2014 IL App (3d) 120995WC-U

Workers' Compensation
Commission Division
Order filed: February 26, 2014

No. 3-12-0995WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

RICHARD BORNSCHEURER,	)	Appeal from the Circuit Court
	)	of Marshall County.
	)	
Appellant,	)	
	)	
v.	)	No. 12-MR-04
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Stuart P. Borden,
(Henry Senachwine Grade School, 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 Commission erred in awarding permanent partial disability instead of wage differential benefits; and, the claimant forfeited his argument pertaining to the inclusion of a hold-harmless provision in the medical expenses award.

¶ 2 The claimant, Richard Bornscheurer, appeals from the circuit court order which confirmed the decision of the Workers' Compensation Commission (Commission) to award him

permanent partial disability (PPD) benefits under section 8(d)(2) of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)(2) (West 2004)), instead of wage differential benefits under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2004)), for injuries he sustained while in the employ of the Henry Senachwine Grade School (School). He further argues that the Commission erred in failing to include in the medical expenses award a provision ordering the School to hold him harmless for any claims for reimbursement of state benefits. For the reasons that follow, we reverse that portion of the judgment of the circuit court which confirmed the Commission's award of PPD benefits under section 8(d)(2) of the Act; reverse that portion of the Commission's decision which awarded PPD benefits under section 8(d)(2) of the Act; remand the cause to the Commission with instructions to award the claimant wage-differential benefits pursuant to section 8(d)(1) of the Act; and affirm the judgment of the circuit court in all other respects.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on January 19, 2011.

¶ 4 The claimant testified that he began working as a custodian for the School in 1998 or 1999. On November 5, 2004, he was putting a rack of chairs away when a 12-foot ladder fell and struck the back of his right knee. On November 8, the claimant saw his primary care physician, Dr. Thaw Tun, who referred him to an orthopedist, Dr. Sekhar Sompalli. An MRI, dated November 11, 2004, showed that the claimant suffered a medial and lateral meniscal tear in his right knee. On December 14, 2004, Dr. Sompalli performed a partial medial and lateral meniscectomy on the claimant. On June 14, 2005, Dr. Sompalli performed a second arthroscopic surgery on the claimant's right knee, which included an excision of the plica, debridement and resection of the flap tear of the medial femoral condyle and partial synovectomy. Following the

second surgery, the claimant underwent physical therapy, and Dr. Sompalli ordered work restrictions for the claimant, including no climbing, no repetitive work, sit-down work with a break every two hours, and no squatting.

¶ 5 On October 13, 2005, the claimant, upon the referral from Dr. Sompalli, saw Dr. Pietro Tonino at Loyola University Hospital for a second opinion. Dr. Tonino reported that the claimant reported no significant improvement following either surgery, complaining of significant discomfort and pain in his knee. Dr. Tonino wrote that, upon physical examination, the claimant had no effusion of his right knee, a range of motion from 20 to 100 degrees, and no evidence of ligamentous or meniscal pathology. He wrote that the claimant had diffuse tenderness to palpation anywhere about the knee. Dr. Tonino stated that the right knee had undetermined etiology and recommended another MRI.

¶ 6 On October 20, 2005, at the request of the School, the claimant saw Dr. David Fletcher. Dr. Fletcher reported that the claimant continued to have pain in his right knee four months after his second surgery. He stated that there was evidence of right thigh atrophy and that the claimant may need a third arthroscopy to evaluate the knee. Dr. Fletcher recommended that the claimant have an isokinetic strength test to evaluate his knee function, participate in pool therapy, take anti-inflammatory medication, and consider visco-supplementation injections. He stated that the claimant could continue "to do modified duty," but permanent job restrictions were not yet necessary.

¶ 7 On March 14, 2006, the claimant underwent a Functional Capacity Evaluation (FCE), which resulted in the following recommendations: the claimant should continue his home therapy exercises; he should not perform repetitive motions; he should not perform duties for long periods of time; and he should not bend or squat due to restricted knee motion and pain.

¶ 8 On March 27, 2006, Dr. Sompalli wrote to the School's insurer that the claimant was restricted to light physical demand work and should not perform repetitive motions, perform duties for long periods of time, or bend to squat. He wrote that these were "lifetime restrictions" and he will have to modify his job to fit these restrictions. At this point, Dr. Sompalli wrote that the claimant was at maximum medical improvement (MMI) and that he was releasing him from his care.

¶ 9 On July 19, 2006, Dr. Robert Eilers evaluated the claimant at his request. The claimant reported a history of two knee surgeries and difficulty with daily life activities, including putting on shoes and socks, getting in and out of the shower, walking long and short distances, shopping, cleaning, yard work, and sitting for periods longer than 15 minutes. The claimant reported that he could drive for about 30 minutes and that, with some activities, his right leg goes numb or gets a shooting pain. Upon physical examination, Dr. Eilers noted that the claimant had significant pain beyond a 90-degree range of motion in the right knee whereas normal is about 110 degrees. The claimant tended to ambulate with the right leg externally rotated and the knee in slight flexion and showed significant pain on flexion-extension of the right knee, tenderness over the patella, tenderness over the distal femoral condyles, and pain when testing for medial and lateral stability. Dr. Eilers concluded that the claimant was not able to return to his prior job and that he would be limited to a sedentary position at the very best. Because of the claimant's limited education, Dr. Eilers stated that the claimant was unlikely to find employment and was permanently and totally disabled for competitive employment because he had difficulty ambulating and sitting for prolonged periods of time. Dr. Eilers further reported that the claimant was limited in his ability to drive and commute and that these restrictions were permanent. Dr. Eilers testified consistently with the opinions in his report.

¶ 10 On August 23, 2006, the claimant underwent a second FCE. The FCE resulted in a recommendation that the claimant could return to work but the "physical demand level [was] unknown, secondary to submaximal test effort," that he continue a home exercise program, and that he may benefit from psychological testing. The report noted that the claimant did not demonstrate maximum ability and, therefore, his physical and functional deficits remained unknown.

¶ 11 On August 24, 2006, Dr. Fletcher examined the claimant a second time at the request of the School. Dr. Fletcher reported that the recent FCE did not reflect a "consistent, maximal effort" on the part of the claimant and that he tested positive on four out of seven written questionnaires used to identify symptom magnification. Additionally, the claimant reported weakness and pain during activities unrelated to his knee. Accordingly, Dr. Fletcher reported that no objective statement regarding the claimant's physical abilities could be made because of his failure to demonstrate a maximum voluntary effort during his evaluation.

¶ 12 On November 29, 2006, at the request of the School, Dr. Fletcher reviewed surveillance video of the claimant filmed on September 16 and 17 of 2006. (The videos are not part of the record on appeal). He stated that the video supported his belief that the claimant was magnifying his symptoms as it showed the claimant carrying laundry that appeared heavier than the weights he demonstrated an ability to carry during his FCE and showed a noticeably improved gait. The video depicted the claimant performing activities, such as shopping, walking a small dog, and hanging laundry on a clothesline, which he reported having difficulty performing to Dr. Fletcher during his recent exam.

¶ 13 On March 13, 2007, the claimant underwent a third FCE, which resulted in three conclusions. First, the claimant's functional abilities were unable to be assessed due to

"submaximal efforts." Second, the claimant demonstrated significant pain behavior throughout the evaluation that limited the abilities of the tests applied to him. Third, the claimant would not benefit from any further rehabilitative efforts.

¶ 14 The claimant testified that he was told by the School that he could not return to work until the work restrictions were lifted. He received temporary total disability (TTD) benefits between November 8, 2004, and November 30, 2006. At that point, he began receiving wage differential payments even though he did not have another job. The claimant testified that he worked for one day at a job involving calling people or businesses from his home, which paid $7.50 per hour. He stated that he was placed in that job in summer 2008 through the assistance of vocational counselor Jim Ragains. He testified that he had difficulty performing that job because he could not sit down for very long and had trouble sitting and filling out the paperwork. He also testified that he had an altercation with a training manager. After that job ended, the claimant received no further vocational rehabilitation assistance. The claimant testified that he was not currently employed and was receiving approximately $105 per week in disability benefits, which represented the wage differential of his custodian position with the school and the telecommunications position he had for one day.

¶ 15 Regarding the weekly benefits that the claimant was receiving, the following colloquy arose between the parties:

> "[Counsel for claimant]: And you are currently being paid as a wage differential as if you did still have the phone job?
>
> [Counsel for School]: Objection, we are paying benefits at [$]105.50, and we have been for a substantial period of time.
>
> * * *

By the payment of those benefits I am not at all suggesting that this case is a wage differential nor a permanent total.

* * *

Our position is depending on the evidence, and at the conclusion we will cover in our proposed decisions how those benefits should be credited, either they be TTD or maintenance or a credit towards permanence as a whole, if there is an overpayment based on the theory that we are going to base this case on.

[Counsel for claimant]: They are paying him on a wage differential, that's how they did the math.

[Counsel for the School]: I want the record to be clear we are not conceding this is a wage differential, I am saying we are paying benefits in order to facilitate the final resolution and bring this matter to a trial."

¶ 16 The claimant testified that he dropped out of high school during his sophomore year and was in special education classes since the 6th grade. During his life, he held jobs as a fuel attendant, dishwasher, and fast food restaurants. The claimant stated he did not have a GED, never served in the military, and had no special training or certifications. He submitted a list of places that he had applied for jobs, including fast food and dishwasher attendants, but he had not been successful.

¶ 17 The claimant testified that, if he does not elevate his right knee, he has constant pain, throbbing and burning. After the workplace accident, he cannot walk very far, run, or play basketball. He testified that he is unable to engage in any physical activities that he engaged in before the accident, including wrestling or playing basketball, football, or soccer with his kids.

¶ 18 On cross-examination, the claimant admitted that he is able to drive a car, just not for an extended period of time. For that reason, he admitted that he told Ragains that he wanted to limit his job search to the Princeton and surrounding geographic area. He also admitted that he has a computer and knows how to operate the computer; however, he stated his skills were limited.

¶ 19 James Ragains, a certified rehabilitation counselor, testified that he met with the claimant on May 18, 2007. According to Ragains, the claimant's vocational tests showed that he had average mental abilities, including the reading comprehension and math skills of a junior-college student. Ragains testified that he reviewed all three FCE reports, the various medical reports by Dr. Sompalli, Dr. Tun, and Dr. Fletcher, and the claimant's request to seek employment in the Princeton area. Taking all the factors into consideration, Ragains testified that he concluded the home-based telephone position through Expedited Employment was a suitable employment option. According to Ragains, the position paid $7.50 per hour, offered full-time hours, and provided the opportunity to earn more per hour as an individual progressed in the job. After performing the job for one day, the claimant reported to his attorney that he was having difficulty with his trainer. Ragains testified that he offered to have another trainer assigned to work with the claimant, but the claimant refused and quit the job. After that, Ragains did not assist the claimant in finding other employment.

¶ 20 An October 3, 2006, employability study completed by the claimant's certified vocational rehabilitation specialist, Edward Pagella, was entered into evidence. Pagella testified consistently with his report. He testified that the claimant reported having trouble with any type of heavy lifting, walking for any duration of time, and that he needed to elevate his leg to alleviate the pain throughout the course of the day. He reviewed the claimant's medical records, employment history, and educational background. Based on the totality of the medical evidence

by Dr. Sompalli and Dr. Eilers, Pagella believed that the claimant was unemployable and totally disabled because no employer would tolerate an individual needing to take a break every two hours to elevate his leg.

¶ 21 Pagella also testified that he did not believe that Expediter was offering the claimant a position that existed in his local or national economy because there was no such thing as a "sub-sedentary" job market, which Expediter claimed to service. Pagella acknowledged that the home-based teleservicing position was a recognized job classification, but he testified that the claimant was not able to perform the repetitive nature of the job and did not have the communication skills necessary for such jobs. He testified that there are sedentary positions, but no category for "sub-sedentary," as Expediter classified its position; he testified that the job with Expediter was simply not a job that existed within our national economy. Pagella admitted, that if the claimant did not have to elevate his leg several times a day on a daily basis, he would be employable with vocational rehabilitation assistance.

¶ 22 Joe Lacey, the owner of Expediter, testified that the mission of his company was to place injured or disabled people in jobs to help them become self-sufficient. Expediter worked specifically with individuals coming off of worker's compensation and social security benefits. He testified that the company would forward a job description to a claimant's physician for approval that the position fit within the claimant's restrictions. In the claimant's case, Dr. Sompalli approved the home-based telephone position, which was with a company named Information Direct. Lacey denied that the position involved sales or any type of solicitation and testified that the telecommunications industry continues to grow, paying minimum wage to about $9 an hour on average. He denied the jobs were "sham jobs," but he admitted that the insurers

pay for the costs of setting up the individual's home with the telephone equipment necessary for the job; costs typically averaged $5,000.

¶ 23 Following the hearing, the arbitrator found that the claimant was entitled to PPD benefits in the amount of $274.95 per week for 250 weeks, because the knee injury caused a 50% loss of the person as a whole as provided in section 8(d)(2) of the Act. The arbitrator stated that he did not believe the claimant was permanently and totally disabled from any type of gainful employment, finding that he did not give full effort to complete the Expediter job, which was within his restrictions, and made no further attempt at the job after October 4, 2007. The arbitrator denied wage differential benefits under section 8(d)(1) of the Act "based on the fact the petitioner did not request such an award."

¶ 24 The claimant sought review of this decision before the Commission, arguing that he was entitled to wage differential benefits under section 8(d)(1) of the Act. The claimant also sought an order that the School hold him harmless for any claims for reimbursement of payments made by the Illinois Department of Public Aid.

¶ 25 On February 9, 2012, the Commission, with Commissioner Yolaine Dauphin partially dissenting, affirmed and adopted the arbitrator's decision. Commissioner Dauphin agreed that the claimant failed to show permanent and total disability but disagreed with the arbitrator's refusal to award wage differential benefits. She stated that the Act is clear that the employee must waive the right to a wage-differential award and prohibits the Commission from awarding a percentage-of-the-person-as-a-whole where the claimant has demonstrated a loss of earning capacity. She further stated that, under the facts of this case, the claimant proved a loss of earning capacity as the Expediter job paid only $7.50 per hour and he did not waive his right to wage differential benefits. Commissioner Dauphin referred to the colloquy in which the School

explicitly stated that it was not conceding that the claimant was entitled to a wage differential award as evidence that wage differential benefits were at issue and not waived. Therefore, she stated that she believed the Commission should have awarded wage differential benefits under section 8(d)(1) instead of the man-as-a-whole benefits under section 8(d)(2).

¶ 26 The claimant sought judicial review of the Commission's decision in the circuit court of Marshall County. On November 6, 2012, the circuit court confirmed the Commission's decision. The claimant now appeals.

¶ 27 In this appeal, the claimant argues that the Commission erred in awarding man-as-a-whole benefits under section 8(d)(1) of the Act because he never waived his right to wage differential benefits and proved a loss of earning capacity as a result of his injury. We agree with the claimant.

¶ 28 The Act provides for two types of PPD compensation. *Gallianetti v. Industrial Commission*, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482 (2000). Section 8(d)(1) involves a wage differential award while section 8(d)(2) involves a percentage-of-the-person-as-a-whole award. 820 ILCS 305/8(d) (West 2006); *Gallianetti*, 315 Ill. App. 3d at 727. We will not overturn the Commission's compensation award unless it is against the manifest weight of the evidence. *Gallianetti*, 315 Ill. App. 3d at 729. For a decision to be against the manifest weight of the evidence, a review of the record must disclose that an opposite conclusion is clearly apparent. *Id.*

¶ 29 Section 8(d)(1) provides, in relevant part, that a partially incapacitated employee shall:

> "receive compensation for the duration of his disability ***equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the

accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2004).

¶ 30 Section 8(d)(2) provides, in relevant part, that:

"If such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive his right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section then in any of the foregoing events, he shall receive in addition to compensation for temporary total disability ***, compensation at the rate provided in *** this Section for that percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to total disability." 820 ILCS 305/8(d)(2) (West 2004).

¶ 31 Our supreme court has expressed a preference for wage differential awards, reasoning that "[i]t is often easier to calculate how much a claimant's earnings have decreased since the accident than to assign a percentage partial loss of use." *General Electric Co. v. Industrial Commission*, 89 Ill. 2d 432, 437 (1982). Reading both sections together, we have previously concluded that the "plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity." *Gallianetti*, 315 Ill. App. 3d at 728. "The only time that section 8(d)(2) will apply where a claimant suffers an impairment of earning capacity is if the claimant waives his right to recover under section 8(d)(1)." *Id.* at 729. Thus, if the claimant has not waived the right to a wage-differential award and proves that he qualifies for one, section 8(d) mandates that he be awarded a wage-differential award. *Id.* "If, however, [the] claimant has failed to present any evidence regarding his entitlement to a wage-differential award, he will

be deemed to have implicitly waived his right to such award." *Id.;* see also, *Freeman United Coal Mining Co. v. Industrial Comm'n,* 283 Ill. App. 3d 785, 791, 670 N.E.2d 1122 (1996) (stating that the claimant chose not to prove-up a wage-differential award and thereby waived the right to that type of award).

¶ 32 To qualify for a wage-differential award, a claimant must prove: (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. *Copperweld Tubing Products, Co. v. Illinois Workers' Comp. Comm'n,* 402 Ill. App. 3d 630, 633, 931 N.E.2d 762 (2010). Whether a claimant has satisfied each element is a question of fact to be resolved by the Commission, whose determination in this regard will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id.* For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id.*

¶ 33 Here, the Commission determined that the claimant was permanently and partially disabled because his injuries caused a 50% loss of the person as a whole under section 8(d)(2) of the Act. Based on this conclusion, the first requirement of a wage-differential award was established, that the claimant sustained a partial incapacity that prevented him from pursuing his usual and customary employment as a custodian. The record supports the Commission's finding of partial disability as it discloses that the claimant was never released to work beyond a sedentary level, which prevented him from returning to his usual employment as a custodian. Dr. Sompalli stated that the claimant's restrictions were permanent; Dr. Eilers determined that the claimant could work a sedentary job at best. Dr. Fletcher concluded that the claimant was magnifying his symptoms such that he could not conclude what his physical abilities were, but he did not release the claimant to return to custodial work. Additionally, the undisputed facts

showed that the claimant also sustained an impairment to his earnings as the telecommunications job that Ragains placed him in through Expediter paid only $7.50 per hour. The only evidence suggesting another wage consisted of Lacey's testimony that telecommunications jobs typically paid between minimum wage and $9 per hour. Thus, the claimant established he suffered an impairment to his earnings.

¶ 34 Having presented evidence of his right to a wage-differential award, the claimant did not implicitly waive his right to such an award. Further, our review of the record does not disclose that the claimant ever expressly waived his right to a wage-differential award. In fact, during an objection, the School stated that it was not conceding that this was a wage-differential case which indicated that the matter was at issue and had not been waived by the claimant. Accordingly, the Commission was required to award wage-differential benefits where the claimant proved both that he had a partial incapacity that prevented him from pursuing his usual and customary line of employment and that he incurred an impairment of his earnings. We, therefore, we reverse that portion of the judgment of the circuit court which confirmed the Commission's decision to award PPD benefits, reverse that portion of the Commission's decision which awarded section 8(d)(2) benefits, and we remand the cause to the Commission with instructions to award the claimant wage-differential benefits pursuant to section 8(d)(1) of the Act.

¶ 35 Next, the claimant argues that the Commission erred in failing to order that the School hold him harmless for any claims for reimbursement of the $1,134.54 which the Illinois Department of Public Aid paid for his medical expenses. As the School points out, the claimant fails to cite to any authority that would demonstrate the Commission's erred in its medical expenses order or that its order is somehow against the manifest weight of the evidence.

Accordingly, the claimant has forfeited this argument on appeal. See, Ill. S.Ct. R. 341(h)(7) (eff. July 1, 2008); *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill.App.3d 191, 208, 328 Ill.Dec. 612, 904 N.E.2d 1122, 1137 (2009) (arguments on appeal are forfeited when a party fails to support them with citation to authority).

¶ 36 Based on the aforementioned reasons, we reverse that portion of the judgment of the circuit court which confirmed the Commission's award of PPD benefits under section 8(d)(2) of the Act; reverse that portion of the Commission's decision which awarded section 8(d)(2) benefits; and remand the cause to the Commission with instructions to award the claimant wage-differential benefits pursuant to section 8(d)(1) of the Act. We affirm the judgment of the circuit court in all other respects.

¶37 Circuit court judgment affirmed in part and reversed in part; Commission decision reversed in part; cause remanded to the Commission with instructions.