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2017 IL App (1st) 162889WC-U

FILED: September 29, 2017

NO. 1-16-2889WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ILLINOIS CRANE, INC.,)	Appeal from
Appellee,)	Circuit Court of
v.)	Cook County
THE ILLINOIS WORKERS' COMPENSATION)	No. 16L50144
COMMISSION <i>et al.</i> (Martin Alvarez, Appellant).)	Honorable
)	Carl Anthony Walker,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Moore concurred
in the judgment.

ORDER

¶ 1 *Held:* The Commission's award of TTD benefits from July 2013, to October 2014, was against the manifest weight of the evidence and the circuit court committed no error in reversing that portion of the Commission's decision.

¶ 2 Claimant, Martin Alvarez, brought a claim for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), alleging he sustained accidental work-related injuries on September 15, 2012, while working for the employer, Illinois Crane, Inc. Following a hearing, the arbitrator determined claimant sustained compensable injuries to both his lumbar and cervical spine and awarded him (1) 109-2/7 weeks' temporary total disability (TTD)

benefits from September 16, 2012, through July 21, 2013, and July 25, 2013, to October 23, 2014; (2) past medical expenses; and (3) prospective medical expenses for the surgery recommended by one of claimant's doctors.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) modified the arbitrator's decision by finding the condition of ill-being in claimant's cervical spine was not causally related to his September 2012 work accident. It vacated "awards pertaining to" that condition, specifically referencing awards for past and prospective medical expenses related to claimant's cervical spine. The Commission otherwise affirmed and adopted the arbitrator's decision, including his award of 109-2/7 weeks' TTD benefits. Finally, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980), it remanded the matter to the arbitrator for a determination of claimant's entitlement to further compensation, if any.

¶ 4 The employer sought judicial review of the Commission's decision with the circuit court of Cook County. The court reversed the Commission's TTD award, finding that, after July 25, 2013, claimant was temporarily totally disabled with respect to only his cervical spine. Thus, because the Commission found the cervical spine injury was not causally related to claimant's work accident, an award of TTD compensation from July 25, 2013, to October 23, 2014, was against the manifest weight of the evidence. Claimant appeals, arguing the commission's award of TTD benefits was not against the manifest weight of the evidence and the circuit court erred in reversing a portion of that award. We affirm and remand pursuant to *Thomas*.

¶ 5 I. BACKGROUND

¶ 6 On October 23, 2014, the arbitration hearing was conducted. The record reflects the parties agreed that on September 15, 2012, claimant was involved in a work-related accident and sustained injuries to his lumbar spine. They disagreed as to whether the condition of ill-being

in claimant's cervical spine was also causally related to his work accident.

¶ 7 At the time of arbitration, claimant was 29 years old. He testified he worked for the employer inspecting and repairing cranes. On the date of his accident, claimant was injured while operating a "JLG lift." Claimant testified he was driving the lift and the lift's front wheels went over a pothole. He released the pedal on the lift to bring it to an emergency stop; however, the back wheels of the lift continued over the pothole. Claimant stated he was wearing a harness and was "catapulted *** up," injuring his lower back.

¶ 8 Claimant began seeking medical treatment for his lower back on September 16, 2012, the day after his accident. Initially, he sought treatment in the emergency room of MacNeal Hospital and was diagnosed with a low back strain. He then began receiving treatment at Edward Hospital and, on September 18, 2012, he complained of lower back pain that radiated down his left leg. Claimant was given work restrictions and a recommendation for a magnetic resonance imaging (MRI) scan. On September 27, 2012, an MRI was performed on claimant's lumbar spine and revealed disc herniations at the L5-S1 and L4-5 levels of his spine.

¶ 9 On October 29, 2012, claimant began seeing Dr. Alexander Ghanayem, an orthopedic spine surgeon. The record contains both Dr. Ghanayem's medical records and his deposition, taken July 16, 2014. At his initial visit with Dr. Ghanayem, claimant provided a history of his work accident and complained of lower back and leg pain. Dr. Ghanayem reviewed claimant's MRI films and diagnosed him with a large broad-based disc herniation at L5-S1 and a smaller disc herniation at L4-5. He opined claimant's lower back condition was causally connected with his work accident. Pursuant to Dr. Ghanayem's recommendations, claimant underwent physical therapy and an epidural injection. Dr. Ghanayem also restricted claimant from working. On December 27, 2012, Dr. Ghanayem noted claimant's condition had not improved

and recommended surgery on claimant's lumbar spine, which he performed on February 19, 2013.

¶ 10 Claimant testified that, for approximately two months following his surgery, he slept in a reclining chair rather than his bed because of pain he experienced and because he could not get out of bed on his own. According to claimant, he woke up one morning after sleeping in his recliner and felt a "pinch in [his] neck" and he could not move his head.

¶ 11 Claimant testified that the same day he began experiencing neck-related symptoms he called Dr. Ghanayem's office to report what happened. On April 5, 2013, he saw Dr. Ghanayem's nurse practitioner who noted claimant reported "an exacerbation of cervical symptoms" and that he woke up the previous Monday morning and was "unable to move his neck." Claimant also reported that he experienced radicular symptoms in his right shoulder and arm. On April 22, 2013, claimant saw Dr. Ghanayem, who noted claimant complained of ongoing neck pain "with some referral to the right shoulder girdle." Dr. Ghanayem recommended an MRI of claimant's cervical spine, which claimant underwent on April 29, 2013. At his deposition, Dr. Ghanayem testified claimant's cervical MRI showed a disc herniation at the C5-6 level of claimant's spine.

¶ 12 On May 6, 2013, claimant followed up with Dr. Ghanayem. He reported some continued back pain and Dr. Ghanayem noted claimant's neck symptoms had "greatly subsided." Dr. Ghanayem recommended "physical therapy for strengthening of [claimant's] cervical paraspinal musculature along with trunk stabilization and core reconditioning." On June 10, 2013, claimant returned to see Dr. Ghanayem and reported that "his low back [was] healing well." Dr. Ghanayem noted claimant had no low back complaints and denied having leg pain. However, claimant did complain of continued neck pain. Dr. Ghanayem recommended continued

physical therapy and that claimant remain off work.

¶ 13 On July 8, 2013, Dr. Ghanayem stated claimant reported that his therapy was progressing well and he felt “as though he ha[d] plateaued and reached his maximum recovery.” He recommended a functional capacity evaluation (FCE), which claimant underwent on July 12, 2013. Medical records show claimant “demonstrated functional capabilities at the LIGHT to MEDIUM Physical Demand Level.”

¶ 14 On July 18, 2013, claimant returned to Dr. Ghanayem, who had reviewed the results of claimant’s FCE. According to Dr. Ghanayem, the FCE showed that, on a frequent basis, claimant could lift 15 pounds overhead, 19 pounds from the floor, and 22 pounds from waist level. He determined claimant required permanent work restrictions and that he had reached maximum medical improvement (MMI). The record contains a note from Dr. Ghanayem, releasing claimant to return to work with restrictions. His note states as follows:

“[Claimant] has been examined *** and is able to return to work at the following levels:

Lifting over head: 15 pounds frequently, 35 pounds occasionally[;]

Lifting from the floor: 19 pounds frequently, 40 pounds occasionally[;]

Carrying a [sic] waist level (without bending): 22 pounds frequently, 42 pounds occasionally[;]

Needs to be able to sit, stand and move around throughout the work day[;]

MMI and permanent.”

¶ 15 At his deposition, Dr. Ghanayem testified that, at the time of his July 18, 2013, visit with claimant, he determined claimant was “at [MMI] for his lower back.” When asked whether claimant needed further treatment for his lower back, Dr. Ghanayem responded as fol-

lows: “I think he needs probably some medication for that but there’s nothing formally that needs to be done, keep up with his exercises of course.”

¶ 16 Claimant testified he returned to work for the employer on July 22, 2013, and was given a light-duty position that involved bending, standing, and filing paperwork. He stated he worked three days before returning to see Dr. Ghanayem on July 25, 2013, with neck complaints. Dr. Ghanayem’s records state claimant reported that he went back to work, was doing a lot of filing, and “re-aggravated his neck.” He took claimant “back off work” and recommended medication and physical therapy. At his deposition, Dr. Ghanayem testified that his understanding of how claimant’s neck pain started was that claimant “was basically sleeping funny in a chair because of his back and he woke up with the symptoms after sleeping a number of nights in a row in a recliner.” Dr. Ghanayem opined “the most proximate cause” of claimant’s cervical disc herniation was “sleeping goofy on the recliner for a number of days in a row.”

¶ 17 On August 22, 2013, Dr. Ghanayem noted claimant continued to experience symptoms in his neck and right arm. He recommended surgery in the form of an anterior cervical discectomy and fusion at the C5-6 level of claimant’s spine. Dr. Ghanayem recommended claimant remain “off work in the interim.” At arbitration, claimant testified he had not undergone the surgery recommended by Dr. Ghanayem.

¶ 18 On October 3, 2013, claimant saw Dr. Avi Bernstein, a spine surgeon, at the employer’s request. The employer submitted Dr. Bernstein’s report at arbitration. The report shows claimant provided Dr. Bernstein with a history of his work accident and medical treatment. Dr. Bernstein noted claimant admitted to improvement in his lower back condition following his February 2013 surgery with Dr. Ghanayem but that he still had “some residual low back pain.” Claimant also reported sleeping in a recliner after his surgery and that that he began to experi-

ence neck pain. Dr. Bernstein stated claimant complained of pain behind his right ear and “pain into the right shoulder toward the right side in the middle of his neck.” Following an examination, Dr. Bernstein opined claimant had reached MMI with respect to his low back injury and, as to that injury, was capable of working within the confines of the FCE restrictions. He considered claimant’s lower back restrictions to be permanent.

¶ 19 Dr. Bernstein further opined claimant’s cervical condition of ill-being was not causally related to his work accident or his subsequent surgery. Instead, he believed claimant had “chronic preexisting degenerative change,” which “may have become symptomatic through the course of his activities of daily living.”

¶ 20 Claimant testified he continued to follow up with Dr. Ghanayem, who he stated was keeping him off work because of his neck. On November 4, 2013, Dr. Ghanayem noted claimant’s neck condition was unchanged. He continued to recommend surgery and stated claimant should remain off work pending surgical intervention. On June 16, 2014, Dr. Ghanayem noted claimant was “financially at his wits end” and needed to return to work to avoid losing his house. He stated he would allow claimant to return to work at a light-duty status “just to see if he can tolerate it just to prevent losing his house.”

¶ 21 Claimant testified that, after obtaining a light-duty release from Dr. Ghanayem, he contacted the employer’s human resource department through e-mail to inquire about returning to work. Ultimately, he received a telephone call from Kent Carver, a general manager for the employer. According to claimant, Carver declined claimant’s request to return to work and stated the employer “needed [claimant] back with 100[%]. No restrictions back to work.”

¶ 22 On January 13, 2015, the arbitrator issued his decision in the matter, finding claimant sustained work-related injuries to both his lumbar and cervical spine. He awarded

claimant (1) 109-2/7 weeks' benefits from September 16, 2012, through July 21, 2013, and July 25, 2013, to October 23, 2014; (2) past medical expenses; and (3) prospective medical expenses in the form of the surgery Dr. Ghanayem recommended for claimant's cervical spine.

¶ 23 On February 3, 2016, the Commission issued its decision. It modified the arbitrator's decision by finding claimant's cervical spine condition of ill-being was not causally related to his work for the employer and "vacat[ing] the awards pertaining to [claimant's] cervical spine, including medical fees incurred treating [claimant's] cervical spine complaints as well as the order instructing [the employer] to pay for the surgery proposed by Dr. Ghanayem." The Commission otherwise affirmed and adopted the arbitrator's decision, including his award of 109-2/7 weeks' TTD benefits. Pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322, the Commission remanded the matter to the arbitrator for a determination of claimant's entitlement to further compensation, if any.

¶ 24 The employer sought judicial review of the Commission's decision with the circuit court of Cook County. On September 27, 2016, the court partially reversed the Commission's TTD award, finding claimant was temporarily totally disabled with respect to only his cervical spine—a non work-related condition of ill-being—from July 25, 2013, through October 23, 2014, and, therefore, an award of TTD benefits during that time frame was against the manifest weight of the evidence.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, claimant argues the circuit court erred in reversing, in part, the Commission's TTD award. He contends the Commission's finding that he was entitled to a total of 109-2/7 weeks' TTD benefits from September 16, 2012, to July 21, 2013, and July 25, 2013, to

October 23, 2014, was not against the manifest weight of the evidence.

¶ 28 “A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of h[is] injury will permit.” *Shafer v. Illinois Workers’ Compensation Comm’n*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. To establish an entitlement to TTD benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Id.* The test for determining a claimant’s entitlement to TTD benefits is whether he remains temporarily totally disabled as a result of a work-related injury and whether he is capable of returning to the work force. *Interstate Scaffolding, Inc. v. Illinois Workers’ Compensation Comm’n*, 236 Ill. 2d 132, 146, 923 N.E.2d 266, 274 (2010).

¶ 29 “An employee is totally disabled when he cannot perform any service except those for which no reasonably stable labor market exists.” *Archer Daniels Midland Co. v. Industrial Comm’n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 627 (1990). Once the claimant’s physical condition stabilizes, he is no longer eligible for TTD benefits and may, instead, be entitled to some form of permanent disability benefits. *Id.* “The factors to consider in deciding whether a claimant’s condition has stabilized include (1) a release to return to work; (2) the medical testimony about the claimant’s injury; and (3) the extent of the injury.” *Land & Lakes Co. v. Industrial Comm’n*, 359 Ill. App. 3d 582, 594, 834 N.E.2d 583, 594 (2005).

¶ 30 A claimant’s entitlement to TTD benefits presents a question of fact for the Commission and, on review, its decision will not be disturbed unless it is against the manifest weight of the evidence. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. “A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent.” *Sunny Hill of Will County v. Workers’ Compensation Comm’n*, 2014 IL App (3d)

130028WC, ¶ 22, 14 N.E.3d 16.

¶ 31 Here, there is no dispute that claimant sustained work-related injuries to his lumbar spine on September 15, 2012, and was entitled to benefits under the Act for that condition of ill-being. Although claimant asserted he sustained an injury to his cervical spine that was also causally related to his employment, the Commission disagreed, finding no causal connection existed and denying benefits associated with that condition. Claimant did not seek judicial review of the Commission's causal connection determination and that portion of its decision is final. Thus, claimant is only entitled to TTD benefits for the time period that he was temporarily and totally disabled as a result of his lumbar spine injury.

¶ 32 The Commission awarded claimant TTD benefits for two distinct time periods: (1) September 16, 2012, to July 21, 2013, and (2) July 25, 2013, to October 23, 2014. The first TTD time period—September 16, 2012, to July 21, 2013—is inarguably related to claimant's lumbar spine condition of ill-being. However, after reviewing the record, we agree with both the employer and the circuit court that the second TTD time period awarded by the Commission—July 25, 2013, to October 23, 2014—is related only to claimant's cervical condition of ill-being. Because no causal connection exists between claimant's employment and his cervical spine injury, he is not entitled to compensation under the Act for the period of TTD associated solely with that condition.

¶ 33 The record shows claimant was under work restrictions due to his lumbar spine injury from the time of his accident until July 2013, when that condition stabilized and claimant had the ability to return to work. Specifically, on July 18, 2013, Dr. Ghanayem determined claimant had reached MMI with respect to his lower back condition and released him to return to work with the restrictions outlined in claimant's FCE. Dr. Ghanayem deemed those restrictions

permanent and testified claimant needed no further formal medical treatment for his lower back. Claimant testified he began performing light-duty work for the employer on July 22, 2013. On July 25, 2013, claimant returned to Dr. Ghanayem with neck complaints and was taken “back off work.” On October 3, 2013, Dr. Bernstein, the employer’s examining doctor, agreed that claimant had reached MMI with respect to his low back injury and, as to that injury, was capable of working within the confines of the FCE restrictions. He also considered claimant’s lower back restrictions to be permanent.

¶ 34 Thus, the record reflects that, as of July 2013, claimant’s lower back condition had stabilized and he required permanent work restrictions. He was no longer temporarily totally disabled and was capable of returning to work, which he did for three days until he was taken back off work due to a non work-related cervical injury. Under these facts, an award of TTD benefits from July 25, 2013, to October 23, 2014, is not supported by the record.

¶ 35 On appeal, claimant argues he is entitled to the full amount of TTD awarded by the Commission because the evidence showed that, in June 2014, the employer refused to allow him to return to work with any restrictions. We disagree. As stated, claimant was only entitled to benefits under the Act for his work-related lumbar spine injury. With respect to that specific injury, the record shows claimant was no longer temporarily totally disabled after July 21, 2013. Rather, his lumbar spine condition had stabilized by that date and he was able to return to work. Although claimant might be entitled to some form of permanent disability compensation with respect to his lumbar spine, his eligibility for TTD compensation ended on July 21, 2013.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the circuit court’s judgment and remand the matter to the Commission pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322.

¶ 38 Affirmed and remanded.