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Carla Bender
4th District Appellate
Court, IL

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No. 4-17-0899WC

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IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

PLEASANT HILL CUSD #3,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Pike County.
	)	
v.	)	No. 17-MR-44
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and MARION WHITE,	)	Honorable
	)	John F. McCartney,
Defendants-Appellees.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The Commission's decision was not against the manifest weight of the evidence for finding claimant permanently and totally disabled under the "odd-lot" category where evidence demonstrated a diligent job search.

¶ 2 The claimant, Marion White, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)) for an

injury to his cervical spine and left arm sustained on October 23, 2013, while working as a custodian for the respondent, Pleasant Hill CUSD #3 (Pleasant Hill), a community unit school district. Pleasant Hill argues on appeal that the Illinois Workers' Compensation Commission (Commission) improperly awarded maintenance benefits beyond the last documented date of the claimant's job search and incorrectly listed the number of weeks of awarded temporary total disability benefits. Pleasant Hill also asserts that the Commission's determination that the claimant was permanently and totally disabled under the "odd-lot" category was against the manifest weight of the evidence. For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 On July 24, 2014, the claimant filed an application for adjustment of claim pursuant to the Act (820 ILCS 305/1 *et seq.* (West 2008)) for an injury to his cervical spine and left arm sustained on October 23, 2013, while employed by and working for Pleasant Hill. The following evidence was adduced at the arbitration hearing on March 3, 2016.[1] At the time of the accident on October 23, 2013, the claimant, a 56-year-old male, was employed as a maintenance custodian for Pleasant Hill. The claimant's position necessitated heavy physical demand, as he was required to scrub, mop and wax school room floors, as well as perform general maintenance on air conditioners and furnaces.

¶ 5 On October 23, 2013, the claimant reported a neck injury when he attempted to lift a 150-pound table while cleaning floors in the science lab. Following the incident, the

[1] On a request for hearing form the parties stipulated that the claimant was temporary total disability for 46 weeks from October 25, 2013, through September 11, 2014, and entitled to maintenance benefits from September 12, 2014, through February 23, 2015.

claimant testified that he informed Pleasant Hill's superintendent, Ron Edwards (Edwards), at 7:00 a.m. that same day that he was experiencing left side pain down his left ear into his left arm and left hand.

¶ 6 On October 25, 2013, the claimant attended his first medical treatment with Dr. Mefford, a chiropractor. The claimant testified that he had never experienced neck pain prior to October 23, 2013. Dr. Mefford referred the claimant to Dr. Basho, an orthopedic surgeon.

¶ 7 On November 14, 2013, Dr. Basho recommended the claimant undergo an MRI, receive injections and the possibility of surgery was discussed. Following the MRI on November 20, 2013, Dr. Basho diagnosed the claimant with central and left para-central C6-C7 and C7-T1 disc osteophyte complex with severe spinal canal narrowing. After chiropractic care and a left sided C8 selective nerve root injection failed to relieve the claimant's symptoms, the claimant elected to have surgery, specifically, an anterior cervical discectomy and fusion from C7-T1, on February 3, 2014. The next day, on February 4, 2014, the claimant also underwent a flexible fiberoptic laryngoscopy.

¶ 8 Following surgery, the claimant sustained paralyzed vocal cords, which resulted in a hoarseness condition when he spoke, as well as gripping and tremor issues with his left hand. Although surgery reduced his arm and shoulder pain, the claimant still experienced left sided pain in his hand, arm, shoulder and neck. The claimant's symptoms, however, worsened on May 8, 2014, during physical therapy, and on June 5, 2014, while mowing his lawn.

¶ 9 On July 7, 2014, the claimant participated in a functional capacity evaluation (FCE) through First Choice Rehabilitation where medium physical demand and lifting restrictions were recommended. On September 11, 2014, Dr. Basho released the claimant to work and determined that he was at maximum medical improvement (MMI). The claimant then contacted Edwards to inquire about job openings at Pleasant Hill but was informed that there were no available positions.

¶ 10 On November 26, 2014, the claimant underwent a section 12 independent medical evaluation with Dr. Matz. Dr. Matz diagnosed the claimant with, among other conditions, "cervical neck pain due to cervicogenic disc disease" with "possible pseudoarthrosis" and "recurrent laryngeal palsy due to the C7-T1 anterior cervical discectomy." Dr. Matz also noted that the claimant had severe left arm pain when he extended his head back, neck pain down his ear and shoulder and weakness in his left hand, as well as permanent hoarseness in his voice. Dr. Matz concluded that the claimant was capable of working with medium physical demand and could occasionally lift 40 pounds, frequently lift 20 pounds and constantly lift eight pounds. Although Dr. Matz did not recommend a second FCE, he ordered a cervical MRI, an EMG/nerve conduction velocity study and plain x-rays to determine if the claimant had pseudo-arthrosis. According to Dr. Matz, the claimant had not reached MMI.

¶ 11 On December 5, 2014, the claimant met with Julie Lynn Bose (Bose), owner and vocational rehabilitation counselor at MedVoc Rehabilitation (MedVoc), for an initial evaluation. During that time, the claimant informed Bose that he had started a self-directed job search in September 2014. In particular, the claimant had "contact[ed]

approximately 12 prospective employers per week, six in person and six via telephone." The claimant indicated that his job search was not performed online because he possessed limited technical skills, did not own a home computer and had minimal access to the internet. The claimant also stated that he did not target a specific type of employment but looked for "any" work. The claimant's prior work experience had included maintenance, machine operator and construction positions, as well as experience with HVAC, plumbing and electrical systems.

¶ 12 Bose claimed that she conducted a transferable skills analysis during the initial interview, although the record demonstrates that a report, dated February 23, 2014, indicated that the claimant was asked to complete a "transferability of skills assessment" on January 27, 2015. Following the initial evaluation, Bose concluded that the claimant was not "conducting an appropriate or effective job search" because he had failed to target specific positions within his skill range and physical demands. Bose determined that the claimant had the ability to earn approximately $8.25 to $10.25 per hour, although he earned $11.76 per hour at Pleasant Hill, and she recommended he apply for positions as a security officer, janitorial supply clerk, construction building material sales clerk or a light van driver.

¶ 13 Following the initial evaluation, Bose employed Lauren Egle (Egle), a job placement specialist, to assist the claimant with job placement services. The claimant's job placement meetings, where he received job search logs to document his job search activity, occurred on January 27, 2015, February 3, 2015, and February 19, 2015. The job search logs included information regarding the type of positons the claimant sought, the

method of application, whether the claimant timely completed applications, whether an interview occurred and whether he followed up after an interview.

¶ 14 On January 27, 2015, a typing test demonstrated that that claimant could type 14 words per minute. On February 3, 2015, Egle performed a mock interview where the claimant displayed "the ability to interview in an appropriate and positive manner." Also on February 3, 2015, Egle showed the claimant how to attach a résumé and cover letter to an email, apply online and print and forward a confirmation letter.

¶ 15 On February 19, 2015, Egle and the claimant submitted an application to Per Mar Security, an appropriate employer determined by MedVoc. Aside from Per Mar Security, the claimant was not given additional employment positions to apply. A Google search that day indicated that a McDonald's, located nine miles from the claimant's home, had free Wi-Fi access.

¶ 16 Bose testified that she did not know whether the claimant had access to the internet following his final meeting with MedVoc on February 23, 2015. Despite this, Bose wrote in a vocational rehabilitation progress report that "Mr. White has the knowledge and experience to look for work in an appropriate and professional manner." Bose did not recommend further vocational services because the claimant had successfully completed a mock interview and online application with minimal assistance. Moreover, Bose believed that potential jobs requiring the claimant's skill level existed in his labor market. As a result, Pleasant Hill terminated the claimant's maintenance benefits on February 25, 2015.

¶ 17 After his final session with MedVoc on February 23, 2015, the claimant testified that he applied to positions using job search forms provided by his attorney. The claimant also stated that he had several interviews with the following employers: Mash, a retail store; Dot Foods, Inc.; K's Furniture; Eagle Business Products; Ayerco; Quick Stop; and Leslie's Hallmark. The claimant was not hired for employment by these employers.

¶ 18 At the request of the claimant's attorney, James Michael Ragains (Ragains), a certified rehabilitation counselor, evaluated the claimant on February 17, 2015. Following the evaluation and review of the claimant's medical records, MedVoc reports, and the claimant's job search records and résumé, Ragains concluded that the claimant was not a candidate for retraining. Ragains also noted that the claimant had never received formal computer and keyboard instruction or vocational training following his military duty. Moreover, the claimant had limited internet access to submit online applications, and the claimant had "difficulty performing basic activities of daily living," thus, his residual functional ability excluded light and medium work.

¶ 19 Following a transferable skills analysis, Ragains determined that the claimant's skills were nontransferable to other skilled or semi-skilled occupations because of his line of work in municipal maintenance, satellite installation and manufacturing, as well as his lifting restrictions, lack of bimanual dexterity and gripping difficulties. Ragains did not believe the claimant could return to any job he had performed in the previous 15 years. Moreover, because the claimant had "obvious disabilities to the eyes [,] *** a speech problem[,] *** a claw[ed] hand and tremors," employers would likely see these factors as

"red flags" in an interview. Thus, Ragains concluded that there did not exist a stable labor market for the claimant to consider.

¶ 20 Moreover, Ragains testified that the claimant's job search in September 2014 had been adequate, and that the claimant had informed him during a follow-up interview on April 14, 2015, that he had contacted 10 to 15 prospective employers per week within 50 miles of his home. On cross-examination, Ragains indicated that he had based his conclusion that the claimant was unemployable on his assumption that the claimant had applied to and interviewed for positions within his physical restrictions. Regardless, Ragains believed that the claimant was unemployable because he was not re-trainable, given his age, disabilities and work restrictions, and there were no available positons with his qualifications and restrictions in his rural area.

¶ 21 Bose's final report, dated February 8, 2016, indicated that "Mr. White was provided vocational planning services and was given detailed instruction as to the most appropriate way to find employment. Mr. White disregarded MedVoc Rehabilitation's advice and continued to target employers that were not hiring, only completing applications on an infrequent basis, and did not do a thorough job search." Although the claimant had contacted 263 employers, with 197 in-person, over a 30-week period, he completed only 18 of 84 applications, two of which were online applications. Bose stated that submitting online applications was the most efficient means to determine physical demand requirements.

¶ 22 The claimant testified that he continued to have stiffness and painful rotation in the left side of his neck. The claimant continued to experience pain down his shoulder

and into his left arm, "clawing" and tremors in his left hand, left hand coldness and hoarseness in his voice. Moreover, the claimant lived in Pleasant Hill, Illinois, which was located 90 miles from Springfield, Illinois, and roughly 50 miles from Jacksonville, Quincy and Hannibal, Illinois.

¶ 23 On March 28, 2016, the arbitrator rendered a decision in favor of the claimant. The arbitrator determined that the claimant had testified credibly and that significant distance from his rural home in Pleasant Hill, Illinois, more than 50 miles from a larger city, impeded his ability to find suitable employment. The arbitrator also determined that Bose's criticisms of the claimant were meritless. First, the job search forms that the claimant had obtained from his attorney were "basically identical," in the arbitrator's eyes, to those MedVoc had provided to the claimant. Although the claimant applied to positions without an understanding of whether it fit his work restrictions, the arbitrator believed that the claimant would have applied more effectively had MedVoc employed a labor market survey. Moreover, although Bose found the claimant employable as a "light van driver, unarmed security officer, janitorial supply clerk, or construction building material sales clerk," no evidence supported Bose's finding that these types of positions existed in the claimant's labor market.

¶ 24 In conclusion, the arbitrator agreed with Ragains' assessment that the claimant had performed a diligent job search. In so finding, the arbitrator determined that Ragains' testimony was credible and supported by the record where he concluded that the claimant was unemployable in light of his "failed job search, his age, lack of transferable skills, physical restrictions, and the labor market in which he lived ***." Following Pleasant

Hill's termination of maintenance benefits on February 25, 2015, the arbitrator determined that "lack of benefits impeded his ability to search for work as it limited [the claimant's] ability to maintain internet and phone service, as well as being able to buy gas for his vehicle." The arbitrator concluded that the claimant had carried his burden of proving that he fell into the "odd-lot" category of permanent total disability (PTD), and Pleasant Hill had failed to offer evidence to show that a stable labor market existed for the claimant.

¶ 25 The arbitrator awarded the claimant 122-5/7 weeks of temporary total disability (TTD) benefits from October 25, 2013, to September 11, 2014, at $341.24 per week; 76-6/7 weeks of maintenance benefits from September 12, 2014, to March 3, 2016, at a weekly rate of $341.24; and PTD benefits for life commencing on March 4, 2016, at a weekly rate of $499.20.

¶ 26 Pleasant Hill filed a timely petition for review of the arbitrator's award of PTD benefits. On January 20, 2017, the Commission affirmed the arbitrator's decision finding that the claimant fell within the "odd-lot" category of PTD. On February 14, 2017, Pleasant Hill filed a petition for judicial review with the circuit court of Sangamon County, Illinois, requesting the court set aside the Commission's decision and grant further relief as justified.

¶ 27 On February 27, 2017, the claimant filed a motion to transfer venue asserting that neither the Commission nor the claimant resided in Sangamon County, Illinois, at any time while the events of the claim took place. The court granted the claimant's motion for change of venue and transferred the cause to Pike County, Illinois.

¶ 28 On August 7, 2017, Pleasant Hill filed its brief in support of its petition for judicial review with the circuit court of Pike County, Illinois. On November 9, 2017, the circuit court confirmed the Commission's decision. Pleasant Hill filed a timely notice of appeal on December 4, 2017.

¶ 29 II. Analysis

¶ 30 Pleasant Hill argues first on appeal that the Commission improperly listed the number of weeks of awarded TTD, despite the parties' stipulation filed on the request for hearing form. The arbitrator's decision, entered on March 28, 2016, awarded the claimant credit for $15,697.04 in TTD benefits; $6,824.80 in maintenance benefits; and $5,052.20 in medical services. The arbitrator also awarded the claimant 122-5/7 weeks of TTD benefits from October 25, 2013, to September 11, 2014, at $341.24 per week; 76-6/7 weeks of maintenance benefits from September 12, 2014, to March 3, 2016, at a weekly rate of $341.24; and PTD benefits for life commencing on March 4, 2016, at a weekly rate of $499.20.

¶ 31 The claimant argues, and Pleasant Hill concedes, that Pleasant Hill failed to specifically raise this issue at any point in the litigation, either before the Commission or on judicial review of the Commission's decision before the circuit court. It is well settled that failure to raise an issue or claim before the Commission results in waiver of that issue on review. *Pietrzak v. Indus. Comm'n of Illinois*, 329 Ill. App. 3d 828, 832 (2002). Thus, this issue has been waived.

¶ 32 Next, Pleasant Hill requests this court to find that the Commission erred in awarding the claimant maintenance benefits beyond the last submitted job search log on

August 19, 2015, and to vacate the maintenance award between August 20, 2015, and March 3, 2016. We decline to do so.

¶ 33 Section 8(a) of the Act (820 ILCS 305/8(a) West 2012)) permits an award of maintenance benefits while a claimant is engaged in a prescribed vocational rehabilitation program, and provides in pertinent part, that an employer shall compensate an injured employee "for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee." The determination of whether an employee is entitled to maintenance benefits is a question to be decided by the Commission, and its finding will not be disturbed unless against the manifest weight of the evidence. *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n,* 2012 IL App (1st) 113129WC, ¶ 39. Thus, the Commission's decision will not be reversed on review unless an opposite conclusion is clearly apparent. *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC, ¶ 39 (citing *University of Illinois v. Industrial Comm'n,* 365 Ill. App. 3d 906, 910 (2006)). Where the Commission's decision is supported by competent evidence, its finding is not against the manifest weight of the evidence. *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC, ¶ 39 (citing *Benson v. Industrial Comm'n,* 91 Ill. 2d 445, 450 (1982); *University of Illinois,* 365 Ill. App. 3d at 911-12).

¶ 34 In disputing the Commission's award of maintenance benefits, Pleasant Hill asserts that the claimant did not conduct a valid job search on and after February 23, 2015, per Bose's opinion, and the claimant failed to introduce supporting evidence of a self-directed job search. Here, Pleasant Hill essentially asks this court to reweigh the evidence that was presented at the hearing and disregard the inferences drawn by the

Commission. In particular, the Commission, in affirming and adopting the arbitrator's determination, found Ragains' testimony more credible than that of Bose, and determined that the claimant's job search was diligent provided his restrictions and qualifications.

¶ 35 First, the arbitrator indicated, and the Commission affirmed and adopted, that the parties had stipulated that the claimant was TTD from October 25, 2013, through September 11, 2014, and entitled to maintenance benefits from September 12, 2014, through February 23, 2015. The Commission noted, however, that Pleasant Hill terminated the claimant's benefits on February 25, 2015, for no stated reason other than Bose's opinion that the claimant, through vocational rehabilitation planning, was able to locate suitable work in his labor market. Despite this conclusion, Pleasant Hill failed to demonstrate that a stable labor market existed within which the claimant could locate suitable employment.

¶ 36 Next, the claimant presented evidence that he conducted his own self-directed job search in September 2014 and April 2015 when he submitted applications, although he lacked knowledge whether a particular position met his work restrictions, and performed interviews. Lastly, Ragains, an experienced, certified vocational counselor, concluded that the claimant's skills were nontransferable to other skilled or semi-skilled occupations, especially given the claimant's lifting restrictions, age and level of education. In fact, Ragains did not believe that the claimant could return to any job he had performed in the previous 15 years. Rather, the claimant could, at best, obtain unskilled work, given that "a stable labor market did not exist within which [the claimant] could find suitable and continuous employment."

¶ 37 Based on this evidence, the Commission apparently drew the inference that the claimant was engaged in a self-directed plan to obtain employment and that his efforts were sufficiently diligent to warrant granting him maintenance benefits during the disputed months. Considering the evidence presented, we decline to invade the province of the Commission, whose function it is "to judge the credibility of the witnesses, resolve conflicting testimony and draw reasonable inferences from the evidence presented." *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC, ¶ 31 (citing *Sisbro v, Industrial Comm'n*, 207 Ill. 2d 193, 207 (2003)). Consequently, we cannot say that the Commission's award of maintenance benefits between September 12, 2014, and March 3, 2016, was against the manifest weight of the evidence.

¶ 38 Lastly, Pleasant Hill challenges the Commission's determination that the claimant satisfied his burden of showing "odd lot" PTD. Pleasant Hill argues that the Commission's decision was against the manifest weight of the evidence because "a well known branch of the labor market exists for [the claimant] despite his permanent restrictions, namely, unskilled sedentary-light duty at or near minimum wage," all within one hour from his home in Pleasant Hill, Illinois. We disagree.

¶ 39 An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *Westin Hotel v. Industrial Comm'n of Illinois,* 372 Ill. App. 3d 527, 544 (2007) (citing *A.M.T.C. of Illinois v. Industrial Comm'n,* 77 Ill. 2d 482, 487 (1979)). The employee, however, need not be reduced to total physical incapacity before a PTD award may be granted. *Westin Hotel,* 372 Ill. App. 3d at 544 (citing *Ceco Corp. v. Industrial Comm'n,* 95 Ill. 2d 278,

286-87 (1983)). Instead, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability or quality that there is no reasonably stable market for them. *Westin Hotel,* 372 Ill. App. 3d at 544.

¶ 40 If the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove by a preponderance of the evidence that he fits into the "odd-lot" category, which consists of "one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market." *Id.* at 544. The claimant ordinarily satisfies his burden of proving that he falls into the "odd-lot" category in one of two ways: "(1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." *Id.* Whether a claimant falls into the "odd-lot" category of PTD is a factual determination to be made by the Commission and may only be set aside if it is against the manifest weight of the evidence. *Id.* Once the claimant establishes that he falls into the "odd-lot" category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Id.*

¶ 41 Here, we conclude that the claimant carried his burden of establishing by a preponderance of the evidence that he falls into the "odd-lot" category. First, the claimant presented evidence that he conducted a diligent job search in September 2014 and April 2015. Moreover, the claimant's testimony was bolstered by Ragains' credible testimony regarding the claimant's self-directed job search, the claimant's desire to obtain

employment and the fact that the claimant was not employable due to "his age, lack of transferable skills, physical restrictions, and the labor market in which he lived ***." Once this information was provided, the burden shifted to Pleasant Hill to prove the claimant was employable in an existing stable labor market and that such a market existed. As stated above, however, there was no evidence that Bose's job recommendations, specifically, to apply for positons as a "light van driver, unarmed security officer, janitorial supply clerk, or construction building material sales clerk" were available in the claimant's labor market. The fact of the matter is that Pleasant Hill failed to prove, at any time, that the claimant was employable in a stable labor market and that such a market existed.

¶ 42 Thus, we conclude that the Commission's award of maintenance benefits and its finding that the claimant was "odd-lot" PTD, based on credible testimony that the claimant had conducted a diligent job search, was not against the manifest weight of the evidence.

¶ 43 III. Conclusion

¶ 44 We affirm the decision of the circuit court of Pike County which confirmed the Commission's decision.

¶ 45 Affirmed.