2017 IL App (1st) 161488WC-U

FILED: June 30, 2017

NO. 1-16-1488WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

PARKSHORE ESTATES NURSING & REHABILITATION CENTER, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (John Gebert, Appellee).	)))))))))	Appeal from Circuit Court of Cook County No. 15L50609 Honorable Carl Anthony Walker, Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) The Commission's determination that claimant was entitled to permanent and total disability benefits under an odd-lot theory was not against the manifest weight of the evidence.

(2) The employer failed to establish that the manner in which claimant's workers' compensation claim proceeded to arbitration violated its due process rights.

¶ 2 Claimant, John Gebert, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), seeking benefits from the employer, Parkshore Estates Nursing & Rehabilitation Center. Following a hearing, the

arbitrator found claimant sustained an accident that arose out of and in the course of his employment and awarded him (1) medical expenses of $148,259.64; (2) 63-2/7 weeks' temporary total disability (TTD) benefits; (3) 73-6/7 weeks' maintenance benefits; and (4) permanent and total disability (PTD) benefits for life, beginning July 10, 2014. On review, the Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Cook County confirmed the Commission. The employer appeals, arguing (1) the Commission's award of PTD benefits was against the manifest weight of the evidence and (2) its due process rights were violated when the case proceeded to arbitration shortly following a change in the employer's legal counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 9, 2014, the arbitration hearing was conducted. Claimant testified he worked for the employer for 10 years and was a maintenance supervisor. He was responsible for building maintenance, which included "plumbing, electrical, carpentry, tiling, [and] heating and air conditioning" work. Claimant testified he completed high school only through the ninth grade and never obtained a general equivalency diploma (GED). Prior to working for the employer, he worked for his father's fencing company, installing fences, as well as on a "travelling" maintenance team for multiple nursing homes.

¶ 5 Claimant asserted, on November 22, 2011, he injured his back while painting at work. Specifically, he stated he "bent down to pick up a five gallon [container of] paint" and experienced "sharp pains *** across [his] back," which "put [him] on [his] knees." At the time of his alleged accident, claimant was 39 years old.

¶ 6 The day of his accident, claimant sought emergency medical care at South Suburban Advocate Hospital. Hospital records show he complained of lower back and right wrist pain.

Claimant was diagnosed with an acute back strain and acute right wrist sprain. He was also taken off work and told to follow up with his primary care physician.

¶ 7 On November 28, 2011, claimant saw Dr. Zaki Anwar, an interventional pain management specialist. He provided a history of his work accident and complained of pain across his back "mostly from the right side radiating towards the left side and also radiating to the right side of the hip." Dr. Anwar recommended a diagnostic magnetic resonance imaging (MRI) scan and physical therapy. He also took claimant off work. The same day, claimant underwent an MRI of his lumbar spine, which demonstrated "[l]umbar spondylosis with multilevel neuroforaminal and annular disc bulging contributing to neuroforaminal narrowing bilaterally at multiple levels" and "[m]ultilevel trefoil central canal narrowing[,] which appear[ed] most prominent at the L2-L3 level."

¶ 8 Following claimant's MRI, Dr. Anwar recommended injections for claimant's lower back, which claimant underwent in January, February, and March 2012. Dr. Anwar also prescribed medication and continued claimant off work. Additionally, from December 6, 2011, through March 8, 2012, claimant underwent a course of physical therapy.

¶ 9 On March 29, 2012, Dr. Anwar noted claimant "continue[d] to suffer from worsening intractable low back pain[,] which [was] mostly discogenic in nature." He recommended a lumbar discogram, which claimant underwent on April 20, 2012. The same day, a post-discogram CT scan was performed on claimant's lumbar spine and showed left-sided disc herniations at both the L4-L5 and L5-S1 levels of claimant's spine. On April 26, 2012, Dr. Anwar diagnosed claimant with left-sided disc herniations at L4-5 and L5-S1. He determined claimant was "a candidate for an outpatient microdiscectomy or outpatient plasma disc decompression." Dr. Anwar further found that, due to claimant's weight, 320 pounds, he was not a

good candidate for any kind of invasive spinal surgery. He also continued claimant off work.

¶ 10 On October 1, 2012, claimant saw Dr. Ronald Michael for a neurosurgical consultation pursuant to a referral from Dr. Anwar. Dr. Michael diagnosed claimant with a herniated disc and discogenic pain at L4-L5. He identified claimant's options as (1) learning to live with his pain and accept it; (2) surgery, which he noted claimant wished to avoid; and (3) an "intermediate option" of a plasma disc decompression, which Dr. Michael opined "would be reasonable." At arbitration, claimant testified he did not go through with the surgery recommended by Dr. Michael because the risk was too high due to his weight.

¶ 11 On October 22, 2012, claimant underwent a functional capacity evaluation (FCE). The FCE report stated claimant demonstrated "functional capabilities most consistent with a Modified LIGHT Physical Demand Level."

¶ 12 On November 12, 2012, claimant followed up with Dr. Anwar. Dr. Anwar recommended an outpatient microdiscectomy at L4-L5 as claimant's "best option." On November 28, 2012, claimant underwent an outpatient lumbar microdiscectomy. He testified he felt "[a]bout the same" following that procedure.

¶ 13 On January 25, 2013, claimant underwent a second FCE, which found he demonstrated capabilities "to be most consistent with the LIGHT Physical Demand Level." Specifically, the FCE report stated claimant could occasionally lift 21 pounds from desk to chair, lift 17 pounds from chair to floor, press 24 pounds above his shoulder, push 74 pounds, pull 49 pounds, and carry 17 pounds. Claimant's job with the employer was described as a "MEDIUM Physical Demand Level position," which was beyond the level of claimant's capabilities. Further, the FCE report stated as follows:

> "[Claimant] had the most difficulties with prolonged sitting and standing, lifting, kneeling and stair climbing. He reports that he completed a course of physical therapy some time ago with minimal objective results. *** At this time, it is recommended that he return to his MD to discuss all available options. He may benefit from participation in a daily work conditioning program in order to facilitate a safe return to full[-]duty work."

¶ 14 On February 7, 2013, claimant followed up with Dr. Anwar. Dr. Anwar noted claimant's January 2013 FCE suggested claimant could perform only light-duty work and was "not capable of working [at] his current job level due to medium demand level requirements." He released claimant to return to work with restrictions of no lifting, carrying, pushing, or pulling greater than 20 pounds.

¶ 15 The record reflects claimant continued to follow up with Dr. Anwar in 2013 and 2014, and continued to report pain in his lower back. At arbitration, he stated his lower back continued to hurt and affect his daily activities. Claimant testified, prior to his accident, he loved to be outside, fishing, hunting, and riding his motorcycle. However, he maintained he could no longer perform those activities because he was in too much pain.

¶ 16 Claimant testified he had not worked since the day of his accident. Following his January 2013 FCE, he contacted the employer about returning to work but received no response. In March 2013, he made a request to the employer for vocational rehabilitation but, ultimately, never received any assistance in finding employment from the employer.

¶ 17 From March 17, 2013, to May 13, 2014, claimant conducted a self-directed job search. He stated he searched for jobs online and visited places in his neighborhood. Claimant asserted he filled out applications with various potential employers, including "stores, gas sta-

tions, [and] Menards." Additionally, claimant testified he kept track of potential employers he contacted and submitted an exhibit at arbitration containing his job search records. Claimant's records indicate he made contact with over 300 potential employers between March 2013 and May 2014. He testified he looked for both part-time and full-time work within his restrictions. However, his job search did not result in any interviews and, according to claimant's records, several potential employers asserted they would not hire someone with work restrictions.

¶ 18 Claimant testified, on the day of arbitration (July 9, 2014), his attorney showed him a letter from the employer that concerned an offer of employment. The letter was dated June 26, 2014, and offered claimant full-time employment as an assistant maintenance supervisor at his previous salary. He stated the letter did not describe the work or tasks he would be performing. Additionally, claimant asserted that, in the 10 years he worked for the employer, the position of assistant maintenance supervisor did not exist. Rather, the maintenance department had only three employees—a maintenance supervisor (which had been claimant's position) and two maintenance workers. Moreover, claimant testified that, when he worked for the employer, there had not ever been a job in the maintenance department that would have fit within his 20-pound lifting restriction.

¶ 19 On cross-examination, claimant testified that, had he received the employer's letter prior to arbitration, he "probably would have called" the employer. On examination by the arbitrator, claimant stated the employer never terminated him from employment but he was aware that it had replaced him with another employee, making that employee its maintenance supervisor. At arbitration, the employer submitted a copy of its June 26, 2014, employment offer, which stated as follows:

> "This is an offer of employment at Parkshore Estates Nursing and Rehabilitation. Your title will be Assistant Maintenance Director, you will report to the Maintenance Director. We are offering your previous salary of $29.80 per hour, full-time. If you are in agreement with the above employment offer details, please get in touch with Thomeka Brown Administrator as soon as possible to arrange a start ***."

¶ 20 At arbitration, claimant presented the testimony of Carl Triebold, a certified rehabilitation counselor. Triebold testified he had been engaged in vocational rehabilitation counseling for 27 years and held a Master's Degree in rehabilitation counseling. He performed a vocational evaluation on claimant and prepared a report, dated May 14, 2014, in conjunction with his evaluation. In his report, Triebold noted claimant was 42 years old and completed high school through the ninth grade. He stated claimant never obtained his GED. Claimant also never attended college, attended a vocational or trade school, or served in the military. Triebold stated claimant's work for the employer represented his "past relevant work experience." Additionally, he noted claimant conducted an "extensive job search of approximately one year duration" and that he completed "over 100 job applications." Triebold testified he reviewed some of claimant's job search logs. He opined claimant's unsuccessful 14-month search for employment qualified as a diligent search.

¶ 21 As part of his analysis, Triebold reviewed medical records, including claimant's January 25, 2013, FCE. He noted claimant's FCE reflected a "full effort" by claimant and that he could perform light capacity work during a seven-hour work day. Triebold opined claimant would not be available for full-time work because his FCE limited him to seven hours of work activity. He testified that, without any functional limitations, claimant's work history provided

skills that would transfer to similar occupations, requiring work at a medium or heavy level.

¶ 22 Triebold opined based on claimant's age, training, education, experience, and condition he was not able to engage in stable and continuous employment. He reasoned as follows:

> "The [FCE] is limiting not only in the sense that it limits *** [claimant] to seven hours of work activity, but it breaks down that activity in such a manner in which he would be unable to perform sedentary work because it gives a capacity for sitting [of] *** three to four hours. Sedentary work requires a minimum of six hours of sitting, standing and walking for light, medium and heavy—very heavy work generally involves standing and walking most of the day. So full ranges of light, medium, heavy[,] and very heavy work would be out of the question, so there would be a limited range of light work [that claimant could perform] not only because of the sitting, standing and walking limitations, but also with regards to the lifting and carrying limitations."

Triebold further testified claimant's lack of a high school diploma or GED would make it more difficult for claimant to find a job within the limited range of light work available to him.

¶ 23 On cross-examination, Triebold testified that, based on the results of claimant's FCE, he did not believe there was "a stable labor market for his profile." Further, he acknowledged that he never tried to obtain a job or conduct a job search for claimant. He also did not offer or suggest vocational training for claimant or prepare a labor market survey for him. Additionally, he noted that his understanding of full-time work was that it required an eight-hour work day. Therefore, because the FCE found claimant could work only seven hours per day, Triebold opined claimant could not perform full-time work.

¶ 24 On October 24, 2014, the arbitrator issued his decision in the matter, holding claimant sustained an accident arising out of and in the course of his employment and awarding him (1) medical expenses of $148,259.64; (2) 63-2/7 weeks' TTD benefits; (3) 73-6/7 weeks' maintenance benefits; and (4) PTD benefits for life, beginning July 10, 2014. With respect to PTD, the arbitrator found claimant met his burden of establishing the unavailability of employment to a person in his circumstances both through his unsuccessful self-directed job search and by demonstrating that because of his age, training, education, experience, and condition, he was unable to engage in stable and continuous employment. Further, he found the employer failed to show that suitable work was available to claimant, noting it provided no evidence or testimony to contradict Triebold, claimant's vocational expert, and that its job offer to claimant just prior to arbitration was a "sham" offer.

¶ 25 On July 28, 2015, the Commission affirmed and adopted the arbitrator's decision without further comment. On April 27, 2016, the circuit court of Cook County confirmed the Commission's decision.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 A. PTD Benefits

¶ 29 On appeal, the employer first challenges the Commission's award of PTD benefits, asserting claimant failed to show he was permanently and totally disabled under an odd-lot theory. Specifically, it asserts claimant's self-directed job search was not diligent, Triebold's opinions lacked a sufficient basis, and it rebutted claimant's assertion that he was unemployable through its *bona fide* offer of employment within claimant's medical restrictions.

¶ 30 Under the Act, an employee is entitled to benefits for "complete disability, which

renders [him] wholly and permanently incapable of work." 820 ILCS 305/8(f) (West 2010). However, entitlement to PTD benefits does not require "complete physical incapacity." *Lenhart v. Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 32, 29 N.E.3d 648. "Instead, a PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage." *Id.*

¶ 31 The odd-lot theory of compensation permits an award of PTD benefits "when a 'claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability.' " *Id.* ¶ 33 (quoting *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill. 2d 538, 546-47, 419 N.E.2d 1159, 1163 (1981)). In such cases, the claimant must establish the unavailability of employment to persons in his circumstances. *Id.* "The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." *Westin Hotel v. Industrial Comm'n of Illinois*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357 (2007). "Once the claimant establishes that he falls into the 'odd-lot' category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists." *Id.*

¶ 32 "[W]hether a claimant is permanently and totally disabled under section 8(f) of the Act is a question of fact to be determined by the Commission, and its determination on this issue cannot be overturned on review unless it is against the manifest weight of the evidence." *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 31, 29 N.E.3d 648. When deciding questions of fact, it is the Commission's function "to judge the credibility of the witnesses, determine the weight to be given their testimony, and resolve the conflicting medical evidence." *Sharwarko v. Illinois*

Workers' Compensation Comm'n, 2015 IL App (1st) 131733WC, ¶ 56, 28 N.E.3d 946. For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id*. ¶ 57. On review, the appropriate test is whether the record contains sufficient evidence to support the Commission's decision, not whether this court might reach the same conclusion. *Levato v. Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶ 21, 14 N.E.3d 1195.

¶ 33 Here, the Commission first found claimant established the unavailability of employment to someone in his circumstances through a diligent, yet unsuccessful, job search. The employer challenges claimant's job search on the basis that he failed to establish that it was legitimate or thorough. In particular, it contends claimant failed to show that the potential employers he contacted were hiring. The employer maintains claimant's job search logs demonstrate that 79 of the employers he contacted specifically stated they were not accepting applications or that available jobs were outside of claimant's restrictions. The employer also criticizes claimant's job search because it was self-directed.

¶ 34 In this instance, we find an opposite conclusion from that reached by the Commission is not clearly apparent and reject the employer's arguments. First, we find nothing in the Act or relevant case authority which prohibits a claimant from conducting a job search on his own and without the aid of professional assistance. All that is required under relevant case law is that the claimant demonstrates a diligent, but unsuccessful, attempt to find work. We decline to find, as the employer's argument seems to suggest, that self-directed job searches are inherently unreliable or lacking in diligence. Instead, whether a claimant's job search is diligent and sufficient to warrant a PTD award under an odd-lot theory depends upon the particular facts presented in each individual case.

¶ 35 Second, in this case, there was sufficient evidence presented to support the Commission's conclusion that claimant's job search was diligent. Specifically, evidence showed claimant searched for employment for approximately 14 months, looking for jobs both online and in his community. During that time, he contacted over 300 potential employers. Claimant kept a record of his job search and his records reflect that he submitted numerous applications to various employers both online and in person. While claimant's records show he contacted some employers who were not hiring or who would not accommodate his restrictions, they also reflect such contacts were in the minority and not representative of his overall job search. We note the record does not indicate that claimant ignored any employment opportunities or that he turned down any legitimate offer of work. Additionally, Triebold, claimant's vocational expert, reviewed claimant's job search logs and opined they reflected a diligent search for employment.

¶ 36 Here, the Commission's finding of a diligent job search was not against the manifest weight of the evidence. Further, claimant's establishment of a diligent, but unsuccessful, job search was sufficient to shift the burden to the employer and require that it prove claimant was employable in a stable labor market. Thus, for purposes of this appeal, we find it unnecessary to also address whether claimant established that, due to his age, skills, training, and work history, he was not regularly employable in a well-known branch of the labor market.

¶ 37 In this instance, the employer argues it met its burden of proving claimant was employable by showing that it made a *bona fide* offer of employment to claimant that was within his work restrictions. The Commission rejected this claim finding the employer's offer was a "sham" and insufficient to rebut claimant's evidence. In reaching its decision, the Commission relied on this court's decision in *Reliance Elevator Co. v. Industrial Comm'n*, 309 Ill. App. 3d 987, 993, 723 N.E.2d 326, 331 (1999), wherein we held that a "sham" job offer is one that is

"designed to circumvent [the employer's] responsibility under the Act." In that case, the Commission found the employer's offer of employment was a "sham" because it was not made until after the initial arbitration hearing and included "a rate of compensation far higher than was economically justifiable." *Id*. Further, this court noted the employer had repeatedly refused to offer the claimant any employment prior to the offer and that evidence demonstrated it had no intention of bringing the claimant back to work. *Id*.

¶ 38 Here, we find the evidence amply supports the Commission's finding that the employer's job offer was a sham designed to circumvent its liability under the Act. As noted by the Commission, evidence in the record showed the employer's June 26, 2014, job offer was made to claimant less than two weeks prior to the July 9, 2014, arbitration hearing. Although claimant asked to return to work for the employer after his January 2013 FCE and, in March 2013, requested vocational rehabilitation, the employer either ignored or refused his requests, making no offers of any kind until its June 26, 2014, job offer. Further, claimant testified the position offered by the employer of assistant maintenance supervisor never existed in the 10 years he worked for the employer. Also, the employer's letter did not describe the work or tasks claimant would be performing and claimant asserted there had not been any position in the maintenance department that would fit within his work restrictions. Finally, although the position offered by the employer was underneath claimant's previous maintenance supervisor position, he was offered the same rate of pay. Given the evidence presented, the Commission's finding of a sham offer was not against the manifest weight of the evidence.

¶ 39 In this case, claimant presented evidence of a diligent but unsuccessful job search and the employer failed to meet its burden of proving claimant employable in a stable labor market. As a result, the Commission's determination that claimant was entitled to PTD benefits un-

der an odd-lot theory was supported by the record and not against the manifest weight of the evidence.

¶ 40 B. Due Process

¶ 41 On appeal, the employer also argues its due process rights were violated because the arbitrator decided to "force th[e] case to trial despite defense counsel having been only recently assigned to the case." It contends its counsel did not have a sufficient opportunity to prepare a proper defense. The employer asks this court to reverse the Commission's decision and remand on the issue of permanency.

¶ 42 "Due process includes the right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence that is offered." *W.B. Olson, Inc. v. Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 49, 981 N.E.2d 25. In an administrative proceeding, due process requires that the parties have an opportunity to cross-examine witnesses and to offer rebuttal evidence. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 297 Ill. App. 3d 662, 667, 697 N.E.2d 934, 937 (1998). Additionally, a party alleging a due process violation must show prejudice. *RG Construction Services v. Workers' Compensation Comm'n*, 2014 IL App (1st) 132137WC, ¶ 34, 24 N.E.3d 923.

¶ 43 Here, the employer makes no claim that it did not have the opportunity to cross-examine witnesses or offer any specific evidence in rebuttal. Rather, it maintains it lacked sufficient time to prepare a defense given the change in its counsel in approximately May 2014, about two months before the July 2014 arbitration hearing. However, the employer acknowledges that no objections were made on the record regarding the manner in which the case proceeded to arbitration. In fact, at the outset of the arbitration hearing, the arbitrator asked both parties whether

there were any preliminary matters they would like to state for the record and the employer's counsel responded: "No, nothing for the record at this time."

¶ 44 Additionally, while the employer argues it lacked sufficient time to prepare a defense, we note the matter had been pending before the Commission since December 2011. The record further indicates the employer had legal representation long before its May 2014 change in counsel. Finally, we find the employer has failed to demonstrate any specific way in which it was prejudiced. The mere fact that it received an unfavorable ruling before the Commission does not establish a due process violation.

¶ 45 III. CONCLUSION

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

¶ 47 Affirmed.