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2017 IL App (2d) 160339WC-U

FILED: March 3, 2017

NO. 2-16-0339WC

IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ANTHONY R. HOLSTINE,)	Appeal from
Appellant,)	Circuit Court of
v.)	Kane County
THE ILLINOIS WORKERS' COMPENSATION)	No. 15MR973
COMMISSION <i>et al.</i> (Affordable Roofing,)	
Appellees).)	Honorable
)	David R. Akemann,
)	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:* The Commission's denial of a wage differential award was against the manifest weight of the evidence.
- ¶ 2 In June 2012, claimant, Anthony R. Holstine, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)) seeking benefits from the employer, Affordable Roofing, for an injury he sustained to his right leg and hip on May 28, 2010. Specifically, claimant sought a wage differential award pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2010)).

¶ 3 Following a hearing, the arbitrator found claimant sustained a compensable injury but declined to award a wage differential under section 8(d)(1) of the Act. Instead, the arbitrator awarded claimant, in relevant part, 250 weeks' permanent partial disability (PPD) benefits for 50% loss of the person as a whole under section 8(d)(2) of the Act (820 ILCS 35/8(d)(2) (West 2010)). On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court confirmed the Commission's decision.

¶ 4 On appeal, claimant challenges the Commission's denial of a wage differential award under section 8(d)(1) of the Act. We reverse the portion of the judgment of the circuit court which confirmed the Commission's denial of a wage differential award; vacate the portion of the Commission's decision awarding claimant PPD benefits under section 8(d)(2); and remand the matter back to the Commission with directions to enter a wage differential award under section 8(d)(1). We otherwise affirm the circuit court's decision.

¶ 5 I. BACKGROUND

¶ 6 The following evidence relevant to the disposition of this appeal was elicited at the November 18, 2013, arbitration hearing.

¶ 7 Claimant testified that, with the exception of two or three years, he had worked for the employer from 1984 until October 2010, when his employment was terminated. In his position as a foreman roofer, he was required to climb ladders, tear off and install roofs, carry materials, and apply hot tar with a mop which, when full of tar, weighed approximately 35 to 40 pounds. The ladders he climbed were between 10 to 40 feet in length and he would traverse these ladders 4 to 15 times per day, often carrying materials and tools.

¶ 8 Claimant testified he was working for the employer on Friday, May 28, 2010, and

he "was getting some material out of the back of the truck and jumped out of the back of the truck on to the ground and hurt [his right] hip." He immediately felt pain in his right hip, but he finished his shift and did not report the accident that day. Claimant reported the accident to the employer the following week.

¶ 9 Claimant first sought medical treatment at Dreyer Medical on June 14, 2010. On that date, he was restricted to light-duty work. Claimant testified that he worked in the office in a light-duty capacity until June 18, 2010. The record shows that claimant was restricted from work completely on June 25, 2010, after a magnetic resonance imaging (MRI) scan of claimant's right hip revealed a subacromial fracture of the femoral neck and head. He was also restricted from driving and weight bearing, which was later transitioned to limited weight bearing, to allow his fracture to heal. On September 2, 2010, a round of physical therapy was prescribed and claimant was informed that he could put full weight on his right leg "as tolerated." The record shows claimant began physical therapy in September 2010, which transitioned into work conditioning in October 2010.

¶ 10 A December 2010 MRI revealed the subacromial fractures of the femoral neck and head had healed. However, claimant continued to experience persistent right hip pain and an intraarticular steroid injection was prescribed. While the injection initially "took the pain away," it returned by February 2011 and claimant reported it was "[w]orse with increased activity." Claimant was sent for a surgical consultation with Dr. Jamil Jacobs-El, an orthopedic surgeon. Following a March 2011 examination, Dr. Jacobs-El opined that claimant's fracture had healed and that he was not a surgical candidate.

¶ 11 On March 11, 2011, claimant saw Dr. Shane Nho for an independent medical evaluation. After reviewing claimant's medical records, diagnostic studies, and performing a

physical examination, Dr. Nho diagnosed claimant with a right "hip labral tear, secondary to underlying femoral acetabular impingement" and recommended a right hip arthroscopy, labral repair, acetabular rim trimming, and femoral osteochondroplasty, followed by "at least four to six months" of physical therapy. Dr. Nho opined that if claimant underwent the recommended surgical procedure, he would reach maximum medical improvement (MMI) approximately six months later.

¶ 12 On March 24, 2011, claimant underwent a functional capacity evaluation (FCE). The results of the FCE revealed that claimant was capable of returning to an occupation with medium-level lifting, which it defined as "occasional up to 64 pounds; frequent at 45 pounds." It was further noted that claimant would have difficulty traversing a ladder with more than 25 pounds and would need to be able to change positions frequently due to tightness and pain.

¶ 13 On June 20, 2011, claimant saw Dr. Benjamin Domb, an orthopedic surgeon, for a third opinion. Dr. Domb diagnosed claimant with a "[r]ight hip labral tear caused by work-related injury" and a subchondral fracture of his femoral head which had healed. He recommended claimant undergo a right hip arthroscopy. On August 10, 2011, Dr. Domb performed a right hip arthroscopy involving a labral debridement, femoroplasty peripheral component, and a capsular release. Claimant continued to treat with Dr. Domb postoperatively, and underwent physical therapy and work hardening. On October 4, 2011, Dr. Domb released claimant to light-duty work with no lifting greater than 20 pounds. On November 15, 2011, and February 3, 2012, Dr. Domb performed ultrasound-guided cortisone injections to claimant's right hip.

¶ 14 On February 22, 2012, claimant underwent a second FCE. Although a description of claimant's job as a roofer was not provided, the therapist noted that claimant's reports of his

job duties suggested the position was "a VERY HEAVY Physical Demand Level position (110 lbs occasional basis)." According to the report, claimant "demonstrated his functional capacities at the VERY HEAVY Physical Demand Level" and that he was "capable of chair to floor lifting in excess of 105 lbs, [d]esk to chair lifting in excess of 105 lbs, bilateral shove shoulder lifting 95 lbs and right and left unilateral carrying 84 lbs." The FCE noted claimant was capable of occasional bending, stooping, squatting, crouching, and climbing ladders, and that he was limited to five to six hours of standing or walking with regular or frequent breaks. The report also indicated that claimant reported right hip pain with many of the lifting activities and it urged the physician to factor in all components of the FCE when determining claimant's employability or need for further medical care.

¶ 15 Dr. Nho also reviewed the results of claimant's second FCE. He authored a letter on April 27, 2012, opining that claimant's FCE demonstrated he was capable of working at the very heavy demand level and "certainly can return back to full-duty work without restrictions based on the [FCE]." During his evidence deposition, Dr. Nho testified his assessment of claimant's ability to return to full-duty work as a roofer was based on his FCE which demonstrated he was capable of working at the very heavy demand level; however, he acknowledged that he was unaware of the specific job duties required of a roofer.

¶ 16 Claimant last saw Dr. Domb on August 9, 2012, at which time he was returned to modified work duty of lifting no more than 50 pounds and no climbing ladders. At his March 12, 2013, evidence deposition, Dr. Domb testified he considers a combination of the FCE and the patient's level of pain in formulating an opinion regarding a patient's work restrictions. As of the date of his deposition, Dr. Domb continued to recommend work restrictions for claimant of no lifting more than 50 pounds and no climbing ladders. Dr. Domb explained that he restricted

claimant to a work level lower than what the FCE recommended because claimant experienced pain in his right hip when he worked at higher physical demand levels. In Dr. Domb's opinion, claimant could continue to work at the medium level for "some time," but he expected claimant's hip condition would eventually deteriorate and require further treatment. He further opined that if claimant was subjected to higher physical demand work, his pain would increase and his hip condition would deteriorate faster.

¶ 17 Claimant testified that prior to the work accident, and concurrently with his work for the employer, he worked part time doing yard work and building maintenance for the Community of Christ Church. On May 1, 2012, claimant resumed his part-time position with the church, working approximately 25 hours per week at \$14.50 per hour. According to claimant, the demands of his job with the church fell within his work restrictions. Claimant further testified that he did not return to work for the employer, or see if they could accommodate his restrictions, because the employer terminated his employment in October 2010.

¶ 18 According to claimant, once he learned that the employer was not going to provide him with vocational assistance, he conducted an independent job search. In November 2012, he secured a job performing maintenance for a daycare facility. He worked 20 hours per week at \$12.50 per hour. Claimant testified in that position, he used an eight-foot ladder "[m]aybe once every two months" to change light bulbs. He continued to work for the church as well.

¶ 19 In addition, claimant stated he had worked three side jobs for Jim Wojcik that involved remodeling a basement in the summer of 2013, and some electrical work and skylight framing in October 2013. He was paid \$1,000 for the basement remodel which involved tearing out paneling, insulation, and a drop ceiling; reinsulating; and installing drywall, although

claimant denied "holding the drywall up." Claimant stated he was not paid for the electrical job which required him to climb a 12- to 15-foot ladder on two occasions and stand on scaffolding for 15 to 20 minutes that was suspended approximately 15 feet from the ground. His job was limited to repairing an electrical line that had been cut. Wojcik testified that it took claimant "10 minutes at most" to repair the electrical line. Photographs of claimant were admitted into evidence and showed claimant standing on scaffolding and climbing a ladder while on the electrical job. Claimant testified that a couple days after completing the electrical work, he helped frame some skylights at the same worksite and was paid \$320 for his work. Claimant stated he was not required to climb a ladder for that job.

¶ 20 Finally, claimant testified he turned down several offers for additional side jobs, including a siding job and several roofing jobs which would have paid approximately \$40 per hour, due to his work restrictions. During his testimony, Wojcik stated he offered claimant a safety monitor position that paid \$40 per hour "on at least three occasions" in September 2013. He explained the safety monitor position would have required claimant to "watch and make sure no one steps outside of the established safety lines." Further, while it required no lifting, claimant would have been required to climb a 10-foot ladder to reach the roof and to "walk around all day." According to Wojcik, claimant turned down the offer because "he didn't think he could walk around and stand up all day."

¶ 21 At the time of arbitration, claimant testified he continued to experience "a great deal of pain at times depending on the activities that [he does]."

¶ 22 On December 19, 2013, the arbitrator issued his initial decision. On February 11, 2014, the arbitrator issued a corrected decision in response to the employer's motion to correct clerical errors in the original decision. The arbitrator found that claimant suffered a work

accident and awarded him benefits under the Act. In addition to an award of temporary partial disability (TPD) benefits which are not at issue here, the arbitrator awarded claimant 250 weeks' PPD benefits in the amount of \$664.72 per week, or 50% use of the person as a whole, pursuant to section 8(d)(2) of the Act. With respect to the PPD award, the arbitrator found claimant had "achieved or secured suitable employment as contemplated by [s]ection 8(d)(1) [of the Act]," and that his average weekly income between his two part-time jobs averaged \$575.25 per week. He further indicated that claimant would have been earning \$1,559.01 per week had he not sustained his work injury and continued to be employed by the employer and the church. However, the arbitrator concluded that claimant "declined three job offers for jobs in the \$40.00/hr range that appeared to be within the physical restrictions imposed by Dr. Domb." Accordingly, the arbitrator found claimant was "entitled to a loss of use of the person as a whole to the extent of 50% thereof pursuant to [s]ection 8(d)(2) of the Act," rather than a wage differential award under section 8(d)(1).

¶ 23 On March 10, 2015, the Commission affirmed and adopted the decision of the arbitrator. It further ordered that the employer (1) pay interest to claimant under section 19(n) of the Act if applicable and (2) receive credit for all amounts paid, if any, on account of claimant's injury.

¶ 24 On April 7, 2016, the circuit court of Kane County confirmed the Commission's decision.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, claimant challenges the Commission's denial of a wage loss differential award under section 8(d)(1) of the Act. Specifically, claimant argues "[t]he

Commission ignored applicable case law and engaged in speculation" in finding that he did not suffer an impairment of earnings as a result of his injury.

¶ 28 The Act provides for various types of compensation, two which are at issue here. Section 8(d)(1) involves a wage differential award (820 ILCS 305/8(d)(1) (West 2010)), while section 8(d)(2) involves a percentage-of-the-person-as-a-whole award (820 ILCS 305/8(d)(2) (West 2010)).

¶ 29 A claimant is entitled to a wage differential award under section 8(d)(1) when (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) "there is difference between the average amount which he 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 2010).

¶ 30 On the other hand, under section 8(d)(2), a claimant is entitled to a PPD award based on a percentage-of-the-person-as-a-whole where, in relevant part, his "injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive his right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section." 820 ILCS 305/8(d)(2) (West 2010).

¶ 31 Our supreme court has expressed a preference for wage-differential awards, noting that, "the basis of the workers' compensation system should be earnings loss." *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 43, 433 N.E.2d 671, 674 (1982). "As a general matter, section 8(d)(2) applies to those cases in which a claimant suffers injuries that partially incapacitate him from pursuing the usual and customary duties of his line of employment, but do

not cause him to suffer an impairment of earning capacity." *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 729, 734 N.E.2d 482, 488 (2000). "Where a claimant proves he is entitled to a wage-differential award, the Commission is without discretion to award a section 8(d)(2) award in its stead" except "where the claimant waives his right to recover under section 8(d)(1)." *Id.*

¶ 32 As indicated, "[t]o receive an award under section 8(d)(1), an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 531, 844 N.E.2d 414,422 (2006). Here, neither party disputes the Commission's finding that claimant's work injury resulted in a partial incapacity preventing him from pursuing his usual and customary line of employment as a roofer. Thus, the issue before us is whether claimant's work-related injury has resulted in an impairment of his earning capacity. Regarding this issue, our supreme court has held the focus is " 'on the capacity to earn, not necessarily the amount earned.' " *Id.* at 531, 844 N.E.2d at 423 (quoting *Franklin County Coal Corp. v. Industrial Comm'n*, 398 Ill. 528, 533, 76 N.E.2d 457, 460 (1947)).

¶ 33 Whether a claimant has provided sufficient evidence to satisfy each element is a question of fact to be determined by the Commission. *Copperweld Tubing Products, Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633, 931 N.E.2d 762, 765 (2010). A finding of fact is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *Id.*

¶ 34 In this case, the parties stipulated that claimant would have been earning \$1,599.01 per week, between working for the employer and the church, if he had not sustained

the work injury. Following the work injury, Dr. Domb imposed permanent restrictions for claimant of no lifting more than 50 pounds and no climbing ladders. Claimant continued to work for the church, but because his restrictions precluded him from returning to roofing, he performed an independent job search and secured additional employment, *i.e.*, a second part-time job for a daycare where the pay was commensurate with the prevailing wage for one with his experience and education. With the exception of climbing a short ladder to change light bulbs "[m]aybe once every two months," these positions fell within claimant's work restrictions. The parties stipulated that claimant earned an average of \$575.25 per week between these two part-time jobs.

¶ 35 In its decision, the Commission explicitly found claimant had "secured suitable employment as contemplated by [s]ection 8(d)(1)." Nonetheless, it denied a wage differential award after finding claimant "declined three job offers for jobs in the \$40.00/hr range that appeared to be within the physical restrictions imposed by Dr. Domb." The record refutes the Commission's finding. The evidence shows that claimant declined several job offers for roofing and siding which would have paid \$40 per hour because the jobs were not within his work restrictions. In addition, while Wojcik offered claimant a safety monitor position which would have paid \$40 per hour on "at least three occasions," the position would have required claimant to climb a ladder daily and stand all day which are activities outside of his work restrictions and beyond the four to six hour standing recommendation provided by the second FCE. Thus, contrary to the Commission's finding, there is no evidence of any jobs available to claimant which paid approximately \$40 per hour and fell within claimant's work restrictions.

¶ 36 Based on the above, we find that claimant demonstrated an impairment of his earnings such that he is entitled to a wage differential award under section 8(d)(1) of the Act.

The record contains no evidence to support a finding that claimant waived his entitlement to a wage differential award. Thus, the Commission's denial of section 8(d)(1) benefits in favor of section 8(d)(2) benefits was against the manifest weight of the evidence.

¶ 37

III. CONCLUSION

¶ 38 For the reasons stated, we reverse the portion of the judgment of the circuit court which confirmed the Commission's denial of a wage differential award; vacate the portion of the Commission's decision awarding claimant PPD benefits under section 8(d)(2); and remand the matter back to the Commission with directions to enter a wage differential award under section 8(d)(1). We otherwise affirm the circuit court's decision.

¶ 39

Circuit court's judgment reversed in part and affirmed in part; Commission's decision vacated in part; cause remanded.