

2013 IL App (3d) 121007WC-U
No. 3-12-1007WC
Order filed December 17, 2013

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

ASG STAFFING, INC.,)	Appeal from the Circuit Court
)	of Will County.
Appellant,)	
)	
v.)	No. 11-MR-959
)	
THE ILLINOIS WORKERS')	
COMPENSATION COMMISSION, et al.,)	Honorable
)	Barbara Petrunaro,
(Marlene Rodriguez, 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:* (1) Claimant's choice of treatment did not exceed the two-physician choice limitation where one chain of medical care was a referral by respondent and another chain was for a *bona fide* emergency; and (2) Commission's finding that claimant was entitled to 32-4/7 weeks of temporary total disability benefits is against the manifest weight of the evidence as the evidence failed to establish that claimant was unable to work during part of the period for which TTD benefits were awarded.

¶ 2 Respondent, ASG Staffing, Inc., appeals the judgment of the circuit court of Will County, which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding claimant, Marlene Rodriguez, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)). On appeal, respondent argues that the Commission erred in awarding claimant certain medical expenses because claimant exceeded the two-physician choice limitation set forth in section 8(a) of the Act (820 ILCS 305/8(a) (West 2008)). Respondent also contends that the Commission erred in awarding claimant temporary total disability (TTD) benefits (see 820 ILCS 305/8(b) (West 2008)) because she failed to establish that she was unable to work during the periods for which such benefits were awarded. We affirm in part, reverse in part, and remand this cause for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On August 7, 2009, claimant filed an application for adjustment of claim alleging an injury to her back while working for respondent. The following evidence was presented at the arbitration hearing held on May 17, 2010, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)).

¶ 5 Claimant testified that she sustained an injury at work on July 21, 2009, her second day of employment as a temporary worker for respondent. Claimant stated that she was lifting a monitor when she “felt something pop in [her] back.” At the time of the accident, claimant was 18 years old and had not had any previous back problems. Claimant testified that she reported the accident to “Steve,” one of her supervisors. Steve told claimant to “report [the injury] to the staffing,” so claimant “went over to the staffing and * * * reported it to Andrias.” According to claimant, Andrias instructed her to go to Premier Occupational Health (Premier) for treatment.

¶ 6 Claimant presented to Premier on July 21, 2009, the date of the injury, with her primary complaint being low back pain. Claimant was diagnosed with a sprain in the lumbar region related to work activities. Claimant was given an analgesic balm and ibuprofen and authorized to return to regular duty work. A “Work Comp Follow-up Visit” was scheduled for July 23, 2009. Claimant testified that she did not return to work and that she did not remember the doctors at Premier authorizing her to do so.

¶ 7 On July 23, 2009, claimant visited Premier as scheduled. At that time, she described continued complaints of low back pain, but denied any numbness, tingling, or weakness of the lower extremities. Claimant reported that she had stayed home and been inactive since her last visit at Premier. Claimant was instructed on proper lifting technique and home exercises and told to continue using the analgesic balm and ibuprofen. She was again cleared to return to regular duty and a follow-up visit was scheduled for July 28, 2009.

¶ 8 Meanwhile, on July 24, 2009, claimant began treatment at Grandview Health Partners. There, she received chiropractic care and physical therapy from several individuals, including Dr. Gerald Reed. On July 28, 2009, Dr. Reed placed claimant on modified duty with no lifting or carrying greater than 10 pounds, no pushing or pulling greater than 10 pounds, and no repetitive lifting. The off-work slip also provided that if work within these restrictions is not available, claimant “should be considered temporarily totally disabled.” In response to questioning from her attorney, claimant agreed that she “wrote” to respondent and “put down the date of July 21, 2009,” but was “never asked to come back to work [for respondent].”

¶ 9 Dr. Reed subsequently ordered an MRI of the lumbar spine, which was taken on July 30, 2009. The MRI revealed a subligamentous posterior disc herniation with an extruded nucleus

pulposus at L5-S1. Dr. Reed referred claimant to Dr. Xavier Pareja, a pain-management specialist.

¶ 10 Claimant missed the appointment scheduled with Premier for July 28, 2009, but presented to the facility on August 4, 2009. At that time, claimant reported no improvement in her condition. Claimant was again authorized to return to regular duty and instructed to continue with the conservative treatment previously prescribed. Although a follow-up visit with Premier was scheduled, claimant did not seek additional treatment at the facility.

¶ 11 Claimant consulted with Dr. Pareja on August 10, 2009. Dr. Pareja conducted a physical examination and reviewed claimant's MRI. He diagnosed low back pain secondary to a work injury and noted that claimant had a herniated disc. Dr. Pareja recommended a series of epidural injections. In the interim, claimant continued to treat with Dr. Reed. At a follow-up appointment on August 14, 2009, claimant told Dr. Reed that since starting treatment she has experienced a 60% improvement in her back pain. At that time, Dr. Reed authorized claimant off of work for a period of four weeks. On August 19, 2009, claimant began employment with a company called OHL. Claimant testified that her job responsibilities with OHL involved printing out labels and did not require any lifting.

¶ 12 On September 16, 2009, Dr. Pareja administered the first epidural injection. On October 23, 2009, while at work for OHL, claimant complained of leg pain. Claimant was transported by ambulance from OHL to Adventist Bolingbrook Hospital (Adventist). Adventist's notes reflect a complaint of "sharp" right leg pain which began about one month earlier following an injection for back pain. The pain was noted to be "worse today after bending at work." Claimant was diagnosed with acute chronic leg pain. She was given crutches and instructed to rest, apply ice,

and follow up with her family doctor. Claimant agreed that the doctors at Adventist did not take her off work.

¶ 13 On October 26, 2009, claimant returned to Dr. Pareja's office. Claimant reported experiencing right leg pain after the epidural steroid injection on September 16, 2009. Claimant stated that the pain had increased since that time, but that she had not returned to Dr. Pareja's office earlier because of transportation difficulties. Dr. Pareja opined that the radiculopathy is secondary to claimant's herniated disc and is "a continuation of the problem that she had when she initially saw me." Dr. Pareja issued an off-work slip for the period from October 26, 2009, through November 26, 2009, and referred claimant to Dr. Bruce Montella, a spine surgeon.

¶ 14 Claimant's initial consultation with Dr. Montella was on October 29, 2009. According to Dr. Montella's notes, claimant described pain, tingling, and weakness bilaterally at the upper back, arm, wrist, buttocks, calf, and foot. Dr. Montella conducted a physical examination and diagnosed a lumbar disc herniation. Dr. Montella recommended conservative treatment, including a course of physical therapy and chiropractic care, and took claimant off work for two months. He advised claimant to return in four to six weeks for a follow up. Claimant testified that she ceased working for OHL on October 29, 2009.

¶ 15 Claimant returned to Dr. Pareja's office on November 10, 2009. At that time, claimant continued to report low back pain with radiation to the right leg, but related that the pain is less severe than it had been before Dr. Pareja administered the epidural injection. Noting that claimant would be following up with Dr. Montella, Dr. Pareja released her from his care. At a follow-up appointment with Dr. Reed on December 1, 2009, claimant reported an improvement of 80% in her back pain since her initial examination. She also told Dr. Reed that her radicular

symptoms are much less frequent and less severe and that the pain only radiates to the back of the knee.

¶ 16 Claimant saw Dr. Montella again on December 15, 2009. Noting that claimant experienced some improvement following the injection administered by Dr. Pareja, Dr. Montella recommended a series of three epidural steroid injections. Dr. Montella stated that if claimant's condition does not improve after the series of injections, he would consider operative intervention. Dr. Montella authorized claimant off work until her next evaluation, and she was instructed to follow up in four weeks.

¶ 17 Claimant never returned to Dr. Montella's office. Instead, early in 2010, she consulted Dr. Ronald Michael at the request of her attorney. After conducting a physical examination and reviewing the MRI taken in July 2009, Dr. Michael diagnosed a disc herniation at L5-S1. In a progress note dated February 15, 2010, Dr. Michael wrote that claimant "may learn to live with her pain and accept it; or alternatively, she may consider other options. She wishes to proceed with conservative measures." Dr. Michael recommended a series of three lumbar epidural steroid injections. Claimant underwent the injections between March 2010 and May 2010. She testified that she was scheduled to see Dr. Michael for a follow up the same day as the arbitration hearing.

¶ 18 At respondent's request, claimant saw Dr. Avi Bernstein for an independent medical evaluation on May 3, 2010. See 820 ILCS 305/12 (West 2008). Claimant provided Dr. Bernstein with a history of the injury. She related that she continues to experience back pain, but denied any radicular symptoms. Upon physical examination, Dr. Bernstein noted complaints of mild tenderness to palpation in the very low midline of the lumbar spine. Dr. Bernstein noted normal strength, sensation, and reflexes in claimant's lower extremities. Straight-leg raising was

negative. Dr. Bernstein reviewed the July 2009 MRI, noting degenerative changes at L5-S1 and a focal central disc herniation. Dr. Bernstein concluded that claimant “may have suffered” a lumbar sprain or discogenic injury as a result of a work-related accident on July 21, 2009. However, he opined that claimant’s complaints are exaggerated. Dr. Bernstein concluded that no further treatment is necessary, that claimant is at maximum medical improvement, and that she is capable of returning to full-time, full-duty work without restrictions.

¶ 19 Based on the foregoing evidence, the arbitrator determined that claimant sustained an accidental injury on July 21, 2009, arising out of and in the course of her employment with respondent and that her current condition of ill-being is causally related to her industrial accident. The arbitrator awarded claimant reasonable and necessary medical expenses in the amount of \$14,005.63. See 820 ILCS 305/8(a), 8.2 (West 2008). In addition, the arbitrator determined that claimant was unable to work from the date of injury through the date of the arbitration hearing with the exception of the period from August 19, 2009, through October 29, 2009, when she was able to work for OHL “in a capacity that did not involve any lifting.” As such, the arbitrator awarded claimant 32-4/7 weeks of TTD benefits. See 820 ILCS 305/8(b) (West 2008).

¶ 20 A majority of the Commission affirmed and adopted the decision of the arbitrator and remanded the cause for further proceedings pursuant to *Thomas v. Industrial Comm’n*, 78 Ill. 2d 327 (1980). Commissioner Lamborn dissented. He concluded that the record is void of any testimony that claimant presented any off-work slips to respondent. Thus, he would have held that claimant failed to sustain her burden of proof regarding an award of TTD. On judicial review, the circuit court of Will County confirmed the decision of the Commission. This appeal followed.

¶ 21

II. ANALYSIS

¶ 22 On appeal, respondent raises two distinct issues. First, respondent claims that claimant failed to sustain her burden of proof regarding the issue of medical expenses because she exceeded the two-physician choice limitation set forth in the Act. See 820 ILCS 305/8(a) (West 2008). Second, respondent argues that claimant failed to sustain her burden of establishing that she was unable to work during the periods for which she was awarded TTD benefits. See 820 ILCS 305/8(b) (West 2008). We address each contention in turn.

¶ 23

A. Two-Physician Choice Limitation

¶ 24 Respondent first argues that the Commission erred in awarding claimant certain medical expenses because claimant exceeded the limit of permissible medical providers. See 820 ILCS 305/8(a) (West 2008). An employer's liability to pay for medical services selected by the employee is governed by section 8(a) of the Act (820 ILCS 305/8(a) (West 2008)). That provision states in relevant part:

“[T]he employer's liability to pay for * * * medical services selected by the employee shall be limited to:

- (1) all first aid and emergency treatment; plus
- (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent service provider of medical services in the chain of referrals from said initial service provider; plus
- (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other

physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider.”

820 ILCS 305/8(a) (West 2008).

Thus, pursuant to the plain language of section 8(a) of the Act, an employer is liable to pay for two chains of medical services selected by the employee. However, doctors chosen by the employer as well as first aid and emergency treatment do not count as an employee’s physician choice.

¶ 25 According to respondent, claimant pursued four separate choices of treatment as a result of the back injury she sustained on July 21, 2009: (1) Premier; (2) the chain of referrals consisting of Dr. Reed, Dr. Pareja, and Dr. Montella; (3) Adventist; and (4) Dr. Michael. Thus, respondent argues, treatment rendered by Adventist and Dr. Michael are outside the allowable two chains of referral. While we agree that claimant treated with all of the foregoing providers, we do not agree that claimant exceeded the two-physician-limitation rule set forth in section 8(a) of the Act.

¶ 26 Respondent asserts that Premier constituted claimant’s first choice of physician. We disagree. Claimant testified at the arbitration hearing that after she injured her back, she notified one of her supervisors. The supervisor told claimant to “report [the injury] to the staffing.” In response, claimant “went over to the staffing and * * * reported [the injury] to Andrias.” Andrias instructed claimant to seek treatment at Premier. Thus, the record clearly shows that claimant did not elect on her own to treat at Premier. Rather, she was sent to Premier by Andrias. Andrias’ role with respondent is not clear from the record. However, based on claimant’s testimony, a reasonable inference is that he was a representative of respondent.

Respondent presented no evidence to the contrary. Since the two-physician choice limitation rule does not apply to medical treatment chosen by the employer, we find that Premier does not constitute one of claimant's physician choices.

¶ 27 Relying on *Wolfe v. Industrial Comm'n*, 138 Ill. App. 3d 680, 688-89 (1985), respondent also contends that claimant's visit to the Adventist emergency room on October 23, 2009, constituted a physician choice. At issue in *Wolfe* was whether the employee's visit to the emergency room constituted his second choice of medical service provider under section 8(a)(3) of the Act or emergency treatment under section 8(a)(1) of the Act. *Wolfe*, 138 Ill. App. 3d at 688-89. We held that the employee's visit to the emergency room constituted a physician choice under section 8(a)(3) because (1) the employee misrepresented that his physician was unavailable to treat him at the time he presented to the emergency room and (2) the employee did not present to the emergency room for a *bona fide* emergency. *Wolfe*, 138 Ill. App. 3d at 688-89. In the present case, claimant made no representation regarding the availability of her physician. Indeed, there is no evidence that claimant even had the opportunity to contact her physician before seeking treatment at Adventist. Claimant was transported by ambulance to the emergency room after she reported an increase in right leg pain after bending at work for her then employer, OHL. *Cf. Wolfe*, 138 Ill. App. 3d at 684-85, 688-89 (rejecting the employee's contention that his doctor was unavailable where the employee left the emergency room voluntarily after becoming dissatisfied with the treatment he was receiving and appeared at his doctor's office 10 minutes after leaving the emergency room).

¶ 28 Moreover, Adventist's records establish that claimant's visit to the emergency room on October 23, 2009, constituted a *bona fide* medical emergency. At that time claimant presented to the emergency room, she was experiencing severe pain that limited her mobility. According to

the emergency room notes, claimant described experiencing “sharp” pain in her right leg after bending over at work. Claimant rated the pain at level nine on a ten-point scale and was given Vicodin. Claimant was diagnosed with acute chronic leg pain, told to rest and use ice, and given crutches to walk. Given this record, we find that claimant’s visit to the emergency room constituted emergency treatment under section 8(a)(1) of the Act (820 ILCS 305/8(a)(1) (West 2008)) and therefore does not count as one of claimant’s physician choices. *Cf. Wolfe*, 138 Ill. App. 3d at 685, 688-89 (concluding that the claimant’s visit to the emergency room did not constitute a *bona fide* emergency where the claimant’s complaints consisted of numbness in the right arm and stiffness in the right knee).

¶ 29 In light of our findings above, claimant did not exceed the two-physician choice limitation set forth in section 8(a) of the Act (820 ILCS 305/8(a) (West 2008)). Claimant’s treatment with Premier did not constitute claimant’s choice of physician as she was referred to that facility by respondent. Therefore, the line of treatment consisting of Dr. Reed, Dr. Pareja, and Dr. Montella constituted claimant’s first physician choice. Claimant’s treatment at Adventist on October 23, 2009, constituted a *bona fide* medical emergency for purposes of section 8(a)(1) of the Act (820 ILCS 305/8(a)(1) (West 2008)) and therefore did not count against claimant’s two physician choices. As such, claimant’s treatment with Dr. Michael constituted her second physician choice. Accordingly, the treatment rendered by Premier, Dr. Reed, Dr. Pareja, Dr. Montella, Adventist, and Dr. Michael were all within the allowable chain of referrals and the Commission did not err in finding respondent liable for medical expenses billed by these providers.

¶ 30

B. TTD Benefits

¶ 31 Respondent also challenges the Commission's award of TTD benefits. An employee is temporarily totally disabled from the time an injury incapacitates him until such time as he is as far recovered as the permanent character of the injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). An employee seeking TTD benefits must prove not only that he or she did not work, but that he or she is unable to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832 (2002). The period during which an employee is temporarily totally disabled is a question of fact for the Commission, and its determination will not be set aside on review unless contrary to the manifest weight of the evidence. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118-19. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009).

¶ 32 In this case, the Commission awarded claimant 32-4/7 weeks of TTD benefits, consisting two distinct periods of time, from July 21, 2009 (the date of the injury), through August 19, 2009 (the date claimant began working at OHL), and from October 29, 2009 (the date Dr. Montella took claimant off work), through May 17, 2010 (the date of the arbitration hearing). According to respondent, the record fails to support an award of TTD benefits prior to October 29, 2009, or after January 11, 2010, because claimant failed to establish that she was unable to work during those time periods. We agree with respondent in part.

¶ 33 The record shows that after seeking treatment at Premier on July 21, 2009, and July 23, 2009, claimant was authorized to return to regular duty. Nevertheless, claimant admitted that she did not attempt to return to work. In fact, it was not until July 28, 2009, when claimant treated with Dr. Reed, that she was placed on modified duty. At that time, Dr. Reed also noted that if work within the restrictions he prescribed were not available, claimant would be unable to work.

On August 14, 2009, Dr. Reed took claimant off work completely for a period of four weeks. At the arbitration hearing, claimant agreed that she “specifically wrote [respondent]” and “put down the date of July 21, 2009,” but that she was “never asked to come back to work for [respondent].” The Commission found this evidence sufficient to establish TTD from July 21, 2009, through August 19, 2009. We disagree. There is no evidence that claimant was unable to work prior to August 14, 2009, when Dr. Reed took claimant off work. Although claimant’s testimony suggests that she notified respondent about the July 21, 2009, accident, we find no evidence of record that claimant was unable to work prior to that time. Moreover, there is no evidence that claimant informed respondent of the work restrictions prescribed by Dr. Reed on July 28, 2009, so that it could accommodate them. As such, the Commission’s award of TTD expenses for the period from July 21, 2009, through August 13, 2009, is against the manifest weight of the evidence. The Commission’s award of TTD expenses from August 14, 2009, through August 19, 2009, however, was proper.

¶ 34 We also find that the Commission did not err in awarding claimant TTD benefits from October 29, 2009, through the date of the arbitration hearing. The record establishes that on August 19, 2009, claimant began employment with OHL. She continued to work for OHL until October 29, 2009, when Dr. Montella took claimant off work for two months. On December 15, 2009, Dr. Montella recommended a series of three epidural steroid injections, authorized claimant off work until her next evaluation, and instructed her to follow up in four weeks. Claimant did not seek additional treatment from Dr. Montella. Nevertheless, the Commission could have reasonably concluded that claimant remained unable to work thereafter. Claimant continued to experience chronic pain. Early in 2010, claimant consulted Dr. Michael for a second opinion. He ultimately prescribed a series of epidural steroid injections, the same course

of treatment recommended by Dr. Montella. Although Dr. Michael did not offer an opinion regarding claimant's work capacity, he did not administer the last injection until May 6, 2010, and, according to claimant's testimony, she continued to treat with him and had an appointment on May 17, 2010, the date of the arbitration hearing. Given this record, the Commission could have reasonably concluded that claimant's condition had not yet reached a state of permanency by the time of the arbitration hearing. We will not reject a reasonable inference of the Commission merely because we might have drawn a contrary inference on the particular facts. *Archer Daniels Midland Co.*, 138 Ill. 2d at 119. As such, we conclude that the Commission's award of TTD benefits from October 29, 2009, through May 17, 2010, is not against the manifest weight of the evidence.

¶ 35

III. CONCLUSION

¶ 36 For the reasons set forth above, we reverse the Commission's award of TTD benefits from the period from July 21, 2009, through August 13, 2009. We affirm the remainder of the Commission's decision. Accordingly, the judgment of the circuit court of Will County is affirmed in part and reversed in part. This cause is remanded to the Commission for the entry of an order consistent with this disposition and for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327.

¶ 37 Affirmed in part, reversed in part, and remanded.