2012 IL App (3d) 110207WC-U

Workers' Compensation
Commission Division
Filed: March 2, 2012

No. 3-11-0207WC

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

CHICAGO BRIDGE AND IRON COMPANY,	) APPEAL FROM THE
	) CIRCUIT COURT OF
Appellant,	) PEORIA COUNTY
	)
v.	) No. 10 MR 167
	)
ILLINOIS WORKERS' COMPENSATION	)
COMMISSION, et al.,	)
(JERRY EVANS,	) HONORABLE
	) MICHAEL E. BRANDT,
Appellees).	) JUDGE PRESIDING.

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

O R D E R

Held: The decision of the Commission awarding the claimant temporary total disability benefits, maintenance benefits and ordering vocational services is not against the manifest weight of the evidence.

¶ 1 Chicago Bridge and Iron Company (Chicago) appeals from a judgment of the Circuit Court of Peoria County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Jerry Evans, temporary total disability (TTD)

and maintenance benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2006)), for back injuries he sustained on January 8, 2007, and ordering a vocational assessment. For the reasons which follow, we affirm.

¶ 2 The following factual recitation is taken from the record of the arbitration hearings as well as the remainder of the record on appeal.

¶ 3 The claimant, a boilermaker who was 64 years old at the time of his testimony and had worked for Chicago for 27 years, testified that he slipped and fell on the job on January 8, 2007, and injured his back. The injury was later revealed to be a disc herniation. He reported his injury, and, on January 12 and afterwards, doctors restricted him to light-duty work. The claimant stopped working for Chicago on February 22, 2007, the end date of the job he had been working on. He thereafter sought treatment (including physical therapy and medication) for his back pain. A functional capacity evaluation conducted approximately one year later revealed that he was functioning in the "light to medium physical demand range" despite his reports of improvement.

¶ 4 The claimant testified that, at the time of his injury, he worked as a superintendent, a position that required him to supervise other employees but also to perform various physical tasks, such as climbing water towers or scaffolds, lifting heavy weights, and standing for long periods. He said that, after his injury, he informed his supervisor, David Lieske, of his new limitations and asked for accommodations.

¶ 5 The claimant stated that his plan had been to continue to work with Chicago for another three years in order to maximize his pension benefits. However, on cross-examination, he agreed that around the time of his January 2007 accident, he had told Lieske and another supervisor, David Beck, that he was considering retirement. He also agreed that he made his statements about retirement to his supervisors when they proposed that he begin work on a new job in the next month and that he told them that, if his back did not improve, he would likely have to retire.

After that conversation, the claimant submitted a pension request form to Chicago's human resources department and, on the form, he indicated that he would retire in March 2007. In his testimony, the claimant explained that he completed the form in that way because he was considering retiring in March.

¶ 6 Near the time of the claimant's accident, Chicago had planned for the claimant to supervise a job in Darien, Illinois. When this plan was presented to him after his accident, the claimant recalled that he told Lieske he would be physically unable to do the job as planned but would accept the job if his duties were limited to his advising and training other workers. In the claimant's recollection, Lieske then offered to hire the claimant's son on the Darien job in order to entice the claimant to accept the work, but the claimant maintained that he could not accept the job without work restrictions. At that time, the claimant said, Lieske asked him to start the job while Lieske searched for another supervisor. The claimant testified that he agreed to this proposal, with the caveat that he had to contact his union to stop any steps that had been taken towards his official retirement. During cross-examination, the claimant agreed that he spoke with Lieske closer to the start of the Darien job and again told him he still had to tell the union to call off his retirement before he could commit to the Darien work, but he said that he intended to call the union to clarify the situation. According to the claimant, Lieske never gave him that chance. Instead, shortly thereafter, Lieske called him back to tell him that he "[did not] have to be there Monday, [']send me your telephone *** and your credit card. Have a good life.['] And that was it." The claimant said that he remembered that Lieske called him one week later to try to smooth over any personal offense that had been caused by their earlier communications. The claimant reiterated that, in January and February 2007, he was willing to work if Chicago had offered him duties within his physical restrictions.

¶ 7 When asked during cross-examination whether he recalled a follow-up conversation with Lieske regarding the Darien job, the claimant stated that he had no recollection of such a

conversation, nor any recollection of his telling Lieske that he intended to stop working for personal reasons.

¶ 8 The claimant recalled that, in the summer of 2008, Lieske called him again to offer him work on a job in Michigan. The claimant testified that he told Lieske he would be interested in the work but that he "never heard back" from Lieske, who "evidently found someone else to do it." The claimant said that, other than that summer 2008 contact, Chicago made no efforts to provide him with light-duty work.

¶ 9 The claimant further testified that he had conducted his own job searches after he stopped working for Chicago. He documented eight contacts with potential employers in the years after he left Chicago, and he said that he had made several more contacts prior to the time he began documenting them.

¶ 10 Lieske, the claimant's supervisor at Chicago, testified that he, the claimant, and Beck spoke about the claimant's retirement in mid- to early-January. According to Lieske, the claimant told them at that meeting that he had been traveling "a long time" and was considering retiring at the end of the job he was completing. At that point, Lieske testified, the supervisors asked the claimant if he would continue working to oversee the Darien job. Lieske said that he told the claimant to do the Darien work within his medical limitations, something the claimant would have been able to accomplish since he would have overseen all work activities at the site. In Lieske's recollection, the claimant responded by saying he was still considering retirement and would get back to them.

¶ 11 In early February 2007, two weeks before the end of what became the claimant's last job with Chicago, Lieske had a follow-up conversation with the claimant regarding the Darien job. During that conversation, Lieske said, the claimant "said he'd been traveling a long time and that his wife wanted him to come home and that he didn't want to work anymore." Lieske testified that he responded by offering to let the claimant's son work on the Darien job despite the

company's anti-nepotism policy, but the claimant still wished to retire. At that point, Lieske asked the claimant to start the Darien job while Chicago looked for another foreperson, and the claimant, who had begun paperwork to receive a pension from his union, responded that he would have to get permission from his union to work. Lieske recalled that he later telephoned the claimant to inquire about the Darien job, and the claimant had not yet contacted his union and could not commit to the job. Although the claimant promised to contact the union and then call Lieske back, Lieske testified that he became nervous and instead found another foreperson. After doing so, Lieske informed the claimant and asked the claimant to return his company phone and credit card. Lieske said that he later called the claimant again to reconcile, because he had heard that the claimant was upset following their last conversation. He said that, in March 2007, he completed a "B card" to finalize the claimant's job file due to the claimant's retirement.

¶ 12 Lieske testified that he called the claimant again in 2008, to gauge the claimant's interest in acting as a safety supervisor at a new job for Chicago. He said, however, that he elected to use another Chicago employee for the job.

¶ 13 Jerry Evans, another of the claimant's supervisors at Chicago, testified that the claimant told him near the end of 2006 that "he was planning on retiring" because "he had been on the road a long time ***, [and] wanted to spend more time with his grandchildren and his wife and work in his wood shop." Evans also remembered a January 2007 conversation, after the claimant's work injury, between the claimant, Lieske, and him in which the claimant again stated an intent to retire at the end of the pending job. When the claimant indicated his intent to retire, Evans recalled, Lieske responded by asking the claimant to stay on to do the Darien job, and the claimant replied that he would consider doing so. Evans testified that Chicago actually had the claimant scheduled to work on the Darien job and another job after that. Evans verified that the claimant would have been able to limit himself to his medical restrictions if he had continued to work for Chicago.

¶ 14 Recalled as a rebuttal witness, the claimant reiterated that he had intended to continue to work for Chicago until he had 30 years of service, and he said that his December 2006 comments were general ruminations about retirement. Although Evans and Lieske had testified that the claimant could do the Darien job within his job restrictions by delegating certain physical tasks, the claimant testified that his delegating those tasks would have been inappropriate. He further said that the job would have required him to lift beyond his restrictions, and to operate machinery despite medical problems doing so. On cross-examination, the claimant agreed that, despite his restrictions, he was able to finish his last job for Chicago, but he said he did so without taking his medications and by sometimes exceeding his medical restrictions.

¶ 15 The claimant's medical records include a January 8, 2010, note from Drs. Keith Barnhill and Demaceo Howard stating that the claimant was "not returning to work as he will retire as of February." However, the records also include a February 6, 2008, note from the same doctors reporting that, "[o]n discharging [the claimant] he stated he would like to return to duty, however he wanted work-related restrictions because he cannot lift."

¶ 16 On September 4, 2009, the arbitrator issued a decision finding that the claimant had retired from the workforce and had turned down work during the period for which he sought TTD benefits. The arbitrator awarded the claimant some medical expenses but denied him TTD and vocational rehabilitation benefits. In so ruling, he found that the claimant was not credible and that the claimant's testimony was undercut by documentary evidence, including a written pension request. The arbitrator also noted that the fact that the claimant continued to work for Chicago after suffering his injury indicated that he could perform supervisory tasks after his disability. Based on this evidence, the arbitrator found that the claimant retired on January 15, 2007, and that he declined work Chicago had offered him within his restrictions.

¶ 17 The claimant filed a petition for review of the arbitrator's decision before the Commission. In a decision with one commissioner dissenting, the Commission extensively

modified the arbitrator's decision. In the Commission's view, the evidence showed that the claimant "began to plan his retirement in December of 2006 and started putting that plan into action in mid-January 2007" but did not decline later work offers. The Commission found that the claimant was willing to work the first two weeks on the Darien job, and it awarded him TTD benefits for those two weeks (from February 23, 2007, through March 8, 2007). The Commission also found that the claimant demonstrated a willingness to work when Lieske contacted him in 2008, and it thus awarded him maintenance benefits for 37 weeks from October 1, 2008, through June 16, 2009. It also ordered a vocational assessment, and it remanded the case to the arbitrator for further proceedings pursuant to Thomas v. Industrial Comm'n, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 18 Chicago filed a petition for judicial review of the Commission's decision in the Circuit Court of Peoria County. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 19 On appeal, Chicago asserts that the Commission erred in finding that the claimant had not retired by February 22, 2007, and that he had not removed himself from the workforce thereafter. It argues, therefore, that the Commission's award of TTD and maintenance benefits and its order for a vocational assessment of the claimant are against the manifest weight of he evidence. We disagree.

¶ 20 Normally, benefits under the Act may be suspended or terminated if an employee refuses work falling within the physical restrictions prescribed by his doctor. Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n, 236 Ill. 2d 132, 146, 923 N.E.2d 266 (2010). Here, the Commission found as a matter of fact that the claimant was willing to work both for the first two weeks of the Darien job, from February 23, 2007, through March 8, 2007, and at a job Lieske offered him in 2008. This represents a finding of fact by the Commission, whose function it is to decide questions of fact, judge the credibility of witnesses and resolve conflicting evidence.

O'Dette v. Industrial Comm'n, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980). The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. Orsini v. Industrial Comm'n, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987). 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 against 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).

¶ 21 To assert that the Commission's finding regarding the claimant's willingness to work is against the manifest weight of the evidence, Chicago emphasizes testimony from Lieske and Beck that the company stood ready to accommodate any of the claimant's restrictions, yet he hesitated to accept work on the Darien job. It also emphasizes evidence, both from Lieske's and Beck's testimony and from exhibits introduced at the hearing, that the claimant was planning to retire in early 2007. The Commission, however, considered this evidence and determined that the claimant's discussion of retirement amounted only to planning. There was ample evidence in the record to support this determination. The claimant testified that his retirement talk was only planning, and he further testified that he had no intention of retiring until he obtained 30 years of service. Although Liekse and Beck testified that their job offers would have allowed the claimant to work within his restrictions, the claimant testified that such promises were not realistic. Further, although there was evidence that the claimant told treating physicians that he was retired, there was matching evidence that he told the same physicians within the same time period that he wanted to return to work. In addition, the claimant testified that he was willing to take a job described to him by Lieske in October 2008. In sum, although there may be sufficient

evidence to support a finding that the claimant in fact did intend to retire in early 2007, there is also sufficient evidence to support a contrary finding. Given this conflicting evidence, we will not disturb the Commission's factual findings on the issue. That being the case, the Commission's award of TTD and maintenance benefits and its order for a vocational assessment of the claimant are not against the manifest weight of he evidence.

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the Commission's decision, and we remand the matter back to the Commission for further proceedings.

¶ 23 Affirmed and remanded.