No. 5-10-0183WC
Order filed April 22, 2011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

AMEREN CIPS,	)	Appeal from the Circuit Court
	)	of Williamson County.
Appellant,	)	
	)	
v.	)	No. 09-MR-133
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*	)	Honorable
	)	Ronald R. Eckiss,
(Randy Edmonds, Appellee).	)	Judge, Presiding.

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

ORDER

Held: The Commission's finding that claimant is entitled to permanent total disability benefits is not against the manifest weight of the evidence where claimant proffered medical evidence of permanency which the Commission found credible and there was conflicting evidence regarding claimant's employability which the Commission resolved in claimant's favor.

Claimant, Randy Edmonds, was injured on July 9, 2004, while working for respondent, Ameren CIPS. At the hearing on claimant's application for adjustment of claim, the only issue in

dispute was the nature and extent of the injury. After determining that claimant was permanently and totally disabled as a result of the industrial accident, the arbitrator awarded claimant $745.30 per week for life. See 820 ILCS 305/8(f) (West 2008). The Illinois Workers' Compensation Commission (Commission) affirmed and adopted the decision of the arbitrator. Thereafter, the circuit court of Williamson County confirmed. On appeal, respondent argues that claimant failed to establish that he is entitled to permanent and total disability (PTD) benefits. We affirm.

I. BACKGROUND

Claimant, a high school graduate with some college education, was hired by respondent, a public service utility company, in 1977. Since then, claimant has worked for respondent in various capacities, including stints as a janitor, meter reader, gas utility man, line clearance journeyman, and line clearance foreman. Most recently, claimant worked as a lineman, which involved installing, maintaining, and repairing overhead and underground electrical equipment. In mid-2004, claimant noted an increase in low back pain which corresponded with a gradual increase in his workload. On July 9, 2004, claimant sought medical treatment after he awoke with right-sided lower back pain and numbness in the right thigh and right lower extremity which made it difficult to ambulate. Respondent accepted compensability of this injury, and the matter proceeded to arbitration on July 24, 2008, on the issue of the nature and extent of the injury.

At the time of the injury claimant was 45 years old. Claimant was initially treated by Dr. Kevin Rutz. Dr. Rutz diagnosed low back pain and right-sided lumbar radiculopathy. He recommended lumbar epidural steroid injections, physical therapy, various pain medications, and exercises for pain control. Claimant reported no significant benefit from this treatment. As a result,

at Dr. Rutz's suggestion, nerve-root blocks were administered. The nerve-root blocks also proved unsuccessful, and Dr. Rutz recommended surgical intervention. To this end, on September 3, 2004, claimant underwent a microdiscectomy and foraminotomy at L3-4 on the right. Claimant did not report any significant improvement with the lumbar surgery, and he sought a second opinion from Dr. Kee Park, a neurosurgeon, on November 22, 2004.

Dr. Park's progress notes indicate that claimant's chief complaint was back, right hip, and leg pain with numbness and weakness. Dr. Park diagnosed an L3 radiculopathy manifested by numbness and weakness with persistent pain. Ultimately, Dr. Park recommended further surgery. On March 4, 2005, Dr. Park performed a "redo" discectomy at L3-4 with fusion. Following the second procedure, claimant again reported no significant improvement of his right leg pain. On August 2, 2005, upon Dr. Park's referral, claimant underwent a functional capacity evaluation (FCE). The FCE lasted less than 2½ hours before the evaluator stopped it because of several "near falls" by claimant. Ultimately, the FCE was determined to be invalid because of significant symptom magnification type behavior. On August 18, 2005, Dr. Park authorized claimant to return to work with the following permanent restrictions: no lifting more than 10 pounds; limited walking; occasional bending, twisting, and squatting; and limited sitting with accommodations that allow him to change his position frequently for pain control. Dr. Park stated that pending an MRI, claimant would be at maximum medical improvement (MMI). The MRI referenced by Dr. Park was taken late in August 2005. A progress note from Dr. James Wachter, claimant's family physician, indicated that as of November 2005, claimant had been released to MMI. At that time, respondent ceased paying claimant temporary total disability benefits.

On January 23, 2007, claimant was evaluated by Dr. Anne-Marie Puricelli for long-term disability. Dr. Puricelli's diagnosis was status postlumbar surgeries with chronic low back pain. Dr. Puricelli did not believe that claimant was disabled from all occupations. She stated that claimant could return to work with the following restrictions: no lifting more than 10 pounds, no climbing ladders, and standing up to four hours per day with minimal walking. In addition, Dr. Puricelli recommended that claimant be prohibited from performing safety-sensitive positions at work, including driving commercial vehicles.

Dr. Wachter testified by evidence deposition that he treated claimant for various conditions both prior to and after claimant's July 2004 injury. Following claimant's second back surgery, Dr. Wachter examined claimant on April 12, 2005. At that time, claimant related that the surgeries did not result in significant improvement and he complained of sadness from being in constant pain. Dr. Wachter diagnosed depression and chronic back pain. He prescribed Cymbalta for depression and suggested claimant seek pain management. Dr. Wachter attributed the depression to multiple stressors, primarily related to his work injury. Dr. Wachter also recommended a four-pronged steel cane to assist with ambulation because of weakness in claimant's right leg. Dr. Wachter continued to see claimant throughout 2005, and claimant continued to report symptoms of depression and pain. Dr. Wachter noted that during this time period claimant was on various medications, including MS Contin, Neurontin, and Ambien. The latter medication, a sleeping aid, was prescribed because claimant's back problems had exacerbated a preexisting sleeping disorder.

At an examination on April 20, 2006, claimant reported continued weakness in his right lower extremity. At that time, Dr. Wachter noted atrophy of the right leg muscles. As a result,

claimant was only able to walk 10 minutes at a time before becoming fatigued and having to lie down. Claimant also reported that he was able to sit and stand for no more than 10 to 20 minutes at a time before having to lie down, that lying down is the only position that does not increase his pain, and that he has become less active because of the pain. Dr. Wachter found that claimant was not able to work, noting that he did not have the physical ability for standing, walking, or other manual work and that he does not have the ability to sit for extended periods of time. As a result of these "significant limitations," Dr. Wachter did not believe that claimant was employable. Dr. Wachter testified that during an examination of claimant on March 6, 2008, claimant continued to be in chronic pain. Dr. Wachter believed that claimant's back problems were permanent and that claimant remained unemployable. On cross-examination, Dr. Wachter admitted that he did not consult any vocational records or opinions in assessing claimant's employability.

Respondent arranged for a vocational assessment with Becky Johnson at CorVel. In her report, Johnson noted that claimant had reached MMI and had been released to return to work with a 10-pound lifting restriction. After reviewing claimant's educational and work histories, his skills and abilities, and his physical restrictions, Johnson opined that claimant could perform jobs in various fields, including, but not limited to, positions as an electrical estimator, shop superintendent, maintenance worker, or reservation clerk. After Johnson left CorVel's employment, Adrian Byrd prepared a labor market survey with respect to claimant. Byrd noted that claimant was not capable of working in his previous position as a lineman for respondent because of his physical restrictions. However, she concluded that claimant was employable in other positions at a pay range of between $9 and $26.84 per hour based on the following restrictions: no lifting more than 10 pounds, no ladder

climbing, no driving of commercial vehicles, no standing more than four hours a day, and minimal walking. On cross-examination, Byrd admitted that she never personally evaluated claimant, she did not review the testimony of Dr. Wachter, and she did not consider the side effects of claimant's medications. She also admitted that claimant's employability could be impacted by excessive sleeping as a result of the medications and absences from any job opportunities as a result.

John Grenfell, a certified rehabilitation counselor, conducted a vocational evaluation of claimant at his attorney's request. At the time Grenfell examined claimant, he was taking MS Contin and Neurontin. Grenfell stated that these medications tend to make a person drowsy, and given the extent of the medications, he expressed concern as to claimant's concentration. Grenfell concluded that given the restrictions of changing positions frequently and no lifting more than 10 pounds, the extent of claimant's pain, and the effects of claimant's medication, claimant would not be able to engage in full-time work. Grenfell disagreed with Johnson's assessment that claimant is employable, on the basis that Johnson failed to consider all of the work restrictions imposed on claimant. Significantly, she did not consider the fact that claimant has to move around frequently, which, according to Grenfell, would render claimant unproductive. Grenfell also stated that there was no indication that Johnson considered the impact of claimant's medications.

At the arbitration hearing, claimant testified that he has not looked for any type of employment following his release. Claimant stated that he has difficulty sitting, standing, or undertaking any type of meaningful physical activity. For instance, claimant explained that following the surgeries, he attempted to paint four house shutters in his garage. However, he was only able to paint for a short time before he began "hurting," and it ultimately took him six days to

complete the task. Claimant also testified that it is difficult for him to walk on concrete floors, that his ability to climb stairs using his right leg as the lead has been impeded, that he experiences constant pain in his right leg, and that he uses a cane for walking because of the weakness in his right leg. Claimant compared the pain in his right thigh to being struck with a baseball bat. Claimant testified that he takes medication, including MS Contin and Neurontin, to "deaden" the pain in his leg. He also indicated that the leg pain affects his sleep. As a result, he was prescribed a sleeping aid. However, as a result of the combination of lack of sleep, his pain medications, and the sleeping aid, he sometimes sleeps more than 24 consecutive hours and suffers from depression. Claimant also stated that the medications affect his concentration.

Claimant acknowledged that he maintains an active hunting license. Claimant stated that prior to being hurt he would hunt more than a hundred days a year. Since November 2005, he has tried to hunt about a dozen times, including a trip to Mexico to turkey hunt. Claimant testified that the trip to Mexico was booked prior to his surgeries, and when he tried to cancel it, he was told that his disability could be accommodated. Even so, claimant described the hunt as a "handicap hunt," adding that because of his condition he was only able to hunt part of one day on the trip. Claimant also admitted that he has hunted deer behind his house. However, this did not involve using a stand or climbing a ladder, but rather a "ground blind," and he was assisted by his children. Although claimant's telephone number is listed on a hunting website known as VooDoo Outfitters, claimant denied earning any money as a hunter or a hunting guide after November 2005. Claimant explained that when people call him about hunting he refers them to George Briscoe, the owner of VooDoo Outfitters.

Respondent hired Garth Vanskike, a private investigator based in Detroit, Michigan, to investigate claimant. Vanskike testified that he spoke with claimant in February 2007 about booking a hunt and was told by claimant that he would have to contact Briscoe at VooDoo Outfitters. To that end, Vanskike called Briscoe in April 2007. Vanskike posed as a hunter trying to arrange for a hunt with claimant as his guide. Vanskike testified that he was told by Briscoe that claimant would be available for hunts in Oklahoma or Texas in April 2007. However, Vanskike never actually hunted with claimant. Vanskike explained that he sent payment for the hunt by certified mail, but it was returned. Vanskike did not produce the check or letter. Vanskike also conducted surveillance video of claimant but did not produce any at the arbitration hearing. Vanskike admitted, however, that the video does not show claimant hunting. Vanskike stated that he was unable to find anyone who had been guided by claimant on any hunt since November 2005.

Briscoe testified that he is the owner of VooDoo Outfitters, a waterfowl guiding business. Briscoe said that claimant does not own any part of the business and does not and has not ever worked for VooDoo Outfitters. Briscoe testified that claimant is listed as a contact person on his company's website because of claimant's reputation as a hunter in Southern Illinois. Briscoe stated that claimant could not participate in any meaningful physical or hunting activity since his surgeries. Briscoe acknowledged speaking with Vanskike but denied ever discussing hiring claimant as a guide.

Based on the foregoing evidence, the arbitrator awarded claimant permanent and total disability benefits of $745.30 per week for life commencing November 6, 2005. The arbitrator observed that during the hearing, claimant changed positions frequently, from sitting to standing to lying flat on the floor. The arbitrator then explained his ruling as follows:

> "This is based on [claimant's] credible testimony relative to his pain, the medical records, the on-going use of multiple narcotic medications, [claimant's] restrictions and depression, the opinions of Dr. Wachter and of the vocational expert *** Grenfell. The opinions of Dr[]. Wachter and Grenfell are more persuasive than those of Respondent's retained witnesses. Respondent's P.I.'s testimony is given little, if any, weight, as no evidence was produced to support his allegations."

The Commission unanimously affirmed and adopted the decision of the arbitrator. Subsequently, the circuit court of Williamson County confirmed. This appeal followed.

II. ANALYSIS

On appeal, respondent argues that the circuit court erred in finding that claimant was permanently and totally disabled. At the outset, we note that it is our function to review the decision of the Commission, not, as respondent asserts, that of the circuit court. See *Dodaro v. Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 543-44 (2010). In this regard, the nature and extent of an employee's disability is a question of fact for the Commission. *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 361 (1978). In addressing questions of fact, it is the function of the Commission to assess the credibility of witnesses and resolve conflicts in the medical testimony. *Weyer v. Workers' Compensation Comm'n*, 387 Ill. App. 3d 297, 310 (2008). The Commission's factual findings will not be set aside on appeal unless they are against the manifest weight of the evidence. *E.R. Moore Co.*, 71 Ill. 2d at 361. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Bassgar, Inc. v. Workers' Compensation Comm'n*, 394 Ill. App. 3d 1079, 1085 (2009).

An employee has the burden of proving the nature and extent of his injury by a preponderance of the evidence. *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534 (1996). An employee is permanently and totally disabled when he is unable to make some contribution to industry sufficient to justify the payment of wages to him. *A.M.T.C. of Illinois v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). However, the employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286 (1983). Rather, the employee must show that he is unable to perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alano*, 282 Ill. App. 3d at 534. When the employee has presented evidence that he is obviously unemployable or where there is medical evidence to support a claim of total disability, the burden shifts to the employer to present evidence that some kind of work is regularly and continuously available to the employee. See *Sterling Steel Casting Co. v. Industrial Comm'n*, 74 Ill. 2d 273, 278-79 (1979); *Zion-Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill. App. 3d 109, 116 (1993); *Electro-Motive Division, General Motors Corp. v. Industrial Comm'n*, 240 Ill. App. 3d 768, 775 (1992).

Respondent asserts that claimant has not shown that he is incapable of working without posing a health risk to himself or others. However, claimant presented medical evidence that he is permanently and totally disabled by way of his long-term physician, Dr. Wachter. Because claimant presented medical evidence of permanency, respondent was required to present evidence that some kind of work is regularly and continuously available to the employee. *Zion-Benton Township High School District 126*, 242 Ill. App. 3d at 116; *Electro-Motive Division, General Motors Corp*, 240

Ill. App. 3d at 775. Respondent attempted to meet its burden through Dr. Puricelli and the vocational assessment done at CorVel. Dr. Puricelli did not believe that claimant was disabled from all occupations but imposed certain restrictions. The CorVel employees, Johnson and Byrd, found that based on Dr. Puricelli's restrictions, claimant could perform jobs in various fields, including positions as an electrical estimator, shop superintendent, maintenance worker, and reservation clerk. However, the Commission found more persuasive the opinions of Dr. Wachter and claimant's vocational expert, Grenfell. As noted above, Dr. Wachter did not believe that claimant was employable given his inability to stand, walk, or sit for extended periods of time. Grenfell also concluded that claimant could not engage in full-time work in light of the side effects of claimant's medications, the extent of claimant's pain, and the restrictions imposed by Dr. Park. Grenfell faulted the assessment done at CorVel, noting that it failed to consider (1) the side effects of claimant's medications and (2) one of the restrictions imposed by Dr. Park, *i.e.*, that claimant be allowed to change positions frequently for pain control. Grenfell considered the latter significant because it would render claimant unproductive. As this evidence suggests, the Commission was presented with medical evidence of permanency coupled with conflicting evidence concerning whether some kind of work is regularly and continuously available to claimant. In affirming and adopting the decision of the arbitrator, the Commission resolved this conflict in claimant's favor, finding that the opinions of Dr. Wachter and Grenfell were more persuasive than the opinions of respondent's retained witnesses. Given that Dr. Wachter is claimant's long-term physician and the fact that Grendell provided a basis for his disagreement with respondent's witnesses, we cannot say that the Commission's decision is against the manifest weight of the evidence.

Respondent claims that the testimony of claimant and Briscoe regarding claimant's hunting activities after the surgeries is not credible. Respondent insists that Vanskike's testimony proved that claimant was holding himself out to be a hunting guide after the accident and after he was allegedly unable to perform hunting activities. As such, respondent insists that claimant qualifies to be a hunting guide. However, as set forth above, credibility determinations are particularly the province of the Commission. *Weyer*, 387 Ill. App. 3d at 310. Here, the Commission disregarded the testimony of Vanskike because he produced no evidence to support his allegations that claimant worked as a hunting guide following his surgeries. Therefore, we find this argument insufficient to overturn the decision of the Commission.

III. CONCLUSION

For the reasons set forth above, we affirm the decision of the circuit court of Williamson County, which confirmed the decision of the Commission.

Affirmed.