

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

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

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

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

OPINION

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

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

¶ 2

I. BACKGROUND

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

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

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

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

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

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

“For instance, if I am loading bags of concrete, 50, 60 pounds of concrete and I am having to pull them off of the truck, I will notice that the right side is starting to get weak. So I switch over to the left side, and I start using that for a while until it kind of calms down, and then I start using the right side which is I am right handed [*sic*].

So I generally use the right hand all of the time. The other thing is climbing in and out of my truck or up and down off [a] tractor. I notice I have been using my left hand to pull myself up into the truck now because if I pull my whole weight with my right side up and down off the tractor all day, it gets sore pretty quick.”

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

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

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

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

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

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

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

¶ 11

II. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶23

III. CONCLUSION

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

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¶ 25 Affirmed.