2014 IL App (1st) 131270WC-U

Workers Compensation
Commission Division
Order filed: June 23, 2014

No. 1-13-1270WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

HILTON CHICAGO O'HARE,	)	Appeal from the Circuit Court
	)	of Cook County.
	)	
Appellant,	)	
	)	
v.	)	No. 11 L 51149
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Patrick J. Sherlock,
(Robert Amparan, Appellees).	)	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 Illinois Workers' Compensation Commission's findings, that the claimant was entitled to an unpaid medical expense and certain temporary total disability benefits, were against the manifest weight of the evidence. However, the Commission's finding that the claimant was permanently and totally disabled was

not against the manifest weight of the evidence. The Commission's award was modified to reflect proper temporary and permanent disability dates.

¶ 2 The employer, Hilton Chicago O'Hare (Hilton), appeals the circuit court order which confirmed the decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Robert Amparan, temporary and permanent total disability benefits and an unpaid medical expense pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)). For the following reasons, we reverse that portion of the circuit court's judgment that confirmed the Commission's award of unpaid medical expenses and temporary total disability (TTD) benefits, modify the Commission's award of TTD benefits to reflect the appropriate termination date of those benefits, and affirm all other aspects of the circuit court's judgment.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on March 2, 2011. We note that the claimant had three prior applications for adjustment of claims related to left knee injuries, which were consolidated and heard by an arbitrator in February 2006. The arbitrator in that case decided that the claimant was permanently and totally disabled under the odd-lot theory. However, before that decision was final, the parties settled the claim in May 2006 for a lump sum of $150,000. The evidence and transcripts of the prior arbitration hearing are contained in the record and detail the claimant's history of the deteriorating condition of his left knee. Following these earlier injuries, the claimant had permanent work restrictions placed upon him by his treating physician, Dr. Robert Goldberg, including a 30-lb. lifting restriction, a push-pull restriction, and a restriction on kneeling, squatting, and climbing.

¶ 4 The claimant testified that he began working for Hilton as a laundry attendant on June 18, 2006. A job description for his position states that the position required the ability to lift, bend, stoop, carry, push or pull heavy loads, stand for long periods of time, and lift linen bundles weighing up to 50 lbs. The position also required an ability to push or pull wheeled carts weighing up to 1,000 lbs. The claimant admitted that he never informed Hilton about any preexisting condition in his left knee which resulted in work restrictions that would have limited his ability to perform the duties required of a laundry attendant.

¶ 5 On June 20, 2006, as the claimant was standing near a linen chute, a large bag of linen was thrown down the chute by an employee on another floor. The bag of linen hit the claimant, causing him to crash into a cart. The cart struck the claimant in the middle of his back, and he fell to the ground on both knees. The claimant testified that he immediately felt a "shocking pain" in his left knee. He sought treatment at Concentra Medical Center the same day.

¶ 6 The June 20, 2006, Concentra emergency room report stated that the claimant had knee pain which affected his range-of-motion; reported that the knee felt as though it would "give out"; and that there appeared to be some ACL laxity, possibly due to his prior knee injury and prior arthroscopic knee surgery. For the following week, the claimant went to physical therapy at Concentra, reporting improvement in his lumbar spine but continuing pain in his left knee.

¶ 7 On June 28, 2006, the claimant was terminated by Hilton. The "Disciplinary Action Notice" stated that, as part of "normal policy," a drug and alcohol test was performed in the medical clinic on the date of his accident and the test results came back positive.

¶ 8 On June 29, 2006, the claimant returned to Concentra and saw Dr. Charles Carlton, who advised him to continue physical therapy. On July 6, 2006, Dr. Carlton wrote that the claimant's knee pain continued and that he was awaiting MRI approval. On July 21, 2006, the claimant had the MRI exam, which showed a medial meniscus tear and some degenerative changes in his left knee. On July 24, Dr. Carlton advised the claimant that he should be sitting 70% of the time, should not lift over 15 lbs., and should perform only ground level work. He also referred the claimant to an orthopedic surgeon.

¶ 9 On August 3, 2006, on referral from Dr. Carlton, the claimant saw Dr. Charles Mercier, who stated that the claimant never made a full recovery from his previous surgery, but had been able to work. Dr. Mercier reviewed the claimant's MRI and conducted a physical examination. He noted that the claimant had the inability to fully extend the knee and had anterior medial and mid-medial joint line pain. According to Dr. Mercier, it appeared that the claimant had a displaced meniscal tear causing a blockage of his knee. He opined that the claimant should have surgery as soon as possible to prevent permanent contracture of his knee.

¶ 10 On August 28, 2006, Dr. Mercier operated on the claimant's left knee, performing an arthroscopy of the left knee with partial posterior horn and posterior medial meniscectomy and excision of medial plica. Following surgery, the claimant underwent physical therapy.

¶ 11 On September 13, 2006, Dr. Mercier stated that the claimant could "return to work with restrictions, if available."

¶ 12 On October 10, 2006, Dr. Mercier stated that the claimant was doing well post-operatively, with no swelling and full range-of-motion, and that he could return to his regular job duties.

¶ 13 On October 17, 2006, Dr. Mercier noted that the claimant had been released to work, but he reported that his position had been eliminated. The claimant complained of increased pain in the anteromedial aspect of his knee and bouts of instability. Dr. Mercier stated that the claimant's knee exam was normal with no evidence of instability, but he gave him a cortisone injection for the pain. He advised the claimant to find a new job.

¶ 14 On November 14, 2006, the claimant saw Dr. Mercier, but he could not recall telling him that he had pain after a full day of work. In his exam notes, Dr. Mercier stated that the claimant had instability of the knee and "increased pain after a full day's work." Dr. Mercier ordered another MRI and told the claimant that he had degenerative changes in his knee which will cause him pain from time to time.

¶ 15 On December 19, 2006, Dr. Mercier noted that the claimant's MRI revealed post-operative changes of the medial meniscus with degenerative changes of the medial compartment. He informed the claimant that his main problem was arthritis and that he needed to learn to live with that condition.

¶ 16 The record does not contain any evidence that the claimant sought treatment for his knee between December 19, 2006, and March 14, 2007. The claimant testified that the only medical treatment he received during that time was through emergency room visits. However, no medical records are contained in the record for those dates.

¶ 17 On March 15, 2007, the claimant sought emergency room treatment at MacNeal Hospital, after he "tripped over the two stairs" at the front entrance of his fiancee's apartment building. The claimant testified that, as he was walking down the stairs, there was a cable in the way. He also stated that he has fallen many times since his accident because his knee frequently "gave out." The MacNeal Hospital bills and records are contained in the record. An x-ray of the claimant's right hand, left elbow, and left knee were taken, showing only a possible displaced fracture of the right ring finger and swelling in the elbow. The parties stipulated that the unpaid MacNeal Hospital bill was $1,363.30, although Hilton argued it was not liable for this medical expense.

¶ 18 At the request of his attorney, on November 23, 2007, the claimant saw Dr. Robert Goldberg, his prior orthopedic surgeon. Dr. Goldberg stated that, on March 13, 2003, and November 13, 2003, he repaired a medial meniscus tear in the claimant's left knee. When he released the claimant from his care after these surgeries, Dr. Goldberg had imposed a permanent light-duty work restriction, meaning the claimant was restricted to lifting no more than 20 lbs. and no crawling, climbing, pulling or pushing. Upon his 2007 examination of the claimant, Dr. Goldberg observed that he had some mild swelling and effusion within the knee, a painful gait, and tenderness along the medial joint space. Dr. Goldberg opined that the claimant's current knee condition represented an aggravation of his preexisting knee condition. According to Dr. Goldberg, the claimant's June 20, 2006, accident caused a new and aggravated tear of the medial meniscus, which in turn, aggravated the arthritic process in his knee. Dr. Goldberg administered a cortisone injection to relieve the claimant's pain, but he returned in March 2008, reporting

persistent pain. Dr. Goldberg opined that the claimant would possibly need a knee replacement in the future. According to Dr. Goldberg, as of December 2007 and March 2008, the claimant had reached maximum medical improvement (MMI) and could perform light-duty work, meaning lifting, pushing, or pulling no more than 20 lbs., and refraining from climbing, kneeling or squatting. He also recommended that the claimant alternate standing and sitting.

¶ 19 On March 20, 2009, at the request of Hilton, the claimant was examined by Dr. Charles Bush-Joseph, who opined that the claimant had returned to his pre-2006 injury condition. Dr. Bush-Joseph stated that, as of December 19, 2006, the claimant had reached MMI and was able to work with a 40-lb. lifting restriction and should avoid repetitive squatting or kneeling on his left knee. He did not believe that the claimant required further treatment, had osteoarthritis, or needed a knee-replacement surgery.

¶ 20 At the request of his attorney, the claimant met with Susan Entenberg, a vocational rehabilitation specialist, who opined that he could not return to his laundry attendant position. Entenberg noted the claimant was 48 years old, completed the 11th grade, and had no further education or training. She stated that, based on the claimant's report, Dr. Mercier released him with permanent work restrictions in December 2006, and that, in December 2007, Dr. Goldberg also restricted him to lifting, pushing or pulling no more than 20 lbs. and restricted him from climbing, kneeling or squatting. Entenberg concluded that the claimant sustained a reduction in earning power and a loss of job security since his June 20, 2006, injury because of his work restrictions. She further concluded that the claimant was not a training candidate given his work history and education; he did not possess transferrable skills; and that, with rehabilitation

services, he may be placed in an appropriate position earning $8 to $10 per hour. Without vocational rehabilitation, however, Entenberg opined that it was unlikely the claimant would secure gainful employment. She recommended a 90- to 120-day job search to determine whether a labor market existed for the claimant.

¶ 21 On April 15, 2009, Entenberg wrote that she reviewed the report of Dr. Bush-Joseph, dated March 20, 2009, in which he stated that the claimant was able to work and stand with only a 40-lb. lifting restriction. Entenberg stated that, given those restrictions, the claimant could return to his prior work as a laundry attendant. She further stated that, if such employment was no longer available to him, he was a candidate for direct job placement in janitorial and light maintenance positions, earning wages similar to his pre-injury wage of approximately $10 per hour. The record contains a wage statement showing that the claimant was earning $9.60 per hour at the time of his accident while working at Hilton.

¶ 22 After his injury, the claimant requested light-duty work, but Hilton refused to "hire [him] back." He denied that Hilton gave him a reason as to why he was not allowed back to work. On cross-examination, the claimant admitted that he was terminated by Hilton after he failed a mandatory post-accident drug test. He admitted that he used marijuana the day before the accident.

¶ 23 The claimant testified that, after the June 20, 2006, accident, he looked for employment outside of Hilton. He identified a log in which he recorded his contacts with about 50 prospective employers to which he applied between October 17, 2007, and April 28, 2009. However, he was not successful in his efforts to find full-time employment. In 2010, he did

work for five months on an on-call basis, 10 to 15 hours per week, for the Romeoville Lakewood Falls Homeowner's Association Clubhouse. He stated that he had to quit that position because his knee gave out while he was changing a light bulb on a ladder. He denied filing any claim with the Commission related to that incident. The claimant testified that he currently worked for his brother in his auto repair business, mainly handing him tools and assisting with whatever he was able. He denied that he was able to work on the vehicles. Hilton admitted investigative videos, filmed over several days in 2009, in which one scene depicts the claimant lying on the ground underneath a car for a short time, helping two other men repair the car.

¶ 24 The claimant admitted that his left knee had been injured, that he had surgery in 2002, and that the injury had been the subject of a previous claim before the Commission. The claimant acknowledged that he had received an award from the Commission, but that, before the award was final, he and his former employer settled the matter.

¶ 25 The claimant testified that his injury has affected his ability to perform daily activities, including dressing himself, showering, and holding his baby, without pain in his knee. He stated that he used a cane often, but not all the time. He admitted that, in the 2009 videotape, he is seen standing in front of his home without a cane. The claimant testified that he did not bring the cane and used the railings to traverse the stairs.

¶ 26 On April 19, 2011, following the hearing, the arbitrator ordered Hilton to pay the claimant TTD benefits under section 8(b) of the Act (820 ILCS 305/8(b) (West 2006)) for a period of time between June 21, 2006, and August 25, 2008, medical expenses in the amount of $1,363.30, pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), and permanent

total disability (PTD) benefits under the odd-lot theory, commencing August 26, 2008, pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2006)).

¶ 27 Hilton sought review before the Commission. On September 16, 2011, the Commission affirmed and adopted the arbitrator's decision.

¶ 28 Hilton sought judicial review of the Commission's decision in the circuit court of Cook County. On March 19, 2013, the circuit court confirmed the Commission's decision. Hilton now appeals.

¶ 29 Hilton first argues that the Commission's finding, that the claimant was entitled to TTD benefits between September 2006 and August 25, 2008, is against the manifest weight of the evidence. Hilton contends that it paid TTD benefits until the claimant was released to light-work duty in September 2006. Because the claimant had been terminated for cause in June 2006, Hilton argues that its obligation to pay TTD benefits ended when the claimant had reached MMI in September 2006.

¶ 30 "It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142 (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.* "[A]n employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had

been discharged—whether or not the discharge was for 'cause'," but rather the obligation ends when the claimant's condition has stabilized. *Id.* at 149.

¶ 31 Here, the evidence established that the claimant was released to light-duty work by Dr. Mercier on September 13, 2006, and to full-duty on October 10, 2006. At that point, the claimant had been terminated for cause by Hilton, but his condition had been stabilized such that his treating physician had determined that he was capable of working. While the claimant reported to Dr. Mercier that he continued to have pain and instability in his knee, Dr. Mercier stated that the post-operative MRI showed arthritis, which the claimant had to learn to live with. Even Dr. Goldberg opined that, while the claimant's June 2006 injury had aggravated his preexisting knee condition and aggravated the arthritic process in his knee, he had reached MMI as of his examination in December 2007 and could return to light-duty work. Dr. Goldberg also explained that, after the claimant's 2003 knee surgery, he imposed a permanent light-duty work restriction on the claimant, and so, when Dr. Mercier released the claimant to light-duty work on September 13, the claimant had returned to his pre-injury condition. Thus, based on the undisputed evidence, the claimant was not entitled to TTD benefits after he was released to return to light-duty work by Dr. Mercier on September 13, 2006.

¶ 32 Hilton also contends that the Commission's decision, that the claimant was entitled to the $1,363.30 MacNeal Hospital bill from his March 2007 emergency room visit, is against the manifest weight of the evidence. We agree.

¶ 33 Under section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 24 (2001). The claimant has the burden of proving that

the medical services were necessary and the expenses were reasonable. *Id*. What is reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence. *Id.*

¶ 34 Here, the Commission determined that the claimant had fallen down the stairs when his knee "gave out" and that he had a greater propensity to lurch forward with movements such as descending the stairs as Dr. Goldberg had testified and as the claimant had testified. Because the claimant's fall down the stairs had resulted in part from his workplace injury, the Commission found the emergency room services to be a reasonable and necessary medical expense to treat his injury. However, while the claimant had testified that he had fallen many times since his accident because his knee frequently "gives out," he specifically testified that the March 2007 fall resulting in the MacNeal Hospital emergency room visit occurred after he tripped on a cable in the stairwell of his fiancee's apartment. He did not testify that, in that particular instance, he had fallen because of instability in his knee. Therefore, we agree with Hilton that the Commission's determination, that the $1,363.30 MacNeal Hospital medical expense was a reasonable and necessary medical service, is against the manifest weight of the evidence.

¶ 35 Finally, Hilton argues that the Commission's decision, that the claimant proved that he was permanently and totally disabled under the odd-lot theory, is against the manifest weight of the evidence. At the outset, we note that, Hilton contends that it was denied due process of the law when the Commission failed to consider the evidence presented and merely adopted the arbitrator's finding without reviewing the record. We reject this argument as there is nothing in the record to suggest that the Commission did not consider all relevant evidence adduced at the arbitration hearing. We also disagree with Hilton that the evidence does not support the Commission's finding that the claimant was permanently disabled under the "odd-lot" theory.

¶ 36 The question of whether a claimant is permanently and totally disabled is one of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Ceco Corp. v. Industrial Comm'n,* 95 Ill. 2d 278, 288-89, 447 N.E.2d 842 (1983). 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). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n,* 91 Ill.2d 445, 450, 440 N.E.2d 90 (1982).

¶ 37 In *Ceco,* the supreme court held that:

> "[A]n employee is totally and permanently disabled when he 'is unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations]. The claimant need not, however, be reduced to total physical incapacity before a permanent total disability award may be granted. [Citations]. Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonable stable market. [Citation]." *Ceco,* 95 Ill. 2d at 288-89.

¶ 38 Alternatively, if a claimant's disability is "not so limited in nature that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, to be entitled to PTD benefits under the Act, the claimant has the burden of establishing the unavailability of employment to a person in his circumstances; that is to say that he falls into the 'odd-lot' category." *Ameritech Servs., Inc. v. Illinois Workers' Comp. Comm'n,* 389 Ill. App. 3d 191, 203-04, 904 N.E.2d 1122, 1133 (2009). The claimant can satisfy his burden of proving that

he falls into the “odd-lot” category by (1) showing diligent but unsuccessful attempts to find work or (2) by showing that he will not be regularly employed in a well known branch of the labor market. *Id.*

¶ 39 The Commission determined that it was undisputed that the claimant had: permanent work restrictions as a result of his knee injury; limited experience, skills and education; and diligently but unsuccessfully searched for employment on his own accord. Entenberg reported that, with vocational rehabilitation services, the claimant may be placed in an appropriate position for his work restrictions and skills, earning $8 to $10 per hour, which was comparable to his wage of $9.60 per hour with Hilton, but that without such services, it was unlikely that the claimant would find an appropriate position. The claimant's self-directed job search, which included his record of applications to over 50 employers, was unsuccessful, lending support to Entenberg's opinion that he would have a difficult time finding gainful employment without professional assistance. The claimant testified that the only position he found since his accident was a part-time, on call position at Romeoville Lakewood Falls Homeowner's Association, which he ultimately resigned from after his knee injury caused him to fall off a ladder.

¶ 40 "Once the claimant initially established that he falls into the 'odd-lot' category, the burden shifted to [the employer] to show that some kind of suitable work is regularly and continuously available to the claimant." *Ameritech Servs., Inc. v. Illinois Workers' Comp. Comm'n*, 389 Ill. App. 3d 191, 205-06, 904 N.E.2d 1122, 1134-35 (2009). Hilton failed to do so as it did not introduce the testimony of any vocational rehabilitation expert to contradict Entenberg, failed to submit any evidence refuting the fact it provided no vocational assistance to the claimant, and failed to submit any evidence refuting that the claimant had been unsuccessful in his self-guided job search. Hilton objected to the admission of the claimant's log of employers which he

contacted on the basis it was hearsay because the claimant testified that his sister helped him create the log. Nevertheless, the arbitrator admitted the evidence. Even without the handwritten log, however, the claimant testified regarding his unsuccessful job search efforts. Further, the investigative videos, while during a brief moment showed the claimant lying on the ground assisting other people with a car repair, do not refute the limitations imposed on him or disprove that his injury has prevented him from finding suitable employment. Based on this record, we cannot find that the Commission's determination, that the claimant proved that he was permanently and totally disabled under the odd-lot theory, is against the manifest weight of the evidence. However, we modify the Commission's award of PTD benefits to reflect a commencement date of September 14, 2006, the date upon which TTD benefits should have terminated.

¶ 41 Based on the foregoing reasons, we reverse that portion of the judgment of the circuit court which confirmed the Commission's award of the $1,363.50 unpaid medical expense and TTD benefits between September 13, 2006, and August 28, 2008, reverse those portions of the Commission's decision awarding the claimant $1,363.50 for medical expenses and TTD benefits from September 13, 2006, through August 28, 2008, and we affirm the judgment of the circuit court in all other respects. We further modify the Commission's award to reflect a commencement date of PTD benefits of September 14, 2006.

¶ 42 Circuit court judgment affirmed in part and reversed in part.

¶ 43 Commission award reversed in part and modified in part.