

**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).

2013 IL App (1st) 122852WC-U

Order filed: December 23, 2013

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MINAS ARMIRAS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois
Appellant,	)	
	)	
v.	)	Appeal No. 1-12-2852WC
	)	Circuit No. 11-L-51428
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION <i>et al.</i> (Palmer House Hilton,	)	Margaret Ann Brennan,
Appellee).	)	Judge, Presiding.

---

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Hoffman, Harris, Stewart, and Hudson concurred in the judgment

---

**ORDER**

¶ 1 *Held:* Judgment of the circuit court is vacated, decision of the Commission vacated, and the cause is remanded to the Commission for further proceedings where the Commission determined the matter on an issue not raised by either party. The cause is remanded so the Commission may address the arguments raised by the claimant.

¶ 2 The claimant, Minas Armiras, a 55-year-old food server, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.*

(West 2004)) seeking benefits for an injury to his neck, right shoulder, and right arm on August 11, 2005. On that date, while employed by Palmer House Hilton (employer), the claimant noticed a sharp pain in his neck and right shoulder when he lifted a heavy tray of food. He was subsequently diagnosed with disc herniation and nerve root compression. There was no dispute that the claimant's current condition of ill-being arose out of and in the course of his employment.

¶ 3 Following a hearing on September 29, 2010, the arbitrator found the claimant to be permanently and totally disabled as a result of his employment related injuries, and awarded lifetime permanent total disability (PTD) benefits of \$884.55 per week beginning September 29, 2010, pursuant to section 8(f) of the Act. 820 ILCS 305/8(f) (West 2004). The arbitrator found that the medical evidence presented by the claimant established that he was permanently and totally disabled as a result of his work-related injuries. The arbitrator also awarded temporary total disability (TTD) benefits for 267 weeks from August 12, 2005, through August 29, 2010, and reasonable medical expenses of \$17,732.89.

¶ 4 The employer appealed to the Illinois Workers' Compensation Commission (the Commission) which affirmed and adopted the arbitrator's finding that the claimant's current condition of ill-being was causally related to his employment. The Commission, however, vacated the PTD award and instead awarded the claimant a permanent partial disability (PPD) benefit equal to 50% loss of the person as a whole pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2004). In reaching its finding, the Commission found that the claimant had failed to establish entitlement to a PTD award under an "odd-lot" theory. The Commission found that the claimant had reached maximum medical improvement (MMI) on March 30, 2009. It therefore found that the claimant was entitled to temporary total disability (TTD) benefits up to

that date and modified the arbitrator's award of TTD benefits accordingly. The Commission affirmed and adopted the arbitrator's award of medical expenses.

¶ 5 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision. This appeal followed.

¶ 6 ISSUES

¶ 7 The claimant raises the following issues on appeal: (1) whether the medical evidence established that the claimant was entitled to PTD benefits pursuant to section 8(f) of the Act; (2) whether the Commission erred in treating his PTD claim under an "odd-lot" theory where the claimant did not pursue an odd-lot theory; and (3) whether the Commission erred in finding that the claimant reached maximum medical improvement on March 30, 2009. Because we agree with the claimant's argument that the Commission erroneously considered his claim under an "odd-lot" theory, we reverse the Commission's decision and remand the matter back to the Commission so that it may properly consider the issues and arguments raised by the parties.

¶ 8 FACTS

¶ 9 The claimant was working as a dining room server on August 11, 2005. He testified that as he was lifting a heavy tray of food to take to the dining room, he felt a sharp pain in the right upper portion of his neck which traveled down into his right shoulder and arm. He also noted numbness in his right thumb and index finger. The claimant testified that he continued working to complete his shift, but noticed that the pain and numbness increased as he continued working. At some point during his shift, he notified his supervisor.

¶ 10 On August 13, 2005, the claimant sought treatment in the emergency department of Thorek Hospital. He reported pain in his right neck and shoulder with accompanying numbness

in right thumb and index finger. The claimant was examined by Dr. Thomas Bahk, an emergency care physician, who diagnosed peripheral numbness in his right forearm, index finger and thumb with associated pain in his neck area. Dr. Bahk ordered the claimant off work, prescribed physical therapy, and advised the claimant to seek further treatment.

¶ 11 On September 7, 2005, the claimant was evaluated by physical therapist Jagen Mohan, who reported the claimant as having functional limitations due to an apparent inability to perform work related duties due to his pain. Thereafter, the claimant attended physical therapy from September 7, 2005, until September 14, 2005. The claimant completed the prescribed course of physical therapy at Thorek Hospital.

¶ 12 On September 16, 2005, the claimant underwent a physical evaluation performed by Dr. Raad Yaldo. The claimant told Dr. Yaldo that approximately a month ago he was lifting a tray that had food on it and it weighed approximately 50 pounds when he noted pain around his right upper cervical region as well as his right trapezius region. The claimant also stated that he did not pay much attention to it, but noted that there was increased severity of pain and numbness in his right index finger and thumb. Diagnostic tests ordered by Dr. Yaldo revealed a herniated disc with localized nerve pinching. The claimant also reported that he had not noted any relief in his symptoms during physical therapy, and that actually his thumb and his index finger seemed to be worse. He also reported shooting pain down his right upper extremity when he turned his neck. He denied any previous injuries to the area. Dr. Yaldo diagnosed cervical radiculopathy, and opined that the cause of the claimant's reported symptoms was consistent with frequent lifting and carrying moderately weighted food trays. Dr. Yaldo's prescribed treatment was for the claimant to repeat a course of physical therapy and therapeutic exercise. Dr. Yaldo also ordered

the claimant to remain off work. Dr. Yaldo referred the claimant to Dr. Angelo Lambos, a neurological specialist affiliated with the same practice group as Dr. Yaldo.

¶ 13 On September 19, 2005, the claimant was examined by Dr. Lambos, who ordered further diagnostic testing. Following those tests, on September 23, 2005, Dr. Lambos diagnosed cervical radiculopathy, placed the claimant under physical restrictions including no lifting, pushing or pulling more than two pounds, and no reaching above the shoulder. Dr. Lambos then referred the claimant for an orthopedic surgical consultation.

¶ 14 On September 30, 2005, the claimant was examined by Dr. Ronald Michael, a board certified orthopedic surgeon. Dr. Michael took a history from the claimant consistent with the claimant's previous description of his injuries. Dr. Michael reviewed MRI images and diagnosed central disc herniation at C4-C5, right disc herniation at C5-C6, broad disc herniation at C6-C7, and nerve root compression. Dr. Michael recommended a conservative treatment course, including a series of epidural injections.

¶ 15 On November 4, 2005, Dr. Michael noted that after two epidural injections the claimant reported a 30% reduction in pain and numbness. After a third injection approximately two weeks later, Dr. Michael noted that the claimant reported an 80% improvement. Dr. Michael did not release the claimant to return to work, opining that a return to work would likely precipitate an aggravation of the claimant's condition. He suggested that the claimant continue epidural injections, but told the claimant that eventually he would need surgical intervention.

¶ 16 On December 12, 2005, the claimant returned to Dr. Michael complaining of burning right scapula pain which was stabbing and reporting right axillary pain and cramping. The claimant also reported to Dr. Michael that these symptoms occurred approximately five to six

times per day, particularly when he attempted to pick up or lift small objects. The claimant reported continuing severe pain which precluded him from engaging in almost any activity. Dr. Michael advised the claimant to continue with conservative treatment. The claimant told Dr. Michael the he also wished to avoid surgery.

¶ 17 On December 23, 2005, the claimant had a series of injections after which he reported a 60% improvement. On January 20, 2006, however, Dr. Michael reported that the pain injections had only temporarily provided relief and the claimant's pain and numbness had returned to previous levels. Dr. Michael reported that he then discussed the possible need for surgery with the claimant. On February 3, 2006, Dr. Michael again discussed surgery with the claimant. The claimant was reluctant to undergo surgery at that time and asked if he could return to work.

¶ 18 After meeting with Dr. Michael, the claimant attempted to return to work. After five days, the claimant noted increased pain and numbness. On February 17, 2006, the claimant returned to Dr. Lambos for a follow-up examination. Dr. Lambos indicated in his notes that the claimant had attempted a return to work, but was unable to tolerate work due to pain and numbness. Dr. Lambos advised the claimant to consider surgery and return for another appointment in two weeks.

¶ 19 On March 3, 2006, the claimant returned to Dr. Lambos complaining of continued neck and right shoulder pain, along with pain in his right arm down to the biceps. His numbness and tingling, however, had improved. The claimant told Dr. Lambos that he was ready to proceed with surgery. Dr. Lambos then referred the claimant back to Dr. Michael for a surgical consultation.

¶ 20 On June 6, 2006, Dr. Michael performed an anterior cervical discectomy and fusion, along with surgery on the claimant's herniated nucleus pulposus at areas C4-C5, C5-C6 and C6-C7. After surgery, the claimant reported bilateral pain and stiffness. The claimant also reported that he was more than 50% improved and that all the numbness and tingling had completely resolved. The record shows that the claimant returned to see Dr. Michael several times for post-operative care and evaluations.

¶ 21 On August 17, 2006, the claimant was again evaluated by Dr. Michael. The claimant reported no new complaints of pain. Dr. Michael recommended that the claimant continue his current level of activity. However, on November 17, 2006, the claimant, after completing a month of physical therapy, reported right shoulder pain. Dr. Michael recommended an orthopedic referral to rule out a shoulder pathology.

¶ 22 On December 15, 2007, Dr. Michael reported that the claimant completed physical therapy for his neck and reported decreased pain. However, he also reported significant shoulder pain upon attempted abduction of the right upper extremity. Dr. Michael opined that the right shoulder symptoms were the result of the claimant's work-related injury. Dr. Michael further opined that the claimant was unable to return to any employment as long as the shoulder pain persisted.

¶ 23 On December 29, 2006, Dr. Michael reported that, in his medical opinion, the claimant was currently incapacitated due to the condition of his right shoulder. On January 17, 2007, Dr. Michael referred the claimant to Dr. James Cohen, an orthopedic surgeon, for an orthopedic evaluation of his right shoulder pain. After several visits and diagnostic studies of the claimant's right shoulder, Dr. Cohen opined that the claimant's pain and discomfort originated not in the

claimant's his right shoulder, but in his neck. Dr. Cohen released the claimant for limited light duty work.

¶ 24 On February 12, 2007, the claimant was examined at the request of the employer by Dr. Francisco J. Espinosa, a board certified orthopedic surgeon. Dr. Espinosa examined the claimant and reviewed his medical records and the x-rays and MRIs of his cervical region. Dr. Espinosa opined that the claimant's care and treatment, anterior cervical discectomy and fusion surgery that was performed on June 1, 2006, by Dr. Michael was medically necessary and the underlying cervical injury was related to the claimant's work related accident of August 11, 2005.

¶ 25 On June 1, 2007, Dr. Michael observed that the claimant reported no new complaints of pain or numbness. Diagnostic tests showed the claimant's post-operative condition was unchanged. Dr. Michael recommended that the claimant continue current levels of activity and reiterated the claimant's work restrictions. Dr. Michael opined that the claimant had reach maximum medical improvement (MMI), and that he was not able to perform any work at that time. Dr. Michael examined the claimant again on June 29, 2007, and his opinions and recommendations remained unchanged.

¶ 26 On March 21, 2008, Dr. Michael again examined the claimant, who continued to complain of right shoulder and arm pain. The claimant reported to Dr. Michael that he was unable to elevate his right arm. Dr. Michael noted that the claimant's range of motion was significantly decreased since his last examination. Dr. Michael continued to recommend that the Petitioner remain off work, and opined that the claimant was totally permanently disabled.

¶ 27 On August 21, 2008, the claimant was examined at the request of the employer by Dr. Marc J. Breslow, a board certified orthopedic surgeon associated with the Illinois Bone and Joint



Institute in Chicago. After performing an evaluation and physical examination of the claimant, as well as reviewing all relevant medical records, Dr. Breslow opined that the claimant did in fact injure his cervical spine and right shoulder on August 11, 2005, while working as a banquet waiter for the employer. Dr. Breslow agreed with Dr. Michael that the claimant required a additional surgery. In addition, Dr. Breslow opined that the claimant's neck symptoms improved significantly, but he was left with a great deal of stiffness in his cervical spine. Dr. Breslow also opined that, although the claimant's upper extremity symptoms had improved due to the cervical surgery, the claimant was left with persistent shoulder complaints that appeared to be overshadowed by the cervical problems. Additionally, Dr. Breslow noted that the pain intensified dramatically at a later date. Dr. Breslow further opined that the claimant's cervical problem was permanent, but the claimant's shoulder problem should be subjected to continued monitoring.

¶ 28 The claimant continued to treat with Dr. Michael. On February 16, 2009, he reported right shoulder abduction pain and neck pain. Dr. Michael opined that the claimant was unchanged neurologically and that the claimant should continue all his current restrictions. On March 23, 2009, the claimant again sought treatment from Dr. Michael, reporting right neck pain and right upper extremity pain with elevation. The claimant described his pain as an electrical and shock-like sensation with occasional headaches. Dr. Michael continued to opine that the claimant was totally and permanently disabled, and that he should continue with his current level of activity and restrictions.

¶ 29 On March 3, 2009, the claimant underwent a Functional Capacity Evaluation (FCE) which stated that: “[the claimant] is demonstrating full effort... He is employed as a Banquet

Server at Palmer House Hotel. Based on the job description, this is considered a MEDIUM Physical Demand Level position. The server must be capable of frequently lifting up to 30 pounds, and occasionally lifting up to 50 pounds. His demonstrated capabilities fall below this level." The evaluation reported that the claimant could function at the light to medium physical demand level, with frequent lifting of up to 28 pounds and occasional lifting of up to 34.6 pounds.

¶ 30 On March 30, 2009, the claimant was again examined by Dr. Michael when he reported continuing right neck pain and right shoulder pain, especially on elevation. During this examination Dr. Michael also reviewed the results of the FCE. Dr. Michael observed that the FCE demonstrated that the claimant could work at the light-to-medium physical demand level. However, Dr. Michael opined that this was below the claimant's current work demand level, which was the medium or higher level. Dr. Michael further opined that the claimant continued to be totally and permanently disabled and that he should maintain all of his current physical restrictions and would not be expected to improve.

¶ 31 Over the next few months, the claimant continued to treat with Dr. Michael. The record shows the claimant treated with Dr. Michael on September 11, 2009, November 23, 2009, January 11, 2010, February 22, 2010, April 5, 2010, May 17, 2020, July 12, 2010, and September 13, 2010. Following each appointment, Dr. Michael reiterated his opinion that the claimant was not suited for any employment and remained permanently and totally disabled.

¶ 32 The claimant testified that he was 60 years old, an native of Greece, with only a grade school education. He also testified that he had no other training in any other type of work other than as a laborer. He further testified that his only work experience had been as a laborer, and

that he possessed no other marketable job skills. He admitted, however, that he had made no attempt to obtain employment within the parameters indicated in the FCE at any time prior to the date of the hearing.

¶ 33 The arbitrator found that the claimant's current condition of ill-being was causally related to his work injury on August 11, 2005, and that, as a result of this accident, the claimant was totally and permanently disabled. The Arbitrator relied upon: (1) the medical opinion testimony of Dr. Michael, who repeatedly stated his opinion that the claimant was totally and permanently disabled due to his work-related injury to his right cervical (neck) area and right upper shoulder; (2) Dr. Breslow's opinion that the claimant's cervical work-related injury was "permanent" and thus claimant was unlikely to return to any work that involved heavy physical labor; (3) the March 3, 2009, FCE which stated that the claimant's current functional capacity was below the level required in his previous employment; and (4) the claimant's testimony that he was 60 years old, with only a grade school education, and had no other training in any other type of work other than as a laborer.

¶ 34 The employer appealed the arbitrator's decision to the Commission. The Commission vacated the arbitrator's permanency award, finding that the claimant had failed to establish that he was entitled to PTD benefits. The Commission noted that, contrary to the arbitrator's finding, the FCE stated that the claimant was capable work involving light to medium physical demands. The Commission also gave less weight to Dr. Michael's unsupported opinions that the claimant was incapable of performing any work. The Commission noted that Dr. Michael persisted in his opinion even after reviewing the FCE finding that the claimant was capable of light to medium work. Additionally, the Commission discounted the arbitrator's finding that, based on the

claimant's age, skills, education, and physical condition that no reasonably stable job market existed for the claimant. The Commission observed that a conclusion as to the availability of a reasonably stable job market would require the opinion of a rehabilitation services provider or a vocational counselor. See *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007).

In addition, the Commission noted that the claimant admitted that he had not attempted a job search for employment within the physical limitations outlined in the FCE. Based upon the evidence, the Commission found that the claimant had established only that he was permanently partially disabled to the extent of 50% of the person as a whole. The Commission also found that the claimant had reached MMI on March 30, 2009, the date that Dr. Michael reported his opinion that the claimant reached MMI. It therefore terminated TTD benefits and established that date as the effective date of the permanency award.

¶ 35 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which affirmed the Commission's decision. This appeal followed.

¶ 36 ANALYSIS

¶ 37 The claimant maintains that the clear preponderance of the medical evidence established he was permanently and totally disabled and that he was entitled to have his case evaluated by the Commission based upon the medical evidence. He argues that the Commission erred in analyzing his case under the so-called "odd-lot" theory. The claimant points out that there are three different and independent ways to establish permanent and total disability: (1) by a preponderance of the medical evidence; (2) by showing a diligent but unsuccessful job search; or (3) by demonstrating that, because of his age, training, education, experience, and condition, there are no jobs available for a person in his circumstances. *Federal Marine Terminals v.*

*Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 1117, 1129 (2007). The two alternatives to medical evidence are referred to as "odd-lot." *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1094 (2007). The claimant points out that he did not argue that he was entitled to PTD benefits under the odd-lot theory and that it was error for the Commission to rule on his claim under a theory he did not raise while at the same time failing to evaluate his claim under the medical evidence theory that he actually raised. We agree.

¶ 38 As the claimant correctly observes, there are three different theories under which a claimant may prove that he is permanently and totally disabled. The record is clear that the claimant sought to prove his entitlement to PTD benefits by a preponderance of medical evidence. The Commission did not determine whether the medical evidence presented by the claimant supported his claim. Rather, it chose to rule that the claimant had failed to establish that he was entitled to PTD benefits by the odd-lot theory, a theory the claimant never raised. The only issue before the Commission was whether the claimant had proven by a preponderance of the medical evidence that he was permanently and totally disabled. The Commission failed to rule on that issue. Accordingly, we vacate the decision of the trial court which confirmed the decision of the Commission, we vacate the Commission's decision in its entirety, and we remand the matter to the Commission for further proceedings consistent with this order. Upon remand, the Commission shall make appropriate findings of fact and conclusions of law necessary to determine whether the claimant proved he was permanently and totally disabled based upon the preponderance of the medical evidence.

¶ 39

#### CONCLUSION

¶ 40 For the foregoing reasons the judgment of the Cook County circuit court is vacated and the cause is remanded to the Commission for further action consistent with this order.

¶ 41 Vacated and remanded with directions.