2012 IL App (3d) 110077WC
No. 3-11-0077WC
Opinion filed February 17, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

WILL COUNTY FOREST PRESERVE DISTRICT a/k/a FOREST PRESERVE DISTRICT OF WILL COUNTY,	)	Appeal from the Circuit Court of Will County.
Appellant,	)	
v.	)	No. 10-MR-673
ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*	)	Honorable Barbara Petrungaro,
(Denzil Smothers, Appellee).	)	Judge, Presiding

JUSTICE HUDSON delivered the judgment of the court, with opinion.

Presiding Justice McCullough, and Justices Hoffman, Holdridge, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 Respondent, Will County Forest Preserve District a/k/a Forest Preserve District of Will County, appeals from a judgment of the circuit court of Will County confirming a decision of the Illinois Workers' Compensation Commission (Commission). The Commission, affirming and adopting the decision of the arbitrator, determined that claimant, Denzil Smothers, suffered a compensable shoulder injury on June 2, 2008, which "partially incapacitate[s] him from pursuing the duties of his usual and customary line of employment." As such, the Commission awarded

claimant a person-as-a-whole award under section 8(d)2 of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)2 (West 2008)). On appeal, respondent concedes that claimant suffered an injury which resulted in a partial incapacity. However, respondent argues that an award under section 8(d)2 was improper because claimant failed to establish that this incapacity prevents him "from pursuing the duties of his usual and customary line of employment." Respondent therefore maintains that the Commission should have awarded claimant benefits for a scheduled injury to the arm as set forth in section 8(e)(10) of the Act (820 ILCS 305/8(e)(10) (West 2008)). We conclude that an award under section 8(d)2 is proper, but on a basis different than that proffered by the Commission. Accordingly, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On February 4, 2009, claimant filed an application for adjustment of claim alleging that on June 2, 2008, he sustained an injury to his right shoulder while in respondent's employ. The matter proceeded to arbitration on June 19, 2009. Among the issues in dispute were causal connection and nature and extent of the injury. The evidence presented at the arbitration hearing established that claimant, who is right-hand dominant, has worked for respondent for more than 20 years, most recently as a heavy-equipment operator. Claimant testified that in this position, he is subject to impact and vibration from various types of equipment, including tractors, dump trucks, jack hammers, chain saws, and sledge hammers. The physical-demand level for an equipment operator is medium to medium/heavy.

¶ 4 The parties stipulated that on June 2, 2008, claimant sustained an injury to his right shoulder which arose out of and in the course of his employment. Claimant explained that the injury occurred

as he was trying to lift the tailgate of a trailer and he felt a "burning severe pain in [his] right shoulder." Conservative treatment resulted in limited symptomatic improvement. As a result, on June 23, 2008, claimant presented for treatment to Dr. Harry Fuentes of Parkview Orthopaedics. Dr. Fuentes ordered an MRI. Upon reviewing the MRI, Dr. Fuentes diagnosed a partial thickness rotator cuff tear of the right shoulder with a possible posterior inferior labral tear. On August 13, 2008, Dr. Fuentes performed an arthroscopic repair of the right rotator cuff and a subacromial decompression with acromioplasty. Following surgery, claimant underwent physical therapy and work hardening.

¶ 5 A case-management report dated November 20, 2008, indicates that claimant had been participating in a daily work-hardening program for up to three hours a day. The report notes that claimant demonstrated the ability to safely lift 80 pounds from floor to bench height and 60 pounds to shelf height. The report further notes that claimant demonstrated the ability to perform essential job tasks such as entering and exiting a truck cab, bilateral and unilateral carrying of equipment, bilateral shoulder carrying of equipment, sweeping, digging, packing gravel, and forward and overhead reaching. The report concludes that claimant meets the physical-demand requirements (medium/heavy) for a safe, full-duty return to work. On November 24, 2008, claimant visited Dr. Fuentes and reported that his shoulder "feels great." At that time, Dr. Fuentes released claimant to full duty without limitations and instructed him to return on an as-needed basis. Claimant has not visited Dr. Fuentes for his right shoulder since he was released to full duty.

¶ 6 Claimant acknowledged that after November 24, 2008, he has been able to perform his job. However, he testified that since returning to work, he has noticed that his right shoulder becomes stiff and weak if he uses it a lot. Claimant also indicated that he experiences soreness with vibration

and sensitivity with changes in the weather. Claimant cited several examples of how he compensates for these problems by using his left side more frequently than his right side, especially with heavy or repetitive activities. Representative of these examples is the following testimony from claimant:

> "For instance, if I am loading bags of concrete, 50, 60 pounds of concrete and I am having to pull them off of the truck, I will notice that the right side is starting to get weak. So I switch over to the left side, and I start using that for a while until it kind of calms down, and then I start using the right side which is I am right handed [*sic*].
>
> So I generally use the right hand all of the time. The other thing is climbing in and out of my truck or up and down off [a] tractor. I notice I have been using my left hand to pull myself up into the truck now because if I pull my whole weight with my right side up and down off the tractor all day, it gets sore pretty quick."

Claimant testified that prior to the June 2, 2008, accident, he did not use his left arm frequently for tasks that required the use of only one arm because most of the equipment he uses is geared towards right-handed individuals.

¶ 7 Claimant also testified that he experiences a "rubbing affect [*sic*]" with tasks that require him to extend his arms over his head such as greasing a tractor. Further, claimant recounted that prior to the June 2, 2008, accident, he was able to lift between 75 and 80 pounds overhead with his right shoulder. Although claimant still attempts to lift the same amount, he testified that he quickly becomes sore. As a result, he generally tries to limit overhead lifting with his right shoulder to 50 pounds or less. Claimant added that if his shoulder starts to hurt, he applies ice or takes pain medication.

¶ 8 Although claimant testified that he had never injured or had problems with his right shoulder prior to the June 2, 2008, accident, he did acknowledge suffering an injury at work in May 2003 which required surgery to his right elbow and a right carpal-tunnel release. Claimant negotiated a settlement with respondent as a result of the May 2003 injury, which consisted of, *inter alia*, benefits under section 8(e) of the Act representing a 15% loss of use of the right hand and a 15% loss of use of the right arm. Following the May 2003 injury, claimant testified that he returned to work for respondent at full duty, but began experiencing stiffness, soreness, numbness, and weakness in his right elbow with heavy use or vibration.

¶ 9 Claimant was examined by Dr. Jeffrey Coe on May 12, 2009, at the request of his attorney. Dr. Coe's report documents complaints by claimant of right shoulder pain while lifting or reaching with his right arm, with changes in the weather, and with sleeping on his right side. Claimant also complained of stiffness, weakness, "catching," and "popping" of the right shoulder. Claimant provided a history of his June 2, 2008, accident and noted that he had injured his right upper extremity at work in May 2003. Dr. Coe's examination revealed a well-healed arthroscopic scar above the right shoulder. There was residual tenderness over the anterior glenhumeral joint, but claimant's scar was not tender to palpation and there was no right shoulder acromioclavicular tenderness. Claimant's right shoulder showed a decreased range of motion versus normal with abduction (160 degrees versus 180 degrees), forward elevation (170 degrees versus 180 degrees), and internal rotation (35 degrees versus 40 degrees), but not with external rotation. Dr. Coe also noted positive right shoulder impingement and atrophy of the right upper arm. However, muscle strength about the right shoulder girdle was normal in all aspects except resisted forward elevation,

which measured 4+/5. Dr. Coe concluded that the injury to claimant's right shoulder on June 2, 2008, caused "permanent partial disability to the right arm." In addition, Dr. Coe opined that claimant continued to experience impairment from the injury to his right elbow in May 2003 and from right carpal-tunnel syndrome.

¶ 10 Based on the foregoing evidence, the arbitrator determined that claimant established a causal connection between his employment and the condition of his right shoulder as a result of the June 2, 2008, accident. The arbitrator awarded claimant 15 weeks of temporary total disability (TTD) benefits. See 820 ILCS 305/8(b) (West 2008). In addition, the arbitrator addressed whether claimant's shoulder injury should be compensated as a partial disability to the person as a whole under section 8(d)2 of the Act (820 ILCS 305/8(d)2 (West 2008)) or whether it should be compensated pursuant to the schedule of specific losses set forth in section 8(e) of the Act (820 ILCS 305/8(e) (West 2008)). The arbitrator noted that "[t]he mere fact that [claimant's] injured body part happens to be one of those enumerated in the §8(e) schedule, standing alone, does not deprive the Commission of its authority to award partial disability to the whole person under §8(d)(2)." Ultimately, the arbitrator determined that a person-as-a-whole award under section 8(d)2 of the Act (820 ILCS 305/8(d)2 (West 2008)) was appropriate because claimant sustained injuries which "partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, which is the exact language of §8(d)(2)." In support of his finding that claimant's right shoulder injury partially incapacitated him from pursuing the duties of his usual and customary line of employment, the arbitrator found that in performing certain work activities, claimant "can only apply the forces necessary with his left, non-dominant

arm." The arbitrator also pointed out that claimant commences other work activities using his right arm, but it tires easily, requiring him to switch to his left arm. As such, the arbitrator awarded claimant 125 weeks of permanent partial disability (PPD) benefits under section 8(d)2, representing a loss of 25% of the person as a whole. Upon review, the Commission corrected a clerical error and the benefit rate, but otherwise affirmed and adopted the decision of the arbitrator. The circuit court of Will County confirmed the decision of the Commission. Thereafter, respondent filed the present appeal.

¶ 11 II. ANALYSIS

¶ 12 On appeal, respondent argues that the Commission's award of benefits pursuant to section 8(d)2 of the Act (820 ILCS 305/8(d)2 (West 2008)) was erroneous. According to respondent, the record establishes that claimant has returned to work at full duty resuming all prior job activities. Respondent also points out that claimant is under no medical restrictions and that he has not sought any additional treatment for his right shoulder. Thus, respondent reasons, it was improper to award claimant benefits under section 8(d)2 on the basis that claimant proved a partial incapacity which prevents him from "pursuing the duties of his usual and customary line of employment." Instead, respondent maintains, the Commission should have awarded claimant benefits for a scheduled loss to the right arm as set forth in section 8(e)(10) of the Act (820 ILCS 305/8(e)(10) (West 2008)). Respondent further maintains that if a scheduled benefit is found proper, it is entitled to a credit pursuant to section 8(e)(17) (820 ILCS 305/8(e)(17) (West 2008)) for the award claimant previously received as a result of his May 2003 settlement.

¶ 13 At issue in this case is the applicability of two provisions of the Act relating to PPD benefits:

(1) a person-as-a-whole award under section 8(d)2 (820 ILCS 305/8(d)2 (West 2008)) and a scheduled award pursuant to section 8(e) (820 ILCS 305/8(e) (West 2008)). Section 8(e) sets forth a statutory schedule of benefits for the physical loss of or the permanent and complete loss of use of certain parts of the body. 820 ILCS 305/8(e) (West 2008). The number of benefit weeks awarded varies by the body part affected. 820 ILCS 305/8(e) (West 2008). Thus, for instance, each toe other than a great toe is compensated at 13 benefit weeks (820 ILCS 305/8(e)(7) (West 2008)) while a leg is compensated at 215 benefit weeks (820 ILCS 305/8(e)(12) (West 2008)). An employee who suffers the physical loss of an arm or the permanent and complete loss of use of an arm is compensated at 253 benefit weeks. 820 ILCS 305/8(e)(10) (West 2008). Benefits for an injury resulting in less than a total loss of function of a body part are calculated according to the percentage loss of function of that part. See *Outboard Marine Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 1026, 1029 (2000) ("When loss of use is found, benefits are generally calculated as a percentage of the benefits of total loss of the member.").

¶ 14 Section 8(d)2 provides for benefits in any of the following three situations: (1) where a claimant sustains serious and permanent injuries not covered by section 8(c) (820 ILCS 305/8(c) (West 2008) (relating to injuries resulting in disfigurement)) or section 8(e) of the Act; (2) where a claimant covered by section 8(c) or 8(e) of the Act also sustains other injuries which are not covered by those two sections and such injuries do not incapacitate him from pursuing his employment but would disable him from pursuing other suitable occupations, or which have otherwise resulted in physical impairment; or (3) where a claimant suffers injuries which partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment

of earning capacity. 820 ILCS 305/8(d)2 (West 2008). Under section 8(d)2, benefits are awarded based on the "percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to total disability." 820 ILCS 305/8(d)2 (West 2008). As the foregoing discussion suggests, the amount of compensation for PPD benefits can vary significantly depending on whether an injury falls under the statutory schedule or whether the injury is compensable as a percentage of the person as a whole.

¶ 15 In this case, the Commission determined that a person-as-a-whole award was appropriate under the third subpart of section 8(d)2. As noted above, respondent insists that this was erroneous. Respondent concedes that the injury to claimant's right shoulder partially incapacitated him. However, according to respondent, claimant failed to establish that this partial incapacity prevents him from "pursuing his usual and customary line of employment" because claimant has returned to work at full duty resuming all prior job activities, he is under no medical restrictions, and he has not sought any additional treatment for his right shoulder. The determination of the extent or permanency of an employee's disability is a question of fact for the Commission, and its decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 718 (1993). A decision is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent. *Elgin Board of Education School District U-46 v. Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 949 (2011). Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion. *Cox v. Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 546

(2010). We find this to be such a case.

¶ 16 Claimant's position as a heavy-equipment operator was classified in the medium to medium/heavy physical-demand level. Claimant testified that he works with various types of equipment, including tractors, dump trucks, jack hammers, chain saws, and sledge hammers. Claimant also referenced tasks involving lifting, climbing, and pulling. Claimant related that he experiences residual effects from the injury to his right shoulder, including stiffness, soreness, weakness, and a diminished ability to lift heavy objects. However, the case-management report from claimant's work-hardening program noted that claimant demonstrated the ability to safely lift 80 pounds from floor to bench height and 60 pounds to shelf height. The report also noted that claimant demonstrated the ability to perform essential job tasks such as entering and exiting a truck cab, bilateral and unilateral carrying of equipment, bilateral shoulder carrying of equipment, sweeping, digging, packing gravel, and forward and overhead reaching. As a result, claimant was found capable of performing tasks at the medium/heavy physical-demand level, which is at the high end of the range for his position. More important, Dr. Fuentes released claimant to full duty without limitations and claimant acknowledged that he has been able to perform his job. Similarly, there is no indication that Dr. Coe limited claimant's ability to engage in the duties of his usual and customary line of employment.

¶ 17 Further, there is no evidence that claimant's duties require any modifications, that claimant performs his job duties at a slower pace, that claimant is less productive than others in the same position, that claimant has missed any work because of his injury, that claimant refused to perform his duties because of his injury, or that claimant experiences a much greater degree of physical

difficulty than before the accident. In fact, claimant stated that when his right shoulder bothers him while performing work tasks, he is able to compensate for any problems by using his left side. Moreover, despite any residual effects from the injury, claimant has not sought any additional medical treatment for his condition. Based on this evidence, we find that the Commission's award of benefits for the loss of a person as a whole under section 8(d)2 on the basis that the injury to claimant's right shoulder "partially incapacitate[s] him from pursuing the duties of his usual and customary line of employment" is against the manifest weight of the evidence. The record simply does not support this finding.

¶ 18 Because we conclude that claimant has failed to prove his entitlement to benefits under the third subpart of section 8(d)2, we must determine whether PPD benefits are appropriate under another provision of the Act. Respondent insists that claimant's shoulder injury should be compensated as a scheduled loss to the right arm under section 8(e)(10) (820 ILCS 305/8(e)(10) (West 2008)). However, respondent's argument assumes that an injury to the shoulder is an injury to the arm. This court has not had occasion to consider the classification of a shoulder injury. Whether an injury to the shoulder is an injury to the arm under the statutory schedule presents an issue of statutory construction. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 953. The best indicator of the legislature's intent is the plain language of the statute itself, which must be given its plain and ordinary meaning. *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 953. A court may look to dictionary definitions to derive the plain and ordinary meaning of statutory language. *In re Bailey*, 317 Ill. App. 3d 1072, 1086 (2000).

¶ 19 The word "arm" is defined as "the segment of the upper limb *between the shoulder and the elbow*; commonly used to mean the whole superior limb." (Emphasis added.) Stedman's Medical Dictionary 127 (27th ed. 2000); see also Webster's Third New International Dictionary 118 (2002) (defining "arm" as "a human upper limb *** the part of an arm between the shoulder and the wrist"). This definition clearly indicates that the shoulder is not part of the arm. Other jurisdictions have recognized this distinction. See, *e.g.*, *Geston v. WM Bancorp*, 694 A. 2d 961, 964-69 (Md. App. 1997) (concluding that a shoulder injury is not an injury to the arm for purposes of statutory schedule of benefits); *Prewitt v. Firestone Tire & Rubber Co.*, 564 N.W. 2d 852, 854 (Iowa App. 1997) (recognizing that injuries to the arm are scheduled injuries while injuries to the shoulder should be compensated as an injury to the body as a whole); *Taylor v. Pfeiffer Plumbing & Heating Co.*, 648 S.W. 2d 526, 527 (Ark. App. 1983) (holding that where the medical evidence conclusively established that the claimant sustained an injury to his shoulder, a scheduled award for an injury to the arm was improper even if the effects of the shoulder injury extended to the arm); *Safeway Stores, Inc. v. Industrial Comm'n*, 558 P. 2d 971, 974 (Ariz. App. 1976) (noting that the shoulder is not part of the arm). Because the plain and ordinary meaning of the statute establishes that the arm and the shoulder are distinct parts of the body, if claimant sustained an injury to his shoulder, an award for a scheduled loss to the arm would be improper.

¶ 20 Here, the evidence clearly establishes an injury to the shoulder, not to the arm. Dr. Fuentes diagnosed claimant with a partial thickness rotator cuff tear of the right shoulder with a possible posterior inferior labral tear. Subsequently, Dr. Fuentes performed an arthroscopic repair of the right rotator cuff and a subacromial decompression with acromioplasty. The rotator cuff is "the anterior,

superior, and posterior aspects of the capsule of the *shoulder joint* reinforced by the tendons of insertion of the supraspinatus, infraspinatus, teres minor, and subscapularis *** muscles." (Emphasis added.) Stedman's Medical Dictionary 434 (27th ed. 2000). An acromioplasty is the "surgical reshaping of the acromion." Stedman's Medical Dictionary 18 (27th ed. 2000). The acromion is "[t]he lateral end of the spine of the scapula [shoulder blade] which projects as a broad flattened process overhanging the glenoid fossa [the articular depression of the scapula entering into the formation of the shoulder joint]." Stedman's Medical Dictionary 18 (27th ed. 2000). The acromion "articulates with the clavicle [collar bone] and gives attachment to part of the deltoid and trapezius muscles." Stedman's Medical Dictionary 18 (27th ed. 2000). Further, claimant testified that he experiences stiffness, soreness, and weakness in his right shoulder. While the injury to claimant's right shoulder may impact the use of his arm, the initial injury was to his shoulder, and a scheduled award for the loss of use of the right arm would therefore be inappropriate. See *Gates Division, Harris-Intertype Corp. v. Industrial Comm'n*, 78 Ill. 2d 264, 269 (1980) ("To establish loss of use of a hand, the loss must be shown to be that of the hand rather than the mere loss of use of fingers").

¶ 21 Since claimant's shoulder injury does not qualify as a scheduled loss to the arm, we turn to other provisions of the Act for guidance. We find applicable the first subpart of section 8(d)2. That provision provides for a person-as-a-whole award where the claimant sustains serious and permanent injuries not covered by section 8(c) or 8(e) of the Act. In this case, there is no evidence that claimant suffered disfigurement as required for an award under section 8(c) of the Act (820 ILCS 305/8(c) (West 2008)). In addition, as set forth above, the injury to claimant's right shoulder does not qualify

as a scheduled loss to the arm under section 8(e)(10). As such, we hold that benefits are proper under the first subpart of section 8(d)2, and not, as the Commission concluded, under the third subpart of section 8(d)2.

¶ 22 Before concluding, we are cognizant that the applicability of the first subpart of section 8(d)2 was not raised below. We also acknowledge respondent's suggestion that any argument that a shoulder is not an arm for purposes of the statutory schedule has been waived because claimant did not raise this issue "at the trial level." In fact, our review of the record indicates that while the latter issue was not raised before the Commission, it was raised in front of the circuit court. In any event, waiver is a rule of administrative convenience. *Klein Construction/Illinois Insurance Guaranty Fund v. Workers' Compensation Comm'n*, 384 Ill. App. 3d 233, 238 (2008). We may override considerations of waiver in furtherance of providing a just result. *Klein Construction/Illinois Insurance Guaranty Fund*, 384 Ill. App. 3d at 238. We also point out that we may affirm a decision of the Commission if there is any legal basis in the record to do so, regardless of whether the Commission's reasoning is correct or sound. *Ameritech Services, Inc. v. Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208 (2009); *Builder's Square, Inc. v. Industrial Comm'n*, 339 Ill. App. 3d 1006, 1012 (2003).

¶ 23 III. CONCLUSION

¶ 24 In sum, although we disagree with the Commission's rationale, we ultimately find that the Commission properly awarded claimant benefits for an injury to the person as a whole under section 8(d)2 of the Act. Accordingly, we affirm the judgment of the circuit court of Will County, which confirmed the decision of the Commission.

*2010 Ill. Wrk. Comp. LEXIS 653, **

DENZIL **SMOTHERS,** PETITIONER, v. **WILL** COUNTY FOREST PRESERVE DISTRICT, RESPONDENT.

NO: 09WC 04916

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF **WILL**

2010 Ill. Wrk. Comp. LEXIS 653

June 14, 2010 10 IWCC 582

CORE TERMS: arbitrator, shoulder, elbow, right shoulder, arm, impairment, pain, partial disability, surgery, heavy, residual, weakness, partial, tear, incapacitate, customary, partially, right hand, right side, post-operative, scheduled, debrided, anterior, symptom, scaring, truck, earning capacity, body part, right arm, extremity

JUDGES: David L. Gore; James F. DeMunno; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability, benefit rates, and credit and being advised of the facts and law, corrects a clerical error and benefit rate, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that the Arbitrator typed an incorrect accident date noted in the Findings section of the Decision, the Commission therefore corrects to find the correct accident date of June 2, 2008 as noted on the Request for Hearing.

The Commission finds that the Arbitrator had used a permanent partial disability-(PPD) rate that exceeded the maximum rate for the date of accident. The parties both acknowledged that as an error and the Commission therefore corrects for the maximum PPD rate for the date of accident to be $ 636.15 per week. All else affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 9, 2009 otherwise is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION **[*2]** that Respondent shall pay to the Petitioner the sum of $ 714.87 per week for a period of 15 weeks, (August 13, 2008 through November 24, 2008) that being the period of temporary total incapacity for work under § 8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 636.15-[maximum rate] per week for a period of 125 weeks, as provided in § 8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of 25% loss of use of Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUN 14 2010

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for* **[*3]** *Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **LEO HENNESSY**, arbitrator of the Commission, in the city of **Joliet**, on **June 19, 2009**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
L. What is the nature and extent of the injury?
N. Is the respondent due any credit?

FINDINGS

. On **06/20/2008**, the respondent **Will County Forest Preserve District *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **55,759.60**; the average weekly wage was $ **1,072.30**

. At the time of injury, the petitioner **[*4]** was **49** years of age, ***married*** with **2** children under

18.

. Necessary medical services ***have*** been provided by the respondent.

. To date, $ **10,725.30** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **714.87**/week for **15** weeks, from **08/13/2008** through **11/24/2008**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **643.38**/week for a further period of **125** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **partial disablity under Section 8(d)(2)**.

. The respondent shall pay the petitioner compensation that has accrued from **06/03/2008** through **06/19/2009**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **None** for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ in penalties, **[*5]** as provided in Section 19(l) of the Act.

. The respondent shall pay $ in attorneys' fees, as provided in Section 16 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

8-26-09

Date

SEP 9 2009

RIDER TO ARBITRATOR'S DECISION

In support of the Arbitrator's Decision regarding "F" (Causal Connection), "L" (Nature and Extent of the Injury), and "N" (Credit) the Arbitrator makes the following findings and conclusions:

Petitioner, a 49 year old heavy equipment operator, had been employed by Respondent 23 years as a laborer and then heavy equipment operator. May 8, 2003, he sustained injuries to his elbow **[*6]** and wrist with an avulsion and inflammation of the lateral epicondyle of the right elbow resulting in right lateral eipconylar reconstruction and right carpal tunnel release, both of which were performed September 29, 2003 (Pet's. Ex. 13 p. 10, Pet's Ex. 1-5, with 5 being the Operative Report). Residual abnormalities included post-operative scaring of the right

elbow, decreased range of motion of the right elbow in flexion and extension, residual tenderness over the right lateral epicondyle and mild atrophy of the right (dominant) arm. He also had post-operative scaring of the right wrist and residuals of the right and left median nerves including mild weakness of the right hand to grasp and pinch grip (Pet's. Ex. 13, p. 10).

Following the treatment for the 2003 injury, Petitioner was returned to full duties as a heavy equipment operator. These duties included unloading large trucks as caused his initial injury, working heavy equipment, being subjected to vibration and impact type of tools, using sledge hammers, hammers, picks, shovels, chainsaws, and climbing in and out of and operating his heavy equipment. His initial settlement was *Pro Se*. From that time through the present, **[*7]** if he used tools with a lot of vibration his elbow would stiffen, it would feel sore and weak, and he would stop and rest until it would come around. He could also tell the weather from his elbow. His hand was all right but there was numbing on top of the fingers which he would have to shake off and go back to work.

On June 2, 2008, Mr. **Smothers** was trying to lift the tailgate of one of the tractors, he yanked on it hard, and felt a burning, searing pain in the right shoulder. He reported it immediately and was sent to MedWorks who diagnosed a strain and possible biceps tendonitis (Pet's. Ex. 1, pp. 7 - 10). With no improvement, Petitioner returned to the orthopedic group that had performed his previous elbow and wrist surgery, Parkview Orthopedics, where he saw Dr. Henry Fuentes, (Pet's. Ex. # 9). Petitioner gave the history of lifting on the back of a truck and feeling a sharp burning pain in the right shoulder radiating into the upper arm, consistent with his testimony and the history to MedWorks (Pet's. Ex. # 6, p. 7, Pet's. Ex. # 9, p. 6). Following an MRI, Petitioner had shoulder surgery, August 13, 2008 (Pet's. Ex. # 12).

The operative report, Exhibit 12, showed strain on the **[*8]** superior and anterior labrum which was debrided. Examination of the rotator cuff revealed a full thickness tear of the anterior portion of the supraspinatus tendon. The edges of the tear were debrided and a subacromial bursectomy was carried out. The anterior acromion was also debrided. A partial acromioplasty was then performed, including removal of the anterior/inferior acromial spur. The edges of the full thickness supraspinatus tendon tear were minimally debrided, the bone medial to the greater tuberosity was decorticated, and the rotator cuff tear was repaired using a swivel lock, and was completed by using two anchors (Pet's. Ex. 12).

Petitioner then went to physical therapy through November 20, 2008. In the visits of the last week Petitioner's pain would be on a scale of 4 of 10 at 8:00 a.m., and at the end of therapy would be from 2 to 5 (Pet's. Ex. 7, pp. 96 - 101). This was consistent with Petitioner's testimony that he would have to loosen up his shoulder in the morning when he woke up.

Petitioner is a muscular individual, and his recommended release from the therapist shows significant abilities up to shelf height, but the only overhead ability tested was reaching (*id* **[*9]** . p. 109). At that stage the therapist felt he could return to his medium/heavy job safely (*id.*).

Throughout all the medical records, and with the Arbitrator having observed Mr. **Smothers** and weighed his testimony, there are no indications of any symptom magnification, exaggeration, or any type of complaining beyond what are shown by and consistent with the findings. In fact, both the records and his testimony show the Petitioner to be a driven patient who, if anything, understates his complaints and symptoms. For example, on the last date he saw Dr. Fuentes he told him his shoulder felt great, but that was compared to how it was when he hurt, and before actually returning to full duties.

Since returning to duties, he readily admits performing his full duties, yet has had to make significant modifications because of his shoulder condition. If Petitioner does anything overhead, there is a rubbing effect on it and a catch that **will** pop and is sore. For example, greasing a tractor up high to operate a grease gun, there is a lever, and his shoulder **will** pop, he **will** stop for a few minutes, and then he **will** continue. He is right hand dominant, yet in

hitching trailers he **will** have to **[*10]** use his left arm to do it. On his trucks and tractors, he has a wheel spinner usually used for the handicapped in order to maneuver the steering wheel. He **will** do shoveling and raking, and most of the time he **will** start with the right side, he **will** fatigue fast, and have to switch to the left. When reaching above shoulder height and pulling items off the truck, he is now using left side to reach, grab and pull it out. He **will** carry bags of concrete, sometimes 50 to 70 lbs., but he **will** now have to compensate with his left arm because his right gets tired. Most of the time with lighter tools his right extremity **will** be good, but like using pruners he **will** have to switch to his left side. Hammering nails, he right side **will** act up and he **will** switch over to his left. Once he starts working his arm feel weak and irritated so he is now simply in the habit of switching to his left arm where only one armed duties are required.

With the weather changes, his right side **will** get sore after awhile. Many of the tools, such as chainsaws, are mostly made for the right hand, with the left for balance, but he **will** have to use the left to saw through branches. At home, things like yard work and cleaning **[*11]** house **will** bring on pain, as **will** playing horseshoes or beanbag toss. Likewise, it is painful if he sleeps on it or lays on it too long. Petitioner testified the reason he favors the shoulder was both because of weakness and pain. The sum of Petitioner's testimony was that the shoulder injury, superimposed on the prior elbow injury, causes him to significantly favor his right extremity and use the left extremity in his work activities.

For home remedies, he **will** take Extra-Strength Tylenol, he **will** perform his exercises in the morning, as the physical therapy records are consistent that his pain was at least 4 out of 10 at 8:00 a.m. before therapy, and **will** have to ice it two times or more per week, depending upon activities. He keeps a gel pack in his freezer which Dr. Fuentes had given him following the surgery.

The only current medical evidence is the report of Dr. Jeffrey Coe, an Occupational Medicine Specialist (Pet's. Ex. 13). Petitioner's current complaints to Dr. Coe, consistent with his testimony herein were of the post-operative scaring of the right shoulder, right shoulder pain with lifting or reaching using his right arm, with weather changes and sleeping on his right **[*12]** side. He complained of shoulder stiffness, catching and popping. He also stated that his right shoulder was weak (Pet's Ex. 13 p. 5).

Consistent with those complaints, Dr. Coe found the post-operative scaring of the right shoulder, residual tenderness over the interior right glenohumeral joint, decreased range of motion of the right shoulder in abduction, forward elevation and internal rotation. The doctor also found the impingement sign remained positive consistent with ongoing right shoulder subacromial impingement. This would clearly be a source of significant pain.

Finally, Dr. Coe found atrophy of the right (dominant) upper arm and weakness about the right shoulder girdle, consistent with the weakness Petitioner complained about and which impaired him in the performance of his duties. Dr. Coe testified that there was a casual connection between the injury suffered June 2, 2008 and the current symptoms and state of impairment which has caused permanent partial disability, and also noted a continued impairment from the injury to the right elbow and right carpal tunnel from 2003 (*id.* p. 10). Dr. Coe found deficits in grip strength as well.

In the case at bar Petitioner suffered **[*13]** a significant injury resulting in a complete rotator cuff tear and surgery with two anchors and a fixation device. This was on his right, dominate arm, and was superimposed on a previously impaired arm by reason of Petitioner having undergone his prior elbow surgery with residual abnormalities therefrom. Indeed, each of the three joints of Petitioner's right upper extremity have had surgery and have resulted in significant impairment.

This case is similar to *Guynes v. Illinois Department of Human Services*, 06 I.W.C.C. 0883, where the Arbitrator found-that Petitioner's symptoms to her hands caused a permanent

change in the manner in which she performs her job duties. She was a caseworker, who held the same post injury job as before. An Award of 20% 8(d)(2) for injuries to the hands was affirmed. Here Petitioner's testimony was clear, unrebutted and medically corroborated that he had significant pain and weakness which caused him to do virtually all work activities left handed, when possible, after attempting to perform them for short periods of time right hand, thus significantly altering the manner in which he performs his duties.

The question before **[*14]** the Arbitrator is whether Petitioner's injury should be compensated as a partial disability to the whole person under Section 8(d)(2) of the Act. Due to the issue of credit, Respondent claims that Mr. **Smothers** is entitled only to compensation for a specific, scheduled loss of use of the right arm under Section 8(e) of the Act:

Section 8(d)(2) of the Act provides, in pertinent part, as follows:

If, as a result of the accident, the employee . . . sustained injuries covered by [§ 8(e)] ... which ... partially incapacitate him from pursing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, he shall receive in addition to [TTD], compensation at the rate provided in [§ 8(b)(2.1)] for that percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to total disability.

The mere fact that Petitioner's injured body part happens to be one of those enumerated in the § 8(e) schedule, standing alone, does not deprive the Commission of its authority to award partial disability to the whole person under § 8(d)(2). The express, unambiguous terms of § 8 (d)(2), allow such an Award, where **[*15]** Petitioner has sustained injuries

> covered by [§ 8(e)] ... which ... partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity. 820 ILCS 305/8(d)(2).

Nothing in the Act precludes Petitioner from proving and recovering compensation for an actual loss under § 8(d)(2) which exceeds the value of the *scheduled* loss under § 8(e). Indeed, the plain language of the statute itself makes clear that § 8(e) merely establishes a presumptive "floor," rather than a "ceiling," governing the amount of compensation payable for injuries to certain specified body parts.

It is well-established that our General Assembly did not intend § 8(e) to impose any limit upon the Commission's power to award compensation under § 8(d). In General Elec, Co. v. Industrial Comm'n, 89 Ill.2d 432, 433 N.E.2d 671 (1982) ("Williamson" case), our Supreme Court reviewed the legislative history of § 8(d) and determined that the 1975 amendments to § 8(d) were intended to render the § 8(e) schedule non-exclusive. Williamson thus overruled **[*16]** Pruiett v. Industrial Comm'n, 65 Ill.2d 240, 357 N.E.2d 544 (1976), which had once held that the inclusion of the body part in the § 8(e) schedule would preclude a compensation award under the prior version of § 8(d). As a result of the 1975 amendments, Pruiett is no longer good law. Williamson, 433 N.E.2d at 673-674.

In General Elec. Co. v. Industrial Comm'n, 144 Ill.App.3d 1003, 495 N.E.2d 68 (1986), appeal denied, 113 Ill.2d 573, 505 N.E.2d 352 (1987) ("Campbell" case), the Appellate Court expressly followed Williamson, holding that a claimant whose injuries were sustained after the effective date of the 1975 statutory amendments may proceed under *either* § 8(d) or § 8(e), but not both. Campbell, 495 N.E.2d at 73-74. Taken together, Williamson and Campbell stand for the proposition that if Petitioner proved that his injuries partially incapacitate him from pursing his usual and customary work, as did Mr. **Smothers** in the instant case, he is entitled to receive **[*17]** compensation under § 8(d). That right to receive compensation under § 8(d) is in no way compromised by the statutory inclusion of Petitioner's injured body part among those

enumerated within the § 8(e) specific loss schedule. Williamson, at 673-674; Campbell, at 73-74.

Commentators wholeheartedly agree that under the modern approach, exemplified in Illinois by the Williamson and Campbell cases, statutory specific loss schedules do not limit the right of an injured worker to recover compensation for whole body impairment. For example, Professor Larson some years ago observed as follows:

[A]t one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that *the field is dominated by the view that, scheduled allowances should not deemed exclusive*, whether the issue is treatment of a smaller member as a percentage loss of larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole . . . [D]estruction of the more favorable remedy should not be read into the act by implication in **[*18]** a case when claimant is able to prove a case coming under either heading [citations omitted].

1C A. Larson, WORKMEN'S COMPENSATION, § 58.23 (1992) (emphasis supplied). Notably, Professor Larson counts Illinois among the growing majority of jurisdictions which have now abandoned the antiquated doctrine that a statutory specific loss schedule should preclude an award of compensation for whole body impairment. 1C A. Larson, WORKMEN'S COMPENSATION, § 58.22 n. 20, § 58.23 n. 27. See also *Schraeder v. City of Chicago*, 08 I.W.C.C. 0509 awarding 30% 8(d)(2) for thrice operated shoulder injuries, same earnings, different duties.

In the case at bar, Petitioner clearly sustained injuries which partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, which is the exact language of § 8(d)(2). In doing some work activities, such as sawing branches, he can only apply the forces necessary with his left, non-dominant arm. Other work activities he **will** begin with his right arm, but it weakens or tires easily and he **will** have to then use his left arm. Either is a partial incapacity **[*19]** within the meaning of section 8(d)(2), and neither is inconsistent with his full duty release, as he **will** perform such duties, albeit with modifications for the partial incapacity.

Thus, as in Guynes, which involved both hands, as opposed to here where a dominant right shoulder is involved, the Arbitrator Awards 25% partial disability under Section 8(d)(2). The Arbitrator notes that the same surgery in the case of a maintenance mechanic, with overhead restrictions and some loss of earnings, resulted in an Award of 50% 8(d)(2). *Clemmons v. Central Can Co.*, 04 I.I.C. 0316. Because the Award is under Section 8(d)(2), there is no credit to Respondent under Section 8(e) 17 See *Isaars v. Industrial Commission*, 138 Ill. App. 3d 392, 485 N.E. 2d 1093 (1985).

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Filing Requirements

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

WILL COUNTY FOREST PRESERVE DISTRICT a/k/a FOREST PRESERVE DISTRICT OF WILL COUNTY,	)	
Plaintiff,	)	
vs.	)	**No.: 10 MR 673**
THE ILLINOIS WORKER'S COMPENSATION COMMISSION and DENZIL SMOTHERS,	)	
Defendants.	)	

FILED
2011 JAN -3 AM 11: 20

ORDER

This cases arises out of injuries incurred by Denzil Smothers (hereinafter "Defendant") to his right shoulder while employed by the Will County Forest Preserver District (hereinafter "Plaintiff"). Defendant was awarded benefits by the Arbitrator, who determined that the Defendant sustained injuries arising out of and in the course of his employment on June 20, 2008, that necessary medical services were provided to Defendant, that the Defendant was entitled to temporary total disability benefits for 15 weeks, and that the Defendant was entitled to permanent partial disability under Section 8(d)(2) for a further period of 125 weeks. The Commission affirmed and modified the Arbitrator's decision by correcting the date of accident to June 2, 2008, and also correcting the maximum rate for permanent partial disability, noting that the injuries sustained caused the loss of 25% use of Defendant's person as a whole.

On review, Plaintiff, Will County Forest Preserve District, disputes the Commission's finding that the Defendant was entitled to benefits under Section 8(d)(2), and argues that the Commission incorrectly applied the facts to the relevant statutory provisions by failing to award permanency under Section 8(e)(10) and by failing to apply credit under Section 8(e)(17) for the prior award of 15% loss of use of the right arm. Further, the Plaintiff contends that the Commission's award of benefits under Section 8(d)(2) was against the manifest weight of the evidence.

Relevant Statutory Provisions

Section 8(d)(2) of the states, in relevant part:

> (d) 2. If, as a result of the accident, the employee sustains serious and permanent injuries not covered by paragraphs (c) and (e) of this Section or having sustained injuries covered by the aforesaid paragraphs (c) and (e), he shall have sustained in addition thereto other injuries which injuries do not incapacitate him from pursuing the duties of

his employment but which would disable him from pursuing other suitable occupations, or which have otherwise resulted in physical impairment; or if such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive his right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section then in any of the foregoing events, he shall receive in addition to compensation for temporary total disability under paragraph (b) of this Section, compensation at the rate provided in subparagraph 2.1 of paragraph (b) of this Section for that percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to total disability . . .

820 ILCS 305/8(d)(2). Section 8(e) states in relevant part:

(e) For accidental injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such accidental injury, under subparagraph 1 of paragraph (b) of this Section, and shall receive in addition thereto compensation for a further period for the specific loss herein mentioned, but shall not receive any compensation under any other provisions of this Act. The following listed amounts apply to either the loss of or the permanent and complete loss of use of the member specified, such compensation for the length of time as follows:

* * *

10. Arm-

* * *

253 weeks if the accidental injury occurs on or after February 1, 2006.

Where an accidental injury results in the amputation of an arm below the elbow, such injury shall be compensated as a loss of an arm. Where an accidental injury results in the amputation of an arm above the elbow, compensation for an . . . additional 17 weeks (if the accidental injury occurs on or after February 1, 2006) shall be paid . . . .

* * *

17. In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury.

820 ILCS 305/8

Standard of Review

Plaintiff contends that two standards of review apply to this case. Plaintiff first contends that this Court should apply a de novo standard of review to the argument that the Commission incorrectly determined that the Defendant was entitled to benefits under Section 8(d)(2) and failed to award permanency under Section 8(e)(10) and to apply credit under Section 8(e)(17) for the prior award of 15% loss of use of the right arm. Plaintiff further argues that the Commission's incorrect award of benefits under Section 8(d)(2) falls within the manifest weight standard.

When the issue presented involves an examination of the legal effect of a given set of facts, that is, where the facts and law are established and the issue is whether the facts satisfy a certain statutory standard, the proper standard of review is the clearly erroneous standard. Dodaro v. Illinois Worker's Compensation Commission, 403 Ill. App. 3d 538, ____ N.E.2d ___ 2010 WL 3035744 (1st Dist. August 3, 2010). The clearly-erroneous standard provides some deference to the Commission's experience and expertise. Id. As such, under this standard, a court of review will reverse the Commission's decision only when there is evidence supporting reversal and the court of review is left with the definite and firm conviction that a mistake has been committed. Id. Thus, the first issue should be resolved under a clearly erroneous standard.

The parties agree that the standard of review for the second question is whether the Commission's finding is against the manifest weight of the evidence. It is the role of the Commission to resolve conflicts in the evidence, to assess the credibility of witnesses and to assign weight to their testimony. See Paganelis v. Industrial Comm'n, 132 Ill. 2d 468, 483-84, 548 N.E.2d 1033 (Ill. 1989); Edward Hines Precision Components v. Industrial Comm'n, 356 Ill. App. 3d 186, 825 N.E.2d 773 (2d Dist. 2005); Navistar International Transp. Corp. v. Industrial Comm'n, 331 Ill. App. 3d 405, 771 N.E.2d 35 (1st Dist. 2002). The reviewing court will not set aside the Commission's decision unless it is contrary to law or its fact determinations are against the manifest weight of the evidence. Roberson v. Industrial Comm'n, 225 Ill. 2d 159, 866 N.E.2d 191 (Ill. 2007). In order for a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Edward Hines Precision Components, 356 Ill. App. 3d at 194, 825 N.E.2d at 782.

The Commission determined that the Defendant sustained injuries to his elbow and wrist in May 2003. (Rec. at pp. 000104-07, 000486, 000543.) Defendant returned to his full duties as a heavy equipment operator. On June 2, 2008, Defendant suffered an injury to his right shoulder at work, which was initially diagnosed as a right shoulder strain with deltoid muscle strain. (Rec. at pp. 000114-17, 000544.) Defendant received pain medication, was prescribed physical therapy, and was returned to work on light duty. (Rec. at pp. 000115-16.) The treatment provided little improvement. (Rec. at pp. 000117-20.) Defendant was re-examined by Dr. Fuentes in late June 2008. (Rec. at pp. 000403-04.) At that point, an MRI was performed which revealed a partial thickness rotator cuff tear of the right shoulder with possible posterior inferior labral tear. (Rec. at pp. 000405-07.) Dr. Fuentes performed a steroid injection on Defendant, ordered physical therapy and kept him on light duty. (Rec. at p. 000408.) When the Defendant thereafter failed to show improvement, surgery was recommended. (Rec. at p. 000409.) The surgery on August 13, 2008, revealed a near full thickness tear of the rotator cuff, which was repaired by a

right shoulder rotator cuff repair and subacromial decompression with acromioplasty. (Rec. at pp. 000405, 000420-21, 000433-74, 000480-81.) Thereafter, the Defendant underwent physical therapy through November 20, 2008. (Rec. at pp. 000310-15, 000318-20, 000339-44, 000346-98.) The Defendant returned to work on full duty as of November 24, 2008.

Dr. Jeffrey Coe examined the Defendant on May 12, 2009 and determined that, based upon a review of the medical records and an examination of the Defendant, the Defendant's injury of June 2, 2008 caused permanent partial disability to the right arm. (Rec. at pp. 000483-93.)

The Defendant testified that once he returned to work he did still have some problems with his right shoulder. Specifically, he testified that if he uses it a lot it gets stiff and feels weak. (Rec. at p. 000036.) For example, if he is loading 50-60 pound bags of concrete, he will notice that the right side feels weak and will switch to his left side for awhile. (Rec. at p. 000037.) If he is using heavy equipment, and there is a lot of vibration, it starts to get sore. (Rec. at p. 000037.) He also testified that he noticed that if he is doing any heavy activity with it, he compensates using his left side more than the right. (Id.) For example, if he is swinging a sledge hammer or anything heavy and repetitive, he will use his left side more than his right side. (Id.) The Defendant also noted that he generally uses his right hand all the time, but he notices that he will use his left hand to climb into and out of his truck and the tractor. (Rec. at pp. 000037-38.) He further testified that when using his chain saw he has more strength in his left hand to move the machine through trees and branches. (Rec. at p. 000039.) Other activities at work will allow him to start with his right arm, and if it becomes weak, to switch to his left arm, like raking, pulling timbers, picking up bags of concrete, using pruners, hammers, etc. (Rec. at pp. 000041-43.) He still does daily exercises to loosen his shoulder in the morning. He also will take Tylenol and ice the shoulder if he has pain. (Rec. at pp. 000046-47.)

The Commission noted that the question is whether the Defendant was entitled to partial disability under Section 8(d)(2) as opposed to Section 8(e). (Rec. at p. 000546.) Plaintiff contended that Defendant was only entitled to compensation for a specific scheduled loss for use of the right arm under Section 8(e). (Rec. at p. 000546.) The Commission noted its statutory authority to award partial disability under Section 8(d)(2), even when it could award under Section 8(e)(10). (Rec. at p. 000546.) Citing General Elec. Co. v. Ind. Comm'n, 89 Ill. 2d 432, 433 N.E.2d 671 (1982), the Commission noted that our Supreme Court has addressed the issue and determined that the Defendant has the ability to proceed under either Section 8(e) and Section 8(d)(2) but cannot receive benefits under both provisions. (Rec. at p. 000547.)

The Commission then proceeded to apply the facts of the Defendant's case, noting that he had sustained injuries which partially incapacitated him from pursuing the duties of his usual and customary line of employment, but do not result in an impairment of earning capacity, "which is the exact language of Section 8(d)(2)." (Id.) The Commission further noted that with some activities the Defendant could not use his right arm at all, but other activities, he could start the work with his right arm and then switch if it weakens or tires easily. (Id.) The Commission stated that either one is a partial incapacity under Section 8(d)(2) and neither is inconsistent with his full duty release, as he can perform the job with modifications for his incapacity. (Id.) As such, the Commission awarded Defendant benefits under Section 8(d)(2).

On appeal, Plaintiff contends that the Commission was incorrect in its award of benefits under Section 8(d)(2) based upon a determination that the Defendant clearly sustained injuries which partially incapacitate him from pursuing the duties of his usual and customary employment. Plaintiff argues that the Commission applied Section 8(d)(2) to someone whose injury is scheduled under Section 8(e), who returned to his employment without restrictions and who is receiving the same salary and performing the same duties without any medical treatment.

Our Supreme Court has made clear that the Defendant is free to pursue remedies under either Section 8(d)(1) or Section 8(e), but not under both. See General Electric Co. v. Industrial Comm'n, 89 Ill.2d 432, 433 N.E.2d 671 (1982) (claimant allowed to pursue under Section 8(d)(1) or Section 8(3)). Other courts have determined that claimants are free to pursue remedies under Section 8(d)(2) or Section 8(e), but not both. In Lusietto v. Ind. Comm'n, 174 Ill. App. 3d 121, 528 N.E.2d 18 (3d Dist. 1988), the court analyzed the General Electric case and noted:

> Schedule allowances were originally exclusive. A strong trend, however, now views schedule allowances as non-exclusive. (See General Electric Co. v. Industrial Com. (1982), 89 Ill. 2d 432, 60 Ill. Dec. 629, 433 N.E.2d 671; see generally 2 A. Larson, The Law of Workmen's Compensation, § 58.23 at 10-344.86 (1987); 37 I.L.P. Workers' Compensation § 125, at 383 (1987).) Instead of simple losses compensated strictly on the schedule value of the listed members, the loss or impairment could be compensated on the percentage disability of the body as a whole, or of a general disability. (See 2 A. Larson, The Law of Workmen's Compensation, § 58.23 at 10-344.86 (1987).) A claimant may have an option, therefore, which will result in an award more favorable than a schedule award. See, e.g., General Electric Co. v. Industrial Com.
>
> The typical statute provides for both the total body's disability and the specific schedule benefits for the loss of the use of a leg, without mandating that either is exclusive.

Lucietto, 174 Ill. App. 3d at 129, 528 N.E.2d at 23.

Similarly, in McDaneld v. Ind. Comm'n, 307 Ill. App. 3d 1045, 718 N.E.2d 722 (5th Dist. 1999), the claimant contended that he should have been awarded damages under Section 8(d)(2) as opposed to Section 8(e). The court noted:

> Where the evidence supports a PPD award based on a percentage of loss of use of a member, the Commission is not required to award benefits based on a disability of the claimant's "body as a whole." Lusietto v. Industrial Comm'n, 174 Ill. App. 3d 121, 128-29, 123 Ill. Dec. 634, 528 N.E.2d 18 (1988). . . Based on the facts before us, we find that it was well within the Commission's discretion to award claimant benefits under section 8(e) rather than under section 8(d) 2. See Lusietto, 174 Ill. App. 3d at 128-29, 123 Ill. Dec. 634, 528 N.E.2d 18.

McDaneld, 307 Ill. App. 3d at 1054-55, 718 N.E.2d at 729-30 (5th Dist. 1999).

In this case, the Commission determined that the Defendant's testimony was credible. The Defendant is able to perform his full duties, but has had to make significant modifications to perform his job. The Commission further cited the only current medical evaluation of Dr. Coe to support the Defendant's pain.

The current trend in the law is to allow the Commission to choose between Section 8(d)(2) or Section 8(e) as a vehicle to award benefits. Similar to Lucietta and McDaneld, the testimony here supports the Commission's determination that the Defendant suffered an injury which partially incapacitates him from pursuing the duties of his usual and customary line of employment. As such, the Commission was not clearly erroneous in its application of the facts to the law. Further, a review of the decision and the record indicates that the Commission's decision was not against the manifest weight of the evidence.

WHEREFORE, for the reasons set forth above, the decision of the Commission is hereby CONFIRMED. Clerk to notify.

1/3/11
Date

Hon. Bobbi N. Petrungaro

*62 Ill. 2d 106, *; 338 N.E.2d 561, **;*
*1975 Ill. LEXIS 327, ****

GENERAL MOTORS CORPORATION, FISHER BODY DIVISION, Appellant, v. THE INDUSTRIAL COMMISSION et al. -- (Grady A. Pardue, Appellee and Cross-Appellant)

No. 47371

Supreme Court of Illinois

62 Ill. 2d 106; 338 N.E.2d 561; 1975 Ill. LEXIS 327

November 25, 1975, Filed

PRIOR HISTORY: [*1]** Appeal from the Circuit Court of Cook County; the Hon. Arthur L. Dunne, Judge, presiding.

DISPOSITION: Aff'd in pt. and rev'd in pt. and rem.

CASE SUMMARY

PROCEDURAL POSTURE: The Circuit Court of Cook County (Illinois) modified appellee Industrial Commission's order awarding compensation to appellee claimant for a second work-related injury to the claimant's hand. The circuit court held that the weekly compensation rate had increased and that appellant employer was entitled to a credit for the dollar amount of compensation paid for the first injury. The employer appealed.

OVERVIEW: The arbitrator found that the claimant had suffered a 25 percent permanent and complete loss of the use of the left hand as a result of two industrial accidents. The arbitrator refused to allow the employer credit for the five percent disability to the claimant's hand from the first injury. The circuit court reversed the arbitrator's order refusing to allow the employer credit for the first injury. The arbitrator and the circuit court held that the weekly compensation rate had increased between the two accidents pursuant to 1971 Ga. Laws 77 and awarded the claimant the higher rate of compensation for the second injury. The court affirmed the circuit court's order that the employer was entitled to an offset for the prior injury, but reversed the circuit court's order for the higher compensation. The court held that the higher compensation impermissibly gave retroactive application to 1971 Ga. Laws 77 and that the employer was entitled to a five percent credit for the first injury to the claimant's hand. There was no evidence in the statute that the legislature intended to give retroactive application to the statute increasing the weekly rate of compensation for industrial accidents.

OUTCOME: The court affirmed the circuit court's order granting the employer credit for the first injury to the claimant's hand, but reversed the circuit court's orders that the credit was

limited to the dollar amount of compensation paid and that the claimant was entitled to a higher rate of weekly compensation. The court remanded to the circuit court and ordered a remand to the Industrial Commission for an award in accordance with the court's order.

CORE TERMS: Public Act, claimant's, disability, prior injury, loss of use, arbitrator's, rate of compensation, weekly, entitled to credit, settlement, Compensation Act, recommendations, compensated, dollar, oral argument, conformed, credited, becoming, earliest, repealed, married, partial, Amendatory Act, accidental injury, payment of compensation, amount paid, deducting

LEXISNEXIS® HEADNOTES Hide

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN1 If the legislature intends to give retroactive operation to a statute, a clear expression of such intent is necessary. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities

Workers' Compensation & SSDI > Compensability > Injuries > Successive Injuries

HN2 48 Ill. Comp. Stat. 138.8(e)17(1969) of the Workers' Compensation Act provides in part that in computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the permanent loss of use or the permanent partial loss of use of any such member for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Legislation > Interpretation

HN3 The true intent and meaning of the legislature must be ascertained and given effect. The language used in a statute is the primary source for determining this intent, and where that language is certain and unambiguous, the proper function of the courts is to enforce the statute as enacted. Absent statutory definitions indicating a different legislative intention, courts will assume that words have their ordinary and popularly understood meaning. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Thomas D. Nyhan and Alan C. Garrett, of Chicago (Pope, Ballard, Shepard & Fowle, of counsel), for appellant.

Discipio & DeCarlo, of Chicago (Vito D. DeCarlo, of counsel), for appellee and cross-appellant.

JUDGES: Mr. Justice KLUCZYNSKI delivered the opinion of the court. SCHAEFER and CREBS, JJ., took no part in the consideration or decision of this case.

OPINION BY: KLUCZYNSKI

OPINION

[*108] **[**562]** This is an appeal from the circuit court of Cook County in proceedings to review orders of the Industrial Commission. (Ill. Rev. Stat. 1973, ch. 110A, par. 302(a).) The facts pertinent to the issues on appeal are undisputed. On May 15, 1970, claimant, Grady Pardue, suffered an accidental injury to his left hand, which arose out of and in the course of his employment as a millwright for the Fisher Body Division of General Motors (hereinafter employer). The claim was settled on April 22, 1971, without arbitration proceedings by the payment of $ 675 based upon 9 1/2 weeks of compensation at the rate of $ 71 per week for a 5% loss of use of the **[***2]** left hand. The settlement was reported to the Industrial Commission as required by section 6 of the Workmen's Compensation Act. (Ill. Rev. Stat. 1969, ch. 48, par. 138.6.) The report used to inform the Commission of the final payment of compensation under this settlement is commonly referred to as a "green sheet."

On November 22, 1971, claimant suffered a second injury to the same hand and filed an application for adjustment of claim. At a hearing before an arbitrator, the parties stipulated that the injury arose out of and in the course of employment, that the claimant was married and that he had four children under eighteen years of age. The sole issue in dispute was the nature and extent of the injury. From the evidence adduced, the arbitrator found that claimant had suffered accidental injuries causing the permanent and complete loss of use of the left hand to the extent of 25% and awarded compensation. The arbitrator, however, refused to allow the employer credit for the previous 5% disability to claimant's left hand. Moreover, the arbitrator awarded 47 1/2 weeks of compensation at a weekly rate of $ 85, while the employer maintained that $ 71 was the proper weekly rate **[***3]** at the time of claimant's **[*109]** injury.

On review before the Industrial Commission, the arbitrator's decision was affirmed. On *certiorari* to the circuit court of Cook County, the decision of the Industrial Commission was reversed in part. The circuit court held that the employer was entitled to credit for the amount of compensation paid for the prior injury, and that the higher rate of compensation was effective at the time of claimant's second injury. Because the rate of compensation applicable on the dates of the respective accidents was different, the circuit court determined that the employer was entitled to credit for the dollar amount paid rather than credit for the percentage of disability compensated.

The employer appeals contending that the higher compensation rate applied had not yet come into effect at the time of claimant's second injury, and that it is entitled to credit for the percentage of the disability. The claimant cross-appeals maintaining that the settlement for his prior injury was not an "award" under the **[**563]** Workmen's Compensation Act which would be credited toward a subsequent award.

Prior to the 1971 session of the General Assembly, **[***4]** the weekly rate of compensation payable to a married employee with four children under the age of eighteen, who sustained a disability similar to claimant's, was $ 71. (Ill. Rev. Stat. 1969, ch. 48, par. 138.8(b)4(b).) The 1971 General Assembly passed House Bill 844 prior to July 1 of that year amending this provision, among others, of the Workmen's Compensation Act by increasing the weekly rate to $ 85. Under section 9(e) of article IV of the Illinois Constitution of 1970, the Governor made specific recommendations for changes in the bill and returned it. Both houses of the General Assembly concurred in the amendatory veto and sent the bill back to the Governor, who on October 28, 1971, certified that the concurrence of the General Assembly conformed to his specific recommendations, **[*110]** and the measure became law as Public Act 77 -- 1659. (Laws of 1971, p. 3103.) The bill contained no provision providing for a specific effective date, or that it should become effective upon its becoming law.

The employer maintains that Public Act 77 -- 1659 could not have become effective prior to July 1, 1972 (approximately 7 months after the accident for which claimant seeks recovery), **[***5]** and that the circuit court erred in holding the effective date was October 28, 1971. In

support of this contention, it relies on *People ex rel. Klinger v. Howlett*, 50 Ill.2d 242, which involved the issue of the effective date of three bills that had a legislative history identical to that of Public Act 77 -- 1659. The bills in issue were passed by the General Assembly prior to July 1, 1971. On September 10, 1971, the Governor returned the bills with recommended changes which were accepted by both houses in October, and on October 28, 1971, the Governor certified that the acceptance of the General Assembly conformed to his recommendations. In *Klinger* we considered the constitutional and legislative provisions dealing with the "effective date of laws" in effect on October 28, 1971 (Ill. Const. 1970, art. IV, sec. 10; Ill. Rev. Stat. 1971, ch. 131, par. 21), and found that the earliest date which the three bills could become effective was July 1, 1972. The factual similarity of that case with the present case makes the rationale expressed in *Klinger* controlling. Accordingly, the earliest effective date for Public Act 77 -- 1659 was July 1, 1972.

During oral argument **[***6]** it was suggested the General Assembly intended that Public Act 77 -- 1659 was to become effective when it became a law, *i.e.*, on October 28, 1971. The General Assembly specifically repealed and reenacted Public Act 77 -- 1659 in June 1972, by Public Act 77 -- 1871 (Laws of 1972, p. 148) with the additional provision that the amendment take effect upon its becoming law. Public Act 77 -- 1871 was approved on June 26, 1972. The question was posed as to whether this **[*111]** subsequent legislation indicated the General Assembly's intent concerning the effective date of Public Act 77 -- 1659. (*Cf. Bruni v. Department of Registration and Education*, 59 Ill.2d 6, 11-12.) To accept this interpretation, however, would, in effect, give retroactive operation to Public Act 77 -- 1871. HN1 Had the legislature intended this result, a clear expression of this intent would be necessary. (*People ex rel. American Federation of State, County and Municipal Employees v. Walker*, 61 Ill.2d 112, 118; *People ex rel. Baylor v. Bell Mutual Casualty Co.*, 54 Ill.2d 433, 440.) We find no expression of this intent in Public Act 77 -- 1871.

Moreover, the reason the parties did not raise the issue **[***7]** of the applicability of Public Act 77 -- 1871 to this case is disclosed by a reading of section 2 of that act, which provided:

> "Public Act 77 -- 1659 * * * certified October 28, 1971, is repealed; provided, however, that this repealer shall not affect any rights, obligations or actions **[**564]** arising pursuant to said Amendatory Act of 1971 prior to the effective date of this Amendatory Act of 1972." Laws of 1972, p. 175.

This provision clearly indicates that Public Act 77 -- 1871 was not intended to be retroactively applied. While this provision reveals the legislature's misconception that Public Act 77 -- 1659 became effective October 28, 1971, this erroneous interpretation can be afforded no validity under our decision in *Klinger*, which was based upon the constitutional and legislative provisions in effect on October 28, 1971. The circuit court, therefore, erred in holding the higher rate of compensation provided by Public Act 77 -- 1659 was applicable at the time of claimant's second injury.

Claimant argues that the circuit court improperly allowed credit for the prior injury which he sustained. He concedes that when an award has been made for a prior injury, **[***8]** credit for the percentage of disability suffered **[*112]** should be allowed in an award for a subsequent injury. He maintains, however, that the settlement with his employer was not an "award" under section 8(e) of the Workmen's Compensation Act for which credit should be given. HN2 Section 8(e) provides, in pertinent part:

> "In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in * * * the permanent loss of use or the permanent partial loss of use of any such member for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury." Ill. Rev. Stat. 1969, ch. 48, par. 138.8(e)17.

The employer argues that the ordinary meaning of this provision indicates the legislature's intention that credit be allowed for the "loss" of use for which compensation has been paid and not upon the entry of an "award" by the Industrial Commission. Both parties cite various cases in support of their respective positions. A review of these cases is unnecessary, however, because none involves the precise issue **[***9]** raised here.

The cardinal rule of all statutory construction, to which other rules are subordinate, is that ***HN3*** the true intent and meaning of the legislature must be ascertained and given effect. (*People ex rel. Carey v. Power*, 59 Ill.2d 569, 571.) The language used in a statute is the primary source for determining this intent, and where that language is certain and unambiguous, the proper function of the courts is to enforce the statute as enacted. (*Certain Taxpayers v. Sheahen*, 45 Ill.2d 75, 84.) Absent statutory definitions indicating a different legislative intention, courts will assume that words have their ordinary and popularly understood meaning. (*People v. Dednam*, 55 Ill.2d 565, 568.) The clear and obvious meaning of the pertinent provisions of section 8(e) is that the permanent loss or permanent partial loss of use "for which compensation has been paid" shall be credited in any award for a **[*113]** subsequent injury to the same member. The statute is devoid of any condition or limitation that an award must have been entered for the prior injury. The statute's only requirement is that compensation has been paid for the prior injury. *Cf. Caterpillar Tractor* **[***10]** *Co. v. Industrial Com.*, 397 Ill. 474, 483-485.

In his brief claimant does not contest the propriety of deducting the percentage of a prior disability in an award for a subsequent injury rather than deducting only the dollar amount paid. During oral argument claimant conceded that if credit is allowed for his prior injury, it should be for the percentage of the prior compensated disability. Therefore, the employer is entitled to a deduction from the present award of the prior 5% disability for which compensation was paid.

[565]** Accordingly, that portion of the judgment of the circuit court holding that the employer's payment of compensation for claimant's initial injury is a proper credit in an award for the subsequent injury is affirmed; those portions of the judgment holding that the higher rate of compensation was applicable and that the employer was entitled to credit for the dollar amount paid rather than the percentage of the disability compensated are reversed. The cause is remanded to the circuit court of Cook County with directions to enter an order remanding this cause to the Industrial Commission for entry of an award not inconsistent with the views expressed **[***11]** herein.

Affirmed in part and reversed in part and remanded, with directions.

*78 Ill. 2d 287, *; 399 N.E.2d 1312, **;*
*1980 Ill. LEXIS 262, ***; 35 Ill. Dec. 784*

PAGE ENTERPRISES, INC., Appellant, v. THE INDUSTRIAL COMMISSION et al. (Kenneth Hamm, Appellee)

No. 51956

Supreme Court of Illinois

78 Ill. 2d 287; 399 N.E.2d 1312; 1980 Ill. LEXIS 262; 35 Ill. Dec. 784

January 23, 1980, Filed

PRIOR HISTORY: [*1]** Appeal from the Circuit Court of Lake County, the Hon. John L. Hughes, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Under the Illinois Workmen's Compensation Act, an arbitrator for the Industrial Commission awarded petitioner employee compensation for the complete and permanent loss of use of his right leg to the extent of 65 percent thereof. The Industrial Commission affirmed this award without taking additional evidence. On certiorari, the Circuit Court of Lake County (Illinois) affirmed the ruling. Respondent employer sought further review.

OVERVIEW: It was not disputed that the employee sustained a compensable injury to his back and legs that ultimately led to a permanent disability in his right leg. On appeal, the employer contended that the employee failed to meet his burden of proving the nature and extent of his injury and that it was permanent. The court held that it was not necessary in all cases that a medical expert make the categorical statement that the disability was permanent. The court found that the Industrial Commission had the authority to determine the facts and draw reasonable inferences from the record. The court also found that a prior compensation settlement between the employee and a previous employer involved an injury to the employee's back rather than to his right leg, thus justifying the Industrial Commission's denial of credit to the second employer because the same body part was not involved. The court further held that the finding of permanent disability was not contrary to the manifest weight of the evidence.

OUTCOME: The court affirmed the judgment that the employee was entitled to receive

workmen's compensation benefits from his employer for a permanent disability in his right leg.

CORE TERMS: pain, leg, surgery, Compensation Act, disability, symptoms, ample, returned to work, settlement contract, entitled to credit, arbitrator's, occurrence, settlement, underwent, surgical

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence

Workers' Compensation & SSDI > Benefit Determinations > Permanent Total Disabilities

HN1 It is not necessary in all cases that a medical expert make the categorical statement that the disability is permanent, and it is the province of the Illinois Industrial Commission to determine the facts and draw reasonable inferences from the record. The employee's testimony, corroborated by the medical records of the hospital and the report of the operating surgeon, sufficiently support the award. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Gordon, Schaefer & Gordon, Ltd., of Chicago (Gilbert W. Gordon, of counsel), for appellant.

Klohr, Braun, Lynch & Smith, Ltd., of Chicago (Mark A. Braun, of counsel), for appellee.

JUDGES: Mr. CHIEF Justice GOLDENHERSH delivered the opinion of the court.

OPINION BY: GOLDENHERSH

OPINION

[*289] [1313]** Pursuant to section 8(e) of the Workmen's Compensation Act (Ill. Rev. Stat. 1973, ch. 48, par. 138.8(e)), an arbitrator for the Industrial Commission awarded petitioner, Kenneth Hamm, compensation for the complete and permanent loss of use of his right leg to the extent of 65% thereof. On review, without taking additional evidence, the Industrial Commission affirmed the arbitrator's decision. On *certiorari* the circuit court of Lake County confirmed the ruling and respondent appealed. 73 Ill. 2d R. 302(a).

The testimony shows that petitioner, while employed as a carpenter by respondent, Page Enterprises, Inc., sustained an injury to his back and legs. While working on the second story of a house being constructed by respondent, petitioner attempted **[***2]** to lift a beam being raised by fellow workers. He experienced pain in his back and legs. He advised his foreman of the occurrence and continued to work the remainder of that day. He did not work the next two days. Several weeks thereafter he underwent back surgery. The pain in his back and legs persisted, and at the request of respondent's insurer, he was examined by another physician, who told petitioner that nothing further could be done for him. Petitioner obtained an opinion from yet another physician and again underwent surgery. He recovered well and with his physician's approval returned to work for respondent. Petitioner received temporary total disability payments, which were terminated upon his return to work. Thereafter he continued to experience intermittent pain in his back and legs and, pursuant to orders from his physician, requested "light work." He continued to perform these tasks until he was assigned some

"rough" work and his pain increased dramatically. Following examination, **[*290]** surgery was again performed. Petitioner has not returned to work.

The testimony showed that prior to the accident for which compensation was claimed, petitioner had sustained **[***3]** a back injury while working for another employer. Following three surgical procedures, a settlement agreement was negotiated providing compensation for a "back" injury. It is undisputed that these surgical procedures had enabled petitioner to work without pain, and that, on the date of the occurrence out of which the present claim arose, he was able to perform his work in a normal manner.

Respondent contends that petitioner failed to meet his burden of proving the nature and extent of his injury and that it was permanent. Additionally, respondent contends that it was entitled to credit for the prior approved settlement.

Respondent argues that the only relevant medical evidence presented is the letter report received from Dr. William J. Kane, who performed a laminectomy on petitioner, and that it contained no statement which supports the finding of permanency. We do not agree. The record contains the record of Northwestern Hospital covering petitioner's period of confinement, and supplies ample proof as to the nature of the injury and the surgery performed. HN1 It is not necessary in all cases that a medical expert make the categorical statement that the disability is permanent **[***4]** (*Gould v. Industrial Com.* (1968), 40 Ill. 2d 548, 552), and as we have said repeatedly, it is the province of the Industrial Commission to determine the facts and draw reasonable inferences from **[**1314]** the record. Petitioner's testimony, corroborated by the medical records of the hospital and the report of the operating surgeon, sufficiently support the award.

Respondent argues that there is no evidence of objective conditions or symptoms of the petitioner's injury as was formerly required by section 8(b)(7) of the Workmen's Compensation Act (Ill. Rev. Stat. 1973, ch. 48, par. 138.8(b)(7)). **[*291]** As was stated in *Martin Young Enterprises, Inc. v. Industrial Com.* (1972), 51 Ill. 2d 149, 153-54:

> "It was the injury which had to be proved by competent evidence, including objective conditions or symptoms. The Act does not require an objective finding of disability or of the effect of the injury upon the employee. Such finding can only be a conclusion based upon a proper evaluation of objective conditions or symptoms. [Citation.]
>
> There was ample objective proof of the petitioner's injury and condition."

We consider respondent's contention **[***5]** that under the provisions of section 8(e)(17) of the Workmen's Compensation Act (Ill. Rev. Stat. 1973, ch. 48, par. 138.8(e)(17)) it is entitled to credit on this award for the payment made under the settlement contract approved by the Industrial Commission with respect to an injury suffered approximately 12 years before the injury in question. So far as can be determined from the record, the settlement contract in question involved an injury to petitioner's back. Implicit in the Industrial Commission's denial of credit in computing the award is its finding that it did not involve the same "member," as is required for credit under the provisions of section 8(e)(17). This finding is not contrary to the manifest weight of the evidence.

For the reasons stated, the judgment is affirmed.

Judgment affirmed.

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In

*125 Ill. App. 3d 999, *; 466 N.E.2d 1001, **;*
*1984 Ill. App. LEXIS 2077, ***; 81 Ill. Dec. 199*

LLOYD SMITH, Appellant, v. THE INDUSTRIAL COMMISSION et al. (The City of Chicago, Appellee)

No. 1-84-0381WC

Appellate Court of Illinois, First District, Industrial Commission Division

125 Ill. App. 3d 999; 466 N.E.2d 1001; 1984 Ill. App. LEXIS 2077; 81 Ill. Dec. 199

May 23, 1984, Filed

SUBSEQUENT HISTORY: [*1]** Rehearing Denied July 27, 1984.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County; the Hon. James C. Murray, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant sought review of a judgment of the Circuit Court, Cook County (Illinois), which confirmed the decision of the appellee commission denying **workers' compensation** benefits to him.

OVERVIEW: The claimant applied for a **workers' compensation** award for injuries incurred during the course of his employment. The commission found that no permanent disability was proved and denied compensation to the claimant. The trial court confirmed the commission's decision denying permanent total disability benefits and the claimant appealed, arguing that the judgment was against the manifest weight of the evidence. The court ruled that the claimant was not obviously unemployable and there was no medical evidence to support the claim of total disability. Further, the court held that the claimant had the burden of proving that no employment was available for a person in his circumstances. Also, the court found that while there was no evidence that the claimant returned to work there also was no indication of any attempt on his part to find suitable work. The court affirmed the judgment, concluding that the claimant's failure to testify as to his current employment status or work search resulted in a lack of proof as to an element necessary to establish his claim.

OUTCOME: The judgment denying **workers' compensation** benefits to the claimant was affirmed.

CORE TERMS: disability, claimant's, temporary, arbitrator's, spine, permanently disabled, disease, neck, cervical, lumbar, pain, total disability, conclusive, totally, blood, degenerative arthritis, lifting, garbage, doctor's, muscle, leg, return to work, treating physician, burden of proving, failure to testify, permanency, arthritis, suitable, regular, desk

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Permanent Total Disabilities

HN1 Proof of total and permanent disability requires evidence that the employee is unable to perform services except those for which there is no reasonably stable market; an award of compensation is not justified if the person can perform some type of regular employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Permanent Total Disabilities

HN2 One way to sustain the burden of proving that no employment is available to a **workers' compensation** claimant is to show an unsuccessful search for suitable work. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: J. Michael Madda, of Chicago (John E. Flavin, of counsel), for appellant.

Vincent J. Getzendanner, Jr., of Chicago, for appellee.

JUDGES: PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court. McNAMARA, BARRY, WEBBER, and KASSERMAN, JJ., concur.

OPINION BY: SEIDENFELD

OPINION

[*1000] **[**1002]** The claimant, Lloyd Smith, applied for a **workers' compensation** award for injuries incurred while lifting a garbage can in the course of his duties for the city of Chicago, Bureau of Sanitation. On August 21, 1978, the arbitrator found that the injury arose out of and in the course of his employment and that the claimant sustained temporary total disability for a period of 76 2/7 weeks. The question of permanent disability was reserved. No review of the award of temporary total disability was sought.

On August 28, 1980, the arbitrator took additional evidence and found that Smith had sustained complete and permanent disability and awarded compensation for life. On review the Industrial Commission **[*1001]** found **[***2]** that no permanent disability had been proved,

and denied further compensation. The circuit court confirmed the decision of the Commission. Smith appeals, contending that the decision of the Commission is against the manifest weight of the evidence.

The original finding of temporary disability rendered August 21, 1978, was based on evidence that Smith, who was working as a garbage collector for the city, experienced a pain in his lower back, right side, neck, and right shoulder while lifting a can of garbage onto a sanitation truck on March 1, 1977. Smith's right leg also became swollen. Thereafter, Smith was treated by various doctors, including treatment for high blood pressure and "statis dermititus," neither connected to the accident. He was given physical therapy, pain medication, massages, and heat treatments. He also was hospitalized for five days. As of February 1978, Smith was still under doctor's care and continued to have pain in the affected areas and swelling in his right leg and knee. Smith, who had been wearing a back brace since 1972, wore a larger brace after the instant accident. As of April 1978, Smith had not worked anywhere since the accident.

One of **[***3]** the doctors who examined Smith, Dr. Hyman Hirshfield, found osteoarthritic spurring of Smith's cervical, dorsal, and lumbosacral spine, a narrowing of the disc space between several vertebrae, herniated disc syndrome in Smith's lumbar area, spondylolisthesis in Smith's lumbosacral spine, a sprain injury to Smith's neck and upper and middle back muscles, with inflammation of these muscles, and strain and nerve inflammation in Smith's lower back. Hirshfield believed that Smith's condition was permanent and concluded that he should refrain from heavy lifting and other strenuous activities. Another physician who examined Smith, Dr. Audley Loughran, found tenderness in Smith's lower back. Loughran concluded that Smith had degenerative arthritis and disc disease in the lumbar and cervical spine, but no primary hip disease, no significant muscle disease, no spinal nerve problem, and no sacroiliac irritation. While noting that further testing would be appropriate, Loughran concluded that Smith could return to his prior job.

A third examining physician, Dr. E. H. Tannehill, found some spurring of the cervical vertebrae, with few other objective findings, and considered Smith to be capable **[***4]** of returning to work.

In the subsequent proceedings, the arbitrator found Smith to be totally and permanently disabled based on two reports of Smith's treating physician, Dr. John Froiland. These reports, based on examinations of Smith on November 2, 1979, and February 4, 1980, stated that Smith had increased blood pressure, arthritis of the neck and **[*1002]** right shoulder, and lumbar spondylolysis with pain in the back and leg from bone disease. In Froiland's opinion, Smith was "permanently disabled for heavy duty and anything except a desk job."

On review by the Commission, the city introduced a report by Dr. Loughran, detailing his findings after an examination of Smith on March 23, 1981. As before, Loughran noted tenderness in Smith's neck and upper back on the right side and a limitation in Smith's neck motion and ability **[**1003]** to bend. There was some difference in the degree of limitation. Recent X rays revealed degenerative arthritis and disc disease in the cervical spine, mild degenerative changes in the dorsal spine, and degenerative arthritis and a spondylolisthesis in the lumbar spine. While not identical, these findings were similar to those **[***5]** in Loughran's prior report. The Commission determined that Smith had failed to prove that he was permanently disabled.

Smith did not testify at the second hearing before the arbitrator or before the Commission.

We conclude that the determination of the Commission is not contrary to the manifest weight of the evidence.

HN1Proof of total and permanent disability requires evidence that the employee is unable to perform services except those for which there is no reasonably stable market; an award of compensation is not justified if the person can perform some type of regular employment.

(*A.M.T.C. of Illinois, Inc. v. Industrial Com.* (1979), 77 Ill. 2d 482, 489.) While Smith had back problems, arthritis, and "increased" blood pressure, there is no indication that these ailments so restrict Smith's activities as to prevent him from performing any regular and useful services. Smith's inability to resume his former employment duties does not render him totally and permanently disabled. (77 Ill. 2d 482, 490.) Significantly, claimant's own treating physician believed that he could perform a desk job. Where, as here, the claimant is not obviously unemployable and there is no medical **[***6]** evidence to support the claim of total disability, the claimant has the burden of proving that no employment is available for a person in his or her circumstances. (*Intercraft Industries Corp. v. Industrial Com.* (1983), 95 Ill. 2d 297, 300; *Valley Mould & Iron Co. v. Industrial Com.* (1981), 84 Ill. 2d 538, 546-47.) While there is no evidence that Smith has returned to work, there also is no indication of any attempt on his part to find suitable work. In light of these circumstances, Smith has not demonstrated that he is totally and permanently disabled. *Intercraft Industries Corp. v. Industrial Com.* (1983), 95 Ill. 2d 297, 300-01.

Contrary to Smith's argument, his failure to testify as to **[*1003]** whether he was working or looking for work is significant. HN2 One way to sustain his burden of proving that no employment is available to him is to show an unsuccessful search for suitable work. (*A.M.T.C. of Illinois, Inc. v. Industrial Com.* (1979), 77 Ill. 2d 482, 490.) Consequently, Smith's failure to testify as to his current employment status or work search results in a lack of proof as to an element necessary to establish Smith's claim.

Smith suggests that the **[***7]** fact that Dr. Loughran's report failed to state that Smith could return to work should be taken as "negative evidence" that he could not do so. Negative inferences may be drawn from silence where the circumstances are such as to not only afford an opportunity to speak, but also naturally and properly call for speech. (*Dill v. Widman* (1952), 413 Ill. 448, 454; E. Cleary & M. Graham, Illinois Evidence sec. 802.7 (3d ed. 1979).) However, these criteria are not met here. As it is the province of the Industrial Commission to determine the extent of a claimant's disability, it is not necessary for a medical expert to express an opinion as to whether the claimant is able to return to work. See ***Page Enterprises,*** *Inc. v. Industrial Com.* (1980), 78 Ill. 2d 287, 290.

The claimant has also placed considerable emphasis on the fact that the city failed to appeal the August 1978 decision of the arbitrator, arguing that this is a conclusive finding that the disabling condition resulted from a March 1, 1977, accident. Undoubtedly, the arbitrator's initial decision is *res judicata* as to all questions within the purview of the original proceeding. **[**1004]** (**[***8]** *Hughey v. Industrial Com.* (1979), 76 Ill. 2d 577; see Ill. Rev. Stat. 1983, ch. 48, par. 138.19(b).) However, while the temporary disability award is conclusive as to issues such as causation, employment relationship, and temporary disability, the ruling does not preclude a later determination of the claimant's entitlement to permanent disability and is not conclusive of questions as to the nature and extent of the disability. (Ill. Rev. Stat. 1983, ch. 48, par. 138.19(b).) An award of temporary disability is designed to provide some compensation to an employee even though the extent or permanency of his or her disability cannot then be ascertained. (See Ill. Rev. Stat. 1983, ch. 48, par. 138.19(b).) The Commission is entitled to reassess the permanency of the disability, and, in doing so, is not bound by the arbitrator's finding that the disability was permanent. See *Wirth v. Industrial Com.* (1976), 63 Ill. 2d 237; *Leason v. Industrial Com.* (1973), 55 Ill. 2d 486; *Quick v. Industrial Com.* (1972), 53 Ill. 2d 46.

Because of the different standards involved in assessing permanent as opposed to temporary disability, the Commission also was entitled **[*1004]** to reach a conclusion **[***9]** concerning permanent disability which was different from that reached with regard to temporary disability, based on the factors which we have indicated.

The decision of the circuit court of Cook County confirming the decision of the Industrial Commission is therefore affirmed.

Affirmed.

Source: **Legal > States Legal - U.S. > Illinois > Find Cases > IL State Cases, Combined**
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*138 Ill. App. 3d 392, *; 485 N.E.2d 1093, **;*
*1985 Ill. App. LEXIS 2693, ***; 92 Ill. Dec. 850*

LARRY ISAACS, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Freeman United Coal Company, Appellees)

No. 5-84-0760WC

Appellate Court of Illinois, Fifth District, Industrial Commission Division

138 Ill. App. 3d 392; 485 N.E.2d 1093; 1985 Ill. App. LEXIS 2693; 92 Ill. Dec. 850

August 21, 1985, Filed

SUBSEQUENT HISTORY: [*1]** Rehearing Denied November 25, 1985.

PRIOR HISTORY: Appeal from the Circuit Court of Franklin County; the Hon. Larry O. Baker, Judge, presiding.

DISPOSITION: Affirmed in part and reversed in part.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee sought review of the judgment of the Circuit Court of Franklin County (Illinois) that confirmed the decision of appellee Industrial Commission (Commission) to reduce the benefits that were awarded to the employee by an arbitrator under the Illinois Workmen's Compensation Act (Act), Ill Rev. Stat. ch. 48, para. 138.1 et seq. (1975).

OVERVIEW: The employee injured his back while lifting. He had also injured his back three years earlier and at that time had received compensation for a partial loss of use of his right leg. For the more recent back injury, the employee was hospitalized for traction, heat treatments, and therapy. An arbitrator awarded him both temporary total and permanent partial disability benefits under the Act. On review, the Commission reduced the benefits awarded by the arbitrator, and the trial court confirmed the Commission's decision. On appeal, the employee contended that his average weekly earnings should have been calculated on the basis of 40 weeks rather than 52 weeks, as the Commission had calculated them. The court held, however, that because there was no basis in the record for deducting any days because of absences due to unavoidable causes, the findings of the Commission as to the employee's weekly earnings were not against the manifest weight of the evidence. The court also ruled, however, that the Commission had improperly taken into consideration a member disability (i.e., the leg) and, as a result, had affected the employee's right to compensation for disability to the person.

OUTCOME: The court affirmed the portion of the judgment regarding the computation of the employee's average weekly earnings; however, it reversed the portion of the judgment that allowed a credit to the employer for the prior injury.

CORE TERMS: claimant's, disability, arbitrator's, loss of use, partial, earnings, prior injury, straight time, average weekly earnings, unavoidable cause, leg, temporary, right leg, annual earnings, overtime, average weekly wage, per week, deducted, year next preceding, computation, computed, annual, partial disability, disability benefits, per annum, continuously, installment, computing, wild-cat, holidays

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN1 The Illinois Workmen's Compensation Act (Act) § 10 contains the following provisions for computing an employee's level of compensation: (a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings if in the employment of the same employer continuously during the year next preceding the injury. (b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause. Ill. Rev. Stat. ch. 48, paras. 138.10(a), (b) (1975). Annual earnings must be determined, if possible, under ch. 48, para. 138.10(a). Under § 10(i) of the Act, the earnings per annum are to be divided by the number of installment periods per annum in order to determine the amount of compensation for each installment period. Ill. Rev. Stat. ch. 48, para. 138.10(i) (1975). More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities

HN2 The Illinois Workmen's Compensation Act (Act) § 8(e)(17) provides for credit to the employer for a prior injury under some circumstances. It states: In computing the compensation to be paid to an employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury. Ill. Rev. Stat. ch. 48, para. 138.8(e)(17) (1975). Section 8(d)(2) of the Act concerns disability to the person. It provides that compensation awarded for disability to the person should not take into consideration injuries covered under § 8(e) and, furthermore, should not affect the employee's right to compensation payable under § 8(e). Ill. Rev. Stat. ch. 48, para. 138.8(d)(2) (1975). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Statutes of Limitations > Statutory Construction

Governments > Legislation > Interpretation

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 In construing statutes, the courts are free to interpret the language used by the legislature only where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions that depart from its plain meaning. Credits that operate as partial exceptions to the liabilities created by the Illinois Workmen's Compensation Act (Act), Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1975), should, therefore, be narrowly construed where granted and not be extended by implication unless necessary to accomplish the purpose of the Act. More Like This Headnote

COUNSEL: Serkland & Muelhausen, of Chicago (James C. Serkland, of counsel), for appellant.

Carter Harrison and Elmer Jenkins, both of Benton, for appellee Freeman United Coal Company.

JUDGES: JUSTICE BARRY delivered the opinion of the court. WEBBER, P.J., and McNAMARA, LINDBERG and KASSERMAN, JJ., concur.

OPINION BY: BARRY

OPINION

[*392] **[**1094]** The claimant, Larry Isaacs, filed a claim under the Workmen's Compensation Act (Ill. Rev. Stat. 1975, ch. 48, par. 138.1 *et seq.*), for injuries sustained while employed by the defendant, Freeman United Coal Mining Company (the company). The arbitrator awarded both temporary total and permanent partial disability benefits to the claimant. On review, the Illinois Industrial Commission (the Commission) **[*393]** reduced the benefits awarded by the arbitrator. The circuit court of Franklin County confirmed the decision of the Commission. The claimant **[**1095]** brings the instant appeal. We affirm in part and reverse in part.

The claimant **[***2]** had been employed by the company since 1970. On January 23, 1976, he injured his back while lifting a plate weighing approximately 100 pounds. This injury was the basis for the instant claim. The claimant had previously injured his back in 1973 and at that time had received 40 weeks' compensation for a 20% loss of use of his right leg.

The claimant's physician initially prescribed heat treatments, a back brace, and medication for the instant injury, and on May 11, 1976, the claimant returned to work. He was hospitalized in October 1976 and again in November 1976 for traction, heat treatments, and therapy. The claimant went back to work on January 29, 1979. A herniated disc was diagnosed in April 1979, and on May 21, 1979, a bilateral hemilaminectomy was performed. The claimant returned to work as a laborer on April 16, 1980.

At the arbitrator's hearing, it was established that the company operated 239 2/3 days in 1975, the year preceding the instant injury. The claimant's straight-time pay for the 52-week period prior to the accident was $ 11,157.22, and his hourly wage was $ 7.15 at the time of the injury. These earnings of the claimant during this 52-week period did not **[***3]** include payment for any wild-cat strikes, holidays, or 40 days of overtime on Saturdays and Sundays, but they did include two weeks for vacations. Of the 239 2/3 days that the company operated in 1975, the claimant worked 164 days at the straight time pay rate.

The arbitrator awarded benefits to the claimant for temporary total disability and for 30%

permanent partial disability of the person. The arbitrator found that the claimant's average weekly wage was $ 295.69 based on an annual wage of $ 15,376.08. The arbitrator applied section 10(c) of the Act, stating that section 10(a) did not apply because the claimant was absent from work due to unavoidable cause in the year before the injury. The claimant was awarded $ 191.13 per week for 58 4/7 weeks for the temporary total disability. Additional benefits of $ 197.13 per week for 150 weeks were awarded by the arbitrator for the 30% permanent partial disability of the person.

The Commission established the claimant's average weekly wage at $ 214.56 based upon his straight time annual wage of $ 11,157.22 divided by 52 weeks. Although the record does not state which rate provision of section 10 of the Act was applied, the Commission **[***4]** apparently utilized section 10(a). On this basis, the Commission awarded temporary disability benefits of $ 143.04 per week for 58 4/7 weeks. The **[*394]** Commission also granted 22% partial disability benefits of $ 143.04 per week for 110 weeks, finding that Freeman was entitled to an 8% credit for the prior 1973 injury.

On appeal to the circuit court of Franklin County, the court confirmed the Commission's decision. This appeal followed.

The claimant argues on appeal that his average weekly wage should be determined by dividing his annual earnings by the number of weeks during which work was available and during which he was not unavoidably absent. The claimant thus contends that his annual earnings of $ 11,157.22 should be divided by 40, the number of weeks that work was available. This number of weeks is computed by the claimant based on the fact that the mine operated 239 2/3 days in the year before the injury. After deducting his 40 days of overtime earnings, the claimant asserts that only 199 2/3 day or 40 weeks of regular work were actually available to him. The claimant asks, therefore, that his average weekly earnings be calculated on the basis of 40 weeks rather **[***5]** than 52 weeks.

We find initially that the arbitrator's basis was improperly computed. The arbitrator based his determination of the claimant's average weekly wage on the assumption that the claimant worked a total of 275 days in the year next preceding the injury. The record states, however, that the claimant worked 164 straight time days **[**1096]** and 40 days of overtime on Saturdays and Sundays.

HN1Section 10 of the Act contains the following relevant provisions for computing an employee's level of compensation:

> "(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings if in the employment of the same employer continuously during the year next preceding the injury.
>
> (b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause." (Ill. Rev. Stat. 1975, ch. 48, pars. 138.10(a),(b).)

Other rate provisions are contained in subsections 10(c), (d), and (e) of the Act, but it is well accepted that annual **[***6]** earnings must be determined, if possible, under paragraph (a). (*Vaught v. Industrial Com.* (1972), 52 Ill. 2d 158, 287 N.E.2d 701.) Under section 10(i) of the Act, the earnings per annum are to be divided by the number of installment periods per annum in order to determine the amount of compensation for each installment period. Ill. Rev. Stat. 1975, ch. 48, par. 138.10(i).

[*395] The claimant bases his argument for the use of 40 weeks on *Monterey Coal Co. v.*

Industrial Com. (1980), 79 Ill. 2d 334, 403 N.E.2d 263. There the court held that an employee's absence due to a strike should not be included in the computation of the employee's average weekly earnings. The facts of *Monterey*, however, are not applicable to the instant case. In the case at bar, the record contains insufficient evidence to determine the extent of any periods of strikes or absences due to unavoidable causes. We note further that the claimant's annual straight time earnings of $ 11,157.22 properly excluded payment for wild-cat strikes, holidays, and overtime. The instant record, therefore, fails to indicate any basis for a deduction of days because of absences due to unavoidable causes.

We **[***7]** find in the case before us that section 10(a) is applicable to the calculation of the claimant's average weekly earnings and that the Commission properly based this computation on 52 weeks. The record clearly indicates that the claimant was continuously employed by the company during the year next preceding the injury. All of the claimant's straight time earnings for that year were taken into consideration in determining his actual wages, and the claimant's employment did not constitute temporary or seasonal work. The record, furthermore, does not reveal any unusual circumstances regarding absences from work due to unavoidable causes. The findings of the Commission as to the claimant's average weekly earnings are, therefore, not against the manifest weight of the evidence.

The claimant next contends that the Commission improperly deducted an 8% credit from the 30% permanent disability award. The disputed 8% credit was allowed for the claimant's 1973 back injury which resulted in a 20% loss of use of his right leg. The claimant asserts that the Commission's extrapolation of this prior injury to an 8% disability of the person was contrary to the provisions of the Act.

The critical **[***8]** question in the case at bar is whether the Commission could properly allow a credit for a previous back injury by extrapolating this prior injury, a 20% loss of use of a leg under section 8(e), into an 8% disability to the person under section 8(d)(2). The Commission based this extrapolation on the premise that both an 8% disability to the person and a 20% loss of use of a leg equal 40 weeks of compensation. Forty weeks were then deducted from the arbitrator's award of 150 weeks. The Commission thus awarded the claimant compensation for 110 weeks.

HN2 Section 8(e)(17) of the Act provides for credit to the employer for a prior injury under some circumstances:

> "In computing the compensation to be paid to an employee **[*396]** who, before the accident **[**1097]** for which he claims compensation, had before that time sustained an injury resulting in the loss * * * of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an **[***9]** eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury." Ill. Rev. Stat. 1975, ch. 48, par. 138.8(e)(17).

Section 8(d)(2) of the Act concerns disability to the person. It provides that compensation awarded for disability to the person should not take into consideration injuries covered under section 8(e) and, furthermore, should not affect the employee's right to compensation payable under section 8(e). Ill. Rev. Stat. 1975, ch. 48, par. 138.8(d)(2).

It is well established that HN3 in construing statutes, the courts are free to interpret the language used by the legislature only where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning. Credits which operate as partial exceptions to

the liabilities created by the Act should, therefore, be narrowly construed where granted and not be extended by implication unless necessary to accomplish the purpose of the Act. *Freeman United Coal Mining Co. v. Industrial Com.* (1984), 99 Ill. 2d 487, 459 N.E.2d 1368. **[***10]**

In support of the instant 8% credit, the company relies on *General Motors Corp., Fisher Body Division v. Industrial Com.* (1975), 62 Ill. 2d 106, 338 N.E.2d 561. The factual situation in *General Motors*, however, is distinguishable. There, both injuries to the employee involved the same bodily member. In the instant case, although both injuries to the claimant involved his back, the claimant's prior injury resulted in compensation for the partial loss of use of his right leg.

A fact situation more applicable to the case before us was presented in *Page Enterprises, Inc. v. Industrial Com.* (1980), 78 Ill. 2d 287, 399 N.E.2d 1312. There the claimant had sustained a prior back injury, and then sustained a subsequent injury to his right leg which resulted in a 65% permanent loss of use of the leg. The court denied credit for the prior injury because it did not involve the same "member," as is required for credit under section 8(e)(17).

We find in the case at bar that the Commission's allowance of an 8% credit for the claimant's prior injury was improper. Although both **[*397]** of the injuries involved the claimant's back, the prior award was for a "member" disability. **[***11]** In crediting the prior award, the Commission disregarded the statutory direction of section 8(d)(2) that compensation for disability to the person shall not take into consideration injuries classified as member disabilities. In deducting the prior 20% loss of use of the claimant's leg, the Commission improperly took into consideration a member disability and, as a result, affected the claimant's right to compensation for disability to the person. We conclude, therefore, that the claimant is entitled to receive compensation benefits for 30% permanent partial disability of the person.

Accordingly, the judgment of the circuit court of Franklin County is affirmed as to the computation of the claimant's average weekly earnings. The judgment of the circuit court is reversed as to the allowance of the credit for the prior injury.

Affirmed in part; reversed in part.

*148 Ill. App. 3d 975, *; 500 N.E.2d 450, **;*
*1986 Ill. App. LEXIS 2997, ***; 102 Ill. Dec. 557*

DARRELL KILLIAN, Appellee, v. THE INDUSTRIAL COMMISSION et al. (Chicago Extruded Metals, Inc., Appellant)

No. 1-85-2898WC

Appellate Court of Illinois, First District, Industrial Commission Division

148 Ill. App. 3d 975; 500 N.E.2d 450; 1986 Ill. App. LEXIS 2997; 102 Ill. Dec. 557

October 15, 1986, Filed

SUBSEQUENT HISTORY: [*1]** Rehearing Denied November 19, 1986.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County; the Hon. Alfred T. Walsh, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of the judgment of the Circuit Court of Cook County (Illinois), which reversed a portion of the award of the Industrial Commission allowing the employer a six percent credit for a previous payment to appellee claimant for a 1975 disability. The employer and the claimant had entered into a settlement agreement with regard to the 1975 injury to the claimant's back.

OVERVIEW: The claimant twice reinjured his back while working for the employer after the initial 1975 injury. The employer contended on appeal that the trial court erred as a matter of law because the **Worker's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.8(e)(17) (1983), authorized a credit for payments previously made to the claimant for injuries causing permanent disabilities to the same body part. The court disagreed and affirm the trial court's denial of a credit to the employer. The court held that para. 138.8(e) provided coverage for a body "member" listed. The arbitrator had found that the claimant had sustained a 20 percent partial disability for which he was entitled to receive compensation pursuant to para. 138.8 (d)(2), but the arbitrator did not rule on the issue of the employer's entitlement to a credit. The court found that a person's back was not a body "member" listed in para. 138.8(e) and, as a result, the employer was not entitled to a credit under para. 138.8(e)(17), which

required successive injuries causing loss of use of the same member.

OUTCOME: The court affirmed.

CORE TERMS: claimant, body part, loss of use, finger, sentence, leg, toe, arbitrator, partial loss, disability, listing, thumb, foot, arm, narrowly, partial, arbitrator's decision, recoverable, industrial, amputation, enumerated, successive, deducted, Act Ill, payment of compensation, partial disability

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Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN1 The **Worker's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.8(e)(17) (1983) provides: In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury. The Illinois Supreme Court interprets para. 138.8(e)(17) as providing a credit only when the injury occurs to the same member. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities

HN2 An employer takes his employees as he finds them and must pay full compensation for injuries which result in industrial disability. Credits operate as partial exceptions to the liabilities created by the **Worker's Compensation** Act (Act) Ill. Rev. Stat. ch. 48, para. 138.8(e)(17) (1983), and should be construed narrowly where granted and should not be extended by implication unless necessary to accomplish the purpose of the Act. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities

HN3 The **Worker's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.8(e)(17) (1983) lists in numerical order the 15 specific members for which compensation amounts are specified. The first sentence of para. 138.8(e)(17) refers to the loss or partial loss of any member including hand, arm, thumb or fingers, foot or any toes. The court reads the members listed in para. 138.8(e)(17) as representative of the more complete listing of members contained in para. 8(e). Every specific member listed in para. 138.8(e)(17) is also listed first in paras. 138.8(e)(1) through (e)(15). The court interprets the term "member" to refer only to those body parts which are

enumerated in paras. 138.8(e)(1) through (e)(15). More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities

HN4 Whether or not the legislature is correct in awarding more compensation for one type of injury rather than another is not for the reviewing court to say. The legislature has wide discretion in the exercise of the police power and absolute uniformity of treatment for injuries is impossible. Credits should be interpreted narrowly and should not be extended by implication. The term "member" as used in the **Worker's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.8(e)(17) (1983), can be fairly and narrowly read as referring only to body parts listed in para. 138.8 (e). More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Robert E. Maciorowski and Julie A. Garrison, both of Seyfarth, Shaw, Fairweather & Geraldson, of Chicago, for appellant.

George J. Murges, of Murges, Bowman & Corday, Ltd., of Chicago, for appellee.

JUDGES: JUSTICE LINDBERG delivered the opinion of the court. WEBBER, P.J., and BARRY, KASSERMAN, and MCNAMARA, JJ., concur.

OPINION BY: LINDBERG

OPINION

[*975] **[**451]** Chicago Extruded Metals, Inc. (employer), appeals from a judgment of the circuit court of Cook County reversing that portion of the award of the Industrial Commission (Commission) allowing employer a **[*976]** 6% credit for a previous payment to Darrell Killian (claimant) for a 1975 disability. Employer argues that the circuit court erred as a matter of law because section 8(e)(17) of the **Worker's Compensation** Act (the Act) (Ill. Rev. Stat. 1983, ch. 48, par. 138.8(e)(17)) authorizes a credit for payments previously made to the claimant for injuries causing permanent disabilities to the same body part. We affirm.

Claimant first sustained an employment-related **[***2]** back injury while working for employer on February 6, 1975. On July 15, 1977, claimant and employer entered into a settlement agreement for the February 1975 injury. The agreement stated that the $ 2,668.73 amount paid to claimant represented a "7 1/2% loss of use of right leg and 7 1/2% loss of use of left leg."

Claimant thereafter twice reinjured his back while working for employer. These accidents, which occurred on March 16, 1979, and January 15, 1980, provide the basis for the instant appeal. Both injuries involved claimant's lower back. Claimant was hospitalized after each accident.

Arbitrator Norman Brown rendered his decision in the March 16, 1979, accident (No. 79 WC 52690) and in the January 15, 1980, accident (No. 80 WC 4617) on the same day, December 26, 1980. The arbitrator filed a corrected decision in cause No. 80 WC 4617 on June 24, 1981. As a result of these accidental injuries, the arbitrator found that claimant had sustained a 20% partial disability for which he was entitled to receive the sum of $ 220.53 per week for a period of 100 weeks pursuant to section 8(d)(2) of the Act (Ill. Rev. Stat. 1983, ch. 48 par. 138.8(d)(2)). The arbitrator apparently did **[***3]** not rule on the issue of employer's entitlement to a credit.

Both parties filed for review of the arbitrator's decision. On May 14, 1982, the Commission ordered that an impartial medical expert examine claimant and review the existing medical records. The doctor **[**452]** filed his report with the Commission on October 22, 1982.

In its written decision and opinion on review dated August 30, 1984, the Commission affirmed the arbitrator's decision in cause No. 79 WC 52690, in which claimant's award for temporary total incapacity resulting from the March 16, 1979, accident had been adjudicated. With respect to claimant's permanent partial disability, which the arbitrator resolved for both the 1979 and 1980 accidents in his decision on cause No. 80 WC 4617, the Commission concluded claimant was permanently disabled to the extent of 10% as a result of both accidents. However, the Commission modified the arbitrator's decision by finding that employer was entitled to a credit "equivalent to 6% loss under section 8(d)(2) by reason of payment of compensation to that **[*977]** extent pursuant to a prior award."

Claimant filed a writ of certiorari with the circuit court **[***4]** of Cook County, and on September 12, 1985, circuit court judge Alfred T. Walsh reversed the Commission's decision with regard to the credit, finding that the credit to employer was contrary to the law. Employer thereafter filed a timely notice of appeal on September 25, 1985.

Employer makes only one argument in support of reversal of the trial court's order. Employer argues in its brief to this court that it is entitled to a credit under section 8(e)(17) in this action for its payment of compensation for claimant's 1975 lower-back injury since the 1979 and 1980 work injuries and resulting permanent disability affected the same part of the body.

Section 8(e)(17) of the Act provides:

> HN1 "In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or **[***5]** the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury." (Ill. Rev. Stat. 1983, ch. 48, par. 183.8(e)(17).)

Our supreme court has interpreted section 8(e)(17) as providing a credit only when the injury occurs to the same member. ***Page Enterprises,*** *Inc. v. Industrial Com.* (1980), 78 Ill. 2d 287, 291; see also *Isaacs v. Industrial Com.* (1985), 138 Ill. App. 3d 392, 396, 485 N.E.2d 1093, 1097.

Resolution of the issue raised on appeal requires this court to interpret the language of section 8(e); specifically, the meaning of the term "member" as used in section 8(e)(17) and throughout section 8(e). The general rule is that HN2 an employer takes his employees as he finds them and must pay full compensation for injuries which result in industrial disability. (*Freeman United Coal Mining Co. v. Industrial Com.* (1984), 99 Ill. 2d 487, 496.) Credits operate as partial exceptions to the liabilities created by the Act, and should be construed narrowly where granted and should not be extended by implication unless necessary to accomplish the purpose of the Act. **[***6]** *Freeman v. Industrial Com.* (1984), 99 Ill. 2d 487, 496.

The term "member" first appears in section 8(e) in the introductory **[*978]** paragraph immediately prior to a listing of the specific amounts recoverable for loss or loss of use of 15 members. The list recites the following body parts as members: thumb, index finger, middle finger, ring finger, little finger, great toe, other toes, distal phalanx, hand, arm, foot, leg, eye, ear and testicle. Nowhere is the back listed as a member.

HN3 Paragraph 17 of section 8(e) follows in numerical order the 15 specific members for which compensation amounts are specified. The first sentence of section 8(e)(17) refers to the loss or partial loss of any member "including hand, arm, thumb or **[**453]** fingers, foot or any toes." Employer argues that the legislature's use of the word "including" indicates that more body parts than those listed in the first sentence of 8(e)(17) are intended to be included within the definition of member. We agree that the word "including" suggests those members listed in 8(e)(17) are not exclusive, but this interpretation does not mean that a back is a member. Rather, we read the members **[***7]** listed in 8(e)(17) as representative of the more complete listing of members contained in section 8(e). Every specific member listed in 8(e)(17) is also listed first in sections 8(e)(1) through (e)(15). Therefore, we interpret the term "member" to refer only to those body parts which are enumerated in sections 8(e)(1) through (e)(15).

In the second sentence of section 8(e)(17), which governs the permanent loss or permanent partial loss of use of a member and which is relied upon by employer here, we observe that the sentence contains the phrase "any such member." This phrase directs the reader to the preceding sentence which references leg, fingers, toes, foot, hand, arm, and thumb as members. Since the members listed in the first sentence are representative of the more complete listing in sections 8(e)(1) through (e)(15), the second sentence in 8(e)(17), with its phrase "any such member," must also include as members those body parts listed in sections 8 (e)(1) through (e)(15). The body part "back" is not listed as a member in sections 8(e)(1) through (e)(15) or anywhere else in section 8(e). Therefore, we conclude the credit in section 8 (e)(17) does not apply to injuries to **[***8]** the back.

Based upon our interpretation of the statute, claimant did not sustain an injury to a member when he sustained injuries to his back on March 16, 1979, and January 15, 1980. Therefore, employer is not entitled to a credit under section 8(e)(17), which requires successive injuries causing loss of use of the same member.

Employer argues that section 8(e)(17) cannot be read to exclude back injuries because the absence of a credit for injuries not recited in 8(e)(17) leads to absurd results. For example, employer argues, **[*979]** an employee, pursuant to section 8(d)(2), could receive compensation for successive back injuries greater than the entire 100% man as a whole without a credit available to an employer. Our interpretation of the statute does not limit members to those enumerated in 8(e)(17), but rather includes those listing in sections 8(e)(1) through (e)(15). Moreover, assuming *arguendo* that the result suggested by employer is possible, the observation of our supreme court in discussing the disparity in the amounts recoverable for two similar injuries is applicable here.

> *HN4* "'Whether or not the legislature is correct in awarding more compensation for one **[***9]** type of injury rather than another is not for the court to say. As was said in *Sampson v. Industrial Com.*, 33 Ill. 2d 301, the legislature "has wide discretion in the exercise of the police power and absolute uniformity of treatment for injuries is impossible."'" *Weast Construction Co. v. Industrial Com.* (1984), 102 Ill. 2d 337, 341, quoting *Koesterer v. Industrial Com.* (1970), 45 Ill. 2d 383, 385-86.

Regardless of any anomalous results which may obtain from our reading of section 8(e)(17), we

adhere to the admonition in *Freeman United Coal Mining Co. v. Industrial Com.* (1984), 99 Ill. 2d 487, that credits should be interpreted narrowly and should not be extended by implication. The term "member" as used in section 8(e)(17) can be fairly and narrowly read as referring only to body parts listed in section 8(e). We therefore conclude that the circuit court correctly ruled that employer was not entitled to a credit for compensation which claimant received for the 1975 injury.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

*174 Ill. App. 3d 121, *; 528 N.E.2d 18, **;*
*1988 Ill. App. LEXIS 1304, ***; 123 Ill. Dec. 634*

JAMES LUSIETTO, Appellant, v. THE INDUSTRIAL COMMISSION et al. (W.S. Bills & Sons, Appellee)

No. 3-87-0661WC

Appellate Court of Illinois, Third District, Industrial Commission Division

174 Ill. App. 3d 121; 528 N.E.2d 18; 1988 Ill. App. LEXIS 1304; 123 Ill. Dec. 634

August 30, 1988, Filed

PRIOR HISTORY: [*1]** Appeal from the Circuit Court of La Salle County; the Hon. William P. Denny, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee sought review of a judgment of the Circuit Court of La Salle County (Illinois), which confirmed the decision of appellee industrial commission regarding the employee's claim for **worker's compensation** benefits.

OVERVIEW: The employee suffered a back injury at work for which he received **worker's compensation** benefits. Later, he injured his back again in another work-related accident. The employee did not return to work after the injury. He did, however, go daily to the offices of his wife's business, where he answered the telephone occasionally and performed other services for which he received no compensation. On his claim for benefits for the subsequent injury, an arbitrator awarded him temporary total disability benefits and permanent partial disability. The commission reduced the number of weeks of temporary total disability. The trial court confirmed the commission's decision. On appeal, the court affirmed. The evidence that the employee performed sedentary work at his wife's business strongly suggested that he was not totally disabled during that time.

OUTCOME: The court affirmed the trial court's judgment, which confirmed the commission's decision regarding the employee's claim for **worker's compensation** benefits.

CORE TERMS: leg, disability, manifest, surgery, pain, partial, arbitrator, disabled, sedentary, temporary, worker's compensation, loss of use, ironworker, average weekly wage, disability benefits, matter of law, totally disabled, annual earnings, temporarily, seasonal, earning, hourly, total disability, per week, years prior, manual labor, telephone, answered, fusion, solid

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN1 The time during which a worker is temporarily totally disabled presents a question of fact for the industrial commission to decide. The commission's decision will not be disturbed unless it is against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence

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HN2 Evidence that a physician released an employee for work, even for light duty, may support the industrial commission's decision that the duration of temporary disability had ended. More Like This Headnote

Civil Procedure > Discovery > Methods > Admissions > General Overview

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HN3 The parties cannot by stipulation bind the industrial commission. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Medical Evidence

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN4 It is the province of the industrial commission to determine the nature and extent of an employee's disability, particularly where conflicting medical evidence is presented. The commission's determination on this issue will be disturbed only if it is against the manifest weight of the evidence. More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN5 Under § 8(d)(2) of the Act, an employee receives compensation for that percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to the total disability. Ill. Rev. Stat. ch. 48, para. 138.8(d)(2) (1985). More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > General Overview

HN6 Instead of simple losses compensated strictly on the schedule value of the listed members, the loss or impairment could be compensated on the percentage disability of the body as a whole, or of a general disability. A claimant may have an option, therefore, which will result in an award more favorable than a schedule award. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > Normal Exertion

HN7 Under the statute the employer receives a credit only where the injury is to the same member. Section 8(e)(17) of the Act provides that for the permanent partial loss of the use of any of the listed members, for which compensation was paid before the accident for which he now claims compensation, that loss must be taken into consideration and deducted from any award for the subsequent injury. Ill. Rev. Stat. ch. 48, para. 138.8(e)(17) (1985). More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN8 The extent of a disability is a question of fact within the peculiar province of the industrial commission. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN9 Section 10(c) of the Act provides that if the worker was not employed by the same employer for the full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class, in the same employment and same location earned during such period. Ill. Rev. Stat. ch. 48, para. 138.10(c) (1979). In contrast, § 10(e) of the Act provides that in types of employment where the custom is to operate for a part of the whole number of working days in each year, such number, if the annual earnings are not otherwise determinable, shall be used instead of 300 as a basis for computing the annual earnings, provided the minimum number of days which shall be so used for the basis of the year's work shall be not less than 200. Ill. Rev. Stat. ch. 48, para. 138.10(e) (1979). Section 10(e) of the Act provides an earnings base for seasonal employees. More Like This Headnote

COUNSEL: Anthony C. Raccuglia, of Anthony C. Raccuglia & Associates, of Peru, for appellant.

James Lannon, of Herbolsheimer, Lannon, Duncan & Reagan, P.C., of La Salle, for appellee.

JUDGES: JUSTICE McNAMARA delivered the opinion of the court. BARRY, P.J., and WOODWARD, McCULLOUGH, and CALVO, JJ., concur.

OPINION BY: McNAMARA

OPINION

[*123] **[**19]** Petitioner James Lusietto sought **worker's compensation** benefits for injuries sustained while working for respondent W. S. Bills & Sons. An arbitrator found that claimant's average weekly wage was $ 504. The arbitrator awarded temporary total disability benefits of 186 weeks at $ 329.81 per week and $ 247.36 per week for 130 weeks as permanent partial disability benefits for 60% of a man as a whole, and medical benefits. Both parties sought review.

The Industrial Commission found the average weekly wage was $ 416.92, and granted temporary total disability benefits at the rate of $ 277.95 for 78 1/7 weeks. The Commission also awarded permanent partial disability benefits, at the rate of $ 247.36 per week, for 130 weeks for the loss of use of 32 1/2% of each leg. **[***2]** The circuit court of La Salle County confirmed the Commission's decision. Petitioner appeals.

On appeal, petitioner contends that the Commission's reduction of the number of weeks of temporary total disability was against the manifest weight of the evidence; that the Commission's finding of the extent of permanent and partial disability was against the manifest weight of the evidence; that the Commission erred in using the back injury as the basis for finding the loss of the use of a leg, and in considering credit for prior injuries; and that the Commission erred in its determination of the applicable average weekly wage.

Petitioner testified that prior to the accident at issue here, he suffered a back injury in 1970 for which he received a **worker's compensation** settlement representing 50% loss of the use of a leg. In 1975 he suffered another back injury and received a **worker's compensation** settlement representing a 35% loss of the use of a leg.

On May 6, 1979, petitioner, an ironworker, twisted his body and fell while using a 70- to 80-pound wrench to tighten rods in a furnace **[*124]** at work. He sustained the injury for which he now makes claim. Petitioner has not worked for **[***3]** respondent since that day. The following day, petitioner sought medical treatment for his back, which ultimately required surgery in September 1979. Petitioner testified that he continued to suffer from a significant amount of pain. **[**20]** He could participate in no physical activities. It hurt to walk or stand, and he could not lift.

Petitioner testified that his wife owned a business, Portable Welding and Construction. She began the business seven years prior to his accident. Following the accident, petitioner earned no income from Portable Welding and did not work for it in any capacity. Petitioner testified that he went to the Portable Welding offices on a daily basis. He sometimes answered the telephone, and he occasionally visited worksites. He spoke with insurance representatives about Portable Welding's insurance coverage. Petitioner denied being manager of Portable Welding.

Bernadette Lusietto, petitioner's wife, testified on behalf of petitioner that she began Portable Welding in 1976. In regard to a newspaper article naming petitioner as manager, she denied having given anyone that information. Her husband did not work for Portable Welding. He merely answered the **[***4]** telephone on occasion, and she would "talk to him on occasion because he is an iron worker."

Larry Mussato, a representative of Illinois Valley Contractors Association, testified for petitioner that he had participated in negotiating construction contracts in the area with various building trades. The average hourly rate for ironworkers was $ 13.19 plus fringe benefits.

Patricia Gerrond, an insurance representative, testified for respondent that in September 1982 her company received a written request to quote insurance to Portable Welding. She made an appointment and met with petitioner to discuss the possible types of insurance the business needed.

An October 26, 1981, report written by Dr. James Wilson, an orthopedic surgeon, was introduced

into evidence by petitioner. Dr. Wilson stated that he examined petitioner on that day. Petitioner had pain in his low back and in both legs. He complained of occasional numbness and tingling in his legs. Petitioner had recovered to the maximum extent possible. The restricted motion and neurological deficits were permanent. Dr. Wilson did not believe petitioner would ever be able to return to any type of gainful employment which involved **[***5]** manual labor.

Dr. Robert Fitzgerald, an orthopedic surgeon, testified on behalf **[*125]** of petitioner by means of an evidence deposition. Dr. Fitzgerald treated petitioner at Mayo Clinic beginning on June 5, 1979. Petitioner had tenderness over the scar on his low back from previous surgery, and the fusion mass was not solid. After more conservative treatment failed, Dr. Fitzgerald performed a surgical refusion of the fourth and fifth lumbar vertebrae on September 20, 1979. Dr. Fitzgerald then instructed petitioner to return in three months. No treatment was prescribed.

In September 1980, Dr. Fitzgerald released petitioner for work. He could perform a sedentary job with no climbing or lifting objects weighing more than 25 to 30 pounds. In February 1981, petitioner returned to Dr. Fitzgerald complaining that his lower back pain was worse. On February 25, 1981, he was placed in a body cast. After its removal on April 13, 1981, the pain returned.

In regard to the extent and cause of petitioner's disability, Dr. Fitzgerald testified that, following refusion surgery, petitioner had a solid fusion, but had persistent pain which was probably related to the scar tissue. No further **[***6]** medical treatment would completely resolve the persisting problems. The condition was permanent.

On review before the Commission, petitioner testified that he continued to experience constant pain in his lower back and right hip and numbness in his feet. He returned to Dr. Fitzgerald on July 25, 1983. Dr. Fitzgerald's report indicated that the fusion remained solid, the neurological condition was unchanged, and there was no reason for additional surgical intervention.

Petitioner first contends that the Commission's finding as to the period of time he was temporarily totally disabled was against the manifest weight of the evidence. Petitioner relies upon the arbitrator's finding that the disability period was 186 weeks, *i.e.*, from May 6, 1979, through **[**21]** December 2, 1982. Respondent first relied upon a stipulation which resulted in its paying for 156 2/7 weeks, *i.e.*, May 6, 1979, through November 15, 1980, and April 13, 1981, through September 20, 1982. Respondent now relies upon the Commission's finding that petitioner was temporarily totally disabled for 78 1/7 weeks, *i.e.*, May 6, 1979, through September 15, 1980, and February 24, 1981, through April 13, 1981.

HN1The **[***7]** time during which a worker is temporarily totally disabled presents a question of fact for the Commission to decide. (*Lukasik v. Industrial Comm'n* (1984), 124 Ill. App. 3d 609, 465 N.E.2d 528.) The Commission's decision will not be disturbed unless it is against the manifest weight of the evidence. *Lukasik v. Industrial Comm'n* (1984), 124 Ill. App. 3d 609, 465 N.E.2d 528.

[*126] In the present case, petitioner was clearly disabled from the date of the accident until Dr. Fitzgerald released him for work on September 15, 1980. ***HN2***Evidence that a physician released an employee for work, even for light duty, may support the Commission's decision that the duration of temporary disability had ended. (See, *e.g., Boker v. Industrial Comm'n* (1986), 141 Ill. App. 3d 51, 489 N.E.2d 913.) There is no medical evidence of any disability following that time, until the body cast was put on in February 1981 and removed in April 1981.

Evidence of petitioner's involvement in Portable Welding also tended to show that he was working and thus not disabled for the claimed time period. He stated that he **[***8]** was at Portable Welding every day. Petitioner admitted that he answered Portable Welding's telephone. Moreover, he would meet with salespeople who came in to sell products. Petitioner denied going out and estimating or supervising jobs for Portable Welding.

Petitioner testified about Portable Welding's job at Mobil Chemical in late fall 1980. The workers would meet at 6:30 a.m. and go to work together. Petitioner met with the workers every day in a restaurant where they would have coffee. Sometimes he then accompanied the workers to the Mobil Chemical plant.

Petitioner also conceded that he spoke with insurance representatives on behalf of Portable Welding. Gerrond testified that her company received a written request for insurance consultation, and that request named petitioner as the contact person. Gerrond and another representative went to Portable Welding and met with petitioner. They walked around various other parts of the building and were accompanied only by petitioner. Gerrond saw petitioner's wife, who was sweeping the floor, but she did not recall her making any comment about the insurance.

The insurance representatives asked petitioner questions such as what **[***9]** kind of jobs the company performed, the radius of jobsites, and other information to help determine what kind of insurance the business needed. During the hour they were there, it was necessary to refer to Portable Welding's records. Petitioner was always able to obtain the necessary records, which were kept in a file cabinet next to where petitioner sat in the office.

Another indication of petitioner's involvement concerned whether he earned money from Portable Welding. Petitioner testified that he earned nothing after the accident. He seemed unsure of who worked there. When asked if his wife worked following the accident, petitioner replied, "Yes, I imagine so." Moreover, petitioner testified that **[*127]** after Portable Welding's accountant prepared the financial statements petitioner would go through them. The financial reports and tax returns indicated a significant increase in income following petitioner's accident.

Petitioner points to respondent's purported admission on the request for hearing sheet, or stipulation sheet, that petitioner was disabled for 156 2/7 weeks. Petitioner maintains that the Commission erred in ignoring this admission. HN3 The parties cannot by **[***10]** stipulation bind the Commission. See *Neal v. Industrial Comm'n* (1986), 141 Ill. App. 3d 289, 490 N.E.2d 124.

We hold that the Commission's decision as to the nature and extent of petitioner's **[**22]** temporary total disability is not against the manifest weight of the evidence.

Petitioner next contends that the Commission's finding as to the nature and extent of the permanent disability is against the manifest weight of the evidence. Petitioner maintains that he is 100% permanently disabled. HN4 It is the province of the Commission to determine the nature and extent of an employee's disability, particularly where conflicting medical evidence is presented. (*Peavey Co. Flour Mills v. Industrial Comm'n* (1976), 64 Ill. 2d 252, 356 N.E.2d 36; *Wallace v. Industrial Comm'n* (1983), 98 Ill. 2d 33, 455 N.E.2d 92.) The Commission's determination on this issue will be disturbed only if it is against the manifest weight of the evidence. *Bishop v. Industrial Comm'n* (1980), 78 Ill. 2d 315, 399 N.E.2d 1326.

Petitioner points to Dr. Wilson's opinion that petitioner "would [never] **[***11]** be able to return to any type of gainful employment involving manual labor." Dr. Fitzgerald testified that petitioner would not be able to carry out any type of manual labor. Dr. Fitzgerald's testimony, however, clearly indicates that as of September 15, 1980, petitioner was capable of working, with some restrictions. Following the September surgery, Dr. Fitzgerald prescribed no treatment. Dr. Fitzgerald found that the "deep pain that [petitioner] had previously experienced had been relieved." He saw no muscle spasms. He concluded that petitioner had some neuroma, which is injury to the nerves in the area where the incisions were made. Dr. Fitzgerald released petitioner to return to work at a sedentary job with no climbing or lifting objects weighing more than 25 or 30 pounds. He wrote, "I seriously doubt that [petitioner] will be able to carry out any type of heavy manual work. However, should it be possible for him to work in a more sedentary capacity as an ironworker, it would indeed be possible for him to be actively employed."

Dr. Fitzgerald emphasized, however, that petitioner could go to **[*128]** worksites and supervise, or make estimates. Dr. Fitzgerald noted that, **[***12]** as with most back surgery patients, following the September 1979 surgery, petitioner was able to return to a sedentary job within six months and manual work, with the noted limitations, within one year. Petitioner was released to work in September 1980, 16 months after the accident.

Thus, the ruling that petitioner failed to prove 100% permanent disability was not against the manifest weight of the evidence. The evidence permitted the Commission to find that petitioner performed sedentary work at Portable Welding, strongly suggesting that he was not totally disabled. See *Edwards v. Industrial Comm'n* (1983), 96 Ill. 2d 221, 449 N.E.2d 1330.

Petitioner next contends that the Commission erred as a matter of law in deciding this case on the basis of the loss of use of the legs, and also erred in giving the employer a credit for prior compensation awards.

The arbitrator noted that petitioner had twice previously received benefits as the result of back injuries. In 1970, petitioner received permanent partial benefits for the loss of 50% of one leg. In 1975, petitioner received permanent partial benefits for the loss of 35% of one leg. The arbitrator **[***13]** then awarded benefits for the additional disability to the back and legs. In total, petitioner's "body as a whole" was found to be presently disabled to the extent of 60% disability HN5 under section 8(d)(2). Under that section, the employee receives compensation for that percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to the total disability. (Ill. Rev. Stat. 1985, ch. 48, par. 138.8(d)(2).) Sixty percent of 500 weeks is 300 weeks. Deducting the previous awards pursuant to section 8(e)(17), the arbitrator awarded 130 weeks of benefits for the new, additional disability.

The Commission chose a different method to arrive at the same compensatory result. Under the schedule set forth in section 8(e)(12), the loss of the use of a leg results in compensation for 200 weeks. The Commission used this section 8(e) schedule instead of the section 8(d)(2) **[**23]** "body as a whole" provision. It found that, in addition to the prior awards of compensation, petitioner had lost 32 1/2 of the use of each leg. The 1970 loss of 50% of one leg, or .50 times 200 weeks, is 100 weeks. The 1975 loss of 35% of one leg, or .35 times 200 weeks, **[***14]** is 70 weeks. The loss of 32 1/2% of one leg, or .325 times 200 weeks, is 65 weeks. Sixty-five weeks for each leg, therefore, are 130 weeks of benefits awarded for the new, additional disability. The 130 weeks of benefits, together with the 100 weeks and the 70 weeks **[*129]** of benefits previously awarded, totaled 300 weeks. Thus, the arbitrator and Commission arrived at the same result.

Respondent questions whether, as a matter of law, the Commission can use the 200-week schedule leg benefit as the basis for the award here. Schedule allowances were originally exclusive. A strong trend, however, now views schedule allowances as nonexclusive. (See *General Electric Co. v. Industrial Comm'n* (1982), 89 Ill. 2d 432, 433 N.E.2d 671; see generally 2 A. Larson, Workmen's Compensation § 58.23, at 10 -- 344.86 (1987); 37 Ill. L. & Prac. ***Workers' Compensation*** § 125, at 383 (1987).) HN6 Instead of simple losses compensated strictly on the schedule value of the listed members, the loss or impairment could be compensated on the percentage disability of the body as a whole, or of a general disability. (See 2 A. Larson, Workmen's Compensation § 58.23, at 10 **[***15]** -- 344.86 (1987).) A claimant may have an option, therefore, which will result in an award more favorable than a schedule award. See, *e.g., General Electric Co. v. Industrial Comm'n* (1982), 89 Ill. 2d 432, 433 N.E.2d 671.

The typical statute provides for both the total body's disability and the specific schedule benefits for the loss of the use of a leg, without mandating that either is exclusive. (2 A. Larson, Workmen's Compensation § 58.23, at 10 -- 344.100 (1987).) We conclude that the Commission did not err in awarding benefits under the schedule as it did here.

Having concluded that the Commission was entitled to use the section 8(e) schedule instead of

the section 8(d)(2) "body as a whole" provision, we consider whether the Commission properly allowed the respondent credit for the previous "leg" injury awards. In *Killian v. Industrial Comm'n* (1986), 148 Ill. App. 3d 975, 500 N.E.2d 450, this court held that HN7 under the statute the employer receives a credit only where the injury is to the same "member." Section 8 (e)(17) provides that for the permanent partial loss of the use of any of the listed members, for **[***16]** which compensation was paid before the accident for which he now claims compensation, that loss must be taken into consideration and deducted from any award for the subsequent injury. (Ill. Rev. Stat. 1985, ch. 48, par. 138.8(e)(17); see also *General Motors Corp., Fisher Body Division v. Industrial Comm'n* (1975), 62 Ill. 2d 106, 338 N.E.2d 561 (employer receives credit where injury to same member); see generally 37 Ill. L. & Prac. ***Workers' Compensation*** § 131, at 399 (1987).) In *Killian*, a prior award was for a "back" injury. Because the statute does not list a "back" as a "member," the present "back" injury could not be an injury to the same "member," and thus no credit was awarded.

[*130] Similarly, in ***Page Enterprises,*** *Inc. v. Industrial Comm'n* (1980), 78 Ill. 2d 287, 399 N.E.2d 1312, the first injury was to the "back," but surgery resulted in a pain-free condition. Consequently, the court held that the Commission's decision implicitly found the second accident, which resulted in "new" back and leg pain and which required more back surgery, did not involve the same "member" as the previous injury.

In the **[***17]** present case, the prior awards were for "leg" injuries, and the present award is for "leg" injuries. Because "legs" are listed as "members," and the present injury is to the same members, the credit was properly awarded.

In *Isaacs v. Industrial Comm'n* (1985), 138 Ill. App. 3d 392, 485 N.E.2d 1093, the employer received no credit where the first accident resulted in an award for a 20% loss of use of the right leg. The injury at issue resulted in an award for benefits for 30% disability of the **[**24]** person under section 8(d)(2). The Commission then deducted an 8% credit from the 30% permanent disability award. The disputed 8% credit was an extrapolation of the earlier back injury which resulted in the 20% loss. The court found the Commission could not allow a credit for a previous back injury by extrapolating this prior injury, a 20% loss of use of a leg under section 8(e), into an 8% disability to the person under section 8(d)(2). Here, the Commission avoided making such an extrapolation by awarding benefits under section 8(e) in both cases.

HN8 The extent of a disability is a question of fact within the peculiar province of the Industrial Commission. (**[***18]** *Bishop v. Industrial Comm'n* (1980), 78 Ill. 2d 315, 399 N.E.2d 1326; *Consolidated Freightways, Inc. v. Industrial Comm'n* (1976), 64 Ill. 2d 312, 356 N.E.2d 51.) We find no error here.

Petitioner finally contends that the Commission erred as a matter of law in applying section 10 (e) instead of section 10(c) of the Act. Moreover, he argues it was against the manifest weight of the evidence to determine that section 10(e) applied and that the average weekly wage was $ 416.92.

HN9 Section 10(c) provides that if the worker was not employed by the same employer for the full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class, in the same employment and same location earned during such period. Ill. Rev. Stat. 1979, ch. 48, par. 138.10(c).

In contrast, section 10(e) provides that in types of employment where the custom is to operate "for a part of the whole number of **[*131]** working days in each year, such number, if the annual earnings are not otherwise determinable, shall be used instead of 300 as a basis for computing the annual earnings, **[***19]** provided the minimum number of days which shall be so used for the basis of the year's work shall be not less than 200." (Ill. Rev. Stat. 1979, ch. 48, par. 138.10(e).) This section provides an earnings base for seasonal employees. *Rambert v. Industrial Comm'n* (1985), 133 Ill. App. 3d 895, 477 N.E.2d 1364; *Hasler v. Industrial Comm'n* (1983), 97 Ill. 2d 46, 454 N.E.2d 307; *Friddle v. Industrial Comm'n* (1982), 92 Ill. 2d 39, 440

N.E.2d 865.

Petitioner testified that he was unemployed for most of the year prior to his injury because ironwork was slow in the winter. That year particularly had been bad. At the time of the accident, he had only earned $ 3,094 that year. Petitioner testified that his average hourly union wage was $ 13.55 per hour for a 40-hour week during the year prior to the occurrence.

Mussato's testimony did not indicate the work was anything other than seasonal, since he testified as to an average hourly wage, not an average weekly or annual wage for ironworkers. The Commission was entitled to find that petitioner's work was seasonal and thus calculate his earning **[***20]** base under section 10(e). (See *Rambert v. Industrial Comm'n* (1985), 133 Ill. App. 3d 895, 477 N.E.2d 1364.) Neither this argument nor other points raised by petitioner convince us that the Commission erred in determining the proper earning base. See *Reynolds v. Industrial Comm'n* (1986), 151 Ill. App. 3d 695, 502 N.E.2d 1178.

For the foregoing reasons, the judgment of the circuit court of La Salle County, confirming the decision of the Industrial Commission, is affirmed.

Judgment affirmed.