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2012 IL App (4th) 110669WC-U

NO. 4-11-0669WC

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

Illinois Workers' Compensation Commission Division

R.J. POWER PLUMBING & HEATING,) Appeal from
Appellant,) Circuit Court of
v.) Sangamon County
THE WORKERS' COMPENSATION) No. 10MR468
COMMISSION, <i>et al.</i> (Charles Harris, Appellee).)
) Honorable
) Peter C. Cavanagh,
) Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held:* (1) The Commission's decision to award claimant wage differential benefits was not against the manifest weight of the evidence and (2) the Commission's decision to award claimant maintenance benefits was not against the manifest weight of the evidence.

¶ 2 Employer, R.J. Power Plumbing & Heating, appeals from an order of the circuit court confirming a decision of the Worker' Compensation Commission (Commission), awarding claimant, Charles Harris, maintenance benefits of \$708.74 per week for 8 5/7 weeks, from November 22, 2007, through January 22, 2008; and wage differential benefits of \$550.47 per week from April 2, 2005, through November 21, 2007, January 23, 2008, through April 9, 2009, and commencing April 10, 2009, for the duration of claimant's disability. We affirm the judgment of the circuit court confirming the Commission's decision.

¶ 3 The parties are aware of the procedural history and facts pertinent to a resolution of this appeal and they will not be reviewed in detail.

¶ 4 On May 13, 2009, the arbitrator issued a decision in which he found claimant demonstrated an impairment of earnings. The arbitrator did not find the vocational rehabilitation report prepared by Karen Kane credible. The arbitrator awarded claimant wage differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2002)). Further, the arbitrator found claimant entitled to additional maintenance benefits from November 22, 2007, through January 22, 2008, the period of time claimant became unemployed as a bartender and later resumed full-time work as a manager and bartender. The arbitrator restated his earlier finding that Dr. Mark Greatting's work restrictions were more credible than Dr. Evan Crandall's opinions.

¶ 5 Employer sought a review of the arbitrator's decision. On July 9, 2010, a majority of the Commission issued a decision affirming and adopting the arbitrator's decision.

¶ 6 Thereafter, employer sought judicial review of the Commission's decision in the circuit court of Sangamon County. On July 15, 2011, the circuit court confirmed the Commission's decision (with the exception of reversing an award of medical expenses in the amount of \$100 not at issue in this appeal).

¶ 7 This appeal followed.

¶ 8 Initially, employer contends the Commission's decision to award claimant a wage differential award is against the manifest weight of the evidence. We disagree.

¶ 9 To qualify for a wage differential award, a claimant must prove: (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2)

an impairment of earnings. 820 ILCS 305/8(d)(1) (West 2002); *Copperweld Tubing Products, Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633, 931 N.E.2d 762, 765 (2010). Whether a claimant has satisfied each element is a question of fact to be resolved by the Commission, whose determination in this regard will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 1061, 853 N.E.2d 40, 45 (2006). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006).

¶ 10 Claimant presented ample evidence that he is unable to return to his "usual and customary line of employment" as a pipefitter. Dr. Greatting testified to this fact. The permanent restrictions issued by Dr. Greatting were based on a functional capacity evaluation. The Commission, by adopting the arbitrator's decision, restated its earlier finding that Dr. Greatting's work restrictions were more credible than Dr. Crandall's opinions. Employer failed to offer claimant work within his restrictions. Further, claimant was advised by his union that there were no light duty jobs within his restrictions. Therefore, we focus on whether claimant demonstrated an impairment of earnings.

¶ 11 Claimant presented ample testimony that his injury reduced his earning capacity. Claimant testified he began working as a bartender on April 2, 2005. Claimant earned \$7.00 per hour and worked a total of twenty-seven hours per week, yielding an average weekly wage of \$189 per week. Claimant's journeyman wage rate as of April 1, 2006, was \$33.85 per hour. Claimant worked an average of 38.70 hours per week while employed by employer. Therefore, as of April 1, 2006, had claimant continued to work in his previous occupation, claimant would

have been able to earn an average weekly wage of \$1,310.08. Claimant's earnings were reduced by \$1,121.08.

¶ 12 Further, claimant began work as a bartender and manager on January 23, 2008. Claimant worked 40-45 hours per week earning \$8.25 per hour. Claimant earned \$18,672.33 from January 23, 2008, to December 31, 2008, including 246 1/2 hours of overtime work at \$12.37 per hour. Claimant earned \$4,627.21 from January 7, 2009, through March 18, 2009, a total of 59 6/7 weeks. Claimant earned a total of \$23,299.54 yielding an average weekly wage of \$389.25. Claimant's union contract indicated that as of April 1, 2009, claimant would have been able to earn \$37 per hour were he able to continue in his previous occupation as a pipefitter. As noted above, claimant worked an average of 38.70 hours per week while employed by employer in the year preceding his injury. Accordingly, were claimant able to resume his prior occupation as a pipefitter, he would be able to earn an average weekly wage of \$ 1,431.90. Therefore, as a result of the injury claimant demonstrated a reduction in his earnings of \$1,042.65 per week.

¶ 13 Nevertheless, employer argues claimant is not entitled to a wage differential award under section 8(d)(1). According to employer, claimant failed to establish his true earning capacity because he did not secure suitable employment within his restrictions. In particular, employer asserts claimant's job search between February 1, 2005, and February 20, 2005, and between April 1, 2005, and May 3, 2005, was "de minimus *** self-serving, and disingenuous."

¶ 14 There is no affirmative requirement under section 8(d)(1) that a claimant even conduct a job search. Rather, as discussed above, a claimant need only demonstrate an impairment of earnings. See *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 731, 734 N.E.2d

482, 490 (2000). Further, the rate of pay for the bartender positions fell within or exceeded the \$6.50 to \$8 range the claimant's vocational rehabilitation counselor believed he could obtain. Under the facts of this case, the Commission could reasonably rely on claimant's work as a bartender in determining that he had proven that his earnings were impaired. The Commission's finding that claimant was entitled to a wage differential award is not against the manifest weight of the evidence.

¶ 15 Employer next contends that the Commission erred in awarding claimant maintenance benefits from November 22, 2007, through January 22, 2008. The Commission clarified its award of maintenance during the period of time claimant became unemployed as a bartender and later resumed full-time work as a manager and bartender, stating:

"While Petitioner acknowledged working for The Cove during this period, he made it clear that he merely 'filled in,' working one day every other weekend. He did not begin working full-time for The Cove until January 23, 2008. In the Commission's view, the fact that Petitioner earned occasional wages prior to January 23, 2008 should not affect his claim for maintenance, especially given that Respondent never provided vocational assistance in this case and that the 'filling in' led to full-time employment plus overtime."

¶ 16 There is no rule prohibiting claimant-created and directed vocational rehabilitation programs. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 503, 812 N.E.2d 65, 70-71 (2004). A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that

rehabilitation will increase his earning capacity. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432, 454 N.E.2d 672, 676 (1983). The evidence in this case shows claimant suffered a work-related injury and the restrictions arising from that injury impaired his earning power. Further, the record establishes claimant's self-created vocational program increased his earning capacity as demonstrated by the positive results of his job search. Therefore, the Commission properly awarded claimant maintenance benefits for the period of time he was undertaking his self-created and directed rehabilitation program.

¶ 17 Based upon the foregoing analysis, we affirm the judgment of the circuit court confirming the Commission's decision.

¶ 18 Affirmed.