2015 IL App (5th) 140481WC-U
No. 5-14-0481WC
Order filed November 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

REHKEMPER & SON BUILDING CO.,	)	Appeal from the Circuit Court
	)	of Clinton County.
Appellant,	)	
	)	
v.	)	No. 13-MR-29
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*	)	Honorable
	)	William J. Becker,
(Kevin Cook, Appellee).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Workers' Compensation Commission's decisions regarding causation, medical expenses, vocational rehabilitation, maintenance and temporary total disability were not against the manifest weight of the evidence where the Commission's decision found support in the testimony of claimant and his treating physician despite the existence of some evidence to the contrary.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, Rehkemper & Son Building Company, appeals an order of the Illinois Workers' Compensation Commission (Commission) awarding benefits to claimant, Kevin Cook, in accordance with the provisions of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)). Respondent contends several of the Commission's decisions are contrary to the manifest weight of the evidence. We disagree and affirm.

¶ 4 II. BACKGROUND[1]

¶ 5 Claimant's accident occurred on February 24, 2011. Claimant testified the he worked for respondent as a truss fabricator. A truss had fallen between the gaps in a roller system. Claimant climbed onto the truss to put weight on one end in an attempt to dislodge it. The machine "somehow kicked back" and threw claimant into the air. He landed on his right leg. Claimant was taken to St. Joseph's Hospital, and emergency surgery was performed by Dr. Donald Bassman two days later. Claimant spent eight days in the hospital. He had never previously injured his right leg or knee, and he had not had prior problems with his lower back. On June 9, 2011, a second surgery was performed to remove screws from claimant's knee. As of the time of the arbitration hearing, claimant continued to experience decreased strength and range of motion in his right leg. He limps. When claimant steps forward, he experiences a sharp pain on the left side of his back. He began experiencing back pain in January 2012.

[1] Both parties are advised that providing general citations in support of factual assertions, such as "Employee's Ex. 6" or C. 172-267, is not particularly helpful to the court and leaves a great deal of ambiguity as to what portion of the record is being relied upon. If we are unable to identify where in the record support for a factual claim resides, it is our practice to disregard the assertion.

¶ 6 Claimant worked light duty for about two weeks in July 2011. His job was to sweep the premises. Claimant stated that "[i]t was a lot of walking." Walking or standing for "any significant time causes pain." If claimant sits for too long, it also causes pain. Claimant takes Tramadol to manage pain three or four times per day. In September 2011, Bassman released claimant to full duty work despite claimant being unable to squat or kneel. Claimant's first day back with respondent was September 29. Respondent gave him light work. At the end of the day, respondent terminated claimant.

¶ 7 Claimant sought vocational rehabilitation services. He tried to work as a roofer (his former profession before working for respondent). Given his physical condition, his former employer tried to use him as an estimator. However, when he tried to ascend a ladder, he was not comfortable. His boss made him come down and took claimant home. Uneven surfaces are difficult for claimant to walk on, particularly down an incline. Claimant testified that he sought work at "[a]t least 25" local establishments (during cross-examination, claimant explained that he sought work at places including Dollar General, Walmart, Dairy Queen, Moto-Mart, and Phillips 66) . He has a high school diploma. Claimant stated that he physically cannot climb up and down a roof, and the only skill he had was being a roofer. He has no other transferable skills. He had always worked in construction. Claimant stated he wanted to undergo further training and get a job.

¶ 8 Claimant experiences pain on a daily basis. Bassman has referred him to a pain management specialist. The drugs claimant uses do not work particularly well.

¶ 9 On cross-examination, claimant explained that he could not hold a sheet of drywall above his head. Claimant stated that he did the best he could during physical therapy and he made the maximum effort he was capable of on his functional capacity evaluation (FCE). Claimant was

placed at the very heavy physical demand level, with limitations (on redirect, he explained that the limitations involved standing and walking—claimant had to have rest breaks, as needed). Claimant goes swimming, as Bassman advised him that it would help his leg recover. He went to a family reunion at Kentucky Lake in September, but he primarily just sat in a camper. He acknowledged that he signed an intake form during his first office visit to Bassman that signed a form stating that he had never used "illegal street drugs"; however, he did not recall doing so. He further acknowledged that he tested positive for marijuana after the accident. He explained that he had used marijuana at a bonfire on the weekend before the accident. Claimant testified that he does some cleaning around the house.

¶ 10 Dr. Bassman testified, via evidence deposition on March 20, 2012, that he is a board-certified orthopedic surgeon. Claimant came into the emergency room on the day of the accident with a "comminuted intraarticular fracture of the proximal right tibia." Bassman characterized the injury as "very severe." He performed surgery on February 26, 2011. He pieced together claimant's knee, which he said was like a jigsaw puzzle, and inserted multiple screws. Following claimant's discharge from the hospital, Bassman saw him on several occasions. On June 9, 2011, Bassman performed a second surgery during which several screws were removed from the tibia. Claimant "underwent a large amount of physical therapy." While his range of motion improved, claimant "never regained his original strength or his original range of motion." Claimant was walking with a limp. Claimant experienced significant pain, which required narcotic medications to control.

¶ 11 Bassman examined claimant about a week before the deposition, and claimant reported that he was still experiencing significant pain. Claimant also complained of pain in the lower part of his back. Bassman opined that walking with a limp can cause lower back pain and that,

in claimant's case, "[a]t least it contributes to it." Bassman recommended an MRI of the lumbar spine.

¶ 12 Bassman referred claimant to Dr. Kini, a neurologist (claimant was complaining of pain and swelling in his right foot and ankle). Kini diagnosed "complex regional pain syndrome," which is also known as "reflex sympathetic dystrophy." This is a condition where a "disconnect" develops between the mind and the injury. The mind thinks the injury is more severe than it is and it "acts appropriately." Bassman explained, "People complain of a lot of pain." He added that "it's a very hard thing to correct once it develops." Bassman further testified that given claimant's injury, claimant had an "objective basis to suffer pain." Bassman opined that claimant needed treatment from a pain specialist.

¶ 13 Bassman opined that it was "reasonable" to expect that claimant would require a knee replacement within 10 years. He further opined that certain permanent restrictions would be necessary, including no working at heights. A sedentary job where claimant could remain sitting would be most appropriate.

¶ 14 On cross-examination, Bassman acknowledged that he was not a vocational counselor. In a note written July 6, 2011, Kini stated that claimant had no back pain at that time. Bassman did not know when claimant's back pain actually developed. On October 31, 2011, Bassman released claimant from treatment for his knee with instructions to return as needed. Claimant returned on January 5, 2012, complaining of back pain and pain in his knee caused by "his hardware." Maximum medical improvement (MMI) regarding his knee would have been October 31, 2011, as claimant had reached the "maximum benefit" Bassman could provide. Bassman's records from October 2011 indicate that claimant was on a roof with a six degree pitch, and claimant felt unstable. Bassman imposed restrictions of no climbing, jumping, or

walking on uneven surfaces. He never thought claimant was malingering or that he was exaggerating his symptoms. It is possible that claimant will never need a knee replacement. The restrictions imposed by Bassman were based on claimant's subjective complaints.

¶ 15 On redirect examination, Bassman testified that he first recorded back pain in claimant's records on January 5, 2012. This time frame would be "consistent with the gradual onset of low back pain due to [an] altered gait." On September 26, 2011, when claimant was released to return to work, he was still taking Tramadol and Bassman was not certain "what he could or could not do?" Instead, "[t]he idea was to try it and see."

¶ 16 Respondent submitted the report of Dr. Peter Mirkin, who examined claimant on respondent's behalf on March 28, 2012. Claimant recounted the accident to Mirkin. He also told Mirkin that he attempted to return to work as a roofer, but "he had pain and almost fell when he was trying to work on a roof." Mirkin reviewed claimant's medical records. Mirkin conducted a physical examination. He noted that claimant walked "with a slight limp on the right side." No spasms were noted when Mirkin examined claimant's lumbar spine, but he did note "minimal tenderness."

¶ 17 Mirkin opined that claimant "had an obvious work injury with a displaced tibial plateau fracture." He reiterated, "This was a direct result of his work injury." Claimant has "posttraumatic degenerative disease in his knee and has limited range of motion in his knee." Claimant was diagnosed with reflex sympathetic dystrophy, however, Mirkin said that it "appears to have largely resolved." Further, claimant "has significant progressive degenerative changes as a result of the traumatic effect." Mirkin agreed that claimant would, at some point, need a knee replacement.

¶ 18 Regarding claimant's spine, Mirkin noted "mild degenerative changes" at the L3-L4 level. Mirkin opined, "At this point in time, there is no evidence that his back condition is related to the work incident of February 24, 2011." He continued, "In other words, I do not think the prevailing factor in his subjective back complaints and degenerative changes are a result of the fall at work in 2011." He concluded, "[I]t would be my opinion [claimant's] complaints of back pain do not have a direct relationship to the work injury for the reasons that he had no complaints of back pain until 11 months postinjury." Mirkin stated claimant was "essentially at MMI." He agreed that claimant should not work at heights or on uneven ground.

¶ 19 The arbitrator found that claimant's knee injury was causally related to his employment with respondent; however, he further found that claimant had failed to establish a causal relationship between the condition of his back and his at-work accident. The arbitrator largely relied on Mirkin's opinion and the fact that the back condition did not manifest until 11 months after the accident. He also found that claimant failed to establish that he suffered from right-foot reflex sympathetic dystrophy. He noted that claimant did not mention foot complaints during his testimony during the arbitration hearing. Moreover, while claimant's medical records document complaints of pain in his foot and ankle, it appears to have resolved by March 2012, as claimant reported to Mirkin that "his foot was not bothering him." Thus, he found that no further treatment for reflex sympathetic dystrophy was necessary. Based on a stipulation by respondent, the arbitrator awarded 26-3/7 weeks temporary total disability (TTD) at a rate of $253 per week. Given that an FCE placed claimant at the very heavy physical demand level (albeit with limitations), the arbitrator found vocational rehabilitation was not warranted. In turn, he denied claimant's request for maintenance. The arbitrator also awarded some of claimant's claimed medical expenses.

¶ 20 The Commission (with one Commissioner dissenting) modified several aspects of the arbitrator's decision, but otherwise affirmed. It found that claimant's back condition and reflex sympathetic dystrophy were causally related to his employment with respondent; awarded medical expenses, additional TTD, prospective medical expenses, vocational rehabilitation, and maintenance; and remanded for further proceeding in accordance with *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980). It explained that it found Mirkin's opinion problematic in that it was limited to whether there was a direct relationship between the accident and claimant's back condition. It noted that Mirkin did not consider whether "an altered gait result[ed] in back pain." The Commission found Bassman more credible since he addressed whether there could have been an indirect relationship, *i.e.*, the accident caused claimant to limp, limping resulted in back pain. It stated, "We find it reasonable that, over time, [claimant] may start to experience symptoms in his back as a result of his altered gait." It then found that prospective care was warranted for claimant's knee and back.

¶ 21 The Commission awarded an additional 6-4/7 weeks TTD. It explained that the arbitrator improperly terminated TTD at the time Bassman allowed claimant to return to full duty. It noted that this was an attempt to see whether claimant could tolerate full duty. Notably, when claimant was released to full duty, he was still taking Tramadol and Bassman was not certain "what he could or could not do?" Bassman explained, "[t]he idea was to try it and see."

¶ 22 Citing Bassman's testimony that claimant should pursue a sedentary job, it awarded claimant vocational rehabilitation and, in turn, maintenance. The Commission found it unlikely that claimant could work a roofer or in some other capacity in the construction industry. Citing *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 505-06 (2004), and *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019-20 (2005), it rejected the arbitrator's finding

that vocational rehabilitation was not warranted because claimant did not request it. It found it unreasonable to expect claimant to pursue further employment with respondent after respondent fired claimant, and it further found that claimant conducted a diligent and credible job search. Respondent sought judicial review, and the circuit court of Clinton County confirmed. Respondent now appeals to this court.

¶ 23 III. ANALYSIS

¶ 24 Respondent contends that several of the Commission's decisions are against the manifest weight of the evidence. A finding is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). Assigning weight to evidence, assessing the credibility of witnesses, drawing inferences from the record, and resolving conflicts in the testimony are primarily matters for the Commission. *C. Iber & Sons, Inc. v. Industrial Comm'n*, 81 Ill. 2d 130, 136 (1980). We owe significant deference to the Commission on such matters, especially when medical issues are involved, as the Commission's expertise in that area is well recognized. *Bennett Auto Rebuilders v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655 (1999); *Long v Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). All of respondent's arguments present issues of fact. On appeal, respondent, as the appellant, bears the burden of establishing error. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008). With these standards in mind, we now turn to respondent's arguments.

¶ 25 A. CAUSATION

¶ 26 Respondent first attacks the Commission's decision regarding causation. It is axiomatic that a claimant's condition of ill being must have been caused by an at-work incident for a claimant to recover under the Act. See *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d

582, 592 (2005). However, a claimant need only show that some aspect of employment was *a* causal factor in his or her injury, not the sole or principle causal factor. *Id*. Whether a claimant's condition of ill being is causally related to his or her employment is a factual issue subject to the standards of review set forth above. *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 741 (1994).

¶ 27 Respondent begins its argument by noting that Bassman released claimant to full duty in September 2011. While true, the evidence is undisputed that Bassman viewed this return to work as a trial. He stated, "[t]he idea was to try it and see." Thus, the Commission reasonably could attribute little weight to this fact. It is also true, as respondent points out, that Bassman felt claimant was at MMI *with respect to his knee* as of October 31, 2011; however, this says nothing about claimant's back. Respondent points out that Bassman's notes from January 5, 2012, do not describe claimant's back pain; however, they do mention that it was occurring, which provides a degree of corroboration.

¶ 28 Respondent then turns to Mirkin for support, noting that Mirkin opined that the 11-month delay in the manifestation of back pain indicated that, along with the lack of objective findings, the condition of claimant's back was not causally related to his at-work accident. However, there were sound reasons for which the Commission could reject Mirkin's opinion. Notably, Mirkin opined that claimant's at-work accident was neither "the prevailing factor" in the condition of claimant's back, nor did it "have a direct relationship to" it. This is not the legal standard; a claimant need only prove that employment was *a* factor in the ensuing condition of ill being. *Land & Lakes Co.*, 359 Ill. App. 3d at 592. As such, Mirkin's opinion was not particularly probative of the question before the Commission.

¶ 29 Instead, the Commission could and did rely on Bassman's opinion. The only criticism respondent makes of Bassman is that he purportedly "only opined the irregular gait *could cause* some low back pain." (Emphasis by respondent.) This is simply not true. After testifying that an irregular gait could cause low back pain, the following colloquy took place:

> "[Claimant's counsel:] Do you have an opinion whether that did in fact cause *his* low back pain?
>
> * * *
>
> [Bassman:] At least it contributes to it." [Emphasis added and omitted.]

Thus, Bassman opined that claimant's irregular gait was a cause of *his* back pain. Respondent's attack on Bassman's credibility is not well founded.

¶ 30 In short, respondent gives us no reason why the Commission could not credit Bassman's opinion and there were good reasons for it to reject Mirkin's. Under such circumstances, we cannot say that an opposite conclusion to the Commission's is clearly apparent.

¶ 31 B. TTD

¶ 32 Respondent next complains of the Commission's award of TTD. To be entitled to TTD, claimant must show not only that he *did not* work, he must establish that he *could not* have worked. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256 (2008). Respondent contends that it was clearly apparent that claimant could work as of the time Bassman returned him to full duty in September 2011; however, as noted above, this return to work was provisional and the Commission could have placed little weight upon it.

¶ 33 Respondent also asserts that when Bassman reimposed restrictions, he was under the belief that claimant had actually "experienced instability while working on a roof." Respondent notes that claimant had not actually gotten onto the roof. According to respondent, claimant

merely "climbed up and down a ladder." We find respondent's characterization of claimant's activities somewhat disingenuous. In fact, claimant attempted to ascend the ladder, and when his former boss noted the difficulties claimant was having doing so, he "made [claimant] come down." That claimant was unable to climb a ladder certainly does not demonstrate a fitness for duty and point to an opposite conclusion to the Commission's. More fundamentally, to the extent Bassman misunderstood what claimant was doing on the day he tried to return to work as a roofer goes to the weight to which Bassman's opinion is entitled. This is primarily a matter for the Commission (*City of Chicago v. Industrial Comm'n*, 59 Ill. 2d 284, 288 (1974)), and respondent does not explain why this purported defect is so serious that the Commission was required to reject Baseman's testimony.

¶ 34 Quite simply, respondent has failed to carry its burden on appeal of establishing that the Commission's decision on TTD is contrary to the manifest weight of the evidence.

¶ 35 C. MEDICAL EXPENSES

¶ 36 Respondent's argument regarding prospective medical expenses is wholly derivative of its first argument regarding causation. As we have rejected respondent's argument on causation above, this argument necessarily fails. We need not address it further.

¶ 37 D. PROSPECTIVE MEDICAL EXPENSES

¶ 38 This argument is partially derivative on respondent's first argument; we need not address those portions of it that are based on respondent's attack on the Commission's finding of causation. However, respondent, somewhat cryptically, further argues that Kini did not refer claimant to pain management and that Bassman does not mention pain management in a report dated March 12, 2012. Respondent then points out that Bassman testified that claimant's future

treatment could include pain management. Respondent also notes that Mirkin stated findings of back pain were minimal and that claimant had reached MMI and required no further treatment.

¶ 39 Respondent relies on the legal proposition that the Commission may give more weight to the opinion of an examining physician over that of a treating physician. *Prairie Farms Dairy v. Industrial Comm'n*, 279 Ill. App. 3d 546, 550 (1996). While this is undeniably true, the converse is true as well, the Commission may give more weight to the opinion of a treating physician. See *O'Neal Brothers Construction Co. v. Industrial Comm'n*, 93 Ill. 2d 30, 38 (1982). Respondent certainly identifies a conflict in the testimony between Bassman and Mirkin; however, it never gives us a reason why Mirkin's position was so persuasive that an opposite conclusion to the Commission's is clearly apparent. Resolving conflicts in the evidence under such circumstances is a matter for the Commission. *C. Iber & Sons, Inc.*, 81 Ill. 2d at 136. Respondent has not shown that the Commission's decision is against the manifest weight of the evidence.

¶ 40 E. VOCATIONAL REHABILITATION

¶ 41 Next, respondent complains of the Commission's award of vocational rehabilitation benefits. In actuality, respondent asks that we simply substitute our judgment for that of the Commission. Of course, this is something we cannot do. *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055 (2004).

¶ 42 Section 8(a) of the Act provides in pertinent part, as follows:

> "The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required." 820 ILCS 305/8(a) (West 2010).

Generally, a claimant is entitled to vocational rehabilitation where an injury causes a reduction in earning power and rehabilitation would restore his or her earning capacity. *Howlett's Tree Service v. Industrial Comm'n*, 160 Ill. App. 3d 190, 193 (1987). Relevant factors include the likelihood the claimant will be able to obtain employment following vocational rehabilitation; whether the claimant is not trainable due to age, education, or other circumstances; whether the claimant has other skills that would allow him or her to find a job; and whether the claimant has failed in a similar program in the past. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432 (1983). A failed job search provides evidence of a claimant's unemployability. See *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007).

¶ 43 The Commission cited the restriction Bassman placed upon claimant regarding not working at heights or walking on uneven surfaces when it found that it was "unlikely that [claimant] will return to work as a roofer or to a position in the construction trade." Bassman's restrictions adequately support this factual finding. It further relied on claimant having unsuccessfully conducted what it termed a "diligent job search." Respondent characterizes claimant's efforts to find employment as "only look[ing] for work at a few businesses" (claimant testified that he contacted over 25 employers). What respondent is arguing is exactly the sort of thing a reviewing court cannot do. The Commission found contacting "[a]t least 25" employers a diligent job search; respondent suggests that it is not. Essentially, respondent asks that we simply substitute our judgment for that of the Commission here and accept its characterization of claimant's attempts to find employment. This would be improper. *Setzekorn*, 353 Ill. App. 3d at 1055.

¶ 44 In sum, the Commission's decision finds adequate evidentiary support in the record. Respondent makes an attack on the Commission's award of maintenance that is wholly

dependent on the success of its arguments concerning vocational rehabilitation, which, in turn, necessarily fails.

¶ 45 IV. CONCLUSION

¶ 46 In light of the foregoing, the order of the circuit court of Clinton County confirming the decision of the Commission is affirmed, and this cause is remanded in accordance with *Thomas*, 78 Ill. 2d 327.

¶ 47 Affirmed and remanded.