

No. 1-12-1324WC

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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

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ZEPEDA CONSTRUCTION SERVICES,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	
	)	No. 10 L 51669
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, et al.,	)	
(Daniel Britzke,	)	Honorable
	)	Margaret Ann Brennan,
Appellee).	)	Judge Presiding.

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

**ORDER**

¶ 1 Held: The Illinois Workers' Compensation Commission's denial of the employer's petition brought under sections 8(f) and 19(h) of the Workers' Compensation Act and its award of attorney fees to the claimant under section 16 is not against the manifest weight of the evidence.

¶ 2 Zepeda Construction Services (Zepeda) appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) denying the petitions it brought under sections 8(f) and 19(h) of the Workers' Compensation Act (Act) (820 ILCS 305/8(f), 19(h)(West 2008)) in which it sought to modify an

No. 1-12-1324WC

award for permanent and total disability (PTD) that the Commission had previously granted to the claimant, Danial Britzke. Zepeda also appeals from the circuit court's order confirming the Commission's award of attorney fees to the claimant pursuant to section 16 of the Act (820 ILCS 305/16 (West 2008)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual summary is taken from the evidence adduced at the hearing held before the Commission on January 21, 2009, as well as from the record of proceedings on the claimant's original petition for adjustment of claim on June 16, 2004.

¶ 4 The claimant was employed by Zepeda as a commercial truck driver and equipment operator. In that capacity, he drove commercial trucks and operated heavy equipment. On July 17, 2000, while attempting to unload a trailer filled with construction debris, the claimant propped the trailer's tailgate open with a crowbar, causing a large piece of construction debris weighing over 1,000 pounds to come loose. The construction debris started rolling out of the trailer, causing the tailgate to swing open and strike the claimant in his right arm and face. Subsequently, the debris fell out of the trailer and struck the claimant's left leg, causing him to fall to the ground.

¶ 5 As a result of the accident, the claimant was diagnosed with acute compartment syndrome. The claimant underwent a bilateral fasciotomy in the left leg, followed by additional extensive surgery, including a popliteal to posterior tibial and peroneal artery bypass with interposition of the saphenous vein, reimplantation of the anterior tibial artery, resection and repair of the popliteal vein, arteriogram, debridement and repair of some muscle in the thigh and calf. The claimant was further required to undergo physical therapy, psychological treatment, and additional treatment for his back, teeth and head pain.

¶ 6 Following a June 16, 2004, arbitration hearing, the arbitrator found that the claimant sustained physical and psychological injuries arising out of and in the course of his employment with Zepeda. The arbitrator concluded that the claimant is permanently incapable of work based

No. 1-12-1324WC

on his multiple physical injuries and his prevailing post-traumatic stress disorder (PTSD). In concluding that the claimant's physical condition rendered him permanently disabled, the arbitrator relied primarily on the opinion of Dr. Michael Treister, the claimant's orthopedic surgeon. Dr. Treister opined that the claimant was unable to walk long distances, his knee was unstable, and he had a vascular claudication. Thus, Dr. Treister concluded that the claimant was totally disabled based upon the injury to his left leg alone. As to the claimant's psychological condition, the arbitrator relied on the report of Dr. Jeanne Trifone, the claimant's psychologist. Dr. Trifone, who had over 80 individual psychotherapy sessions with the claimant, opined that the claimant's PTSD rendered him unable to work for the foreseeable future.

¶ 7 Based on the claimant's multiple injuries, the arbitrator awarded the claimant temporary total disability (TTD) benefits from July 18, 2000 through September 4, 2003. The arbitrator further concluded that the claimant's injuries rendered him permanently incapable of work and, therefore, awarded the claimant permanent PTD benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq.(West 2002)) for life beginning on September 5, 2003. The arbitrator also ordered Zepeda to pay medical expenses pursuant to the claimant's section 8(a) petition, as well as penalties and attorney's fees pursuant to sections 19(k), 19(l) and 16 of the Act (820 ILCS 305/19(k), 19(l), 16 (West 2002)) .

¶ 8 On August 26, 2005, after the arbitrator's ruling, but before the Commission reviewed the case, the claimant was examined by Dr. Robert Hanlon, a neuropsychologist, at the request of Zepeda. Following the examination, Dr. Hanlon reported that the claimant revealed a "strong tendency for symptom exaggeration." Thus, Dr. Hanlon opined that, although the claimant may have symptoms of depression and PTSD, "his tendency to exaggerate symptoms during the current evaluation and the resultant invalidation of the tests that were administered to him, makes the objective determination of such symptoms impossible."

¶ 9 On September 27, 2005, the claimant was examined by Dr. Julie Wehner, an orthopaedic

surgeon, also at the request of Zepeda. In her report, Dr. Wehner opined that the claimant reached maximum medical improvement (MMI) as to his knee injury as of April 16, 2001, and that the claimant was presently capable of returning to work at a light-medium level. Dr. Wehner further opined that the claimant's back condition was pre-existing and not related to the injury. Finally, Dr. Wehner stated that the claimant's complaints of headaches, dizziness, and photophobia, as well as his dental problems, were not related to the injury, as there is no evidence that the claimant lost consciousness or injured his jaw during his workplace accident.

¶ 10 On September 30, 2005, the claimant filled out an application to renew his commercial drivers license (CDL) in the state of Virginia. The claimant's original application was submitted in September 2001. In signing and submitting this application, the claimant certified that he was "physically qualified to drive a commercial motor vehicle," pursuant to 49 C.F.R. section 391.11(b)(4) (West 2005). See also 49 C.F.R. § 391.41 - 391.49 (stating qualifications).

¶ 11 Zepeda filed a petition for review of the arbitrator's June 16, 2004, decision before the Commission. On January 22, 2006, in a unanimous decision, the Commission affirmed and adopted the arbitrator's decision. Thereafter, Zepeda filed a petition for judicial review of the Commission's decision in the Circuit Court of Cook County. October 31, 2006, the circuit court confirmed the Commission's decision, and neither party appealed that decision.

¶ 12 On December 29, 2006, Zepeda filed a petition under sections 8(f) and 19(h) to suspend the claimant's PTD benefits, alleging that the claimant was capable of working. In support, Zepeda cited to Dr. Hanlon and Dr. Wehner's reports, both of which stated that the claimant was capable of returning to work in a light-medium category. Zepeda later supplemented its petition to include evidence that the claimant had received a speeding ticket approximately one month prior to the arbitration hearing and that the claimant re-applied for his CDL license. Zepeda argued that this evidence demonstrated that the claimant thought he was physically and psychologically capable of working as a commercial truck driver. Thus, Zepeda argued, it was

No. 1-12-1324WC

"obvious" that the claimant was not permanently totally disabled.

¶ 13 In May 2007, the claimant underwent additional examinations with his treating physicians, Dr. Treister and Dr. Trifone. Dr. Treister opined that the claimant's left knee was at least as bad as in 2003 and that this condition alone was enough for him to make a determination of permanent disability. Dr. Treister further found objective evidence that the claimant's knee was worsening such that an arthroscopic inspection of the joint may be required in the near future. As to the claimant's back condition, Dr. Treister concluded that there appeared to be a progressive deterioration of the lumbar spine.

¶ 14 Dr. Trifone reported that after treating the claimant for approximately seven years, it was her opinion that the claimant still required psychotherapy. She further stated that during their appointments, the claimant's presentation consistently indicated the appropriate response to difficulties related to reduced mobility, loss of employability, and unexplained causes for ongoing dizziness and headaches. Dr. Trifone also reported that the outpatient therapy the claimant receives assists the claimant in managing the stressors placed on him.

¶ 15 On June 21, 2007, the claimant was examined by his primary care physician, Dr. Vidya Kora. Dr. Kora reported that the claimant had significant leg pain, limitations on his mobility, difficulty sitting for a prolonged period of time and difficulty lifting heavy objects. Dr. Kora therefore opined that the claimant was permanently disabled.

¶ 16 On January 22, 2008, the claimant filed a response to Zepeda's supplemented petition, arguing that Zepeda failed to meet its burden of presenting medical evidence demonstrating that the claimant's physical condition changed or improved such that he is presently capable of working. To the contrary, the claimant argued, the medical reports of Dr. Treister, Dr. Trifone, and Dr. Kola, all of whom the Commission previously relied on, demonstrated that the claimant's condition had not improved and that he remained totally disabled. The claimant further moved for attorney's fees pursuant to section 16 of the Act, alleging that Zepeda's petitions were

No. 1-12-1324WC

frivolous and without merit.

¶ 17 On May 24, 2008, the claimant was examined by Dr. Kevin Walsh, an orthopedic physician, at the direction of Zepeda. In his report, Dr. Walsh opined that the claimant reached MMI with regard to his left knee and no additional medical or orthopaedic intervention was required. Dr. Walsh further concluded that the claimant was capable of returning to light-medium, or medium work activities. Dr. Walsh explicitly disagreed with Dr. Treister's report and stated that an arthroscopic inspection of the patient's knee will not become mandatory. Zepeda amended its petition to include Dr. Walsh's findings. Dr. Walsh's report did not address the claimant's psychological condition of ill-being; it stated only that the claimant was capable of working based on his physical condition.

¶ 18 On January 21, 2009, a hearing was held before Commissioner Kevin Lamborn regarding Zepeda's section 8(f) and 19(h) petitions, and the claimant's sections 8(a) and 16 petitions. In support of its position, Zepeda submitted the reports of Dr. Wehner, Dr. Hanlon, and Dr. Walsh. Zepeda also submitted a surveillance video showing the claimant driving short distances; the claimant's speeding ticket from 2004; and a labor market survey report dated November 24, 2008, showing the wages applicable for commercial over-the-road truck drivers.

¶ 19 At the hearing, the claimant testified that he continues to receive treatment from Dr. Kora, his primary care physician; Dr. Gupta, his psychiatrist; and Dr. Trifone, his neuropsychologist. The claimant stated that none of these doctors had released him to work in any capacity. He further testified that his back, knee, and hip conditions had worsened since the Commission's last finding, and that he continued to experience dizziness, pain, swelling, increased weakness, locking, and numbness in his knee and back. As to his psychological condition, the claimant testified that he continues to have problems with PTSD, a limited attention span, and his emotions. He stated that he currently takes Mobic, Tramadol, Vicodin, Klonipin, Concerta, and Lamictal, which were all prescribed by a physician.

¶ 20 The claimant further conceded that he reapplied for his Virginia CDL in September 2005; however, he stated that he was not aware that in so doing, he was certifying that he was physically and psychologically capable of operating a truck. Moreover, the claimant testified to his understanding that, notwithstanding approval of his CDL application, he would still have to pass a department of transportation (DOT) physical, which he testified he probably could not pass based on his condition.

¶ 21 Additionally, at the hearing, Dr. Treister testified consistent with his May 2007 examination report. He stated that he observed approximately one inch of atrophy in the claimant's proximal left thigh, and over one-half inch of atrophy in the mid-portion of the left thigh. He also observed approximately one inch of swelling around the claimant's knee. Dr. Treister stated the claimant's anterior cruciate ligament was totally incompetent, and that there was a moderate amount of grinding or crepitus throughout the claimant's knee indicating articular cartilage degeneration inside the joint. As to the claimant's back pain, Dr. Treister testified that there were no changes in the claimant's condition from his previous examination prior to the 2004 hearing and, if anything, both his knee and back worsened.

¶ 22 Dr. Trifone also testified consistent with her May 2007 medical examination report. Dr. Trifone stated that she meets with the claimant twice a month to monitor how he manages his PTSD symptoms. Dr. Trifone testified that despite years of treatment, the claimant is sometimes unable to utilize his learned coping mechanisms in stressful situations, thereby requiring a therapy session with Dr. Trifone. Dr. Trifone further opined that the claimant was not capable of consistent employment because of the unpredictable nature of his PTSD symptoms and the risk of regression.

¶ 23 The Commission denied Zepeda's petitions under section 8(f) and 19(h) on October 10, 2010. In so ruling, the Commission concluded that Dr. Wehner's opinion was unpersuasive because it contradicted specific findings of ill-being previously found compensable by the

Commission, and confirmed by the circuit court. Instead, the Commission relied on Dr. Treister's testimony and report, both demonstrating that the claimant's condition was at least as bad as when he examined the claimant in 2003. The Commission further found that Dr. Hanlon failed to make an objective determination of the claimant's symptoms and therefore, relied primarily on Dr. Trifone's findings that the claimant's employability from a psychological standpoint had not changed. The Commission also concluded that the evidence indicating that the claimant was in possession of a current CDL did not demonstrate that he is physically capable of operating a motor vehicle.

¶ 24 The Commission granted the claimant's petitions under sections 8(a) and 16. With respect to the claimant's petition for 8(a) medical expenses, the Commission found that Zepeda was required to compensate both Dr. Kora and Dr. Trifone for the claimant's office visits. As to the claimant's petition for attorney fees under section 16, the Commission concluded that it was reasonable to require the claimant to undergo independent examinations with Dr. Wehner and Dr. Hanlon. However, the Commission found that as of October 29, 2007, Zepeda began carrying on proceedings that did not present a real controversy or were frivolous. Accordingly, the Commission awarded the claimant \$1,220.00 in medical expenses pursuant to section 8(a) of the Act, and \$9,449.26 in attorney costs and fees pursuant to section 16 of the Act.

¶ 25 Zepeda filed a petition for judicial review of the Commission's decisions as to its petitions under sections 19(h) and 8(f) of the Act, and the award of section 16(a) attorney fees in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 26 Zepeda first argues that the Commission's denial of its petitions pursuant to section 8(f) and 19(h) are against the manifest weight of the evidence because the claimant's lack of credibility undermined his assertion of continued entitlement to PTD benefits. Under section 8(f) of the Act, PTD benefits may be terminated or reduced if a claimant has returned to work or is



No. 1-12-1324WC

able to do so. 820 ILCS § 305/8(f) (West 2008); *King v. Industrial Comm'n*, 189 Ill. 2d 167, 172, 724 N.E.2d 896 (2000). Similarly, pursuant to section 19(h) of the Act, employers are granted the right to have certain compensation awards reviewed within 30 months of the Commission's decision. 820 ILCS § 305/19(h) (West 2008); *King*, 189 Ill. 2d at 172-73, 724 N.E.2d 896. Under both section 8(f) and section 19(h), the employer bears the burden of demonstrating a change in the claimant's employability since the Commission's decision. *King*, 189 Ill. 2d at 175, 724 N.E.2d 896 ("[A] section 8(f) modification is obtainable where the employer proves that the claimant is able to return to work and able to earn. A change to a claimant's physical disability is relevant to these determinations."); *Howard v. Industrial Comm'n*, 89 Ill. 2d 428, 429-30, 433 N.E.2d 657 (1982) ("The purpose of a proceeding under section 19(h) is to determine whether a claimant's disability has changed since the time of the original decision by the Industrial Commission."). Whether there has been a change in a petitioner's disability is an issue of fact, and the Commission's determination will not be disturbed on review unless it is contrary to the manifest weight of the evidence. *Sammon v. Indus. Comm'n*, 123 Ill. App. 3d 182, 184, 462 N.E.2d 788 (1st Dist. 1984). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E. 2d 894 (1992).

¶ 27 Zepeda argues that in applying for his Virginia CDL, the claimant certified that he did not have a mental or physical condition preventing him from driving a commercial motor vehicle safely. Zepeda further argues that the claimant's 2004 traffic ticket demonstrates that the claimant is capable of driving, at least locally. Finally, the claimant failed to disclose his CDL application approval to any of his treating physicians, which Zepeda argues, "significantly undercuts their 'ability-to-work' opinions." Zepeda asserts that this evidence demonstrates that the claimant is not credible, and is actually able to return to work.

¶ 28 However, "it was the function of the Commission to decide the credibility of witnesses,

No. 1-12-1324WC

determine the weight to be given to their testimony, and resolve conflicting medical evidence." *Tower Auto. v. Illinois Workers' Comp. Comm'n*, 407 Ill. App. 3d 427, 435-36, 943 N.E.2d 153 (2011) (citing *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E. 2d 221 (1980)). The Commission in this case concluded that this evidence did not demonstrate the claimant's physical ability to work operating a commercial motorized vehicle. The Commission likewise found the video surveillance unpersuasive. As we must defer to the Commission's findings pertaining to the credibility of the evidence, we conclude that the Commission's finding is not against the manifest weight of the evidence.

¶ 29 Zepeda next argues that the medical evidence demonstrates that the claimant is not permanently and totally disabled, and therefore, the Commission's decision was against the manifest weight of the evidence. In support, Zepeda points to the reports of Dr. Wehner, Dr. Hanlon, and Dr. Walsh, all of whom opined that the claimant was employable in some fashion. Additionally, Zepeda argues that the opinions of the claimant's treating physicians should be given less weight because the claimant did not inform them that he possessed a valid CDL. Further, Zepeda argues, incorrectly, that section 8(f) of the Act does not require that it present medical evidence exhibiting how the claimant's physical condition has changed or improved, such that he is now working or able to work. See *King*, 189 Ill. 2d at 175, 724 N.E.2d 896.

¶ 30 However, we again conclude that the Commission's decision of October 10, 2010, is not against the manifest weight of the evidence. The Commission's findings in 2006 relied on both the claimant's physical and his psychological conditions of ill-being as independently rendering him permanently and totally disabled. At that time, the Commission relied on the opinion of Dr. Treister, who opined that the claimant's left leg alone rendered him permanently disabled. The Commission further relied on the report of Dr. Trifone, who opined that the claimant's psychological condition disabled him from all work. Thus, in order to succeed on a section 8(f) or 19(h) petition, Zepeda bore the burden of demonstrating the claimant's physical and

psychological condition had changed, such that the claimant is capable of working.

¶ 31 Put simply, Zepeda failed to meet its burden in that it did not present any credible evidence that the claimant's psychological condition had improved. Instead, in support of its petition, Zepeda presented Dr. Hanlon's 2005 report, in which Dr. Hanlon opined that the claimant's tendency to exaggerate symptoms during his evaluation resulted in an invalidation of the tests administered to him. The Commission found that Dr. Hanlon failed to make an objective determination of the claimant's symptoms, other than indicating that the claimant continues to experience mild symptoms of depression and PTSD. The Commission therefore relied on the 2007 report of Dr. Trifone, stating that the claimant's PTSD continued to restrict his ability to work. As the reviewing court, we defer to the Commission's reliance on Dr. Trifone's report. Although Zepeda justifiably argues that it did present evidence addressing the claimant's ability to work from a physical standpoint, it presented nothing addressing his psychological condition. As Zepeda failed to present any credible evidence contradicting Dr. Trifone's opinion that the claimant was totally and permanently disabled based on his psychological condition of ill-being, we conclude that the Commission's decision to deny Zepeda's sections 8(f) and 19(h) petitions is not against the manifest weight of the evidence.

¶ 32 Zepeda next argues that the Commission erred in awarding attorney fees and costs to the claimant. Section 16 of the Act authorizes the Commission to award attorney fees where the employer has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy. 820 ILCS 305/16 (West 2008); McMahan v. Industrial Comm'n, 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998). Generally, "[w]hen the employer acts in reliance upon reasonable medical opinions, or when there are conflicting medical opinions, penalties ordinarily are not imposed." USF Holland, Inc. v. Industrial Comm'n, 357 Ill. App. 3d 798, 805, 829 N.E.2d 810 (2005). "Whether the employer's conduct justifies the imposition of penalties is to be considered

No. 1-12-1324WC

in terms of reasonableness and is a factual question for the Commission." *McKay Plating Co. v. Industrial Comm'n*, 91 Ill.2d 198, 209, 437 N.E.2d 617 (1982).

¶ 33 Here, the Commission awarded the claimant attorney fees and costs, finding that as of the second deposition of Dr. Treister, on October 29, 2007, forward, Zepeda began carrying on proceedings that did not present a real controversy or were frivolous. Zepeda argues the Commission erred because it reasonably relied on the medical opinions of Dr. Wehner, Dr. Hanlon, and Dr. Walsh, as well as the credibility problems Zepeda asserts arose by the claimant's renewal of his Virginia CDL. However, as discussed above, Zepeda failed to present any evidence contradicting Dr. Trifone's opinion that the claimant was permanently and totally disabled because of his psychological condition of ill-being. Notwithstanding whatever evidence Zepeda may have had relating to the claimant's physical ability to work, the fact remains that it presented nothing addressing the claimant's psychological condition and, as a consequence its petitions did not present a real controversy, and were frivolous. We conclude, therefore, that the Commission's decision to award section 16 attorney fees and costs was not against the manifest weight of the evidence.

¶ 34 Based upon the foregoing analysis, we affirm the judgment of the circuit court, which confirmed the decision of the Commission denying Zepeda's section 8(f) and 19(h) petitions and awarding the claimant section 16 attorney fees and costs.

¶ 35 Affirmed.