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Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160744WC-U

Workers' Compensation
Commission Division
Order Filed: October 27, 2017

No. 4-16-0744WC

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MONTEREY COAL COMPANY,)	Appeal from the
)	Circuit Court of
Appellant,)	Macoupin County
)	
v.)	No. 15 MR 104
)	
THE ILLINOIS WORKERS' COMPENSATION)	
COMMISSION <i>et al.</i> ,)	Honorable
)	Kenneth Deihl,
(Gary Goodson, 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 Commission's award of wage differential benefits under section 8(d)1 of the Workers' Compensation Act (820 ILCS 305/8(d)1 (West 2014)) was not against the manifest weight of the evidence despite the fact that the claimant voluntary left his employment as a coal miner before he was diagnosed with an occupational lung disease.

¶ 2 Monterey Coal Company (Monterey) appeals from an order of the circuit court of Macoupin County which confirmed a decision of the Illinois Workers' Compensation

Commission (Commission) awarding the claimant, Gary Goodson, benefits under the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2004)), including wage differential benefits under section 8(d)1 of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)1 (West 2014)). 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 conducted on November 18, 2014.

¶ 4 Prior to his retirement, the claimant worked as a coal miner for 33 years. He last worked in a coal mine on August 31, 2006. On that date, he was employed by Monterey.

¶ 5 The claimant testified that he worked as a continuous miner operator and was exposed to coal mine dust and silica. He described the job as one of the dirtiest in the mine. He stated that, when the machine was operating, there was always dust. According to the claimant, he noticed his breathing problems getting worse in the last seven to eight years that he worked in the mine. The claimant admitted that he was a former smoker. He stated that he smoked about one-half of a pack of cigarettes per day from the time that he was 15 or 16 years of age until he was 57 or 58.

¶ 6 James Bunge worked as a coal miner for Monterey for 35 years. He testified that he worked with the claimant. Bunge also testified that being a continuous miner operator was one of the dirtiest and dustiest jobs in the mine. He stated that he has known the claimant for approximately 40 years. According to Bunge, he noticed the claimant coughing and witnessed him having increased breathing problems.

¶ 7 The claimant testified that he decided to quit coal mining because he felt that he could no longer do the job. He stated that he believed the work was physically taking a toll on him as he was coughing up “black stuff” and the substance was also coming out of his nose.

¶ 8 The claimant retired from Monterey on August 31, 2006, and began drawing his pension. He also received medical benefits. After leaving coal mining, the claimant found work at the Duna Hardware store (Duna) in Staunton, Illinois. He started working at Duna in 2006 and worked there until the spring of 2014. The claimant's duties included store clerk, stockman, and forklift operator. While employed at Duna, the claimant worked three to four days per week, eight hours per day, and was paid \$9.50 to \$9.75 per hour.

¶ 9 The claimant had a chest x-ray on October 8, 2007. And at the request of his attorney, the film was reviewed by Dr. Henry Smith a certified "B" reader. In a report dated October 23, 2007, Dr. Smith noted that the film revealed interstitial fibrosis and slightly thickened interlobar fissures. He found no evidence of chest wall plaques, thickenings, or calcification. Dr. Smith recorded an impression of pneumoconiosis and interstitial fibrosis.

¶ 10 The claimant was examined by Dr. Glennon H. Paul at the request of his attorney. In a report of that examination dated March 27, 2008, Dr. Paul wrote that he found the claimant's pulmonary function studies to be normal with a mild decrease in the FEF 25-75. He also noted that the claimant had a positive Methocholine Stimulation Test with a 29% fall in the FEV 1 after three breaths of Methocholine. Dr. Paul's impression, as noted in his report, was that the claimant had simple coal worker's pneumoconiosis (CWP). When deposed, Dr. Paul testified that, in his opinion, the claimant suffers from both asthma and CWP; both of which conditions were caused and aggravated by exposure to coal mine dust. He admitted that cigarette smoking can cause reactive airway disease, but not to the extent of reactivity present in the claimant. Dr. Paul stated that the claimant's pulmonary impairment is significant, as revealed by both his chest x-ray and pulmonary function testing. He was also of the opinion that the claimant could not have any additional exposure to coal mine dust without endangering his health. According to Dr.

Paul, the claimant's asthma and CWP render him totally and permanently disabled from working as a coal miner.

¶ 11 Dr. Manish Mather testified at his deposition that he had been the claimant's family physician since June 7, 2010, and had treated him for a number of health issues. According to Dr. Mather, the claimant suffers from asthma, a condition which was aggravated by exposure to coal dust. He opined that the claimant could not return to work in a coal mine without a risk to his health and that he is limited to light to medium work.

¶ 12 At the request of Monterey, the claimant was examined by Dr. Peter Tuteur on September 8, 2010. In his report of that examination, Dr. Tuteur noted that an x-ray of the claimant's chest was taken that day, and upon reviewing the film, he found no parenchymal abnormalities or changes consistent with CWP. He also noted that pulmonary function tests were administered to the claimant which revealed an element of bronchial reactivity which Dr. Tuteur attributed to the cigarette smoking. Dr. Tuteur opined that the claimant does not have CWP or any other coal mine dust related disease process of sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function or radiographic change. When deposed, Dr. Tuteur testified consistently with his report. However, he admitted that coal mine dust may produce an obstructive abnormality which cannot be differentiated from an abnormality caused by smoking.

¶ 13 At the request of Monterey, Dr. Jerome Wiot, a radiologist and "B" reader, reviewed the claimant's chest x-ray taken on September 8, 2010. In his report dated November 29, 2010, Dr. Wiot stated that he found no evidence of CWP. However, he did find evidence of over-expanded lungs consistent with emphysema, but the x-ray was otherwise unremarkable.

¶ 14 Contained within Dr. Mathur's records is the report of Dr. Curtis Settlemoir, a radiologist who reviewed the results of a chest x-ray of the claimant taken on October 21, 2011, which states that there were no acute pulmonary findings. Also contained within Dr. Mathur's records is the report of Dr. Gene Spector, the radiologist who reviewed the results of a chest x-ray of the claimant taken on March 19, 2012. In that report, Dr. Spector recorded an impression of emphysema and "no active disease."

¶ 15 Dr. Mathur's records reflect that he saw the claimant on October 19, 2012, at which time the claimant complained of intermittent chest tightness brought on by a dusty environment. The claimant was prescribed an episodic inhaler and Atrovet.

¶ 16 At the direction of his attorney, the claimant was evaluated by June M. Blaine, a vocational rehabilitation counselor. She testified that she interviewed the claimant on January 14, 2014. In her vocational assessment report dated January 20, 2014, Blaine described the claimant's personal background, his education and training, and work history. The report also noted the vocational testing which Blaine administered. In arriving at her opinions as to the claimant's employability, Blaine assumed that the claimant could not return to work as a coal miner due to work-related lung disease and that he had no other physical limitations except those of a normal person of his age. Blaine opined that the wage which the claimant earned at Duna, \$9.75 per hour, is representative of the highest wage which he is able to earn based upon his age, education, training, and lack of transferable skills.

¶ 17 At the arbitration hearing, the claimant testified that, since he left mining, his breathing problems have worsened. He stated that he can only walk a quarter of a mile before becoming short of breath and can only climb seven or eight stairs before having to rest. He also gave

examples of how his breathing problems affected his daily living. According to the claimant, if he were employed as a continuous miner operator, he would be earning \$28.42 per hour.

¶ 18 Following a hearing, the arbitrator found that the claimant sustained an occupational disease which arose out of and in the course of his employment with Monterey. The arbitrator awarded the claimant wage differential payments of \$497.73 per week commencing on October 8, 2007.

¶ 19 Monterey filed for a review of the arbitrator's decision before the Commission. The Commission issued a unanimous decision on September 28, 2015, affirming and adopting the decision of the arbitrator.

¶ 20 Monterey sought a judicial review of the Commission's decision in the circuit court of Macoupin County. On October 3, 2016, the circuit court entered an order confirming the Commission's decision. This appeal followed.

¶ 21 Monterey contends that the Commission's award of a wage differential is against the manifest weight of the evidence. In support of its contention, Monterey makes several arguments. We will address each in turn.

¶ 22 For its first argument, Monterey contends that the claimant voluntarily left his employment as a coal miner before he was diagnosed with any occupational lung disease. It reasons, therefore, that the claimant is not entitled to a wage differential award as he did not suffer a reduction in earnings as the result of asthma or CWP. Stated otherwise, Monterey appears to argue that, since the claimant left his employment as a coal miner before he was diagnosed by any physician as suffering from either asthma or CWP, no occupational disease could have manifested itself on August 31, 2006, the day that he retired. We find Monterey's argument in this regard to be both illogical and contrary to law.

¶ 23 Monterey has not cited to any authority, nor has our research discovered any authority, standing for the proposition that, in order to be entitled to a wage differential award, an employee must, prior to leaving his usual and customary employment, be diagnosed with an employment-related condition which partially incapacitates him from pursuing that employment. Whether an employee has been diagnosed with a partially incapacitating work-related condition, is not the test of whether he has the condition.

¶ 24 In order to qualify for a wage-differential award under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2014)), a claimant must prove that he has sustained a work-related injury or disease which (1) partially incapacitates him from pursuing his “usual and customary line of employment,” and (2) that he has suffered an impairment in earnings as a result. *Gallianetti v. Industrial Comm’n*, 315 Ill. App. 3d 721, 730 (2000). An award of wage differential benefits under section 8(d)1 presumes that, but for his employment-related injury or disease, the claimant would have been in the full performance of his usual and customary line of employment. *Dawson v. Workers’ Compensation Comm’n*, 382 Ill. App. 3d 581, 586 (2008). Whether a claimant has introduced sufficient evidence to satisfy each element necessary to support a wage differential award is a question of fact for the Commission to determine, and its resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.* For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Id.*

¶ 25 In this case, the question before the Commission was whether the claimant sustained a work-related lung disease which partially incapacitated him from working as a coal miner and suffered an impairment in earnings as a result. The Commission found that he did, and we

cannot find, based upon the record before us, that its determination is against the manifest weight of the evidence.

¶ 26 The claimant worked as a coal miner for 33 years prior to his retirement on August 31, 2006. He testified that he decided to quit coal mining because he felt that he could no longer do the job. He stated that his breathing problems were getting worse, he was coughing up “black stuff,” and the black substance was coming out of his nose.

¶ 27 Drs. Smith and Paul opined that the claimant suffered from CWP. To be sure, Drs. Tuteur and Wiot were of the opinion that the claimant did not have CWP. However, it was the function of the Commission to judge the credibility of the witnesses, determine the weight to be accorded their testimony, and to resolve conflicting medical evidence. *O’Dette v. Industrial Comm’n*, 79 Ill. 2d 249, 253 (1980). In this case, the Commission relied upon the opinions of Drs. Smith and Paul on the issue of whether the claimant suffered from CWP and upon the opinions of Drs. Paul and Mathur that the claimant suffered from asthma. The Commission also relied upon the opinions of Drs. Paul and Mathur that the claimant’s CWP and asthma were caused by and aggravated by his exposure to coal mine dust while working as a coal miner. Clearly, the testimony of the claimant along with the opinions of Drs. Paul and Mathur was sufficient to support the Commission’s finding that the claimant suffered occupational lung disease that arose out of and in the course of his employment as a coal miner working for Monterey.

¶ 28 On the issue of incapacity, Drs. Paul and Mathur both opined that the claimant’s pulmonary impairment was significant, and he could not have any additional exposure to coal mine dust without endangering his health. Dr. Paul went so far as to opine that the claimant’s CWP and asthma rendered him totally and permanently disabled from working as a coal miner.

The opinions of Drs. Paul and Mathur support the Commission's finding that the claimant is precluded from returning to work as a coal miner.

¶ 29 On the issue of whether he suffered an impairment in earnings, the claimant testified that, if he were employed as continuous miner operator, he would be earning \$28.42 per hour. Commission relied upon the opinion of Blaine that, as the result of his inability to work as a coal miner, \$9.75 per hour is representative of the highest wage that the claimant is capable of earning. There is no evidence in the record contradicting Blaine's opinion in this regard.

¶ 30 The foregoing analysis leads us to conclude that the Commission's finding that the claimant is entitled to a wage differential award is not against the manifest weight of the evidence.

¶ 31 Monterey next argues that the Commission erred in calculating its wage differential award commencing on October 8, 2007, based upon evidence that the claimant would have been earning \$26.415 per hour as a coal miner as of January 1, 2012. However, Monterey presented no argument in its brief as to the proper date that the Commission should have used to determine the amount that the claimant would have been able to earn in the full performance of his duties as a coal miner when his employment-related lung disease rendered him partially incapacitated, nor did it argue the appropriate date for the commencement of a wage differential award. In addition, Monterey failed to cite any authority setting forth the appropriate dates to be used. The argument has, therefore, been forfeited by reason of Monterey's failure to cite supporting authority. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *Service Adhesive Co. v. Industrial Comm'n*, 226 Ill. App. 3d 356, 365 (1992).

¶ 32 Based upon the foregoing analysis, we affirm the judgment of the circuit court which confirmed the Commission's decision.

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¶ 33 Affirmed.