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Carla Bender
4th District Appellate
Court, IL

No. 4-16-0258WC

2017 IL App (4th) 160258WC-U

Workers' Compensation
Commission Division
Order Filed: May 31, 2017

No. 4-16-0258WC

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

T.A. BRINKOETTER & SONS,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Macon County
	)	
v.	)	No. 15 MR 346
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*,	)	Honorable
	)	Robert C. Bollinger,
(Lonie Ginger, Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The decision of the Illinois Workers' Compensation Commission (Commission) finding that the claimant's current condition of ill-being is causally related to injuries he sustained while working on July 11, 2008, is not against the manifest weight of the evidence. The Commission's award to the claimant of temporary total disability benefits and permanent partial disability benefits under sections 8(b) and 8(d)2, respectively of the Workers' Compensation Act (820 ILCS 305/8(b), 8(d)2 (West 2008)), is not against the manifest weight of the evidence.

¶ 2 T.A. Brinkoetter & Sons (Brinkoetter) appeals from a judgment of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Lonie Ginger, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)) for an injury he sustained to his lumbar spine while working on July 11, 2008. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence adduced at the arbitration hearing held on December 27, 2011.

¶ 4 The claimant testified that, on July 11, 2008, he was employed by Brinkoetter as a journeyman electrician. While standing on a ladder to install wiring at a worksite, he lost his balance and fell approximately eight feet; as he fell, the right side of his back "bounc[ed] off" a steel motor and struck the concrete floor. Coworkers called for an ambulance, which transported the claimant to St. Mary's Hospital. A doctor prescribed Vicodin for pain and told him to "stay off work for a few days[.]"

¶ 5 On July 15, 2008, at Brinkoetter's request, the claimant presented for treatment to Dr. Lee Barnes at DMH Corporate Health Services (DMH). Dr. Barnes's notes from that date state that the claimant, while checking in, indicated that he was taking Vicodin and experiencing pain at a level of 9 or 10. The claimant left DMH without seeing Dr. Barnes, "walking very swiftly for someone with *** 9+ pain." He returned the next day, moving "very slowly" and displaying "acute distress[.]" Dr. Barnes examined him and observed resolving ecchymosis in his right flank, point tenderness, and a decreased range of motion in his lower back with pain at the end ranges.

¶ 6 Based upon his examination, Dr. Barnes diagnosed the claimant with a lower back contusion, lower back strain, and hematuria. Dr. Barnes modified the claimant's work activities for one week to prohibit him from: lifting more than five pounds; repetitive motions or awkward positions; pushing or pulling; walking or standing for more than half an hour; and climbing stairs and ladders. Additionally, Dr. Barnes directed the claimant to attend physical therapy for two weeks and prescribed pain medications.

¶ 7 On July 18, 2008, the claimant saw his general practitioner, Dr. Kurt J. Heimbrecht. In his evidence deposition, Dr. Heimbrecht testified that he diagnosed the claimant with "generalized backache" and advised him to resume work "when [an] occupational medicine doctor gives the okay." Dr. Heimbrecht denied that the claimant presented with any back problems prior to the work accident.

¶ 8 After seeing Dr. Heimbrecht, the claimant attended two sessions of physical therapy but experienced increasing back pain.

¶ 9 On July 23, 2008, the claimant presented for re-evaluation at DMH. Clinical notes from that date state that he reported lower-back pain and appeared to be in "moderate distress" when he leaned forward. He moved slowly and stiffly, displayed decreased range of motion with discomfort at the end ranges, and reported tenderness and tightness in his paraspinal muscles. Clinical notes from July 29, 2008, state that a CT scan revealed fractures at L2-L3-L4 of the transverse process of the claimant's spine and that the fractures were caused by the work accident. The clinical notes direct the claimant to cease physical therapy, adhere to work restrictions, and consult with a neurologist.

¶ 10 Dr. Robert Kraus, a neurologist, examined the claimant on July 31, 2008. In his evidence deposition, Dr. Kraus testified that the claimant's spinal fractures resulted from the work accident

but did not require surgery. The claimant reported right lumbar tenderness but was neurologically normal, moved comfortably, and did not appear to be in a high level of pain. Dr. Kraus ordered the claimant to use pain medication and remain on light work duty for one month.

¶ 11 The claimant saw medical personnel at DMH on four occasions in August and September 2008. On August 1, according to clinical notes, he walked with difficulty, exhibited edema, and reported "significant pain." On August 6, his lower back and paraspinal muscles remained tender to palpitation. On August 20, he reported increased pain and tightness in his right paraspinal muscles, which he attributed to overexertion at work. He underwent a bone scan of his lumbar spine, which "[a]ppear[ed] to be healing" by September 11.

¶ 12 Dr. Kraus testified that he removed the claimant's work restrictions after reviewing the bone scan on September 24, 2008. According to Dr. Kraus, the claimant still reported right lower-back pain but was neurologically normal and appeared to move comfortably. On October 23, 2009, Dr. Heimbrecht testified that he examined the claimant and determined that his condition was unchanged.

¶ 13 The claimant testified that he worked on "light duty" until he was laid off on November 17, 2008, at which time he began receiving temporary total disability (TTD) benefits.

¶ 14 Dr. Kraus testified that, on January 28, 2009, the claimant presented with lower-back pain which had worsened after he shoveled snow that morning. The claimant underwent a neurological exam, which was negative. He reported similar pain on February 17, 2009. In response, Dr. Kraus re-imposed work restrictions because he could not determine a cause for the pain; he expected that, six months after the work accident, the spinal fractures would have healed. The claimant underwent an MRI, which revealed that the fractures were no longer visible and that no nerve roots were compressed. The MRI indicated disc desiccation relating to

degenerative disc disease, which could cause discomfort, but Dr. Kraus opined that these changes resulted from aging and did not cause the pain described by the claimant.

¶ 15 On March 11, 2009, following another negative neurological exam, Dr. Kraus concluded that there was no reason to restrict the claimant's work activities. He recommended physical therapy, but noted that a muscle injury would likely have resolved within 8 to 12 weeks of the work accident.

¶ 16 The claimant began physical therapy on March 24, 2009. The therapist's notes from that date state that he reported lower-back pain that increased when he lifted objects, bent forward, or sat for long periods of time. Notes from subsequent therapy sessions state that his level of pain essentially remained constant throughout the course of treatment.

¶ 17 On April 2, 2009, the claimant sought treatment from Dr. Terrence L. Pencek. Dr. Pencek's notes from that date state that the claimant reported "marked right sacroiliac joint pain" and "right low back pain." An MRI revealed a synovial cyst and a blackened disc at L5-S1, but Dr. Pencek did not believe that the cyst caused the claimant's "main problems." Dr. Pencek recommended that he attend physical therapy for four weeks.

¶ 18 Dr. Kraus testified that, on April 22, 2009, the claimant returned and reported "very minimal" improvement in his right lower-back pain. Dr. Kraus advised the claimant to continue physical therapy and "gradually elevate" his work restrictions.

¶ 19 At Brinkoetter's request, the claimant reported for an independent medical examination by Dr. Kenneth R. Smith, Jr., on May 1, 2009. Dr. Smith imposed work restrictions, the nature of which is not set forth in the record.

¶ 20 Dr. Kraus testified that, on May 20, 2009, the claimant again presented with lower right-back pain and underwent a neurological test, which was negative. The claimant reported similar

pain on June 18, 2009, and stated that "he was not able to do his job[.]" Dr. Kraus recommended that he undergo a functional capacity exam (FCE).

¶ 21 On June 25, 2009, the claimant presented to Midwest Rehabilitation, Inc. (Midwest Rehabilitation) for the FCE. In a report, the therapist stated that the claimant functioned at a sedentary to light physical demand level, but he may not have exhibited full effort. The therapist could not make any recommendations regarding his employability but opined that, with motivation, the claimant could improve his functional levels.

¶ 22 Dr. Kraus testified that the claimant returned on July 14, 2009, and reported that his condition remained unchanged. According to Dr. Krause, no "objective evidence" established the cause for the claimant's ongoing pain but it was unlikely to result from his spinal fractures. Dr. Kraus noted, however, that an individual may suffer pain even when neurological tests are negative. Dr. Kraus did not believe that permanent work restrictions were necessary, but advised the claimant to return to light duty work and avoid twisting his spine or lifting more than 20 pounds.

¶ 23 On July 15, 2009, a physician from DMH permanently prohibited the claimant from repetitively twisting his "L-S" spine and lifting more than 20 pounds.

¶ 24 On July 31, 2009, the claimant returned to Dr. Smith, who canceled his work restrictions from May 2009. In a report, Dr. Smith diagnosed the claimant with "lumbar strain with spasm" and opined that he had reached maximum medical improvement (MMI) on September 24, 2008. Citing the FCE report from Midwest Rehabilitation, Dr. Smith concluded that nothing prevented the claimant from returning to work at "full duty capacity."

¶ 25 On September 3, 2009, the claimant underwent a second FCE at the Illinois Work Injury Resource Center. In a report from that date, the therapist noted that the claimant exhibited a

reduced range of motion in his lumbar spine and decreased tolerance to stooping, sitting, standing, walking, and climbing stairs and ladders. The therapist concluded that the claimant did not demonstrate the ability to work without restriction, as he functioned at a sedentary to light physical demand level and his occupation required a minimum medium physical demand level.

¶ 26 The claimant next sought treatment from Dr. Shane Fancher at St. Mary's Pain Center. Dr. Fancher, in his evidence deposition, testified that the claimant's lower right back was "tender to palpitation *** approximately L3 to L5" during an initial examination on March 9, 2010, and that he still reported back pain after undergoing a variety of treatments between March and October 2010. Dr. Fancher eliminated all diagnoses except myofascial (muscle) pain resulting from the work accident and concluded that the claimant reached MMI on October 14, 2010.

¶ 27 On cross-examination, Dr. Fancher stated that no test can prove or disprove the existence of myofascial pain. Rather, his diagnosis depended on the claimant's representations and "a lack of any other explanation for the pain." Dr. Fancher acknowledged that he was unfamiliar with the claimant's earlier medical treatment. He noted that muscle injuries resulting from a fall generally heal in a few months but that some individuals "never get better."

¶ 28 Dr. Heimbrecht testified that he imposed work restrictions at the claimant's request in July and October 2010. He opined that the claimant could no longer work as an electrician due to his lack of improvement, need for medication, and ongoing complaints of pain.

¶ 29 At the arbitration hearing, the claimant testified that he had no back problems prior to the work accident but, since the accident, experiences a constant "dull aching pain" in his right lower back. Due to the pain, he uses Vicodin four times per day, muscle relaxers one to three times per day, and Oxycontin one to three times per week. Additionally, he walks with a cane and is

unable to touch his toes, sit for more than half an hour, walk in the woods, fish, or ride a motorcycle.

¶ 30 The claimant testified that, after he was laid off in November 2008, he applied to two to four jobs per week but no contractors would hire him because "there is no light duty in the electrical construction trade." He also applied to the electrical departments of retail stores without mentioning his work restrictions. Two employers expressed interest in his application but, upon learning about his work restrictions, neither hired him. Based upon his current condition of ill-being, the claimant did not believe that he could return to work as a journeyman electrician, as his occupation requires: pulling wire; running and bending conduit; climbing ladders; bending, twisting, and pulling; and lifting objects weighing more than 20 pounds.

¶ 31 Following a hearing held on December 27, 2011, the arbitrator found that the claimant sustained accidental injuries arising out of and in the course of his employment and that his current condition of ill-being is causally related to the work accident. The arbitrator awarded the claimant: 62 weeks of TTD benefits for the period from August 16, 2009, through October 14, 2010, under section 8(b) of the Act (820 ILCS 305/8(b)) (West Supp. 2011)); 67 4/7 weeks of maintenance benefits for the period from October 14, 2010, through December 27, 2011, under section 8(a) of the Act (820 ILCS 305/8(a)) (West Supp. 2011)); $31,581.39 for reasonable and necessary medical services under section 8(a) of the Act (820 ILCS 305/8(a)) (West Supp. 2011)); and 225 weeks of permanent partial disability (PPD) benefits under section 8(d)2 of the Act (820 ILCS 305/8(d)2) (West Supp. 2011)) because the lumbar spine injuries resulted in a 45% loss of use of the person as a whole. Additionally, the arbitrator ordered Brinkoetter to provide vocational rehabilitation services to the claimant but did not set out a specific rehabilitation plan. The arbitrator found that the claimant was credible and "sustained serious

injuries as a result of a significant accident, that he was asymptomatic in his lumbar spine prior to the work accident and that he has had continuous *** complaints of pain since that date." The arbitrator observed that several doctors released the claimant to work at full duty at different times but did so in spite of the claimant's complaints of pain, which "remained constant throughout his treatment."

¶ 32 Brinkoetter filed a petition for review of the arbitrator's decision before the Commission. On February 27, 2013, the Commission affirmed and adopted the arbitrator's decision.

¶ 33 Brinkoetter sought judicial review of the Commission's decision in the circuit court of Macon County. On September 25, 2013, the circuit court confirmed the Commission's decision.

¶ 34 Brinkoetter appealed from the circuit court's order. On appeal, this court found that the Commission's decision was interlocutory and not appealable because it did not "specify a plan for the rehabilitation services to be rendered." *T.A. Brinkoetter & Sons v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130906WC-U, ¶¶ 23-24. Accordingly, we vacated the circuit court's judgment, dismissed the appeal, and remanded the cause to the Commission for further proceedings. *Id*. ¶ 26.

¶ 35 On March 4, 2015, the Commission issued its decision. In its decision, the Commission vacated the claimant's award of vocational training, finding it to be inconsistent with the simultaneous award of PPD, and affirmed the remainder of the arbitrator's decision.

¶ 36 Brinkoetter sought review of the Commission's decision before the circuit court. The court entered a written order on March 11, 2016, confirming the Commission's decision. Brinkoetter now appeals.

¶ 37 For its first argument, Brinkoetter contends that the Commission's finding that the claimant's current condition of ill-being is causally related to the work accident of July 11, 2008,

is against the manifest weight of the evidence. Brinkoetter does not dispute that the claimant's spinal fractures resulted from the work accident, but maintains that no evidence—aside from the claimant's own statements to doctors and therapists—establishes that the work accident caused the pain that he claimed to experience even after his spinal fractures healed.

¶ 38 When, as in the present case, an appeal is taken following entry of judgment by the circuit court on review from a decision of the Commission, this court reviews the ruling of the Commission, not the judgment of the circuit court. *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 543 (2010). The claimant has the burden of establishing by a preponderance of the evidence the elements of his claim, including "some causal relation between the employment and the injury." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989); see also *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003).

¶ 39 Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on review unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence; rather, the appropriate test is "whether there was sufficient evidence in the record to support the Commission's decision." *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 40 Based upon the record before us, we conclude that the Commission's finding that the claimant proved a causal connection between the work accident and his current condition of ill-

being is not against the manifest weight of the evidence. The record demonstrates that the claimant lacked a history of back injury prior to the work accident on July 11, 2008. Less than one week after the work accident, he reported lower back pain during an examination by Dr. Barnes. The claimant was diagnosed with spinal fractures, but consistently reported pain, tenderness, and tightness in his lower right paraspinal muscles both before and after the fractures healed in February 2009. These complaints persisted more than one year after his spinal fractures healed, and are extensively documented in physical therapy reports, clinical notes, and the testimony of Drs. Kraus, Pencek, Smith, and Fancher. Notably, Drs. Kraus and Pencek both opined that the claimant's discomfort was unrelated to his preexisting spinal conditions.

¶ 41 In October 2010, Dr. Fancher diagnosed the claimant with myofascial pain resulting from the work accident. He testified that no test can prove or disprove myofascial pain and that some individuals never heal from muscle injuries. Similarly, Dr. Kraus observed that pain might exist even when neurological tests are negative. In light of this evidence, we find that the record supports the Commission's determination that a causal connection exists between the claimant's work accident and his current condition of ill-being. *O'Dette*, 79 Ill. 2d at 253.

¶ 42 Brinkoetter contends, however, that the claimant was not credible and, therefore, neither his representations, nor Dr. Fancher's diagnosis in reliance thereon, establish causation. In support of this theory, Brinkoetter notes that Drs. Barnes and Kraus observed instances where the claimant's physical presentation did not comport with his reported level of pain, and that the first FCE report suggested that he did not exhibit full effort during his examination. In adopting the arbitrator's findings, however, the Commission concluded that the claimant was credible and consistently reported back pain after "sustain[ing] serious injuries as a result of a significant accident[.]" Brinkoetter, at most, has identified conflicts in the evidence which the Commission

was obliged to resolve. This court's task is not to substitute our judgment for that of the Commission, but to determine whether there is sufficient evidence in the record to support the Commission's determination. *Benson*, 91 Ill. 2d at 450. Here, the Commission's causality finding was not contrary to the manifest weight of the evidence and, therefore, will not be disturbed.

¶ 43 For its second argument, Brinkoetter contends that the Commission's decision to award TTD benefits from August 16, 2009, through October 14, 2010, was against the manifest weight of the evidence. Brinkoetter acknowledges that it paid the claimant TTD benefits from November 17, 2008, through August 15, 2009, but contends that the claimant was never actually disabled as a result of the work accident. Having previously rejected Brinkoetter's contention that the Commission's finding on causation was erroneous, we decline to overturn the award of TTD benefits on this basis. See *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC, ¶¶ 48-49.

¶ 44 Brinkoetter argues, however, that the Commission also erred in awarding TTD benefits where the claimant did not mention his work restrictions on certain job applications and, therefore, failed to establish that the work accident precluded him from obtaining new employment. We disagree.

¶ 45 Irrespective of why the claimant did not receive more interviews, the record supports a finding that no positions fitting his limitations were available. In July 2009, a DMH physician permanently restricted the claimant from repetitively twisting his "L-S" spine or lifting more than 20 pounds. The claimant testified, however, that a journeyman electrician's duties include, *inter alia*, bending, twisting, pulling, and lifting objects weighing more than 20 pounds. Both FCE reports noted that the claimant functioned at a sedentary to light physical demand level, and

the second report stated that his occupation required a minimum medium physical demand level. According to the claimant, no contractors or retailers hired him upon learning of his work restrictions because "there is no light duty in the electrical construction trade." See *Messamore v. Industrial Comm'n*, 302 Ill. App. 3d 351, 356 (1999) ("The fact a claimant is capable of working with restrictions or limitations does not bar him from receiving TTD benefits if no positions fitting those limitations are available.").

¶ 46 An injured employee is temporarily and totally disabled from the time that his injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). The period of time during which the claimant was temporarily and totally disabled was a question for Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id*. at 118-19. In this case, the claimant was subject to permanent work restrictions on August 16, 2009, and according to Dr. Fancher's testimony, he did not reach MMI until October 14, 2010. The claimant testified that he sought work but was not hired because no positions fitting his work restrictions were available, and Brinkoetter introduced no evidence to the contrary. Consequently, we cannot say that the Commission's decision to award TTD benefits for that period of time was against the manifest weight of the evidence.

¶ 47 Finally, Brinkoetter contends that the Commission's decision to affirm the award of PPD benefits is against the manifest weight of the evidence. Brinkoetter's challenge to the Commission's decision regarding PPD, like its challenges to the Commission's causality finding and TTD benefits determination, is premised on its conclusion that no credible evidence demonstrates that the claimant experienced pain after his spinal fractures healed in February

2009. This argument, as we have explained, is unavailing and we again reject it for the reasons previously set forth in this order.

¶ 48 In the alternative, Brinkoetter contends that the award of PPD benefits representing 45% loss of the person as a whole is disproportionately high in comparison to other cases involving PPD benefits for mysofascial pain syndrome. We disagree.

¶ 49 "The extent or permanency of a claimant's disability is a question of fact to be determined by the Commission" in each particular case. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004). Moreover, due to the Commission's expertise in the area of workers' compensation, its finding on the nature and extent of a disability is given substantial deference on review. *Pemble v. Industrial Comm'n*, 181 Ill. App. 3d 409, 417 (1989).

¶ 50 Here, the claimant testified that, since the work accident, he experiences a constant "dull aching pain" in his back and takes pain medications and muscle relaxers on a daily basis. Additionally, he walks with a cane and is unable to touch his toes, sit for more than half an hour, walk in the woods, fish, or ride a motorcycle. Both FCE reports concluded that the claimant functioned at a sedentary to light physical demand level. Based upon the totality of the record, we cannot say that the Commission's finding on PPD was against the manifest weight of the evidence.

¶ 51 In summary, we conclude that: (1) the Commission's finding that the claimant's current condition of ill-being is causally related to the work accident is not against the manifest weight of the evidence; (2) the Commission's award of TTD is not against the manifest weight of the evidence; and (3) the Commission's award of PPD is not against the manifest weight of the evidence. Therefore, we affirm the judgment of the circuit court which confirmed the Commission's decision in this case.

¶ 52 Affirmed.