2017 IL App (4th) 160231WC-U

NO. 4-16-0231WC

FILED
May 31, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

LAURA PEVERELLE, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Gibson Area Hospital, Appellee).	)	Appeal from Circuit Court of Ford County No. 15MR30 Honorable Matthew John Fitton, Judge Presiding.

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

ORDER

¶ 1 *Held*: The Commission's finding that claimant was not entitled to temporary total disability benefits during a portion of her claimed period of temporary total disability was against the manifest weight of the evidence.

¶ 2 On May 1, 2013, claimant, Laura Peverelle, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2012)), seeking benefits from the employer, Gibson Area Hospital. Following a hearing, the arbitrator determined claimant sustained accidental injuries arising out of and in the course of her employment on December 20, 2012, and awarded her (1) 72-3/7 weeks' temporary total disability (TTD) benefits from January 8, 2013, through May 30, 2014; (2) medical expenses related to treatment for claimant's lumbar spine through May 30, 2014; and (3) prospective medical ex-

penses in the form of an anterior L5-S1 fusion and the postoperative treatment recommended by one of claimant's doctors.

¶ 3 On review, the Workers' Compensation Commission (Commission) modified the arbitrator's TTD award, finding claimant was not entitled to an award of TTD from May 24, 2013, through January 9, 2014. It otherwise affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Ford County confirmed the Commission's decision. Claimant appeals, arguing the Commission erred in denying her TTD benefits from May 24, 2013, through January 9, 2014. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 At the May 30, 2014, arbitration hearing, claimant testified she began working for the employer in October 2012. She held the position of surgical technician and her job duties included setting up for surgical procedures, assisting doctors during the procedures, helping move patients to the recovery bed, cleaning up the surgical room, and lifting in excess of 20 pounds. Claimant testified she was injured at work on December 20, 2012, while cleaning the surgical room. She stated she was moving a surgical bed into the hallway and, while pushing the bed, she "noticed something pull and shoot down [her] low back, into [her] legs."

¶ 6 Following her accident, claimant immediately sought medical treatment in the employer's emergency room. Medical records show she complained of low back pain and a "shooting sensation down both legs[,] mostly on the left." Claimant was diagnosed with a lower back strain with radicular symptomatology. Further, she was prescribed pain medication, given light-duty work restrictions, and told to follow up with her primary care doctor. With respect to her light-duty restrictions, claimant was told to "avoid bending, twisting, pushing or pulling over 25 pounds" and "[w]ork with 50% of the time sitting."

¶ 7 On December 28, 2012, claimant began seeing Dr. David Fletcher. She complained of lower back pain that radiated down her right leg as a result of her December 20, 2012, work accident. Dr. Fletcher diagnosed claimant with a lumbar strain and recommended physical therapy and modified-duty work of "no lifting over 20 [pounds] and no pushing/pulling more than 20 [pounds]." Claimant testified that, during physical therapy, she continued to experience pain and that "it was getting worse."

¶ 8 On January 2, 2013, claimant followed up with Dr. Fletcher and reported feeling the same but having increased pain at the time of her visit "due to being up more." Dr. Fletcher continued to recommend physical therapy and modified-duty work restrictions. On January 8, 2013, claimant reported an increase in radicular pain in her left leg and Dr. Fletcher noted claimant "was taken off work by her employer" until she followed up with him. He recommended a magnetic resonance imaging (MRI) scan of claimant's lumbar spine. Dr. Fletcher also continued to recommend physical therapy and modified-duty work restrictions. On January 10, 2013, claimant's MRI was performed, showing a "[p]osterior central disk protrusion at L5-S1 without nerve root impingement or significant foraminal compromise."

¶ 9 On January 14, 2013, claimant returned to see Dr. Fletcher and reported continued symptoms. Dr. Fletcher reviewed claimant's MRI and diagnosed her with a lumbar strain and L5-S1 disc herniation. He continued to recommend modified-duty work restrictions and physical therapy. Dr. Fletcher also referred claimant to Dr. Steven Thatcher for epidural steroid injections. Claimant testified she underwent two injections but they did not help her condition.

¶ 10 On February 12, 2013, claimant followed up with Dr. Fletcher, who found claimant had failed conservative treatment and needed a discectomy. He referred claimant to Dr. Kern Singh, an orthopedic spine surgeon. Dr. Fletcher also continued claimant's modified-duty work

restrictions but noted her "employer [was] not accommodating."

¶ 11 On March 18, 2013, claimant saw Dr. Singh. She reported experiencing a sudden onset of low back and left leg pain after pushing and pulling an operating room bed at work in December 2012. Claimant complained of low back pain that radiated into both lower extremities but which was worse on the left. Dr. Singh noted claimant reported pain that "comes on suddenly and is constant in nature." He stated claimant was currently not working. Claimant reported that standing, sitting, climbing, walking, stairs, and bending forward increased her pain and discomfort and Dr. Singh diagnosed her with "[d]egenerative disk disease, L5-S1" and a "[c]entral disk protrusion, L5-S1." Dr. Singh recommended "surgery in the form of an anterior lumbar interbody fusion, L5-S1." He identified claimant's ability to work and work restrictions as "per Dr. Fletcher." Further, he opined claimant's diagnoses and treatment were causally related to her alleged work accident.

¶ 12 On April 1, 2013, claimant followed up with Dr. Singh, who continued to recommend surgery. His records further stated claimant was unable to work.

¶ 13 At arbitration, the employer submitted a Physicians' Review Network report, dated April 3, 2013. In the report, Dr. Richard Erickson, an orthopedic surgeon, offered an opinion that fusion surgery at L5-S1 was not medically necessary for claimant.

¶ 14 On April 15, 2013, claimant returned to see Dr. Fletcher. He noted claimant was "no better" and needed surgery. Dr. Fletcher further stated as follows: "[Claimant] remains on modified work duty. Her restrictions are no lifting over 20 [pounds] and no pushing/pulling more than 20 [pounds]. Her employer is not accommodating."

¶ 15 On April 18, 2013, Dr. Singh authored a letter, stating he had reviewed the Physician Review Network report on claimant and disagreed with its conclusions. He continued to

recommend surgery for claimant.

¶ 16 On May 14, 2013, claimant was evaluated at the employer's request by Dr. Robert Beatty, a neurosurgeon. At arbitration, the employer submitted Dr. Beatty's report and deposition, taken February 24, 2014, into evidence. Dr. Beatty opined claimant had degenerative lumbar disc disease, which was present before her December 2012 work accident. He found claimant's ongoing back problem was related to her preexisting degenerative changes and not her work accident. Dr. Beatty also determined claimant had reached maximum medical improvement (MMI) with respect to her December 2012 work injury. Further, although he opined Dr. Singh's surgical recommendation was "a reasonable suggestion" in view of claimant's pain and her resistance to conservative treatment, he asserted the proposed surgery was related to claimant's preexisting condition and not her December 2012 work accident. In his report, Dr. Beatty further opined as follows:

> "It is my opinion that [claimant] is not able to return to work to her former full duties as a surgical tech because of her lower back pain. However, the inability to return to work full duty is a result of the pre-existing degenerative lumbar disc disease and is not related to the work injury. In my opinion, she can return to work with modified duty, limiting bending to no more than once per hour and lifting no more than 20 pounds three times an hour. These would be temporary restrictions, which would be reevaluated after she achieves a solid fusion from her surgery."

¶ 17 In July and August 2013, claimant continued to follow up with Dr. Fletcher. Dr. Fletcher reiterated his surgical recommendation and continued claimant's modified-duty work restrictions.

¶ 18 On August 21, 2013, claimant returned to Dr. Singh. Dr. Singh noted claimant had been scheduled for surgery by his office until she was examined by Dr. Beatty and placed at MMI. He stated claimant reported "having persistent axial low back pain radiating to bilateral buttocks and posterior aspects of her bilateral lower extremities, left leg being greater than her right leg." Claimant further complained of numbness, tingling, a throbbing sensation, and burning in her left foot. Dr. Singh's diagnoses of "[d]egenerative disk disease" and a "[c]entral disk herniation" at L5-S1 remained the same. He also continued to recommend surgery and his records identified claimant as being unable to work.

¶ 19 At arbitration, claimant submitted Dr. Singh's deposition, taken October 17, 2013. Dr. Singh testified he reviewed claimant's actual MRI films when diagnosing her with degenerative disc disease at L5-S1 and a central disc protrusion at L5-S1. Further, he opined claimant's December 2012, work accident aggravated her preexisting degenerative condition.

¶ 20 On October 16, 2013, claimant followed up with Dr. Fletcher, who stated claimant's condition was worse, in that she developed right leg pain and had "occasional bowel incontinence." He recommended an updated MRI and stated claimant remained on "modified work duty." Dr. Fletcher's recommendations and work restrictions remained the same during follow-up visits in November and December 2013. On December 20, 2013, claimant underwent an MRI. The MRI report set forth the following impression: "Posterior central and left paracentral disk protrusion at L5-S1 showing some progression of changes compared to the prior study. There are now findings suggesting mild left nerve root impingement."

¶ 21 On January 9, 2014, claimant returned to Dr. Fletcher, who noted claimant's primary problem was her lower back. He stated her problem began in December 2012 and claimant felt it was getting worse. On examination, he noted claimant moved with difficulty and was

limping. Dr. Fletcher stated claimant was "involved in a disputed WC case involving her back" and she had an "updated MRI that showed further progression of her L5-S1 disc herniation." Dr. Fletcher opined claimant needed surgery as she had failed conservative treatment and that "[h]er condition [was] clearly related to her work injury." He further identified claimant's "recommended work status" as "No Work Capacity."

¶ 22 The record reflects claimant continued to follow up with Dr. Fletcher through May 2014. His opinions and recommendations remained the same, including that claimant needed surgery and had "No Work Capacity."

¶ 23 At arbitration, claimant testified she had not worked since January 7, 2013. Further, she stated Dr. Fletcher had not lifted her restrictions or released her to return to full-duty work. Claimant acknowledged that she was paid TTD through May 19, 2013. She testified that, at the time of arbitration, she continued to experience low back pain with radiating and shooting pain down her left leg. Claimant stated she also had numbness and tingling in her left leg and right foot.

¶ 24 Additionally, claimant testified that, while working for the employer, she also worked for Christie Clinic, where she had been employed since December 2006. At Christie Clinic, claimant worked as a patient service representative (PSR) and a medical office assistant. Her PSR duties involved checking patients in, helping patients fill out forms, taking insurance information, entering information into a computer, "registration," and making appointments. Claimant agreed her work for Christie Clinic did not involve pushing, pulling, and lifting. During cross-examination, the following colloquy occurred between the employer's counsel and claimant regarding claimant's work for Christie Clinic:

"Q. Okay. Are you still working [at Christie Clinic]?

A. I'm not. I was PRN when I took the job [for the employer], which is just kind of like as needed, part-time, but I haven't been able to work that job since I've been injured.

Q. Have you tried going back there at all?

A. I am a liability to them so I am unable to work anywhere.

Q. My question is, did you go back to them and say, my restrictions are no lifting more than 20, no pushing more than 20?

A. I explained that to my boss, which I would be in that department at, which was Convenient Care at Christie Clinic, and she just said I was a liability, even with restrictions, she didn't want to take a risk.

Q. When did you try going back there?

A. That would have been in January.

Q. Of this year?

A. No, of 2013. So after [January] 8th, I explained to her that I was taken off, you know, with restrictions from [the employer]. And she even said, with the 20 pounds, I just don't want to have you work.

* * *

Q. *** You would be able to work a job similar to Christie Clinic today?

A. As long as they didn't feel like I was a liability to them.

Q. Physically, you could do that, right?

A. I don't think I could now, now today, I don't. Maybe back in January of 2013, but since then, my pain has increased, so I'm unable to stand or sit without increasing pain within five minutes."

¶ 25 On redirect, claimant testified she was unable to work at Christie Clinic due to her back injury. She stated she could not sit or stand for very long without experiencing an increase in her pain. On recross-examination, claimant testified she could not sit or stand for more than five minutes without increased pain.

¶ 26 On July 7, 2014, the arbitrator issued her decision in the matter. As stated, she found claimant sustained a low back injury arising out of and in the course of her employment on December 20, 2012, and awarded her (1) 72-3/7 weeks' TTD benefits from January 8, 2013, through May 30, 2014, the date of the arbitration hearing; (2) medical expenses related to treatment for claimant's lumbar spine from the date of her accident through the date of arbitration; and (3) prospective medical expenses in the form of an anterior L5-S1 fusion and the postoperative treatment recommended by Dr. Singh.

¶ 27 On June 8, 2015, the Commission issued its decision. It modified the arbitrator's TTD award by reducing claimant's TTD benefits to 39-4/7 weeks. Specifically, the Commission found claimant was not entitled to an award of TTD from May 24, 2013—the day following the employer's termination of TTD benefits based upon Dr. Beatty's opinion—through January 9, 2014—"when Dr. Fletcher ordered [claimant] totally off work." It otherwise affirmed and adopted the arbitrator's decision.

¶ 28 In reducing TTD benefits, the Commission first noted the employer stipulated that claimant was entitled to a TTD award from January 8, 2013, through May 23, 2013, and, as a result, the disputed TTD time period was May 24, 2013, through May 30, 2014. It then reasoned as follows with respect to its TTD determination:

> "At hearing, [claimant] testified she had been employed by [the employer] for only two months at the time of her accident. *** During that time, she worked

only as needed, so she had only worked at [the employer's] hospital 'a couple of times' before her accident. *** She testified the [employer] was aware that she concurrently worked at Christie Clinic, and she described her work at Christie Clinic as sedentary. She testified that even though she was on light duty and had not been prescribed completely off work from May 24, 2013 until January 9, 2014, she was unable to work at either job during that period because she couldn't sit or stand for more than five minutes without increasing pain. *** [Claimant] further testified that Christie Clinic had refused to allow her to return to work on light duty, because they considered her a liability to them with her injury. The Commission notes that [claimant] offered no evidence of her inability to perform either job, other than her own testimony. Dr. Fletcher clearly believed that she would be able to return to work with appropriate restrictions, and [claimant's] job at Christie Clinic was well within her light-duty restrictions. There is no evidence that [claimant] missed any work with [the employer] during that period, since she only worked when she was needed and had only worked a couple times before her injury.

The Commission first finds [claimant] is not entitled to [TTD] for her inability to work for [the employer] during the period of light duty from May 24, 2013 through January 9, 2014. The Commission also finds that [claimant] failed to prove that she was entitled to [TTD] benefits for the period during which she missed work at Christie Clinic due to her light[-]duty restrictions. There was no supporting documentation or witness to corroborate [claimant's] testimony that her concurrent employer, Christie Clinic, would not permit her to perform her

> regular job during this period of light duty. The Commission observes that physicians' prescribed medical restrictions belie her asserted level of restricted work ability, and further observes the light[-]duty work restrictions are full duty for her regular sedentary-level job.
>
> The Commission finds that [claimant] failed to prove that she suffered a loss of income from [the employer] or Christie Clinic as a result of her light[-]duty restrictions."

¶ 29 Claimant sought judicial review of the Commission's decision with the circuit court of Ford County. On February 25, 2016, the court confirmed the Commission's decision.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 For purposes of this appeal, it is undisputed that claimant was injured at work in December 2012, her work accident was causally related to her low back condition of ill-being and radicular symptoms, and she required fusion surgery to treat her work-related injury. The only dispute on appeal is claimant's entitlement to TTD benefits during a specific time frame—May 24, 2013, through January 9, 2014. Claimant argues the Commission erred in denying her benefits during that period because the evidence showed (1) her condition of ill-being had not stabilized, (2) she required work restrictions, and (3) she was not offered light-duty work by either the employer or Christie Clinic. For the reasons that follow, we agree with claimant.

¶ 33 The Act's purpose "is to compensate an employee for lost earnings resulting from work-related injuries." *Sharwarko v. Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 49, 28 N.E.3d 946. A claimant is temporarily and totally disabled, and thus entitled to TTD benefits, "from the time an injury incapacitates him from work until such time as he

is as far recovered or restored as the permanent character of h[is] injury will permit." *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1.

¶ 34 It is well-settled "that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached [MMI]." *Interstate Scaffolding, Inc. v. Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 271 (2010). Further, to prove his entitlement to a TTD award, an injured employee must establish not only that he did not work, but that he was unable to work. *Sharwarko*, 2015 IL App (1st) 131733WC, ¶ 49, 28 N.E.3d 946. "TTD benefits may be suspended or terminated before an employee reaches MMI if he: (1) refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) refuses to cooperate in good faith with rehabilitation efforts; or (3) refuses work falling within the physical restrictions prescribed by his doctor." *Id.* ¶ 47 (citing *Interstate Scaffolding*, 236 Ill. 2d at 146-47, 923 N.E.2d at 274).

¶ 35 "The determination of whether claimant was unable to work and the period of time during which a claimant is temporarily and totally disabled are questions of fact to be determined by the Commission, and the Commission's resolution of these issues will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. "A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent." *Sunny Hill of Will County v. Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, ¶ 22, 14 N.E.3d 16.

¶ 36 Initially, claimant maintains that a *de novo* standard of review applies to this issue because the facts material to this court's analysis are undisputed and subject to only a single inference. See *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 17, 956 N.E.2d 543 (stating this court will apply a *de novo* standard of review

"when the facts essential to our analysis are undisputed and susceptible to but a single inference, and our review only involves an application of the law to those undisputed facts"). However, we disagree with claimant's assertion and decline to accept her request to apply *a de novo* standard of review. Rather we review the Commission's TTD decision to determine whether it was against the manifest weight of the evidence.

¶ 37 In this instance, even applying a more deferential standard of review, we find the Commission erred. In particular, the record reflects the Commission misconstrued the nature of claimant's employment with both the employer and Christie Clinic when modifying the arbitrator's TTD award. A clear reading of the Commission's decision shows that it relied on the finding that claimant worked for the employer on an as-needed basis and that Christie Clinic was her "regular" position. Specifically, it stated as follows: "[Claimant] testified she had been employed by [the employer] for only two months at the time of her accident. *** During that time, she worked only as needed, so she had only worked at [the employer's] hospital 'a couple of times' before her accident." Further, the Commission identified Christie Clinic as claimant's "regular sedentary-level job" and determined there was "no evidence that [claimant] missed any work with [the employer] during [the disputed TTD] period, *since she only worked when she was needed and had only worked a couple times before her injury*." (Emphasis added.)

¶ 38 The record demonstrates, however, that the Commission's factual findings were incorrect. In particular, claimant testified she began working for the employer in October 2012 as a surgical technician. Although she had only worked for the employer for two months at the time of her accident, the record reflects it was her "regular," full-time job. While working for the employer, claimant also worked for Christie Clinic, but her work for that secondary employer was infrequent and only on an as-needed basis. Thus, the record supports opposite factual find-

ings from those reached by the Commission.

¶ 39 The Commission's denial of TTD was also based on its determination that claimant "offered no evidence of her inability to perform either job, other than her own testimony." However, at the arbitration hearing, evidence which was supportive of claimant's entitlement to TTD during the disputed time period was not contradicted. We note it was undisputed that claimant's work for the employer required her to lift in excess of 20 pounds. During the relevant time frame, claimant was continually on modified-duty work restrictions that prohibited her from lifting over 20 pounds or pushing and pulling more than 20 pounds. Claimant testified that her condition worsened and she did not return to work for the employer after January 7, 2013. Dr. Fletcher's records state claimant was "was taken off work by her employer" and that the employer did not accommodate her restrictions. Nothing in the evidence presented contradicts this testimony from claimant or the information contained in Dr. Fletcher's records and, on appeal, the employer does not argue that it offered to accommodate claimant's work restrictions. Additionally, claimant's testimony that Christie Clinic refused to allow her to work following her accident because she was "a liability" was similarly not contradicted. Because the evidence presented by claimant was not contradicted, there is nothing in the record to support the Commission's TTD denial.

¶ 40 Finally, on appeal, the employer contends the Commission's decision was correct because claimant's work for Christie Clinic was within her light-duty restrictions. It maintains she "simply refused to work in a position that fell within [the restrictions] prescribed by her treating physician." The problem with the employer's argument, however, is that no evidence was presented that claimant was offered and refused work falling within her physical capabilities from Christie Clinic (or any other employer). Rather, the only evidence regarding claimant's

ability to perform work for Christie Clinic was claimant's testimony that Christie Clinic would not allow her to continue working because she was "a liability." Moreover, even if we were to find claimant's uncontradicted testimony was wholly incredible, the evidence otherwise supports a finding that her position with Christie Clinic was insufficient to warrant the termination or suspension of TTD benefits. See *Mobil Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 627, 722 N.E.2d 703, 711-12 (1999) (holding "that the type of minimal activity engaged in by [the] claimant, attending classes and working 10 hours per week ***, [was] insufficient to eliminate a finding of TTD given the extent of claimant's injury"). As stated, the evidence showed that, by the time claimant began working for the employer and was injured, her work for Christie Clinic was infrequent and on only an as-needed basis.

¶ 41 Here, the Commission's factual findings were contradicted by the record. Additionally, its denial of TTD benefits from May 24, 2013, through January 9, 2014, was not otherwise supported by any of the evidence presented. In other words, an opposite conclusion from that reached by the Commission was clearly apparent and its denial of TTD was against the manifest weight of the evidence.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we reverse the portion of the circuit court's judgment confirming the Commission's denial of TTD benefits from May 24, 2013, through January 9, 2014, and remand to the Commission for an award of TTD benefits during that time period.

¶ 44 Reversed and remanded.