2011 IL App (5th) 100327WC-U
No. 05—10—0327WC
Order filed July 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

AMERICAN STEEL FOUNDRIES,	)	Appeal from the Circuit Court
	)	of Madison County.
Appellant,	)	
	)	
v.	)	No. 09—MR—488
	)	
WORKERS' COMPENSATION COMMISSION *et al*. (Elliot Blaylock, Appellee).	)	Honorable Clarence W. Harrison II, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.

Presiding Justice McCullough and Justices Hoffman and Holdridge concurred in the judgment.

Justice Stewart concurred in part and dissented in part.

ORDER

Held: The decision of the Workers' Compensation Commission awarding claimant wage-differential benefits is contrary to the manifest weight of the evidence; permitting admission of form filled out by doctor in furtherance of claimant's attempt to secure Social Security benefits was not an abuse of discretion.

¶ 1 Claimant, Elliot Blaylock, filed an application for adjustment of claim in accordance with the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)). In it, he alleged that

he sustained a work-related injury on September 15, 2006, while in the employ of respondent, American Steel Foundries. The arbitrator agreed and awarded claimant (1) 25 and 6/7 weeks' temporary total disability (TTD) benefits, (2) medical expenses in the amount of $2,252.12, and (3) wage-differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)). The Workers' Compensation Commission (Commission), with one commissioner dissenting, affirmed and adopted the arbitrator's decision. The circuit court of Madison County confirmed the Commission. Respondent now appeals, and, for the reasons that follow, we affirm in part and reverse in part. Before proceeding to the merits of this appeal, we remind respondent that Illinois Supreme Court Rule 6 (eff. Jan. 20, 1993) requires that "[c]itations of cases must be by title, to the page of the volume where the case begins, and to the pages upon which the pertinent matter appears in at least one of the reporters cited" and that "[i]t is not sufficient to use only *supra* or *infra*."

¶ 2 BACKGROUND

¶ 3 Claimant testified he was 62 years old and, in 1973, began working for respondent, a manufacturer of railroad car undercarriages for wheel assemblies. During intermittent layoffs from respondent, claimant worked as a truck driver. While working for respondent, claimant held a variety of positions, including general laborer, green and sand finisher, crane operator, and mold closer.

¶ 4 On August 24, 2006, claimant saw his family physician, Dr. Joseph Schallert, and reported that he had been experiencing hives for a couple of weeks. Claimant testified that August 2006 was the first time in his life he developed hives. At that time, he was working in respondent's molding department and had held that position for a number of years.

¶ 5 While at work on September 15, 2006, claimant began to notice discomfort in his face and discovered it was swollen. He also experienced labored breathing. Claimant reported to his

foreman's office that he did not feel well and went to respondent's dispensary. At the dispensary, claimant was given oxygen and an ambulance was called to take him to the hospital, where he was admitted with a diagnosis of chest pain and hives. At claimant's request, he was transferred to Memorial Hospital and admitted under Dr. Schallert's care. He underwent cardiac evaluation, which was negative, as well as gastrointestinal evaluation. Once claimant's hives resolved with medication, he was discharged. Dr. Schallert recommended he follow up with Dr. Phillip Korenblat at Barnes Hospital allergy clinic.

¶ 6 On September 26, 2006, claimant saw Dr. Korenblat with a chief complaint of hives. Dr. Korenblat's records show claimant reported "approximately three weeks of urticaria." Claimant provided a history of his work incident and his hospitalization. Dr. Korenblat noted claimant remained off work and continued to experience hives "but no angioedema." Claimant reported that, on one occasion, he put on clean work clothes to perform yard work but developed severe hives on his trunk and intense itching.

¶ 7 Dr. Korenblat noted claimant worked in a warehouse that produced steel parts for a railroad company. Claimant reported that he was exposed to several fumes and noxious gasses, as well as sand used in the formation of some molds. Dr. Korenblat assessed claimant as having chronic urticaria. He informed claimant that his condition was most often caused by foods and medications. He recommended claimant change soaps and stop taking Crestor, a medication he had recently begun taking. Dr. Korenblat also prescribed Zyrtec and ordered RAST testing for certain foods.

¶ 8 On October 3, 2006, claimant returned to see Dr. Korenblat. He reported he had made all of Dr. Korenblat's recommended changes and had no incidence of hives since his last visit. Dr. Korenblat noted claimant's previous skin tests were mildly positive for almonds and his RAST testing "was mildly elevated" for beef. He opined claimant's chronic urticaria appeared "to be

secondary to [his] Crestor" but it was possible that beef was also playing a role. Dr. Korenblat did not believe claimant's condition was secondary to exposure at work. He released claimant to return to work as soon as possible.

¶ 9 On October 6, 2006, claimant returned to work. On October 12, 2006, he went to respondent's dispensary complaining of welts that started the previous night after he arrived home from work. Ultimately, claimant sought emergency room treatment for hives.

¶ 10 On October 17, 2006, claimant returned to the allergy clinic and saw Dr. Jeffrey Tillinghast, an internist with a subspecialty in allergy and immunology. Dr. Tillinghast found it noteworthy that claimant worked in a foundry, working with steel molds. He stated respondent's physician was concerned that claimant was sensitive to something in respondent's facility. Dr. Tillinghast noted claimant had exposure to formaldehyde, alcohol, and clay. He recommended RAST testing on those chemicals, as well as Zyrtec and Allegra. The RAST testing came back positive for isphaghula and silk.

¶ 11 On November 1, 2006, claimant returned to work for respondent. On November 4, 2006, he began breaking out in hives while on his way to work, which he attributed to the clothes he had worn to work the previous night. The same date, he sought emergency room care, complaining of itching and discomfort and hives for three days. Claimant was diagnosed with urticaria and prescribed medication.

¶ 12 On November 6, 2006, claimant returned to Dr. Tillinghast, who noted claimant continued to have problems with urticaria every time he went to work. Dr. Tillinghast reported claimant underwent RAST testing that came back positive for isocyanate HDI but he was unaware if claimant had been exposed to that substance. He recommended claimant not return to work until the substance to which he was reacting could be identified or his urticaria could be suppressed.

¶ 13 On November 17, 2006, claimant followed up with Dr. Tillinghast. He reported experiencing some breathlessness but that he was doing better. Dr. Tillinghast testified claimant had some mild reversibility, meaning he experienced some element of reactivity in his lungs. On December 4, 2006, he authored a letter stating claimant could return to work but should have no contact with or be near the allergen diisocyanate HDI, for which he had tested positive. Dr. Tillinghast testified he was convinced that something at claimant's work was triggering his reactions but could not state with certainty what the triggering substance was. He was suspicious of isocyanates.

¶ 14 On December 19, 2006, Dr. Tillinghast followed up with claimant for his urticaria and anaphylaxis. He noted claimant's condition appeared to be work-related. Dr. Tillinghast stated claimant was sensitive to isocyanides and since being out of work was able to avoid exposure and had no further problems.

¶ 15 On January 27, 2007, William John Lowry, an industrial hygienist, went to respondent's facility at its request to collect air samples to test for isocyanate HDI. He took samples from claimant's work areas. Lowry stated testing revealed no airborne concentration for HDI in the workplace. Further, while the presence of methylene diphenyl isocyanate (MDI) was discovered, it was well below the maximum airborne level concentrations for the workplace.

¶ 16 On February 7, 2007, claimant returned to work for respondent. On February 8, 2007, he experienced labored breathing and felt lightheaded while at work. Claimant also stated "the noise was going in and out like you was [*sic*] turning up a radio and turning it down ***." He went to respondent's dispensary, where he was given oxygen and an ambulance was called.

¶ 17 On February 15, 2007, claimant returned to see Dr. Tillinghast. Dr. Tillinghast stated claimant had what sounded like an episode of recurring anaphylaxis after being back at work for a few days. He noted respondent asserted claimant was not being exposed to HDI isocyanate, but Dr.

Tillinghast determined there was clearly something triggering claimant's reaction. He recommended that claimant not return to work.

¶ 18 On March 30, 2007, claimant followed up with Dr. Tillinghast. He complained of breathlessness, particularly when around fumes. Dr. Tillinghast noted claimant was clearly better since not returning to work. However, he developed episodes of breathlessness when around certain irritating substances. Claimant reported improvement when taking Advair and Albuterol, which Dr. Tillinghast recommended he continue. Dr. Tillinghast stated he was unsure what was causing claimant's continued reactions. However, he opined claimant's system had been "turned on" and "primed" by his work-related reactions, causing other substances to bother him when those same substances might not have bothered him in the past. Dr. Tillinghast discussed how a similar "priming" occurred in people with seasonal allergies. On cross-examination he agreed that he was speculating as to the reason for claimant's continued symptoms.

¶ 19 Claimant testified February 12, 2007, was the last day he worked for respondent. After that time, he did not work anywhere else nor did he seek employment. At the time of arbitration, he was taking Advair, an Albuterol inhaler, and Zyrtec on a daily basis. He described his day-to-day condition as being fine, so long has he could get away from something that bothered him. Upon encountering something that bothered him, claimant's nose would get stopped up, and if it was too bad, he became incoherent like he was drunk. Claimant stated he had reactions to gasoline, fabric softener, lawn chemicals, scented candles, cigarette smoke, and chemicals at Home Depot.

¶ 20 On June 4, 2007, claimant saw Dr. Robert Schwarze, a dermatologist, at respondent's request. After examining claimant and reviewing his medical records, Dr. Schwarze authored a letter stating it appeared that claimant "must avoid his current work place at all cost."

¶ 21 Claimant continued to follow up with Dr. Schallert. On September 17, 2007, Dr. Schallert

filled out a form concerning claimant's condition. The form was addressed to Dr. Schallert and requested that he answer questions on the form relating to claimant and attach any treatment records that had "not been provided previously to the Social Security Administration." In response to one form question, Dr. Schallert recommended claimant "avoid even moderate exposure" to extreme cold or heat, high humidity, and perfumes. Dr. Schallert also recommended claimant "avoid all exposure" to fumes, odors, dusts, gases, cigarette smoke, soldering fluxes, solvents/cleaners, chemicals, and isocyanate. At arbitration, respondent objected to admission of the form into evidence, arguing it was hearsay and completed for Social Security Administration purposes. The arbitrator allowed the form into evidence, stating it was "more a treatment record as opposed to a report prepared for this litigation."

¶ 22 On December 17, 2007, claimant met with Liala Slaise, a vocational rehabilitation counselor who performed a vocational assessment and labor market surgery for claimant. She was not hired to find claimant a job. Slaise concluded claimant's earning capacity was $9 to $11 per hour in the open labor market given his medical restrictions. Slaise testified he did not require any vocational retraining and he was employable on a full-time basis.

¶ 23 Relying on the restrictions imposed on claimant by Dr. Schallert, Slaise limited her search to jobs where claimant would not be exposed to cold, heat, humidity, perfumes, odors, dust, gases, cigarette smoke, soldering fluxes, solvents, and cleaners. Slaise acknowledged that her labor market survey did not address general labor, floor crane operator, mold closer, or piecework jobs. However, she stated she did not find any of those jobs available in the open labor market when she conducted her search. Slaise agreed that claimant would not be precluded from finding one of those types of jobs, so long as the job was within Dr. Schallert's restrictions.

¶ 24 John Stephen Dolan testified he was a vocational rehabilitation counselor and reviewed

claimant's records at respondent's request. Based upon his calculations, claimant would sustain little to no wage loss if he was unable to return to work for respondent. Dolan noted that claimant earned $20.48 an hour during the last year he worked for respondent and that the average wage for positions similar to those claimant held for respondent included $24.59 to $25.80 an hour for a crane operator, $20.56 to $21.99 an hour for an industrial inspector, and $16.78 an hour for a foundry mold worker. He also noted that the average wage for a heavy truck driver, a position in which claimant had experience, was $17.90 to $21.17 an hour. Light truck drivers earned an average wage of $15.72 an hour.

¶ 25 On cross-examination, Dolan testified an individual's medical restrictions can have an impact on his earning capacity. He understood that claimant was restricted from returning to work for respondent. That was the only restriction upon which Dolan based his conclusions. He did not review or base his opinions on any of the medical restrictions made by Dr. Schallert.

¶ 26 On January 28, 2008, the arbitrator issued his decision, finding claimant sustained injuries that arose out of and in the course of his employment. He awarded claimant 25 and 6/7 weeks' TTD benefits and $2,252.12 in medical expenses. The arbitrator also awarded claimant wage-differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)) in the sum of $279.47 per week from March 31, 2007, through the duration of his disability. With respect to claimant's wage-differential award, the arbitrator stated as follows:

> "[Claimant] is entitled to a wage differential award. There is no dispute that [claimant] can not perform his customary and usual job duties with [respondent]. [Claimant's] vocational expert's testimony is more persuasive than [respondent's] expert. She said [claimant] could find work within his restrictions in the range of $9-$11/hr. $10/hr is the median wage."

¶ 27 On July 20, 2009, the Commission, with one commissioner dissenting, affirmed and adopted the arbitrator's decision without further comment. The dissenting commissioner disagreed with the majority's wage-differential award. On June 15, 2010, the circuit court of Madison County confirmed the Commission's decision. While we agree with portions of the Commission's decision, we agree with the dissent regarding the wage-differential award.

¶ 28 ANALYSIS

¶ 29 Respondent raises two main issues on appeal. First, it argues that the Commission erred in admitting a form filled out by Dr. Schallert in conjunction with a Social Security claim because it was hearsay. Second, respondent challenges the Commission's wage-differential award. We reject the former claim; however, we find the latter persuasive.

¶ 30 Turning to respondent's first argument, we note that respondent contends the form was prepared for the purpose of litigation and is inadmissible hearsay. It is axiomatic that "[t]he rules of evidence apply to all proceedings before the Commission or an arbitrator, except to the extent they conflict with the Act." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010 (2005). Accordingly, "[e]videntiary rulings made during the course of a workers' compensation proceeding will be upheld on review absent an abuse of discretion." *Greaney*, 358 Ill. App. 3d at 1010. Medical reports that are created to assist in the treatment of a claimant's injury, as opposed to those prepared for litigation purposes, are trustworthy and may be admitted over a party's hearsay objections. *Fencl-Tufo Chevrolet, Inc. v. Industrial Comm'n*, 169 Ill. App. 3d 510, 514-15 (1988).

¶ 31 Respondent contends *National Wrecking Co. v. Industrial Comm'n*, 352 Ill. App. 3d 561 (2004), is controlling authority under the circumstances. In that case, we held a doctor's letter, "written at the behest of claimant's attorney to an administrative law judge of the Social Security Administration, was prepared for the purpose of assisting claimant during the litigation to procure

social security benefits and should not have been admitted ***." *National Wrecking*, 352 Ill. App. 3d at 566-67.

¶ 32 Here, Dr. Schallert was one of claimant's treating physicians and claimant submitted Dr. Schallert's medical records as an exhibit at arbitration. Contained within that exhibit was the form at issue addressed to Dr. Schallert and asking him to answer questions about claimant's condition. He was also asked to attach any documentation that had not "been provided previously to the Social Security Administration." Unlike in *National Wrecking*, the record does not indicate the form was prepared at the behest of claimant or his attorney, or that it was necessarily prepared for the purpose of litigation. As such, we do not find the Commission abused its discretion in overruling respondent's objection and finding the form admissible.

¶ 33 However, even were we to find the form prepared by Dr. Schallert to be inadmissible, "not every admission of incompetent evidence requires reversal." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 537 (2007). Harmless error may occur where the Commission's decision was supported by other competent evidence. *Westin Hotel*, 372 Ill. App. 3d at 537. Here, sufficient evidence existed to support the Commission's decision even without the form at issue.

¶ 34 As the circuit court noted on review, the most meaningful use of the form prepared by Dr. Schallert was by Slaise, claimant's vocational expert. An expert witness may base his opinion upon inadmissible records where the expert's testimony demonstrates the disputed records were "of a kind reasonably relied upon by experts in the specific field in forming opinions on that subject." *Beecher Wholesale Greenhouse, Inc. v. Industrial Comm'n*, 170 Ill. App. 3d 184, 188 (1988).

¶ 35 In this instance, Slaise did not specifically testify that the form prepared by Dr. Schallert was the type of record that was reasonably relied upon by vocational experts. However, both her testimony and that of Dolan, respondent's vocational expert, demonstrated that medical restrictions

from a claimant's treating physician were the type of information reasonably relied upon by such experts in forming their opinions. Both Slaise and Dolan considered claimant's restrictions in determining the types of jobs he could perform. In particular, Dolan agreed that an individual's medical restrictions can have an impact on his earning capacity. In forming his opinions, Dolan relied on the medical restriction from claimant's treating doctors that he could not return to work for respondent. As stated, Dr. Schallert was one of claimant's treating physicians and was continuing to see him at the time he prepared the form at issue. Slaise testified the form was faxed to her by Dr. Schallert after she sought confirmation of claimant's current restrictions. Based upon the facts presented, we find no error in Slaise's reliance on Dr. Schallert's opinions.

¶ 36 Respondent also challenges to the Commission's wage-differential award. It contends the award was based on the wrong legal standard. Respondent argues that claimant failed to present evidence that his work-related injury prevented him from pursuing his usual and customary line of employment and, in the alternative, that he did not prove that he suffered an impairment of earnings. As we agree with respondent's first contention, we need not address its second one.

¶ 37 To qualify for a wage-differential award under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)), "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. Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633 (2010). "The purpose of section 8(d)(1) is to compensate an injured claimant for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation." *Dawson v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586 (2008). Respondent suggests that we conduct *de novo* review of this issue "because the facts are undisputed and susceptible of only a single reasonable inference." We disagree and find the manifest-weight

standard is the appropriate standard of review. See *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 494 (2007). It has often been stated that "[f]or a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Copperweld Tubing Products Co.*, 402 Ill. App. 3d at 633.

¶ 38 Respondent argues claimant failed to establish that his work injury precluded him from pursuing his usual and customary line of employment. It asserts that claimant proved only that his injury precluded him from working for respondent and not that he could not perform the same job functions for another employer. Like the dissenting commissioner, we find this contention persuasive.

¶ 39 We note that, while claimant continues to experience certain conditions, such as breathlessness, lightheadedness, and congestion, the only tie between those symptoms and claimant's employment with respondent is Dr. Tillinghast's theory that the exposure to substances during the course of that employment somehow "primed" claimant's system and rendered him susceptible to being irritated by other substances. However, Dr. Tillinghast admitted that he was speculating. It is axiomatic that an award cannot rest upon mere speculation. *Palos Electric Co. v. Industrial Comm'n*, 314 Ill. App. 3d 920, 926 (2000). We also observe that two doctors–Dr. Tillinghast and Dr. Schwarze–recommended claimant not return to work for respondent. Notably, they did not recommend that claimant not work anywhere. Indeed, even the decision of the arbitrator, which the majority of the Commission adopted, found only that "[t]here is no dispute that [claimant] can not perform his customary and usual job duties *with [r]espondent*." (Emphasis added.) Moreover, claimant did not prove that the environmental conditions where he was employed by respondent were so prevalent that no employer existed where he could earn a wage by using the myriad of skills he developed while employed by respondent. They might have been unique to respondent's facility.

In short, claimant has not carried his burden of proof on this issue. As claimant has not proved he is precluded from pursuing his usual and customary line of employment, he is not entitled to a wage-differential award. See 820 ILCS 305/8(d)(1) (West 2006). Therefore, we find the Commission's decision on this issue to be contrary to the manifest weight of the evidence.

¶ 40 In light of the foregoing, we reverse the portion of the trial court order confirming the Commission's wage-differential award, and we affirm in all other respect.

¶ 41 Affirmed in part and reversed in part.

¶ 42 JUSTICE STEWART, concurring in part and dissenting in part.

¶ 43 I agree with the findings of the majority that the report of Dr. Schallert detailing the claimant's work restrictions was properly admitted into evidence and that it was appropriate for Slaise, the claimant's vocational expert, to rely upon that report in forming her opinions. That being the case, in my view, there is sufficient evidence in the record to support the Commission's wage-differential award. Given the claimant's medical restrictions outlined by Dr. Schallert, which were far more extensive than the conditions that existed during his work for the employer, it was proper for the Commission to conclude that the claimant was unable to return to the same type of industrial employment with any employer. Slaise opined that, given the claimant's medical restrictions, the only jobs available to him were in the $9 to $11 range. The Commission found the opinions of Slaise more persuasive than those of the employer's vocational expert. The Commission's decision is not against the manifest weight of the evidence.

¶ 44 For the foregoing reasons, I respectfully dissent from the decision of the majority reversing the wage-differential award. I would affirm the decision of the circuit court,

confirming the decision of the Commission, in its entirety.