

No. 1-14-1541WC

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

KEVIN RAFFERTY,)	Appeal from the
)	Circuit Court of
Appellant,)	Cook County
)	
v.)	No. 14 L 50197
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	Honorable
)	Edward S. Harmening,
(City of Chicago, 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 which confirmed the Commission's decision was reversed; the Commission's decision awarding the claimant permanent partial disability benefits pursuant the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2006)) for a 40% loss of use of his right arm was vacated; and the Commission's previous order directing the arbitrator to order vocational testing and for the City of Chicago to submit a vocational rehabilitation plan was reinstated and the matter remanded to the Commission with directions.

¶ 2 The claimant, Kevin Rafferty, appeals from an order of the circuit court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission)

awarding him permanent partial disability benefits pursuant the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) for a 40% loss of use of his right arm. For the reasons that follow, we reverse the judgment of the circuit court which confirmed the Commission's decision, vacate the Commission's decision awarding the claimant permanent partial disability benefits pursuant the Act for a 40% loss of use of his right arm, reinstate the Commission's previous order directing the arbitrator to order vocational testing and for the City of Chicago (City) to submit a vocational rehabilitation plan, and remand the matter to the Commission with directions.

¶ 3 The claimant began working as a garbage-truck laborer for the City in 1981. On January 24, 2006, he was pushing a cart full of tile into the garbage truck when he felt a "pop" in his right shoulder. The claimant went to MercyWorks, where Dr. Steven Anderson, a primary care physician, ordered x-rays, diagnosed him with a right shoulder strain and tendinitis, and prescribed medication. On January 30, 2006, the doctor referred the claimant for physical therapy.

¶ 4 On February 15, 2006, the claimant had a magnetic resonance imaging (MRI) scan of his right shoulder, which revealed degenerative changes of the glenohumeral joint and supraspinatus, and tendonopathy of the supraspinatus, as well as a possible labral tear. On February 27, 2006, Dr. William Heller, an orthopedic surgeon at MercyWorks, injected the claimant's right shoulder with cortisone. Subsequently, on April 5, 2006, Dr. Heller performed an arthroscopy of the claimant's right shoulder to repair his rotator cuff tear. Dr. Heller's operative report states that he also performed a right shoulder subacromial decompression, and extensive debridement of the glenohumeral joint. The arthroscopy revealed "significant tendinosis with fraying and full-thickness or near-full-thickness tearing of the majority of the

supraspinatus tendon" and "significant arthritic change within the humeral head and glenoid." Additionally, Dr. Heller noted that the claimant suffered from rotator cuff tendinosis and tearing in the subacromial area.

¶ 5 After the surgery, on May 12, 2006, the claimant followed-up with Dr. Anderson and Dr. Heller, informing them that his right shoulder's range of motion was improving. Dr. Heller recommended that the claimant continue with six additional weeks of physical therapy. After a follow-up exam on June 26, 2006, Dr. Heller recommended that the claimant continue with another six weeks of physical therapy. On July 10, 2006, Dr. Anderson released the claimant to light-duty work.

¶ 6 On August 4, 2006, the claimant saw Dr. Heller, and complained of pain and a decreased range of motion in his right shoulder. Dr. Heller prescribed additional physical therapy, and ordered the claimant off of work until further notice. On September 6, 2006, Dr. Anderson and Dr. Heller released the claimant to work with a restriction on the use of his right arm.

¶ 7 At a September 15, 2006, follow-up exam, the claimant informed Dr. Heller that he was still experiencing pain in his right shoulder. Dr. Heller recommended that a functional capacity evaluation (FCE) be performed. The FCE was completed; however, the report is not included in the record. Dr. Anderson's follow-up notes, dated September 25, 2006, state that the FCE showed that the claimant "was able to lift 30 [pounds from the] floor to [his] waist, and 20 [pounds] above shoulder level." At the follow-up examination on September 25, 2006, Dr. Heller discharged the claimant at maximum medical improvement (MMI) and authorized him to work per the FCE limitations.

¶ 8 The claimant requested that Dr. Anderson refer him to a specialist for a second opinion. On October 24, 2006, the claimant saw Dr. Gordon Nuber. Dr. Nuber's notes of that visit state

that the claimant was experiencing continued discomfort and pain, as well as decreased range of motion in his right shoulder. The doctor ordered another MRI of the claimant's right shoulder, and on October 26, 2006, he recommended that the City restrict the claimant to sedentary work with limited walking and standing.

¶ 9 On November 7, 2006, the claimant had an MRI scan of his right shoulder, which revealed a labral tear, degenerative joint disease of the glenohumeral joint, hypertrophic changes in the "AC joint," and supraspinatus tendonopathy. Approximately one week later, on November 14, 2006, Dr. Nuber reviewed the MRI, and wrote that he did not believe that it showed a right shoulder rotator cuff tear, but he reported that there was possibly some labral tearing. Dr. Nuber's progress notes from December 19, 2006, state that the claimant had "significant degenerative changes" in his right shoulder, and that he recommended a repeat arthroscopy and assessment of the articular surfaces.

¶ 10 On March 6, 2007, after an emergency hearing pursuant to section 19(b-1) of the Act (820 ILCS 305/19(b-1) (West 2006)), the arbitrator determined that the claimant's injury was causally connected to the January 24, 2006, accident, and awarded the claimant temporary total disability (TTD) benefits from January 25, 2006, through October 3, 2006, and from October 24, 2006, through February 19, 2007, and prospective medical expenses, including expenses for a repeat arthroscopy. The arbitrator, however, denied the claimant's request for penalties and attorney fees. Neither party sought a review of that decision.

¶ 11 Thereafter, on May 4, 2007, Dr. Nuber performed a second arthroscopy and debridement of the claimant's right shoulder. The doctor's operative report states that the claimant had early degenerative arthritis with a frayed, degenerative labrum. Dr. Nuber's progress notes, dated May 15, 2007, state that the claimant complained of pain in his left shoulder which had persisted for

the preceding few months. The claimant testified that he injured his left shoulder in 1994, but did not experience any pain in that shoulder since that time. He stated that his left shoulder began hurting after the right shoulder injury, which caused him to favor the left shoulder. Dr. Nuber took x-rays of the claimant's left shoulder, which revealed that the claimant "probably has some degenerative changes and some narrowing of the joint space." The doctor prescribed physical therapy, and recommended an MRI of the claimant's left shoulder.

¶ 12 Dr. Nuber's notes from June 12, 2007, state that the claimant's right shoulder motion was slightly improving, but still restricted. Dr. Nuber recommended that the claimant continue with physical therapy, but noted that the claimant might need joint-replacement surgery due to the severe arthritis in his right shoulder. At another follow-up appointment on August 7, 2007, Dr. Nuber noted that the claimant was still reporting pain in his right and left shoulders; accordingly, he recommended Synvisc injections for the claimant's right shoulder and ordered an MRI for his left shoulder.

¶ 13 On August 21 and August 28, 2007, Dr. Victoria Brander administered Synvisc injections to the claimant's right shoulder. Dr. Brander's August 21, 2007, progress notes state that the claimant had limited flexibility in his right shoulder, but that his strength was "good within his available range." Dr. Brander's progress notes from the August 21, 2007, visit also state that the Synvisc injections, physical therapy and second arthroscopy have not alleviated the claimant's right shoulder discomfort. Dr. Brander stated that the claimant's left shoulder pain was likely due to its increased use following the right shoulder injury and surgery. Dr. Brander prescribed pain medication and suggested that the claimant continue with physical therapy. She also wrote a note to the City stating that the claimant was unable to work "because he must avoid lifting, pulling, reaching, etc., with that right arm."

¶ 14 On September 4, 2007, Dr. Brander injected Synvisc in the claimant's right shoulder for the third time. During this visit, the claimant again informed Dr. Brander that he had not yet noticed any improvement in his symptoms.

¶ 15 On December 13, 2007, Dr. Nuber determined that the claimant was at MMI, and that he "may need to return to [a] sedentary or light duty job" based upon his right shoulder condition. However, the doctor stated that the claimant had "discretions [*sic*] for heavy labor." The claimant testified that the December 13, 2007, examination with Dr. Nuber was the last medical treatment he received for his shoulders. He complained that his left shoulder currently hurts "like a toothache."

¶ 16 The claimant testified that the City terminated him for allegedly falsifying his timesheets. He did not give an exact date of the termination and no date is contained in the record; however, Dr. Anderson's notes, dated January 3, 2007, report that the claimant was discharged.

¶ 17 At his counsel's request, the claimant met with a certified rehabilitation counselor, Joseph Belmonte, on March 14, 2008. On May 30, 2008, Belmonte issued a written report based upon his evaluation of the claimant. Belmonte reported that the claimant graduated high school in 1980 and had no trade or vocational schooling, or history of military service. The claimant had no typing skills or familiarity with computers, and had no driver's license due to past drunk driving violations. In addition, the claimant had a felony conviction for battery and intimidation of a witness in his background. Belmonte noted that the claimant's sole work history is with the City, where he has been a garbage collector for 26 years. Based upon these facts, Belmonte opined that the claimant "has very serious exposure for total disability at this time which may be permanent in nature." He recommended that the claimant undergo vocational testing, an upper-extremity specific FCE, and an on-site evaluation to determine his ability to acquire keyboard

proficiency or computer literacy. On June 2, 2008, the claimant sent Belmonte's report to the City, and requested that the City pay particular attention to Belmonte's recommendation for vocational testing and an FCE.

¶ 18 At the April 30, 2009, permanency hearing, Belmonte's testimony was primarily a recapitulation of his March 14, 2008, evaluation of the claimant, and his May 30, 2008, vocational report. Belmonte also testified that:

"true unskilled sedentary jobs really are a very small proportion of jobs in the economy overall ***. When we drill down into the data, the number of unskilled sedentary jobs actually amounts to about 2 percent or less of all jobs in the U.S. economy ***. There's just a very small number of jobs available."

Based upon this and his consideration of the claimant's criminal and educational background, and skills, Belmonte testified that he did not believe that the claimant was "prospectively employable" and that there was "a very meaningful probability that [the claimant] is facing the prospect for total disability."

¶ 19 The claimant testified to the accuracy of the details contained in Belmonte's report; namely, that he has no educational training, computer skills, or job-searching experience. He also admitted that he has not applied to any other jobs since the City discharged him.

¶ 20 As a result of his shoulder pain, the claimant testified that he has trouble sleeping, and cannot engage in activities with his two children, such baseball and Frisbee.

¶ 21 Following the permanency hearing, the arbitrator filed a written decision on May 21, 2009, finding that the claimant suffered from a "permanent partial disability [PPD] *** to the extent of 40% loss of use of his right arm," and awarded the claimant PPD benefits for a period of 94 weeks. The arbitrator also awarded an additional 42 3/7 weeks of TTD benefits for the

period of February 20, 2007, through December 13, 2007, but denied benefits for medical expenses related to the claimant's left shoulder because it was not proven that the left shoulder condition was causally connected to the January 24, 2006, workplace accident.

¶ 22 The claimant filed a petition for a review of the arbitrator's decision before the Commission. On April 7, 2010, the Commission awarded the claimant 42 3/7 weeks of TTD benefits. Additionally, the Commission vacated the arbitrator's award of 40% loss of use of the claimant's right shoulder "pending the vocational rehabilitation testing," and remanded the case to the arbitrator "to order appropriate vocational testing and for [the City] to submit a vocational rehabilitation plan." Specifically, the Commission stated that it considered the testimony of Belmonte, and ordered as follows:

"In order to determine possible vocational rehabilitation potential, and to determine appropriate permanent partial disability benefits, the Commission remands the case to the Arbitrator to order appropriate vocational testing and for [the City] to submit a vocational rehabilitation plan."

¶ 23 On April 23, 2010, the claimant filed a motion to correct an alleged clerical error, arguing that the Commission erred by ordering vocational testing without simultaneously ordering the City to pay related maintenance benefits. The Commission denied the claimant's motion in an order, dated May 5, 2010, determining that the alleged error was not clerical in nature. However, the Commission added that "its decision does not preclude the Arbitrator from ordering additional TTD and/or maintenance benefits on remand."

¶ 24 Both the claimant and the City filed for review of the Commission's April 7, 2010, decision in the circuit court of Cook County, and on July 22, 2010, the circuit court consolidated the cases. On July 28, 2010, the claimant filed a motion to dismiss both cases, alleging that the

Commission's April 7, 2010, remand order was interlocutory and thus the circuit court lacked jurisdiction to review the order. On August 3, 2010, the circuit court granted the claimant's motion based upon lack of jurisdiction, and remanded the cause to the Commission.

¶ 25 Upon remand, the parties and the arbitrator interpreted the Commission's April 7, 2010, order as barring the admission of additional evidence concerning the claimant's need for vocational testing and a rehabilitation plan. The arbitrator questioned whether the Commission has jurisdiction to require him to enter an order mandating vocational testing and a rehabilitation plan. He also questioned if the Commission simply wanted him to assess the need for the testing and a plan.

¶ 26 At an August 19, 2011, hearing, the following colloquy transpired among the arbitrator, the claimant's attorney, Daniel Collins, and the City's attorney, Joseph Zwick:

"MR. COLLINS: *** Mr. Zwick and I have reviewed the [April 7, 2010,] decision of the Commission, and I believe that we're in agreement that the Commission's decision does not require a new hearing with additional evidence at this time; and, therefore, neither side was going to present any new evidence at this time ***.

MR. ZWICK: *** [I]t's my understanding that [the Commission is] actually ordering that the—that [the arbitrator] consider this matter in terms of vocational rehabilitation based on the current record.

If, in fact, the Commission thinks that there was supposed to be additional evidence presented or if [the City] was to—or either party was to offer additional evidence in that regard, then certainly that's something that [the Commission] should have put in the order or would have put in the order, but I guess it's my

interpretation that this is to be considered based on the current record and that we are not allowed to present additional evidence.

If that's incorrect, then I would say then certainly we would like the opportunity to present the additional evidence—or I think both parties, I think, would like the opportunity to present additional evidence.

So I guess my point is, you know, Mr. Collins said that we aren't required to produce additional evidence. I think the more accurate statement is it's our interpretation that we're precluded from offering additional evidence the way this order is written ***.

MR. COLLINS: I'm in agreement. I think both of us would be saying that neither one of us want to feel we are somehow waiving some right to introduce evidence. We feel like we've been precluded from doing that."

¶ 27 The arbitrator then stated:

"I feel at this juncture, an order would be—it would be more appropriate that an order be issued at the Commission level for any vocational plan or vocational testing without any—since all the evidence that has been presented was simply for a permanent total and—or for a permanent partial award ***.

I feel that I have to deny the order for vocational testing. In the event that it's remanded back for a hearing, in which [counsel is] given an opportunity to present evidence as to whether or not it's appropriate, if that happens—again, the Commission may order it themselves."

¶ 28 On August 19, 2011, the arbitrator issued a written order stating that "[b]oth parties felt that they were precluded from presenting further evidence by the Commission's decision." He, therefore, ordered that "[w]ithout further evidence, after consideration of the positions and evidence presented by the parties at the hearing on April 30, 2009, and my decision, it is not appropriate to order the [City] to provide vocational testing or to submit a vocational rehabilitation plan." The arbitrator awarded the claimant PPD benefits for the 40% loss of use of his right arm.

¶ 29 The claimant filed a petition for review of the decision before the Commission. On October 1, 2012, the Commission affirmed and adopted the decision of the arbitrator.

¶ 30 On January 4, 2013, the claimant filed for a review of the Commission's decision in the circuit court. He argued that, by failing to order vocational testing and a rehabilitation plan, the Commission denied him due process of law and that the Commission's decision, that he was not permanently and totally disabled, was against the manifest weight of the evidence.

¶ 31 On June 3, 2013, the circuit court remanded the case to Commission seeking clarification as to why, in its decision of October 1, 2012, the Commission removed the phrase ordering "appropriate vocational testing and for [the City] to submit a vocational plan."

¶ 32 On February 20, 2014, the Commission entered an order which stated that the claimant did not seek to admit additional evidence supporting his request for vocational testing and a rehabilitation plan at the August 19, 2011, remand hearing. The Commission held that, because of this, it had "no other alternative but to" vacate its prior decision ordering a vocational assessment and reinstate the arbitrator's May 21, 2009, decision awarding the claimant TTD and PPD benefits for the 40% loss of use of his right arm.

¶ 33 The claimant filed for a review of the Commission's February 20, 2014, decision in the circuit court.¹ On May 19, 2014, the circuit court confirmed the decision of the Commission. The claimant now appeals.

¶ 34 For his first assignment of error, the claimant argues that he was denied due process of law when the Commission and arbitrator failed to order the City to provide vocational testing and a rehabilitation plan. We need not reach this issue, however, because we find merit in the claimant's underlying assertion, that the error in this case can be traced directly to the Commission's "poorly worded" order of April 7, 2010, and the ensuing confusion between the arbitrator and the parties as a result of that order. For the reasons discussed below, we reverse the judgment of the circuit court which confirmed the Commission's February 20, 2014, decision, vacate the February 20, 2014, decision, and reinstate the April 7, 2010, order subject to instructions.

¶ 35 Subsequent to the arbitrator's decision of May 21, 2009, awarding the claimant PPD and TTD benefits, the claimant filed a petition for review and statement of exceptions before the Commission. The claimant took exception with, among other issues, the arbitrator's rejection of his claim that he is permanently and totally disabled, and the decision instead to award him PPD benefits reflecting 40% loss of the use of his right arm. In its order of April 7, 2010, the Commission affirmed and adopted the arbitrator's decision in all respects other than the PPD award, which it vacated. The Commission entered the following order:

"In order to determine possible vocational rehabilitation potential, and to determine appropriate permanent partial disability benefits, the Commission

¹ The Commission assigned a new case number to this matter during its last review. During subsequent review by the circuit court, the court consolidated the cases, and referred to the cause by its new number.

remands the case to the arbitrator to order appropriate vocational testing and for respondent to submit a vocational rehabilitation plan."

¶ 36 At the hearing on remand, counsel for the claimant, counsel for the City, and the arbitrator all interpreted the Commission's April 7, 2010, order as precluding the parties from introducing any additional evidence on the issue of vocational testing or rehabilitation. The arbitrator also questioned whether the Commission had the "jurisdiction or authority" simply to mandate that he enter an order requiring vocational testing or a rehabilitation plan for the claimant. Accordingly, the arbitrator reinstated his previously-vacated award of PPD benefits for the 40% loss of use of the claimant's right arm. The claimant then appealed this order before the Commission.

¶ 37 On October 1, 2012, the Commission issued its decision affirming the arbitrator's award. The Commission explained its decision to affirm, in pertinent part, as follows:

"The Commission remanded the case to the Arbitrator in order for him to review vocational testing and a rehabilitation plan. In essence, the Commission was indicating that [the claimant] had failed to sufficiently allege that he was permanently and totally disabled, and the vocational testing was to be used to determine once and for all if [the claimant] deserved such a designation. During the remand hearing on August 19, 2011, [the claimant], through Counsel, indicated that he did not believe the Commission's remand order required the taking of additional evidence, and thus [the claimant] did not seek to enforce the Commission's order. As [the claimant] seems to argue that no additional evidence was required, the Commission has no new evidence with which to render a

Decision, and thus is left with no choice but to affirm the Arbitrator's reaffirmation of the 40% of an arm [sic] award."

¶ 38 Then, on February 20, 2014, in response to the circuit court's request for clarification of the October 1, 2012, order, the Commission stated that the claimant, by "acquiescing to the [City's] position" on remand that no new evidence was permitted on the issue of vocational rehabilitation, had essentially "refused" the Commission's order of April 7, 2010. Because of this, the Commission held that it had "no other alternative but to" vacate its prior decision ordering a vocational assessment, and reinstate the arbitrator's May 21, 2009, decision awarding the claimant TTD and PPD benefits for the 40% loss of use of his right arm. The circuit court confirmed the Commission's decision in its order of May 19, 2014, giving rise to the instant appeal.

¶ 39 This case requires an inquiry into the meaning of several orders of the Commission, and involves no disputed issues of fact. As such, our review is *de novo*. *Beelman Trucking v. Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370 (2009). In an appeal from a final judgment, we consider not only that judgment, but may review any interlocutory orders constituting "a step in the procedural progression" preceding it. (Internal quotation marks omitted.) *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 13 (quoting *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1014 (2010)).

¶ 40 We have reviewed the Commission's decisions from October 1, 2012, and February 20, 2014, and find them both to be in error. In its commentary accompanying these orders, the Commission appeared to understand the uncertainty of both the arbitrator and the parties over whether its April 7, 2010, remand order contemplated the taking of further evidence on the issue of the claimant's suitability for vocational rehabilitation. For example, in the October 1, 2012,

order, the Commission observed that the claimant "seems to argue" that no additional evidence was required on the subject. Nonetheless, rather than address the parties' confusion, the Commission simply declared that, because the claimant had provided it with no additional evidence, it had no choice but to affirm the reinstatement of the PPD award, a decision that it had previously vacated as error. The proper course would have been for the Commission to clarify the terms of its April 7, 2010, order and again remand the case to the arbitrator, authorizing the taking of additional evidence if the parties deemed it appropriate. See *Honda of Lisle v. Industrial Comm'n*, 269 Ill. App. 3d 412, 415-16 (1995) (Commission may properly remand a case to arbitrator to hear additional evidence). In fact, the circuit court ordered such clarification in its remand order of June 13, 2013.

¶ 41 Rather than clarify the issue, however, the Commission's order of February 20, 2014, only served to compound the confusion and the error. There, the Commission inexplicably arrived at the conclusion that the claimant had "acquiesced" in the City's position that the April 7, 2010, remand order disallowed the taking of further evidence on the vocational rehabilitation issue. Thus, the Commission reasoned, the claimant had thereby "refused" the mandate of the April 7, 2010, remand, apparently meaning that the claimant had waived his opportunity to offer evidence on the issue.

¶ 42 A review of the hearing before the arbitrator following the April 7, 2010, remand order reveals that there was no acquiescence or waiver by either party of any right to present additional evidence as to the appropriateness of vocational testing or rehabilitation. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) (waiver is an intentional relinquishment of a known right and requires an affirmative, consensual act). To the contrary, it was clear that the parties, as well as the arbitrator, were initially uncertain as to whether the language of the order contemplated

further evidence. They ultimately agreed, apparently erroneously, that such evidence was barred. Regardless of this, throughout their discussions at the hearing, the parties consistently reserved their right to present additional evidence should the Commission later require it, and expressly disavowed any waiver of that right. There was no "refusal" of the Commission's April 7, 2010, order, only a mutual misinterpretation of what the order contemplated. Accordingly, we conclude that the Commission erred, in its orders of October 1, 2012, and February 20, 2014, by failing to enforce and clarify its April 7, 2010, order, prior to determining whether the claimant was entitled to PPD or TTD benefits.

¶ 43 In light of our decision, we need not reach the claimant's second argument, namely, that the Commission's decision that he is not entitled to "odd-lot" permanent and total disability benefits is against the manifest weight of the evidence.

¶ 44 Based upon the foregoing analysis, we: reverse the judgment of the circuit court which confirmed the February 20, 2014, decision of the Commission; vacate the Commission's decision of February 20, 2014; reinstate the Commission's order of April 7, 2010, directing the arbitrator to order vocational testing and the City to submit a vocational rehabilitation plan; and remand this matter back to the Commission for further proceedings with directions to instruct the arbitrator to allow the parties to introduce additional evidence with regard to the claimant's suitability for vocational rehabilitation.

¶ 45 Circuit court reversed; Commission's decision vacated with its earlier order reinstated; and cause remanded with directions.