2013 IL App (1st) 120889WC-U

Workers' Compensation
Commission Division
Filed: November 12, 2013

No. 1-12-0889WC

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

MARGARET RONAN,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County, Illinois
	)	
v.	)	
	)	No. 11 L 050893
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	
(The Village of Winnetka,	)	Honorable
	)	Daniel Gillespie,
Appellee).	)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Neither the Commission's decision to vacate the arbitrator's award of maintenance benefits nor its decision to vacate the arbitrator's wage differential award and substitute an award for permanent partial disability is against the manifest weight of the evidence.

¶ 2 The claimant, Margaret Ronan, appeals from an order of the Circuir Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission),

awarding her permanent partial disability (PPD) benefits under section 8(e) of the Workers' Compensation Act (Act) (820 ILCS 305/8(e) (West 2008)) for a 45% loss of use of her left foot and $12,175.13 for medical expenses all sustained as a result of an injury she suffered working for the Village of Winnetka (Village). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following facts are taken from the evidence presented at the arbitration hearing conducted on August 19, 2010.

¶ 4 At the time of her injury, the claimant was 47 years of age and was working for the Village as a utilities meter reader. On January 17, 2005, during the course of her employment, the claimant was walking in the employee garage when she missed a step and twisted her left ankle. The claimant suffered immediate, ongoing pain and swelling in the ankle. The following week she was seen in the employee clinic where she was x-rayed and diagnosed with a left ankle sprain. The claimant was given a compression cast and hose and was instructed by the clinic physician to limit prolonged walking and uneven surfaces and to return to work in a week. She returned to the clinic the following week but her condition had not improved. She was given exercises and advised to continue with her restricted activity and to report back in another week.

¶ 5 On February 14, 2005, the claimant returned to the clinic noting that her ankle was better but that she had re-injured it while shopping on vacation. The claimant observed that when the re-injury occurred she had performed no unusual motion with the ankle and that it would not have been painful had the ankle not already been injured. The clinic physician advised her to increase walking with an ankle sleeve, work on range of motion exercises, and return in ten days. When the claimant

returned to the clinic, she said that her ankle was doing better but that she still had some tightness in her left calf and also some exacerbation of her plantar fasciitis, a condition which existed prior to the accident. The clinic physician released her from restrictions, gave her exercises and told her to return in a month. At this point the claimant resumed full duties as a meter reader.

¶ 6 On April 4, 2005, the claimant returned to the clinic with some continuing discomfort. The clinic physician noted that her ankle appeared completely normal but referred her for a second opinion to Dr. Steven Haddad, an orthopedist.

¶ 7 About 7 days before the claimant saw Dr. Haddad, she began experiencing left medial calf pain. After examining the claimant, Dr. Haddad recommended physical therapy and an MRI scan, which was performed on April 25. The MRI revealed a stress fracture of the left calcaneus and distal tibia/posterior malleolus. Haddad casted her and removed her from all weight-bearing activities for six weeks. The claimant was off of work and received temporary total disability (TTD) benefits from May 9, 2005, through July 31, 2005.

¶ 8 On June 13, 2005, Dr. Haddad reported that the claimant's stress fracture had healed. He removed her cast and referred her for physical therapy and a CT scan. The scan was done on June 19 and thereafter the claimant was ordered to resume full weight-bearing in a CAM boot. However, on July 25, 2005, she returned to Dr. Haddad indicating that her pain had changed from posterior to anterolateral. Dr. Haddad switched her from the CAM boot into a McDavid brace and gave her more physical therapy. The claimant was released to a light duty desk job which the Village was able to provide.

¶ 9 The claimant next saw Dr. Haddad on August 22, 2005, stating that she was improving, had

no problem doing light duty, and wanted to attempt to return to full duties. Dr. Haddad concurred and released her to full duty in gradually progressing time increments.

¶ 10 On September 21, 2005, the claimant reported that she had begun experiencing shooting pains in the past few days after she "stepped downwards" and "somewhat twisted her ankle." On October 26, 2005, the claimant again returned to Dr. Haddad who put her on light duty and recommended another MRI.

¶ 11 An MRI was performed on October 27, 2005, and revealed a redemonstration of the post-traumatic defect in the posterior malleolus at the tibiotalar joint space. Dr. Haddad informed the claimant that she was suffering from an osteochondral defect, or osteochondritis dissecans, of the distal tibia at the ankle joint. This condition was beyond the scope of his practice so Dr. Haddad referred her to Dr. James Grober at Evanston Northwestern Healthcare for conservative pain management and Dr. Rick Ferkel in Los Angeles for a second opinion. He also recommended several orthopedic surgeons in the Chicago area.

¶ 12 On December 16, 2005, the claimant underwent a Section 12 exam (820 ILCS 305/12 (West 2008)) performed by Dr. Armen Kelikian at Northwestern Orthopedic Institute. Dr Kelikian reported status post-fracture of the posterior malleolus, ankle, secondary to OCL lesion, distal tibia on the left. He found that this was all concomitant from the original injury and from the stress fracture of the calcaneus, which was resolved. He stated that these were "consistent" and that her prior treatment had been appropriate. Dr. Kelikian recommended that the claimant perform only a sedentary job but that an FCE be performed if there were a question regarding her work ability.

¶ 13 On January 26, 2006, the claimant saw Dr. James Grober at Evanston Northwestern

Healthcare who recommended aquatic exercise.

¶ 14 On March 2, 2006, the claimant underwent another Section 12 examination, this time with foot specialist Dr. George Holmes. His diagnosis was post-tramatic cystic lesion of the distal tibia status post a previous posterior malleolar fracture. He stated that the history of her injury and subsequent treatment were consistent with the development of this particular lesion. He also felt that further treatment was needed in the form of a autogenous bone graft with an internal bone growth stimulator.

¶ 15 On April 1, 2006, the claimant stopped work entirely and the Village resumed TTD payments.

¶ 16 The claimant flew to Los Angeles to see Dr. Ferkel whose assessment was left ankle pain due to the osteochondral lesion in the posterior distal tibia and also plantar fasciitis. He felt that there were several options, including living with the condition or surgery.

¶ 17 On June 29, 2006, the claimant returned to see Dr. Holmes who reviewed the recommendations of Dr. Ferkel and indicated that he agreed with the surgical option. On August 11, 2006, a pre-operative MRI was performed. On review of the MRI, Dr. Holmes noted improvement of the nonunion over the claimant's prior scans. He also noted an improvement of the claimant's symptoms. He elected to proceed with conservative treatment including EBI bone stimulation and continued use of the brace. However, by November 16, 2006, Dr. Holmes again recommend surgery.

¶ 18 On February 2, 2007, Dr. Holmes operated on the claimant. The surgery consisted of excision, drilling and bone grafting of the tibial lesion, and insertion of the internal bone growth

stimulator.

¶ 19 The claimant's post-operative course was fairly uneventful, and in mid-March Dr. Holmes removed the cast and put the claimant back in a CAM walker boot. He referred her to the Northshore Pain Center (Northshore) for pain management and she began treatment there on March 28, 2007.

¶ 20 During her visit to Northshore on May 3, 2007, in addition to left ankle pain, the claimant complained of right hip pain which she attributed to the many months she had been in the CAM boot. The claimant proceeded to undergo 10 treatment sessions with Village Chiropractic between May 2007 and February 2008.

¶ 21 In August 2007, in order to alleviate the claimant's hip pain, Dr. Holmes recommended that she switch to an AFO for immobilization rather than the CAM boot. On October 23, 2007, Dr. Holmes proceeded surgically remove the battery for the bone stimulator from the claimant's left ankle.

¶ 22 On November 15, 2007, Dr. Holmes released the claimant from his care. He noted that she was "structurally intact" with no real risk of further fractures or dislocations or arthritis. He also believed that her pain should improve over time. Dr. Holmes gave the opinion that the claimant could return to work within restrictions determined by a functional capacity evaluation (FCE).

¶ 23 On December 13, 2007, the claimant underwent an FCE at AthletiCo. The summary report noted that during the examination the claimant did not exert an entirely full effort and that, while her complaints of pain were reasonable, she was capable of more than she currently stated or perceived. With regard to the claimant's pre-injury job, the report determined that she safely performed at a

"light" physical demand level which did meet the light physical demand requirements for her job as a meter reader. Despite this determination, however, the report recommended that the claimant work a more sedentary to light physical job because she lacked the "physical strength or endurance to be safe or successful" in her pre-injury job.

¶ 24 On December 20, 2007, Dr. Holmes reviewed the FCE report and determined that the claimant was at maximum medical improvement and could return to light duty work as limited by the FCE restrictions.

¶ 25 Also in December 2007, Dr. Holmes referred the claimant to Dr. Trish Palmer at Midwest Orthopedics at Rush for help for her hip pain. She did not see Dr. Palmer until the following May but in the interim underwent two more Section 12 exams, one with Dr. Richard Noren on February 28, 2008, and one with Dr. Mark Levin on March 18, 2008. Dr. Noren believed that the prior treatment had been appropriate and that the claimant could function in a light sedentary job. In rendering his opinion, Dr. Noren noted "limitations based on her subjective complaints of prolonged standing." Dr. Levin believed that the claimant could resume work with no restrictions related to her hip.

¶ 26 On May 23, 2008, the claimant saw Dr. Palmer who diagnosed her hip pain as originating from biomechanical difficulties. She administered a cortisone injection and referred the claimant for physical therapy. The claimant last saw Dr. Palmer on January 23, 2009, at which time she had undergone two novacaine injections. Dr. Palmer gave her another hip injection and prescribed a Flector patch. The claimant continued regular pain management care at NorthShore.

¶ 27 The Village initiated videotaped surveillance (videotape) of the claimant for the periods of

July 10 and 11, 2009, and September 18 and 19, 2009. The videotape contained prolonged periods of the claimant standing, walking, climbing and descending a short staircase, performing chores indoors and out, playing with her dog and riding her bicycle to the beach all while wearing flat sandals with no brace or other support. The videotape purported to show that the claimant could perform these functions unaided and with no appreciable sign of pain or disability.

¶ 28 On September 29, 2009, the claimant submitted to another Section 12 exam by Dr. Levin. After an extensive review of the claimant's medical records and the videotape, Dr. Levin reached the conclusion that the claimant was at maximum medical improvement and should be capable of functional work activities. Dr. Levin further found that her subjective claims were out of proportion to the objective results and that she should be capable of performing at least a sedentary to light physical demand level. The Village subsequently terminated the claimant's TTD benefits on November 13, 2009. On January 20, 2010, the claimant saw a doctor of her own choosing, Dr. Howard Freedberg, for an evaluation. Dr. Freedberg reviewed her medical history including her FCE and the videotape, and stated that he "did not see that she could function in a way that would be deemed contrary" to the FCE.

¶ 29 On March 29, 2010, the Village ordered a second FCE. The claimant displayed improvement from her initial FCE, performing at a medium physical demand level. As the claimant's prior job was classified in the light physical demand level, the evaluator recommended that she could return to her prior position as a meter reader.

¶ 30 A third FCE was performed at the claimant's request on May 13, 2010, at Flexcon. The test revealed that the claimant was capable of performing at a medium physical strength level, which

exceeded the light physical demand level of her prior job. However, they found that it would be unlikely she could safely perform her prior job because of the limitations of her left ankle; specifically, she demonstrated limited walking tolerance, limited tolerance to prolonged standing without taking a break and subjective pain.

¶ 31 The claimant testified that the Village had attempted vocational rehabilitation that lasted six to eight months and resulted in hundreds of contacts with prospective employers. The claimant got two phone interviews and no job offers, leading the Village to abandon the effort.

¶ 32 At the Village's request the claimant also interviewed with Ed Steffen of E.P.S. Rehabilitation, Inc. to do a vocational evaluation and rehabilitation plan. Mr. Steffen concluded that the claimant was not currently placeable in full-time gainful employment and that she needed further assistance from a certified rehabilitation counselor. Mr. Steffen believed that if the claimant were able to secure employment, she probably would be able to earn $8 to $10 per hour.

¶ 33 On October 22, 2010, following an arbitration hearing, the arbitrator awarded the claimant maintenance benefits for 39 6/7 weeks, TTD benefits for 201 weeks, and PPD wage differential benefits in the amount of $482.23 per week for the duration of the disability under Section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2008)). The arbitrator further ordered the Village to pay the claimant medical expenses in the amount of $13,185.61.

¶ 34 The Village filed a petition for review of the arbitrator's decision before the Commission. On July 25, 2011, the Commission affirmed and adopted the decision of the arbitrator subject to the following modifications: the Commission vacated the 39 6/7 weeks of maintenance benefits and wage differential award, but ordered the Village to pay the claimant the PPD benefits for a period

of 69.75 weeks under section 8(e) of the Act, representing a 45% loss of use of her left foot. Finally, the Commission reduced the award of medical expenses from $13,185.61 to $12,175.13.

¶ 35 The claimant subsequently filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. The Circuit Court confirmed the Commission's decision on March 1, 2012, and this appeal followed.

¶ 36 The claimant first argues that the Commission's decision to vacate the arbitrator's award of maintenance benefits after November 14, 2009, was contrary to the manifest weight of the evidence. She asserts that the Commission based its decision on inflammatory videotaped evidence and the opinion of only one physician out of others who had treated and examined her.

¶ 37 On review, we do not disturb a factual determination of the Commission unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987). A decision is against the manifest weight of the evidence only if a contrary decision is clearly apparent from the record. *Orsini*, 117 Ill.2d at 44; *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill App. 3d 288, 291, 591 N.E. 2d 894 (1992). Where there is controverted evidence in the record as to issues of credibility, we do not substitute our judgment for that of the Commission unless no reasonable person could have reached the conclusion reached by the Commission. *Dolce v. Industrial Comm'n*, 286 Ill App. 3d 117, 120, 675 N.E.2d 175 (1996).

¶ 38 The claimant initially argues that the Village failed to produce a witness to authenticate the videotape and testify to its accurate portrayal. We find this argument to be waived (see *Christman v. Industrial Comm'n*, 180 Ill App. 3d 876, 882, 536 N.E. 2d 773 (1989) (party who fails to raise an argument before the Commission waives it for appeal)), and also without merit. There is no

indication in the record that the claimant ever sought to exclude or question the authenticity of the videotape at any stage of the proceedings below. In fact, the claimant expressly admits that, with the exception of a brief sequence depicting her housekeeper, she was the person performing each of the activities portrayed in the two hour videotape.

¶ 39 The claimant's reliance on *Paoletti v. Industrial Comm'n*, 279 Ill App. 3d 998, 665 N.E. 2d 507 (1996) is misplaced, as that case involved the Commission's refusal to allow a claimant to present evidence in rebuttal to a videotape. Here, there is no indication that the claimant ever sought an opportunity to rebut the tape, and in fact, she expressly disavows any assertion of such claim in her brief.

¶ 40 The claimant next argues that the tape was inflammatory because it was "obviously edited containing stops and starts." She contends that the Commission should instead have relied upon her testimony in the arbitration hearing, that she was on extremely heavy pain medication during the videotaping and that she took frequent rests during the intervals of time not caught on the videotape. We disagree.

¶ 41 It is well established that a videotape is admissible as demonstrative evidence as long as it helps prove or disprove matters in controversy, *Carney v. Smith*, 240 Ill. App. 3d 650, 656, 608 N.E.2d379 (1992), and its probative value is not substantially outweighed by the danger of unfair prejudice. *Carroll v. Preston Trucking Co, Inc*., 349 Ill. App. 3d 562, 812 N.E.2d 431 (2004). The weight to be ascribed videotape evidence, as well as any conflicts in the evidence, are matters to be resolved by the Commission. See *Carney*, 240 Ill. App. 3d at 656-57.

¶ 42 At the arbitration hearing, the claimant testified that she suffered debilitating ankle pain that

precluded her from working outside or walking for extensive periods of time. Further, two of the claimant's physicians and her recent FCEs all noted, as a basis for their conclusions, her subjective complaints and her limited tolerance of prolonged standing or walking. The videotape, however, depicts lengthy periods of the claimant standing, walking, shopping, performing chores indoors and out, driving, running errands, and playing with her dog, all while wearing only flat sandals, unaided by any boot or brace. In each of these instances, some of them filmed at very close range, the claimant displays no visible evidence of discomfort or uneven gait, and appears to be walking normally. In one prolonged sequence, the claimant is observed as she retrieves a large beach umbrella, loads it onto a bicycle, places a beach chair on her back and balances the load while riding six blocks to the beach. She dismounts her bicycle easily and is seen walking in her sandals on the sand and near the water with no appreciable sign of pain or discomfort. In another scene, she has descended a steep roadside embankment in sandals and is walking at a quick pace with no real evidence of discomfort. While the tape does stop and resume at certain points, we do not find this unreasonable when the camera operator was covertly attempting to film an individual moving from place to place, at times going out of view. Accordingly, we find no error in the Commission's reliance on the videotape. See *Mathias v. Baltimore & Ohio R.R. Co.*, 93 Ill. App. 2d 258, 236 N.E.2d 331 (1968); *McGoorty v. Benhart*, 305 Ill. App. 458, 27 N.E.2d 289 (1940).

¶ 43 The claimant next argues that the Commission erred in relying on the testimony of Dr. Levin and the findings of the most recent FCE obtained by the Village on March 29, 2010. She maintains that the findings of her own doctor, Dr. Freedberg, and the FCE she procured on January 20, 2010, were more reliable. Again, we find that this was a question of fact that was resolved by the

Commission.

¶ 44 It is the function of the Commission to resolve conflicting medical evidence. *Docksteiner v. Industrial Comm'n*, 346 Ill App. 3d 851, 856, 806 N.E. 2d 230 (2004). In formulating his opinion regarding the claimant's capacity to return to work, Dr. Levin relied on a detailed analysis of her medical records indicating that her sprained ankle had healed that her fractures were largely resolved. He also relied upon the videotape and her only FCE at that point, taken December 13, 2007, both of which indicated she was performing at or above the demand level required by her pre-injury job. Dr. Levin found that this evidence called the claimant's subjective reports of pain into question, and we agree. Thus, there was no error in the Commission's decision to vacate the award of maintenance after November 14, 2009.

¶ 45 Finally, the claimant asserts that the Commission erred in vacating the arbitrator's award of wage differential benefits and instead granting her a PPD award representing the loss of 45% of her left foot. See 820 ILCS 305/8(e)(11) (West 2008). The claimant contends again that the Commission erroneously relied on the testimony of Dr. Levin, the videotape, and her recent FCE in determining that she was fit to return to her pre-injury job. We disagree.

¶ 46 The Act provides for two types of PPD compensation. Gallianetti v. Industrial Commission, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482 (2000). Section 8(d)(1) involves a wage differential award while section 8(e) involves a percentage of the loss of use of a body part. 820 ILCS 305/8(d), 8(e) (West 2006); Gallianetti, 315 Ill. App. 3d at 727. Section 8(d)(1) of the Act provides an award for wage differential benefits if an accidental injury renders a worker partially incapacitated from pursuing his usual and customary line of employment and results in the worker's loss of earning

capacity. Durfee v. Industrial Comm'n, 195 Ill. App. 3d 886, 890, 553 N.E.2d 8 (1990). The Commission's findings as to the nature and extent of a disability will be given deference by this court unless they are contrary to the manifest weight of the evidence. Freeman United Coal Mining Co v. Industrial Comm'n, 283 Ill App. 3d 785, 793, 670 N.E. 2d 1122 (1996). Further, where, as in this case, the evidence supports reasonable inferences in support of either an award for permanent partial loss or permanent partial disability, the Commission's determination will be upheld unless it is contrary to the manifest weight of the evidence. Peavy Company Flour Mills v. Industrial Comm'n, 64 Ill.2d 252, 257, 356 N.E. 2d 36 (1976). As indicated above, the medical evidence in this case, including the findings of Dr. Holmes, the videotape, and the three FCE's in the record, provide ample support for the determination of the Commission that the claimant was fit to return to her pre-injury position. Therefore, the claimant failed to demonstrate that her injury incapacitated from pursuing her usual and customary line of employment. Accordingly, the Commission's award of PPD under section 8(e) rather than an award of wage differential benefits under section 8(d)(1) is not against the manifest weight of the evidence.

¶ 47 For these reasons, we affirm the judgment of the circuit court, which confirmed the decision of the Commission.

¶ 48 Affirmed.