2012 IL App (2nd) 110547WC-U
NO. 2-11-0547WC
Order filed February 17, 2012

IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

COSTCO WHOLESALE,	)	Appeal from
Appellant,	)	Circuit Court of
v.	)	DuPage County
THE WORKERS' COMPENSATION	)	No. 10MR1426
COMMISSION *et al*. (John Trybula, Appellee).	)	
	)	Honorable
	)	Bonnie M. Wheaton,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission committed no error in finding claimant's condition of ill-being after July 31, 2005, was causally connected to his work-related accident or in its award of PTD benefits.

¶ 2 On November 19, 2003, claimant, John Trybula, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2002)), seeking benefits from employer, Costco Wholesale. Following a hearing, the arbitrator found claimant sustained an accidental injury to his lower back that arose out of and in the course of his employment on June 14, 2003. She awarded claimant $10,898.40 for medical expenses and 111 weeks' temporary total disability (TTD) benefits from June 14, 2003, through July 31,

2005. The arbitrator also denied claimant's request for prospective medical expenses in the form of spine surgery, finding his doctors were not qualified to render medical opinions as to the need for such surgery. On review, the Workers' Compensation Commission (Commission) modified the arbitrator's decision to require employer to authorize payment for an evaluation by a doctor qualified to render an opinion regarding claimant's need for spinal surgery. It otherwise affirmed and adopted the arbitrator's decision and remanded to the arbitrator for proceedings to determine further amounts of TTD or compensation for permanent disability, if any. Neither party sought review of the Commission's decision and it became final.

¶ 3 Following a second arbitration hearing, the arbitrator found claimant's current condition of ill-being was causally connected to his June 2003, work accident and caused him permanent and total disability. The arbitrator awarded claimant permanent total disability (PTD) benefits of $385.57 per week for life, beginning June 12, 2008. On review, the Commission modified the arbitrator's decision to reflect that claimant's permanent and total disability began on August 1, 2005. It otherwise affirmed and adopted the arbitrator's decision. The circuit court of DuPage County confirmed the Commission's decision.

¶ 4 Employer appeals, arguing the Commission's decision that claimant's condition of ill-being after July 31, 2005, was causally connected to his June 2003, work accident was (1) incorrect as a matter of law because the Commission failed to give proper weight to certain medical opinions and (2) against the manifest weight of the evidence. It also challenges the Commission's decision that claimant was permanently and totally disabled as being against the manifest weight of the evidence. We affirm.

¶ 5 The parties are familiar with the evidence presented and we will discuss it only the extent necessary to put their arguments in context. On appeal, employer first argues the Commission's decision that claimant's condition of ill-being after July 31, 2005, was causally connected to his work-related accident was incorrect as a matter of law because the Commission failed to give proper weight to the opinions of Dr. Frank Phillips. It notes claimant was examined by Dr. Phillips, an orthopedic surgeon, pursuant to the Commission's order that he be evaluated by a doctor who was qualified to render an opinion regarding his need for spinal surgery. Employer maintains that, as a matter of law, Dr. Philips' opinions should have been afforded more weight than those of Dr. Jerry Coltro, claimant's family doctor. Further, it emphasizes that Dr. Phillips was the only physician in the case capable of rendering an opinion regarding claimant's need for spinal surgery.

¶ 6 Whether a claimant's condition of ill-being is causally connected to his employment is a factual question for the Commission and its decision will not be set aside on review unless it is contrary to the manifest weight of the evidence. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 160 (2011). "In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence." *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶38.

¶ 7 We reject employer's contention that the Commission was required, as a matter of law, to give more weight to Dr. Phillips' opinions over those of Dr. Coltro. There is no legal

authority for its position. Instead, Dr. Phillips' status as a board certified orthopedic surgeon who was qualified to render an opinion regarding claimant's need for spinal surgery was simply a factor for the Commission to consider when determining the weight to give Dr. Phillips' testimony and opinions. While a doctor's qualifications and experience might weigh in his favor, it does not follow that, simply because of those factors, the Commission is required to ignore other more credible evidence.

¶ 8 On appeal, employer also argues the Commission's causal connection decision was against the manifest weight of the evidence. It contends the evidence shows claimant's condition of ill-being after July 31, 2005, was the result of a long-standing, pre-existing degenerative low back condition and not his 2003, work-related accident.

¶ 9 "In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim." *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 867, 923 N.E.2d 870, 878 (2010). " '[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment.' " *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165 (2011), quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36, 440 N.E.2d 861, 864 (1982). Further, "[e]very natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807,

812 (2005). "That other incidents, whether work-related or not, may have aggravated the claimant's condition is irrelevant." *Vogel*, 354 Ill. App. 3d at 786, 821 N.E.2d at 812.

¶ 10 As discussed, the Commission's factual determinations "will not be disturbed on review unless they are against the manifest weight of the evidence; that is to say, unless an opposite conclusion is clearly apparent." *R & D Thiel*, 398 Ill. App. 3d at 868, 923 N.E.2d at 878. "The relevant inquiry is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other might reach an opposite conclusion." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 538-39, 865 N.E.2d 342, 353 (2007).

¶ 11 Here, the record contains sufficient evidence to support the Commission's decision. It shows, in June 2003, claimant was working for employer as a gas station attendant when he fell while lifting trash out of a receptacle. Claimant immediately sought medical care and complained of low back pain. Although claimant had a preexisting back condition of ill-being, he experienced a significant increase in back pain following his June 2003 fall. Following a hearing, the arbitrator and Commission determined that credible medical evidence and opinions established claimant's work accident "caused hemotogenous seeding of strep pneumonial bacteria which was coincidentally in his blood-stream, onto the L4-L5 disc area, causing disc infection and osteomyelitis of the adjacent vertebrae." Claimant was awarded benefits under the Act and the Commission's decision was not challenged.

¶ 12 Following these initial proceedings, claimant continued to follow up with his family doctor, Dr. Coltro, for various medical conditions, including chronic low back pain. Dr. Coltro testified claimant's low back pain was a "constant feature" of his complaints during those

follow-up appointments. Claimant testified on his own behalf and described the pain he experienced while performing his regular daily activities. In particular, he noticed a lot of pain after sitting for 20 minutes, standing for 10 minutes, walking two blocks, mowing his grass, and driving for 20 to 25 minutes. Although the record shows claimant worked and performed his job duties prior to his June 2003 accident, his condition after that date prevented him from returning to work. Dr. Coltro never released claimant to return to work and Dr. Phillips described claimant as disabled and agreed it was highly likely that claimant's back condition caused him significant pain. Dr. Philips also recommended claimant perform only light levels of physical activity.

¶ 13 Additionally, both Dr. Coltro and Dr. Phillips provided testimony that linked claimant's work-related back infection to the condition of his back after July 31, 2005, the last date he received treatment for his back injury before the initial arbitration hearing. Dr. Coltro testified claimant's infection had healed, causing degenerative changes, including degenerative disc and joint disease, as well as pain. He believed the condition of the L4-L5 level of claimant's spine affected by the infection was a component in claimant's back pain. Although Dr. Coltro could not measure the effect of the infection on claimant's current condition of ill-being, he believed the infection could not have resolved without some residual effect to the area involved. He testified claimant's infection would have aggravated and accelerated claimant's preexisting back condition of ill-being and noted there were progressive changes at L4-L5 that were more dramatic than at other levels of claimant's spine.

¶ 14 Employer supports its position of a lack of causal connection with Dr. Phillips' testimony and opinions. However, even though Dr. Phillips opined claimant's condition of ill-

being after July 2005 was not causally connected to his work accident, he testified claimant was disabled "based on the constellation of things going on" in his back, including the infection he suffered as a result of his work accident. He agreed that claimant's infection was "a cause of the need for disability" and that the infection played a role in claimant's condition. Dr. Phillips also acknowledged that it was in the realm of possibility that claimant's infection at L4-L5 could have aggravated and accelerated the degree of degeneration in that area.

¶ 15 Employer also refers to a fall claimant had in December 2007, when he slipped on some ice. However, the record does not support a finding that the fall was an intervening accident that broke the chain of causation. Claimant testified his increase in pain after his December 2007 fall lasted approximately three weeks and then he returned to his typical levels of pain. Further, Dr. Coltro testified claimant's December 2007 fall did not cause any permanent damage that he could note clinically and that claimant returned to his baseline status with respect to his back problems.

¶ 16 Here, the arbitrator and Commission agreed with Dr. Coltro's belief that claimant's infection and resulting auto fusion had to have some residual effect on claimant's underlying condition. Based upon the foregoing evidence, the Commission found claimant's condition of ill-being after July 31, 2005, was causally connected to his June 2003, work accident. As stated, the record contains sufficient support for that decision and it is not against the manifest weight of the evidence.

¶ 17 Finally, on appeal, employer challenges the Commission's award of PTD benefits. It contends the Commission's decision that claimant became permanently and totally disabled as

a result of his June 2003 accident was against the manifest weight of the evidence.

¶ 18 Pursuant to the Act, a claimant is entitled to lifetime benefits when he suffers "complete disability" which renders him "wholly and permanently incapable of work." 820 ILCS 305/8(f) (West 2008)). In *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842, 845 (1983), the supreme court has stated as follows:

> "This court has frequently held that an 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 reasonably stable market. [Citation.] Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. [Citation.] In determining a claimant's employment potential, his age, training, education, and experiences should be taken into account. [Citations.]"

¶ 19 Where a claimant is not obviously unemployable or no medical evidence exists to support a total disability claim, a claimant may be entitled to lifetime PTD benefits upon a

showing that he falls into an "odd-lot" category, meaning employment is unavailable to a person in his circumstances. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 204, 904 N.E.2d 1122, 1133 (2009). "An odd-lot employee 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." *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1089, 871 N.E.2d 765, 773 (2007). To show he fits into the "odd-lot" category, a claimant must show (1) a diligent but unsuccessful job search, or (2) that he is unable to engage in stable and continuous employment because of his age, training, education, experience, and condition. *Economy Packing Co. v. Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 283, 293, 901 N.E.2d 915, 924 (2008).

¶ 20 Whether a claimant is permanently and totally disabled is a question of fact for the Commission and, on review, its decision will not be disturbed unless it is against the manifest weight of the evidence. *Ameritech*, 389 Ill. App. 3d at 203, 904 N.E.2d at 1133. As stated, "the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination." *Ameritech*, 389 Ill. App. 3d at 203, 904 N.E.2d at 1133.

¶ 21 Here, the commission determined claimant was permanently and totally disabled. Again, its decision is supported by sufficient evidence. As discussed, claimant testified regarding the significant pain he experienced with his day to day activities. Evidence showed he continued to see Dr. Coltro for his back-related symptoms. Dr. Coltro did not offer an opinion as to whether claimant could return to full-time employment but agreed that he had never released claimant to return to work. Dr. Phillips stated claimant was disabled by his back condition and

recommended he perform only "a fairly light level" of physical activity. He did not feel claimant could perform heavy labor and stated he would probably recommend that claimant avoid lifting more than 25 pounds and repetitive bending. Further, Dr. Phillips testified that the L4-L5 auto fusion that resulted from claimant's infection would permanently cause diminished motion at that level of his spine.

¶ 22 The Commission's PTD award is further supported by the vocational evaluation report authored by Joseph Belmonte, a rehabilitation counselor with Vocamotive. Belmonte assessed claimant as having permanent and total disability and determined that, based upon claimant's physical status and situational factors, prospective employers would be unable to "effectively assist [claimant] with placement with or without accommodation." He noted claimant was 59 years old, had only a high school education, was not computer literate, had a work experience consisting of mostly unskilled labor or customer service activities, had no transferable skills, and had a physical demand level that was below sedentary duty.

¶ 23 Employer counters Belmonte's report with a vocational report prepared by Mary Schmit, a vocational rehabilitation consultant. However, the arbitrator, and by adoption the Commission, found Schmit unpersuasive. We agree.

¶ 24 In her report, Schmit initially acknowledged that claimant had "significant disabilities as a result of the multiple diagnoses that he suffer[ed] from" and agreed "that he [was] unlikely to be able to sustain gainful employment." Nevertheless, after finding that the totality of claimant's disability could not be solely related to his work injury and considering only the general result of a lumbar fusion "taken by itself," Schmit ultimately concluded that claimant

could obtain gainful employment as a security guard or parking garage attendant. Schmit's reasoning is flawed. Employer's must take their employees as the find them (*Tower Automotive*, 407 Ill. App. 3d at 434, 943 N.E.2d at 160) and employment need not be the *sole* causative factor in a claimant's condition of ill-being. Again, the evidence presented was sufficient to show claimant's work-related accident was a causative factor in his condition of ill-being and resulting disability. Given Schmit's flawed analysis and her acknowledgment that claimant had significant disabilities and was unlikely to be able to sustain gainful employment, the Commission committed no error in giving her ultimate conclusion of employability less weight than Belmonte's opinions.

¶ 25 Here, the Commission's conclusions were supported by sufficient evidence that showed his condition of ill-being after July 31, 2005, was causally connected to his employment and that he proved his entitlement to PTD benefits. Its decisions were not against the manifest weight of the evidence.

¶ 26 For the reasons stated, we affirm the circuit court's judgment.

¶ 27 Affirmed.