

2018 IL App (4th) 170574WC-U
No. 4-17-0574WC

FILED
June 14, 2018
Carla Bender
4th District Appellate
Court, IL

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IN THE APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MONTEREY COAL COMPANY,)	Appeal from the
)	Circuit Court of
Appellant,)	Macoupin County.
)	
v.)	No. 16-MR-100
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	
)	
(JAMES NEUNABER),)	Honorable
)	Kenneth Deihl,
Appellees.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The Commission's decision that claimant demonstrated a material increase in his disability was not against the manifest weight of the evidence; however, the Commission erred in awarding a disability increase without specifying the exact amount of compensation awarded.

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

Commission (Commission) finding that the claimant, James Neunaber, had suffered a material change in his disability to the extent of 85% of a person as a whole. On appeal, Monterey contends that the claimant failed to demonstrate a material increase in his disability since the arbitration hearing on February 4, 2013, and that the Commission erred in awarding a disability increase. For the following reasons, we affirm in part, vacate in part, and remand with directions.

¶ 3 I. Background

¶ 4 On August 27, 2007, the claimant filed an application for adjustment of claim seeking benefits under the Workers' Occupational Diseases Act (820 ILCS 310/1 et seq. (West 2006)) for Coal Workers' Pneumoconiosis (CWP) and Chronic Obstructive Pulmonary Disease (COPD) that he developed while employed by Monterey. The claimant alleged that he sustained an occupational disease injury to his lungs and/or heart resulting in shortness of breath. He also alleged that he experienced intolerance from the inhalation of coal mine dust for over 35 years while employed by Monterey, with the last exposure on September 30, 2006.

¶ 5 The arbitration hearing occurred on February 4, 2013. The following evidence and testimony was adduced at the hearing. On February 19, 2008, Dr. Paul examined and diagnosed the claimant with CWP, and asthmatic bronchitis. At that time, the claimant had a 10-year history of shortness of breath and experienced breathlessness after walking one mile or ascending four flights of stairs. Dr. Paul indicated that because the claimant had reactive airways disease, his pulmonary function test results would vary depending on how he was functioning that day. Dr. Paul stated that the claimant's exposures to glue

fumes in the mines could cause or aggravate asthmatic bronchitis. Dr. Paul indicated that smoking does not cause asthmatic bronchitis but could be a source of aggravation. Dr. Paul concluded that the claimant was permanently totally disabled (PTD) from coal mining, although capable of performing light to medium labor when his asthmatic bronchitis permitted.

¶ 6 Dr. Tuteur first examined the claimant on October 14, 2010, at the request of Monterey. Dr. Tuteur stated that the claimant's breathlessness occurred after he walked three-fourths of a mile or ascended two to three flights of stairs. Dr. Tuteur determined that the claimant's decreased diffusing capacities, revealed from prior pulmonary function tests, were caused by an exaggerated predicted value because of his morbid obesity. Dr. Tuteur also opined that the claimant's continued smoking, not coal mining, caused his chronic bronchitis. In fact, Dr. Tuteur noted that the most common cause of chronic bronchitis was cigarette smoke, with a risk of 20%, while the risk from coal mining was 1%. Accordingly, Dr. Tuteur agreed that coal mine exposure, to a small degree, could have caused the claimant's chronic bronchitis, COPD, and reduced diffusing capacity. Dr. Tuteur also acknowledged that the claimant had spent many years coal mining and that the claimant would be continuously exposed to coal dust because the dust would remain in his lungs. Nevertheless, Dr. Tuteur concluded that the claimant's continued smoking was the cause of his condition, despite the claimant's 35 years of coal mine exposure.

¶ 7 On May 24, 2012, Delores Gonzalez, a vocational rehabilitation counselor, evaluated the claimant, concluding that he could potentially secure a job making \$8.50 to

\$10.00 per hour, although employers generally favored younger applicants. At the time of the evaluation, the claimant was living by himself, taking care of his day-to-day needs, and had been looking for employment since his retirement from Monterey.

¶ 8 The claimant testified that he had experienced breathing problems for roughly 10 years before he retired from Monterey. During his last few years as an examiner, a position with less dust exposure than a coal miner, other examiners finished his work when he was unable to breath properly. At the time of the hearing, the claimant testified that he was unable to walk without becoming breathless. The claimant could not climb stairs, did not leave his home unless necessary, and had been on 24-hour oxygen since December 18, 2012. The claimant had smoked cigarettes for 20 years, one pack, maybe two, a day, until he started 24-hour oxygen. The claimant still smoked cigarettes occasionally when he drank coffee.

¶ 9 Two of the claimant's lifelong co-workers, David Martioni (Martioni) and Dick Schulte (Schulte), testified to the following. Martioni testified that the claimant was often unable to finish his work as an examiner. Martioni claimed that the claimant's quality of life had significantly deteriorated since he began his mining career and that his physical condition was extremely poor by the end of the work day. Schulte, who had known the claimant since the 1980s, noticed that the claimant experienced breathing problems that forced him to sit and rest while he worked. Schulte indicated that the claimant's level of work tolerability had decreased significantly over the years.

¶ 10 Dr. Chopra, the claimant's treating physician since the early 1990s, testified that the claimant had a history of cough, shortness of breath, and pulmonary limitations for

quite some time. In his medical opinion, the claimant had CWP, moderate to severe COPD, and chronic bronchitis. Following a 19% drop in the claimant's Methacholine testing, Dr. Chopra agreed that there was an asthmatic component to the claimant's condition, and that a contributing factor was coal mining. Countless medical records since 1995 contained entries demonstrating notations of COPD, wheezing, bouts of bronchitis requiring medication, and complaints of shortness of breath and coughing. Dr. Chopra believed the claimant had severe COPD, and that he was unable to perform work as a coal miner or any manual labor work due to his pulmonary capacity. Dr. Chopra concluded that the claimant's smoking and morbid obesity contributed to his significantly deteriorated condition. In particular, Dr. Chopra believed that smoking was the main contributing factor to the claimant's COPD and chronic bronchitis, and could also have contributed to his asthmatic bronchitis issues.

¶ 11 Following the February 4, 2013, arbitration hearing, the arbitrator entered an order on March 1, 2013, finding that the claimant had sustained accidental injuries as a result of exposure to an occupational disease arising out of and in the course of his employment. The arbitrator found a causal connection to the claimant's occupational exposures that resulted in CWP and COPD from working 35 years as a coal worker. The arbitrator denied the claimant's request for wage differential benefits, pursuant to section 8(d)(1) of the Illinois Workers' Compensation Act (Act), but awarded him compensation to the extent of loss of 15% of person as a whole for 75 weeks at \$567.70 per week, pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(d)(1); 305/8(d)(2) (West 2012). The

Commission subsequently affirmed the arbitrator's decision, which the claimant appealed to the circuit court, but later withdrew.

¶ 12 On September 5, 2014, the claimant filed a petition for review with the Commission alleging a material increase in his disability and requesting that the Commission award additional compensation under sections 8(a) and 19(h) of the Act. See 820 ILCS 305/8(a); 305/19(h) (West 2012)).

¶ 13 On May 5, 2016, the Commission held the section 19(h) hearing. The claimant testified to the following. The claimant had previously been able to grocery shop and drive, however, at the time of the 19(h) hearing, he only left home for medical appointments or to attend court. The claimant no longer enjoyed hobbies and had been forced to use a motorized wheelchair for the past six months to move around his house. The claimant started 24-hour oxygen shortly before the arbitration hearing. The claimant explained that he had such poor mobility that he became short of breath and gasped for air when he walked from his bedroom to the living room, and that this occurred even when he wore the oxygen machine. In fact, the claimant further testified that he became short of breath when he walked to the bathroom, which was approximately 15 feet from his bed. As a result, the claimant was confined primarily to his bedroom and watched television most of the day. As a result, Kelly Berry (Berry) moved into his house to assist him with every day household activities. The claimant also indicated that he had smoked cigarettes since he was 20 years old, and still smoked occasionally when he drank coffee. He indicated that in the past he smoked one to two packs per day.

¶ 14 Berry testified that she had lived in the claimant's home for the past 18 months to perform household tasks, such as laundry, cooking, cleaning, and driving the claimant to and from medical appointments and court. Berry explained that the claimant was confined to his bedroom most of the day, except to go to the bathroom or kitchen. Berry stated that the claimant would not be able to live alone without her daily help.

¶ 15 John Horrell (Horrell), a lifelong friend and former co-worker of the claimant, testified to the following. Horrell had visited the claimant on a monthly basis for the past five or six years following the claimant's retirement from the Monterey. Horrell confirmed that the claimant used a motorized wheelchair and that he was confined to his bedroom most days.

¶ 16 Following the above testimony, the parties submitted numerous exhibits, which contained the arbitrator's and Commission's past decisions, certified medical records, deposition transcripts, and the reports of Drs. Paul, Tuteur, and Chopra. The evidence submitted for review is as follows.

¶ 17 On October 28, 2014, Dr. Paul evaluated the claimant for the second time, concluding that the claimant's symptoms of shortness of breath had worsened dramatically since his first evaluation on February 19, 2008. Dr. Paul specifically noted that the claimant would get "short of breath on walking across the floor and he must use oxygen at all times." Dr. Paul indicated that the claimant had severe obstructive airway disease and that the pulmonary function testing demonstrated an obstruction much worse than in 2008.

¶ 18 On January 12, 2015, Dr. Paul testified to the following. Dr. Paul testified that the claimant had severe pulmonary problems. In particular, Dr. Paul had examined the claimant and found that his pulmonary function test results demonstrated a significantly worsening condition between the February 19, 2008, and October 28, 2014, examinations. Specifically, the claimant's results in 2014, which showed severe obstructive impairment with moderate to severe restrictive impairment, was much worse and so severe that heart damage could occur, as compared to the 2008 results, which showed moderate physical impairment. Dr. Paul indicated that the claimant had CWP, asthmatic bronchitis, emphysema, and COPD. Dr. Paul opined that the coal mine dust inhalation caused the claimant's CWP, asthma, emphysema, and chronic bronchitis, although smoking could have been a contributing factor as well.

¶ 19 Dr. Paul indicated that the claimant would have continuing exposure to coal dust, although his active exposure as a coal miner had ended, which would be the reason why the coal mine contributed to his worsening shortness of breath and cough. Dr. Paul noted that the claimant's continued smoking had increased his risk for his current conditions and would significantly worsen his shortness of breath and cough. Moreover, Dr. Paul stated that the claimant was morbidly obese, which could cause a reduction in his pulmonary function study results. Dr. Paul concluded that the claimant was PTD from coal mining, as he was no longer able to perform any labor, and likely had 6 to 12 months to live.

¶ 20 On January 13, 2015, Dr. Chopra testified to the following. Dr. Chopra had been the claimant's treating physician for 20 years. Since Dr. Chopra's last deposition in 2012,

the claimant's shortness of breath and COPD had gotten worse, given that the claimant was unable to walk more than 20 yards without becoming short of breath. Dr. Chopra had counseled the claimant on several occasions to quit smoking and lose weight, both affecting his pulmonary conditions and decreasing ability to recover. Since 2012, the claimant's condition had worsened to such a degree that Dr. Chopra was mainly concerned with the claimant's ability to adequately breathe. As such, the claimant rode motorized wheelchair because he was unable to walk from the front of the office to the examination room without shortness of breath.

¶ 21 In Dr. Tuteur's April 23, 2015, report, he indicated that he first examined the claimant on October 14, 2010, at the request of Monterey, and then again on April 23, 2015. Within four and a half years, the claimant's activity level had significantly decreased, as he was unable to walk more than one city block or climb one flight of stairs. In fact, the last time the claimant had climbed stairs was two years prior. Following pulmonary function testing and exercise assessments, Dr. Tuteur indicated that there had been a worsening of exercise tolerance since 2010 that seemed to progress through 2012 and 2013. Dr. Tuteur noted that the claimant had "experienced clinical deterioration" that was "[a]lmost certainly *** due to a combination of morbid obesity, progressive coronary artery disease and dysrhythmias, the intermittent development of congestive heart failure, with possible contribution by uncontrolled gastroesophageal reflux. None of these conditions are related to, aggravated by or caused by inhalation of coal mine dust or the development of coal workers' pneumoconiosis."

¶ 22 Following the claimant's June 24, 2015, appointment with Dr. Chopra, he indicated that the claimant would benefit greatly from a motorized wheelchair due to the claimant's inability to walk more than a few steps before he experienced breathlessness. Dr. Chopra indicated that the claimant's ill condition was due to deteriorating lung disease and cardiac cor pulmonale. Upon examination, Dr. Chopra found the claimant in mild respiratory distress; his lungs revealed bilateral wheezing; and his movements of the lumbar spine were severely restricted because of pain. Dr. Chopra also noted that the claimant needed assistance with most day-to-day activities, such as using the bathroom, getting in and out of bed, and cooking meals. As of February 15, 2016, Dr. Chopra's notes indicated that the claimant was still smoking and complaining of occasional shortness of breath.

¶ 23 On November 5, 2015, Dr. Tuteur testified to the following. Dr. Tuteur indicated that the claimant's coronary artery disease was likely to progress given his obesity, inactivity, and continued smoking. Dr. Tuteur opined that the claimant did not have CWP or asthma, but suffered from COPD and chronic bronchitis. The claimant had an abnormal pulmonary function test in 2010 that had significantly worsened numerically by 2015, which was the result of deteriorating cardiac disease that caused poorer cardiac function of the lungs. Dr. Tuteur opined that the claimant had a reduction in his ability to work, had severe exercise limitations, and was disabled. However, Dr. Tuteur determined that no percent of the claimant's disability and impairment was significantly contributed by the inhalation of coal mine dust, although coal mine dust could result in coughing and shortness of breath. Regardless, Dr. Tuteur stated that the claimant would be

continuously exposed to coal dust for the rest of his life because the dust would remain in his lungs given the many years he spent underground.

¶ 24 On August 19, 2016, the Commission granted the claimant's section 19(h) petition, finding that the claimant had demonstrated that his permanent disability had materially increased since the February 4, 2013, arbitration hearing to the extent of 85% of the person as a whole. In reaching its determination, the Commission indicated that Dr. Tuteur had opined that the claimant had COPD, chronic bronchitis, was totally disabled from all work, and the claimant's deteriorating condition was attributable to his coronary artery disease. Next, Dr. Paul opined that the claimant had CWP, asthmatic bronchitis, emphysema, and COPD, and that his pulmonary condition was attributable to the inhalation of coal mine dust. Based on his current pulmonary condition, Dr. Paul determined that the claimant was totally disabled from work. Additionally, both Drs. Tuteur and Paul had concluded that the claimant's pulmonary condition had worsened since February 4, 2013. Moreover, Dr. Chopra opined that the claimant was totally disabled from work, given that he could only take a few steps at a time before he experienced shortness of breath and weakness.

¶ 25 Based on the medical opinions of Drs. Tuteur, Paul, and Chopra, the Commission awarded the claimant additional compensation of \$567.70 per week for a period of 425 weeks, pursuant to section 8(d)(2) of the Act, finding that the claimant was medically PTD. Subsequently, Monterey appealed to the circuit court of Macoupin County claiming that the Commission's decision was against the manifest weight of the evidence. The

circuit court confirmed the Commission's decision. Monterey filed a timely notice of appeal to this court.

¶ 26

II. Analysis

¶ 27 Monterey first contends that the claimant failed to demonstrate a material increase in his disability since the arbitration hearing on February 4, 2013, as required for modification under section 19(h) of the Act. Specifically, Monterey argues that the claimant's disability, at the time of the arbitration hearing, was actually worse than the arbitrator found, and that the Commission, in adopting the arbitrator's findings, failed to properly analyze the evidence in the record. Nevertheless, Monterey asserts that the Commission's decision was a final order and that it was improper for the Commission to correct the previous order through a section 19(h) proceeding.

¶ 28 In a section 19(h) proceeding, the issue is whether the employee's disability has recurred, increased, diminished, or ended since the award. *Howard v. Industrial Comm'n*, 81 Ill. 2d 50, 59 (1980). The evidence presented in prior proceedings is relevant in determining whether the employee's condition at the time of the award has changed. *Howard*, 81 Ill. 2d at 60. To warrant a modification of benefits, the change in condition must be material. *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). However, "[s]ince section 19(h) seeks to redress changes in circumstances after the entry of a compensation award payable in installments, it is particularly remedial in nature and should be construed liberally so as to allow review of alleged changes in circumstances." *Hardin Sign Co. v. Industrial Comm.*, 154 Ill. App. 3d 386, 389-90

(1987). The Commission's factual findings will not be reversed on appeal unless they are against the manifest weight of the evidence. *Motor Wheel Corp.*, 75 Ill. 2d 230 at 236-37.

¶ 29 As indicated above, the arbitrator found that the claimant had sustained, at the time of the arbitration hearing on February 4, 2013, a disability to the extent of 15% loss of a person as a whole. Based on record and supporting medical evidence, the arbitrator concluded that the claimant had occupationally induced pulmonary diseases, specifically CWP and COPD. However, Monterey argues that the claimant's disability at the time of the arbitration hearing was actually worse than the arbitrator found, thus, the claimant was unable to show a material increase in his condition at the section 19(h) hearing. This argument is belied by the doctors' testimony and the claimant's extensive medical records.

¶ 30 We first note that the claimant provided a well-documented history of his disability progressively worsening over time. The medical records demonstrate that in 2008 the claimant could walk one mile and ascend four flights of stairs. However, by 2013 he was unable to walk up or down stairs and could only walk a short distance before he needed to rest. In April 2012, Dr. Chopra determined that the claimant was unable to perform manual labor. Three years later in January 2015, the claimant was dependent on a motorized wheelchair due to breathlessness. Additionally, Dr. Chopra had expressed concerns regarding the claimant's ability to adequately breathe and to perhaps continue to live.

¶ 31 Additionally, the record reflects that the claimant's pulmonary functioning continued to deteriorate, resulting in the necessary use of an oxygen machine shortly

before the arbitration hearing. At the section 19(h) hearing, the claimant testified that he was unable to breathe without the oxygen machine and that his condition continued to worsen over time. According to the claimant, he was unable to walk from his bedroom to the living room without gasping for air, and that he primarily watched television throughout the day. The claimant also testified that he became short of breath when he walked to the bathroom, which was approximately 15 feet from his bed. Lastly, we note that the claimant's testimony regarding his lack of mobility, specifically that he seldom left his bedroom and relied on a motorized wheelchair, was corroborated by Berry and Horrell.

¶ 32 Moreover, extensive medical evidence supported the Commission's finding that the claimant's disability materially increased following the February 4, 2013, arbitration hearing. In particular, the testimonies of Drs. Chopra, Paul, and Tuteur revealed that the claimant suffered from deteriorating lung disease and pulmonary function problems that had materially worsened since the examinations conducted prior to the arbitration hearing.

¶ 33 In April 2012, Dr. Chopra, the claimant's treating physician since the 1990s, testified that his main concern was the claimant's inability to perform manual labor because he was unable to work in the coal mine. Since that time, the claimant's condition worsened to such a degree that Dr. Chopra was mainly concerned with the claimant's ability to adequately breathe in order to stay alive. Dr. Chopra believed that the claimant had severe COPD, and that his significant deterioration was the result of coal mine related disease and smoking, which put him at an increased risk for decreased pulmonary

function. Dr. Chopra concluded that the claimant was totally disabled from all work, given that he was morbidly obese, unable to walk short distances without severe shortness of breath, and had decreased cognitive ability.

¶ 34 In February 2008, Dr. Paul determined that the claimant was capable of performing light to medium work. However, on October 28, 2014, Dr. Paul evaluated the claimant for the second time, concluding that his shortness of breath had worsened dramatically since 2008, and that pulmonary function testing demonstrated a significantly larger obstruction than in 2008. Dr. Paul believed the claimant had CWP, COPD, emphysema, and asthmatic bronchitis. He indicated that the claimant would have continuing exposure to coal dust, although his active exposure as a coal miner had ended, given the many years he worked underground. Dr. Paul concluded that the claimant was PTD from coal mining because he was no longer able to perform any labor, and similar to Dr. Chopra's conclusion, he opined that the claimant had 6 to 12 months to live.

¶ 35 Between October 14, 2010, and April 23, 2015, Dr. Tuteur determined that the claimant's activity level had significantly declined, as he was unable to walk more than one block or climb one flight of stairs. Dr. Tuteur concluded that the claimant's decreased diffusing capacities were caused by an exaggerated predicted value because of his morbid obesity, and that the claimant had chronic bronchitis with an associated obstruction that was caused by smoking. While attributing the claimant's condition of ill-being to smoking, Dr. Tuteur agreed that coal mine exposure, to a small degree, could have caused the claimant's chronic bronchitis, COPD, and reduced diffusing capacity. Dr. Tuteur

opined that the claimant's worsening condition was attributable to coronary artery disease.

¶ 36 Based on the testimony and medical records before the Commission, we cannot find that the opposite conclusion was clearly apparent. Accordingly, we find that the Commission's conclusion was not against the manifest weight of the evidence where it found that the claimant had demonstrated a material increase in disability since the February 4, 2013, arbitration hearing.

¶ 37 Next, Monterey argues that the Commission erred in awarding a disability increase. Specifically, Monterey contends that the 85% the Commission awarded should be reduced by 15%, which is the amount awarded in the arbitrator's initial decision. In response, the claimant asserts that the Commission never found him medically PTD in either decision. Instead, the Commission found him disabled to the extent of 15% of a person as a whole in its first decision and then awarded an additional 85% in the second decision because he had sustained a material increase in his disability.

¶ 38 It is well settled that the Commission is required to make findings of fact and law. *Skzubel v. Illinois Workers' Compensation Comm'n Div.*, 401 Ill. App. 3d 263, 269 (2010). These findings need not be stated in any particular language and may be implied from the Commission's decision. *Skzubel*, 401 Ill. App. 3d at 269 (citing *Illinois Bell Telephone Co. v. Industrial Comm'n*, 265 Ill. App. 3d 681, 686 (1994)). In this case, however, it is not possible to imply findings from the Commission's decision regarding the exact amount of compensation awarded.

¶ 39 Monterey cites to a prior decision of the Commission "as instructive regarding the language the Commission has used previously," urging this court to correct the Commission's mathematical calculation or remand with instructions. See *Berner v. State of Illinois*, 09-WC-22338 (April 4, 2016). However, decisions of the Commission are not precedential and thus should not be cited. *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 413 (2009). In response, the claimant argues that a reduction of 15% of a man as a whole would be in conflict with the Commission's finding that he sustained an increase in his condition to the extent of 85% of a person as a whole. The claimant argues that the record demonstrates that the Commission found him to be PPD, not PTD, and awarded him additional compensation.

¶ 40 Based on a review of the record, it appears that the Commission first determined that the claimant was "medically permanently totally disabled," based on the opinions of Drs. Chopra, Paul, and Tuteur, and then determined that he "is now permanently disabled to the extent of 85% of a person as a whole ***." The Commission did not provide a determination whether the award of 85% of a person as a whole included or was inclusive of the previous award of 15% of a person as a whole. The Commission's award of compensation for a period of 425 weeks was equally unclear where the Commission failed to state whether that number included, or was in addition to the previous award of 75 weeks. Thus, the record is insufficient for this court to properly review the Commission's compensation award.

¶ 41

III. Conclusion

¶ 42 For the foregoing reasons, we affirm the circuit court's judgment confirming the Commission's decision that the claimant demonstrated a material increase in his disability. We, however, vacate the court's judgment confirming the Commission's decision that the claimant was disabled to the extent of 85% of a person as a whole, and remand the matter with directions for the Commission to make a finding of whether the 85% award is inclusive of the original 15% award.

¶ 43 Affirmed in part, vacated in part, and remanded with directions.