

Workers' Compensation  
Commission Division  
Filed: September 25, 2013

No. 4-12-0639WC

**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).

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

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DECATUR OVERHEAD DOOR,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Macon County
	)	
v.	)	
	)	No. 11 MR 280
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, <i>et al.</i> ,	)	
(Gerald L. Weaver,	)	Honorable
	)	Albert G. Webber
Appellee).	)	Judge Presiding
	)	

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

**ORDER**

¶ 1 *Held:* The circuit court erred in setting aside the Workers' Compensation Commission's original determination that the claimant was entitled to permanent partial disability benefits, but not permanent total disability benefits, under the Workers' Compensation Act.

¶ 2 Decatur Overhead Door (Decatur) appeals from the circuit court's order confirming the decision of the Illinois Workers' Compensation Commission (Commission) to award permanent total

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disability (PTD) benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)) to the claimant, Gerald Weaver, for a back injury he suffered while in Decatur's employ. That Commission decision came after the circuit court set aside a previous Commission decision finding the claimant entitled only to permanent partial disability (PPD), and not PTD, benefits. For the reasons that follow, we conclude that the circuit court erred in setting aside the initial Commission decision. We therefore vacate the circuit court's second decision, vacate the Commission's decision on remand, reverse the circuit court's order setting aside the initial Commission decision, and reinstate the original Commission decision.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on January 22, 2009.

¶ 4 The claimant testified that he was employed by Decatur for approximately 20 years. On February 21, 1997, the claimant bent over to pick up a motor for an overhead door when he felt a pop. He immediately felt pain in his legs and lower back. On the day of the accident, he went to the Decatur Memorial Hospital emergency room, where he was diagnosed with low-back pain.

¶ 5 The claimant testified that his back pain persisted, and, on March 4, he saw his family physician, Dr. Dennis Rademacher, who referred him to Dr. Marie Long, a neurosurgeon in Decatur. On March 21, the claimant underwent an MRI of his back, which showed a large L5-S1 disc herniation producing extradural defect upon the thecal sac at that level as well as a mild bulge at the L4-5 level.

¶ 6 On April 2, the claimant saw Dr. Long, who diagnosed him with bilateral L5-S1 disc extrusion with bilateral sciatica. According to her treatment note from the visit, he reported

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moderate pain that was aggravated by standing and walking. Dr. Long anticipated that the claimant would make a slow recovery, and she noted that she was reluctant to recommend surgery. However, in an April 22 treatment note, she reassessed the need for surgery because of his persistent bilateral sciatica.

¶ 7 On May 5, 1997, Dr. Long performed a lumbar microdiscectomy on the claimant's large herniated disc at the L5-S1 level. According to a May 14 treatment note, the claimant reported significantly improved back and leg pain that registered as a four or five, as opposed to eight or nine, out of 10.

¶ 8 However, on June 11, the claimant returned to Dr. Long to report an increase in his back and leg pain. An MRI of his back was taken on June 16. After reviewing the MRI on June 18, Dr. Long wrote that the claimant had severe leg pain and a recurrent disc extrusion at L5-S1. Dr. Long released the claimant with a recurrent L5-S1 disc herniation along with osteophyte L5-S1.

¶ 9 On July 1, at Decatur's request, the claimant visited Dr. David Kennedy, who performed an exam on his back. After reviewing the second MRI, Dr. Kennedy noted that the scan showed a recurrent herniation at the L5-S1 level, and he recommended a second surgery.

¶ 10 On July 15, 1997, Dr. Long performed a second lumbar microdiscectomy on the claimant. Three weeks later, on August 5, Dr. Long reexamined the claimant, who stated that he was doing moderately well with the pain, which he assigned a level of four out of 10. A third MRI, performed on October 6, 1997, showed that the claimant developed scar tissue at the L5-S1 disc space, but that there was no new herniation of that disc. After reviewing the MRI two days later, Dr. Long stated that the claimant was worse off after surgery. She instructed him to take anti-inflammatory

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medication.

¶ 11 On November 6, at Decatur's request, the claimant was examined by Dr. John Shea, a neurosurgeon. Dr. Shea agreed that the second surgery was necessary to address the recurrent herniation at the L5-S1 level and that the claimant would not be able to return to his prior employment. He recommended the claimant undergo a functional capacity evaluation (FCE) and return to work at the appropriate capacity. The claimant participated in an FCE on November 10. The report of the FCE stated that the claimant was not capable of performing work beyond a sedentary level, but the study indicated that the results were affected by his significant behavioral symptoms.

¶ 12 In a December 10 treatment note, Dr. Long stated that the claimant had persistent and severe leg pain. The claimant sought a second opinion from Dr. David Slay, who said further surgery would not benefit him. Dr. Long recommended that the claimant return to light activity as soon as possible with restrictions on lifting, bending, and twisting.

¶ 13 On January 13, 1998, Dr. Rademacher referred the claimant to orthopedic surgeon Dr. Fields, who noted that he recommended conservative treatment for his diagnosis of right S1 nerve root irritation. The claimant participated in physical therapy and other conservative modalities throughout the spring. Dr. Rademacher then referred him to Dr. Chang Shin, a neurologist.

¶ 14 On May 8, the claimant saw Dr. Shin, who stated in his treatment note that the claimant seemed to be depressed but had found moderate success treating it with Elavil. In a July 9 treatment note, Dr. Shin diagnosed the claimant with chronic low-back pain with failed back syndrome. Also in that same month, Dr. Rademacher confirmed Dr. Shin's suspicion that the claimant suffered from

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depression, and he prescribed medication to treat it. On August 3, the claimant saw Dr. Rademacher for a reevaluation. Dr. Rademacher noted that the claimant said that the Oxycontin prescribed for the pain helped, but that the pain continued to increase, and he prescribed a higher dosage.

¶ 15 On August 12, the claimant saw Dr. Stephen Pineda, who noted that the post-operative MRI of the claimant's back showed scarring as well as disc bulges at L4 and L5-S1. He suspected the claimant had significant root pain and scar arachnoiditis.

¶ 16 On December 29, the claimant saw Dr. John Furry, who noted that "[f]actors which seem[ed] to make the patient's pain worse [were] sitting, lying, and coughing, standing, driving, sneezing, walking, climbing, sex, or any other activity." However, Dr. Furry also noted that "[t]he patient \*\*\* seem[ed] to exhibit some Wadell's signs indicating subconscious or willful exaggeration of the pain."

On January 18, 1999, the claimant saw Dr. Vikram Patel, who initiated a trial of IV Lidocaine infusion for lumbar radiculopathy. At a follow-up appointment, Dr. Patel noted that the claimant reported that his pain was slightly better immediately after the infusion.

¶ 17 On February 19, the claimant underwent an EMG study. The report of that study noted evidence of abnormal denervation changes in the right sacral paraspinal muscle as well as in the right S1 innervated muscles. The nerve conduction evaluation demonstrated normal values for both motor and sensory fibers.

¶ 18 On March 24, Dr. Patel performed a nerve block on the claimant's back at the L5-S1 level. On April 13, 1999 and throughout the spring, Dr. Furry performed a series of diagnostic and therapeutic injections that, according to the claimant, reduced his pain from "a 20 out of 10" to a five or six.

¶ 19 Near this time, a dispute arose regarding the claimant's willingness to submit to an examination at Decatur's request. The dispute eventually proceeded to a pre-hearing conference with the arbitrator. At the conference, Jim Harris, the adjuster from Decatur's insurance company, testified that Decatur sought a second examination to evaluate the possible physical and mental conditions identified by Dr. Rademacher. Harris sought to have the claimant examined by Dr. Wayne Stillings, a psychiatrist and neurologist located in St. Louis. The claimant failed to attend two June appointments with Dr. Stillings, and, as a result, Decatur stopped paying him benefits. The parties thereafter reached an agreement under which Decatur agreed to resume paying benefits in exchange for the claimant's cooperation with Decatur's examination requests, but the claimant again failed to attend two examinations in July.

¶ 20 At the pre-hearing conference, the claimant noted that, on July 2, Dr. Rademacher had written a note restricting him from leaving Macon County. In his deposition testimony presented at the pre-hearing conference, Dr. Rademacher opined that the examination requested by Decatur could be performed in Macon County and that a trip to St. Louis might aggravate the claimant's condition. At the conclusion of the pre-hearing conference, the arbitrator found that the claimant should cooperate with Decatur's request and that Decatur rightfully suspended benefit payments based on his non-cooperation.

¶ 21 In the meantime, following a December 22 treatment visit, Dr. Pineda wrote that the claimant had degenerative disease as well as scarring of his nerve roots. On June 2, 2000, Dr. Pineda noted that the claimant had severe back pain, and he stated that x-rays taken of his back showed significant narrowing at the L5-S1 level.

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¶ 22 On May 30, 2003, Dr. Shane Fancher of St. Mary's Pain Clinic noted that the claimant was not interested in a trial spinal cord stimulator as had been recommended by Dr. Pineda. On June 11, Dr. Henrik Mike-Mayer found that that the claimant had limitation in both flexion and extension. He diagnosed the claimant with, among other things, chronic pain syndrome and mild to moderate spinal stenosis (most prominent at L4-5), although he noted there may be some symptom magnification and functional overlay. He went on to state that the claimant would not benefit from any additional surgeries.

¶ 23 An entry in Dr. Rademacher's office records dated February 13, 2004, stated that the claimant was traveling out of state the next week due to a death in the family. An August 16 entry stated that the claimant requested a refill of his Oxycontin because his medicine was in a suitcase in North Carolina. An August 30 entry stated that the claimant went to Florida in a truck to help his mother-in-law move, though he complained that the weather changes caused him more back problems.

¶ 24 On June 7, 2005, at Decatur's request, Dr. David Fletcher evaluated the claimant. In his report, Dr. Fletcher stated that the claimant could do sedentary-light activities because "he does not need any assistive devices to walk, he's not bedridden, his pain is managed well with the current narcotic regimen he's been given, [and] his activity level and upper extremity strength indicates his capability of demonstrating that."

¶ 25 On June 30, Dr. Lawrence Nord examined the claimant at the claimant's request. In a single-page report, he noted two centimeters of atrophy of his right calf as compared to his left, right Achilles tendon reflex, paresthesias over the right S1 and the right L5 dermatomes, and demonstrable

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weakness of the right lower extremity, especially of the right S1 myotome. Dr. Nord diagnosed the claimant with failed back syndrome.

¶ 26 In November 2005, Decatur obtained an order to compel the claimant to undergo a psychological examination in order to evaluate his claim of depression. An appointment was arranged with Dr. Michael Campion for December 22 in Champaign. The claimant refused to go. Pursuant to his repeated refusal to cooperate with Decatur's request to undergo a psychological evaluation, the arbitrator found that he failed to prove a causal relationship between any psychological condition and his employment accident.

¶ 27 In a December 1 note, Dr. Rademacher described the claimant's ongoing treatment involving pain medication and gave his opinion that this medication was necessary based on the chronic pain that he had diagnosed, especially lumbar radiculopathy type and nerve type pain in his legs.

¶ 28 On December 5, 2005, Bob Hammond, a vocational specialist, submitted a report to Decatur indicating that the claimant could obtain employment at a sedentary level. He explained the inconsistencies with his August 12, 1999, report, in which he stated that the claimant "has limitations that were not allowed for accommodations in the general labor market," were due to the increased work capabilities described in Dr. Fletcher's evaluation report. Hammond stated that the claimant could feasibly work as a materials manager, an order clerk, a security guard, or in sales.

¶ 29 On June 15, 2006, Connie Liptak, a rehabilitation counselor, sent the claimant a letter stating that she scheduled a job interview for him. The customer service job was either part-time or full-time and would have allowed the claimant to choose the hours he worked. Liptak testified that the claimant did not keep the phone interview, and she thereafter informed the claimant's attorney

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that the claimant was not interested in placement.

¶ 30 At an August 17, 2007, visit, Dr. Rademacher noted that the claimant was "actually doing quite well." On September 11, Dr. Rademacher again noted that the medication "seem[ed] to be working quite well."

¶ 31 At his deposition, Dr. Nord testified that the claimant has reached maximum medical improvement, that his pain precluded even sedentary work, and that he is permanently and totally disabled. However, Dr. Nord conceded that he had not reviewed the records of the physicians who treated or examined the claimant before he did. He also acknowledged that a diminished reflex, residual paresthesia, and numbness are not necessarily disabling conditions.

¶ 32 In his deposition, Dr. Rademacher listed the numerous consultations and treatments the claimant underwent in order to attempt to relieve his back pain. He declared that he had not released the claimant for any type of work from 1999 until the time of the hearing. However, he conceded that he had not examined the claimant's back since 1999. Dr. Rademacher opined that the claimant is "totally and permanently disabled from any gainful type of employment." He conceded that it would be practical for the claimant to receive a nerve simulator considering the alleged severity of his pain. Dr. Rademacher testified that the claimant's condition would be aggravated by travel, though he had not restricted him from it. His records indicated that the claimant had left the state within the prior two or three years, but, in his testimony, he stated that the claimant had not in fact left the state. However, Dr. Rademacher agreed that he had filled out a prescription allowing the claimant to pick up Oxycontin in South Carolina within the prior two to three years.

¶ 33 In his deposition testimony, Dr. Fancher acknowledged that the claimant's refusal of the

spinal cord stimulator was inconsistent with the pain he claimed to experience.

¶ 34 At his deposition, Dr. Fletcher testified that the claimant showed three out of five Waddell positive nonorganic back signs during his June 7, 2005, examination. He went on to say that the claimant could do some sedentary-light activities if he were allowed to change positions. Dr. Fletcher testified that the atrophy noted by Dr. Nord was not clinically significant and that he believed that Dr. Rademacher had been "somewhat duped" regarding the claimant's abilities to travel. He went on to assert that he "believe[s] [the claimant] is over-reporting the level of subjective complaints and is much more functional than he purports." Dr. Fletcher concluded that the claimant was capable of gainful employment at the sedentary-light work level.

¶ 35 Liptak testified that telephonic work allows employees to work from a sitting, standing, or laying position, and allows them to change positions as needed. She stated that, as of the date of her testimony, there were still appropriate employment opportunities available to the claimant.

¶ 36 On November 26, 2008, following a hearing, the arbitrator found that the claimant's injury is compensable under the Act, but declined to award the claimant PTD benefits, instead awarding the claimant PPD benefits of \$454.07 per week for 250 weeks. Along with suggesting that Dr. Nord's report of his examination was "not \*\*\* detailed," the arbitrator found Dr. Fletcher's examination and testimony to be credible. Though the arbitrator found that the claimant has a significant disability, she found that he failed to prove that he is permanently and totally disabled.

¶ 37 The claimant sought review of the arbitrator's decision before the Commission. On February 23, 2010, the Commission affirmed and adopted the arbitrator's decision, with one dissent pertaining to the amount to be awarded.

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¶ 38 The claimant filed a petition for review in the Macon County circuit court, which, on January 13, 2011, set aside the Commission's decision and remanded the matter for further consideration of the permanency issue.

¶ 39 On June 30, 2011, following the remand, the Commission found the claimant to be totally and permanently disabled, awarding him \$421.59 per week for the duration of his life.

¶ 40 On June 11, 2012, the Macon County circuit court confirmed the Commission's decision, and the respondent now appeals.

¶ 41 On appeal, Decatur argues the circuit court erred in overturning the Commission's initial decision awarding the claimant PPD but not PTD benefits. We agree.

¶ 42 An appeal from a final judgment of the circuit court confirming a decision of the Commission on remand necessarily implicates the propriety of the circuit court's earlier decision. See *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 531, 758 N.E.2d 18 (2001). Thus, when, as in this case, the Commission's original decision is reversed as against the manifest weight of the evidence, we consider the propriety of the Commission's original decision in any appeal from a final order confirming the Commission's decision on remand. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979 (2001).

¶ 43 An employee is totally and permanently disabled under the Act when "such employee is unable to make some contribution to the work force sufficient to justify the payment of wages" (*Gates Division, Harris-Intertype Corp. v. Industrial Comm'n*, 78 Ill. 2d 264, 268, 399 N.E.2d 1308 (1980)) or when he cannot perform any services except those so limited in quantity, dependability, or quality that there is no reasonably stable labor market. *C.R. Wikel, Inc. v. Industrial Comm'n*, 69

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Ill.2d 273, 278, 371 N.E.2d 610 (1977). In determining whether an employee may perform any useful services, "his age, training, education, and experience must be taken into account." *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill.2d 538, 546, 419 N.E.2d 1159 (1981). On the other hand, a worker has permanent partial disability when his injury received leaves him permanently partially incapacitated from pursuing his usual and customary employment, and is reasonably certain to permanently prevent him from earning as much as he would have earned absent the injury. *DiFoggie v. Retirement Bd. Of County Employees Annuity and Ben. Fund of Cook County*, 156 Ill.2d 377, 379, 620 N.E.2d 1070 (1993).

¶ 44 Determination of the extent or permanency of the employee's medical disability is a question of fact, and the finding of the Commission will not be set aside unless it is against the manifest weight of the evidence. *Interlake Steel Corp. v. Industrial Comm'n*, 60 Ill. 2d 255, 260, 326 N.E.2d 744 (1975). The test for determining whether a factual finding of the Commission is against the manifest weight of the evidence "is not whether this or any other tribunal might reach the opposite conclusion, but whether there was sufficient factual evidence in the record to support the Commission's determination." *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 450, 657 N.E.2d 1196 (1995). For a Commission decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729-30, 734 N.E.2d 482 (2000).

¶ 45 To argue that the Commission's original decision was against the manifest weight of the evidence, the claimant relies primarily on the testimonies of Dr. Nord and Dr. Rademacher. However, the Commission was skeptical of each of these doctors. Regarding Dr. Nord, the

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Commission said that "he had not reviewed the records of any physicians who had preceded him on the case" and "[his] report of examination was less than one page \*\*\* suggesting it was not a detailed explanation." As for Dr. Rademacher, the Commission expressed doubts about the credibility of his diagnoses because he had not examined the claimant's back since 1999. Further, the Commission noticed discrepancies between the claimant's and Dr. Rademacher's testimonies, most notably in regards to whether the claimant was able to travel or had traveled outside Macon County since his injury.

¶ 46 Further, there was substantial evidence to support the Commission's finding that the claimant's injuries do not prevent him from making a contribution to the work force. Dr. Fletcher reviewed the medical records and examined the claimant, and he concluded that the claimant is capable of gainful employment. Hammond provided a list of jobs that he believed the claimant was able to perform, including materials manager, order clerk, and security guard. Liptak even procured a job interview for the claimant, who declined to participate. The Commission found these witnesses, whose testimony indicated that the claimant's injuries are not debilitating, to be more credible than those who testified on the claimant's behalf. "It is the role of the Commission to resolve conflicts in the evidence, and this is particularly true with regard to medical evidence. It is also the duty of the Commission to assess the credibility of witnesses and assign weight to their testimony." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 887, 864 N.E.2d 266 (2007). Based on the above evidence, we cannot say that the Commission's determination, that the claimant is partially but not totally disabled, was against the manifest weight of the evidence.

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¶ 47 For the forgoing reasons, we conclude that the circuit court erred in setting aside the Commission's original February 23, 2010, decision granting the claimant PPD benefits. Accordingly, we vacate the circuit court's June 11, 2012, decision confirming the Commission's June 30, 2011, decision on remand; vacate the Commission's June 30, 2011, decision on remand; reverse the circuit court's January 13, 2011, decision setting aside the Commission's original February 23, 2010, decision; and reinstate the Commission's February 23, 2010, decision.

¶ 48 Circuit court's June 11, 2012, decision vacated; Commission's June 30, 2011, decision vacated; circuit court's January 13, 2011, decision reversed; Commission's February 23, 2010 decision reinstated.