2012 IL App (5th) 110117WC-U

NO. 5-11-0117WC

Order filed May 15, 2012

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SAM HOUSTON,	)	Appeal from the Circuit Court
	)	of the 3rd Judicial Circuit,
Appellant,	)	Madison County, Illinois.
	)	
	)	Appeal No. 5-11-0117WC
v.	)	Circuit No. 10-MR-186
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION *et al*. (Washington Group	)	Clarence W. Harrison II,
International, Appellee).	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.

Presiding Justice McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission did not err in awarding a permanent partial wage differential benefit rather than a permanent total disability benefit under the "odd lot" theory.

¶ 2 The claimant, Sam Houston, filed an application for adjustment of claim under the

Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)) seeking benefits for injuries to his cervical spine sustained while working as an ironworker employed by the respondent, Washington Group International (employer). Following a hearing, the arbitrator found that the claimant was permanently and totally disabled under the "odd-lot" theory and awarded the claimant permanent total disability (PTD) benefits of $1,019.73 per week for life under section 8(f) of the Act. 820 ILCS 305/8(f) (West 2006). The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission unanimously modified the arbitrator's decision, finding that the claimant had failed to establish that he was odd-lot. Instead, it awarded benefits calculated based upon a wage differential computation pursuant to section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1) (West 2006). The Commission reduced the award to $550.47 per week, the maximum allowable at the time of the injury. The claimant then sought judicial review of the Commission's decision in the circuit court of Madison County, which confirmed the Commission's ruling. The claimant then brought this appeal, maintaining that the Commission's award of a wage differential benefit under section 8(d)(1) rather than a section 8(e) permanent total disability award under the "odd lot" theory was contrary to law and against the manifest weight of the evidence.

¶ 3 FACTS

¶ 4 The claimant, a 47-year-old ironworker, testified that he was working for the employer on March 30, 2004, when he was injured while a coworker was passing tools down to him on a rope and a welding lead (a piece of rubber-coated copper weighing approximately 50 to 100 pounds per 100 feet) fell and struck him on the head, neck, shoulders, back, and nose. The claimant testified that, after the accident, he experienced intense pain in his neck. After taking a break of

approximately 15 minutes, the claimant returned to work but noticed that his body "was starting to stiffen up."

¶ 5 The claimant sought treatment from Dr. Donald Bassman, who referred him to Dr. Andrew Youkilis, a neurosurgeon. On September 13, 2005, Dr. Youkilis performed surgery on the claimant's cervical spine at C4-C5. Dr. Youkilis eventually ordered a functional capacity examination. On May 3, 2006, he opined that the claimant had reached maximum medical improvement (MMI), imposed permanent restrictions, and released the claimant from further care. The restrictions imposed by Dr. Youkilis included light to medium duty work with no overhead work involving the lifting of arms and lifting limited to no more than 20 pounds on a frequent basis and no more than 30 pounds on an occasional basis. Based upon these permanent restrictions, Dr. Youkilis opined that the claimant would not be able to return to employment as an ironworker.

¶ 6 The claimant sought treatment for pain management with Drs. Graham and Dave at the same time. Each prescribed narcotic pain medication. Dr. Graham eventually discharged the claimant as a patient due to a belief that the claimant was abusing his pain medication. The claimant sought further treatment from Dr. Gornet beginning on or around July 1, 2006.

¶ 7 The claimant's treating physician, Dr. Schenewerk, opined that the claimant was not able to work due to his continuing pain, his medication usage, and the side effects of the medication. He noted that the claimant had been taking pain medication, muscle relaxants, and sleeping medication, along with other prescribed narcotics. Dr. Schenewerk opined that the claimant was not exaggerating his pain.

¶ 8 At the hearing, the claimant testified that he takes several prescription pain medications

up to three times per day, as well as prescription sleeping medication. He also testified that, due to the continuing pain, he sleeps no more than two to four hours per night.

¶ 9 The claimant testified that he started a program of vocational rehabilitation on August 9, 2007, and began a job search shortly thereafter. He ended the rehabilitation and job search in approximately June 2008. The claimant estimated that he applied for more than 400 jobs, but he "never had any calls, no phone interviews, no come in – oral interview or nothing ever, not even one." The claimant also testified that none of the job leads supplied by the vocational rehabilitation specialists ever resulted in a response.

¶ 10 Bob Hammond, one of the claimant's vocational rehabilitation experts, testified that he believed that the claimant was capable of employment and could earn approximately $15 per hour in the current local job market. Hammond doubted the claimant's level of cooperation with the job search and observed that the claimant appeared to be distracted by his claim of inadequate medical care and his belief that he could not do any work.

¶ 11 Delores Gonzales, a certified rehabilitation specialist, evaluated the claimant at the request of his attorney. Gonzales has testified extensively for both employers and claimants. Her opinion was that the claimant had no transferable job skills, and his previous employment as an ironworker did not provide him with any skills necessary to work within the job restrictions imposed by Dr. Youkilis. Relying upon the opinion of Dr. Schenewerk, she further opined that, given his medical condition, his previous work experience, his age, education, and training, there was no reasonable stable labor market for the claimant.

¶ 12 The claimant testified that, when he graduated from high school, he immediately began a three-year ironworker apprenticeship program. He had been an ironworker ever since successful

completion of the apprenticeship and had never worked in any other field.

¶ 13 The claimant testified that his current condition of ill-being includes constant pain in his neck, shoulders, forearms, and hands. He stated that he has nearly constant tingling in his hands radiating down to his fingertips. He testified that he has limited range of motion in his neck which makes driving difficult. He cannot perform household and yard activities without extreme pain, and he no longer is able to engage in his former recreational activities such as hunting, fishing, and mushroom hunting. He also stated that he has headaches all the time, and he "just can't do nothing [*sic*] anymore." He further testified to having depression and emotional problems traceable to his physical condition. The claimant also testified that he has good days when the pain is not so bad and he can engage in some physical activities. However, when he does so, he is often bedridden for two or three days afterwards.

¶ 14 The arbitrator found that the claimant reached MMI on April 3, 2006, and was entitled to maintenance benefits until his job search was discontinued by the vocational rehabilitation service on June 24, 2008. The arbitrator determined that, effective June 25, 2008, the claimant had established that he was entitled to PTD benefits under the odd-lot theory. The arbitrator noted that, while the claimant was not obviously unemployable, his heavy dependence upon medication and his psychological state prevented him from returning to gainful employment. The arbitrator further noted that the claimant had established that he had no transferable skills, and had not been able to find employment within his physical restrictions despite a diligent and good faith job search. The arbitrator also credited the opinion of Ms. Gonzales over that of Mr. Hammond.

¶ 15 The Commission rejected the arbitrator's conclusion that the claimant had established that

he was entitled to PTD benefits, either on a medical basis or under the "odd lot" category. In finding that the claimant had failed to prove that he was entitled to PTD benefits on a medical basis, the Commission found that the medical records showed a systematic pattern of dishonesty with his medical providers about his medication use which seriously damaged his credibility, both with regard to his present condition and his purported inability to engage in gainful employment.

¶ 16 The Commission pointed to the fact that, by January 2006, the claimant was taking 120 Vicodin tablets per month. The Commission also noted that on February 6, 2006, Dr. Graham issued a letter to Dr. Youkilis indicating that he had discharged the claimant from his care due to "grossly inappropriate" behavior. In the letter, Dr. Graham indicated that he learned that the claimant had been obtaining Vicodin from Dr. Schenewerk since May 2004, while also obtaining Vicodin from Dr. Graham. Dr. Graham also reported that the claimant told him, falsely, that he was not receiving medication from any other physician. The Commission also noted that the claimant was receiving narcotic medication from other sources such as at least one visit to an emergency room. The Commission further noted that the claimant was concealing from Drs. Graham, Youkilis, and Schenewerk that he was receiving pain medication from the other physicians. The Commission inferred that this lack of candor with his physicians regarding the pain medication reflected adversely on his credibility in general.

¶ 17 The Commission also noted that, in February 2006, even after he had been counseled against seeking pain medication from multiple physicians, the claimant sought treatment from a new physician, Dr. Dave. Dr. Dave counseled the claimant not to take any pain medication from any other physician while he was treating with him. The claimant agreed; however, pharmacy

records placed into evidence indicated that the claimant continued to receive Vicodin and hydrocodone from other physicians.[1]

¶ 18 The Commission also made note of Dr. Graham's opinion that the claimant may have been engaged in symptom magnification and, at one point, appeared to be overly fixated on obtaining surgery. In addition, the Commission noted that the medical records relative to the claimant's emergency room visit on February 17, 2006, established that the treating physician made inquiries with Dr. Youkilis's office before starting pain medication "on the off chance that this may be a genuine pain syndrome."

¶ 19 The Commission was "concerned" that the claimant was "overly fixated on additional surgery." The treatment records of Dr. Graham indicated that the claimant was pressing for surgery in the C6-C7 area. Dr. Graham, however, expressed sound reasoning in explaining why the additional surgery the claimant believed he should undergo was not warranted. Dr. Graham indicated in his notes from October 12, 2005, and October 26, 2005, that if the claimant's pain was originating from the C6-C7 level, either partially or totally, then the claimant's response to the facet blocks that he had with Dr. Youkilis would have provided only mild improvement or none at all. As Dr. Graham noted, the claimant reported that he had complete resolution of his symptoms for 10 and 14 days after two occasions of facet block injections. Dr. Youkilis's records corroborate that the claimant expressed that he had significant relief of his symptoms. On October 28, 2004, Dr. Youkilis documented that the facet block at C4-C5 that the claimant

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[1]The Commission noted that the pharmacy records included prescriptions for oxycodone and hydrocodone written by a Dr. Guarino; however, there was no evidence in the record as to the identity of Dr. Guarino.

had on October 7, 2004, provided "near complete relief of his neck pain for seven to eight days." On January 13, 2005, Dr. Youkilis indicated that the claimant underwent a repeat C4-C5 block on January 7, 2005, and that the block helped "significantly" and the claimant reported "no pain." On February 10, 2005, Dr. Youkilis documented that, after the repeat block, the claimant's relief lasted about 10 days.

¶ 20 The Commission also noted that the surgery the claimant claimed he needed was not recommended by Dr. Youkilis or Dr. Graham. In addition, the Commission noted, there was evidence in the record to suggest that the claimant did not really want the surgery. In July 2006, the claimant began treatment with Dr. Gornet, whose treatment records dated July 12, 2006, indicated that the surgery had been approved by the employer's workers' compensation insurance carrier. The record documented a phone conversation with the claimant, in which Dr. Gornet's staff indicated that the surgery had been approved and sought to discuss potential surgery dates. The claimant indicated that he could not make a decision at that time due to pressing family matters. Although Dr. Gornet's notes from September 11, 2006, reflected that the claimant indicated a desire to proceed with the disc replacement surgery at C6-C7, the claimant did not actively seek treatment with Dr. Gornet thereafter. The next record from Dr. Gornet was over a year later, on October 29, 2007, in the form of a letter sent to the claimant indicating that Dr. Gornet was no longer going to treat him. The Commission further noted that, while the claimant strongly insisted that he wanted the surgery that Dr. Gornet recommended, there was no evidence that the claimant ever took any steps to proceed with such surgery.

¶ 21 The Commission next determined that the claimant had failed to prove that he was entitled to PTD benefits based on an odd-lot theory of recovery. The Commission noted that the

arbitrator had based his award primarily upon the medical opinion of Dr. Schenewerk. The Commission rejected Dr. Schenewerk's opinions, finding that his opinions were not true medical opinions but had been specifically obtained for litigation purposes.

¶ 22 In evidence, there is an undated handwritten letter from the claimant addressed to Dr. Schenewerk, which reads as follows:

> "So I can only ask you one more time, please write a letter that states in it like this and please don't put anything in it that the insurance company can contradict. My lawyer has said that it only needs to say patient is permanently totally disabled from the intense chronic pain and impairment from his medications he takes to alleviate his symptoms. This is from the accident of March 28, 2004."

¶ 23 The Commission found that Dr. Schenewerk's opinion was provided in response to the claimant's solicitation. Dr. Schenewerk's records dated July 11, 2007, documented a phone conversation with the claimant during which he was informed that Dr. Schenewerk was "unable to do this letter" and that Dr. Schenewerk would not be able to opine whether the claimant was disabled for another two to three years. Yet, despite Dr. Schenewerk's indication in July 2007 that he could not provide an opinion as to permanent disability, Dr. Schenewerk did just that in March 2008. On March 13, 2008, Dr. Schenewerk wrote on his notepad that the claimant "is permanently disabled given his intensity and chronicity [*sic*] of pain from accident March 28, 2004. His only option for possible resolution is the advice from previous doctors, which is surgery." Dr. Schenewerk's records dated March 18, 2008, reflect a request to type the written

note on letterhead instead, a request with which the doctor complied. Dr. Schenewerk's records show a typed letter dated March 18, 2008, addressed "to whom it may concern," with the following note: "Patient is permanently disabled given his intense and chronic pain from the accident on March 28, 2004. His only option for possible resolution is the advice from previous doctors, which is surgery." Dr. Schenewerk issued another letter dated April 17, 2008, also addressed "to whom it may concern," with the following:

> "This letter is in regards to Samuel Houston. The patient is disabled, at this point permanently because of his chronic neck pain, decreased range of motion, and strong pain medications that he takes every four to six hours. These medications make it dangerous for him to drive. His condition has only worsened throughout the years, since his work accident on March 28, 2004."

¶ 24 The Commission was further dismissive of Dr. Schenewerk's opinion. It noted that Dr. Schenewerk's most recent letter dated April 17, 2008, shortly before the hearing, addressed all of the points that the claimant had asked for in his handwritten letter. The Commission found that Dr. Schenewerk's opinions were not reliable. It also noted the record established that Dr. Schenewerk did not actually see the claimant very often, and it appeared to the Commission that "Dr. Schenewerk's office primarily served the purpose of calling in prescriptions for [the claimant]." The Commission noted that the claimant saw Dr. Schenewerk approximately eleven times in four years, of which two were for issues clearly not related to his back pain. Thus, the Commission questioned whether Dr. Schenewerk's opinion should have any weight given that he did not treat the claimant that often. The Commission further noted the contrasting opinion of

medical specialists whose expertise related more directly to the claimant's alleged condition of ill-being than a general practice family physician or internist. The Commission also reiterated its previous conclusion that the claimant had shown an extreme lack of candor with all his physicians, including Dr. Schenewerk.

¶ 25 The Commission also found that Ms. Gonzales's opinion was not persuasive, as it was based, in large part, on Dr. Schenewerk's opinion. Moreover, the Commission found that the claimant's participation in vocational rehabilitation was disingenuous. The records reflected that the claimant consistently applied for jobs for which he was not qualified. Mr. Hammond testified that the vast majority of the positions that the claimant applied for were clearly outside of his background and education level. In a progress note dated March 3, 2008, the claimant indicated that he refused to look at jobs that paid minimum wage or close to minimum wage. Moreover, the claimant did not apply for the jobs in person despite having been asked to do so. Furthermore, it appeared to the Commission that the claimant harbored a belief that the jobs that he perhaps could have obtained were beneath him. For example, Hammond had sent job leads for Petco and Cracker Barrel. The claimant's response to those job leads is found in the claimant's Exhibit 16, in a note the claimant sent to his attorney, which read as follows: "Here is the last job search that was sent to me by [Hammond]. Petco? Cracker Barrel? Why not put a clown's outfit on and wave people in on the side of the road at Chucke [*sic*] Cheese. This is all a real crock of shit really."

¶ 26 The Commission noted Hammond's testimony that the claimant was employable in the general labor market and that there were positions readily available on a continuous basis that were within his restrictions and for which he was qualified. The Commission concluded that the

claimant's participation in vocational rehabilitation was for the purpose of showing cooperation to justify continuation of payment of benefits. The Commission further concluded that the claimant's job search was not *bona fide* and therefore was not a basis upon which to find that he was entitled to permanent total disability benefits based on an odd-lot status.

¶ 27 Having concluded that the claimant's job search and participation in vocational rehabilitation was not *bona fide*, the Commission concluded that the claimant failed to prove that he is permanently and totally disabled on a medical basis or under the odd-lot theory of recovery. Instead, the Commission held that, beginning on April 4, 2006, the claimant was entitled to wage differential benefits under section 8(d)(1) of the Act in the amount of $550.47 per week, the maximum permanent partial disability award applicable at the time of the claimant's injury. The Commission based its finding on the April 3, 2006, opinion of Dr. Youkilis that the claimant had reached MMI and imposed permanent work restrictions. Additionally, on that date, Dr. Youkilis indicated that the claimant should not return to work as an ironworker. The Commission found, therefore, that the claimant's inability to return to work as an ironworker results in a diminution of his earning capacity. The Commission further determined that the claimant's wage differential award would be based on the claimant earning $9 per hour and working 40 hours per week. Hammond had testified that a majority of the job leads that he provided to the claimant paid $10 or less. The claimant sought review in the circuit court of Madison County, which confirmed the Commission's decision, finding that it was not against the manifest weight of the evidence.

¶ 28 ANALYSIS

¶ 29 The claimant maintains that the Commission erred in finding that he was not permanently and totally disabled under the odd-lot theory. Under the odd-lot theory, a claimant must establish

that he is unable to perform services except for those that are so limited in quantity, dependability, or quality that there is no reasonable stable market for his skills. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). It is the claimant's burden to prove that he is so incapacitated from working, that he is unable to be regularly employed in any well-known branch of the labor market. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286 (1983). A claimant can establish this by showing either: (1) a diligent, yet, unsuccessful job search; or (2) that his age, training, education, experience, and physical condition prevent him from engaging in stable and continuous employment. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). If the claimant establishes by a preponderance of the evidence that he falls within the odd-lot, the burden then shifts to the employer to show that work is actually available for the claimant. *Lanter Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 5 (1996). Ultimately, whether a claimant falls into the odd-lot category is a factual determination to be made by the Commission, and that determination will not be set aside unless it is against the manifest weight of the evidence. *Westin*, 372 Ill. App. 3d at 544.

¶ 30 A factual finding is against the manifest weight of the evidence if the opposite conclusion is "clearly apparent." *Swartz v. Illinois Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002). "A reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006).

¶ 31 Applying these standards, we cannot say that the Commission's conclusion that the

claimant failed to establish that he fell into the odd-lot category was against the manifest weight of the evidence. The Commission found that the claimant had not engaged in a diligent job search. The evidence in support of this conclusion was listed in great detail by the Commission, including the fact that the claimant tended to only apply for jobs for which he was objectively not qualified and the negative comments he made about the job referral that Hammond presented that appeared to be within his qualifications. The Commission gauged the claimant's diligence in light of this evidence and found his efforts lacking. Moreover, we must note that the Commission found the claimant not credible. Given that credibility is an important factor to be weighed when determining whether the claimant engaged in a diligent job search, we cannot say that the Commission erred in finding that the claimant failed to approach his job search with a sufficient degree of diligence. In all, the Commission weighed the evidence in a manner which supported a finding that the claimant failed to establish that he was odd-lot, and we will not reweigh that evidence differently.

¶ 32 Having found that the claimant failed to establish that he engaged in a diligent job search, the Commission also determined that the claimant had failed to establish that no stable and continuous employment was available to someone in the claimant's position. The Commission relied upon Hammond's testimony that the claimant was employable if he were motivated to find employment. In so doing, the Commission chose to reject Gonzales's testimony to the contrary. Given the conflicting testimony of the two vocational experts, we cannot say that the Commission's decision to rely upon Hammond's testimony was against the manifest weight of the evidence. The record established that Hammond worked with the claimant for several months, while Gonzales only met with the claimant once immediately prior to the hearing. Moreover, the

Commission noted that Gonzales relied heavily on the medical opinion of Dr. Schenewerk, which the Commission did not find credible. Given these facts, we cannot say that the Commission erred in weighing the evidence.

¶ 33 The claimant also maintains that the Commission erred in finding that the medical evidence did not establish that he was permanently and totally disabled. The claimant maintains that the Commission improperly weighed Dr. Schenewerk's opinions regarding the nature and extent of his disability. The Commission was quite critical of Dr. Schenewerk and listed a plethora of reasons for dismissing his opinion. It is well within the purview of the Commission to determine what weight to give testimony and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). Moreover, medical opinion testimony is often a critical component of odd-lot analysis. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 178 (2000) (in odd-lot cases, the focus is upon the degree to which the claimant's medical condition impairs his employability). Here, there is no factual basis upon which we could find that the Commission's rejection of Dr. Schenewerk's medical opinion was against the manifest weight of the evidence.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the Madison County circuit court, which confirmed the Commission's decision.

¶ 36 Affirmed.