

1-10-1784WC

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ALEXI GIANNOULIAS, ILLINOIS STATE)	Appeal from the Circuit Court
TREASURER, as <i>ex-officio</i> of the Second)	of Cook County, Illinois
Injury Fund,)	
)	
Appellant,)	
)	Appeal No. 1-10-1784WC
v.)	Circuit No. 09-L-51513
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Payton Thomas, Jr.,)	Sanjay T. Tailor,
Appellees).)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The Commission's determination that the claimant was entitled to permanent total disability benefits payable from the Second Injury Fund was not against the manifest weight of the evidence.
- ¶ 2 The Treasurer of the State of Illinois, as *ex-officio* custodian of the Second Injury Fund (820 ILCS 305/7(f) (West 2008)) (the State Treasurer), appeals from an order of the circuit court of Cook County confirming a decision of the Illinois Workers' Compensation Commission which

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ordered the Second Injury Fund to pay certain benefits to Payton Thomas, Jr. (claimant). An arbitrator found that the claimant sustained a work-related injury to his right leg and that he previously had sustained the permanent and complete loss of the use of his left leg which had been amputated following a prior work-related injury in 1992. The arbitrator found that, as a result of the accident, claimant sustained the permanent and complete loss of use of his right leg and, under section 8(e)(18) of the Workers' Compensation Act (the Act) (820 ILCS 305/18(e)(18) (West 2008)), claimant is totally and permanently disabled. The arbitrator ordered the City of Chicago, the employer, to pay the claimant \$550.47 per week for 70½ weeks and 30% loss of use of the right arm and \$550.47 per week for a further period of 200 weeks for 100% loss of the use of the right leg. The arbitrator ordered the Second Injury Fund to pay the claimant \$106.03 for 200 weeks and, thereafter, \$656.50 per week for the rest of his life because the claimant's injuries caused a statutory permanent total disability.

¶ 3 On review sought by the State Treasurer, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. The State Treasurer then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. The State Treasurer then appealed to this court.

¶ 4 **FACTS**

¶ 5 Claimant was employed by the City of Chicago since 1975. Originally hired as a garbage collector, the claimant's employment was terminated in 1980, but he was rehired a few months later to the position of Tree Trimmer II. In 1992, the claimant suffered an injury to his left leg

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which resulted in amputation of that leg below the knee. He was subsequently fitted with a prosthesis and later returned to work as a tree trimmer.

¶ 6 On July 20, 2003, the claimant was called out on an emergency at 10 p.m. to remove a tree that had fallen during a storm. While attempting to cut and remove the tree, a portion of the tree fell on the claimant and pinned him between the tree and the concrete sidewalk, injuring his right shoulder and leg.

¶ 7 The claimant was transported from the scene to Little Company of Mary Hospital where he was immediately admitted, and he underwent a closed reduction of a segmental fracture of the right tibia and transverse fracture of the right proximal fibula. The claimant also reported right shoulder pain.

¶ 8 On August 4, 2003, Dr. Harun Durudogan performed surgery to repair the fractures to the right leg and install metal rods and screws. The claimant was then transferred to Schwab Rehabilitation Center. Rehabilitation was deemed necessary due to the fact that the claimant's left leg had been previously amputated.

¶ 9 Additionally, the claimant continued to present with right shoulder pain. On April 5, 2004, Dr. Durudogan performed an arthroscopic surgical procedure on the right shoulder to correct tears in the right rotator cuff.

¶ 10 The claimant continued to report pain in the right leg and knee. Dr. Durudogan referred the claimant to Dr. Craig Della Valle for further treatment. Dr. Della Valle diagnosed posttraumatic arthritis of the right knee and performed a right total knee replacement on May 2, 2005. A follow-up surgical procedure was performed on July 7, 2005, to treat post-operative

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reports of pain and loss of range of motion. At the same time, Dr. Della Valle also diagnosed posttraumatic arthritis of the right hip. On August 5, 2005, Dr. Della Valle performed a right total hip replacement.

¶ 11 The claimant then began a program of physical therapy at Mercy Works Hospital. On June 8, 2006, following a functional capacity evaluation (FCE), Dr. Della Valle opined that the claimant had reached maximum medical improvement (MMI) and that he could return to light-duty in a sedentary occupation with a 15-pound lifting restriction. During the FCE, the claimant was able to walk approximately one-tenth of a mile in 5 minutes and could ascend 28 steps, although he had to stand with both feet on each step before ascending to the next step.

Additional restrictions included no prolonged standing, no repeated bending, stooping, squatting, pushing, jerking, or twisting, no climbing ladders, and only ground level work.

¶ 12 On December 2, 2007, the claimant began working for the City of Chicago as a security guard. The claimant's job duties included traveling by car to various job sites and sitting in a trailer watching vehicles and equipment. Once every hour, he was required to walk to inspect vehicles. He occasionally used a cane to assist his walking, particularly in inclement weather.

¶ 13 The claimant further testified that, when he sat for a length of time, his right leg became stiff and painful. He also testified that, if he walked more than 5 minutes at one time, his right leg became painful and he must discontinue walking until the pain subsided. Because he had lost the sense of touch in his right leg, he used hand controls instead of foot pedals to control acceleration and braking when he drove. He also testified that he used an assistive device to put

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on his socks and shoes each morning due to the limited range of motion in his right leg. The claimant also testified that he took Vicodin as needed for the recurring pain in his right leg.

¶ 14 The arbitrator determined that the claimant was *pe se* permanently and totally disabled (PTD) under section 8(e)(18) of the Act (820 ILCS 305/18(e)(18) (West 2008)), as a result of the accident at issue because he suffered a 100% loss of the use of his right leg and had a prior 100% loss of use of his left foot due to the prior amputation of his left leg below the knee.

¶ 15 The State Treasurer filed a petition for review of the PTD award with the Commission, which affirmed and adopted the arbitrator's decision. The State Treasurer then sought review by the circuit court of Cook County, which confirmed the decision of the Commission. The State Treasurer timely appealed the issue of PTD to this court.

¶ 16 ANALYSIS

¶ 17 The only issue on appeal is whether the Commission correctly determined that the claimant suffered a permanent and complete loss of the use of his right leg after the industrial accident occurring on July 20, 2003.

¶ 18 In order to recover benefits under the Act, the claimant has the burden of proving all the elements of his case, including the extent and permanency of his injuries. *Gates Division, Harris-Intertype Corp. v. Industrial Comm'n*, 78 Ill. 2d 264 (1980). The issue of whether a claimant is totally and permanently disabled under section 8(e)(18) of the Act is a question of fact to be determined by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370 (2009). A decision is against the manifest weight of

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the evidence if the opposite conclusion is clearly apparent. *Palos Electric Co. v. Industrial Comm'n*, 314 Ill. App. 3d 920, 926 (2007).

¶ 19 Section 8(e)(18) of the Act provides:

"The specific case of loss of both hands, both arms, or both feet, or both legs, or both eyes, or any two thereof, or the permanent and complete loss of the use thereof, constitutes total and permanent disability, to be compensated according to the compensation fixed by paragraph (f) of this Section. These specific cases of total and permanent disability do not exclude other cases.

Any employee who has previously suffered the loss or permanent and complete loss of the use of any such member, and in a subsequent independent accident loses another or suffers the permanent and complete loss of the use of any one of such members the employer for whom the injured employee is working at the time of the last independent accident is liable to pay compensation only for the loss or permanent and complete loss of the use of the member occasioned by the last independent accident." 820 ILCS 305/8(e)(18) (West 2008).

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¶ 20 In addition, the Act further provides that the Second Injury Fund will pay the PTD benefit attributable to the second injury. 820 ILCS 305/8(f) (West 2008); *Treasurer of the State of Illinois v. Industrial Comm'n*, 136 Ill. App. 3d 800, 816 (1985).

¶ 21 Here, the Commission found that the claimant had suffered the permanent and complete loss of the use of his left foot in 1992, along with the permanent and complete loss of the use of his right leg in the 2003 accident. The State Treasurer does not dispute the fact that the claimant suffered the permanent and complete loss of the use of his left leg in 1992. The only dispute is with the Commission's finding that the claimant suffered the permanent and complete loss of the use of his right leg in the 2003 accident. The State Treasurer specifically maintains that the Commission's finding is against the manifest weight of the evidence because the record established that the claimant is able to walk 10 to 15 minutes at a time, up to 20 times per day, as required by his current job as a security guard. The State Treasurer also points out that the FCE showed that the claimant could lift 15 pounds and could walk short distances and up stairs. In short, the State Treasurer argues that, because the claimant is employable and has retained some functionality in his right leg, he has not sustained the permanent and complete loss of the use of his right leg as a result of the 2003 accident.

¶ 22 We find that the Commission's determination that the claimant has suffered the loss of the use of his right leg is not against the manifest weight of the evidence. There is no requirement that the claimant must establish he is unable to work as result of the loss of the use of a member, only that the member no longer performs its normal function. *Treasurer of the State of Illinois*, 136 Ill. App. 3d at 814. Loss of a member is complete when the claimant has lost the normal use

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of that member. *Illinois Bell Telephone v. Industrial Comm'n*, 265 Ill. App. 3d 681, 687 (1994) citing *C.S.T. Erection Co. v. Industrial Comm'n*, 61 Ill. 2d 251, 257 (1975) (loss of a member is complete when the normal use has been taken away and it is unnecessary to show total and complete loss under all circumstances to establish total disability).

¶ 23 Here, the record shows that, while the claimant maintains some minimal use of his right leg, he has lost the normal use of that member. The claimant testified credibly that, as a result of the knee and hip replacement surgery on his right leg following the 2003 accident, he is no longer able to walk or otherwise function normally. Although he can walk short distances and can climb stairs with extreme difficulty, he does so only with gradually increasing pain. He cannot drive a car without the use of hand pedals, cannot put on his socks and shoes on his right leg, and otherwise cannot perform functions requiring the normal use of his right leg. Additionally, the medical opinion testimony that the claimant has reached MMI and is restricted to, among other things, no prolonged standing, no repeated bending, stooping, squatting, pushing, jerking, or twisting, no climbing ladders, and only ground level work supports a conclusion that the claimant's right leg no longer performs its normal functions. The fact that he has maintained some ambulatory function does negate a finding that the claimant has lost the normal use of his right leg.

¶ 24 For the foregoing reasons, we cannot say that the Commission's finding that the claimant has sustained the complete and permanent loss of the use of his right leg and is, thus, entitled to an award pursuant to section 8(e)(18) of the Act is against the manifest weight of the evidence.

¶ 25

CONCLUSION

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¶ 26 The order of the circuit court of Cook County circuit court confirming the Commission's award is affirmed.

¶ 27 Affirmed.