No. 2-10-0569WC

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

BANNER PLUMBING SUPPLY,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Lake County.
	)	
v.	)	No. 09-MR-1713
	)	
ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION *et al.*	)	
(Jeffrey Shaw,	)	Honorable
	)	David M. Hall,
Appellees).	)	Judge presiding.

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

ORDER

Held: The decision of the Commission that the claimant is entitled to maintenance benefits is not against the manifest weight of the evidence.

The employer, Banner Plumbing Supply (Banner Plumbing), appeals from a decision of the circuit court of Lake County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission). The Commission affirmed and adopted the arbitrator's award of temporary total disability (TTD), maintenance, and $4,761.30 in unpaid medical bills to the claimant, Jeffrey Shaw, under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)). The circuit court confirmed the Commission's decision. We affirm.

BACKGROUND

The following factual recitation is taken from the evidence presented at the arbitration hearing. The claimant began working for Banner Plumbing as a truck driver in 2003. On October 3, 2007, he filed an application for adjustment of claim for an accident that occurred on January 2, 2007 in which he injured his back when lifting a 20 to 30 pound part while loading his truck for delivery. At the expedited arbitration hearing, conducted pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)), the employer did not dispute that the claimant's injury arose out of and in the course of his employment. The employer disputed a portion of the claimant's medical bills, the dates during which the claimant was entitled to TTD payments, and the claimant's entitlement to maintenance benefits. The parties agreed that the claimant had earned $53,478.88 in the year before his injury, that his average weekly wage was $1,028.44, and that the employer had paid $65,125.35 in TTD and/or maintenance benefits. The parties agreed that the claimant was entitled to TTD from January 3, 2007, to October 2, 2007. They disputed, however, whether the claimant was

entitled to TTD or maintenance benefits from October 3, 2007, to the date of the hearing on December 19, 2008.

As a truck driver, the claimant retrieved the customers' orders at the warehouse, loaded the truck, drove it to the customers' locations, unloaded the orders, loaded any returned items from the customers, drove the truck back to the warehouse, unloaded any returned items, and replaced them in the warehouse. The products he delivered were plumbing supplies ranging in weight from a few ounces to hundreds of pounds. For the heavier items, he was able to use a handcart or a crane, but he was required to place the heavy items on the handcart or position them on and off the crane. He unloaded the customers' orders from the four-foot high truck bed upon arrival at the customers' locations.

On January 2, 2007, the claimant was adjusting an order that another employee had loaded onto his delivery truck. The claimant testified that there was a part hanging out of the back of the truck, so he climbed onto the truck bed, picked up the item, and moved it so that it was far enough inside the truck bed to close the rear doors. When he picked up the 20 to 30 pound item, which was one to two feet off the floor, he felt his back pull. In trying to pick up the item, he had to bend down and twist his back. He reported the incident to his supervisor and sought medical treatment at Northwest Community Hospital.

Dr. John A. Elstrom examined the claimant on January 4, 2007. He later ordered a magnetic resonance imaging (MRI) test of the claimant's lumbar spine. On January 15, 2007,

Dr. Elstrom noted that the MRI showed a protruding disc at L4/L5 and an extruded disc on the right side at L3/L4. Dr. Elstrom referred the claimant to Dr. Kanu Panchal, a neurosurgeon. On February 26, 2007, Dr. Panchal noted that the claimant had undergone physical therapy prescribed by Dr. Elstrom without much improvement, ordered him to remain off work, and recommended that he have an epidural steroid injection as the next phase of treatment. When the epidural steroid injection did not relieve the claimant's pain, Dr. Panchal recommended surgery. On June 27, 2007, Dr. Panchal performed hemilumbar laminectomies at L3-4 on the right and at L4-5 on the left with removal of the herniated disks.

The claimant remained off work and continued to participate in physical therapy, including a work-hardening program conducted by McHenry County Physical Therapy. On September 6, 2007, the claimant's physical therapist drafted a report in which she noted that the claimant's maximum lifting abilities included lifting 100 pounds from floor to knuckle height, 110 pounds from 12 inches above the floor to knuckle height, 65 pounds from knuckle to shoulder height, and 65 pounds from shoulder height to overhead. The therapist stated that the claimant should not lift the maximum amount in any category more than six to eight times in an eight-hour work day. The therapist determined that the claimant's "safe maximums" did not meet "his required work demands" and that continued therapy was necessary in order for him to meet his current job requirements.

Although it is not clear whether he performed an examination or only a records review, on September 20, 2007, Dr. Alexander Ghanayem wrote a five-sentence letter to the employer's insurance carrier stating that he had reviewed "additional" medical records of the claimant. Dr. Ghanayem stated that he believed the claimant had done "very well with his surgery, obtaining a solid fusion." Dr. Ghanayem noted that the claimant "also has had a great result from post-surgical rehabilitation, demonstrating an ability to lift over 100 pounds." He stated that he had reviewed the claimant's "job description which states he has to lift 50 pounds on a frequent basis and no more than 100 pounds on an occasional basis." Dr. Ghanayem stated, "[g]iven the job description and the results of physical therapy," he felt the claimant could return to work at regular duty. After receiving a copy of this report, Dr. Panchal noted in his records that "contrary to Dr. Ghanayem's report, this patient did not have a spinal fusion." A "job demands/physical capacities form" for the claimant's job of truck driver was submitted into evidence by both parties. Apparently, it is this form Dr. Ghanayem relied on in reaching his conclusion that the claimant was able to return to regular duty work. The job demands form, signed by claimant's supervisor, Ray Kingos, indicated that the claimant's job required him to be able to lift/carry 50 pounds frequently and 100 pounds occasionally; that he would be required to bend, squat, and climb frequently; that he would be required to kneel occasionally; and that he would be required to load and unload his delivery truck.

On October 3, 2007, Dr. Panchal allowed the claimant to return to work with the restrictions outlined in the work-hardening report. On October 4, 2007, the claimant met with Kingos and gave him a copy of the work-hardening report. The claimant testified that Kingos told him he could not return to work because Gene Hara, the vice-president of Banner Plumbing, had to approve his return to work with restrictions. On October 8, 2007, Hara drafted a letter to Dr. Panchal to "clarify our understanding as to what restrictions [the claimant] is under upon his return to work as a full-time delivery driver." Hara noted the differences between the essential job functions of a delivery truck driver for Banner Plumbing and the restrictions listed on the work-hardening report. He asked Dr. Panchal to clarify the claimant's permanent restrictions and to state whether the claimant could return to work full-time unrestricted.

The claimant testified that Hara called him on October 9, 2007, and told him to stay home until someone from the employer called him back. He stated that, sometime before Christmas 2007, Hara called him and told him the employer did not "feel comfortable" with him returning to work with restrictions. The claimant had reviewed the job demands Hara listed in his letter to Dr. Panchal as well as the job demands form that Kingos signed and testified that both descriptions were accurate for the most part but that they left out some of the demands of the job. He stated that sometimes he was required to move water heaters weighing 400 to 500 pounds and cast-iron pipes weighing over 100 pounds and, although he

used a two-wheel dolly to transport such heavy items, he still had to maneuver them onto the dolly and unload them from the truck. The claimant agreed with their descriptions that his job required frequent bending, stooping, and climbing.

On March 12, 2008, Hara sent the claimant a letter terminating his employment with Banner Plumbing. In the letter, Hara noted that he had been trying to determine whether the employer could accommodate the claimant's return to work and concluded that based upon the information he had obtained from the claimant and "confirmed by [his] doctor," he could not return to work for the employer. He was then advised that he would be contacted by a vocational rehabilitation specialist. In the meantime, he began a job search. In June 2008, a vocational rehabilitation specialist, Tammy Lindley Lutz, contacted him on behalf of the employer's workers' compensation carrier.

At their first meeting, the claimant told Lutz he had found a full-time job as a bus driver for Pace Bus Company which was within his current restrictions and paid $10.15 per hour. Lutz told him she would have to talk to the employer's workers' compensation insurance carrier before she could advise him whether to take the job. After doing so, she told him not to accept that job, and suggested that he should look for a job paying $12 to $15 per hour. The claimant followed the advice of the vocational rehabilitation specialist and rejected the job offer. Lutz also advised the claimant that he should obtain a functional capacity evaluation (FCE) to clarify his work restrictions and that he should "hold off" on

seeking employment until after the FCE. Once Lutz obtained insurance approval for the FCE, she had the claimant obtain a referral from Dr. Panchal, and the FCE was conducted on September 3, 2008.

The FCE indicated that the claimant could work at the heavy physical demand level, that he demonstrated consistency of effort during the evaluation, and that his capacities were not adequate for the demands of his prior job in several areas, including floor to knuckle and knuckle to shoulder lifting and trunk twisting. The summary of the heavy demand level of work that the claimant was found qualified for under the FCE included lifting 50 to 100 pounds occasionally and 25 to 50 pounds frequently. After he completed the FCE, the claimant returned to Dr. Panchal who released him to return to work within the restrictions of the FCE as of September 23, 2008. The claimant testified that, with those restrictions, he could no longer perform his former job as a truck driver for the employer.

After completing the FCE and seeing Dr. Panchal, the claimant talked to Lutz about conducting a job search. Lutz prepared a transferable job skills analysis and labor market survey dated October 24, 2008. He testified that Lutz told him what questions prospective employers could and could not ask him, helped him prepare a resume, and suggested that he review job listings at internet-based job finders such as Monster.com. Lutz did not set up any job interviews for him or tell him the names of any companies with openings. He testified that between October of 2008, and the date of the arbitration hearing on December 19, 2008,

he began looking for work within the parameters Lutz gave him. He filled out 10 to 15 internet applications, and communicated with another 10 to 15 companies to inquire about the possibility of employment. He also contacted his former employers and some of the companies his friends and relatives worked for. He testified that he had a few interviews and thought they went very well but that when prospective employers learned that he had been out of work and drawing workers' compensation benefits, none of them called him back to offer him a job. The claimant testified that Banner Plumbing did not offer him any employment within his restrictions at any time after his January 2, 2007 injury. As of the date of the arbitration hearing, the claimant had not found employment.

Based upon the agreement of the parties, the arbitrator awarded the claimant 39 1/7 weeks of TTD at the rate of $685.62 for the period of January 3, 2007 through October 2, 2007. He also awarded the claimant 63 2/7 weeks of maintenance benefits in the same amount for the period of October 3, 2007 through December 19, 2007, and $4,761.30 for unpaid medical services. In support of the maintenance award, the arbitrator found that, on September 20, 2007, Dr. Ghanayem had reviewed medical records and a job description and opined that the claimant could return to work at full duty. The arbitrator found that, on September 26, 2007, Dr. Panchal "clarified" the claimant's medical history and cleared the claimant to return to work, but only as allowed by the work-hardening program report. The arbitrator noted that, on October 4, 2007, the claimant contacted the employer and requested

to return to work but was advised that Hara would have to decide if the employer would allow him to come back to work. The arbitrator stated that Hara called the claimant on October 9, 2007 and told him that the employer "would be getting back to him" but that no one from the employer contacted him again until December 2007, when Hara told him the employer would not allow him to return to work.

The arbitrator found that the employer wrote to the claimant on March 12, 2008 to officially terminate his employment, that Lutz contacted the claimant in June 2008, that Lutz told the claimant not to accept the position with Pace Bus Company, and that Lutz recommended the claimant undergo an FCE. The arbitrator determined that the FCE cleared the claimant to return to work at the heavy demand level and that Dr. Panchal cleared him to return to work at that level on September 22, 2008. The arbitrator stated,

> "The [claimant] testified that Tammy Lutz called him in October of 2008 and advised him to start his job search. He testified that while Ms. Lutz reviewed his resume and gave him a list of 'prohibited questions,' she merely referred him to 'Monster.com' and 'The Illinois jobs list' and did not provide him with any specific job leads. The [claimant] testified that he has looked for work but that [he] has not received any offers of employment. The [claimant] acknowledged that his current restriction level comports with what he had to do for [the employer], with the

exception of occasional carrying up to 125 lbs., however he admitted that a dolly or crane would have been available to perform that type of lifting."

The arbitrator found that the claimant had complied with Lutz's instructions when looking for work but had been unsuccessful in finding any employment. The arbitrator allowed the employer a credit in the amount of $65,125.35 for the TTD benefits paid to the claimant before the hearing.

On review, the Commission affirmed and adopted the arbitrator's decision and remanded the case to the arbitrator for further proceedings. The circuit court of Lake County confirmed the Commission's decision. The employer filed a timely notice of appeal to this court.

ANALYSIS

The employer first argues that the claimant was cleared to perform the essential functions of his job on October 2, 2007, and as a matter of law, he is not entitled to maintenance benefits after that date. This argument is patently without merit. The record contains contradictory evidence on the issue of the claimant's ability to perform the essential functions of his job on October 2, 2007 or thereafter. As a result, the issue is not one of law but whether the Commission's decision that the claimant was entitled to maintenance benefits beginning on October 2, 2007 is against the manifest weight of the evidence.

Issues that present purely legal questions are reviewed *de novo*. *Uphold v. Illinois Workers' Compensation Comm'n*, 385 Ill. App. 3d 567, 572, 896 N.E.2d 828, 834 (2008). Similarly, when the court applies undisputed facts to the law, the review is *de novo*. *Uphold*, 385 Ill. App. 3d at 571-72, 896 N.E.2d at 834. Cases in which the facts are disputed, however, are reviewed under the manifest weight of the evidence standard, and the Commission is charged with the functions of deciding questions of fact, judging the credibility of witnesses, and resolving conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223-24 (1980). A reviewing court will not disturb the Commission's resolution of a question of fact unless it is against the manifest weight of the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). "Fact determinations are against the manifest weight of the evidence only when an opposite conclusion is clearly apparent - that is, when no rational trier of fact could have agreed with the agency." *Durand*, 224 Ill. 2d at 64, 862 N.E.2d at 924.

It is clear that the evidence concerning the claimant's ability to perform the essential functions of his job with Banner Plumbing after October 2, 2007, was highly disputed. The claimant testified that he was not able to perform his previous job and described in detail the functions he could not perform. Although Dr. Ghanayem released the claimant to return to full duties, Dr. Panchel only released him to return to work with the restrictions contained in the work hardening report. The restrictions of the work-hardening report were more

detailed than the job demands form upon which Dr. Ghanayem relied. The work-hardening report stated that the claimant could not perform the essential functions of his job without additional physical therapy. Hara called the claimant on October 9, 2007 to tell him not to return to work until someone from the employer called him. The employer sent the claimant a termination letter on March 12, 2008, stating that the employer had confirmed with the claimant's physician that the claimant could not return to work. In that letter, Hara said, "Should you subsequently become able to return to work, please let me know, and we could explore at that time the possibility of rehiring you to a position for which you could perform the essential functions with or without a reasonable accommodation." The employer never offered to rehire him in any capacity. In June 2008, the vocational rehabilitation specialist contacted the claimant, began evaluating his capabilities and job opportunities, and helped him look for employment. The FCE obtained at Lutz's request concluded that he could not perform all of the demands of his previous job.

Although the employer argues that we should determine as a matter of law that the claimant is not entitled to maintenance benefits because he was released to perform the essential functions of his job, we review that argument under the manifest-weight-of-the-evidence standard. The evidence of whether the claimant could perform the essential functions of his job as of October 2, 2007 was clearly disputed. Resolution of that dispute was for the Commission. Substantial evidence was presented that the claimant was unable

to perform the essential functions of his job. The decision of the Commission on that issue is not against the manifest weight of the evidence.

The remaining issue before this court is whether the Commission's decision that the claimant was entitled to maintenance benefits from October 2, 2007 through December 19, 2008, is against the manifest weight of the evidence because the claimant was not diligent enough in his job search. Section 8(a) of the Act requires employers to pay for their employees' necessary physical, mental, and vocational rehabilitation, including the costs and expenses of maintenance. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 505, 812 N.E.2d 65, 70 (2004); 820 ILCS 305/8(a) (West 2005). TTD benefits are generally available only until an injured employee has recovered as fully as his injury permits, but he may be entitled to maintenance benefits under section 8(a) while he is in a prescribed rehabilitation program. *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55, 523 N.E.2d 1265, 1269 (1988). "Such maintenance is often merely a continuation of TTD." *Connell*, 170 Ill. App. 3d at 55, 523 N.E.2d at 1269. A claimant who seeks maintenance benefits must "make good-faith efforts to cooperate in the rehabilitation effort." *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 115-16, 561 N.E.2d 623, 626 (1990). The claimant must initially establish that alternative employment is unavailable to him, and he can satisfy that burden by showing that he has made diligent but unsuccessful attempts to find employment. *Archer Daniels Midland Co.*, 138 Ill. 2d at 122, 561 N.E.2d 629.

Here, the claimant was released to return to work with restrictions and attempted to return in October of 2007. The employer delayed making a decision whether to allow him to return until March of 2008. At that time, the claimant was terminated for the stated reason that he was unable to perform his prior job and the employer could not accommodate his restrictions. At that time, he was told he would be contacted by a vocational rehabilitation specialist. By the time Lutz contacted him in June 2008, he had performed a job search and had been offered a full-time job, within his restrictions, at $10.15 per hour. After consulting with the employer's insurance carrier, she advised him not to take the job, in part, because the pay was allegedly too low. Lutz then advised the claimant to further delay any job search until an FCE was obtained to clarify his restrictions. By the time the FCE report was obtained and Dr. Panchal provided him with a release to return to work within the FCE restrictions it was late September.

Thus, it was October 2008, just a few weeks before the December 19, 2008, arbitration hearing, before the vocational rehabilitation specialist advised the claimant to commence a job search. During that time, the claimant's job search efforts, as assisted by Lutz, included checking internet job search web sites, filling out 10 to 15 internet applications, communicating with an additional 10 to 15 companies to inquire about the possibility of employment, and contacting his former employers and the employers of some of his friends and relatives. Lutz was unable to direct him to any employer who offered him

employment. The claimant began his job search before Lutz contacted him and had successfully found a job within his work restrictions, but he did not accept that job because he followed Lutz's advice. He also was following her advice when he delayed any further job search until after the FCE. There is no evidence to suggest that the claimant failed to cooperate with Lutz in any respect, that he failed to contact any prospective employers, or that his job search was anything other than diligent. Any significant delays in the claimant's job search were primarily the result of actions by the employer, its insurance carrier or the vocational rehabilitation specialist.

Moreover, the issue of the claimant's diligence was a factual question for the Commission to decide. The Commission's decision awarding maintenance benefits to the claimant is not against the manifest weight of the evidence. Accordingly, we affirm.

CONCLUSION

The decision of the circuit court confirming the decision of the Commission is affirmed and this cause remanded to the Commission for further proceedings in accordance with *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

Affirmed and remanded.