NO. 5-10-0144WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CASSENS TRANSPORT COMPANY, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Noal LaRoe, Appellee).	)))))))))	Appeal from the Circuit Court of Randolph County. No. 09-MR-101 Honorable William A. Schuwerk, Jr., Judge, presiding.

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

R U L E 2 3 O R D E R

Held: The Commission's decision remanding the case to the arbitrator for further proceedings, including a determination of vocational rehabilitation, was not a final, appealable order, and the circuit court lacked jurisdiction on review.

The claimant, Noal LaRoe, filed an application for adjustment of claim against his employer, Cassens Transport Company, seeking workers' compensation benefits for injuries to his back and lower extremities sustained on August 12, 2004. The claim proceeded to an arbitration hearing under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2004)).

On July 10, 2008, the arbitrator found that the claimant sustained accidental injuries that arose out of and in the course of his employment. At the time of the decision, the claimant was 37 years old. The arbitrator found that the claimant was entitled to an odd-lot permanent total disability as of May 7, 2008. The arbitrator determined that the claimant was

entitled to temporary total disability (TTD) benefits from August 14, 2004, through June 20, 2006. The arbitrator found that the claimant was entitled to maintenance benefits from June 21, 2006, through March 29, 2008. The arbitrator credited the employer for amounts it paid. The arbitrator found that the employer was liable for the costs of medical care associated with the claimant's complaints, because the care rendered was reasonable and necessary. The claimant's claims for mileage and penalties were denied.

The employer appealed to the Illinois Workers' Compensation Commission (Commission), which vacated the arbitrator's finding of maximum medical improvement and the permanency award, converted the award of maintenance to a TTD award, awarded TTD benefits from May 7, 2008, through June 2, 2008, ordered the employer to prepare a vocational rehabilitation assessment in accordance with the regulations adopted by the Commission governing practice before the Workers' Compensation Commission–specifically, section 7110.10 of Title 50 of the Illinois Administrative Code (50 Ill. Adm. Code §7110.10, amended at 30 Ill. Reg. 11743, 11747, eff. June 22, 2006), affirmed all other aspects of the arbitrator's decision, and remanded to the arbitrator for further proceedings. The employer filed a timely petition for review in the circuit court of Randolph County. The circuit court confirmed the Commission's order, and the employer filed a timely notice of appeal.

BACKGROUND

The claimant began working for the employer on August 10, 1998, driving a tractor-trailer truck hauling new vehicles. His job included loading the vehicles on the truck and chaining them down. The truck has no walkway, so the claimant had to climb the frame of the hauler to chain the vehicles in place.

On August 12, 2004, the claimant, while unloading minivans, fell from the top level of the trailer. He landed on his buttocks with his left ankle twisted under him. As a result

of his injury, on April 8, 2005, Dr. Robert Schultz performed an anterior spinal fusion on the claimant at the L5-S1 level. There was a nonunion of the fusion, and on December 8, 2005, Dr. David Robson and Dr. David Kennedy performed a posterior laminectomy and fusion. Dr. Robson was originally the employer's examining physician, but he became the claimant's treating physician.

The claimant suffered from pain problems postoperatively, and Dr. Barry Feinberg, a pain management specialist, prescribed methadone. The claimant was discharged on December 8, 2005, and instructed to take methadone every six hours as needed for pain and to follow up with his primary care physician regarding home medications. On December 20, 2005, the claimant received a letter from Colleen Murphy, RN, MSN, for Dr. Robson, stating, in pertinent part, as follows:

> "Here is the refill prescription for Methadone as you requested. Please note the change in how you should take the medication. Dr. Robson has decided to monitor this medication without using a pain management specialist."

The claimant continued his care with Dr. Robson. On May 30, 2006, Dr. Robson examined the claimant and found the fusion to be solid. He decreased the claimant's methadone dosage.

On June 14, 2006, the claimant underwent a functional capacity evaluation (FCE) at Sparta Community Hospital. The examiner found that the claimant "appeared to give valid/consistent effort per rise in heart rate." He found, in pertinent part, as follows:

> "Worker is currently performing in the Heavy work demand level, which does meet employer reported job demands at this time. Despite worker's subjective reports of pain and inability to perform his employer's demands, worker should be able to return to work in most all capacities. Worker reports inability to sustain sitting for prolonged periods of driving. Final determination for return to work from physician."

On June 20, 2006, the claimant went to Dr. Robson complaining of low back pain and left leg radiating pain following his FCE. Dr. Robson permanently restricted the claimant from bending, stooping, or twisting. He stated that the claimant required brief hourly position changes. The claimant was permanently restricted to the moderate work range, only occasionally lifting 30 pounds and only lifting 20 pounds repetitively. In his office notes, Dr. Robson wrote that it was his opinion that the claimant was at maximum medical improvement but that he still had some medication issues. He planned to wean the claimant off methadone over the following "several months." Dr. Robson's July 20, 2006, office notes indicate that he planned to wean the claimant off methadone "by the end of the year."

Dr. Robson examined the claimant again on September 21, 2006, December 19, 2006, March 14, 2007, September 12, 2007, and March 12, 2008. He found the claimant's condition unchanged, and he continued the claimant's work restrictions. At each visit, Dr. Robson noted that the claimant still required pain medication, and the doctor renewed his methadone prescription.

Dr. Tom Reinsel, an orthopedic surgeon specializing in spine surgery, testified that he examined the claimant, at the request of the employer, on September 25, 2006. The claimant testified that his examination with Dr. Reinsel took only 15 minutes, and no physical examination was conducted. Dr. Reinsel testified that, in his opinion, the claimant had reached maximum medical improvement and was capable of meeting the job requirements of his employer. In a letter to the employer's attorney dated December 13, 2006, Dr. Reinsel wrote that he felt that there was a reasonable chance that the claimant could be weaned from methadone to nonnarcotic medications.

On January 15, 2007, Dr. John Graham of the Pain Treatment Center, Inc., examined the claimant and reviewed his medical records. Dr. Graham found that the claimant had a "good outcome from his fusion at L5-S1 on the second surgery." He recommended that the

claimant be weaned off methadone and stated that he would benefit from a regimen that would provide him with more round-the-clock relief.

On September 25, 2007, J. Stephen Dolan, a certified rehabilitation counselor, gave the claimant a 4-hour-and-15-minute vocational and rehabilitation assessment. In his written assessment, Mr. Dolan noted that the claimant was seated in a well-cushioned executive office chair during the assessment, and he stood 12 times. The claimant was given a Wide Range Achievement Test to test basic academic skills necessary for effective learning, communication, and thinking. His composite reading ability was at the fourth percentile, meaning 96% of people in his age category, 35 to 44, read better than he does. His spelling was at the second percentile, and his math was at the twenty-first percentile. Mr. Dolan concluded that the claimant was credible. Mr. Dolan testified as follows:

> "My opinion was that he was not employable on a prolonged basis and I don't think that he had access to a reasonably stable labor market and the reasons that I say that, his restrictions alone limit him to or tremendously limit the number of jobs that he would be able to do, most of the jobs that would meet his restrictions are going to have requirements in terms of education and training and that [claimant] does not have and is unlikely ever to have, but even more importantly he has an out of control pain problem and is being prescribed methadone that is a very strong and rather unusual pain treatment program[;] if his pain problem is out of control as he described to me I don't think he is employable."

The claimant testified that the truck he drove for the employer had a heavy clutch and that, since the accident, he could no longer repeatedly push such a clutch. He also stated that he was no longer able to twist around to look out the back window of the truck to load the vehicles. In addition, he now lacked the strength to chain the vehicles in place.

The claimant testified that he applied for a job with Whelan Security. He took an

exam, submitted to an FBI background check, and was issued a type of security guard license. At the end of January 2008, once these steps were complete, he called the company to be scheduled to work. The next day, the main office telephoned the claimant and told him he was ineligible but refused to tell him why. He spoke with the individual who hired him, and that person also was not told why the claimant was ineligible.

The claimant testified that he took a job at a hardware store named Buchheit. He worked there from the beginning of April 2008 through May 7, 2008. He stated that the pain was unbearable. He stated that if he worked Monday through Friday, by Thursday he could hardly walk. He said that he was less depressed when he had the job.

Frank Swalley, the claimant's department manager at Buchheit, testified that when the claimant first came in to work, his gait was normal but that after a "couple of hours you could just tell he was hurting or wore out." Mr. Swalley stated that the claimant tried hard but that there were a lot of things he was unable to do.

On May 7, 2008, the claimant went to see Dr. Robson because of the pain caused by his job at Buchheit. Dr. Robson rewrote the previous restrictions and told him that there was no medical reason to change them. The claimant was terminated at Buchheit on May 7, 2008, because, due to his medical condition, he was unable to fulfill his job requirements.

The claimant testified that he loved his job with the employer and that it was the best job he ever had. He stated that he never received any vocational services from the employer and was never offered any type of light-duty work.

The claimant testified that at one point, when he thought the employer might ask him to return to work, he went through a safety course and had a Department of Transportation physical. The Department of Transportation found that he was not qualified to drive a commercial vehicle due to his methadone usage.

The parties stipulated that John Thyer, the claimant's union representative, would

testify that, with the restrictions Dr. Robson placed on the claimant's activities, he could not meet the physical requirements of his job with the employer.

The arbitrator concluded that the claimant was entitled to an odd-lot permanent total disability as of May 7, 2008. He further found as follows: "Respondent refused to accommodate work restrictions and refused to provide vocational assistance. The opinions expressed by the vocational expert are undisputed. Petitioner conducted a self-directed job search. He was only able to find temporary sales work until his restrictions prevented him from continuing in that position." The claimant was awarded TTD benefits from August 14, 2004, through June 20, 2006, and maintenance benefits from June 21, 2006, through March 29, 2008. The arbitrator found as follows:

> "Respondent knew Petitioner could not return to his regular employment as a truck driver. Respondent elected not to provide any vocational assistance to Petitioner. *** The physician who performed the second surgery and who placed permanent work restrictions on Petitioner was Respondent's initial examiner. Respondent now wants to ignore his opinions when they are adverse to their position."

The employer appealed, arguing that the arbitrator's decision that the claimant was entitled to an odd-lot permanent total disability was contrary to the facts and law, that the arbitrator's decision to award TTD after June 14, 2006, was contrary to the facts and law, and that the facts and law support an award for permanent disability of 40% of the body as a whole. The Commission found that the claimant had not yet reached maximum medical improvement, and it vacated the award of maintenance from June 21, 2006, through March 29, 2008 and the award of odd-lot permanent total disability. It ordered the employer to pay the claimant $890.65 per week in TTD from August 14, 2004, through March 29, 2008, and from May 7, 2008 through June 2, 2008. It ordered that the claimant was entitled to prospective medical care in the form of a pain management program designed to wean him

from methadone and to start him on an alternative pain medication. The Commission ordered the employer, in consultation with the claimant, to prepare a vocational rehabilitation assessment in accordance with section 7110.10. The Commission remanded the cause to the arbitrator for further proceedings consistent with its decision. One Commissioner dissented. The circuit court of Randolph County, after hearing arguments and considering the pleadings and material submitted, found that the Commission's decision was not against the manifest weight of the evidence and confirmed it. The employer filed a timely notice of appeal.

ANALYSIS

Although the parties do not raise the issue of the circuit court's jurisdiction in this appeal, this court is required to do so *sua sponte*. *Consolidated Freightways v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1077, 1079, 870 N.E.2d 839, 840 (2007). If the circuit court lacked subject matter jurisdiction, then its order is void and of no effect. *Rojas v. Illinois Workers' Compensation Comm'n*, __ Ill. App. 3d __, 942 N.E.2d 668 (2010). The failure of a party to object to the lack of jurisdiction cannot confer jurisdiction upon the court. *Taylor v. Industrial Comm'n*, 221 Ill. App. 3d 701, 703, 583 N.E.2d 4, 6 (1991). Subject matter jurisdiction either exists or it does not, and it cannot be waived, stipulated to, or consented to by the parties. *Jones v. Industrial Comm'n*, 335 Ill. App. 3d 340, 343, 780 N.E.2d 697, 700 (2002).

"Only final determinations of the Commission are appealable." *Bechtel Group, Inc. v. Industrial Comm'n*, 305 Ill. App. 3d 769, 772, 713 N.E.2d 220, 221 (1999). A judgment is final if it determines the litigation on the merits, but an order that leaves a case pending and undecided is not a final order. *Honda of Lisle v. Industrial Comm'n*, 269 Ill. App. 3d 412, 414, 646 N.E.2d 318, 320 (1995).

In *International Paper Co. v. Industrial Comm'n*, 99 Ill. 2d 458, 459 N.E.2d 1353 (1984), the supreme court determined that a decision of the Commission remanding the case

to the arbitrator for further proceedings was not a final order. In that case, the arbitrator awarded the claimant TTD for 45 and 4/7 weeks and permanent partial disability (PPD) of 15% of the right arm. *International Paper Co.*, 99 Ill. 2d at 459, 459 N.E.2d at 1353. On review, the Commission found that the claimant's condition had not reached a state of permanency, reversed the arbitrator's PPD award, extended the TTD award to 90 weeks, found that the claimant was entitled to additional medical expenses and vocational rehabilitation, and remanded to the arbitrator for further proceedings. *International Paper Co.*, 99 Ill. 2d at 459, 459 N.E.2d at 1353. In determining that the decision of the Commission was not a final order, the court stated the following:

> "In the case at bar, the Commission ordered the case remanded to the arbitrator. The case reached the circuit court, therefore, before administrative involvement in the case had been terminated. By its own terms, the decision of the Commission mandated further administrative proceedings. We find, therefore, that the decision of the Commission was not a final appealable determination. As such, the circuit court did not have jurisdiction to review the Commission decision." *International Paper Co.*, 99 Ill. 2d at 465-66, 459 N.E.2d at 1357.

Here, as in *International Paper Co.*, the Commission vacated the arbitrator's permanency award, extended TTD benefits, ordered additional medical benefits, and remanded to the arbitrator for further proceedings, including a determination of vocational rehabilitation. It is apparent that the Commission's decision requires further administrative proceedings. Thus, its decision was not a final, appealable order, and the circuit court lacked jurisdiction on review. Consequently, the decision of the circuit court should be vacated and this cause remanded to the arbitrator, as the Commission ordered, for further proceedings.

However, the employer argues that the Commission erred as a matter of law by exceeding its authority in awarding benefits which were not requested by either party. We

disagree.

The employer argues that both parties submitted a request-for-hearing form in accordance with section 7030.40 of Title 50 of the Illinois Administrative Code (50 Ill. Adm. Code §7030.40 (1996)) stipulating to the issues. Neither party requested a determination of the issue of prospective medical care, and the claim did not proceed to arbitration as a section 19(b) petition (820 ILCS 305/19(b) (West 2004)). The claimant did not request TTD beyond the date of the hearing or vocational assistance. The employer argues that there was no dispute regarding the claimant's medical condition or whether he had reached maximum medical improvement at the time of the hearing. The Commission found that the claimant had not reached maximum medical improvement and that he is entitled to prospective care in the form of a pain management program designed to wean him from methadone. It ordered the employer, in consultation with the claimant and his attorney, to prepare a vocational rehabilitation assessment in accordance with section 7110.10 of Title 50 of the Illinois Administrative Code (50 Ill. Adm. Code §7110.10, amended at 30 Ill. Reg. 11743, 11747, eff. June 22, 2006). The employer asserts that because section 7030.40 is binding on the parties with regard to the claims made at the hearing, the Commission exceeded its authority in awarding benefits that were not requested by either party.

In workers' compensation cases, the Commission exercises original jurisdiction. *R&D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010). The Commission has authority to determine all unsettled questions and is not bound by the arbitrator's findings. *Orkin Exterminating Co. v. Industrial Comm'n*, 172 Ill. App. 3d 753, 756, 526 N.E.2d 861, 864 (1988). The Commission weighs the evidence presented at the arbitration hearing and determines where the preponderance of the evidence lies. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). A reviewing court will reverse the Commission only if its fact determinations are against the

manifest weight of the evidence or its decision is contrary to law. *Durand*, 224 Ill. 2d at 64, 862 N.E.2d at 924.

Although a case brought before the Commission is in essence an appeal, the Commission has original jurisdiction in cases that come before it and can consider a new theory of recovery in a case brought on review. *Caterpillar Tractor Co. v. Industrial Comm'n*, 215 Ill. App. 3d 229, 238-39, 574 N.E.2d 1198, 1203 (1991). The procedure in workers' compensation cases is generally informal, to facilitate avoiding the cumbersome procedures and technicalities of pleadings and in order to reach the right decision by the shortest and quickest possible route. *Caterpillar Tractor Co.*, 215 Ill. App. 3d at 239, 574 N.E.2d at 1204. Because the Commission must decide a case on the evidence presented and on the merits of the case before it, it must not be restricted to the information provided on a form, but as long as a party's substantial rights are not prejudiced, it may *sua sponte* consider a new theory of recovery. *Caterpillar Tractor Co.*, 215 Ill. App. 3d at 239, 574 N.E.2d at 1204.

The Commission is an administrative agency whose powers are limited to those granted by the legislature, so that any action taken by the Commission must be specifically authorized by statute. *Alvarado v. Industrial Comm'n*, 216 Ill. 2d 547, 553, 837 N.E.2d 909, 914 (2005). Section 19 of the Act sets out how any disputed questions of law or fact shall be determined. 820 ILCS 305/19 (West 2004). Section 19(b) of the Act provides, in pertinent part, "The jurisdiction of the Commission to review the decision of the arbitrator shall not be limited to the exceptions stated in the Petition for Review." 820 ILCS 305/19(b) (West 2004). Section 19(e) of the Act provides, in pertinent part, "If a petition for review and agreed statement of facts or transcript of evidence is filed, as provided herein, the Commission shall promptly review the decision of the arbitrator and all questions of law or fact which appear from the statement of facts or transcript of evidence." 820 ILCS 305/19(e)

(West 2004). These sections illuminate that, when reviewing an arbitrator's decision, the Commission is not limited to reviewing only the exceptions stated in the petition for review but may review *all* questions of law or fact which appear from the transcript of evidence.

In *Klein Construction v. Illinois Workers' Compensation Comm'n*, 384 Ill. App. 3d 233, 235, 892 N.E.2d 112, 113 (2008), the claimant sought a review of the arbitrator's decision but failed to file a statement of exceptions as required by section 7040.70 of Title 50 of the Illinois Administrative Code (50 Ill. Adm. Code §7040.70, amended at 14 Ill. Reg. 13173, eff. Aug. 1, 1990). The employer argued that the failure to file a statement of exceptions in violation of section 7040.70 constituted a waiver of all the issues on review before the Commission. *Klein Construction*, 384 Ill. App. 3d at 236, 892 N.E.2d at 113. The court held, "Once a timely petition to review an arbitrator's decision has been filed along with an agreed statement of facts or a transcript of the evidence, the Commission is obligated to review all questions of law or fact which appear from the transcript of evidence, and Rule 7040.70(d) cannot relieve it of that obligation." *Klein Construction*, 384 Ill. App. 3d at 237, 892 N.E.2d at 115.

In the instant case, the employer argues that the request-for-hearing form filed June 2, 2008, stipulated that the nature and extent of the injury were at issue. In its statement of exceptions to the arbitrator's award, it asserted that the claimant failed to show he was permanently disabled and could not return to gainful employment. While neither party disputed that the claimant had reached maximum medical improvement, a dispute existed regarding the nature and extent of the claimant's injury. Because the Commission has original jurisdiction, it could *sua sponte* determine that the claimant had not reached maximum medical improvement and that he required prospective care. This decision did not prejudice the employer because the nature and extent of the claimant's injury is an issue that remains to be decided on remand.

CONCLUSION

Since the decision of the Commission was not a final order, the order of the circuit court must be vacated and this cause remanded to the arbitrator for further proceedings.

Order vacated; cause remanded.