

NOTICE
Decision filed 04/18/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

Workers' Compensation
Commission Division
FILED: April 18, 2011

1-10-0086WC

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

PACTIV,)	Appeal from the Circuit Court
)	of Cook County, Illinois
Appellant,)	
)	
v.)	No. 09--L--50156
)	
)	Honorable
THE ILLINOIS WORKERS' COMPENSATION)	Sanjay T. Tailor,
COMMISSION <i>et al.</i> (Juan Luna, Appellee).)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justices McCullough and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

Held: The Commission's award of permanent partial disability benefits equal to 50% of the loss of the person as a whole was neither contrary to law nor against the manifest weight of the evidence. Additionally, this court lacked jurisdiction over the claimant's cross-appeal due to his failure to file a notice of appeal pursuant to Supreme Court Rule 303(a)(3).

No. 1-10-0086WC

The claimant, Juan Luna, filed an application for adjustment of claim against his employer, PACTIV, seeking workers' compensation benefits for injuries to his right hand as the result of an industrial accident on May 17, 2004. The accident resulted in the amputation of the claimant's index, middle, and ring fingers. The matter proceeded to an arbitration hearing where the arbitrator found that the accident was compensable and awarded the following: temporary total disability (TTD) benefits of \$301.60 per week for 55 2/7 weeks (May 18, 2004, through June 13, 2004, and October 22, 2004, through October 16, 2005); and permanent partial disability (PPD) benefits of \$271.44 per week for 142.5 weeks (\$38,680.20), representing 75% loss of use of right hand pursuant to section 8(e) of the Illinois Workers' Compensation Act (the Act). 820 ILCS 305/8(e) (West 2006).

The claimant appealed to the Illinois Workers' Compensation Commission (Commission), maintaining that he should receive temporary partial disability (TPD) benefits for the period from October 12, 2005, through September 30, 2007, and that he should receive a wage differential award pursuant to section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1) (West 2006). The Commission denied the claimant's request for TPD benefits, as well as his request for a wage differential award. However, the Commission unanimously modified the arbitrator's permanency award, finding that the claimant was entitled to an award equal to 50% of the person as a whole ($\$271.44 \times 250 = \$67,860$) pursuant to section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2006). The employer then appealed to the Cook County circuit court, maintaining that the Commission erred in rejecting the arbitrator's section 8(e) award. The claimant also sought review in the circuit court of the Commission's decision to deny TPD

No. 1-10-0086WC

benefits and to deny him a wage differential benefit. The circuit court confirmed the decision of the Commission, and now both parties are seeking review of the Commission's decision, although the claimant failed to file a cross-appeal.

BACKGROUND

The facts in this matter are undisputed and are taken here from the circuit court's recitation. At the time of the arbitration hearing, the claimant was a 33-year old, right-hand-dominant man employed by the employer as an extrusion machine operator. His job duties included feeding raw material into a machine that produced plastic rolls weighing 70 to 80 pounds. He also was required to monitor and troubleshoot the machine and check for product quality. The claimant testified that he often used pliers, screwdrivers, hammers, micrometers, and air guns in the performance of his duties.

On May 17, 2004, the claimant's right hand got caught in the machine, resulting in serious injury. The claimant underwent surgery at Loyola University Hospital in Chicago, Illinois, where his right index, middle, and ring fingers were amputated at the metacarpophalangeal joint (the joint closest to the wrist). A wound to his right thumb was debrided and repaired. Following surgery, the claimant underwent physical therapy.

After his physical therapy was completed, the claimant underwent a functional capacity evaluation (FCE), which showed that he was able to manipulate small objects with both hands although, obviously, he was only able to use the thumb and small finger of his right hand, as these were the only fingers left after the other fingers on the right hand had been amputated. The FCE also showed that the claimant was able to perform such tasks as stair climbing, balancing,

No. 1-10-0086WC

kneeling, crawling, squatting, and overhead work. In addition to the FCE, the claimant's physical therapist opined that he was capable of work at the medium to heavy physical demand level for bimanual lifting and light physical demand level for single-hand lifting.

After reviewing the claimant's medical records, Dr. Charles Carroll, a section 12 examiner, stated that claimant had adequate pinch with his thumb and small finger but was only able to grasp 5 pounds with his right hand, compared to 90 pounds with his left hand. Dr. Carroll also stated that the claimant had difficulty manipulating small objects and could not cut his food. He opined that the claimant could return to his regular duties with PACTIV or other jobs within the parameters noted in the FCE.

On June 14, 2004, the claimant returned to work for the employer. He was initially assigned to light-duty work, checking on inventory and other non-strenuous tasks. On October 12, 2005, the claimant returned to his regular job as an extrusion machine operator, although his pace was slower than before the accident and slower than that of all of his coworkers. The claimant testified that he has difficulty changing rolls and using tools. At the time of the arbitration hearing, the claimant's hourly wage was \$13.50.

Following his return to work, the claimant was evaluated by his vocational rehabilitation expert, James Radke. Radke opined that the claimant was struggling with his machine operator position and was unable to grasp, hold, and support his weight with his right hand. He further opined that, due to the significant lack of dexterity in the right hand, the claimant functioned at a level less than the fifth percentile of other "blue collar" type of workers. Radke concluded that the claimant was currently struggling with his machine operator position and would eventually

No. 1-10-0086WC

need to seek new employment. Radke conducted a vocational analysis of likely employment for the claimant and opined that he might be able to work as a security guard, courier, service station attendant, parking lot attendant, or taxi driver at the average median hourly wage of \$9.25. In a subsequent report, Radke adjusted the median hourly wage that the claimant might be able to secure to \$9.84.

The employer's vocational rehabilitation expert, Julie Bose, did not interview the claimant but, based upon information supplied to her by the employer, opined that the claimant was not a candidate for vocational rehabilitation because he did not complain of difficulty in performing his work tasks. Bose noted the employer's statement to her that the claimant was a valuable employee and was not at risk for permanent layoff. Bose concluded that the extrusion machine operator position was commensurate with the claimant's physical abilities.

The arbitrator, noting that the claimant had returned to his prior duties as an extrusion machine operator, found that he had failed to prove that he was no longer able to pursue his usual and customary line of employment and, thus, he was not entitled to a wage differential award. Rather, the claimant was entitled to an award of section 8(e) for 75% of the loss of the use of his right hand.

The claimant sought review before the Commission, arguing that he was entitled to a wage differential award of \$87.88 per week. Specifically, the claimant maintained that the employer was paying him "unearned wages" because he would not be able to perform his current job in a competitive job market due to his physical limitations. The claimant speculated that the employer was keeping him in his current position specifically to avoid paying a wage differential

No. 1-10-0086WC

award. See *Smith v. Industrial Comm'n*, 308 Ill. App. 3d 260 (1999). The claimant maintained that, should he lose his current job, it would be highly unlikely that he would find a similarly paying position.

The Commission, finding no indication in the record that the claimant's continued employment as an extrusion machine operator was not *bona fide*, held that the claimant had failed to establish his entitlement to a wage differential benefit. The Commission determined, however, that the claimant was entitled to a permanency award under section 8(d)(2) of the Act and increased the award to 50% of the loss of the-person-as-a-whole. The Commission, claiming the discretion to change an arbitrator's section 8(e) award to a section 8(d)(2) award, increased the claimant's permanency award. See *Lusietto v. Industrial Comm'n*, 174 Ill. App. 3d 121 (1988).

Both the claimant and the employer sought review in the Cook County circuit court. In their briefs to the court, both the employer and the claimant argued that the Commission erred by awarding compensation under section 8(d)(2) of the Act. The employer argued that a permanency award was only appropriate under section 8(e) of the Act, while the claimant argued that he should have been awarded a wage differential under section 8(d)(1) of the Act. The circuit court considered each parties' arguments and affirmed the Commission's award.

The employer filed a timely notice of appeal to this court, maintaining that the Commission erred in awarding the claimant a permanency award equal to 50% loss of the person as a whole pursuant to section 8(d)(2) of the Act. The employer maintains that the claimant is entitled only to a scheduled loss award under section 8(e) of the Act. The claimant did not file a

No. 1-10-0086WC

cross-appeal in accordance with Illinois Supreme Court Rule 303 (a)(3) (eff. October 15, 1979), yet he argued in his appellee's brief and at oral argument that he is entitled to a wage differential award under section 8(d)(1) of the Act. The claimant additionally maintained that the Commission erred in not awarding him TPD benefits for the period October 12, 2005, through September 30, 2007.

DISCUSSION

1. Section 8(e)

We will address first the employer's argument that the claimant is, as a matter of law, entitled to a permanency award only under section 8(e) of the Act. We note, generally, that the Commission's findings as to the nature and extent of a disability will be given deference and will not be overturned on appeal unless they are against the manifest weight of the evidence.

Freeman United Coal Mining Co. v. Industrial Comm'n, 283 Ill. App. 3d 785, 793 (1996).

Where evidence gives rise to reasonable inferences in support of either the Commission's award for permanent partial loss of the use of a member or an award for permanent partial disability, the Commission's determination will be affirmed unless it is contrary to the manifest weight of the evidence. *Peavy Consolidated Flour Mills v. Industrial Comm'n*, 64 Ill. 2d 252, 257 (1976).

However, when the issue before a reviewing court is a matter of statutory interpretation, the court will review the matter *de novo*. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 232-33 (2001).

The employer argues that the Commission erred as a matter of law by awarding benefits under section 8(d)(2) of the Act and that the claimant was limited to a scheduled benefit under section 8(e) of the Act. Section 8(e) of the Act states in pertinent part:

"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:

9. Hand - 190 weeks. The loss of 2 or more digits, or one or more phalanges of 2 or more digits, of a hand may be compensated on the basis of partial loss of the use of a hand, provided, further, that the loss of 4 digits, or the loss of the use of 4 digits, in the same hand shall constitute the complete loss of a hand." 820 ILCS 305/8(e) (West 2006).

The employer maintains that the plain language of the phrase "but shall not receive any compensation under any other provision of this Act" means that section 8(e) is the exclusive remedy for all injuries which are covered by the schedule in section 8(e). In other words, where a claimant suffers injuries compensable under section 8(e) of the Act, compensation under that

No. 1-10-0086WC

provision is exclusive of any other methods of compensating permanent injury according to the employer. This argument has been specifically rejected by our supreme court. As the circuit court pointed out in its review of this matter, the phrase in section 8(e) referenced by the employer does not render section 8(e) the exclusive remedy for all scheduled injuries.

Springfield Park District v. Industrial Comm'n, 49 Ill. 2d 67, 72 (1971). Rather, it was only intended to prevent a double recovery, so that if a claimant receives an award under section 8(e), he is not eligible for any other compensation except temporary total disability. *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 436 (1982). The *General Electric* court made note of the fact that in 1975 the legislature changed the relevant statutory language of section 8(d)(1) from "except in cases covered by the specific schedule" to "except in cases compensated under paragraph (e)." *General Electric*, 89 Ill. 2d at 436. The court pointed out that the change in the statutory language indicated a clear legislative intent that "compensation under section 8(d)(1) is barred only if compensation is actually awarded under section 8(e), not simply because an injury is listed in the schedule as compensable under paragraph (e). *Id.* at 437. Moreover, the court conclusively held that "[c]ompensation may be proper under either section, though not both at once." *Id.*

Our supreme court reached the same conclusion in *Lusietto*, which was decided in 1988::

"Schedule allowances were originally exclusive. A strong trend, however, now views schedule allowances as nonexclusive.

[Citations.]. 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. [Citation.]. A claimant may have an option, therefore, which will result in an award more favorable than a schedule award. [Citation.]." *Lusietto*, 174 Ill. App. 3d at 129.

Thus, the employer's argument that section 8(e) is the exclusive remedy for the claimant's injury is contrary to our supreme court's holdings in *General Electric* and *Lusietto*. We find therefore that the Commission did not err as a matter of law in choosing not to award the claimant for permanent injuries in accordance with section 8(e) of the Act.

2. Section 8(d)(2)

Having determined that the Commission was not limited as a matter of law to an award under section 8(e), we must now determine whether the Commission's award under section 8(d)(2) was supported by the manifest weight of the evidence. In order to be eligible for benefits under section 8(d)(2) of the Act, the injuries must be serious and permanent and result in a permanent partial disability or impairment. *Archer Daniels Midland Co. v. Industrial Comm'n*, 99 Ill. 2d 275, 280 (1983). A review of the Act shows three circumstances where a claimant may be awarded benefits under section 8(d)(2) of the Act: (1) where the claimant suffers injuries which are not covered by section 8(c) or section 8(e); (2) where a claimant covered by section 8(c) or section 8(e) 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 otherwise have resulted in physical impairment; or

No. 1-10-0086WC

(3) where he suffers injuries which partially incapacitate him from pursuing the duties of his customary employment but do not result in an impairment of earning capacity. 820 ILCS 305/8(d)(2) (West 2006); *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 728 (2000).

Here, the Commission did not specify which of the three scenarios it relied upon in awarding the claimant 50% loss of the person as a whole. The first scenario is inapplicable since the claimant suffered injuries which were covered under section 8(e). Likewise, the second scenario is inapplicable as the record clearly established that the claimant sustained no other injuries than those covered under section 8(e). Thus, the Commission's award under section 8(d)(2) would be against the manifest weight of the evidence unless the record supports a finding that the claimant suffered injuries which partially incapacitated him from pursuing the duties of his customary employment but did not result in an impairment of his earning capacity.

We find that the manifest weight of the record evidence supports a conclusion that the claimant suffered injuries that partially incapacitated him from pursuing the duties of his customary employment but did not result in an impairment of his earning capacity. It is uncontroverted that the claimant suffered a significant permanent injury by the loss of three digits on his dominant hand, which caused him to perform his customary job duties at a much slower pace and with a much greater degree of physical difficulty than before the accident. It is also clear from the record, however, that the claimant's injuries have not resulted in an impairment of his earning capacity since the record established that the claimant returned to his prior employment and was actually earning more at the time of the arbitration hearing than he was earning prior to his injury.

No. 1-10-0086WC

Despite the fact that the claimant was able to return to work without an impairment in his earning capacity, the record also clearly established that the claimant lacked the capacity post-accident to perform the duties of his customary employment at anywhere near his prior level of productivity. Vocational expert Radke observed the claimant's diminished capability in performing his job customary duties at a pace commensurate with his prior abilities due to a lack of manual dexterity in his right hand and an increased degree of difficulty in performing all his job duties. While the record is clear that the claimant suffered no loss in earning capacity, it also supports a finding that the claimant is partially disabled from performing the duties of his customary employment in that he performs his customary job tasks at a much slower pace and with much greater physical effort, even though he has suffered no reduction in his earning capacity. Thus, the Commission's decision to award the claimant a section 8(d)(2) award cannot be said to be against the manifest weight of the evidence.

CONCLUSION

We note that the claimant has raised a challenge to the Commission's award under section 8(d)(2) of the Act, maintaining that the Commission should have awarded a wage differential under section 8(d)(1) of the Act. The claimant also raised a challenge to the award of TTD. The claimant failed to properly invoke the jurisdiction of this court by filing a proper cross-appeal pursuant to Illinois Supreme Court Rule 303 (a)(3) (eff. October 15, 1979). We therefore have no jurisdiction to address the claimant's claims of error.

The judgment of the Cook County circuit court, which confirmed the decision of the Commission is affirmed.

No. 1-10-0086WC

Affirmed.