

2012 IL App (2nd) 111058WC-U
No. 2-11-1058WC
Order filed June 25, 2012

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IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ZIMMERMAN FORD,)	Appeal from
Appellant,)	Circuit Court of
v.)	DeKalb County
WORKERS' COMPENSATION COMMISSION <i>et al.</i>)	No. 11MR2
(Richard D'onofrio, Appellee).)	
)	Honorable
)	Kurt P. Klein,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The Commission did not err in either awarding claimant wage-differential benefits under the Act or in computing that award by finding certain monthly compensation claimant received constituted a "bonus" and excluding those amounts from its wage-differential calculations.

¶ 2 On February 2, 2007, claimant, Richard D'onofrio, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)), seeking benefits from employer, Zimmerman Ford. Following a hearing, the arbitrator determined claimant sustained injuries that arose out of and in the course of his employment on September 21, 2006. The arbitrator found claimant was entitled to (1) 78-6/7

weeks' of temporary total disability (TTD) benefits and (2) wage-differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)). The Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. The circuit court of DeKalb County confirmed the Commission. Employer appeals, arguing the Commission (1) erred in awarding claimant wage-differential benefits and (2) erred in computing claimant's wage-differential award by finding claimant received monthly bonuses and excluding those amounts from its calculations. We affirm.

¶ 3 Claimant worked for employer as a full line auto technician. The parties agree, on September 21, 2006, claimant sustained a work-related injury when he felt a sharp pain in his left arm while performing transmission work. He sought medical treatment, was found to have a massive rotator cuff tear, and underwent two surgeries. Because the parties are familiar with the evidence presented, we discuss it only to the extent necessary to put their arguments in context.

¶ 4 On appeal, employer argues the Commission should not have determined claimant was entitled to permanency benefits under the Act until he completed his course of vocational rehabilitation. It argues the Commission's wage-differential award was premature where employer offered, and claimant agreed to, renewed vocational rehabilitation services in 2009. Moreover, it contends claimant failed to cooperate with the renewed vocational rehabilitation process by showing little initiative during his second round of services with Dan Minnich, a vocational rehabilitation counselor. Employer also argues claimant failed to maximize his post-accident earning capacity.

¶ 5 "Until the claimant has completed a prescribed rehabilitation program, the issue of the extent of permanent disability cannot be determined." *Hunter Corp. v. Industrial Comm'n*,

86 Ill. 2d 489, 501, 427 N.E.2d 1247, 1252 (1981). "The extent or permanency of disability is a question of fact for the Commission" and its decision "as to compensation will be reversed only if it is against the manifest weight of the evidence." *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833, 769 N.E.2d 66, 71 (2002). "The test is whether there is sufficient factual evidence in the record to support the Commission's determination, not whether this court, or any other tribunal, might reach an opposite conclusion." *Pietrzak*, 329 Ill. App. 3d at 833, 769 N.E.2d at 71.

¶ 6 Here, in May 2007, claimant began vocational rehabilitation with Minnich and, in June 2008, he obtained a position with DuPage Chrysler, Dodge and Jeep (DuPage Chrysler) as a service writer. Minnich testified claimant was cooperative with vocational rehabilitation services and Minnich encouraged him to take the DuPage Chrysler job. Although in January 2009, Minnich began further assisting claimant with job search efforts, he characterized claimant's vocational rehabilitation as already having had a successful outcome. He testified that the DuPage Chrysler job was a good fit for claimant and a position in which claimant could earn wages similar to those he had earned as a mechanic. While claimant did not put forth the same effort with respect to the second course of vocational rehabilitation as he did with his first course, his circumstances had also changed due to his full-time position with DuPage Chrysler and his lengthy commute.

¶ 7 We find no error in the Commission's decision to award wage differential benefits. The record shows claimant completed a course of vocational rehabilitation, was compliant with his services, and obtained a successful outcome from those services. Employer essentially ignores Minnich's opinions regarding the outcome of vocational rehabilitation. Its

arguments are unpersuasive and the record contains sufficient evidence to support the Commission's decision. The Commission's award of wage differential benefits was not against the manifest weight of the evidence.

¶ 8 Employer also argues the Commission incorrectly computed claimant's wage-differential award. It contends the Commission erred by excluding the monthly compensation claimant received for "booked hours" in DuPage Chrysler's service department from its wage-differential calculations.

¶ 9 A claimant is entitled to a wage-differential award if he proves "(1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings." *Copperweld Tubing Products, Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633, 931 N.E.2d 762, 765 (2010); 820 ILCS 305/8(d)(1) (West 2006). Wage-differential compensation should be "equal to 66-2/3 % of the difference between the average amount which [the claimant] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2006). "The Commission's calculation of an employee's wage differential award is a factual finding, which will not be set aside on review unless it is contrary to the manifest weight of the evidence." *Copperweld*, 402 Ill. App. 3d at 635, 931 N.E.2d at 767. "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Copperweld*, 402 Ill. App. 3d at 633, 931 N.E.2d at 765.

¶ 10 Additionally, section 10 of the Act (820 ILCS 305/10 (West 2006)) provides the definition for average weekly wage and explicitly excludes bonuses from the calculation of that wage. Section 10 also applies to wage-differential calculations. *Copperweld*, 402 Ill. App. 3d at 636, 931 N.E.2d at 768. With respect to bonuses, this court has recently stated as follows:

" 'Bonus' is commonly defined as 'something in addition to what is expected or strictly due.' Webster's Third New International Dictionary 167 (1981). We note a distinction between incentive-based pay, which an employee receives in consideration for specific work performed as a matter of contractual right, and a bonus, which an employee receives for no consideration or in consideration of overall performance at the sole discretion of the employer."

Arcelor Mittal Steel v. Illinois Workers' Compensation Comm'n, 2011 IL App (1st) 102180WC, ¶ 40, 961 N.E.2d 807, 815 (2011).

¶ 11 Here, the Commission determined the money DuPage Chrysler paid claimant for "booked hours" constituted a bonus and should be excluded from computations of his wage-differential award. It affirmed and adopted the arbitrator's decision which noted claimant earned \$10,659.50 in bonus payments in the 12 months before the arbitration hearing and excluded that amount from its calculations. An opposite conclusion is not clearly apparent.

¶ 12 The record shows claimant began working for DuPage Chrysler in June 2008, and did not begin receiving his monthly bonus until a few months later in September 2008, when Mark Rupprecht, DuPage Chrysler's service and parts director, determined claimant had performed well at his job. Evidence showed claimant was not guaranteed the monthly bonus and

it was given at DuPage Chrysler's discretion. The monthly bonus was also not based upon the amount of hours claimant himself booked in DuPage Chrysler's service department but upon the total amount booked by all three of the employer's service writers. Based upon this evidence, the record contains support for the Commission's decision and its wage-differential calculations were not against the manifest weight of the evidence.

¶ 13 For the reasons stated, we affirm the circuit court's judgment.

¶ 14 Affirmed.