2011 IL App (5th) 100585WC-U

NO. 5-10-0585WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SOUTHEASTERN ILLINOIS COLLEGE,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Saline County.
	)	
v.	)	No. 09-MR-71
	)	
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (William Schell, Appellee).	)	Honorable Todd D. Lambert, Judge, presiding.

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

O R D E R

¶ 1 *Held*: The Commission's decision that the claimant failed to prove entitlement to an award of PTD benefits based on odd-lot status was not contrary to the manifest weight of the evidence; therefore, the order of the circuit court, reversing the Commission, must be reversed.

¶ 2 The claimant, William Schell, filed an application for adjustment of claim alleging an injury to his lower back sustained when he stepped down from a trailer while carrying tools on December 2, 2002. The arbitrator awarded him 121 and 6/7 weeks of temporary total disability benefits (TTD) at the rate of $582.94 per week, denied his claim of permanent total disability (PTD), and instead awarded 237½ weeks of permanent partial disability benefits (PPD) upon a finding of a 47.5% loss of the person as a whole, at the rate of $524.64 per week. The Illinois Workers' Compensation Commission (the Commission) unanimously affirmed and adopted the

arbitrator's decision, with the following modifications: $582.94 per week for 176 and 4/7 weeks of TTD/maintenance benefits and $524.64 per week PPD benefits for 350 weeks upon a finding that the claimant had sustained a loss of 70% of the person as a whole.

¶ 3 The claimant appealed the Commission's decision to the circuit court of Saline County, asserting that the decision of the Commission denying PTD was against the manifest weight of the evidence. The circuit court confirmed the Commission's award of 176 and 4/7 weeks of TTD/maintenance benefits at the rate of $582.94 per week. However, the court set aside the Commission's award of PPD benefits and found instead that the claimant was permanently and totally disabled under the odd-lot category because, "though he is not altogether incapacitated to work, he is so handicapped he will not be regularly employed in any well-known branch of the labor market." The circuit court awarded the claimant PTD benefits of $582.94 per week for life.

¶ 4 The employer, Southeastern Illinois College, appeals from the order of the circuit court. We reverse the circuit court and reinstate the Commission's decision.

¶ 5 BACKGROUND

¶ 6 The following factual recitation is taken from the evidence presented at the arbitration hearing held on November 14, 2008. Before working for the employer, the claimant had worked at a hardware store, in retail, in maintenance for a school district, as a self-employed contractor, and for the railroad system. The claimant had a general education diploma (GED) and an associate's degree in applied science. On December 2, 2002, the claimant was 48 years old and worked for the employer as a vocational instructor of building trades for the Illinois Department of Corrections at the Hardin County Work Camp. It is undisputed that, on that date, he stepped down from a

trailer while carrying tools and immediately felt low back pain. The claimant testified that he did not have problems with back or leg pain before his work accident. The next day, he went to Dr. Steven D. Knight, who prescribed medicine for him and referred him to Dr. Marius Maxwell, who initially saw him on December 20, 2002. On January 20, 2003, Dr. Maxwell performed a left L5-S1 hemilaminectomy and microdiskectomy.

¶ 7 The claimant began seeing Dr. Kee B. Park after Dr. Maxwell moved out of the area. On July 14, 2003, Dr. Park released him to return to work without restrictions. On July 21, 2003, Dr. Park realized that the claimant had too much pain to go back to work without restrictions and requested that he undergo three weeks of physical therapy. On August 21, 2003, when the claimant complained that his left leg was unstable and unable to support him, Dr. Park ordered an MRI, which revealed disc degeneration and collapse at the L5-S1 level with foraminal encroachment. Dr. Park ordered physical therapy to cease and scheduled the claimant to have an epidural injection, which was performed on September 4, 2003.

¶ 8 On October 21, 2003, Dr. Sherwyn J. Wayne conducted an independent medical examination at the employer's request. Dr. Wayne found that the claimant "had advanced lumbar degenerative disc disease at the time of his injury with probable substantial aggravation of that condition." He recommended that the claimant have a myelogram before undergoing spinal fusion surgery. On October 29, 2003, the claimant had a myelogram/postmyelogram CT scan, which, according to Dr. Wayne, revealed compromising problems at L5-S1, requiring the claimant to either live with the pain or have lumbar interbody fusion.

¶ 9 On December 2, 2003, Dr. Park performed an L5-S1 redo discectomy on the right with microdissection and an L5-S1 posterior lumbar interbody fusion. The

claimant testified that, after the December 2003 operation, he continued to have severe pain and problems with balance. He said that he fell easily and "quite often," that he had trouble getting up and down, and that some days he had trouble walking. Dr. Park ordered the claimant to remain off work after the operation until June 3, 2004, at which time he allowed the claimant to return to work for four hours, five days per week, with restrictions on standing, walking, sitting, bending, squatting, twisting, climbing, pushing, pulling, and overhead reaching.

¶ 10 On July 6, 2004, the claimant underwent a functional capacity evaluation (FCE), and the evaluator indicated that the claimant could work at the medium physical demand level for eight hours per day. On July 8, 2004, Dr. Park determined that the claimant had reached maximum medical improvement (MMI). He noted that the claimant's CT scan showed a solid fusion but that the claimant continued to experience persistent pain in his back. Dr. Park allowed the claimant to return to work with a 10-pound lifting restriction and additional limitations in "walking and standing, bending and twisting and squatting on an occasional basis." He determined that the restrictions were permanent.

¶ 11 On July 13 and 23, 2004, Dr. Wayne reexamined the claimant and determined that he was capable of working in a light-duty capacity. He explained that light-duty capacity meant that if the claimant returned to his employment as a building trades instructor, he would require an assistant to demonstrate heavy physical demand construction activities.

¶ 12 The claimant underwent another FCE on December 3, 2004. This time, the physical therapist who conducted the evaluation found that the claimant was incapable of working at the light level for eight hours per day. He stated that the claimant might be able to work a couple of hours per day at the light level and gradually increase the

number of hours worked, or he could work an eight-hour day at a sedentary level. The therapist found that the claimant had "fully participated in 18 out of 18 tasks" and that his abilities did not match the requirements of his job as a building trades instructor within the prison system.

¶ 13 On December 13, 2004, Dr. Wayne reexamined the claimant and found he had reached MMI and demonstrated a "moderate degree of permanent partial disability of the man as a whole as a result of the December 2, 2002 work-related incident and necessitated treatment." Dr. Wayne determined that the claimant was "incapable of penal system work" if it required violent confrontation.

¶ 14 The claimant testified that, between June 2, 2005, and March 1, 2007, a period of 21 months, he looked for employment in southern Illinois and western Kentucky. He did not receive any assistance from the employer for this search, but he contacted the Illinois "employment agency." He contacted potential employers by placing telephone calls and making personal visits. He also conducted newspaper and Internet searches for prospective employers. He submitted a list of over 700 prospective employers he had contacted, the date of the contact, the name of the person he spoke to, and the result of each contact. He advised prospective employers that he had some physical limitations when they asked about it. He stated that he was using a cane when he walked and that the employers would see the cane when he made personal visits to them. He was still using the cane at the time of the hearing. He testified that he was not offered any employment as a result of the search even though he "was using every avenue" available to him and doing his "very best." He admitted that he had quit seeking employment after March 1, 2007. The claimant did not submit vocational expert testimony.

¶ 15 The employer submitted the written reports of its vocational consultant, Adrian

Byrd. Ms. Byrd did not testify in person or by deposition. The employer referred the claimant to Ms. Byrd on January 24, 2008. She reported having trouble contacting the claimant and did not meet with him until April 18, 2008. She reported that the claimant "had difficulty in providing information to this consultant in the vocational meeting regarding his work history and abilities." She found his behavior "at times was defensive, hostile and inappropriate." Based on her review of the claimant's medical records and his job history, she determined that he might be able to work as a greeter, a salesperson, a dispatcher, a customer service representative, or a security officer or in retail sales/support. She found that the claimant was employable and recommended vocational rehabilitation services, but she concluded that the rehabilitation might not be successful based on the claimant's behavior in their initial meeting. After the initial meeting, Ms. Byrd made several attempts to contact the claimant to provide vocational services, but he did not respond to her requests.

¶ 16 On July 7, 2008, Ms. Byrd submitted a vocational progress report indicating as follows:

"This consultant is of the opinion; within a reasonable degree of vocational certainty [the claimant] is employable. Vocational services are recommended for [the claimant] but at this time he is not cooperating with this consultant's requests to begin. [The claimant's] case is being closed due to non-compliance.

[The claimant] has obtained skills which would allow for employment options in a wide range of positions. Based on available local information positions exist in the area on a regular and consistent basis within the available labor market he could do. Should an employer require more physical labor than he is able to do then accommodations could be requested."

The claimant testified that he did not return to meet with Ms. Byrd after their first meeting

because he did not feel that he would get a fair chance with her.

¶ 17 At the time of the hearing, he had some good days and some bad days. On the bad days, he could barely get out of bed or walk due to the pain. He said that being disabled was "tough" because he had been the provider for his family. He testified that the prison system would not allow him to work with his current restrictions and that Southeastern Illinois College did not have any position to which he could return.

¶ 18 The arbitrator awarded the claimant 121 and 6/7 weeks TTD at the rate of $582.94 per week and 237½ weeks of PPD upon a finding of a 47.5% disability, at the rate of $524.64 per week. In support of his decision to award PPD rather than PTD, the arbitrator stated as follows:

"Petitioner presented logs of places where he claims to have searched for work from June 2, 2005 through March 1, 2007. Petitioner testified that he had no professional help during this search. A review of the list reveals that the overwhelming majority of the cases, probably over 95%, indicate that they were not hiring. Petitioner admitted that he did not focus his job search on employers which were hiring.

Petitioner was offered vocational assistance by Adrian Boyd of CORVEL in April-June 2000 [*sic*]. Petitioner testified that he chose not to participate in voc rehab when it was offered. Adrian Boyd concluded that Petitioner had skills which would allow for employment options in a wide range of positions. She reported that, based on local information, positions exist in the area on a regular and consistent basis within the labor market which Petitioner could do.

*** Petitioner did make an extensive job search but it was not assisted by professional help and was not focused on business which had openings. Petitioner's job search does not establish that he is incapable of finding employment with a

focused effort and professional help. When he was offered professional help in his job search he declined it. Adrian Boyd opined that a reasonably stable labor market does exist for Petitioner and Petitioner's job search does not overcome that opinion."

¶ 19 The Commission unanimously affirmed and adopted the arbitrator's decision, with two modifications. First, the Commission determined that the claimant's self-directed job search entitled him to maintenance benefits through the end of his job search on March 1, 2007, and awarded TTD/maintenance of $582.94 per week for 176 and 4/7 weeks. Second, the Commission determined that the extent of the claimant's disability entitled him to an award of 350 weeks of PPD benefits at $524.64 per week upon a finding that the claimant had sustained a loss of 70% of the person as a whole. The Commission agreed that the claimant was not entitled to odd-lot PTD benefits because he had not shown the unavailability of employment due to being so handicapped that he would not be able to be continuously employed in any well-known branch of the labor market. In deciding that the claimant had not met his burden to prove entitlement to odd-lot PTD benefits, the Commission also noted that he was in his fifties, that he had an associate's degree in applied science, and that he had "significant work experience with transferable skills."

¶ 20 The claimant appealed the Commission's decision to the circuit court of Saline County. The employer did not appeal the Commission's award of increased TTD/maintenance or PPD benefits to the claimant. The circuit court confirmed the Commission's award of 176 and 4/7 weeks of TTD/maintenance benefits at the rate of $582.94 per week. However, the court set aside the Commission's award of PPD benefits and awarded him PTD benefits in the amount of $582.94 per week for life. The circuit court found that the claimant proved "by a preponderance of the evidence" that he is permanently and totally disabled of the odd-lot category "because, though

he is not altogether incapacitated to work, he is so handicapped he will not be regularly employed in any well-known branch of the labor market." The court found that the claimant's evidence concerning available jobs was "far more" extensive and persuasive than the employer's expert vocational evidence. The employer filed a timely appeal from the circuit court's order.

¶ 21 ANALYSIS

¶ 22 The sole issue in this appeal is whether the determination of the Commission that the claimant failed to prove he was entitled to odd-lot PTD benefits is against the manifest weight of the evidence. The employer first argues that the circuit court erred in reweighing the evidence rather than using the manifest weight of the evidence standard. The circuit court stated that the issue before it was whether the Commission's decision was against the manifest weight of the evidence, but then it found that the claimant had proved by a preponderance of the evidence that his handicap was such that he could not be employed in any branch of the labor market. The court outlined the evidence and found that the claimant's evidence was far more extensive and persuasive than the employer's evidence. We agree with the employer that the trial court did not evaluate this case under the proper standard of review.

¶ 23 "The Industrial Commission is the ultimate decisionmaker in workers' compensation cases, and it is not bound by any decision made by the arbitrator." *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 63, 862 N.E.2d 918, 924 (2006). On review from the arbitrator's decision, the Commission reweighs the evidence presented at the arbitration hearing and determines where the preponderance of the evidence lies, but neither the circuit court nor this court is allowed to reweigh the evidence or to reject reasonable inferences the Commission could have drawn merely because the court could draw other inferences from the evidence. *Durand*, 224 Ill. 2d

at 64, 862 N.E.2d at 924; see also *General Telephone Co. of Illinois v. Industrial Comm'n*, 167 Ill. App. 3d 420, 423, 521 N.E.2d 287, 289 (1988) (where the appellate court found that the circuit court had "improperly weighed the evidence in reversing the Commission when its role was limited to determining whether the Commission's decision was against the manifest weight of the evidence").

¶ 24 On review, neither the circuit court nor the appellate court will reverse the Commission unless its decision is contrary to law or its fact determinations are against the manifest weight of the evidence. *Durand*, 224 Ill. 2d at 64, 862 N.E.2d at 924. The Commission's factual determinations are against the manifest weight of the evidence "only when an opposite conclusion is clearly apparent." *Id.* "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 supported by 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." *Inter-City Products Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 185, 194, 759 N.E.2d 952, 959 (2001). "It is not the prerogative of the reviewing court to reweigh the evidence and substitute its judgment for that of the Commission. A reviewing court is not the trier of fact." *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055, 820 N.E.2d 586, 591-92 (2004). Due to its expertise in the area of workers' compensation, a reviewing court must give substantial deference to the Commission's finding on the question of the nature and extent of permanent disability. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 283 Ill. App. 3d 785, 792-93, 670 N.E.2d 1122, 1127 (1996).

¶ 25 From the circuit court's written order, it appears that it did not follow the above-stated rules when it reviewed the Commission's decision. Therefore, we reject the circuit court's finding that the claimant's evidence was more extensive and persuasive

than the employer's evidence. Instead, we consider whether there is sufficient evidence of record to support the Commission's decision.

¶ 26 The employer argues that the Commission's decision that the claimant failed to satisfy his burden of proof for an award of odd-lot PTD benefits is not against the manifest weight of the evidence. The rules governing entitlement to odd-lot PTD benefits are well-established. " '[A] person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists.' " *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546, 419 N.E.2d 1159, 1163 (1981) (quoting *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 361-62, 376 N.E.2d 206, 210 (1978)). "Conversely, if an employee is qualified for and capable of obtaining gainful employment without seriously endangering health or life, such employee is not totally and permanently disabled." *E.R. Moore Co.*, 71 Ill. 2d at 362, 376 N.E.2d at 210. The claimant has the burden to prove all the essential elements of his claim, including the burden to initially establish that he falls into the odd-lot category, by a preponderance of the evidence. *Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 5-6, 668 N.E.2d 28, 30-31 (1996). The claimant need not be reduced to total physical incapacity but "must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357 (2007). "Whether the claimant has successfully met his burden is a question of fact for the Commission to determine." *Courier*, 282 Ill. App. 3d at 6, 668 N.E.2d at 31.

¶ 27 If a claimant's disability is limited so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is on the claimant to show that he fits into the odd-lot PTD category by proof that he is

so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Westin Hotel*, 372 Ill. App. 3d at 544, 865 N.E.2d at 357. "The claimant ordinarily satisfies his burden of proving that he falls into the 'odd-lot' category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing 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." *Id.* If the claimant establishes that he fits into the odd-lot category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Id.*

¶ 28 In this case, there was no medical opinion that the claimant was permanently and totally disabled. All of the doctors found that the claimant was able to work in a limited capacity. No expert vocational evidence was presented by the claimant to show that no reasonably stable labor market existed for him. The claimant does not argue that he proved odd-lot PTD by showing that because of his age, skills, training, and work history he cannot be regularly employed in the labor market. Thus, the claimant's sole argument in this appeal is that he proved that he fits into the odd-lot category by showing that he engaged in a diligent but unsuccessful job search.

¶ 29 The claimant argues that he submitted evidence of over 700 job contacts during a 21- month period during which he was unable to find employment and that therefore the clearly evident, plain, and indisputable weight of the evidence compels the conclusion that the decision of the Commission is against the manifest weight of the evidence. However, the Commission, adopting the findings of the arbitrator on the issue of PTD, determined that the claimant's job search "does not establish that he is incapable of finding employment with a focused effort and professional help." The evidence is undisputed that the claimant completely quit looking for employment

more than 21 months before the arbitration hearing. During that time frame, he was offered professional vocational assistance by the employer, but he refused to participate in professional attempts at vocational placement. Although the claimant engaged in an extensive self-directed job search, it is apparent that the Commission determined that his refusal to participate in professional vocational assistance demonstrated a lack of diligence in seeking employment. Further, the Commission was entitled to give greater weight to the opinion of the employer's vocational expert that employment was available for the claimant. In short, the Commission was not convinced that the claimant would not have been able to find employment within his restrictions if he had accepted professional help.

¶ 30 "The question of how long a search must continue before it becomes apparent that the possibility for realistic employment is futile is one of fact for the Commission." *City of Green Rock v. Industrial Comm'n*, 255 Ill. App. 3d 895, 902, 625 N.E.2d 1110, 1114 (1993). The Commission is not obligated to find PTD simply because the claimant presents evidence that he searched but could not find a job. *Courier*, 282 Ill. App. 3d at 7, 668 N.E.2d at 32. We conclude that there is sufficient evidence in the record to support the Commission's determination that the claimant's job search did not prove entitlement to odd-lot PTD benefits. The Commission could infer that the quality of the claimant's job contacts, his termination of his job search, and his refusal to accept professional vocational help all demonstrated a lack of diligence in seeking employment. Further, the Commission was entitled to rely on the opinion of the employer's vocational expert that the claimant is employable.

¶ 31 Having concluded that there is sufficient evidence in the record to support the decision of the Commission, it is apparent that the circuit court simply reweighed the evidence and determined that a preponderance of the evidence favored the claimant.

Although the facts, as found by the circuit court, might support the conclusion urged by the claimant, we cannot characterize that conclusion as clearly apparent. Accordingly, the decision of the circuit court must be reversed and the decision of the Commission reinstated.

¶ 32 CONCLUSION

¶ 33 For all of the reasons stated, we reverse the circuit court's decision and reinstate the Commission's decision.

¶ 34 Reversed; Commission's decision reinstated.