

2012 IL App (2d) 110731WC
No. 2-11-0731WC
Order filed July 6, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

ROZENIA SMART,) Appeal from
Plaintiff-Appellant,) Circuit Court of
v.) DuPage County
ILLINOIS WORKERS' COMPENSATION) No. 10MR1777
COMMISSION and PEARL HEALTH CARE,)
Defendants-Appellees.) Honorable
) Bonnie M. Wheaton,
) Judge Presiding.

PRESIDING JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Commission's decision finding claimant not entitled to permanent total disability benefits was not against the manifest weight of the evidence.
- (2) Commission's decision finding claimant not entitled to total temporary disability benefits after December 9, 2004, was not against the manifest weight of the evidence.
- (3) Commission's decision finding claimant not entitled to medical expenses after December 9, 2004, was not against the manifest weight of the evidence.
- (4) Commission's decision finding claimant not entitled to an award of attorney fees and penalties was not against the manifest weight of the evidence.
- ¶ 2 Claimant, Rozenia Smart, filed an application for adjustment of claim pursuant to

the Workers' Compensation Act (Act) (820 ILCS 305/1 through 30 (West 2002)), seeking benefits from employer, Pearl Health Care, for injuries suffered to her neck and back on February 24, 2004. After a hearing, an arbitrator found claimant proved she sustained injuries arising out of and in the course of her employment with employer and awarded claimant total temporary disability (TTD) benefits in the amount of \$558.00 per week, from February 25, 2004 through December 9, 2004; permanent partial disability (PPD) benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2002)), in the amount of \$502.20 per week for a period of 75 weeks, to the extent of 15% person as a whole; and medical expenses in the amount of \$15,418.70.

¶ 3 Claimant filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On review, the Commission affirmed and adopted the arbitrator's decision. Thereafter, claimant filed a petition seeking judicial review in the circuit court of DuPage County and the circuit court confirmed the Commission's decision.

¶ 4 Claimant appeals, arguing the Commission's decision finding claimant not entitled to (1) permanent total disability (PTD) benefits is against the manifest weight of the evidence, (2) TTD benefits after December 9, 2004, is against the manifest weight of the evidence, (3) medical expenses after December 9, 2004, is against the manifest weight of the evidence, and (4) an award of attorney fees and penalties is against the manifest weight of the evidence. We affirm the judgment of the circuit court confirming the Commission's decision.

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing on October 16, 2009. The 55-year-old claimant testified that she had worked as a certified nursing assistant (CNA) for approximately 20 years and had also secured a diploma

as an emergency medical technician (EMT). On February 24, 2004, claimant was involved in an automobile accident while working for employer. Claimant was taken by ambulance to the Glen Oaks Hospital emergency room. An emergency room physician diagnosed claimant with cervical strain. Claimant's cervical x-rays were normal. Claimant was prescribed Motrin and removed from work for two days.

¶ 6 On February 26, 2004, claimant sought treatment with her primary care physicians who removed claimant from work through May 18, 2004. Claimant underwent a course of physical therapy and was referred to Dr. Ronald Michael, a neurosurgeon. Dr. Michael ordered a MRI of the lumbar spine which was performed on April 28, 2004. The scan revealed minor degenerative disease and meningeal cysts or diverticula on the right at S2-3. On May 13, 2004, Dr. Michael diagnosed claimant with "a nonspecific lumbar radiculitis." Dr. Michael recommended claimant undergo three lumbar epidural steroid injections. Claimant underwent the injections on June 1, 2004, June 8, 2004, and September 15, 2004.

¶ 7 Also on May 13, 2004, Dr. Michael Orth examined claimant at the request of employer. Dr. Orth is a board-certified orthopedist. Claimant complained of pain on the right side of her lower back with no radiating pain and no cervical complaints. Claimant did not have difficulty changing positions and walked with a normal gait. Dr. Orth diagnosed claimant with low back strain as a result of the accident and opined that additional treatment was not necessary. Dr. Orth stated that claimant could return to regular duty work and was at maximum medical improvement.

¶ 8 Claimant continued under the care of Dr. Michael. On June 24, 2004, Dr. Michael noted that claimant desired vocational rehabilitation and further, that "we may consider

a [functional capacity evaluation (FCE)] at this time." A FCE was never performed.

¶ 9 Claimant experienced significant resolution of pain following the lumbar epidural steroid injections, ranging from 70% to 100%. Dr. Michael returned claimant to light duty work on September 30, 2004, with a 20-25 pound lifting restriction and no bending or twisting. Employer did not provide claimant work within her restrictions. In a letter dated December 9, 2004, Dr. Michael stated that claimant had reached maximum medical improvement (MMI) and recommended claimant undergo a FCE.

¶ 10 Claimant testified that she secured light duty work from January 21, 2005, through June 10, 2005, working with ambulatory patients. Claimant testified that after June 2005, she experienced constant pain, difficulty walking, and her feet swelled.

¶ 11 On July 19, 2006, claimant sought treatment at the Stroger Hospital emergency room complaining of back pain. Claimant had not sought treatment for back pain since October 14, 2004, with Dr. Michael. Claimant testified that she is presently under the care of Dr. Silvio Glusman, board-certified in anesthesiology and pain management. Dr. Glusman diagnosed claimant with chronic low back pain secondary to facet arthropathy and degenerative disc disease.

¶ 12 On March 7, 2008, Dr. Michael Treister examined claimant at the request of claimant's counsel. Dr. Treister is an orthopedic surgeon. According to claimant, she regularly lifted heavy paraplegic and quadriplegic patients while employed by employer. Dr. Treister opined that the February 24, 2004, automobile accident aggravated claimant's minor degenerative disease and remained symptomatic.

¶ 13 Claimant testified that she sought employment within her restrictions for

approximately two months, April and May 2008. She no longer pursued employment when she was advised in June 2008 that she would receive social security disability benefits.

¶ 14 On June 23, 2008, Dr. David Trotter examined claimant at the request of employer. Dr. Trotter is a board-certified orthopedic surgeon. Dr. Trotter opined that claimant was at MMI on April 28, 2004, the date the MRI was performed revealing minor degenerative disease and meningeal cysts or diverticula on the right at S2-3. Dr. Trotter believed that ongoing medical treatment was not necessary and treatment after April 28, 2004, was likely excessive. According to Dr. Trotter, claimant suffered a soft tissue strain at the time of the automobile accident that had resolved and claimant could return to full duty work. Dr. Trotter noted that claimant's subjective complaints were markedly disproportionate and impossible for Dr. Trotter to reconcile with claimant's unremarkable findings.

¶ 15 Pearla Wiszowaty testified that she had been employed by employer for approximately 12 years. She worked as the administrator and agency supervisor. Wiszowaty testified that in February 2004, employer cared for one paraplegic patient weighing between 100-104 pounds.

¶ 16 Employer offered into evidence surveillance of claimant on April 24, 2008, May 8, 2008, July 18, 2008, and September 7, 2008. Claimant is seen moving about freely outside of her home with no sign of pain or discomfort. Claimant walks quickly to a waiting vehicle and with high-heels on, ascends and descends concrete stairs with apparent ease.

¶ 17 Claimant testified that she experiences severe low back pain after shopping all day or riding on a train or bus. She cannot clean her house, take out the garbage, or tie her shoes.

¶ 18 Following the hearing, the arbitrator issued a decision in which he found that

claimant proved she sustained injuries arising out of and in the course of her employment with employer and awarded benefits as previously stated. The arbitrator detailed the conflicting medical opinions and adopted the causation opinion of Dr. Michael, finding that "based on the opinion of treating neurosurgeon Dr. Michael, that Petitioner had reached MMI as of December 9, 2004, or the date of his letter stating as much, and that Petitioner's condition of ill-being and need for treatment thereafter, with respect to her lower back, was not causally related to the motor vehicle on February 24, 2004."

¶ 19 Claimant sought a review of the arbitrator's decision. On November 22, 2010, the Commission issued a decision affirming and adopting the arbitrator's decision. The Commission noted that "videotape was viewed as evidence." Thereafter, claimant sought judicial review of the Commission's decision in the circuit court of DuPage County. On July 8, 2011, the circuit court confirmed the Commission's decision and this appeal followed.

¶ 20 Claimant first argues that the Commission's decision finding claimant not entitled to PTD benefits is against the manifest weight of the evidence. We disagree.

¶ 21 In a workers' compensation case, the claimant has the burden of establishing, by a preponderance of the evidence, the extent and permanency of his injury. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843, 635 N.E.2d 770, 776 (1994). The extent of a claimant's disability is a question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256, 402 N.E.2d 607, 608 (1980). The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 1008 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an

opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 896 (1992).

¶ 22 The claimant does not argue that she showed diligent but unsuccessful attempts to find work. Instead, claimant argues that she was unable to engage in stable and continuous employment because of her age, training, education, experience, and condition. Claimant did not seek a vocational evaluation from a vocational rehabilitation counselor. We note the surveillance of claimant on April 24, 2008, May 8, 2008, July 18, 2008, and September 7, 2008, shows claimant moving about freely outside of her home with no sign of pain or discomfort. Claimant walks quickly to a waiting vehicle and with high-heels on, ascends and descends concrete stairs with apparent ease.

¶ 23 Claimant testified that she had worked as a CNA for approximately 20 years and had also secured a diploma as an EMT. Claimant secured light duty work from January 21, 2005, through June 10, 2005, working with ambulatory patients. We agree with the Commission that "the evidence strongly suggests that Petitioner would have been qualified for other jobs within the health care field, within her restrictions, such as working as a secretary or the like in a doctor's office, for example." The Commission's finding that claimant is not entitled to PTD benefits is not against the manifest weight of the evidence. There is sufficient evidence to support the decision of the Commission. An opposite conclusion is not clearly apparent.

¶ 24 Claimant next argues that the Commission's decision finding claimant not entitled to TTD benefits after December 9, 2004, is against the manifest weight of the evidence. An employee is temporarily totally disabled from the time that an injury incapacitates her from work until such time as she is as far recovered or restored as the permanent character of her injury will

permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 627 (1990). Once an injured employee's physical condition stabilizes or she reaches maximum medical improvement, she is no longer eligible for TTD benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118, 561 N.E.2d at 627. The determination of the period of time during which a claimant is temporarily and totally disabled is a question of fact to be resolved by the Commission and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Archer Daniels Midland Co.*, 138 Ill. 2d at 119-20, 561 N.E.2d at 62-28.

¶ 25 Claimant asserts that she aggressively pursued employment but was not successful in her attempt to find work and therefore, she is entitled to additional TTD benefits through the date of the arbitration hearing, October 16, 2009. Claimant confuses the elements required to prove TTD with the elements required to prove a permanent disability. "To show entitlement to TTD benefits, claimant must prove not only that he did not work, but that he was unable to work." *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827, 829 (1996). It does not matter whether a claimant could have looked for work. "Even though a claimant may be entitled to permanent disability compensation under the [Act], once the injured employee's physical condition has stabilized, he is no longer eligible for TTD benefits because the disabling condition has reached a permanent condition." *Freeman United Coal Min. Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 178, 741 N.E.2d 1144, 1150 (2000). The dispositive question is whether a claimant has reached MMI. *Freeman United Coal Min. Co.*, 318 Ill. App. 3d at 178, 741 N.E.2d at 1150.

¶ 26 Contrary to claimant's argument that on December 9, 2004, she "had not yet fully stabilized from the injuries she sustained on February 24, 2004," the Commission found claimant

had reached MMI on December 9, 2004, and awarded claimant TTD benefits from February 25, 2004 through December 9, 2004. Dr. Michael returned claimant to light duty work on September 30, 2004, with a 20-25 pound lifting restriction and no bending or twisting. In a letter dated December 9, 2004, Dr. Michael stated that claimant had reached MMI. The Commission's decision to award claimant 41 1/7 weeks of TTD benefits was not against the manifest weight of the evidence.

¶ 27 Claimant next argues that the Commission's decision finding claimant not entitled to medical expenses after December 9, 2004, is against the manifest weight of the evidence. Questions as to the reasonableness, necessity, and causal relationship of medical charges are factual in nature to be resolved by the Commission, and its resolution of such matters will not be disturbed on review unless against the manifest weight of the evidence. *Westin Hotel*, 372 Ill. App. 3d at 546, 865 N.E.2d at 359.

¶ 28 Dr. Treister opined that the February 24, 2004, automobile accident aggravated claimant's minor degenerative disease and remained symptomatic. Dr. Glusman diagnosed claimant with chronic low back pain secondary to facet arthropathy and degenerative disc disease. Both Drs. Treister and Glusman opined that claimant's low back complaints were caused by the February 24, 2004, automobile accident.

¶ 29 Dr. Michael noted claimant's significant resolution of pain following lumbar epidural steroid injections, ranging from 70% to 100%, and returned claimant to light duty work on September 30, 2004. In a letter dated December 9, 2004, Dr. Michael stated that claimant had reached MMI.

¶ 30 The Commission is frequently faced with conflicting medical testimony and it is

within the province of the Commission to evaluate that testimony. The Commission believed Dr. Michael's testimony that claimant had reached MMI on December 9, 2004. The Commission's decision finding claimant not entitled to medical expenses after December 9, 2004, was not against the manifest weight of the evidence.

¶ 31 Claimant next argues that the Commission's decision finding claimant not entitled to an award of attorney fees and penalties under various sections of the Act is against the manifest weight of the evidence. See 820 ILCS 305/16, 19(k), 19(1) (West 2002). Claimant's arguments are based upon the conflicting medical testimony and further, the premise that the Commission's causation finding is erroneous. We have already rejected these arguments. Accordingly, we also reject these contentions without further analysis.

¶ 32 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision.

¶ 33 Affirmed.