee will not find regular employment in a well-known branch of the labor market. *City of Chicago*, 373 Ill. App. 3d at 1094, 871 N.E.2d at 777; see also *A.M.T.C. of Illinois v. Industrial Workers' Compensation Comm'n*, 77 Ill. 2d 482, 489, 897 N.E.2d 804, 807 (1979) ("In arriving at a determination of an award for permanent and total disability, the Commission should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training and capabilities").

In this case, the Commission found claimant did not qualify for benefits for permanent, total disability. Claimant was not obviously unemployable and there was no medical evidence that she was permanently and totally disabled (to the contrary, each of claimant's doctors found she could work in at least a sedentary capacity).

Claimant nevertheless argues she qualifies for benefits as an odd lot. The Commission found she failed to establish odd-

No. 1-10-0804WC

lot status by providing no evidence of a diligent and unsuccessful job search and by withdrawing from vocational rehabilitation after participating minimally in efforts to learn skills to improve her employability. These findings are not against the manifest weight of the evidence. Although she testified she conducted a self-directed job search, claimant did not provide corroborating evidence of her job search and apparently applied to only a few retailers. Claimant's testimony was insufficient to compel the Commission to conclude she conducted a diligent but unsuccessful job search. Claimant underwent two vocational rehabilitation programs but completed neither. The second rehabilitation provider, Vocamotive, installed a computer in claimant's home so she could develop computer proficiencies that would aid in her employability. Vocamotive counselors suggested claimant would be more likely to find employment within her restrictions if she could develop basic skills. However, claimant participated halfheartedly and eventually withdrew from the program on the advice of her attorney. Thus, although some evidence in the vocational rehabilitation reports suggested that the sedentary positions for which claimant was otherwise qualified required computer skills claimant did not possess, it is unclear that claimant could not have developed these skills with more diligent cooperation with training efforts. Absent her good-faith attempt at learning the computer skills necessary to find employment, the Commission justifiably concluded claimant's

No. 1-10-0804WC

age, education, employment history, and disability did not preclude her from finding regular employment in a well-known branch of the labor market.

Next, claimant argues she is entitled to benefits for wage differential under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2008)). To qualify for such an award, a claimant must show (1) partial incapacity that prevents the claimant from pursuing her usual and customary line of employment and (2) an impairment of earnings. *Smith v. Industrial Workers' Compensation Comm'n*, 308 Ill. App. 3d 260, 265, 719 N.E.2d 329, 333 (1999). The latter element requires a claimant to prove his actual earnings for a substantial period before his accident and either (1) actual earnings for a substantial period after his return to work or (2) in the event he is unable to return to work, the amount he is able to earn in some suitable employment. *Id.* at 266, 719 N.E.2d at 333.

In this case, the Commission found claimant failed to carry her burden of establishing an impairment of earnings. As she did not find employment after her injury, claimant was required to establish the amount she would be able to earn in some suitable employment. Absent a good-faith job search, however, the Commission found any wage claimant could possibly earn if she returned to work would be conjectural. This determination was not against the manifest weight of the evidence. While one of claimant's vocational rehabilitation counselors

No. 1-10-0804WC

noted claimant could possibly return to work at a position earning between \$7 and \$10 per hour, this projection was made after only a preliminary interview and was not so conclusive the Commission was required to accept it as a basis for a wage-differential award. The Commission's conclusion that claimant did not qualify for benefits for permanent wage loss was not erroneous.

Finally, claimant argues she is entitled to benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2008)) for loss of use of her person as a whole. Section 8(d)(2) enumerates a variety of prerequisites for obtaining benefits for loss of use of the person as a whole. Among them, an employee must either (1) sustain serious and permanent injuries not covered by sections 8(c) and (e) (820 ILCS 305/8(c), (e) (West 2008)) (covering certain disfigurements and isolated injuries to enumerated members, respectively) or (2) if an injury covered by those sections is sustained, sustain "in addition thereto" other injuries. 820 ILCS 305/8(d)(2) (West 2008).

Finding claimant's injury was covered by section 8(e)(11) of the Act (820 ILCS 305/8(e)(11) (West 2008)) and noting claimant did not suffer any back injury that required treatment, the Commission denied claimant benefits for loss of use of her person as a whole. The Commission's judgment in this regard is not against the manifest weight of the evidence. Since claimant's injury was isolated to her left foot and ankle and,

No. 1-10-0804WC

thus, covered by section 8(e)(11), claimant needed to show she suffered an additional injury. However, all the medical evidence discussed claimant's foot-ankle injury and did not mention any other medical complaints she had as a result of her accident. Accordingly, claimant did not show she was entitled to benefits for the loss of use of her person as a whole.

The Commission's conclusions with respect to claimant's claims of permanent, total disability, wage differential, and loss of use of her person as a whole were not erroneous.

Therefore, we affirm the judgment of the circuit court confirming the Commission's award.

Affirmed.