2013 IL App (1st) 123051WC-U

Workers' Compensation
Commission Division
Filed: November 12, 2013

No. 1-12-3051WC

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

SCOTT HUBL, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al*., (Certified Installations, Inc., Appellee).	))))))))))	Appeal from the Circuit Court of Cook County No. 12 L 50361 Honorable Roberto Lopez Cepero, 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 Workers' Compensation Commission's award of permanent partial disability benefits is neither against the manifest weight of the evidence or erroneous as a matter of law.

¶ 2 The claimant, Scott Hubl, appeals from an order the Circuit Court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) that awarded him permanent partial disability (PPD) benefits under section 8(d)(2) of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)(2) (West 2004)) for injuries to his left forearm

sustained while he was in the employ of Certified Installations, Inc. (Certified). The claimant argues that he is entitled to permanent total disability (PTD) benefits. For the reasons which follow, we affirm the judgment of the circuit court.

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

¶ 4 The claimant worked as a journeyman tile setter for approximately 22 years and was a member of the carpenter's union. On July 7, 2005, while working for Certified, he lost control of a razor scraping tool and sliced open his left forearm to the bone. He was treated at Northwestern Memorial Hospital, receiving 17 stitches to close the wound. On December 29, 2005, he underwent surgery with Dr. Richard Makowiec on his left ring finger and left wrist and completed eight months of therapy following the surgery. On June 6, 2006, the claimant had a functional capacity exam (FCE). The FCE states that the claimant was released to work at a "heavy physical demand" level, "with crawling and firm grasping activities at an occasional frequency (up to 1/3 day) and a lifting restriction of up to 58 lbs for no more than 1/3 of the day. The FCE report states that the claimant's "tolerances do not match all job requirements for a Journeyman Tile Installer."

¶ 5 On June 26, 2006, Dr. Makowiec released the claimant to work with restrictions on lifting, including no very heavy lifting (200 lbs) and heavy lifting (25 to 50 lbs) restricted to an infrequent basis. The claimant, who is left-handed, testified that he still has pain in his left arm and hand, has trouble sleeping with the pain, and takes acetaminophen to treat the pain.

¶ 6 The claimant testified that, after the June 26 release, he contacted his union to request light-duty work. He stated that the union told him that it did not offer any permanent light duty work and

required that he be available for full-duty to be employable. The claimant testified that he never submitted his FCE report to the union and that he only verbally told the union representative that he needed "light-duty" work; he did not specify the actual FCE restrictions. In August 2006, the claimant began vocational rehabilitation with Coventry Services and continued until September 2010. During the four-year time period, the claimant searched for jobs using newspapers, the internet, and walk-ins. The vocational counselors also provided him with approximately 2,400 job leads. The claimant testified that he never received any job offers and had only one job interview in 2007 or 2008. In February 2009, the claimant and his vocational counselor went to Chicago Ridge Mall so he could apply at various stores. The claimant testified that everyone he spoke to advised him to apply online. Coventry also presented him with some job leads for security positions, which required a Permanent Employee Registration Card (PERC). The claimant testified that the PERC card was necessary for positions that required him to carry a gun, but he never obtained the license as Coventry would not cover the expense. The claimant testified that the license cost about $200, and that he was receiving $941.92 per week in temporary total disability (TTD) benefits. After Coventry stopped working with him in September 2010, the claimant testified that he continued searching for employment on his own but had no success.

¶ 7 The claimant testified that he worked for an auto body shop for 12 years before becoming a tile setter, but he had no certifications in the auto repair field. He stated that he did not seek employment in the auto repair industry because such work requires heavy lifting. He also testified that he requested assistance from Coventry to get certified through a computer-aided drafting (CAD) program at Moraine Valley Community College, but his requests were always denied. He testified

that he wanted to obtain employment designing signs and that he bought some of the equipment and professional software to try to teach himself the skills necessary to enter into the field. The claimant stated that he spent $3,538.44 for the graphic software program and a vinyl cutter. He testified that his Coventry vocational counselor, Dean Geroulis, helped him tailor a cover letter and resume for design positions.

¶ 8 The claimant entered a July 13, 2009, vocational evaluation by Joseph Belmonte into evidence. The claimant testified that he met with Belmonte for approximately four or five hours for the evaluation. Belmonte reported that the claimant was appropriately dressed and "reasonably neatly groomed," noting that he had "longer hair and a full and rather bushy beard." Belmonte reported that the claimant was willing to modify his beard if interview opportunities arose. In assessing the claimant's prospective employability, Belmonte considered situational factors, including that the claimant was 48 years old, possessed a high school diploma, lacked computer skills and any licenses or certifications, and lacked transferrable work skills and experience. He also considered that the local and national economic conditions deteriorated throughout 2008 and 2009. Belmonte opined that, because of the claimant's injury, he lost access to his usual and customary job and his skills were not transferable to other fields. He noted that the claimant also had no success after an extensive job search with Coventry. Belmonte concluded that the claimant, "though prospectively employable," had "significant exposure for total disability." He stated that, even if the claimant found employment, it was improbable that he would earn much more than $10.50 per hour, far less than the $35 per hour he earned as a tile setter. Belmonte stated that he still considered the claimant a viable vocational rehabilitation candidate, noting that no efforts had been made to offer

him training, such as computer training, to improve his opportunities.

¶ 9 Numerous vocational evaluation reports by Coventry were admitted into evidence. An October 17, 2006, report states that the claimant was cooperative but lacked transferable skills. Subsequent reports documented the claimant's extensive job search activities and his repeated requests for assistance in obtaining a CAD certificate at Moraine Valley Community College. An April 2010, report notes that the claimant's "appearance may *** present a barrier to certain positions" as he wears his "hair shoulder length, and has a beard that extends nearly to his chest." Geroulis wrote that the claimant told him that he dresses "much more professionally for visits with employers, and ties his hair back in a pony tail, but he was unwilling to cut his hair or trim his beard because he said this is who he is."

¶ 10 A "Labor Market Survey Report," dated August 20, 2010, prepared by Geroulis, identified various jobs that the claimant was potentially employable in, including cashier, floor waxer, security guard, and ticket taker. Geroulis's "Closure Report," dated September 20, 2010, states that the claimant had never missed a meeting and did everything that was asked of him. The report states, however, that the claimant had received only one interview throughout the process, had expressed skepticism that the process would result in employment, and had made frequent requests for retraining. Geroulis noted that the insurer had requested that the case be closed.

¶ 11 Following a hearing, the arbitrator found that the claimant was entitled to permanent partial disability (PPD) benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2004)) in the amount of $147,942.50, representing 50% loss of use, man as a whole. The arbitrator stated that the claimant's permanent restrictions only barred him from certain heavy lifting and that he lost his trade.

He placed little weight on Belmonte's opinions because he only met with the claimant on one occasion, which limited his knowledge of the claimant's efforts, actions and beliefs during the vocational process. The arbitrator noted that the claimant did not believe that he was an "odd-lot" permanently disabled individual, evidenced by his own efforts to break into the computerized graphic design field. The arbitrator concluded, that while the claimant was unsuccessful in obtaining new employment, the state of the economy, the claimant's attitude, his efforts to train in graphic design, and his attempts to find employment demonstrated that he was not an "odd-lot permanent total." Therefore, he determined that the claimant was entitled to 50% loss of use, man as a whole, pursuant to section 8(d)(2) of the Act for sustaining a "loss of trade" as a result of his injury. He also denied the claimant reimbursement under section 8(a) of the Act for costs that he incurred for equipment and software to train himself in graphic design.

¶ 12 The claimant sought review of The arbitrator's decision before the Commission. On February 16, 2012, the Commission issued a ruling affirming and adopting the arbitrator's decision except that it awarded the claimant reimbursement under section 8(a) of the Act for costs that he incurred for the equipment and software to train himself in graphic design.

¶ 13 Thereafter, the claimant sought judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision and this appeal followed. The claimant now appeals.

¶ 14 The claimant argues that the that the Commission's decision, that he was entitled to a "man as a whole" award instead of PTD benefits under the "odd-lot" theory, is against the manifest weight of the evidence. Specifically, he argues that the Commission erred by: (1) relying on the national

economic downturn to explain his failure to find a job; (2) faulting him for failing to apply for jobs in the auto industry and failing to obtain a PERC card; (3) finding that he did not believe that he was permanently and totally disabled; and (4) finding his appearance presented a barrier to certain positions. The claimant contends that the evidence supports a PTD award under the "odd-lot" theory. We disagree.

¶ 15 Section 8(d)(2) of the Act provides, in relevant part, that the employee may be compensated after sustaining serious and permanent injuries "if such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity" at a rate of the percentage of 500 weeks that the partial disability bears to total disability. 820 ILCS 305/8(d)(2) (West 2004). The extent or permanency of a claimant's disability is a question of fact to be determined by the Commission, and its decision will not be set aside unless it is contrary to the manifest weight of the evidence. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506-07, 812 N.E.2d 65 (2004). 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). Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence when no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175 (1996).

¶ 16 Here, the undisputed evidence showed that the claimant's forearm injury was serious and permanent and left him unable to perform the duties of his usual and customary line of employment as a journeyman tile setter but that it did not result in an impairment of earning capacity. According

to the FCE report, the claimant's work restrictions were limited and his injury was not so severe that he could not perform in some other type of employment. The FCE report stated that he was released to work at a heavy physical demand with restrictions only on crawling and firm grasping activities (up to 1/3 of day) and lifting no more than 58 lbs (up to 1/3 of day). Further, Dr. Makowiec released the claimant to work with only a restriction on heavy lifting. The claimant himself expressed interest in continuing to work and pursued training in computerized graphic design. Even Belmonte opined that the claimant was "prospectively employable" and considered him a viable rehabilitation candidate. Various labor market reports by Coventry also identified various jobs that the claimant was qualified to obtain, and he testified that he applied to approximately 2,400 jobs over the course of the last four years. While the Commission had considered the fact that the claimant had not yet been successful in obtaining employment, citing various factors including the high local and national unemployment rate, it nevertheless concluded that the claimant had only lost the ability to work in his usual and customary tile trade, but he was still employable in other areas. Based on the evidence, we do not find that the Commission's determination of the nature and extent of the claimant's injury is against the manifest weight of the evidence.

¶ 17 In so holding, we reject the claimant's argument that the Commission improperly considered the high unemployment rate in deciding whether he qualified for PTD under the "odd-lot" theory or PPD. The unemployment rate and economic conditions were mentioned in Belmonte's report and in the Coventry reports. See *Island Lake Water Co. v. Illinois Commerce Comm'n*, 65 Ill. App. 3d 853, 857, 382 N.E.2d 835 (1978) ("[W]e note that this court may take judicial notice of economic conditions"). We also reject his arguments that the Commission erred by considering his failure to

apply for jobs in the auto industry or the security field, his attitude about his disability, and his appearance. These were all relevant factors for the Commission to evaluate the claimant's unsuccessful job search and future employability when it determined that the claimant was only partially disabled, not permanently disabled under the "odd-lot" theory.

¶ 18 If the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove by a preponderance of the evidence that he fits into the "odd-lot" category. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342 (2007). An "odd-lot" claimant is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Id.* The claimant satisfies his burden in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. *Id.* Once the claimant establishes that he falls into the "odd-lot" category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Id.* Whether a claimant falls into the "odd-lot" category is a factual determination to be made by the Commission, and that determination will not be set aside unless it is against the manifest weight of the evidence. *Id.*

¶ 19 In this case, the Commission reasoned that the claimant was not so handicapped that he was not employable in any well-known branch of the labor market. First, the Commission, noting that the claimant had conducted a diligent four-year job search, determined that the claimant's lack of success thus far could be attributed to the high unemployment rate, the claimant's decision not to

obtain the PERC card for security jobs, and potentially the claimant's appearance, which both Belmonte and Geroulis had noted was a possible barrier to his obtaining a job. Second, the Commission determined that the claimant failed to show that, because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. The medical evidence showed that the claimant was released to work with only limited restrictions on heavy lifting, and the various Coventry labor survey reports found a variety of positions suitable for him, including various customer service, security, and other labor positions. Even Belmonte's vocational report stated that the claimant was prospectively employable. The claimant chose not to obtain the PERC card for security positions, although that branch of the labor market was available to him and he provided no evidence that his limited disability prevented him from working in the industry or that he could not afford the $200 PERC card fee. Further, as the Commission noted, the claimant himself sought training in the graphic design field. Under these facts, we cannot say that the Commission's determination, that the claimant was not entitled to PTD benefits under the "odd-lot" theory but was entitled to a 50% loss of use PPD award, is against the manifest weight of the evidence.

¶ 20 Based upon the foregoing analysis, we affirm the judgment of the circuit court, which confirmed the decision of the Commission.

¶ 21 Affirmed.