2012 IL App (2d) 120154WC-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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Appellate Court of Illinois,
Second District,
Workers' Compensation Commission Division.

Luis JIMENEZ, Appellant,
v.
The ILLINOIS WORKERS' COMPENSATION COMMISSION, et al., (BFI Allied Waste, Appellee).

No. 2–12–0154 WC. | Dec. 21, 2012.

Appeal from the Circuit Court of the 16th Judicial Circuit, Kane County, Illinois, Circuit No. 11–MR–150, Thomas E. Mueller, Judge, Presiding.

ORDER

Presiding Justice HOLDRIDGE delivered the judgment of the court:

***1** ¶ 1 *Held:* (1) The Commission's decision that the employer was not required to pay the claimant maintenance benefits until the claimant began a job search was neither contrary to law nor against the manifest weight of the evidence; (2) the Commission's decision that the claimant failed to prove his entitlement to permanent total disability benefits under the "odd-lot" category was neither contrary to law nor against the manifest weight of the evidence; (3) the Commission's decision that the employer was not required to pay penalties or attorney fees was neither contrary to law nor against the manifest weight of the evidence.

¶ 2 The claimant, Luis Jimenez, filed an application for adjustment of claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2004)) seeking benefits for injuries to his lower back which he allegedly sustained while working for the respondent, BFI Allied Waste (employer). After conducting a hearing, an arbitrator found that the claimant had proven injuries that were causally related to a work-related accident and awarded temporary total disability (TTD) benefits and medical benefits, including prospective medical treatment. The arbitrator subsequently conducted another hearing and awarded additional TTD benefits, maintenance benefits, and permanent total disability (PTD) benefits under an "odd-lot" theory but declined to award penalties or attorney fees.

¶ 3 Both parties appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). In a unanimous decision, the Commission affirmed the arbitrator's award of TTD benefits but reduced the arbitrator's award of maintenance benefits. Moreover, the Commission reversed the arbitrator's finding that the claimant qualified for PTD benefits under the "odd-lot" category and awarded the claimant permanent partial disability (PPD) benefits instead of PTD benefits. The Commission affirmed and adopted the arbitrator's decision in all other respects.

¶ 4 The claimant sought judicial review of the Commission's decision in the circuit court of Kane County, which confirmed the Commission's decision. This appeal followed.

¶ 5 FACTS

¶ 6 The claimant worked for the employer as a probationary employee. On December 21, 2004, the claimant injured his lower back while lifting a box at work. He filed a claim for workers' compensation benefits under the Act, which was tried before an arbitrator on April 27, 2005. The arbitrator found that the claimant had sustained a compensable work-related injury and awarded TTD benefits, medical expenses, penalties pursuant to sections 19(k) and 19(1) of the Act (820 ILCS 305/19(k), (l) (West 2004)), and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16). The Commission subsequently entered an order by agreement of the parties modifying the arbitrator's decision to vacate the awards of penalties and attorney fees and dismissing the employer's petition for review.

***2** ¶ 7 At the time of his December 21, 2004, accident, the claimant was still working for the employer on a probationary basis. He never completed his probationary employment and was never offered full-duty employment. The claimant's probationary employment (and, therefore, his employment relationship with the employer) ended before the April 2005 arbitration hearing and did not continue thereafter.

¶ 8 In July 2005, the claimant underwent a lumbar discectomy. He did not improve after that surgery, and he was referred to Dr. Avi J. Bernstein, an orthopedic surgeon, for further care. On February 15, 2006, Dr. Bernstein performed a lumbar interbody fusion. After the surgery, the claimant received physical therapy.

¶ 9 The claimant returned to Dr. Bernstein on September 25, 2006, complaining of chronic pain. Dr. Bernstein noted that he was unable to explain the claimant's residual pain based on his examination of the claimant and his review of the radiographs. The doctor recommended an MRI and a functional capacity evaluation (FCE).

¶ 10 Dr. Bernstein reviewed the results of the MRI scan on October 16, 2006. The doctor concluded that the study was benign. According to Dr. Bernstein, the MRI scan showed no evidence of recurrent disc herniation, nerve root compression, or spinal stenosis, and it showed that the discs above the fusion site appeared normal.

¶ 11 The claimant underwent an FCE on November 15, 2006. The FCE evaluator noted that the claimant put forth varying levels of physical effort during the examination and that the claimant was capable of doing more physically at times than what he demonstrated during the test. The evaluator also concluded that the reliability and accuracy of the claimant's reports of pain and physical limitations were questionable. He noted that the claimant had tested positive in seven of seven possible Waddell signs [1] and that the claimant's heart rate did not rise above 89 beats per minute during all of his complaints of elevated pain levels. He also noted that, although the claimant initially demonstrated the need to lean on the evaluator and required significant manual assistance to move from a side-lying to a sitting position, at other times he was able to perform the same motion without any assistance. Although he concluded that the claimant had put forth an inconsistent effort during the FCE examination, the evaluator found that the claimant had nevertheless demonstrated the ability to qualify for sedentary employment.

¶ 12 The claimant saw Dr. Bernstein again on November 27, 2006. At that time, Dr. Bernstein noted that the claimant had diffuse, persistent complaints of pain despite a successful fusion and no evidence of any further pathology. The doctor also noted that the FCE showed inconsistencies and submaximal effort by the claimant. Based upon the effort the claimant put forward during the FCE, Dr. Bernstein concluded that the claimant was at least capable of performing sedentary work, and he released the claimant to work in a sedentary capacity. Dr. Bernstein concluded that the claimant was at maximum medical improvement (MMI) from his December 21, 2004, lower back injury.

***3** ¶ 13 The claimant testified that, after Dr. Bernstein released him to perform sedentary work, he spoke to his attorney about the matter. He also testified that he contacted the employer, but he could not recall with whom he spoke. The claimant did not present a doctor's note to the employer communicating any medical restrictions at that time. He did not testify that he communicated Dr. Bernstein's work restrictions to the employer or that he told the employer that he wanted to return to work. On January 3, 2007, the employer stopped paying the claimant TTD benefits.

¶ 14 The claimant returned to Dr. Bernstein on January 11, 2007, complaining of continued severe pain. The doctor noted that the claimant's neurological examination was unremarkable and that the claimant had stopped using a cane. He noted again that the claimant's FCE showed inconsistencies and symptom magnification. He concluded that the claimant remained at MMI with respect to his back injury.

¶ 15 The claimant did not see Dr. Bernstein again until February 4, 2008. Dr. Bernstein examined the claimant at that time and found him to be neurologically intact, but he noted that the claimant had very guarded range of motion and mild tenderness in his low back. X-rays showed a slight narrowing of the inferior screws in the claimant's back at L4–L5. The doctor recommended a CT scan and an updated lumbar MRI scan. A February 4, 2008, medical record indicates that the claimant was taken off work. During a follow-up examination on February 22, 2008, Dr. Bernstein reviewed the results of the new CT and lumbar MRI scans and concluded that the claimant had a pseudoarthrosis at L4–L5. [2] Dr. Bernstein noted that this was the only finding that might explain the claimant's complaints of residual pain is his lower back. He recommended a posterior spinal fusion to correct the claimant's condition. The claimant agreed to undergo the procedure. Bernstein gave the claimant a note keeping him off work. The employer resumed paying TTD benefits on February 22, 2008. [3]

¶ 16 At the employer's request, Dr. Alexander Ghanayem evaluated the claimant on May 23, 2008. After examining the claimant and reviewing the most recent CT scan, Dr. Ghanayem concluded that the claimant had apparently

developed a pseudoarthrosis at L4–L5 and that spinal revision surgery would be appropriate.

¶ 17 Dr. Bernstein performed the surgery on August 5, 2008. After undergoing physical therapy, the claimant returned to Dr. Bernstein for a follow-up examination on March 30, 2009. At that time, an MRI scan revealed that the lumbar fusion had healed and that there was good continuous bone running from L4 to S1. Nevertheless, Dr. Bernstein noted that the claimant continued to make subjective complaints, which Dr. Bernstein could not explain on an objective basis. The doctor recommended another FCE to determine the claimant's restrictions.

¶ 18 An FCE was performed on April 6, 2009. The FCE evaluator noted that the claimant tested positive in one of four Waddell signs and that the claimant “self-limited all material handling activities.” The evaluator concluded that the claimant was limited to light duty work with a 15 to 20 pound lifting restriction.

***4** ¶ 19 On April 27, 2009, Dr. Bernstein found the claimant to be at maximum medical improvement with permanent light demand level restrictions of 15 to 20 pounds lifting with no repetitive bending, lifting, or twisting. The claimant communicated Dr. Bernstein's work restrictions to his attorneys, but he did not contact the employer. The employer did not offer the claimant a light-duty position after his release from care in April 2009.

¶ 20 On July 13, 2009, the claimant requested vocational rehabilitation or settlement of his claim on a permanent total disability basis. The employer had a labor market study performed by Alla Massat, the employer's vocational counselor, on July 6, 2009. Based upon the work restrictions noted in the second FCE (which demonstrated that the claimant was able to walk frequently, sit and stand occasionally, climb stairs occasionally, bend, kneel, squat, and crawl occasionally, and reach and grasp frequently), Massat concluded that there were available jobs that the claimant could perform. Specifically, Massat concluded that the claimant could work in light assembly, cashier, and security positions. In his labor market survey report, Massat identified 11 potential employers, 8 with potential light assembly jobs. However, Massat noted that the claimant spoke “limited English,” and he “strongly recommended” that the claimant take ESL classes to improve his English speaking skills, as this would “greatly increase his employment potential.”

¶ 21 At the respondent's request, the claimant was examined by Dr. Marshal Matz, the employer's independent medical examiner, on November 18, 2009. Dr. Matz noted that the claimant sat for a lengthy interview without any sign of discomfort. His reflexes were symmetrical. However, Dr. Matz noted that the claimant walked slowly with a great deal of pain behavior. Moreover, although he was able to squat to 20 degrees, the claimant did essentially no forward bending and had pain with axial rotation. Rotation of the left hip caused the claimant to complain of pain in his lower back and left testicle. Dr. Matz reviewed the claimant's medical history, including the April 6, 2009 FCE. He concluded that the FCE was not reliable because the claimant did not provide a full and complete effort during the test. Dr. Matz found that the claimant was at MMI and that he was capable of working at a level beyond what was demonstrated by the April 6, 2009, FCE. [4] Dr. Matz opined that the claimant could work with a 50–pound lifting restriction. The claimant testified that his prior job with the employer required him to lift only up to 30 pounds.

¶ 22 Based on Dr. Matz's restrictions, the employer had another labor market survey prepared. The second survey report identified 10 potential employers and showed several jobs available for the claimant, including five line cook jobs, a housekeeper position that involved lifting 35 to 50 pounds, an assembly job that involved lifting 50 pounds, a packaging/warehouse job which would require the claimant to stand the entire shift, two sales associate positions, and a pizza delivery driver job. The report concluded that the market survey “clearly demonstrates there are vocational opportunities that could return [the claimant] to gainful employment .” It also recommended that the claimant pursue ESL classes to “expand [his] employment options.”

***5** ¶ 23 During the arbitration hearing, the claimant testified that he had pain all over his back and his left leg. He stated that he experiences pain when standing for long periods of time and numbness when sitting. He testified that he experiences terrible pain when sitting on a wooden seat, as he did during the hearing. He rated that pain as 9 out of 10. The claimant testified that he drives a vehicle, [5] but he feels needles in his back when he drives for long periods of time. In the 12 months prior to the hearing, the claimant drove 35 miles each way to see Dr. Bernstein. The claimant stated that he takes care of his five children while his wife is at work and takes them to and from school. He also testified that he does some grocery shopping and attends his son's soccer games.

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¶ 24 On cross-examination, the claimant testified that he attended six years of grammar school and three years of middle school in Mexico. However, when he was reminded that his application for employment with the employer stated that he had 11 years of schooling, the claimant said that was correct.

¶ 25 The claimant testified that he came to the United States from Mexico in 1996 and became a U.S. citizen in 2007. Although he testified in Spanish during the hearing, he is able to understand English and can speak and write in English. He acknowledged completing an employment application for the employer and answering all questions in English. The claimant told his medical providers that English was his first language.

¶ 26 The claimant testified that he held several jobs in the Unites States before he began working for the employer in October 2004. For example, he worked as a janitor, did cleaning work for a restaurant and a bakery, and drove a delivery truck, a recycling truck, and a forklift.

¶ 27 Although Dr. Bernstein had concluded that the claimant was at MMI and had released him for sedentary work on November 27, 2006, and again declared him MMI and released him for light-duty work on April 27, 2009 (after his August 2008 surgery), the claimant testified that he did not look for work until November 16, 2009, when he began a self-directed job search. At that time, the claimant began contacting various businesses that he thought might offer the types of jobs that he had performed in the past, such as cashier, baker, butcher, and driver. By the time of the arbitration hearing, the claimant had contacted 89 businesses. However, the claimant did not choose these businesses based on any knowledge that they were hiring. He did not review any "help wanted" ads in newspapers or elsewhere. Nor did he contact any businesses that had "help wanted" signs on their property. Rather, he simply visited businesses which he thought might offer the type of work that he could perform. Most of the businesses he contacted were not hiring, and the claimant never filled out a job application or obtained a job interview. [6] The claimant did not disclose his job search log to anyone until he faxed them to his employer on January 7, 2010, five days before the arbitration hearing.

***6** ¶ 28 The claimant testified that neither the employer nor the employer's insurance carrier ever contacted him about looking for new employment or interviewed him regarding his prior job experience. During the hearing, the claimant did not present testimony from a vocational expert.

¶ 29 The arbitrator found that the claimant's current condition of ill-being was causally connected to his December 21, 2004, work accident. The arbitrator found that the claimant was temporarily totally disabled from January 3, 2005, through January 11, 2007 (when Dr. Bernstein found him at MMI following his 2005 surgery), and from February 4, 2008, through April 6, 2009 (when Dr. Bernstein found him at MMI after his 2008 surgery), and awarded TTD benefits for those time periods.

¶ 30 The arbitrator also found that the claimant was entitled to maintenance benefits under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)) commencing January 12, 2007, through February 3, 2008, and commencing April 7, 2009, through the arbitration hearing. During those periods, Dr. Bernstein had found the claimant to be at MMI from his surgeries and had released him to perform sedentary or light duty work. [7] The arbitrator found that the claimant's work restrictions during those periods disabled the claimant from his pre-injury job. Nevertheless, the employer did not offer the claimant employment within his work restrictions. Nor did the employer provide vocational rehabilitation, even though the claimant "had at best eleven years of education in Mexico, spoke English only as a second language and had a work history entirely in laboring jobs." The arbitrator noted that the first market survey prepared by the employer's vocational counselor recommended that the claimant take ESL courses, and that 8 of the 11 jobs identified in the survey were in light assembly, which the claimant had never performed before. The arbitrator found that both of these facts "support[ed] the need for vocational rehabilitation and concomitant maintenance benefits."

¶ 31 The arbitrator also found that the claimant was permanently, totally disabled "on an odd-lot basis" commencing January 13, 2010. In support of this finding, the arbitrator noted that the claimant: (1) continued to have pain in his low back, left leg, and left testicle; (2) was restricted to light-duty work with a 15 to 20 pound lifting restriction and no bending, twisting, or repetitive lifting; (3) was 36 years old; (4) had "at best 11 years of education in Mexico"; (5) was unable to speak English well enough to be comfortable testifying without an interpreter; and (6) had work experience only in unskilled, labor jobs. Moreover, the arbitrator noted that the claimant "did a short, but extensive job search, without finding one vacancy." Based on this evidence, the

arbitrator concluded that the claimant had established a prima facie case for an odd-lot permanent total disability. The arbitrator acknowledged that the employer provided a labor market survey showing 11 possible employers that offered jobs within the restrictions prescribed by Dr. Bernstein. However, the arbitrator found that "there [was] no evidence [that] actual jobs existed for someone with [the claimant's] educational and language skills or work history."

***7** ¶ 32 The arbitrator also found that the claimant had failed to prove that he was entitled to penalties under sections 19(1) or 19(k) of the Act (820 ILCS 305/19(k), (l) (West 2006)) or to attorney fees under section 16 of the Act (820 ILCS 305/16) (West 2006)). The arbitrator noted that, although the employer's payment of some TTD benefits was "substantially delayed," the employer had paid the entire amount of TTD due the claimant by the time of the arbitration hearing. Moreover, the arbitrator noted that, during the disputed TTD period, Dr. Bernstein had found the claimant at MMI and released him to work with restrictions.

¶ 33 Both parties appealed the arbitrator's decision to the Commission. The Commission affirmed the arbitrator's award of TTD benefits but reduced the arbitrator's award of maintenance benefits. The Commission found that the claimant was not entitled to maintenance benefits until he began his self-directed job search on November 16, 2009. The Commission acknowledged that "a self-directed job search is sufficient to support an award of maintenance" under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)). However, the Commission noted that the claimant had testified that "he did not even attempt to find employment until October 2009 when his attorney sent him a job search log to complete" and that the first date listed on the job search log was November 16, 2009. Accordingly, the Commission found that the claimant was entitled to maintenance benefits only from November 16, 2009, until the date of the arbitration hearing.

¶ 34 Moreover, the Commission reversed the arbitrator's finding that the claimant qualified for PTD benefits under the "odd-lot" category. The Commission found that the claimant had failed to prove that he was permanently and totally disabled as an "odd-lot." In support of this finding, the Commission pointed to three facts. First, the Commission noted that, despite the claimant's work restrictions, the claimant testified that he felt capable of performing all of the jobs about which he inquired during his job search, including driver, cashier, butcher, baker, chef, dishwasher, and jobs involving cleaning and ironing.

¶ 35 Second, the Commission pointed to the flawed or limited nature of the claimant's self-directed job search. Although the claimant claimed to have personally visited a large number of employers, the Commission noted that the claimant did not look in newspapers or "help wanted" ads to see who was hiring or go into any establishment that had a "help wanted" sign. Thus, the Commission concluded that "instead of actually trying to find employment at establishments that were actively hiring, [the claimant] went to these various places because, as he testified, he 'didn't know that they weren't hiring.' " In addition, the Commission noted that it did not appear that the claimant ever followed up after certain employers told him to "call later" or to "apply in two weeks."

***8** ¶ 36 Third, the Commission found that the claimant's English skills were not limited to such an extent as to qualify him for PTD benefits under the "odd-lot" classification. In support of this finding, the Commission noted that: (1) the medical records indicated that claimant's primary language was English; (2) the claimant completed the job application for the employer by himself in English; (3) the claimant obtained and performed at least six different jobs of varying types since he came to the United States in 1996 (before he worked for the employer); and (4) during the arbitration hearing, the claimant's attorney admitted that the claimant speaks and understands English and stated that the claimant preferred to testify in Spanish merely for "the comfort and ease of response to certain questions."

¶ 37 The Commission affirmed and adopted the arbitrator's decision in all other respects, including the arbitrator's denial of penalties and attorney fees.

¶ 38 The claimant sought judicial review of the Commission's decision in the circuit court of Kane County. The circuit court held that there were sufficient facts in the record to support the Commission's decision, "particularly in light of the evidence of the claimant's probationary status" at the time of the accident, the available medical reports, and "the claimant's failure to seek employment." Accordingly, the circuit court confirmed the Commission's decision. This appeal followed.

¶ 39 ANALYSIS

¶ 40 1. Maintenance Benefits

¶ 41 The claimant argues that the Commission's conclusion that the employer was not required to pay the claimant maintenance benefits until the claimant began a job search was contrary to law. We disagree.

¶ 42 Section 8(a) of the Act provides that an "employer shall * * * pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a) (West 2006). Whether a claimant is entitled to maintenance benefits is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence. *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n,* 2012 IL App (1st) 113129WC, ¶ 39.

¶ 43 Section 8(a) provides for both physical rehabilitation and vocational rehabilitation and mandates that the employer pay all maintenance costs and expenses "incidental" to a program of "rehabilitation." *Id.;* see also *Nascote Industries v. Industrial Comm'n,* 353 Ill.App.3d 1067, 1075, 289 Ill.Dec. 794, 820 N.E.2d 570 (2004). The statute is flexible and does not limit "rehabilitation" to formal training. *Connell v. Industrial Comm'n,* 170 Ill.App.3d 49, 55, 120 Ill.Dec. 354, 523 N.E.2d 1265 (1988); see also *Roper Contracting v. Industrial Comm'n,* 349 Ill.App.3d 500, 506, 285 Ill.Dec. 476, 812 N.E.2d 65 (2004). We have construed the statutory term "rehabilitation" broadly to include an injured employee's self-initiated and self-directed job search. See, *e.g., Roper,* 349 Ill.App.3d at 506, 285 Ill.Dec. 476, 812 N.E.2d 65. Thus, we have approved the Commission's award of maintenance benefits to an employee who is conducting a self-directed job search, even if the employee has not requested vocational rehabilitation from his employer. *Id.; see also Greaney v. Industrial Comm'n,* 358 Ill.App.3d 1002, 1019, 295 Ill.Dec. 180, 832 N.E.2d 331 (2005).

***9** ¶ 44 However, by its plain terms, Section 8(a) requires the employer to pay only those maintenance costs and expenses that are incidental to rehabilitation. That means that an employer is obligated to pay maintenance benefits only "while a claimant is engaged in a prescribed vocational-rehabilitation program." *W.B. Olson, Inc.,* 2012 IL App (1st) 113129WC at ¶ 39; see also *Nascote Industries,* 353 Ill.App.3d at 1075, 289 Ill.Dec. 794, 820 N.E.2d 570. Thus, if the claimant is not engaging in some type of "rehabilitation" (whether it be physical rehabilitation, formal job training, or a self-directed job search), the employer's obligation to provide maintenance is not triggered. The claimant has failed to cite, and our research has failed to uncover, a case or rule requiring an employer to provide maintenance benefits when the claimant is not engaged in any such "rehabilitation."

¶ 45 Our inquiry does not end here, however. The claimant also argues that the employer violated section 8(a) of the Act and Commission Rule 7110.10(a) (50 Ill. Admin. Code § 7110(a) (eff. June 22, 2006)) by failing to provide him with vocational rehabilitation. If that were true, then the claimant's argument that the employer should have provided maintenance benefits incidental to such rehabilitation would likely succeed because section 8(a) requires employers to pay all maintenance costs and expenses incidental to any prescribed vocational-rehabilitation program. *W.B. Olson, Inc.,* 2012 IL App (1st) 113129WC, ¶ 39. Thus, we must also consider whether, under the facts presented in this case, the employer was obligated to provide vocational rehabilitation.

¶ 46 A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. *National Tea Co. v. Industrial Comm'n,* 97 Ill.2d 424, 432, 73 Ill.Dec. 575, 454 N.E.2d 672 (1983); see also *Greaney,* 358 Ill.App.3d at 1019, 295 Ill.Dec. 180, 832 N.E.2d 331. However, "the primary goal of rehabilitation is to return the injured employee to work." *Schoon v. Industrial Comm'n,* 259 Ill.App.3d 587, 594, 197 Ill.Dec. 217, 630 N.E.2d 1341 (quoting *Hartlein v. Illinois Power Co.,* 151 Ill.2d 142, 165, 176 Ill.Dec. 22, 601 N.E.2d 720 (1992)). Thus, if the injured employee has sufficient skills to obtain employment without further training or education, that is a factor that weighs against an award of vocational rehabilitation. *National Tea Co.,* 97 Ill.2d at 432, 73 Ill.Dec. 575, 454 N.E.2d 672; *Connell,* 170 Ill.App.3d at 53–54, 120 Ill.Dec. 354, 523 N.E.2d 1265. Moreover, an injured employee is generally not entitled to vocational rehabilitation if the evidence shows that he does not intend to return to work (*i.e.,* if he voluntarily remains out of the workforce even though he is able to work). *Schoon,* 259 Ill.App.3d at 594, 197 Ill.Dec. 217, 630 N.E.2d 1341. Whether a claimant is entitled to vocational rehabilitation is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence. *W.B. Olson, Inc.,* 2012 IL App (1st) 113129WC at ¶ 39.

***10** ¶ 47 In this case, the claimant did not establish that his work injury reduced his earning power. In fact, there is

evidence in the record refuting any such claim. For example, Dr. Matz testified that the claimant was able to lift up to 50 pounds, which would have enabled him to perform the same job that he formerly performed for the employer without any special accommodations. Moreover, the labor market survey reports concluded that there were a number of jobs available within the claimant's work restrictions, and the claimant did not establish that these jobs paid less than did his former job with the employer. The Commission was entitled to rely upon this evidence. See, *e.g., Hosteny v. Illinois Workers' Compensation Comm'n,* 397 Ill.App.3d 665, 674, 340 Ill.Dec. 475, 928 N.E.2d 474 (2009) (ruling that, in resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses and assign weight to be accorded the evidence).

¶ 48 Nor did the claimant present any evidence suggesting that vocational rehabilitation would have increased his earning capacity. Although the labor market survey reports recommended that the claimant take ESL classes and noted that such classes would "greatly increase his employment potential" and "expand [his] employment opportunities," they did not conclude that ESL classes would increase the claimant's earning potential. When read in context, the reports merely seem to suggest that more positions would be available to the claimant if he improved his English, not that his salary would increase.

¶ 49 In addition, there was no evidence that the claimant lacked the skills to obtain employment without vocational assistance. To the contrary, the claimant testified that he felt able to perform all of the jobs about which he inquired during his job search, including driver, cashier, butcher, baker, chef, dishwasher, and jobs involving cleaning and ironing. The claimant had performed similar jobs in the United States before working for the employer. Moreover, the labor market survey reports identified a number of jobs that were available to the claimant without any further ESL training. The claimant did not call a vocational expert to rebut these reports.

¶ 50 Moreover, based on the evidence, the Commission could have reasonably inferred that the claimant had no intention of returning to work until November 16, 2009. Although Dr. Bernstein declared the claimant at MMI and released him to work with restrictions on November 27, 2006, and again on April 27, 2009, the claimant testified that he did not look for work until November 16, 2009. This arguably suggests that the claimant did not intend to return to work until that date. Thus, the Commission could have reasonably concluded that the claimant was not entitled to vocational rehabilitation until November 16, 2009. See, *e.g., Schoon,* 259 Ill.App.3d at 594, 197 Ill.Dec. 217, 630 N.E.2d 1341 (ruling that it would be "illogical" to require the employer to provide vocational rehabilitation during times when the claimant did not intend to work). [8]

***11** ¶ 51 Contrary to the claimant's suggestion, Commission Rule 7110.10(a) (50 Ill. Admin. Code § 7110(a) (eff. June 22, 2006)) does not require a different result. That rule provides that:

> "The employer or his representative, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care, and, ***if appropriate,*** rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs." (Emphasis added.) 50 Ill. Admin. Code § 7110(a) (eff. June 22, 2006).

¶ 52 This rule requires the employer to provide rehabilitation only if rehabilitation would be "appropriate." *Id.* As noted above, rehabilitation is neither mandatory nor appropriate if an injured employee manifests no intention to return to work. See, *e .g., Schoon,* 259 Ill.App.3d at 594, 197 Ill.Dec. 217, 630 N.E.2d 1341. Moreover, rehabilitation is not appropriate if, as here, the claimant has failed to present evidence suggesting that his work-related injury caused a reduction in earning power and that rehabilitation would have increased his earning capacity. [9]

¶ 53 Accordingly, the Commission's conclusion that the claimant was not entitled to maintenance benefits until he began his job search on November 16, 2009, is neither contrary to law nor against the manifest weight of the evidence.

¶ 54 2. PTD Benefits under the "Odd-lot" Classification

¶ 55 The claimant argues that the Commission's finding that he failed to prove his entitlement to PTD benefits under the "odd-lot" category was contrary to law and against the manifest weight of the evidence. We disagree.

¶ 56 The question whether a claimant is permanently and totally disabled is one of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n,* 389 Ill.App.3d 191, 203, 328 Ill.Dec. 612, 904 N.E.2d 1122 (2009). For a finding of fact to be contrary to the manifest weight of the evidence, the opposite conclusion must be "clearly apparent." *Id.*

¶ 57 An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *A.M.T.C. of Illinois v. Industrial Comm'n,* 77 Ill.2d 482, 487, 34 Ill.Dec. 132, 397 N.E.2d 804 (1979). The employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Comm'n,* 95 Ill.2d 278, 286–87, 69 Ill.Dec. 407, 447 N.E.2d 842 (1983). Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *City of Chicago v. Illinois Workers' Compensation Comm'n,* 373 Ill.App.3d 1080, 1089, 313 Ill.Dec. 38, 871 N.E.2d 765 (2007).

***12** ¶ 58 If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, he may qualify for "odd-lot" status. *Valley Mould & Iron Co. v. Industrial Comm'n,* 84 Ill.2d 538, 546–47, 50 Ill.Dec. 710, 419 N.E.2d 1159(1981); *City of Chicago,* 373 Ill.App.3d at 1089, 313 Ill.Dec. 38, 871 N.E.2d 765. An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Valley Mould,* 84 Ill.2d at 547, 50 Ill.Dec. 710, 419 N.E.2d 1159; *City of Chicago,* 373 Ill.App.3d at 1089, 313 Ill.Dec. 38, 871 N.E.2d 765. In determining whether a claimant falls within an "odd-lot" category for purposes of an award of PTD benefits, the Commission should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training, and capabilities. *A.M.T.C. of Illinois, Inc.,* 77 Ill.2d at 489, 34 Ill.Dec. 132, 397 N.E.2d 804; *Ameritech Services, Inc.,* 389 Ill.App.3d at 204, 328 Ill.Dec. 612, 904 N.E.2d 1122.

¶ 59 An employee seeking to establish odd-lot status must "initially establish [ ]" by a preponderance of the evidence that he falls within the odd-lot category. *Valley Mould,* 84 Ill.2d at 547, 50 Ill.Dec. 710, 419 N.E.2d 1159; *City of Chicago,* 373 Ill.App.3d at 1091, 313 Ill.Dec. 38, 871 N.E.2d 765. Ordinarily, the employee satisfies this burden either by presenting evidence of a diligent but unsuccessful attempt to find work or by showing that, because of his age, skills, training, experience, and education, he will not be regularly employed in a well-known branch of the labor market. *City of Chicago,* 373 Ill.App.3d at 1091, 313 Ill.Dec. 38, 871 N.E.2d 765. Whether the employee has successfully carried this burden presents a question of fact for the Commission to determine. *Id.* If the employee establishes by a preponderance of the evidence that he falls into the odd-lot category, the burden of production shifts to the employer to show that the employee is employable in a stable labor market and that such a market exists. See *Valley Mould,* 84 Ill.2d at 547, 50 Ill.Dec. 710, 419 N.E.2d 1159; *City of Chicago,* 373 Ill.App.3d at 1091, 313 Ill.Dec. 38, 871 N.E.2d 765. The question whether the employer has satisfied its burden also presents a question of fact for the Commission. *City of Chicago,* 373 Ill.App.3d at 1091, 313 Ill.Dec. 38, 871 N.E.2d 765.

¶ 60 In this case, the claimant attempted to establish that he was permanently totally disabled by proving that he fell into the odd-lot category. He attempted to meet his initial burden by presenting evidence that he performed a diligent but unsuccessful job search. It is not clear that the claimant met this burden, because his job search was rather haphazard. The claimant simply visited businesses which he thought might offer the type of work that he could perform. He did not choose these businesses based on any knowledge that they were hiring. He did not review any "help wanted" ads in newspapers or elsewhere. Nor did he contact any businesses that had "help wanted" signs on their property. Thus, the claimant arguably failed to do the basic preliminary research required of a "diligent" job search. The failure to do such basic research made it more likely that his job search would be unsuccessful and less likely that it would provide a reliable indication of the current labor market.

***13** ¶ 61 However, even assuming *arguendo* that the claimant performed a diligent but unsuccessful job search (thereby shifting the burden of production to the employer), his claim to "odd-lot" status would fail. The employer presented two labor market survey reports which show that the employee is employable in an existing, stable labor market. Both reports identified available jobs that the claimant was able to perform. The claimant argues that he was not qualified to perform most of these jobs

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because of his limited education and lack of relevant work experience. However, the second report identified several cooking, cleaning, and delivery jobs that had no educational or experience requirements. In addition, even some of the light assembly jobs listed in that report did not require prior work experience in assembly.[10] Moreover, the claimant testified that he felt able to perform all of the jobs about which he inquired during his job search, including driver, cashier, butcher, baker, chef, dishwasher, and jobs involving cleaning and ironing. Accordingly, we cannot conclude that the Commission's finding that the claimant failed to establish that he was permanently disabled under the "odd-lot" category was against the manifest weight of the evidence.

¶ 62 The claimant also argues that the Commission erred as a matter of law by focusing exclusively on the claimant's English-speaking ability in determining whether the claimant had established "odd-lot" status. Contrary to the claimant's argument, the Commission relied on several factors in deciding this issue, including the claimant's testimony that he felt capable of performing all of the jobs about which he inquired and the flawed and limited nature of the claimant's job search. It did not rely exclusively on evidence of the claimant's English-speaking ability. Regardless, even assuming *arguendo* that the Commission's reasoning were faulty, we would still affirm. "A reviewing court can affirm the Commission's decision if there is any legal basis in the record to support its decision, regardless of the Commission's findings or reasoning." *USF Holland, Inc. v. Industrial Comm'n,* 357 Ill.App.3d 798, 803, 293 Ill.Dec. 885, 829 N.E.2d 810 (2005). As noted above, there is sufficient evidence in the record to support the Commission's decision that the claimant failed to prove that he was permanently and totally disabled under the "odd-lot" category.

¶ 63 3. Penalties

¶ 64 The claimant also argues that the Commission's finding that the employer was not required to pay penalties under sections 19(k) and 19(l) of the Act or attorney fees under section 16 of the Act was contrary to law and against the manifest weight of the evidence. We disagree.

¶ 65 Section 19(k) authorizes the Commission to award penalties against an employer that unreasonably or vexatiously delays the payment of compensation it owes to a claimant under the Act. 820 ILCS 305/19(k) (West 2006). Section 16 of the Act authorizes an award of attorney fees to the claimant based upon the same showing. 820 ILCS 305/16 (West 2006). In addition, section 19(l) provides that, if an employer refuses or unreasonably delays the payment of benefits under sections 8(a) or 8(b) of the Act without just cause, the Commission "shall allow" additional compensation as a penalty. 820 ILCS 305/19(l) (West 2006); see also 50 Ill. Admin. Code § 7110.70 (eff. June 22, 2006). A delay of 14 days or longer creates a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l) (West 2006).

***14** ¶ 66 Moreover, Commission Rule 7110.70 provides that "[w]hen an employer begins payment of temporary total compensation and later terminates or suspends further payment before an employee in fact has returned to work, the employer shall provide the employee with a written explanation of the basis for the termination or suspension of further payment no later than the date of the last payment of temporary total compensation." 50 Ill. Admin. Code. § 7110.70(b) (eff. June 22, 2006). The rule further provides that an employer's failure to comply with this provision without good and just cause "shall be considered by the Commission or an Arbitrator when adjudicating a petition for additional compensation pursuant to Section 19(l) of the Act, or a petition for assessment of attorneys' fees and costs pursuant to Section 16 of the Act." 50 Ill. Admin. Code. § 7110.70(e) (eff. June 22, 2006).

¶ 67 Whether to award penalties or attorney fees under the Act presents a factual question, and we will not disturb the decision of the Commission on these matters unless it is contrary to the manifest weight of the evidence. *Central Rug & Carpet v. Industrial Comm'n,* 361 Ill.App.3d 684, 693, 297 Ill.Dec. 552, 838 N.E.2d 39 (2005); *Reynolds v. Workers' Compensation Comm'n,* 395 Ill.App.3d 966, 971, 335 Ill.Dec. 285, 918 N.E.2d 1098 (2009).

¶ 68 The claimant argues that he is entitled to penalties under section 19(l) because the employer unreasonably failed to pay him maintenance benefits and failed to provide vocational rehabilitation after the claimant requested it, as required by section 8(a) of the Act and Commission Rule 7110.10(a). He also maintains that he is entitled to additional penalties under section 19(k) and Commission Rule 7110.70 because the employer unreasonably delayed the payment of TTD benefits for the period covering January 3, 2007, through March 23, 2008,[11] and provided no explanation for the delay until it filed its response to the claimant's "Penalty Petition" on the eve of the arbitration hearing.

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¶ 69 We disagree. The purpose of sections 19(k) and (l) is to penalize employers that withhold or delay compensation owed to injured employees *unreasonably* or in *bad faith. Avon Products, Inc. v. Industrial Comm'n,* 82 Ill.2d 297, 301, 45 Ill.Dec. 117, 412 N.E.2d 468 (1980). Penalties are not imposed "when the employer reasonably and in good faith could have believed that the employee was not entitled to compensation." *Complete Vending Services, Inc. v. Industrial Comm'n,* 305 Ill.App.3d 1047, 1050, 239 Ill.Dec. 472, 714 N.E.2d 30 (1999); see also *Avon Products,* 82 Ill.2d at 302, 45 Ill.Dec. 117, 412 N.E.2d 468. As shown above, the weight of the evidence in this case suggests that the claimant was not entitled to vocational rehabilitation under section 8(a) of the Act or Commission Rule 7110.10(a) and was not entitled to maintenance benefits prior to November 16, 2009. Thus, the employer could reasonably have refused to provide such benefits, and the claimant is not entitled to penalties or attorney fees on that basis. See, *e.g., Consolidated Freightways, Inc. v. Industrial Comm'n,* 136 Ill.App.3d 630, 633, 91 Ill.Dec. 306, 483 N.E.2d 652 (1985) ("The award of additional compensation under section 19(l) and the assessment of attorney's fees under section 16 are not proper if the nonpayment is based on a reasonable and good-faith challenge to liability.").

***15** ¶ 70 For similar reasons, the claimant is not entitled to penalties under section 19(k) of the Act or attorney fees due to the employer's failure to pay TTD benefits from January 3, 2007, through February 21, 2008. Once an injured employee reaches maximum medical improvement, he is no longer eligible for TTD benefits. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n,* 409 Ill.App.3d 463, 471, 351 Ill.Dec. 63, 949 N.E.2d 1158 (2011). Here, the employer stopped paying TTD benefits after Dr. Bernstein found that the claimant had reached MMI and resumed paying TTD benefits shortly after Dr. Bernstein issued a note taking the claimant off work again. Based upon Dr. Bernstein's opinion, the employer could have reasonably believed that it was not entitled to pay TTD benefits for the period of January 3, 2007, through February 21, 2008.

¶ 71 We note that the employer apparently failed to provide a written explanation of the basis for its suspension of TTD benefits on January 3, 2007, in violation of Commission Rule 7110.70(b). 50 Ill. Admin. Code. § 7110.70(b) (eff. June 22, 2006). We do not condone such conduct. However, although the Commission Rule requires the Commission to "consider[ ]" this fact when reviewing a request for penalties under section 19(l) or a request for attorney fees under section 16, it does not require an award of penalties or attorney fees on that basis. Accordingly, for all the reasons set forth above, we hold that the Commission's decision not to award penalties and attorney fees in this case was not against the manifest weight of the evidence.

¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, we affirm the judgment of the Kane County circuit court, which confirmed the Commission's decision.

¶ 74 Affirmed.

Justices HOFFMAN, HUDSON, TURNER, and STEWART concurred in the judgment.

All Citations

Not Reported in N.E.2d, 2012 IL App (2d) 120154WC-U, 2012 WL 6861456

Footnotes

1 Waddell signs are a group of physical signs that may indicate a nonorganic or a psychological component to chronic low back pain. They have also been used to detect malingering in patients complaining of back pain.

2 Pseudarthrosis of the lumbar spine is the failure of bones in the lumbar spine to properly weld together after spinal fusion surgery.

3 Shortly before the arbitration hearing, the employer paid the claimant TTD benefits for the period of January 4, 2007, through February 21, 2008, even though it continued to contest its liability for those payments. The parties agreed that no TTD payments remained outstanding at the time of the arbitration hearing.

4 In reaching this conclusion, Dr. Matz found it significant that the claimant's subjective complaints did not correlate with the current neurological assessment or with the FCE. The doctor noted that his examination of the claimant revealed no objective physical confirmatory findings with respect to the claimant's symptoms and that the claimant's symptoms were not attributable to any derangement at L4–L5.

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5 The claimant acknowledged that he has a valid driver's license with no restrictions.

6 According to the claimant's job search log, some of the businesses he contacted told him to call back later, and at least one business told him that he could "apply in two weeks." There is no evidence in the record that the claimant followed up on these invitations.

7 The arbitrator found that Dr. Bernstein's opinion as to the claimant's work restrictions was more credible than Dr. Matz's opinion.

8 Even giving the claimant every benefit of the doubt, the earliest possible indication that the claimant might have intended to reenter the labor market came on July 13, 2009, when he demanded that the employer either provide vocational rehabilitation or settlement of the case for PTD benefits. However, as noted above, in order to establish that he was entitled to vocational rehabilitation on that date, the claimant would have to present evidence suggesting that his work-related injury caused a reduction in earning power and that rehabilitation would have increased his earning capacity. As noted above, the claimant failed to present any such evidence.

9 Further, the unusual facts presented in this case make it particularly inappropriate to award the claimant rehabilitation benefits prior to July 13, 2009. The claimant was a probationary employee who stopped working for the employer in early 2005, several years prior to the events at issue in this appeal. There is no evidence that the claimant told the employer that he was interested in working (either for the employer or for someone else) until shortly before the arbitration hearing, and the claimant did not request vocational rehabilitation prior to July 2009. An employer's responsibilities under Commission Rule 7110(a) should not be triggered if a probationary employee no longer works for the employer and fails to inform the employer of his desire for employment or vocational rehabilitation.

10 The claimant argues that some of the positions listed in the second report required lifting up to 50 pounds and that such lifting exceeded the lifting restriction prescribed by Dr. Bernstein. However, Dr. Matz concluded that the claimant was capable of lifting up to 50 pounds, and the Commission was entitled to credit Dr. Matz's opinion over Dr. Bernstein's opinion. *Westin Hotel v. Industrial Comm'n,* 372 Ill.App.3d 527, 539, 310 Ill.Dec. 18, 865 N.E.2d 342 (2007) ("It is within the province of the Commission to resolve conflicts in the evidence, especially as they relate to medical opinion evidence.") In any event, the first labor market survey report identified at least one available food service position within the lifting restrictions prescribed by Dr. Bernstein. That position also had no educational requirement. It required only prior food service experience, which the claimant had.

11 In his brief on appeal, the claimant asserts that the employer did not resume paying TTD benefits until March 23, 2008. However, during the arbitration hearing, the parties stipulated that the employer stopped paying TTD benefits from January 3, 2007, through February 21, 2008, not March 23, 2008. Moreover, the claimant testified that he began receiving his benefits again on February 22, 2008.

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