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2013 IL App (2d) 111256WC-U

Order filed January 3, 2013

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

ILLINOIS TOOL WORKS,)	Appeal from the Circuit Court
)	of Lake County, Illinois
Plaintiff-Appellant,)	
)	Appeal No. 2-11-1256WC
v.)	Circuit Nos. 08-MR-835,
)	11-MR-694
)	
THE ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION <i>et al.</i> (Miroslav Kukich,)	Jorge L. Ortiz,
Defendants-Appellees).)	Judge, Presiding.

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

¶ 1 *Held:* The Commission's original finding that the claimant was entitled to a permanent partial disability benefit equal to 40% of the person as a whole was not against the manifest weight of the evidence. The circuit court's order reversing the Commission's finding was vacated and the Commission's original order was reinstated.

¶ 2 The claimant, Miroslav Kukich, filed an application for adjustment of claims under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2002)) seeking benefits for injuries to his lower back allegedly sustained on March 21, 2003, while working as a machinist for Illinois Tool Works, his employer. Following a hearing on April 29, 2005, the arbitrator

found that the claimant had established by a preponderance of the evidence that his current condition of ill-being was causally related to an accidental injury at work on March 21, 2003, and awarded \$31,780.21 in reasonable medical expenses and 2 4/7 weeks temporary total disability (TTD) benefits. The arbitrator denied the claimant's request for wage differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2002)), instead awarding a permanent partial disability (PPD) benefit equal to the loss of 40% of the person as a whole pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2002)). The arbitrator additionally awarded penalties in the amount of \$7,945.05 pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2002)) and \$2,500 pursuant to section 19(l) of the Act (820 ILCS 305/19(l) (West 2002)).

¶ 3 The employer sought review of the arbitrator's award from the Illinois Workers' Compensation Commission (the Commission), which affirmed the PPD award of 40% loss of the person as a whole and awarded the claimant additional TTD and medical benefits. The Commission awarded additional 19(k) penalties in the amount of \$21,310.41 and assessed attorney fees against the employer pursuant to section 16 of the Act (820 ILCS 305/16 (West 2002)) in the amount of \$4,262.08 for vexatious and unreasonable delay in the payment of TTD benefits. The Commission assessed an additional \$15,912.74 in 19(k) penalties and \$3,182.55 in attorney fees for vexatious and unreasonable delay in the payment of medical expenses.

¶ 4 The claimant then sought judicial review of the Commission's decision regarding his wage differential claim in the circuit court of Lake County. The circuit court found that the Commission's decision to deny the claimant's wage differential claim and award PPD benefits equal to 40% loss of the person as a whole was against the manifest weight of the evidence. The circuit court entered an order remanding the matter to the Commission with instructions to award

the claimant a wage differential award pursuant to section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1) (West 2002).

¶ 5 The employer sought review of the circuit court's order before this court, which dismissed the appeal for lack of jurisdiction based upon our determination that the order of the circuit court was an interlocutory order. On remand, the Commission issued a decision awarding the claimant a wage differential award of \$542.17 per week, the maximum wage differential award allowable on the date of the accident. The employer filed for review by the circuit court, which confirmed the decision of the Commission. Thereafter, the employer filed the instant appeal.

¶ 6 The employer raises the following issues on appeal: (1) whether this court has the authority to consider the propriety of the original decision of the Commission finding that the claimant was entitled to a PPD award equal to 40% of the person as a whole; (2) whether the Commission's order of a wage differential award pursuant to section 8(d)(1) of the Act was against the manifest weight of the evidence; and (3) whether the Commission's original award of 40% loss of the person as a whole should be reinstated.

¶ 7 **FACTS**

¶ 8 The claimant sustained an undisputed accidental injury to his low back arising out of and in the course of his employment on March 21, 2003. Following a course of conservative treatment and diagnostic testing. The claimant underwent a right lumbar discectomy at L4-L5 on March 22, 2004. In July 2004, the claimant's treating surgeon opined that the claimant would never be able to return to the heavy duty work of a mechanic in which he had been employed prior to the accident.

¶ 9 On August 16, 2004, the claimant underwent a functional capacity evaluation (FCE) which placed the claimant at the light work demand level while noting that his prior work as a

machinist was at the medium/heavy work demand level. The report observed that the claimant could not return to his former occupation but could be placed in a job that would allow frequent changes in body position and would have an initial weight lifting restriction of 20 pounds with the possibility of increased weight lifting of 10 pounds after two weeks. The FCE also recommended a course of physical therapy and work hardening.

¶ 10 On September 27, 2004, Dr. Edward Goldberg, a board certified neurosurgeon, examined the claimant at the request of the employer. Dr. Goldberg opined that the work restrictions outlined in the FCE were permanent, and he concurred with the recommendation that the claimant engage in a work hardening program. The record indicates that the employer refused to authorize the work hardening program.

¶ 11 On January 12, 2005, the employer terminated TTD payments and refused the claimant's request for vocational rehabilitation. The claimant then began looking for employment within his restrictions. On February 28, 2005, after conducting a job search, he found employment as a light duty assembler at CM Industries, Inc., working 40 hours per week at the rate of pay of \$8 per hour.

¶ 12 At the arbitration hearing, the claimant presented the testimony of Susan Entenberg, a licenced clinical professional and certified vocational rehabilitation counselor, who testified that she interviewed the claimant and reviewed his medical records and the FCE report. Entenberg observed that the physical demand level of the claimant's job duties with the employer was medium/heavy while the restrictions imposed by the FCE were at the light duty level. Entenberg opined that the claimant had obtained appropriate employment within his restrictions as a light duty assembler at CMI. She further opined that, based upon his job history, education, and permanent physical restrictions, the claimant could earn as much as \$15 per hour.

¶ 13 The arbitrator concluded that the claimant had failed to establish entitlement to a wage differential award. Noting that in order to be entitled to a wage differential award, the claimant must not only establish that he can no longer pursue his usual and customary line of employment, he must also establish an impairment of his earning capacity. The arbitrator found that the claimant had established that he could no longer pursue his usual and customary line of employment but had failed to establish an impairment of his earning capacity. Specifically, the arbitrator found that the evidence presented failed to establish that his current earning capacity was only \$8 per hour. The arbitrator acknowledged that the claimant was not required to conduct a diligent job search. However, the arbitrator noted that the claimant's testimony concerning where he had looked for employment was so lacking in detail as to call into question whether the claimant had made reasonable attempts to find out what type of employment might be available to him. The arbitrator also questioned the credibility of Entenberg's expert testimony, noting that her willingness to accept the claimant's limited job search as a sufficient indication of his current employability was suspect. The arbitrator also questioned the usefulness of Entenberg's estimate of the claimant's current earning capacity as being somewhere between \$8 and \$12 per hour, with a possibility that it could be as high as \$15 per hour. Instead, the arbitrator determined that the claimant was entitled to a PPD award of 40% of the person as a whole. The Commission adopted the arbitrator's analysis regarding the claimant's request for a wage differential award.

¶ 14 Following remand from the circuit court, the Commission found that the claimant had established entitlement to a wage differential award. Reviewing the record in the original arbitration, the Commission observed that, after the employer terminated TTD benefits on January 12, 2005, the claimant immediately began looking for work within his work restrictions. The record established that the claimant completed ten applications at places like Costco,

Wal-Mart, Walgreen's, and Echo. He received an invitation for an interview from Costco but, when he informed the interviewer of his light duty restrictions, he was told there was nothing available. The claimant further testified that he was personally acquainted with Ed May, who had hiring authority at CM Industries, and was able to offer the claimant a job within the claimant's work restrictions.

¶ 15 The Commission also made note of several points contained in Entenberg's original testimony. According to Entenberg's review of the claimant's records, the claimant was a native of Croatia, where he attended high school, went to a vocational school studying carpentry, and worked as a carpenter in Croatia before immigrating to the United States in 1991. He began employment in the mechanic job immediately upon arriving in this country, working for a company that was subsequently bought out by the employer. Entenberg testified that the claimant's wage of \$8 per hour at CM Industries was at the low end of the range of hourly wages he could expect to make with his restrictions, which she estimated at \$8 to \$12 per hour. She further opined that, at an optimum, the claimant might be able to earn as much as \$15 per hour.

¶ 16 In its decision on remand, the Commission held that the job the claimant actually obtained at CM Industries, along with Entenberg's testimony, established the amount that the claimant was actually capable of earning in some suitable employment following his injury. Where the arbitrator had originally concluded that the claimant's job search was inadequate to establish suitable employment, the Commission rejected that conclusion on remand. The Commission noted that the claimant had worked exclusively for the employer since he came to this country and lacked any other transferable skills. The employer cut off the claimant's TTD and denied his request for vocational rehabilitation, thus placing pressure upon the claimant to find immediate employment. The Commission found that the claimant acted reasonably in

turning to May for a lead on possible employment and, given the circumstances of the economy at the time, acted reasonably in accepting employment at CM Industries. Additionally, the Commission observed that there is no obligation to conduct a diligent job search in order to be eligible for a wage differential award. Rather, the claimant need only establish an impairment of earning capacity following his injury. *Galliannetti v. Industrial Comm'n*, 315 Ill. App. 3d 731, 725 (2000).

¶ 17 The Commission also noted that, while \$8 per hour was at the low end of Entenberg's projections, the mid range of her projections (\$8 to \$15) would be \$11.50 per hour. The Commission then noted that, whether it used \$8 or \$11.50 per hour, the claimant would qualify for the maximum wage differential award. The Commission consequently found that the claimant was entitled to the maximum wage differential award.

¶ 18 The employer sought review of the Commission's decision in the circuit court of Lake County, which confirmed the Commission's ruling. This appeal followed.

¶ 19 ANALYSIS

¶ 20 The employer maintains that the original decision of the Commission, finding that the claimant failed to establish that he was entitled to a wage differential award, is subject to review by this court. The claimant agrees. *Glister Marylee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182 (2001). Thus, the first question before this court is whether the Commission's determination that the claimant was not entitled to a wage differential award under section 8(d)(1) of the Act was erroneous.

¶ 21 In order to qualify for a wage differential award under section 8(d)(1) of the Act, the claimant must establish, by a preponderance of the evidence: (1) partial incapacity which prevents him from pursuing his "usual and customary line of employment;" and (2) an

impairment of earnings. 820 ILCS 305/8(d)(1) (West 2002); *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756, 759 (1995). At issue in the instant matter is whether the claimant established an impairment of earnings after he was no longer able to pursue his usual and customary line of employment. Whether a claimant has established either element of a wage differential claim is a question of fact to be resolved by the Commission, whose determination in that regard will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 1061 (2006). For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id.*

¶ 22 In determining whether a reduction of earning capacity has occurred, section 8(d)(1) of the Act instructs the Commission to look to the amount the claimant "is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2002); *Copperweld Tubing v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 634 (2010). Here, in its original decision, the Commission found that the claimant failed to establish his earning capacity because: (1) he failed to establish that he engaged in a diligent job search before accepting employment at CM Industries; and (2) Entenberg's testimony lacked credibility.

¶ 23 In the instant matter, we cannot say that the opposite conclusion from that reached by the Commission is clearly apparent. Although the claimant is correct that proof of a diligent job search is not a requirement to establish entitlement to a wage differential award, the claimant must establish what he "is able to earn" in some suitable employment. *Copperweld Tubing*, 402 Ill. App. 3d at 634. To that end, it would be appropriate for the Commission to consider whether the claimant had conducted a significantly diligent search to establish that his current job skills and work restrictions could only command a wage of \$8 per hour. The Commission did not require the claimant to establish that he had engaged in a diligent job search. It simply considered the

lack of such a search to be an impediment to the claimant carrying his burden of proof that \$8 per hour constituted the amount that he was "able to earn" in some form of suitable employment.

¶ 24 As to whether Entenberg's testimony was sufficient to establish what the claimant was able to earn in some suitable employment, it is well settled that the weight to accord expert opinion testimony is within the unique purview of the Commission. *Material Service Corp. v. Industrial Comm'n*, 97 Ill. 2d 357, 382 (1983). Although Entenberg was a certified vocational counselor and her testimony was unrebutted, the Commission gave little weight to her opinion as to the claimant's current earning ability. The Commission was particularly concerned with Entenberg's willingness to assume that the claimant's job search alone was sufficient to establish that the job at CM Industries paying \$8 per hour was the amount that he was able to earn in suitable employment. The Commission also adopted the arbitrator's finding that Entenberg's opinion that the claimant could currently earn between \$8 and \$12 per hour, and possibly \$15 per hour, was so vague as to undermine the efficacy of her opinion. These conclusions regarding the weight to accord Entenberg's testimony cannot be said to be against the manifest weight of the evidence.

¶ 25 **CONCLUSION**

¶ 26 Because the record supported the original decision of the Commission rejecting the claimant's wage differential claim, the order of the circuit court of Lake County entered March 18, 2009, is reversed, and the order entered November 16, 2011, is vacated. The Commission's decision entered on remand on April 7, 2011, is vacated, and the Commission's original decision entered on June 28, 2008, is reinstated.

¶ 27 Circuit court reversed; Commission's decision reinstated.