2014 IL App (1st) 122893WC-U

Workers' Compensation
Commission Division
Order Filed: December 26, 2014

No. 1-12-2893WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WILLIAM ARCHER,	)	Appeal from the Circuit Court
	)	of Cook County.
	)	
Appellant,	)	
	)	
v.	)	No. 11-L-51492
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Margaret Brennan,
(River Oaks Ford, 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:* The judgment of the circuit court was affirmed where the Commission's decision, which denied the claimant's requests for vocational rehabilitation benefits, attorney fees and penalties and terminated his maintenance benefits on a specified date, was not against the manifest weight of the evidence.

¶ 2 The claimant, William Archer, appeals from the circuit court order which confirmed the decision of the Illinois Workers' Compensation Commission (Commission) denying his requests for vocational rehabilitation expenses, attorney fees and penalties and terminating his

maintenance benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), after he sustained a lumbar spine injury while in the employ of River Oaks Ford. For the reasons that follow, we affirm the judgment of the circuit court of Cook County and remand the cause to the Commission for further proceedings.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on March 10, 2011.

¶ 4 The claimant testified that, in 2006, he was employed by River Oaks Ford as a heavy line mechanic, earning approximately $94,000 per year. On December 28, 2006, he injured his back while working on a vehicle. Four days later, he returned to work and continued working his normal schedule and duties. On February 16, 2007, the claimant felt a sharp pain in his lower back while working on a vehicle. The next day, he sought treatment for his injury at Concentra Medical Center in Hammond, Indiana. Eventually, the claimant had an MRI exam of his lumbar spine which revealed multiple herniated discs.

¶ 5 The claimant testified that he returned to work at River Oaks Ford on June 8, 2007, and he continued working until December 27, 2008, when the pain in his back became too severe to continue his normal duties. He then sought treatment from Dr. John Song at Northwestern Memorial Hospital, who ordered additional exams and recommended that the claimant undergo surgery to repair the herniated discs. Dr. Song operated on the claimant in May 2008, and thereafter, the claimant saw Dr. David Walega for pain management treatment.

¶ 6 On December 16, 2009, Dr. Walega released the claimant to work with restrictions listed in his December 9th functional capacity exam (FCE). The FCE indicated that the claimant was able to perform at the medium-demand level with the following restrictions: no lifting while

bending, no contorting, and occasionally lifting 35 to 40 pounds but never more than 50 pounds. These restrictions prohibited the claimant from returning to his mechanic position at River Oaks Ford.

¶ 7 The claimant testified that, after the FCE, he realized that he needed to make a career change in order to replace the income he had been earning as a mechanic. He stated that he consulted a counselor at South Suburban College to discuss his work restrictions and desired income, and they agreed that a nursing career would be the best fit for him. The claimant began classes at South Suburban College in September 2010, and he testified that he wanted maintenance benefits until completion of his nursing degree, including the costs of his tuition and books. The claimant stated that he had a 4.0 grade point average and expected to be admitted into the two-year nursing program in spring of 2012. He testified that he graduated high school in 1984 with a 2.15 grade point average and that he earned a certificate in automotive technology in 1986 from Prairie State College. The claimant admitted that he had not pursued any other college courses besides the classes necessary for his automotive technology certificate.

¶ 8 At the request of River Oaks Ford, the claimant met with Richard Morison, a vocational rehabilitation counselor with Genex, on May 11, 2010. The claimant testified that Morison recommended that he return to the automotive industry as a service writer—the employee who records a customer's car complaints upon arriving at the dealership. The claimant stated that he had no interest in that position, because it was "not a career" and had the earning potential of only about $25,000 to $30,000 per year.

¶ 9 Morison's labor market report, dated July 5, 2010, states that, while the FCE indicated that the claimant could work at a medium-demand level, the limitation on lifting while bending was actually in line with the light-demand work level. Given the claimant's work restrictions and work history, Morison determined that appropriate vocational alternatives for the claimant included light or sedentary positions in the automotive industry, such as customer service representative, maintenance dispatcher, counter clerk, or garage supervisor. The average hourly wages for such positions ranged between $7.80 and $22.49. According to Morison, four Ford Service managers expressed an interest in meeting with the claimant about service writer positions that they had available; these positions paid an annual average salary of $36,875.

¶ 10 Regarding the claimant's nursing aspirations, Morison testified that he believed the claimant's work limitations prohibited him from performing nurses' duties. He stated that nursing required the ability to work at a medium-demand level and that new nurses earned an average salary of $40,000 to $50,000, which was not much more than the $35,000 to $40,000 average salary for service writers. Given the expense of a nursing degree and the claimant's work restrictions, Morison did not believe nursing was a reasonable career alternative.

¶ 11 The claimant testified that he received a letter from River Oaks Ford, dated July 6, 2010, informing him that it was suspending his TTD benefits on the basis of Morison's labor market survey report. However, he continued receiving benefits for some time after that date while his attorney disputed Morison's opinions.

¶ 12 At the request of his attorney, the claimant met with Susan Entenberg, a vocational rehabilitation counselor, on July 8, 2010. Entenberg testified that she reviewed the claimant's work restrictions and considered his desire to become a nurse. In her opinion, nursing was a

good career option for the claimant given its earning potential, his young age of 44, his pre-injury wage, his inability to earn his pre-injury wage in the automotive industry, and his interest in the medical field. According to Entenberg, the annual salary range for nurses is $50,000 to $67,000, whereas the annual salary for a service writer is about $36,000. She testified that a nurse typically requires a medium-demand work level which fit the claimant's FCE restrictions.

¶ 13 On cross-examination, Entenberg admitted that she did not administer any written tests to the claimant, did not review his high school grades, and did not perform an analysis of the claimant's transferable skills. Entenberg denied that nurses are often required to lift patients weighing more than 50 pounds. Instead, she stated that nurses' assistants perform such tasks or nurses may work in tandem or use a hoist to lift patients. She further denied knowledge of a 2000 report by the Bureau of Labor Statistics, which listed nursing in the top ten professions at the greatest risk for back injuries, and a 2000 Veterans Health Administration report, which indicated that nurses were injured six times more frequently than any other occupational group.

¶ 14 On October 25, 2010, Morison issued an updated report in response to Entenberg's recommendations. In that report, he disagreed with Entenberg's opinion that nursing was a suitable alternative career option for the claimant because nursing did not fall within his work restrictions and did not pay considerably more than that of a service writer, which did not require an expensive four-year degree.

¶ 15 Following a hearing, the arbitrator awarded the claimant temporary and total disability (TTD) benefits and maintenance benefits until October 25, 2010; denied his request for vocational rehabilitation expenses; and denied his request for penalties and fees. The arbitrator determined that the claimant was entitled to TTD benefits for the weeks that he was under active

medical care between February 17, 2007, and June 7, 2007; and December 28, 2007 to December 16, 2009. Additionally, the arbitrator awarded the claimant maintenance benefits from December 17, 2009, until October 25, 2010.

¶ 16 The claimant sought a review of the arbitrator's decision before the Commission. On November 21, 2011, the Commission affirmed and adopted the arbitrator's decision.

¶ 17 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On August 28, 2012, the circuit court confirmed the decision of the Commission. The claimant now appeals.

¶ 18 The claimant first argues that the Commission's finding that he was not entitled to the vocational rehabilitation expenses he requested is against the manifest weight of the evidence. We disagree.

¶ 19 Awards for vocational rehabilitation are granted pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2010)), which provides that an employer shall compensate an injured employee for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee. *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 32. Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education. 820 ILCS 305/8(a) (West 2010).

¶ 20 Before entering an order for rehabilitation, the evidence must show that rehabilitation is appropriate. *Amoco Oil Co. v. Industrial Comm'n*, 218 Ill. App. 3d 737, 751 (1991). When determining whether rehabilitation is appropriate, certain factors must be considered. *Id.* "The factors favoring rehabilitation include (1) that the employee's injury caused a reduction in

earning power and there is evidence rehabilitation will increase his earning capacity, (2) that the employee is likely to lose job security due to his injury, and (3) that the employee is likely to obtain employment upon completion of rehabilitation training." *Id.* Additional factors to be considered are the costs and benefits to be derived from the program; the employee's work-life expectancy; his ability and motivation to undertake the program; and his prospects for recovering work capacity through medical rehabilitation or other means. *Id.*

¶ 21 The determination of whether a claimant is entitled to an award of vocational-rehabilitation benefits is a question of fact to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence. *W.B. Olson,*, 2012 IL App (1st) 113129WC, ¶ 31. In resolving such a question, it is the function of the Commission to judge the credibility of the witnesses, resolve any conflicts in the testimony, and draw reasonable inferences from the evidence presented. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 207 (2003); *O'Dette v. Industrial Comm'n*, 79 Ill.2d 249, 253 (1980). For a finding to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *W.B. Olson*, 2012 IL App (1st) 113129WC, ¶ 31. Where the Commission's decision is supported by competent evidence, its finding is not against the manifest weight of the evidence. *Benson v. Industrial Comm'n*, 91 Ill.2d 445, 450 (1982).

¶ 22 Here, we cannot find that Commission's determination that the claimant was not entitled to vocational rehabilitation expenses in the form of a nursing education is against the manifest weight of the evidence. Morison opined that nursing positions did not fall within the claimant's work restrictions, making it highly unlikely that he would be able to obtain employment in the field. He also testified that nurses did not earn much more than service writing positions, which did not require costly training and education that nursing positions required. While Entenberg

offered an opposing view as to whether nursing was an appropriate vocation for the claimant, it was the Commission's duty to resolve conflicts in the evidence and make credibility determinations of the witnesses. In this case, the Commission found Morison's opinions persuasive and determined that vocational rehabilitation in the form of a nursing degree was not appropriate for the claimant where service writing positions offered similar earning potential without exceeding his FCE restrictions or requiring additional education.

¶ 23 Next, the claimant contends that the Commission's decision to terminate his maintenance benefits on October 25, 2010, is against the manifest weight of the evidence. We disagree.

¶ 24 When determining whether an employee is entitled to TTD or maintenance benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146-47 (2010). The period during which a claimant is temporarily totally disabled is a question of fact to be resolved by the Commission, whose determination will not be disturbed unless it is against the manifest weight of the evidence. *Id.* at 142.

¶ 25 Here, the Commission determined that the claimant was not entitled to maintenance benefits after October 25, 2010, the date of Morison's amended labor market survey report. It is undisputed that the claimant had reached maximum medical improvement (MMI) on December 16, 2009, the date upon which Dr. Walega released him to work with permanent restrictions. After that, the claimant received vocational rehabilitation services from Morison and Entenberg, both of whom considered his skills, experience, and background. In his labor market report, Morison determined that the claimant was capable of returning to the work force, noting several positions which fell into his work restrictions and experience. Specifically, Morison found four

Ford dealerships interested in potentially hiring he claimant for service writing positions without any additional education or training. The Commission found Morison's opinions persuasive on the issue of whether the claimant required additional vocational rehabilitation benefits beyond October 25, 2010, and it therefore terminated his maintenance benefits on that date. Under these facts, we cannot find that the Commission's determination as to the termination date of the claimant's maintenance benefits is against the manifest weight of the evidence.

¶ 26 In the alternative, the claimant contends that he is entitled to a wage differential award as the evidence demonstrated a permanent reduction in his earning potential because of his injury. However, permanent disability benefits were not addressed by the Commission and are not at issue in this appeal. See *Gallianetti v. Industrial Comm'n of Illinois*, 315 Ill. App. 3d 721, 727 (2000) (stating that section 8(d) of the Act, "which pertains to [permanent partial disability]" specifies two type of awards—wage differential or a percentage of the person as a whole); *Ingalls Memorial Hospital v. Industrial Commission*, 241 Ill. App. 3d 710, 717 (1993) ("The termination of TTD does not affect claimant's right to recover for permanency. The TTD termination date is merely the indicator that the injury has stabilized, the permanent character of the injury can be determined, and claimant's award for permanency, if any, should be determined"). Accordingly, we make no determination at this time as to whether the claimant is entitled to a wage differential award.

¶ 27 Finally, we reject the claimant's contention that the Commission erred in denying his request for penalties and fees for River Oaks Ford's refusal to pay him benefits beyond October 25, 2010.

¶ 28 Penalties under section 19(l) of the Act (820 ILCS 305/19(l) (West 2010)) are in the nature of a late fee and are mandatory if the payment of benefits is late and the employer cannot

show an adequate justification for the delay. *Jacobo v. Illinois Workers' Comp. Comm'n*, 2011 IL App (3d) 100807WC, ¶20. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id.* The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Id.* The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Id.*

¶ 29 In this case, there was no evidence that River Oaks Ford's alleged delay in continuing to pay the claimant's maintenance benefits was unreasonable. The record establishes that the claimant had reached MMI on December 16, 2009, and had participated in vocational rehabilitation services through October 2010. In his October 25, 2010, labor market report, Morison determined that there were several viable positions available to the claimant within his work restrictions and that the claimant did not require additional maintenance benefits. Given the evidence in the record, we cannot find that River Oaks Ford's refusal to pay maintenance benefits beyond the date of Morison's labor market report constituted an unreasonable delay. Accordingly, we cannot find that the Commission's decision denying the claimant's request for section 19(l) penalties is against the manifest weight of the evidence.

¶ 30 It follows that we also cannot find that the Commission erred in denying the claimant's request for penalties and attorney fees under sections 19(k) and 16 of the Act (820 ILCS 305/19(k), 16 (West 2010)) as the standard for awarding penalties under these sections is higher than the unreasonable delay standard under section 19(l). See *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 21-24.

¶ 31 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County which confirmed the decision of the Commission, and remand to the Commission for further proceedings.

¶ 32 Affirmed and remanded.