No. 2—10—0267WC
Order filed March 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

AMERICAN ENGINEERING, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION and JON SCHRINER, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 09—MR—626 Honorable Kenneth L. Popejoy, Judge, Presiding

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JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice McCullough and Justices Hoffman, Holdridge, and Stewart concurred in the judgment.

ORDER

Held: The Commission's finding that claimant is entitled to permanent total disability benefits under an odd-lot theory is not against the manifest weight of the evidence where claimant sustained his burden of proving a diligent but unsuccessful job search and respondent failed to establish that regular and continuous employment was available to claimant.

Claimant, Jon Schriner, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2004)) for injuries he allegedly

sustained on April 1, 2004, while in the employ of respondent, American Engineering. Among the issues in dispute at the hearing on claimant's application for adjustment of claim was the nature and extent of claimant's injury. The arbitrator determined that claimant was not permanently and totally disabled, and granted claimant a wage-differential award pursuant to section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2004)). The Illinois Workers' Compensation Commission (Commission) modified the decision of the arbitrator to award claimant permanent total disability (PTD) benefits under an "odd lot" analysis. See 820 ILCS 305/8(f) (West 2002). The circuit court of Du Page County confirmed the decision of the Commission. On appeal, respondent argues that claimant failed to establish that he was entitled to benefits under an "odd lot" analysis. We affirm.

I. BACKGROUND

Claimant was employed by respondent as a sheet metal worker. Claimant's work involved climbing, hanging duct work, and lifting items weighing up to 100 pounds. On April 1, 2004, claimant, who is right-hand dominant, tripped as he was carrying a bundle of pipes on his left shoulder. As claimant fell, his left shoulder jerked backwards. Although claimant reported the incident to his foreman, he did not think that he was seriously injured, and he continued working until respondent laid him off on April 7, 2004.

Claimant first sought treatment for his injury on April 29, 2004, at the Center for Athletic Medicine, where he initially saw a Dr. LaBella. Dr. LaBella took a history from claimant, performed a physical examination, and ordered X rays. Dr. LaBella's diagnosis was left shoulder pain with signs and symptoms suggestive of a tear in the glenoid labrum. Dr. LaBella ordered an MRI for further evaluation and prescribed naprosyn. In the meantime, Dr. LaBella authorized claimant off work and instructed him to consult with Dr. Preston Wolin after the MRI.

Claimant underwent an MRI of the left shoulder on May 6, 2004. The MRI showed: (1) a Type III acromion with an anterior/inferior hook and mild acromioclavicular degenerative changes with mild edema in the distal clavicle; (2) a superior labral tear compatible with a SLAP Type II tear extending into the anterior labrum; (3) an inferior labral tear and a small cystic collection near the posterior aspect of the inferior glenoid; (4) tendonopathy in the distal supraspinatus tendon; (5) minimal subacromial bursal fluid indicative of possible mild bursitis; (6) irregularity and increase signal along the articular surface of the distal infraspinatus tendon; and (7) a partial articular surface tear of the distal infraspinatus tendon. Dr. Wolin diagnosed symptomatic labral and rotator cuff pathology of the left shoulder, and he recommended surgical intervention. Dr. Wolin's report also indicated that claimant had complained of pain in the left elbow since the injury. Dr. Wolin opined that claimant's conditions are the result of the work injury of April 2004, and he authorized claimant to remain off work pending surgery.

Dr. Wolin performed arthroscopic shoulder surgery and a biceps tenodesis on September 30, 2004. Thereafter, claimant began a course of physical therapy. Claimant was authorized to remain off work until February 5, 2005, when he was released to light-duty desk work with no overhead activity with his left arm, no repetitive activity, and a five-pound weight restriction. However, there is no indication that claimant actually resumed working at that time. In March 2005, Dr. Wolin recommended that claimant undergo a functional capacity evaluation (FCE). The FCE was done on April 19, 2005. The evaluator concluded that although claimant demonstrated the ability to safely perform heavy work, he was unable to return to work in his capacity as a sheet metal worker on a full-time basis primarily because of his inability to perform heavy lifting and above-the-shoulder work on a frequent basis. The evaluator recommended that claimant participate in a work-

conditioning program. Based on the report, Dr. Wolin took claimant off work and referred him for work conditioning.

Claimant completed his work-conditioning program early in August 2005. At that time, Dr. Wolin imposed the following materials-handling limitations: (1) two-handed lifting, floor to knuckle, 71 pounds occasionally and 36 pounds frequently; (2) lifting waist to shoulder, 57 pounds very occasionally and 29 pounds frequently; (3) carrying, 64 pounds very occasionally and 32 pounds frequently; (4) pulling, 76 pounds very occasionally and 38 pounds frequently; and (5) pushing, 78 pounds very occasionally and 39 pounds frequently. Dr. Wolin added that the restrictions are permanent and that claimant had reached maximum medical improvement as of August 5, 2005. On September 9, 2005, the sheet metal workers' union informed claimant that no work was available within his restrictions. In February 2006, claimant experienced a recurrence of pain, which was diagnosed as an exacerbation of his job-related condition of the left shoulder, and additional physical therapy was prescribed.

At the April 14, 2008, arbitration hearing, claimant testified that he continues to experience pain and limitations in the left arm on a day-to-day basis, especially with overhead lifting, extended holding, and pulling. Claimant further testified that he is not employed, but that he has been looking for work within his restrictions. Claimant acknowledged that the restrictions that were imposed following surgery related to his left arm and shoulder and that no lifting restrictions were imposed with respect to claimant's right upper extremity.

Respondent hired Independent Rehabilitation Services, Inc., to work with claimant. In December 2005, claimant underwent vocational tests. According to Gary Wilhelm (a vocational counselor with Independent Rehabilitation Services, Inc.), claimant did "quite well" on the academic

portion of the test, scoring in the average range on the verbal and numerical tests, in the high-average range on the abstractions test (meaning he is good at solving problems and a good candidate for further training), in the high-average range on the spatial form perception test (meaning he is good in design), and in the high-average range on the mechanical and electrical tests (meaning that he had good processing and structural skills). Claimant scored in the low-average range in tests concerning organization and clerical work. Beginning in 2006, claimant met with Wilhelm about every two weeks to review new job leads, engage in job readiness training, revise his resume, and develop strategies on approaching employers. In Wilhelm's opinion, claimant had been "diligent" in his job search, having applied for approximately 500 to 600 jobs in just over two years. Wilhelm indicated that he provided about half of the leads to claimant. Wilhelm stated that his focus was on finding a job for claimant that paid in the range of $12 to $15 per hour, and he believed that a stable job market existed for claimant given his physical restrictions. Wilhelm admitted that he had not focused on or spent any significant time helping claimant to find any minimum-wage or retail jobs. Nevertheless, he could not think of any reason why claimant could not find a job that paid between $8 and $12 per hour.

Susan Entenberg, a vocational rehabilitation counselor, met with claimant once, on March 26, 2007, and prepared a report of her findings. Entenberg related that at the time of the interview, claimant was a 58-year-old high-school graduate with training limited to an apprenticeship with the sheet metal workers' union. Entenberg further related that aside from his work as a sheet metal worker, claimant's only other employment experience was a three-year stint as a factory worker in the late sixties and early seventies. Entenberg testified that she also reviewed medical data, including the restrictions outlined by Dr. Wolin. Entenberg noted that sheet-metal work is

considered a "heavy" job, requiring standing, walking, climbing, and bending throughout the workday as well as lifting up to 100 pounds occasionally and 50 pounds frequently. Based on the restrictions that were set for claimant, Entenberg opined that he could not return to work as a sheet metal worker.

Entenberg further opined that a stable labor market did not exist for claimant and that he was not an appropriate candidate for further job placement. Entenberg based her conclusions on claimant's age, his solitary work history, and limited education. Entenberg also cited her review of the records from Independent Rehabilitation Services, Inc., which, according to Entenberg, demonstrated that claimant had applied for over 1,000 positions, but had not received any job offers. Entenberg opined that claimant conducted "a very diligent job search." Nevertheless, Entenberg testified that if a position was found for him given his abilities, his restrictions, the job market, and the economy, claimant would be able to earn between $12 and $15 per hour.

On cross-examination, Entenberg admitted that none of the medical reports take claimant completely off work. She also acknowledged that she did not state in her report that claimant is completely and totally disabled. Entenberg stated that she did not have a list indicating the employers to whom claimant applied for jobs. She also testified that her report does not include any information about the market for jobs that pay less than $12 per hour.

Based on the foregoing evidence, the arbitrator found that claimant is capable of working at jobs that pay between $12 and $15 per hour. As such, the arbitrator awarded claimant a wage-differential benefit pursuant to section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2002)). On review, the Commission modified the decision of the arbitrator to award claimant permanent total

disability benefits under an "odd lot" analysis. See 820 ILCS 305/8(f) (West 2002). The Commission reasoned as follows:

> "In *Alano v. Industrial Commission*, [282 Ill. App. 3d 531 (1996)] the Appellate Court ruled that 'odd lot' status can be established in one of two ways: evidence of a diligent but unsuccessful job search or testimony of a vocational expert that there is no regular employment in the labor market for the claimant. [Citation.] Petitioner has clearly met both of these prongs. At the hearing, both parties called vocational experts to testify and both experts agreed that, since 2005, Petitioner had made a diligent and good faith effort to find a job in the pay range of $12.00 to $15.00 per hour. Ms. Entenberg also stated that taking into account Petitioner's age, physical impairments, limited education, a work history almost entirely in a field to which he was physically unable to return, and his geographic area, there was simply no stable labor market for him in the pay range targeted by Respondent's vocational counselor.
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> The Commission views the Arbitrator's wage differential calculation as speculative. Despite the fact that Petitioner has spent over two years looking for work in the $12.00 to $15.00 range–apparently at the behest of Respondent since its own witness testified that he focused solely on jobs in that pay range–he has not had one job offer. Respondent had ample opportunity to set its sights lower and try to find work in a different salary range, but made no attempt to do so. While it is true that there are no medical reasons that Petitioner could not perform a job paying $12.00 to $15.00 an hour, there has been no evidence provided by Respondent that such jobs exist and are available to him. Demonstrating that Petitioner is capable of doing a job that exists in a well known branch of the labor market is insufficient.

It must also be shown that he can actually get one and all of the evidence indicates that he cannot."

Therefore, the Commission awarded claimant PTD benefits of $1,019.73 per week for life pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2002)). On judicial review, the circuit court of Du Page County confirmed the decision of the Commission. This appeal followed.

II. ANALYSIS

On appeal, respondent challenges the Commission's finding that claimant was entitled to PTD benefits under an "odd lot" analysis. An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *A.M.T.C. of Illinois, Inc., Aero Mayflower Transit Co., Inc., v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). However, the employee need not be reduced to total physical incapacity before an award of PTD benefits may be granted. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286 (1983). Rather, the employee must show that he is, for all practical purposes, unemployable, *i.e.*, he is unable to perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alano*, 282 Ill. App. 3d at 534; *Marathon Oil Co. v. Industrial Comm'n*, 203 Ill. App. 3d 809, 815 (1990). Therefore, if an employee can work without seriously endangering his health or life, he is not entitled to PTD benefits. *A.M.T.C. of Illinois, Inc.*, 77 Ill. 2d at 488.

If the employee'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 employee to establish by a preponderance of the evidence that he falls into the "odd lot" category, that 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. *Westin Hotel v. Workers' Compensation Comm'n*, 372 Ill. App. 3d 527, 544 (2007). An employee satisfies his burden of proving that he falls into the odd-lot category by showing either (1) a diligent but unsuccessful attempt to find work or (2) 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. *Westin Hotel*, 372 Ill. App. 3d at 544. Once the employee establishes that he falls into the odd-lot category, the burden shifts to the employer to prove that some type of regular and continuous employment is available to the employee. *City of Chicago v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091 (2007); *Westin Hotel*, 372 Ill. App. 3d at 544; *Alano*, 282 Ill. App. 3d at 538 (Colwell, J., specially concurring). Whether the employee has met his burden of establishing that he falls into the odd-lot category and whether the employer has shown that some type of regular and consistent employment is available to the employee are questions of fact for the Commission, and its decisions on these issues will not be disturbed on appeal unless they are against the manifest weight of the evidence. *E.R. Moore & Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 361 (1978); *Alano*, 282 Ill. App. 3d at 538 (Colwell, J., specially concurring). A decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009).

In this case, claimant was not obviously unemployable and he did not produce any medical evidence to support a claim of total disability. Nevertheless, the Commission awarded PTD benefits as an odd lot on the basis that claimant established both a diligent but unsuccessful attempt to find work and the absence of regular employment in the labor market for an individual with claimant's age, skill, training, and work history. In support of these findings, the Commission noted that both

parties called vocational experts (Entenberg and Wilhelm) to testify. Both experts agreed that, since 2005, Petitioner had made a diligent and good faith effort to find a job paying between $12 and $15 per hour. The evidence also shows that claimant's job search was not successful. The Commission also cited Entenberg's finding that in light of claimant's age, physical impairments, limited education, and work history, there was no stable labor market for him in the pay range targeted by Wilhelm (respondent's vocational counselor). Since the Commission determined that claimant satisfied his burden that he falls into the odd-lot category, the burden shifted to respondent to show that some type of regular and continuous employment is available to claimant. The Commission determined that respondent failed to present any evidence that the types of jobs identified by Wilhelm exist and are available to claimant.

Notwithstanding the foregoing, respondent insists that the Commission erred in finding that claimant falls into the odd-lot category. Respondent argues that claimant failed to meet his burden of establishing a diligent but unsuccessful job search. In this regard, respondent first contends that claimant's job search was insufficient because it was limited to positions paying between $12 to $15 per hour. Respondent argues that claimant should have been looking for any position that fit within his restrictions, including those paying less than $12 per hour. This argument is without merit for two reasons. First, the pay-range guidelines were developed by the vocational counselor hired by *respondent* itself. Second, while it is true that Wilhelm focused *primarily* on jobs paying between $12 and $15 per hour, his vocational progress reports reference many jobs that pay less than $12 per hour. For instance, the February 6, 2008, report refers to a warehouse position paying between $7.50 and $8 per hour. The October 15, 2007, report refers to a position paying between $400 and $600 a week, the equivalent of between $10 and $15 per hour based on a 40-hour workweek. The June

25, 2007, report references a handyman position with a pay rate of between $10 and $15 per hour. The October 6, 2006, report states that claimant interviewed for a janitorial position paying $11 per hour. The March 23, 2006, report indicates that claimant was given a job lead for a position as a mechanical assembler paying $10 per hour and an assembler paying between $10 and $11 per hour. Thus, while the job search may have focused on positions paying in the range of $12 to $15 range, the record clearly indicates that claimant also looked for positions outside of this pay range. Yet, there was no evidence that claimant was offered a job at *any* rate of pay.

Respondent also contends that claimant's job search cannot be categorized as "diligent" because he did not make reasonable efforts to secure suitable employment. In support of this claim, respondent contrasts Wilhelm's testimony at the arbitration hearing that claimant's search was diligent with passages from his vocational progress reports. According to respondent, the reports show that claimant did not pursue job leads satisfactorily, that he spent several months dealing with personal matters, and that income from a disability pension posed a disincentive for claimant to return to work. Respondent therefore asserts that Wilhelm's testimony was "contradictory." However, it is within the province of the Commission to assess the credibility of the witnesses and weigh their testimony. *Alexander v. Industrial Comm'n*, 314 Ill. App. 3d 909, 915 (2000). In doing so, the Commission is presumed to consider any weaknesses in the testimony. *Alexander*, 314 Ill. App. 3d at 916. In this case, despite the concerns voiced in his earlier vocational progress reports, Wilhelm opined at the arbitration hearing that claimant had been "diligent" in his job search. Wilhelm pointed out that claimant applied for between 500 and 600 positions in just over two years, and that about half of the leads were generated by claimant himself. Wilhelm's testimony was consistent with the most recent vocational progress report in the record, dated February 6, 2008. In

that report, Wilhelm did not voice any of the concerns cited by respondent above. To the contrary, Wilhelm noted that claimant had recently participated in an interview and that he continued to "document substantial job search activity with a variety of employers."

We also emphasize that Entenberg agreed that claimant had conducted a "very diligent job search." Respondent insists that any reliance on Entenberg's opinion is misplaced because it was based on her assumption that claimant had applied for over 1,000 jobs. Although Entenberg's estimate was challenged at the arbitration hearing, we decline to overturn the Commission's decision on this basis, especially given Wilhelm's testimony that he too considered claimant to have conducted a diligent job search. Moreover, there is no evidence that claimant applied to positions for which he was unqualified (see *Alexander*, 314 Ill. App. 3d at 913, 917 (denying odd-lot status based in part on fact that the employee continually applied to positions for which he was not qualified)), that he failed to meet the recommended number of job contacts (see *Alexander*, 314 Ill. App. 3d at 916-17), that he frustrated the job-search process by failing to attend scheduled interviews (see *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d 587, 591-92 (1994) (denying odd-lot status to employee who did not appear at scheduled job interviews)), or that claimant disregarded potential employment opportunities or refused work which was offered to him (see *City of Green Rock v. Industrial Comm'n*, 255 Ill. App. 3d 895, 902 (1993)). Accordingly, we are not persuaded by respondent's claim that the Commission erred in finding a diligent but unsuccessful job search.

Respondent does not dispute that once the employee presents evidence to establish that he or she falls within the odd-lot category, the burden shifts to the employer to establish that some type of suitable work is regularly and continuously available to the employee. According to respondent, however, the Commission misstated this standard by requiring it to show that claimant "can actually

get a job." Respondent claims that this is not the standard articulated in common law. Rather, respondent asserts, once the burden shifts, the employer must show "that work is available to the [employee]," not "the actual ability of a[n employee] to get a job." While the language used by the Commission was less than artful, we find respondent's interpretation of the Commission's decision without merit. As respondent correctly points out, once the burden shifts in an odd-lot analysis, the employer must show that some type of regular and continuous employment is *available* to the employee. *City of Chicago*, 373 Ill. App. 3d at 1091. The word "available" has been defined as "that [which] is accessible or may be obtained: personally obtainable (as for employment)." Webster's Third New International Dictionary 150 (2002). In this case, the Commission determined that claimant is theoretically capable of performing certain jobs. However, it additionally found that there was no showing that claimant "can actually get [a job]," *i.e.*, respondent failed to carry its burden of showing that some type of regular and continuous employment is "personally obtainable" by claimant. This was the correct standard.

In a related argument, respondent argues that the manifest weight of the evidence shows that work was available to claimant. Respondent notes that both Wilhelm and claimant identified hundreds of jobs in the $12 to $15 per hour range for which claimant was qualified. Respondent also notes that Entenberg opined that positions may exist for claimant in the range of $12 to $15 per hour. This evidence merely established the existence of work within claimant's qualifications and restrictions. However, as the Commission made clear, the fact that claimant may have been capable of and qualified for a particular position does not mean that regular and continuous employment is *available* to him. Significantly, despite the fact that claimant's qualifications and restrictions did not exclude him as an eligible candidate for hundreds of jobs, respondent did not present any evidence

that claimant could obtain any of the jobs for which he applied. In this regard, we emphasize that respondent did not present any evidence that any of claimant's applications and interviews led to a single job offer. Thus, the evidence supports a finding that (1) claimant conducted a diligent but unsuccessful job search and (2) respondent failed to show that some type of regular and consistent employment was available to claimant. Accordingly, we cannot say that the Commission's finding that claimant is entitled to PTD benefits under an odd-lot theory is against the manifest weight of the evidence.

Respondent also challenges the Commission's finding that claimant proved his burden of establishing an odd-lot disability under the second method, *i.e.*, that "no labor market" existed for claimant. However, a claimant need only prove one of the two methods for odd-lot eligibility. See *Alano*, 282 Ill. App. 3d at 538 (Colwell, J., specially concurring). Having found that claimant sustained his burden of proving a diligent but unsuccessful job search and that respondent failed to establish that regular and continuous employment was available to claimant, we need not address respondent's contention that claimant failed to establish his odd-lot status under the second method.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the circuit court of Cook County, which confirmed the decision of the Commission.

Affirmed.