*216 Ill. App. 3d 1027, *; 576 N.E.2d 568, **;*
*1991 Ill. App. LEXIS 1303, ***; 159 Ill. Dec. 899*

THE CITY OF SPRINGFIELD, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Ron Adkinson, Appellee)

No. 4-90-0842WC

Appellate Court of Illinois, Fourth District

216 Ill. App. 3d 1027; 576 N.E.2d 568; 1991 Ill. App. LEXIS 1303; 159 Ill. Dec. 899

July 31, 1991, Filed

NOTICE: [*1]** Released for Publication August 30, 1991.

SUBSEQUENT HISTORY: As Amended October 31, 1991.

PRIOR HISTORY: Appeal from the Circuit Court of Sangamon County; No. 90MR122; Hon. Simon L. Friedman, Judge, presiding.

DISPOSITION: Reversed and Remanded with Directions.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent city sought review of a judgment from the Circuit Court of Sangamon County (Illinois), which affirmed the Industrial Commission's order finding petitioner claimant permanently and totally disabled under the **Workers' Compensation** Act. In finding the claimant permanently and totally disabled, the Commission had held that the city's conditional offer of reemployment following the claimant's injury had not been a bona fide offer.

OVERVIEW: After the claimant suffered an injury while working as a machinist, the city terminated the claimant because of the claimant's inability to perform the job. Thereafter, the city conditionally offered the claimant a drafting position, and in so doing, the city refused to make up the difference in salary and told the claimant that continued problems would result in lost sick time. After the claimant refused the position, a position the claimant admittedly could perform, the claimant sought disability benefits under the Act. In finding the claimant permanently and totally disabled despite the claimant's ability to do the job that was offered, the Commission held that the conditional offer of reemployment had not been a

bona fide offer. After the trial court affirmed the decision, the city sought review. Upon review, the court held that because the claimant could perform the job despite the injury, the claimant had not demonstrated a permanent and total disability under the Act. Moreover, the court held that because the conditions placed on the offer had been legally unenforceable, the conditions had not rendered the otherwise legitimate offer non-bona fide under the Act.

OUTCOME: The court reversed a judgment which affirmed the Commission's order finding the claimant permanently and totally disabled under the Act.

CORE TERMS: claimant's, knee, drafting, technician, totally disabled, permanently, disability, salary, heart condition, earning capacity, capable of performing, reemployment, surgery, master mechanic, sedentary, manifest, gainful employment, total disability, aneurysm, disability benefits, returned to work, pay benefits, bona fide, arbitrator, cyst, myocardial infarction, work-related, ventricular, Act III, unable to work

LEXISNEXIS® HEADNOTES Hide

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

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

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

HN1 A claimant is permanently and totally disabled when the claimant is unable to make some contribution to the work force sufficient to justify the payment of wages. While the burden of proof is upon a claimant to show the nature and extent of the claimant's injuries and the resulting inability to secure gainful employment, a claimant is not required to demonstrate total incapacity or helplessness before a permanent total disability award may be granted under the **Workers' Compensation** Act. Rather, a person is totally disabled when the person is incapable of performing services except those for which there is no reasonably stable market. Conversely, an employee is not entitled to total and permanent disability compensation if the employee is qualified for and capable of obtaining gainful employment without serious risk to health or life. In determining a claimant's employment potential, the claimant's age, training, education, and experiences should be taken into account. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time

HN2 An employer is not liable for a condition caused by a subsequent disability unless it can be shown that the existing work-related disability is a causative factor in producing the subsequent condition. More Like This Headnote

COUNSEL: James K. Zerkle, Corporation Counsel, of Springfield (Peggy J. Witt, Assistant Corporation Counsel, of counsel), for appellant.

J. Jay Robeson, of Springfield, for appellee.

JUDGES: Presiding Justice McCullough delivered the opinion of the court. McNamara, Woodward, Stouder, and Lewis, JJ., concur.

OPINION BY: McCULLOUGH

OPINION

[*1028] **[**569]** PRESIDING JUSTICE McCULLOUGH delivered the opinion of the court:

Respondent, the City of Springfield, appeals from an order of the Industrial Commission (Commission) finding claimant permanently and totally disabled. On appeal, respondent contends that determination is against the manifest weight of the evidence because claimant failed to establish he was unable to secure gainful employment despite the limitations of his injury. Concomitantly, respondent argues that the total disability benefits which claimant was awarded must be adjusted downward to reflect claimant's reduced earning capacity **[***2]** under section 8(d) of the **Workers' Compensation** Act (Act) (Ill. Rev. Stat. 1989, ch. 48, par. 138.8(d)).

The facts are substantially uncontroverted. Claimant was employed by the City of Springfield in September 1970 and rose to the rank of master machinist by November 1, 1980. His duties required that he use all manner of hand tools, climb stairs and ladders, and supervise other employees.

On November 1, 1980, claimant injured his left knee while jumping from a truck and subsequently developed a condition diagnosed as Baker's cyst. Although claimant continued to work, the condition did not improve and, after treatment by Dr. Haggerty, Dr. Olysav performed surgery on the left knee in March 1981.

Ten days after surgery, claimant was rehospitalized because of a pulmonary embolism. He was eventually released and returned to work in May 1981 to his former duties. Claimant's left knee condition, however, began to worsen and the cyst returned.

In September 1981, claimant suffered a myocardial infarction and was hospitalized. He came under the care of Dr. Taylor, a cardiologist. In October 1981, claimant developed a ventricular aneurysm **[*1029]** which required removal of approximately **[***3]** 45% of his heart, as well as a blood clot. Claimant was off work for approximately six months and returned to duty in March 1982, again at the position of master mechanic. Claimant's left leg continued to bother him and he returned to Dr. Haggerty, who had originally treated him following his initial injury. In May 1983, Dr. Haggerty performed a second surgery on claimant's left knee to repair the Baker's cyst. Claimant returned to work again in August 1983.

On August 30, 1983, claimant reinjured his knee when he slipped on a muddy floor at work and almost fell. Claimant returned **[**570]** to Dr. Haggerty, who referred him to Dr. Adair, who concluded that further surgery on claimant's left knee would be fruitless.

Claimant returned to work but respondent terminated his employment in January 1985 because of his inability to effectively perform his job duties due to the condition of his left knee. At the time, respondent indicated that there were no suitable jobs available for claimant because of claimant's medical restrictions which forbade excessive use of the knee and such activities as walking and climbing ladders and stairs.

In February 1985, respondent offered **[***4]** claimant three potential jobs at substantially reduced rates of pay from that which he had earned as a master mechanic. The positions offered were those of janitor, utility security officer, and drafting technician. Claimant testified at arbitration that he was aware of and capable of engaging in the tasks of a drafting technician because he had taken a drafting course in high school and had performed drafting work almost 30 years earlier as part of his apprenticeship toward becoming a tool and die maker, a position he held with another employer for almost 20 years.

Claimant, on the advice of Dr. Taylor, his cardiologist, refused the offered positions, however,

because of his heart condition. Claimant thereafter applied for and received social security disability benefits as well as an employee disability pension.

The medical evidence suggested that although the initial pulmonary embolism suffered in March 1981 was related to the initial knee surgery, neither the subsequent heart attack nor aneurysm had any relationship to the employment or to claimant's knee condition. In addition, Dr. Haggerty testified that although claimant could not return to his former job as a master machinist **[***5]** because of his knee condition, claimant could perform sedentary work as long as he did not put substantial stress on his knee.

[*1030] The arbitrator found that claimant was permanently and totally disabled and awarded benefits accordingly under section 8(f) of the Act (Ill. Rev. Stat. 1989, ch. 48, par. 138.8(f)). In making that award, however, the arbitrator found that claimant was physically capable of performing the job of drafting technician offered by respondent but claimant's unrelated heart condition precluded employment in even that sedentary job. Permanent total disability was, nevertheless, awarded because claimant was disabled from the job in which he was engaged at the time he was originally terminated from employment by respondent because of his knee injury.

Respondent sought review and the Commission affirmed the arbitrator, but on different grounds. The Commission concluded that the subsequent offer of reemployment as a drafting technician was not a *bona fide* offer because, as a condition of reemployment, respondent expressly refused to make up the difference in salary between that which claimant originally earned as a master mechanic and the reduced salary **[***6]** he would have earned in any of the positions offered. In addition, respondent indicated, in its offer, that if problems continued with claimant's knee after he accepted reemployment, he would be charged with sick time should he be unable to work. Because respondent was obligated to pay benefits because of claimant's diminished earning capacity, as well as temporary total disability benefits for any lost time due to his knee condition, the Commission concluded the offer was, in essence, a **sham** and that claimant was permanently and totally disabled. The circuit court confirmed the Commission.

Respondent initially contends that the finding of permanent total disability is against the manifest weight of the evidence because, at least with respect to the drafting position, claimant acknowledged he was capable of and, in fact, had performed such tasks in the past. Moreover, respondent argues that this position was consistent with the restrictions placed on the use of claimant's left knee. Hence, because claimant was employable, respondent is only liable to pay benefits for the difference in reduced earning capacity between the salary claimant would have earned as a master mechanic **[***7]** and the salary he would have been paid had he accepted the drafting technician position.

[571]** HN1 A claimant is permanently and totally disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. (*Gates Division, Harris-Intertype Corp. v. Industrial Comm'n* (1980), 78 Ill. 2d 264, 399 N.E.2d 1308.) While the burden of proof is upon the claimant to show the **[*1031]** nature and extent of his injuries and the resulting inability to secure gainful employment (*A.M.T.C. of Illinois, Inc. v. Industrial Comm'n* (1979), 77 Ill. 2d 482, 397 N.E.2d 804), a claimant is not required to demonstrate total incapacity or helplessness before a permanent total disability award may be granted under the Act (*Inland Robbins Construction Co. v. Industrial Comm'n* (1980), 78 Ill. 2d 271, 399 N.E.2d 1306). Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonably stable market. (*A.M.T.C.*, 77 Ill. 2d at 487, 397 N.E.2d at 806.) Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of **[***8]** obtaining gainful employment without serious risk to his health or life. (*E.R. Moore Co. v. Industrial Comm'n* (1978), 71 Ill. 2d 353, 376 N.E.2d 206.) In determining a claimant's employment potential, his age, training, education, and experiences should be taken into account. *A.M.T.C.*, 77 Ill. 2d at 489, 397 N.E.2d at 807.

We begin by noting that the issue of claimant's heart condition is not material to the issue before us on review. Each of the experts who offered opinions on the subject unequivocally stated that neither claimant's myocardial infarction nor ventricular aneurysm was work related. HN2 An employer is not liable for the condition caused by a subsequent disability unless it can be shown that the existing work-related disability was a causative factor in producing the subsequent condition. (*International Harvester Co. v. Industrial Comm'n* (1970), 46 Ill. 2d 238, 263 N.E.2d 49.) Accordingly, it is immaterial whether claimant refused the job offer because of his heart condition.

The question before us is whether claimant was capable of performing that employment without serious risk to his health because of the work-related injury. The evidence clearly showed **[***9]** claimant was qualified to perform the tasks of a drafting technician given the limitations placed on the use of his knee. His treating physician, Dr. Haggerty, testified claimant was capable of performing sedentary work. There is no suggestion that the duties of a drafting technician are not essentially sedentary in nature. Moreover, claimant testified he was capable of performing these duties as he had previously taken a high school course in drafting and had worked as a drafter prior to becoming a tool and die maker. Since this was the type of employment that could be performed by a person in claimant's circumstances, given the limitations in using his left knee, claimant did not demonstrate he was permanently and totally disabled within the meaning of the Act.

[*1032] Nevertheless, the Commission found claimant's offer of employment was not *bona fide* because of the conditions placed upon it. At the time the offer was made, and in response to questions specifically raised by claimant, respondent indicated it would not make up the difference between the salary claimant earned from his previous position as master mechanic and the substantially reduced sum he would have **[***10]** earned as a drafting technician. Respondent specifically indicated the salary claimant would receive for the position he chose from those offered would be the entire sum he would receive. Respondent further indicated that should claimant be unable to work because of recurring knee problems, he would be charged with sick time rather than be accorded additional temporary disability.

While we do not condone the respondent's conduct in conditioning reemployment upon such conditions, there is no testimony suggesting claimant would have refused the position for those reasons alone. In addition, we are skeptical that had claimant been able to accept the position absent his heart condition, respondent could have enforced such conditions.

[572]** At the time the offer was made, petitions for adjustment of claim had been filed before the Commission for the two knee injuries claimant suffered. To the extent claimant was clearly entitled to benefits because of his obviously permanent knee disability, respondent was in no position to legally compel claimant to forego these benefits in view of the pending Commission proceedings. Since respondent was statutorily obligated under **[***11]** section 8 (d) of the Act to pay benefits based on claimant's diminished earning capacity, any attempt to evade payment of these benefits as a condition of reemployment would have been futile.

Despite the chicanery attempted by respondent, we conclude the Commission's determination the offer was not *bona fide* is against the manifest weight of the evidence because the conditions placed upon that offer were legally unenforceable.

While we appreciate the Commission's displeasure with respondent's practices, that does not detract from the fact that claimant was capable of performing the employment within the medical limitations applicable to his injured knee. Moreover, no authority is offered for the proposition that the mere act of attaching spurious conditions which respondent could not compel claimant to accept to an otherwise legitimate offer of employment renders the offer non-*bona fide* within the meaning of the Act. Accordingly, we conclude the determination that claimant was permanently totally disabled is against the manifest weight of the evidence.

[*1033] For the foregoing reasons, the judgments of the circuit court and the Commission are reversed, and the cause **[***12]** is remanded to the Commission for the calculation of benefits for claimant's reduced earning capacity in conformity with section 8(d) of the Act.

Reversed and remanded with directions.

McNAMARA, WOODWARD, STOUDER, and LEWIS, JJ., concur.

*308 Ill. App. 3d 260, *; 719 N.E.2d 329, **;*
*1999 Ill. App. LEXIS 732, ***; 241 Ill. Dec. 468*

MARIANNE SMITH, Appellant, v. THE INDUSTRIAL COMMISSION et al., (Burns Security, Appellee.)

No. 3-98-0827WC

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT, INDUSTRIAL COMMISSION DIVISION

308 Ill. App. 3d 260; 719 N.E.2d 329; 1999 Ill. App. LEXIS 732; 241 Ill. Dec. 468

October 13, 1999, Opinion Filed

SUBSEQUENT HISTORY: [*1]** Rehearing Denied November 18, 1999. Released for Publication November 18, 1999.

PRIOR HISTORY: Appeal from the Circuit Court of the 13th Judicial Circuit, LaSalle County, Illinois. No. 98 MR 21. Honorable James Lanuti, Judge Presiding.

DISPOSITION: Reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Claimant appealed judgment of 13th Judicial Circuit, LaSalle County, Illinois, affirming the Illinois Industrial Commission's award of permanent partial disability, pursuant to 820 Ill. Comp. Stat. 305/8(d)(2), in lieu of an arbitration award of wage differential under 820 Ill. Comp. Stat. 305/8(d)(1).

OVERVIEW: Claimant appealed a judgment affirming the Illinois Industrial Commission's (Commission) award of permanent partial disability, pursuant to 820 Ill. Comp. Stat. 305/8 (d)(2), in lieu of an arbitration award of wage differential (WD) under 820 Ill. Comp. Stat. 305/8(d)(1), after claimant filed a claim seeking compensation for a shoulder injury she sustained during the course of her employment as a security supervisory officer. The court reversed the judgment and reinstated the WD award on the ground that the Commission's decision not to affirm the WD award was against the manifest weight of the evidence. The court concluded that the claimant had proved impaired earning capacity, particularly in light of the fact that the arbitrator, the Commission, and the lower court all recognized that her employer had falsely raised her wages in attempt to avoid the WD award.

OUTCOME: Judgment was reversed as to permanent partial disability award. Arbitration award of wage differential (WD) was reinstated because Industrial Commission's decision not to affirm WD award was against manifest weight of evidence as employer falsely raised claimant's wages in attempt to avoid WD award and claimant proved impaired earning capacity.

CORE TERMS: claimant, arbitrator's, per hour, earning, supervisory, earning capacity, right shoulder, disability, impairment, earn, agility, senior, watch, partial, re-certification, prescribed, vacated, return to work, customary, shoulder, arbitrator awarded, rate of pay, reinstated, functional, weaponry, therapy, rotator, testing, cuff, accidental

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Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Claim Procedures

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

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

HN1 820 Ill. Comp. Stat. 305/8(d)(2) (West 1992) provides in pertinent part that if a claimant suffers injuries which partially incapacitates him from pursuing the usual and customary duties of his line of employment, but does not cause him to suffer an impairment of earning capacity, in addition to temporary total disability (TTD) benefits, he shall receive compensation for that percent of 500 weeks that his partial disability bears to his total disability. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

Workers' Compensation & SSDI > Benefit Determinations > General Overview

HN2 If a claimant suffers an impairment of earnings, 820 Ill. Comp. Stat. 305/8(d)(1) (West 1992) provides in pertinent part that if, after accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this section, equal to 66-2/3 percent of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

Workers' Compensation & SSDI > Benefit Determinations > General Overview

HN3 The object of 820 Ill. Comp. Stat. 305/8(d)(1) (West 1992) is to compensate an injured claimant for his reduced earning capacity, and if an injury does not reduce his earning capacity, he is not entitled to compensation. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

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

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

HN4 A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event he is unable to return to work, he must prove what he is able to earn in some suitable employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review

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

HN5 On review, the Illinois Industrial Commission's compensation award should be reversed only if it was contrary to the manifest weight of the evidence, i. e. where the opposite conclusion is clearly apparent. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For Marianne Smith, Petitioner-Appellant: Mr. Terence B. Kelly, Law Offices of Peter F. Ferracuti, P.C., Ottawa, IL.

For Burns Security, Respondent-Appellee: Mr. John McAndrews, Dowd & Dowd, Chicago, IL, Mr. Michael G. Patrizio, Dowd & Dowd, Ltd., Chicago, IL.

JUDGES: Present - HONORABLE JOHN T. McCULLOUGH, Presiding Justice, HONORABLE THOMAS R. RAKOWSKI, Justice, HONORABLE MICHAEL J. COLWELL, Justice, HONORABLE WILLIAM E. HOLDRIDGE, Justice, HONORABLE PHILIP J. RARICK, Justice. JUSTICE HOLDRIDGE delivered the Opinion of the court. McCULLOUGH, P.J., and COLWELL and RARICK, JJ., concurring. RAKOWSKI, J., specially concurring.

OPINION BY: WILLIAM E. HOLDRIDGE

OPINION

[*261] **[**330]** JUSTICE HOLDRIDGE delivered the Opinion of the court:

Claimant, Marianne Smith, filed a claim pursuant to the Illinois **Workers' Compensation** Act (the Act) (820 ILCS 305/1 *et seq.*) (West 1996)) seeking compensation for a right shoulder injury that she **[***2]** sustained on March 26, 1992, while employed by Burns Security (the employer).

The arbitrator found that claimant sustained accidental injuries, which arose out of and within the course of her employment, and which were causally connected to her March 26, 1992, accident. The arbitrator awarded claimant temporary total disability (TTD) benefits, a wage differential (WD), medical expenses, and penalties.

[*262] The Illinois Industrial Commission (the Commission) affirmed in part and vacated in part the arbitrator's TTD benefit award, vacated the WD and penalties award, awarded claimant permanent partial disability (PPD) benefits, and otherwise affirmed and adopted the arbitrator's

decision.

The circuit court of LaSalle County reversed the Commission's decision concerning the disputed TTD period, reinstated **[**331]** the arbitrator's TTD benefit award for that period, and confirmed the Commission's PPD benefit award.

Claimant worked as a security supervisory officer for the employer. This position required her to pass an annual physical agility and weaponry test. As of March 1992, her hourly rate of pay was $ 14.70.

On March 26, 1992, and in an attempt to break an airlock seal at the employer's Unit **[***3]** One reactor, claimant injured her right shoulder. On March 27, 1992, and upon the employer's referral, she was seen by Dr. Ralph Tack, who took x-rays, prescribed medication, and ordered physical therapy, which she underwent through November 1992. Dr. Tack referred her to orthopedic surgeon Dr. Keith Rezin, who after taking a history and exam opined that "evidently she injured her right shoulder at work on March 26, 1992," and he diagnosed her with a rotator cuff tear. He prescribed shoulder injections and an arthrogram.

On July 23, 1992, claimant underwent an acromioplasty and a rotator cuff repair performed by Dr. Rezin. In October 1992, Dr. Rezin noted that claimant "really has a restricted range of motion." On November 6, 1992, Dr. Rezin noted claimant was "lacking some external rotation and still having some weakness, prescribing another couple of weeks of therapy." He released her to return to work on November 6, 1992. However, due to the employer's delay, she was told to report to work on November 30, 1992. When she reported to work the employer told her that she was laid off, and that her TTD benefit payments were terminated.

In February 1993, claimant was examined by Dr. **[***4]** Gerald McDonald, who found a protruding mass in the superior aspect of her right shoulder, in addition to deformity, tenderness, and limited range of motion.

Claimant continued to treat with Dr. Rezin. He made a post-surgical diagnosis of impingement syndrome of the right shoulder. His April and May 1993 notes indicated her ongoing pain and range of motion limitations.

In June 1993, the employer referred claimant to orthopedic surgeon Dr. Daniel Mass, who diagnosed her with a partial rotator cuff tear and subacromial inflammation. In July 1993, after Dr. Mass indicated that claimant continued to be disabled from employment, **[*263]** the employer reinstated her TTD benefits. In October 1993, due to her continued pain and functional loss, Dr. Mass performed a second acromioplasty and a distal clavicle resection. Thereafter, Dr. Mass prescribed physical therapy and medication, which continued through September 1994.

In 1994, the employer revised its employee classifications, and its minimum standards for firearms and agility testing. In March 1994, Dr. McDonald again examined claimant, and his findings were consistent with his earlier exam. He opined that there was a causal relationship between **[***5]** claimant's March 1992, accident and her subsequent symptoms and treatment, as well as her physical abnormalities. He believed that her condition was now permanent, and that she would never be able to perform her prior duties as a security supervisory officer.

On September 29, 1994, Dr. Mass released claimant to return to work as of October 3, 1994, which was conditioned upon her re-certification in weaponry and agility testing. He noted that "if she cannot pass the re-certification exam, then she will have to be retrained for another job."

On October 3, 1994, claimant reported to work, but was told that she was still laid off. The employer did not seek re-certification of claimant, but instead, continued her TTD benefits until

January 6, 1995, at which time it suspended those benefits "until Dr. Mass issued a restriction letter."

In spring 1995, claimant enrolled in a computer class, and consulted with a vocational **[**332]** rehabilitative service, which after testing suggested a vocational change. Claimant filed a 19(b) motion for continued benefits. Thereafter, the employer referred her to Dr. Mitchell Krieger.

In March 1995, Dr. Krieger issued a report that diagnosed claimant with status **[***6]** post-op acromioplasty, rotator cuff repair, and distal clavicle resection. He advised a functional work capacity evaluation to determine if claimant could fire a shotgun as required in her employment as a security supervisory officer.

On June 7, 1995, claimant was re-called to work, and she was tested to see if she was qualified to resume her supervisory duties. On June 13, 1995, and at the request of the employer, claimant was examined by Dr. Carmelo Ruiz, who noted, "significant decreased range of motion of the shoulder and decreased strength of the arm, forearm, wrist and grip *** [which] may have negative impact on agility/firearms test."

On June 25, 1995, due to her shoulder condition, claimant failed her first attempt at re-qualification. The employer provided her with a **[*264]** shoulder strap, and a second test, however, she failed her second attempt. Thereafter, claimant was seen by her personal physician Dr. Michael Harney, who prescribed medication and saw her on four occasions. Dr. Mass also prescribed more physical therapy.

Also on June 25, 1995, claimant requested that she be retrained to another vocation. The employer told her that she was not eligible for retraining. The **[***7]** employer offered, and claimant accepted a position as a senior watch person. She was not required to carry a weapon and had less strenuous duties than a supervisor. She accepted an $ 8.55 hourly rate of pay, which was increased to $ 9.75 because of her seniority. Due to several pay raises during March 1996, by the end of that month claimant earned $ 15.00 per hour.

Claimant received her last treatment for her right shoulder on August 10, 1995. In December 1995, a functional capacity evaluation showed claimant's "work tolerance at a light-medium physical demand level." Her ability to tolerate the shooting of a shotgun placed against her right shoulder went beyond the scope of this test.

The arbitrator found claimant sustained accidental injuries that arose out of and within the course of her employment, and which were causally connected to her March 26, 1992, accident.

The arbitrator awarded claimant TTD benefits in the amount of $ 337.12 per week for 171 6/7 weeks, $ 1094 in penalties, and a WD in the amount of $ 145.99 per week beginning July 14, 1995, and continuing through the duration of her disability. The arbitrator concluded that "it is apparent *** that the action of the **[***8]** Respondent in artificially raising Petitioner's wage *** from $ 9.75 to $ 15.00 per hour was a **sham** and transparent device to avoid the effect of a 8(d) 1 finding. To permit an employer indulging in such conduct would wrongfully deprive an injured employee of an 8(d) 1 remedy ***."

The Commission vacated the arbitrator's TTD award for the period of November 30, 1992, through June 21, 1993, only; vacated the WD and penalties award; determined that claimant was permanently partially disabled to the extent of 30% loss of the use of a man as a whole and awarded her $ 145.99 per week for 150 weeks in PPD benefits; and otherwise affirmed and adopted the arbitrator's decision.

The circuit court reversed the Commission as to the disputed TTD benefit period and reinstated the arbitrator's award of TTD benefits for the period of November 30, 1992, through June 21, 1993. It confirmed, however, the Commission's PPD benefit award in lieu of the arbitrator's WD

award.

The sole issue on appeal concerns whether the Commission erred in awarding PPD benefits under section 8(d)(2) in lieu of affirming the arbitrator's WD award under section 8(d)(1).

[*265] **[**333]** HN1 Section 8(d)(2) provides in pertinent part that **[***9]** if a claimant suffers injuries which partially incapacitates him from pursuing the usual and customary duties of his line of employment, but does not cause him to suffer an impairment of earning capacity, in addition to TTD benefits, he shall receive compensation for that percent of 500 weeks that his partial disability bears to his total disability.

HN2 On the other hand, if a claimant suffers an impairment of earnings, section 8(d)(1) provides in pertinent part that:

> "If, after accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall *** receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 1992).

[*10]** In order to qualify for a wage differential award pursuant to section 8(d)(1), claimant must prove: (1) partial incapacity which prevents pursuit of his 'usual and customary line of employment'; and (2) an impairment of earnings. See *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756, 759, 208 Ill. Dec. 1, 648 N.E.2d 923 (1995).

In *Albrecht*, the court concluded that the claimant, a professional football player, satisfied the above mentioned elements of proof by establishing that: (1) but for his injuries, he would have been in full performance of his duties as a Bears offensive lineman; and (2) his annual earnings following his injury were considerably less than the salary for his final season as a professional football player, thereby proving an impairment of earnings. The *Albrecht* court held therefore that a WD award should have been entered in claimant's favor as a matter of law.

In the instant case, medical evidence established that claimant was no longer able to work in her former occupation as a security supervisory officer due to the fact that her right shoulder injury, suffered as a result of her March 1992 accident, prevented her from obtaining **[***11]** the required re-certification in weaponry and agility testing. Therefore, claimant proved that her partial incapacity prevented her from pursuing her usual and customary line of security supervisory officer employment.

Whether claimant proved an impairment of earnings must next be determined in order to justify a WD award. HN3 The object of section **[*266]** 8(d)(1) is to compensate an injured claimant for his reduced earning capacity, and if an injury does not reduce his earning capacity, he is not entitled to compensation. HN4 *Rutledge v. Industrial Comm'n*, 242 Ill. App. 3d 329, 183 Ill. Dec. 263, 611 N.E.2d 526 (1993).

A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event he is unable to return to work, he must prove what he is able to earn in some suitable employment. *Franklin Co. Coal Corp. v. Industrial Comm'n*, 398 Ill. 528, 531, 76 N.E.2d 457 (1947).

In the instant case, in the year preceding her March 26, 1992, accident, claimant's rate of pay as a security supervisory officer was $ 14.70 per hour. When claimant returned to work as a

senior watch person, a job that met her restrictions, **[***12]** she earned $ 8.55 per hour, which was thereafter increased to $ 9.75 per hour due to her seniority.

By March 1, 1996, claimant's pay rate increased to $ 13.73 per hour, then to $ 14.75 per hour by March 8, and finally to $ 15.00 per hour by March 29. Claimant was not informed of, or given any reason **[**334]** for, these pay raises, and her duties were not modified from other senior watch persons who continued to be paid $ 9.75 per hour. Claimant's site security manager acknowledged that he might have been involved in conversations wherein claimant's **workers' compensation** supervisor told him to raise her wages due to the pending **workers' compensation** case.

The arbitrator determined that the employer raised claimant's wages in an attempt to avoid the affect of a WD award, and therefore, her actual wage rate as a senior watch person, and her actual earning capacity in light of her restrictions, was $ 9.75 per hour. The arbitrator noted that if claimant had successfully obtained her re-certification in weaponry and physical agility, she would have accepted an available security supervisory officer position that paid $ 15.23 per hour. As a result, the arbitrator awarded claimant a WD between a **[***13]** security supervisory officer position and a senior watch person position.

The Commission found that the record regarding claimant's current earnings did not support a WD award. The Commission noted that claimant received three pay raises within one month in an apparent attempt by the employer to reduce a WD award, however, it found that a permanency award under 8(d)(2) was more appropriate on the present record.

The circuit court affirmed the Commission's WD award, as it found that claimant was earning the same amount as she had earned in her previous job, and therefore, she suffered no loss of earning capacity to justify such an award.

Our supreme court in **[*267]** *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 437-38, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982) acknowledged that there is a preference for WD awards, as opposed to scheduled awards. However, the Court recognized such preference in those situations where the claimant proved that his actual loss of earnings were greater than the schedule presumed.

Claimant submits that the instant case is one of interpreting statutory construction, and therefore, this court is not bound to the Commission's decision **[***14]** on such a question of law. *Butler Manufacturing Co. v. Industrial Comm'n*, 85 Ill. 2d 213, 52 Ill. Dec. 623, 422 N.E.2d 625 (1991).

Specifically, claimant focuses on the term "is earning or is able to earn," and asserts that the $ 15.00 per hour that she was being paid at the time of hearing was not what she was earning or was able to earn. Claimant refers to the definition of "earn" found in Black's Law Dictionary, pg. 456 (5th ed. 1979) that states "to acquire by labor, service or performance. [Citation.] To merit or deserve." Claimant submits that to artificially raise wages, as the employer did here, above what is normally paid for such services are not "earned" based on her "labor, service or performance." We agree.

Further, claimant notes that the definition of "earning capacity" states, *inter alia,* that the "term does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained, but refers to that which, by virtue of the training, the experience, and the business acumen possessed, an individual is capable of earning." Black's Law Dictionary, pg. 456 (5th ed. 1979).

Claimant submits that her **[***15]** actual earning capacity based on her functional impairment was that of a senior watch person, and therefore, this fact further established that her actual rate of pay was $ 9.75 per hour. We agree.

HN5 On review, the Commission's compensation award should be reversed only if it was contrary to the manifest weight of the evidence, *i. e.* where the opposite conclusion is clearly apparent. *Durfee v. Industrial Comm'n,* 195 Ill. App. 3d 886, 890, 142 Ill. Dec. 658, 553 N.E.2d 8 (1990). Here, although at the time of hearing claimant was being paid at the rate of her **[**335]** previous position as a security supervisory officer, we cannot ignore the fact that the arbitrator, the Commission, and the circuit court all recognized that the employer raised claimant's wages in an attempt to avoid a WD award. This fact, in and of itself, supports a finding that claimant's actual earning capacity was $ 9.75 per hour. We believe, therefore, that claimant proved impaired earning capacity, and as a result, the Commission's decision to not affirm the arbitrator's WD award was against the manifest weight of the evidence.

Based upon the foregoing, the decision of the circuit court of **[*268]** LaSalle **[***16]** County, which confirmed the Commission's PPD benefit award, is reversed and the arbitrator's WD award is reinstated.

Reversed.

McCULLOUGH, P.J., and COLWELL and RARICK, JJ., concurring.

RAKOWSKI, J., specially concurring.

DISSENT BY: THOMAS R. RAKOWSKI

DISSENT

JUSTICE RAKOWSKI specially concurring:

I agree with the majority that claimant is entitled to an award pursuant to section 8(d)(1). I write separately because I would remand this cause to the Commission to consider the arbitrator's 8(d)(1) award.

This is not a case where the arbitrator and the Commission were dealing with the same issue. Consider for example, a situation where the arbitrator awarded 80% of the person as a whole which the Commission modified to a lessor amount. In such a situation, if we concluded that the Commission's decision was against the manifest weight of the evidence, we may reinstate the arbitrator's award. Both the arbitrator and the Commission considered the same issue, percentage of a person as a whole, with differing results.

In the instant case, the Commission vacated the arbitrator's 8(d)(1) award and made an award pursuant to 8(d)(2). The Commission only addressed the propriety of an 8(d)(1) award. **[***17]** In that we have concluded that 8(d)(1) is proper, the Commission should now address the amount. By reinstating the arbitrator's award, the majority has denied Commission review of the arbitrator's decision.

- Citation information available

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*309 Ill. App. 3d 987, *; 723 N.E.2d 326, **;*
*1999 Ill. App. LEXIS 890, ***; 243 Ill. Dec. 294*

RELIANCE ELEVATOR COMPANY, Appellant, v. THE INDUSTRIAL COMMISSION, et al. (Louis Todaro, Appellee)

NO. 1-98-2105WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

309 Ill. App. 3d 987; 723 N.E.2d 326; 1999 Ill. App. LEXIS 890; 243 Ill. Dec. 294

December 20, 1999, Decided

SUBSEQUENT HISTORY: [*1]** Released for Publication February 15, 2000.

PRIOR HISTORY: Appeal from Circuit Court Cook County. No. 97L50218. Honorable Alexander White, Judge Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant elevator company appealed from a ruling of the Circuit Court, Cook County (Illinois) that confirmed the decision of appellee Industrial Commission which affirmed and adopted the decision of the arbitrator to award disability benefits to appellee employee for work-related injuries.

OVERVIEW: Appellee employee sought benefits pursuant to the **Workers' Compensation** Act, Ill. Rev. Stat. 1989, ch. 48, par. 138.1 et seq., for injuries sustained while in the employ of appellant elevator company. The arbitrator determined that appellee employee had met his burden of showing that he was totally disabled. The evidence showed that due to many factors, appellee employee was no longer employable, and that appellant's final job offer to appellee employee was made to avoid liability. Appellee Industrial Commission affirmed, and the circuit court confirmed that ruling. The appellate court held that the evidence supported the lower court's decision. Appellee employee met his burden of proving that he was completely disabled, and that he had made an exhaustive effort to seek gainful employment. Also, appellant's job offer was nothing more than a **sham** to avoid liability.

OUTCOME: The ruling was affirmed; the evidence substantiated the lower court's ruling that

appellee employee had met his burden of proving he was totally disabled and that he had made an effort to seek employment and, further, the evidence established that appellant's offer of employment to appellee was a **sham.**

CORE TERMS: arbitrator, rehabilitation, claimant, totally disabled, permanently, right shoulder, pain, job offer, employable, manifest, counselor, skill, right arm, return to work, training, odd-lot, underwent, contacted, elevator, rotator, lifting, opined, cuff, arbitration hearing, total disability, unsuccessful, arbitration, disability, sham, physical therapy

LEXISNEXIS® HEADNOTES Hide

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > General Overview

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

HN1 A person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > General Overview

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Proof > General Overview

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

HN2 A claimant need not be reduced to total physical incapacity before a permanent and total disability award may be granted. More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > General Overview

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Review

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

HN3 In determining whether a claimant is employable, his age, training, education and experience must be taken into account. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > General Overview

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

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

HN4 The Industrial Commission's resolution of the question of whether an employee is permanently and totally disabled will be upheld unless contrary to the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Claim Procedures

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > General Overview

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

HN5 If the claimant'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, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the "odd-lot" category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market) then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Claim Procedures

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

HN6 The burden of proving that a person is permanently and totally disabled may be met by a showing of diligent but unsuccessful attempts to find work or by proof that he is unfit to perform any but the most menial tasks for which no stable market exists. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > General Overview

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

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

HN7 It is the province of the Industrial Commission to resolve conflicts in the medical evidence and its decision thereon will be upheld unless it is contrary to the manifest weight of the evidence. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > General Overview

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

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

HN8 As with conflicts in the medical testimony, it is the province of the Industrial Commission to determine the credibility of the witness and determine the weight given to their testimony, and its determination thereof will not be set aside on review unless contrary to the manifest weight of the evidence. More Like This Headnote

JUDGES: JUSTICE RARICK delivered the opinion of the court. McCULLOUGH, P. J., and RAKOWSKI, COLWELL, and HOLDRIDGE, JJ., concur.

OPINION BY: RARICK

OPINION

[*988] [327]** JUSTICE RARICK delivered the opinion of the court:

Claimant, Louis Todaro, sought benefits pursuant to the **Workers' Compensation** Act (Act) (Ill.

Rev. Stat. 1989, ch. 48, par. 138.1 *et seq.)* for injuries sustained while in the employ of Reliance Elevator Company (Reliance). Todaro was employed by Reliance as an elevator mechanic. On July 27, 1992, he was helping to move an extremely heavy motor up some stairs when he injured his low back and right shoulder.

The day after his accident, Todaro went to Northwest Community Hospital, where he was examined and x-rayed. Approximately one week later he was seen by Dr. Thomas Bruno for a follow-up. Around August 17, 1992, Todaro began undergoing physical therapy at Northwest Sports Rehabilitation. It was then that he noticed pain in his right shoulder in addition to continuing pain in his low **[***2]** back. On September 3, 1992, he was admitted to Northwest Community Hospital, where he underwent traction for his back and various diagnostic tests. An MRI revealed a large herniated nucleus pulposus at L4-L5, probably compressing the right L4 and L5 nerve roots. Dr. Bruno also diagnosed right shoulder tendinitis with the possibility of a torn rotator cuff.

On November 15 1992, Todaro returned to Reliance where he did office work. On January 22, 1993. Todaro was examined by Dr. Marshall Matz at Reliance's request. Todaro indicated that he continued to have low back discomfort and intermittent pain in the upper right arm. Dr. Matz rendered no opinion on causation or Todaro's ability to work. Todaro was examined by Dr. Dwyer on January 26, 1993, again at Reliance's request. Todaro complained of low back pain and shoulder discomfort. Dr. Dwyer concluded that Todaro demonstrated impairment of the right shoulder consistent with a rotator cuff tear. Dr. Dwyer further concluded that Todaro could return to a sitting job, but that he would need surgical repair of the rotator cuff and rehabilitation.

Todaro worked through March 4, 1993, at which time he underwent an anterior decompression of **[***3]** his right shoulder and a repair of the rotator cuff. He was discharged on March 6, 1993, and began physical therapy. Todaro was released to return to work without restrictions on June 21, 1993. He went back to working on elevators, but avoided heavy lifting and carrying and was supplied with a helper. Nevertheless, on July 6, 1993, Dr. Bruno took Todaro off work because of increasing back pain. Todaro again underwent physical therapy. Another MRI revealed a right paracentral L4-L5 disc herniation.

Todaro was examined by Dr. Cooper on September 3, 1993, at Reliance's request. Dr. Cooper concluded that Todaro was capable of **[*989]** performing light duties with no lifting over 35 pounds. On October 1, 1993, Dr. Bruno released Todaro to return **[**328]** to work with certain restrictions, including no excessive bending and no lifting over 30-50 pounds. Dr. Bruno also recommended job retraining.

Todaro contacted Reliance on a weekly basis requesting employment within his restrictions, but none was provided. On December 23, 1993, Todaro was contacted by Rehabilitation Consultants for Industry, Inc. (RCI), at Reliance's request, for assistance in obtaining alternative employment. Todaro requested retraining, **[***4]** but Reliance denied the request. The rehabilitation counselors were authorized to provide job placement services only. The Initial Rehabilitation Evaluation Plan and Report, dated January 28, 1994, specifically stated that "an employer visit was not conducted due to the fact that instructions state that there will be no return to work with the insured. All subsequent reports, titled "Return to Work Prognosis," state "modified duty, new employer." In June 1994, Todaro contacted Reliance and requested any type of work, but was advised nothing was available. Under the direction and supervision of the rehabilitation counselor, Todaro began a job search. On June 28, 1994, Reliance advised the rehabilitation counselor to close his files, and no further rehabilitation services were provided to Todaro. Todaro continued his job search activities, contacting over 3,600 potential employers by the date of arbitration. No positions were made available to him, however.

In February 1994, Edward Steffan a certified rehabilitation counselor, began to work with Todaro in order to find him a job. Steffan reviewed Todaro's medical records, vocational testing results, RCI's reports, the job search logs, **[***5]** and met with Todaro. Steffan concluded that Todaro had limited physical abilities that would allow him to perform limited vocational activities, and

had marginally transferable skills that could be utilized by a prospective employer. Steffan concluded, however, that, given Todaro's age, education, work history and experience, level of transferable skills, and in light of his extensive but unsuccessful job search, Todaro was not placeable. Steffan further opined that given Todaro's age, he was not a candidate for retraining.

Todaro was reexamined by Dr. Dwyer on June 16, 1994. Dr. Dwyer found no objective evidence of any disability or impairment of the lumbosacral spine, and a slight limitation in the range of motion in the right shoulder. Dr. Dwyer concluded that Todaro could return to his work duties without restriction.

In May 1995, Todaro was examined by Dr. Irwin Barnett. He complained of persistent low back pain and constant pain and stiffness in his right shoulder. Based upon his examination, Dr. Barnett **[*990]** concluded that Todaro's condition was causally related to his work accident. Dr. Barnett opined that Todaro would have difficulty with lifting, excessive bending, stooping **[***6]** or squatting, and raising his right arm above the shoulder. Dr. Barnett further opined that Todaro should be limited to sedentary work. Dr. Barnett also opined that Todaro had a "moderate" loss of use of the right arm, and a "moderate" loss of use of the person as a whole.

On July 24, 1995, Reliance offered Todaro a job that provided full pay and benefits. The job involved delivering materials, picking materials up, identifying parts, and various other light duties. Todaro did not accept the position.

Arbitration hearings were held on July 13, 1995, and on September 7, 1995. The arbitrator found that Todaro had met his burden of demonstrating that he fell into the "odd-lot" category and was totally and permanently disabled. The arbitrator found that Todaro was 56 years old at the time of arbitration and had been employed as an elevator mechanic for most of his adult life. The arbitrator noted that Todaro's job was classified as heavy in nature and that it was physically quite demanding. The arbitrator also found that Todaro had undertaken an extensive job search, **[**329]** first under the direction and supervision of his rehabilitation counselor, and later on his own, but without success. **[***7]** The arbitrator noted that Steffan had testified that Todaro was not placeable and that Reliance presented no evidence to the contrary.

With respect to the job offer, the arbitrator concluded that it was "clear and obvious that such offer of employment [was] made solely to avoid liability under the **Workers' Compensation** Act, and not for the purpose of providing legitimate employment to [Todaro]." The arbitrator noted that the job offer had not been made until July 24, 1995, approximately one month after the initial arbitration hearing, and that prior to that date, Reliance had refused to offer any position to Todaro. The arbitrator also noted that while LaPorte, Reliance's president, had testified that the job first became available at the beginning of July 1995, Reliance had not offered it to Todaro in the weeks preceding the July 13, 1995, arbitration hearing, and that a similar position had become available 5-6 months prior to the hearing, but Reliance did not offer it to Todaro. The arbitrator additionally noted that the position in question was non-union and normally compensated at $ 10 per hour, yet Reliance was offering it to Todaro at full union wages and benefits, a compensation **[***8]** package in excess of $ 44 per hour. The arbitrator found there to be no business or economic justification for this, but for avoidance of liability. Finally, the arbitrator noted that LaPorte admitted that this job might require some tasks that exceeded Todaro's restrictions.

[*991] The Industrial Commission (Commission) affirmed and adopted the decision of the arbitrator. The Commission's decision was confirmed by the circuit court of Cook County.

On appeal, Reliance argues that the award of permanent and total disability is contrary to the manifest weight of the evidence. Specifically, Reliance contends that there is no medical evidence that Todaro is permanently and totally disabled, and that Steffan testified that Todaro was employable.

HN1A person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *A.M.T.C. of Illinois v. Industrial Comm'n,* 77 Ill. 2d 482,

397 N.E.2d 804, 34 Ill. Dec. 132 (1979). HN2 The claimant need not, however, be reduced to total physical incapacity before a permanent and total disability award may be granted. *Interlake, Inc. v. Industrial Comm'n,* 86 Ill. 2d 168, 427 N.E.2d 103, 56 Ill. Dec. 23 (1981). **[***9]** HN3 In determining whether a claimant is employable, his age, training, education and experience must be taken into account. *E.R. Moore Co. v. Industrial Comm'n,* 71 Ill. 2d 353, 376 N.E.2d 206, 17 Ill. Dec. 207 (1978). HN4 The Commission's resolution of the question of whether an employee is permanently and totally disabled will be upheld unless contrary to the manifest weight of the evidence. *Ceco Corp. v. Industrial Comm'n,* 95 Ill. 2d 278, 447 N.E.2d 842, 69 Ill. Dec. 407 (1983).

In *Valley Mould & Iron Co. v. Industrial Comm'n,* 84 Ill. 2d 538, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981), our supreme court held that:

> Under *A.M.T.C.,* HN5 if the claimant'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, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the "odd-lot" category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known **[***10]** branch of the labor market [cite] then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. [Cite.]
>
> **[**330]** In the case at bar, none of the medical experts testifying were of the opinion that claimant was permanently and totally disabled. They all agreed that he could return to some form of light physical work. The objective findings in the record indicate that he had a full range of motion in his right arm and leg despite the injury, although he had lost "some control and strength" in those limbs. Under these circumstances, the claimant could not be considered obviously unemployable. Since he had not made out a *prima facie* case that he fell into the odd-lot category, the burden remained upon him to show his inability to return to gainful employment. It **[*992]** was incumbent upon him to show that, considering his present condition, in light of his age, experience, training, and education, he is permanently and totally disabled within the definition stated in *Moore* set out above. HN6 This burden may be met by a showing of diligent but unsuccessful attempts to find work [cite] or by proof that because of the above-mentioned **[***11]** qualities he is unfit to perform any but the most menial tasks for which no stable market exists. *Valley Mould,* 84 Ill. 2d at 547, 419 N.E.2d at 1163.

In the present case, as in *Valley Mould,* there is no medical expert opinion that Todaro was permanently and totally disabled. Todaro therefore failed to establish a *prima facie* case that he fell into the odd-lot category and the burden remained on him to demonstrate that because of his age, condition, training, education, and experience, he is totally disabled within the definition of *Moore.* The record overwhelmingly demonstrates that Todaro met this burden. He testified to an extensive job search, contacting over 3,600 potential employers, but was unsuccessful in obtaining employment. Todaro contacted Reliance on a regular basis seeking employment, but was not offered anything. Reliance offers no evidence to contradict Todaro's testimony with respect to either the extent or futility of his job search efforts.

In addition to Todaro's own efforts, RCI, the rehabilitation services provider selected by Reliance, was unable to secure employment for Todaro. Todaro underwent vocational training and complied with **[***12]** the program designed by RCI and began a job search under their supervision. Despite RCI's efforts, Todaro was unable to secure employment.

In addition to the job search, Steffan testified that Todaro was not placeable. Reliance contends that Steffan testified that Todaro was employable. Reviewing Steffan's testimony, however, reveals that Reliance takes this testimony out of context. Steffan testified that "from a skill level, Mr. Todaro is employable." Steffan went on the explain that while there were some employers looking for the skills that Todaro possessed, he would not get those jobs because of his age, education, and condition. Therefore while he was employable from a "skills perspective," as a practical matter Todaro would be unable to find gainful employment.

Reliance notes that Dr. Dwyer examined Todaro on June 16, 1994. Both times he concluded that Todaro could return to his normal work duties without restrictions. The Commission specifically found Dr. Bruno's opinions and conclusions to be more compelling than Dr. Dwyer's on the issue of Todaro's ability to return to work. As we have held, HN7 it is the province of the Commission to resolve conflicts in the medical evidence **[***13]** and its decision thereon will be upheld unless it is **[*993]** contrary to the manifest weight of the evidence. *Steve Foley Cadillac/Hanley Dawson v. Industrial Comm'n,* 283 Ill. App. 3d 607, 670 N.E.2d 885, 219 Ill. Dec. 207 (1996). Nothing in the record would support a reversal of the Commission's determination that Dr. Bruno was more credible.

With respect to the job offer made by Reliance, the record overwhelmingly supports the Commission's determination **[**331]** that it was a **sham** and designed to avoid liability under the Act. It was not offered to Todaro until after the initial arbitration hearing, and was offered at a rate of compensation far higher than was economically justifiable. Reliance's repeated refusal to offer Todaro any employment prior to this offer, as well as RCI's records clearly demonstrate that Reliance had no intention of bringing Todaro back to work. Reliance maintains that LaPorte testified without contradiction that the deliveryman job had only become available shortly before it was offered to Todaro and that he turned down a *bona fide* offer. Clearly, the Commission did not find this testimony credible. HN8 As with conflicts in the medical testimony, it is **[***14]** the province of the Commission to determine the credibility of the witness and determine the weight given to their testimony, and its determination thereof will not be set aside on review unless contrary to the manifest weight of the evidence. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill. App. 3d 92, 631 N.E.2d 724, 197 Ill. Dec. 502 (1994). Reviewing the record, it is clear that the manifest weight of the evidence supports the Commission's determination that the job offer was a **sham**. The Commission properly gave no consideration to this "offer" in reaching its conclusion that Todaro was permanently and totally disabled because it was not a *bona fide* offer, but rather was designed to circumvent Reliance's responsibility under the Act. Such practice must be strongly discouraged and even condemned. Employers must not be allowed to defeat an injured employee's entitlement to a disability award by making **sham** job offers. To countenance such practice would severely jeopardize injured workers' abilities to obtain relief and would undermine the spirit and purpose of the Act.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

[*15]** McCULLOUGH, P. J., and RAKOWSKI, COLWELL, and HOLDRIDGE, JJ., concur.

In

*351 Ill. App. 3d 789, *; 814 N.E.2d 910, **;*
*2004 Ill. App. LEXIS 926, ***; 286 Ill. Dec. 684*

YELLOW FREIGHT SYSTEMS, Petitioner-Appellant, v. ILLINOIS INDUSTRIAL COMMISSION (Jeffrey Labonte, Respondent-Appellee).

NO. 1-03-2572WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

351 Ill. App. 3d 789; 814 N.E.2d 910; 2004 Ill. App. LEXIS 926; 286 Ill. Dec. 684

August 4, 2004, Filed

SUBSEQUENT HISTORY: [*1]** Released for Publication September 20, 2004.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County, No. 03-L-50673. The Honorable Joann L. Lanigan, Judge, presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner employer sought review of a decision of the Circuit Court of Cook County (Illinois), which confirmed a decision by respondent Illinois Industrial Commission that determined that respondent claimant was entitled to wage differential benefits for a shoulder injury that left him unable to return to his prior work.

OVERVIEW: The claimant's injury aggravated a pre-existing condition in his shoulder. Due to permanent lifting restrictions, the injury prevented the claimant from returning to his prior work. With the approval of the employer, the claimant took a security guard job at an hourly wage of less than half of his previous wage. The claimant was originally awarded disability benefits under § 8(d)(2) of the **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/1 et seq. (1996). That award was reversed by the circuit court and the case was remanded for a determination of wage differential benefits under § 8(d)(1) of the Act. The court affirmed. The Commission's order was thorough and the evidence supported the wage differential award because (1) the claimant could not return to his prior work; (2) the employer approved his acceptance of the security guard job; and (3) while the employer told the claimant about three open positions it had, those positions were not offered and the claimant was not qualified for them.

OUTCOME: The judgment of the circuit court confirming the Commission's award of a wage differential was affirmed.

CORE TERMS: claimant, wage differential, arbitrator's, security guard, vocational, shoulder, manifest, per week, disability, earning, per hour, surgery, supervisor, dock, permanently, impairment, customary, lifting, partial, injury resulted, disability benefits, partially, confirmed, accepting, pounds, spotter, workers' compensation, partial disability, totally disabled, sufficient evidence

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

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

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

HN1 In order to qualify for a wage differential award pursuant to § 8(d)(1) of the Illinois **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/1 et seq. (1996), a claimant must prove: (1) partial incapacity which prevents pursuit of his "usual and customary line of employment" and (2) impairment of earnings. 820 Ill. Comp. Stat. Ann. 305/8(d)(1) (1996). On the other hand, under § 8(d)(2) of the Act, in addition to temporary total disability, a claimant receives compensation for that percent of 500 weeks that his partial disability bears to his total disability. 820 Ill. Comp. Stat. Ann. 305/8(d)(2) (1996). More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

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

HN2 In general, 820 Ill. Comp. Stat. Ann. 305/8(d)(2) (1996) applies to cases in which a claimant suffers injuries that partially incapacitate him or her from pursuing the usual and customary duties of his like of employment, but do not cause him or her to suffer an impairment of earning capacity. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN3 The Illinois Supreme Court has expressed a preference for wage differential awards over scheduled awards in **workers' compensation** cases. If a claimant requests a wage differential and proves that he or she qualifies for one, the plain language of 820 Ill. Comp. Stat. Ann. 305/8(d)(1) (1996) requires that he or she be awarded a wage differential award. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Attorney for Appellant: Hennessy & Roach, P.C., Chicago, IL.

Attorney for Appellee: Goldstein, Fishman, Bender & Romanoff, Chicago, IL.

JUDGES: JUSTICE GOLDENHERSH delivered the opinion of the court. GOLDENHERSH, J., with HOFFMAN and HOLDRIDGE, JJ., concurring. PRESIDING JUSTICE McCULLOUGH dissenting. CALLUM, J., joining in the dissent.

OPINION BY: GOLDENHERSH

OPINION

[911]** **[*790]** JUSTICE GOLDENHERSH delivered the opinion of the court:

Claimant, Jeffrey Labonte, sought benefits pursuant to the **Workers' Compensation** Act (Act) (820 ILCS 305/1 *et seq.* (West 1996)) for injuries he sustained on April 5, 1998, while employed by Yellow Freight System, Inc. (employer). After a hearing, the arbitrator determined that claimant suffered an aggravation of a pre-existing shoulder condition, which resulted in surgery. The arbitrator awarded claim ant temporary total disability benefits (TTD) of $ 520.07, for a period of 47 1/7 weeks and $ 305.50 for reasonable and **[***2]** necessary medical expenses The arbitrator found that as a result of the accident, claimant was only capable of doing "medium" work due to permanent restrictions of not lifting more than 40 pounds and frequent lifting of up to only 25 pounds. The arbitrator further found the shoulder injury resulted in 45% loss of the use of claimant's left arm under section 8(e) of the Act and a back injury resulted in 5% disability of the person as a whole under section 8(d)(2). The arbitrator refused to award claimant a wage differential award pursuant to section 8(d)(1) of the Act.

The employer sought review with the Illinois Industrial Commission (Commission). The issues raised were the extent of claimant's permanent partial disability and whether claimant was entitled to a wage differential. The Commission agreed with the arbitrator that **[*791]** claimant failed to prove he was entitled to a wage differential under section 8(d)(1) of the Act. The Commission modified the permanency award finding claimant permanently partially disabled to the extent of 40% under section 8(d)(2) of the Act, and ordered the employer to pay claimant $ 439.89 per week for a period of 200 weeks. The Commission further modified **[***3]** by finding claimant was not entitled to any benefits under section 8(e) of the Act.

The circuit court of Cook County reversed the Commission's award of permanent partial disability benefits under section 8(d)(2), finding instead that claimant was entitled to wage differential benefits pursuant to section 8(d)(1) of the Act, and remanded to the Commission for a determination of benefits under section 8(d)(1). In all other respects, the Commission's decision was affirmed. Upon remand, the Commission, with one dissent, determined that claimant was entitled to wage differential benefits of $ 361.34 per week, commencing March 2, 1999, for the duration of his disability. In his dissent, Commissioner Stevenson adhered to his original decision that an award under Section 8(d)(2), rather than a wage differential, was the appropriate remedy. The circuit court confirmed the majority's decision. We affirm.

FACTS

Claimant began working for the employer in 1987. Over the years, he worked as both a dockworker and a spotter. The dockworker position required significant overhead lifting, and the spotter position required him to lift trailers off a "pintlehook." In order to start work with the employer, **[***4]** claimant was required to take a pre-employment physical; which he passed. In 1987, claimant did not have any problems with his neck or back.

In 1990, claimant suffered a cervical injury, which required C-5 and C-6 fusion surgery. He received a **workers' compensation** settlement for that injury and resumed **[**912]** his regular employment in 1991. During 1992 and 1993, claimant experienced soreness in his left shoulder, and in 1994, he reported a back injury. The parties stipulated that claimant suffered a work accident on April 5, 1998, while cranking down dolly legs on a trailer. Claimant attempted to pull a pin two or three times and felt immediate pain in his left shoulder. Claimant also felt pain in his lower back when he pulled on the pin. Claimant reported the accident to his supervisor and was treated at the emergency room at Alexian Brothers Hospital.

On July 15, 1998, claimant underwent arthroscopic surgery on his left shoulder, followed by

physical therapy. Dr. Weidman, the surgeon who performed the surgery, ordered permanent restrictions of no lifting over 40 pounds and frequent lifting of only 25 pounds. Both Dr. **[*792]** Weidman and Dr. Gnadt, claimant's other treating physician, opined **[***5]** that as a result of the April 5, 1998, accident claimant suffered an aggravation of a pre-existing condition, which resulted in the need for surgery and permanent restrictions. The employer's examining doctor opined that claimant merely suffered a shoulder strain on April 5, 1998, and claimant's shoulder problems were chronic in nature and a separate issue.

Claimant, age 43 at the time of the accident, testified that he still experiences shoulder pain, which is particularly painful when he sits too long or reaches overhead. He is no longer able to bowl or play basketball. Claimant testified that he did not graduate from high school. He dropped out after the 11th grade and started pumping gas. He then worked in a foundry/machine shop. He also did landscaping, worked as a switchman for a railroad company, worked as a box handler, worked as a freight handler, and worked as a bartender before accepting his position with the employer. When claimant originally applied for the job with the employer, he wrote on the application that he was a high school graduate.

After shoulder surgery and therapy; claimant began working with Tracy Peterlin, a vocational consultant retained by the employer. **[***6]** Peterlin advised claimant that a security officer position would be appropriate for him. Peterlin even composed a report advising claimant of several security companies that were hiring and that he should contact those companies about employment. The salary range for such a position was $ 6 to $ 8 per hour. Claimant testified he made $ 19.15 per hour as a dock worker and approximately $ 19.30 as a spotter.

Claimant secured a job with Metro Milwaukee Auto Auction prior to meeting with Peterlin. The job pays $ 7 per hour. Claimant works 32 hours per week, which is considered full-time, and receives health benefits. Claimant testified that he accepted the position after he contacted the employer about the job and was told that it was acceptable and he should take it. Karen Tolbert was the person who told claimant it was okay for him to take the job. Tracy Peterlin's report specifically states that she spoke with Karen Tolbert who said it was fine that claimant accepted the position. Tolbert told Peterlin to keep the file open for 30 days and if claimant was still working, the file could be closed.

On cross-examination, claimant acknowledged that he had been living in Franklin, Wisconsin, **[***7]** and commuting to Illinois for five years prior to his work accident. The parties stipulated that claimant was advised of job openings with the employer in July 1999, some five months after accepting a position as a security guard. The employer introduced the job descriptions for three positions open in July 1999: **[*793]** Associate Dock Operations Supervisor, **[**913]** Shift Operations Manager, and Dock Supervisor. The Shift Operations Manager position required a bachelor's degree or equivalent combination of education and experience, as well as experience as a front line supervisor. The Dock Supervisor position did not require a bachelor's degree, but a bachelor's degree and previous supervisory experience was considered a plus. It also required the applicant to have the ability to train and motivate others and have a good knowledge of the bargaining unit agreement. The Associate Dock Operations Supervisor required a high school education or equivalent and one to two years work experience, along with knowledge of computer applications and proficient keyboard skills.

Claimant testified that he did not have the skills required for the three positions. For example, claimant is unable to type due to a **[***8]** previous injury to his finger. Claimant has not looked for any other jobs since accepting the position as a security guard. In his 1987 job application, claimant set forth that in addition to working as a bartender, he was also a manager for the same bar from 1983-1987. He also claimed additional managerial experience with a company called Carry Light, Inc.

After hearing all the evidence, the arbitrator awarded TTD benefits and found claimant's shoulder injury resulted in 45% loss of the use of claimant's left arm under section 8(e) of the Act and the back injury resulted in 5% disability of the person as a whole under section 8(d)(2). The arbitrator refused to award a wage differential. The Commission initially agreed that claimant

was not entitled to a wage differential. The Commission modified the permanency award, finding claimant permanently and partially disabled to the extent of 40% under section 8(d)(2) of the Act, but refusing to award benefits under section 8(e) of the Act. The circuit court reversed the Commission's permanent partial disability award under section 8(d)(2), finding instead that claimant was entitled to a wage differential pursuant to section 8(d)(1) of the **[***9]** Act and remanded for a determination of benefits under section 8(d)(2). In all other respects, the circuit court confirmed. Upon remand, the Commission determined that claimant was entitled to wage differential of $ 361.34 per week. The circuit court confirmed. The employer now appeals.

ANALYSIS

The issue raised on appeal is whether claimant has proven that he is partially incapacitated from pursuing his usual and customary line of employment as required to receive a wage differential award under section 8(d)(1) of the Act. The employer maintains that the circuit **[*794]** court ignored the proper standard of review when reviewing the Commission's first decision, and, upon remand, the Commission erred in awarding claimant a wage differential under section 8(d)(1) of the Act. The employer contends that the circuit court provided no analysis as to why the Commission's decision denying claimant a wage differential was against the manifest weight of the evidence, and the circuit court erred in reversing.

A review of the circuit court's original order shows that the circuit court specifically stated that the Commission's award of permanent partial disability benefits, rather than a wage differential, **[***10]** was against the manifest weight of the evidence and contrary to the law. The circuit court summarized its analysis as follows:

> "The [claimant] proved a partial incapacity which prevented him from pursuing his usual and customary line of employment which [the employer] conceded was true. He also proved an impairment **[**914]** of earnings. He proved, because of the injury, he could only earn less than when he was working for the respondent prior to the injury. Therefore, the court finds the decision of the Commission to award [claimant] permanent partial disability benefits pursuant to. § 8(d)(2) instead of wage differential benefits pursuant to § 8(d)(1) is against the manifest weight of the evidence and contrary to law."

The circuit court correctly analyzed the evidence in the instant case and concluded that the manifest weight of the evidence indicated claimant was not qualified for the three positions suggested by the employer five months after he accepted a position as a security guard.

The circuit court pointed out that while the Commission initially determined that claimant did not put forth enough effort to find employment within his physical restrictions and **[***11]** employment background, this finding "conflicted with the Commission's finding the security guard position was suitable employment for [claimant] based on his education, physical restrictions and experience." The circuit court also reasoned that because the employer approved the security guard position and told its vocational counselor to close claimant's file if he was still employed after 30 days with the subsequent employer, the manifest weight of the evidence did not support the Commission's finding that claimant was not entitled to a wage differential.

It is well-settled that *HN1* in order to qualify for a wage differential award pursuant to section 8 (d)(1) of the Act, a claimant must prove: (1) partial incapacity which prevents pursuit of his "usual and customary line of employment" and (2) impairment of earnings. 820 ILCS 305/8(d) (1) (West 1996)); **[*795]** *Gallianetti v. Industrial Comm'n,* 315 Ill. App. 3d 721, 728, 734 N.E.2d 482, 488, 248 Ill. Dec. 554 (2000). On the other hand, under section 8(d)(2) of the Act, in addition to TTD, a claimant receives compensation for that percent of 500 weeks that his partial disability bears to his total **[***12]** disability. 820 ILCS 305/8(d)(2) (West 1996)). *HN2* In general, section 8(d)(2) applies to cases in which a claimant suffers injuries that partially incapacitate him or her from pursuing the usual and customary duties of his like of employment, but do not cause him or her to suffer an impairment of earning capacity. 820 ILCS 305/8(d)(2)

(West 1996); 315 Ill. App. 3d at 728-28, 734 N.E.2d at 488. In *General Electric Co. v. Industrial Comm'n,* 89 Ill. 2d 432, 438, 433 N.E.2d 671, 673-74, 60 Ill. Dec. 629 (1982), HN3 our Supreme Court expressed a preference for wage differential awards over scheduled awards. If a claimant requests a wage differential and proves that he or she qualifies for one, the plain language of section 8(d)(1) requires that he or she be awarded a wage differential award. *Gallianetti,* 315 Ill. App. 3d at 729, 734 N.E.2d at 488.

In the instant case, the employer conceded that claimant could not continue in his usual and customary line of work as a dock worker or spotter. The employer arranged for a vocational expert to assist claimant in a job search. The vocational expert listed **[***13]** security guard as a position which would be appropriate for claimant given his education, experience, and physical restrictions. The vocational expert set forth that claimant could expect to make between $ 6 and $ 8 per hour in such a position. Prior to meeting with the vocational expert, claimant obtained employment as a security guard, earning $ 7 per hour. Claimant testified he works 32 hours per week, which is considered full-time. His new employer provides health insurance for him and his wife who has **[**915]** diabetes. Claimant checked with the employer and was told that the job as a security guard was appropriate and he should go ahead and accept the position. Accordingly, his meeting with the vocational expert was cancelled. The employer told the vocational expert to keep the file open for 30 days and if claimant was still employed with the security company, she should go ahead and close the file.

We are unconvinced by the employer's contention that claimant's failure to apply for three jobs with the employer some five months after accepting a permanent position as a security guard disqualifies him for a wage differential. Because the employer did not offer claimant any of the three **[***14]** positions, but merely gave claimant notice of the positions, we find the offer in the instant case similar to the **sham** offer made by the employer in *Reliance Elevator Co. v. Industrial Comm'n,* 309 Ill. App. 3d 987, 723 N.E.2d 326, 243 Ill. Dec. 294 (1999).

In *Reliance Elevator,* there was no medical opinion that the **[*796]** employee was permanently and totally disabled; nevertheless, the court found the employee met his burden of demonstrating he was permanently and totally disabled by showing that he contacted over 3,600 potential employers without success. 309 Ill. App. 3d at 992, 723 N.E.2d at 330. The employee contacted the employer on a regular basis seeking employment without success until five months after the initial arbitration hearing at which time the employer offered the injured employee a light duty job at a rate of compensation much higher than was economically justifiable. Regarding this "offer" the *Reliance* court specifically stated as follows:

> "Reviewing the record, it is clear that the manifest weight of the evidence supports the Commission's determination that the job offer was a **sham.** The Commission properly gave no consideration **[***15]** to this 'offer' in reaching its conclusion that [the employee] was permanently and totally disabled because it was not a *bona fide* offer, but rather was designed to circumvent Reliance's responsibility under the Act. Such practice must be strongly discouraged and even condemned. Employers must not be allowed to defeat an injured employee's entitlement to a disability award by making **sham** job offers. To countenance such practice would severely jeopardize injured workers' abilities to obtain relief and would undermine the spirit and purpose of the Act." *Reliance,* 309 Ill. App. 3d at 993, 723 N.E.2d at 331.

The same reasoning applies here.

It is clear that claimant was not qualified for the jobs "offered" by the employer, as claimant does not even possess a high school diploma. While claimant alleged management experience with previous employers when he applied for a job with the employer in 1987, this allegation appears to be nothing more than mere puffing. Most importantly, the employer only notified claimant about three open positions, but never actually offered the employee any of the positions. The employer cannot be allowed to use this type of tactic **[***16]** to defeat claimant's entitlement to a wage differential award.

The facts here show that claimant realized he was qualified for few jobs; nevertheless, claimant, on his own volition, applied for a job with a security company after a vocational expert retained by the employer suggested such a position. Claimant was offered the position. He accepted the position only after the employer approved it. Claimant earns $ 7 per hour as a security guard, but earned over $ 19 per hour from the employer. Claimant showed sufficient evidence of impaired **[**916]** earnings. Under these circumstances, the circuit court's determination that the Commission's refusal to award a wage differential was against the manifest weight of the evidence was proper.

[*797] The circuit court remanded to the Commission for a determination of benefits under section 8(d)(1) of the Act. The Commission determined that claimant is entitled to a wage differential of $ 361.34 per week. One Commissioner dissented, refusing to make an award pursuant to section 8(d)(1). The majority of the Commission, however, agreed with the circuit court that claimant is entitled to a wage differential. The Commission's order is thorough and shows that the **[***17]** Commission determined there was sufficient evidence of earning impairment to award claimant a wage differential. The circuit court confirmed the wage differential award. We agree.

For the foregoing reasons, the judgment of the circuit court confirming the Commission's award of a wage differential is affirmed.

Affirmed.

GOLDENHERSH, J., with HOFFMAN and HOLDRIDGE, JJ., concurring.

DISSENT BY: McCULLOUGH

DISSENT

PRESIDING JUSTICE McCULLOUGH dissenting:

The decision of the Industrial Commission entered August 16, 2001, should be reinstated. The Commission affirmed the arbitrator's award of 47 1/7 weeks, temporary total disability, and awarded claimant "$ 439.89 per week for a period of 200 weeks, as provided in § 8(d)2 of the Act for the reason that the injuries sustained caused the permanent disability *** to the extent of 40%."

The arbitrator found that claimant "presented no evidence of an appropriate job search and no testimony from a vocational expert." A review of the trial court's findings shows that the trial court adopted and based its decision on the testimony of claimant. It is apparent from a review of the arbitrator's award and the Commission's decision that claimant was found **[***18]** not credible concerning any job search, or effort to secure work. At oral argument, claimant conceded the finding as to credibility. The Commission found claimant failed to inquire about employment opportunities and that claimant failed to prove entitlement to a § 8(d)1 award but did award 40% of man as a whole pursuant to § 8(d)2.

The trial court's reference to *Consolidation Coal Co.:* "whether a claimant has presented sufficient evidence of earnings impairment is a question of fact for the Commission, whose decision will not be reversed unless it is against the manifest weight of the evidence." and to *Caterpillar Tractor Co.,* "liability for **workers compensation** cannot rest on imagination, speculation or conjecture, but must be based solely upon the facts contained in the **[*798]** record," support the Commission's first decision. The majority has, as did the circuit court, simply reweighed the evidence and determined credibility in the place of the fact finder.

The order of the circuit court should be reversed and the August 16, 2001, decision of the

Commission reinstated.

CALLUM, J., joining in the dissent. **[***19]**

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*2011 Ill. App. Unpub. LEXIS 2713, **

MUSA AZEMI, Plaintiff-Appellant and Cross-Appellee, v. THE ILLINOIS **WORKERS' COMPENSATION** COMMISSION et al. (Menards, Inc., Appellee and Cross-Appellant).

Appeal No. 2-10-0763WC

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, **WORKERS' COMPENSATION** COMMISSION DIVISION

2011 IL App (2d) 100763WU; 2011 Ill. App. Unpub. LEXIS 2713

November 4, 2011, Decided

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).

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of the 16th Judicial Circuit, Kendall County, Illinois. Circuit No. 09-MR-66. Honorable Timothy J. McCann, Judge, Presiding.

DISPOSITION: Affirmed.

CORE TERMS: claimant, pain, arbitrator, sedentary, right shoulder, shoulder, labor market, knee, clerk's, disability, totally, syndrome, arrived, cervical, work restrictions, odd-lot, opined, tunnel, surgery, orthopedic, manifest, carpel, permanently disabled, right arm, permanently, disabled, forklift, deadline, skills, diagnosed

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

OPINION BY: HOLDRIDGE

OPINION

ORDER

Held: The circuit court did not err in finding that the claimant's petition for judicial review of the Commission's decision was timely filed under section 305/19(f) of the Act. In addition, the Commission's finding that the claimant proved a causal connection between his current condition of ill-being and a work-related accident was not against the manifest weight of the evidence.

The claimant, Musa Azemi, 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 he sustained while working as an employee of respondent Menards, Inc. (employer). Following a section 19(b) hearing, an arbitrator found that the claimant's injuries were causally connected to a work-related accident and awarded the claimant temporary total disability (TTD) benefits, medical expenses, **[*2]** and other benefits. Neither party appealed this decision. After conducting a permanency hearing, the arbitrator found that the claimant was totally and permanently disabled and awarded permanent disability benefits. The employer appealed the arbitrator's decision to the Illinois **Workers' Compensation** Commission (the Commission). In a unanimous decision, the Commission found that the claimant failed to prove that he was permanently and totally disabled, concluded that the claimant was partially permanently disabled to the extent of 75% person as a whole, and awarded partial disability benefits. The claimant sought judicial review of the Commission's decision in the circuit court of Kendall County, which confirmed the Commission's decision. This appeal followed.

FACTS

The claimant worked for the employer as a forklift operator. On December 12, 2003, he fell while attempting to unload a carpet roll from a trailer, injuring his neck, right shoulder, and side. He was taken to the emergency room at Valley West Community Hospital where the attending physician diagnosed a contusion and right arm strain. He returned to the emergency room and to Valley West's Department of Occupational Health **[*3]** over the next several days, complaining of severe pain in his arm and in the right side of his back. He was referred to Dr. Steven Treacy, an orthopedic surgeon.

The claimant saw Dr. Treacy on December 22, 2003. Dr. Treacy ordered an MRI to rule out a rotator cuff tear. The claimant underwent an MRI of his right shoulder on December 31, 2003. The radiologist reported diffuse rotator cuff tendinopathy with complete tearing of the subscapularis fibers. After discussing the MRI results with other orthopedic surgeons, Dr. Treacy recommended surgery.

On February 18, 2004, Dr. Treacy operated on the claimant's right shoulder to repair the torn subscapularis tendon. After his shoulder surgery, the claimant underwent physical therapy. On April 20, 2004, Dr. Treacy released the claimant for full-time, light-duty work but specified that the claimant was not to use his right arm. The claimant began working light duty on May 6, 2004.

In June 2004, the claimant underwent an electromyography nerve conduction study (EMG) which indicated that the claimant had carpel tunnel syndrome in his right wrist, cubital tunnel syndrome, and sensory neuropathy in the wrist. The radiologist also noted possible brachial **[*4]** plexopathy. [1] Dr. Treacy diagnosed carpel tunnel syndrome, cubital tunnel syndrome, ulnar sensory neuropathy, brachial plexitis, [2] and cervical myelopathy. [3] Dr. Treacy initially maintained the claimant's work restrictions. However, on June 22, 2004, he modified the claimant's work restrictions to no lifting of more than one pound with the right arm, no repetitive use of the right arm, no work above waist level, and no working more than four hours per day.

FOOTNOTES

1 Brachial plexopathy is pain, decreased movement, or decreased sensation in the arm and

shoulder due to a nerve problem.

2 Brachial plexitis is an inflammation of the brachial plexus (a network of nerves leading from the cervical spine) that can cause arm pain.

3 Cervical myelopathy is the clinical syndrome that results from a disorder that disrupts the flow of neural impulses through the cervical spinal cord.

On July 7, 2004, the claimant saw Dr. Christina Marciniak at the Rehabilitation Institute of Chicago. Dr. Marciniak performed a neuromuscular electro-diagnostic study, which revealed evidence of demeyliniating median motor and sensory neuropathy at the right wrist.

After undergoing another MRI, the claimant returned to Dr. Treacy. **[*5]** Dr. Treacy diagnosed postoperative arthofibrosis [4] and recommended surgery to improve the range of motion in the claimant's right shoulder. The claimant declined to undergo another surgery. Dr. Treacy continued the claimant's work restrictions.

FOOTNOTES

4 Arthofibrosis a severe complication in joints that can occur after a trauma or after surgery. It is characterized by the loss of motion due to the formation of fibrous tissues.

In September and October 2004, the claimant saw Dr. Guido Marra at Loyola University Medical Center. The claimant underwent another EMG, after which Dr. Marra noted evidence of carpel tunnel syndrome and an injury to the medial cord of the right brachial plexus. Dr. Marra diagnosed a "frozen shoulder" [5] and discussed the possibility of surgery with the claimant. On December 7, 2004, Dr. Marra noted that the claimant had completed a functional capacity examination (FCE) and concluded that the claimant had reached maximal medical improvement unless he considered surgery. Dr. Marra released the claimant to work within the limits of his FCE.

FOOTNOTES

5 A "frozen shoulder" is characterized by pain and loss of motion in the shoulder due to inflammation.

On December 23, 2004, the claimant **[*6]** suffered a second work-related accident. On that day, the claimant was working light duty dusting a rack when a portion of a fence leaning against the rack fell on his left shoulder and knocked him down. The claimant became caught between the rack and the fence and injured his left knee and right hand. He also reinjured his right shoulder.

On January 24, 2005, the claimant was examined by Dr. Robert Eilers, a physician who is board certified in physical medicine and rehabilitation. Dr. Eilers diagnosed the claimant as suffering from a rotator cuff tear and a brachioplexus injury which Dr. Eilers opined were caused by the claimant's fall at work on December 12, 2003. Dr. Eilers also diagnosed "a double-crush carpel tunnel phenomenon with associated carpel tunnel syndrome," and opined that the claimant's brachioplexus injury predisposed him to "carpel tunnel involvement." Dr. Eilers noted that the claimant had "limitations with *** bathing, hygiene, grooming, and dressing" due to his shoulder and plexus injuries, and he opined that "these deficits will continue to be permanent." He also noted that the claimant "lacks significant use of the dominant right upper extremity for heavy activity **[*7]** and will be limited to light sedentary work activity at best, primarily using

a left arm." Dr. Eilers concluded that the claimant "will not be able to return to the competitive employment he had previously done," and that competitive employment of any kind "may be unlikely" for the claimant because of his limited education and his age.

On March 4, 2005, Dr. Arif Saleem, an orthopedic surgeon with Castle Orthopedics, performed an arthroscopic capsular release on the claimant's right shoulder. A few weeks after the procedure, Dr. Saleem noted that the claimant's right shoulder had "significantly improved." Specifically, Dr. Saleem's March 24, 2005, notes indicate that the claimant's overall motion was improving and that he "[did] not have as much pain or discomfort" in the shoulder. However, the claimant still complained of significant pain in his cervical spine and left knee with limited range of motion in his neck and knee. He also continued to complain of pain in his right forearm and wrist. Dr. Saleem held the claimant off work because it concluded that the claimant had "multiple complaints that will probably continue to aggravate his right shoulder."

On June 23, 2005, Dr. Saleem concluded **[*8]** that the claimant had reached MMI concerning his right shoulder and noted that there was no further treatment for the right shoulder that would improve his range of motion. Dr. Saleem noted that he "did not think that [the claimant's] right shoulder will lend him to working in the previous occupation that he was in." However, Dr. Saleem stated that he would "leave evaluation of [the claimant's] shoulder, in terms of him being able to return to his original job, up to his work comp advisor," and noted that "[i]f an FCE would be required," that "certainly would be acceptable."

On August 11, 2005, Dr. Saleem wrote a letter to the Illinois Department of Human Services in which he stated that the claimant had "multiple orthopaedic issues," nerve problems, tendon injuries, and "chronic low back pain." Dr. Saleem noted that "[a]ll of these issues together have severely limited [the claimant's] function and ability to work."

On May 8, 2006, Dr. Saleem examined the claimant and noted that the range of motion in his right shoulder had "improved substantially." However, Dr. Saleem noted that the claimant was having "quite a bit of pain still" in his neck and back. Although the claimant experienced **[*9]** some shoulder pain with resisted elevation, Dr. Saleem noted that "most of his pain [was] in the cervical spine and going down the back of his mid thorax." Dr. Saleem also observed that the claimant's cervical range of motion was limited with pain and discomfort. He also noted that the claimant had undergone an arthroscopy of his knee and that he was being treated by Dr. Marciniak for that condition. Dr. Saleem recommended holding off on an FCE until the claimant's back and left knee had been treated and the claimant reached MMI as to those injuries. In the interim, Dr. Saleem continued the claimant on work restrictions for his left knee, back, and right shoulder, some of which had already been imposed by Dr. Marciniak. The work restrictions imposed by Dr. Saleem included no squatting or kneeling, bending or twisting, no climbing (other than short stairways), no lifting with his right shoulder, and no "repetitive activities with the right arm."

On June 14, 2006, the claimant was examined by Dr. Ira Goodman, a physician and pain specialist. The claimant complained of severe neck pain, pain in his right shoulder, low back, and left leg, and numbness in his hands and left leg. Dr. Goodman **[*10]** concluded that the claimant was suffering from several medical conditions which caused these symptoms, including degenerative disc disease of the cervical spine, cervical and lumbar facet arthropathy, carpel tunnel syndrome, and "[c]omplex regional pain syndrome" in his left leg. [6] He recommended diagnostic cervical facet injections and other treatments to manage the claimant's pain. Dr. Goodman concluded that the claimant "should be off work at this time due to his inability to sit for any longer than 20 minutes with the need for opiod medication" and noted that the work limitations imposed by the claimant's orthopedist (including restrictions on the use of the claimant's right arm and hand and lifting limitations) "make it impossible for him to work at this time." However, Dr. Goodman concluded that the claimant was "no where near [MMI]" and that it was "impossible to determine when [MMI] will be reached" because the claimant had not yet received treatment for several of his underlying conditions. Dr. Goodman found that the claimant's prognosis was "unclear" because of his many pain problems and the lack of

treatment for those problems other than his shoulder and knee. However, Dr. **[*11]** Goodman stated that he was "fairly certain that [the claimant's] pain can be dramatically improved" over time, although the extent and duration of the improvement (and the time it would take to achieve any such improvement) remained unclear.

FOOTNOTES

6 Complex regional pain syndrome (CRPS) is an uncommon form of chronic pain that usually affects an arm or leg. It typically develops after an injury, surgery, stroke or heart attack, but the pain is out of proportion to the severity of the initial injury.

On August 17, 2006, the claimant was examined by Dr. Richard Lazar, the employer's section 12 medical examiner. Dr. Lazar is a board certified neurologist and rehabilitation specialist. After reviewing the claimant's medical records and examining the claimant, Dr. Lazar prepared a report containing his diagnostic impressions and professional opinions. In his report, Dr. Lazar noted that, at the time the claimant saw Dr. Lazar, he complained of "persistent" and "sharp" right shoulder pain radiating to the middle of his back. The claimant told Dr. Lazar that, on a scale of one to ten (with ten being the "worst pain imaginable"), the pain is usually a six but can be as high as ten or as low as three **[*12]** to four when he is relaxed. The claimant also reported weakness in his right hand, with numbness in some of the digits in that hand, and difficulty with his right shoulder and overhead reaching.

After noting that the claimant had "a long-standing history of Diabetes Mellitus," Dr. Lazar diagnosed the claimant as suffering from: (1) diabetic sensorimotor peripheral polyneuropathy (a type of nerve damage caused by diabetes); (2) right brachial plexus mononeuritis multiplex (due to Diabetes Mellitus); (3) right and left carpel tunnel syndrome, diabetic mononeuropathy; (4) a medial meniscus tear in the left knee; and (5) an injury to the right rotator cuff. With the exception of the knee and shoulder injuries, Dr. Lazar concluded that all of the claimant's conditions were caused by the progression of his diabetes, rather than his work-related accidents or his shoulder surgery. He opined that the claimant's diabetes explained all of his "neurologic complaints," and he found no evidence of complex regional pain syndrome.

However, Dr. Lazar noted that he did not "offer any opinions on the state of [the claimant's] right shoulder subscapulars [*sic*] tendon injury, nor the injury to the left medial **[*13]** meniscus" because he was "not an orthopedic surgeon." Dr. Lazar noted that he would "defer to orthopedic specialists in this regard." Consequently, Dr. Lazar did not conduct a "detailed history" of the claimant's shoulder and knee conditions. He did note, however, that the claimant's knee and shoulder injuries could have been caused by his work-related accidents, although he "defer[red] to the orthopedist" on that issue.

Regarding the claimant's ability to work, Dr. Lazar noted that he was "concerned about [the claimant's] diabetic peripheral neuropathy" and the complications caused by his diabetes, including weakness in his feet, poor balance, unsteadiness, and weakness in his right hand. Despite these concerns, Dr. Lazar opined that the claimant "was capable of working a full workweek [*sic*], but only at a sedentary level." However, Dr. Lazar concluded that "[a] more aggressive approach to [the claimant's] neuropathic pain will be required before he can return to sedentary work, including but not limited to the use of drugs like Neurontin and Topamax."

The claimant filed an application for adjustment of claim for the injuries that he claimed resulted from his December 12, 2003, accident **[*14]** and a separate application for adjustment of claim for the injuries he claimed resulted from his December 23, 2004, accident. On September 17, 2007, an arbitrator issued a decision in the latter case, finding that the claimant's right shoulder, left knee, cervical, and lumbar conditions were all causally related to his December 23, 2004, accident. The arbitrator also found that the claimant had failed to prove that he suffered from CRPS. The arbitrator found that the claimant had reached MMI in

2006 and, therefore, awarded TTD benefits from December 23, 2004, through 2006. Neither party appealed the arbitrator's decision.

On January 11, 2008, the arbitrator conducted a permanency hearing. During the hearing, the claimant testified that he is in a lot of pain daily and that he abstains from any lifting. He claimed to have continual pain in his neck, back, knee, and right shoulder. He stated that he was receiving social security disability benefits. However, he admitted that he walks up to a mile per day for health reasons on the orders of his physician.

Because the claimant's employability was at issue in the permanency proceeding, the parties presented evidence regarding the claimant's **[*15]** educational level and his ability to understand and communicate in English. The claimant testified that, in 1975, he came to the United States from Macedonia, where he had received a 12th grade education. [7] He does not have a high school diploma or GED. He claimed that his primary language is Albanian and that he is very limited in his ability to read and write in English. He testified that his daughter had to help him fill out his job application at Menards and his application for social security benefits. However, he was able to testify in English. Moreover, Will Harris, the employer's Human Resources Coordinator and the claimant's former supervisor, testified that the claimant could not have performed his position as a forklift operator as well as he did without having at least a high school education.

FOOTNOTES

[7] This testimony contradicted statements that the claimant had made to others regarding his level of education. The claimant told the Social Security Administration that he only attended school through the fourth grade, and he told his vocational expert that he had attended school through the eighth grade.

The claimant testified that, other than his work for the employer, his only prior **[*16]** employment in the United States was as a cook. He stated that he had no formal training in any occupation.

Edward Pagella, a certified vocational expert, testified by deposition on the claimant's behalf. The claimant's attorney had retained Pagella to perform a labor market survey and to render a professional opinion regarding the claimant's employability. Pagella evaluated the claimant on November 26, 2007, when the claimant was 58 years old. Pagella noted Dr. Saleem's statements regarding the claimant's physical limitations (including his August 11, 2005, letter to the Illinois Department of Human Services), Dr. Goodman's opinion that the claimant could not perform any type of sedentary work, and Dr. Lazar's opinion that the claimant could perform sedentary work only if his pain were treated more aggressively. Based largely on these medical opinions, Pagella opined that the claimant would be unable to return to his prior occupations as a forklift operator or a cook and that he would be "unable to perform any type of occupation."

Pagella admitted that, if the claimant were employable at the sedentary level, there would be positions available to him in the labor market. However, he opined **[*17]** that there would be "severe erosion" of those positions if a worker had only a limited ability to read and write in English. Pagella testified that there are three basic types of sedentary positions available in the labor market: clerical, service, and manufacturing. According to Pagella, clerical and service positions require a high school diploma or GED and the ability to read, write, and thoroughly understand the English language. Pagella opined that the claimant would not be able to perform these types of jobs without retraining. Moreover, Pagella testified that sedentary positions in manufacturing require employees to "be able to utilize their bilateral upper extremities on a repetitive basis." Thus, barring vocational retraining, Pagella opined that the claimant would be ineligible for any type of sedentary position.

Pagella admitted that his conclusions regarding the claimant's educational limitations were based upon what the claimant had told him and that he did not independently test the claimant's abilities. Moreover, Pagella admitted that he did not know how many positions the employer had available.

Harris testified that the employer had a progressive policy of bringing injured **[*18]** employees back to work and accommodating "any" work restriction. He produced a list of jobs that he claimed were available for anyone with "sedentary restrictions." However, with the possible exception of the "wood sorter/ operator" position (which involves pushing buttons on a control panel with either hand), each of these positions required either the use of both hands or the use of the dominant hand to write. Moreover, although Harris testified that he was aware that the claimant was restricted to sedentary duty, he was not aware that the claimant was under any other work restrictions. He testified that it was his understanding that "as long as [the claimant] can sit down, he's capable of returning to work."

Harris also testified that, in his former position as a forklift operator, the claimant was required to operate a device similar to a personal computer that mounted on the forklift. The claimant was also responsible for routing and matching products that were shipped to and from the distribution facility where he worked. Harris stated that the claimant performed the job well without making too many mistakes and that he did not exhibit a lack of education or understanding in performing **[*19]** his job.

Although Harris could not recall personally offering the claimant a modified position after his injuries, he testified that the employer offered the claimant a sedentary position in September 2006, which the claimant declined.

The arbitrator found that the claimant was totally and permanently disabled from employment pursuant to section 8(f) of the Act. The arbitrator based this finding on the work restrictions prescribed by Drs. Saleem, Marciniak and Goodman, the claimant's age, and his limited skills in the English language which were "evident as he testified." [8] In addition, the arbitrator concluded that, "[w]hatever Petitioner's level of formal education, it was done in Macedonia and is of little use in the labor market." The arbitrator noted that "[t]he doctors agree [the claimant] can no longer work as a forklift operator", and he relied upon Pagella's testimony that "there was no stable labor market for someone with [the claimant's] restrictions, lack of transferable skills and lack of language skills." The arbitrator noted that the employer "did not rebut that testimony." Moreover, the arbitrator found that only one of the sedentary jobs identified as available by the **[*20]** employer—the wood sorter control panel operator position—"was conceivably within [the claimant's] restrictions or skills," and that there was "no evidence [that the employer] had, or would create, a vacancy for [the claimant] in that position or that the position had been offered to him." Accordingly, the arbitrator awarded permanent total disability benefits.

FOOTNOTES

8 The arbitrator also found credible the claimant's testimony that he cannot write in English and that his daughter filled out his pre-employment questionnaire and his Social Security Disability Report.

The employer appealed the arbitrator's decision to the Commission, which rejected the arbitrator's finding of permanent total disability. The Commission noted that "[the claimant's] Section 12 medical examiner did opine that Petitioner was capable of sedentary work and Respondent did produce evidence that it had an extensive light duty work program." In addition, the Commission noted that the claimant was "adamant about refusing to even attempt any work despite [the employer's] offers." From this, the Commission concluded that the

claimant had failed to prove that he was permanently totally disabled. Accordingly, the Commission modified **[*21]** the arbitrator's decision to find that the claimant was partially permanently disabled to the extent of 75% of the person as a whole and ordered the employer to pay partial permanent disability benefits of $272.40 per week for 375 weeks. The Commission otherwise affirmed and adopted the arbitrator's decision.

The claimant sought judicial review of the Commission's decision in the circuit court of Kendall County. Under the jurisdictional time limit prescribed by section 19(f) of the Act, the claimant had 20 days from the time he received the Commission's decision to commence a proceeding for review of the decision in the circuit court by filing a request for summons and proof of payment of the probable cost of the record. The claimant received the Commission's decision on April 14, 2009. Thus, the claimant had until May 4, 2009, to file the required documents. The claimant's request for summons and petition for review were file-stamped by the Kendall County Circuit Clerk's office on May 5, 2009. Although the claimant claimed to have filed its petition for review on May 4, 2009, he had no documentary proof of that claim. Arguing that the claimant's petition for review was untimely under **[*22]** section 19(f) of the Act, the employer filed a motion to dismiss the claimant's petition for lack of subject matter jurisdiction.

Shirley Krause, the Deputy Circuit Clerk of Kendall County, provided an affidavit and was deposed. In her affidavit, Krause stated that she filed the claimant's petition and summons, and that May 5, 2009, represented the date that she filed the documents, not the date that the documents were received by the clerk's office. During her deposition, Krause testified that she recalled receiving the documents from the claimant's attorney. Although she could not recall the exact date when the documents arrived in the clerk's office, she testified that she was "certain" they arrived before May 5, 2009.

The circuit court denied the employer's motion to dismiss. The court relied upon Krause's testimony that the required documents were received in the clerk's office before May 5, 2009. The court ruled that "[t]he act of tendering a document to the Clerk of Court, along with the required fee due, if any, is the final act required of a party attempting to file documents with the Clerk of Court." Moreover, the court noted that the claimant "ha[d] no ability to compel the **[*23]** Clerk of Court" to file stamp the documents. The court later denied the employer's motion to reconsider its ruling.

Addressing the merits of the claimant's appeal, the circuit court found that the Commission's decision was not against the manifest weight of the evidence and confirmed the decision.

In this appeal, the claimant appeals the Commission's finding that he was not totally, permanently disabled. In its cross appeal, the employer appeals the circuit court's denial of its motion to dismiss the claimant's petition for review of the Commission's decision as untimely.

ANALYSIS

A. The Employer's Cross-Appeal

Because the employer's cross-appeal raises a threshold jurisdictional issue, we will address it first. Section 19(f) of the Act provides that a proceeding for review of a Commission decision "shall be commenced" within 20 days of the receipt of notice of the decision of the Commission. 820 ILCS 305/19(f) (West 2008). It is undisputed that the claimant received the Commission's decision on April 14, 2009. Therefore, the claimant was required to "commence" a proceeding to review that decision by filing a request for summons and proof of payment for the probable cost of the record no **[*24]** more than 20 days later, *i.e.*, by May 4, 2009. *Jones v. Industrial Comm'n*, 188 Ill. 2d 314, 320, 721 N.E.2d 563, 242 Ill. Dec. 284 (1999). This time limit is "mandatory and jurisdictional." *Id.* at 321. Thus, it "must be strictly adhered to in order to vest the circuit court with jurisdiction over an appeal from the Commission." *Id.* at 320.

The employer argues that the claimant's request for summons and petition for review were

untimely filed—and, therefore, the circuit court lacked jurisdiction over the petition—because these documents were not file-stamped until one day after the jurisdictional deadline and because there is "no evidence" suggesting they were timely filed. We disagree. Shirley Krause, the Deputy Circuit Clerk of Kendall County who file-stamped the documents on May 5, 2009, testified she was certain that the claimant's request for summons and petition for review arrived in the clerk's office before May 5, 2009. [9] In addition, Krause stated in her affidavit that "I did not file stamp the documents when they arrived but I swear and affirm that they arrived in the Kendall County Circuit Clerk's office before May 4, 2009." This testimony is competent evidence establishing that the required documents were "filed" **[*25]** with the Clerk's office either on or before the May 4, 2009, statutory deadline. See *Newman, Raiz and Shelmadine, LLC v. Brown*, 394 Ill. App. 3d 602, 607, 915 N.E.2d 782, 333 Ill. Dec. 711 (2009) (a document is "filed" when it is "delivered to the proper officer with the intent of having such document kept on file by such officer in the proper place") (citation and internal quotation marks omitted). The fact that the circuit clerk file-stamped the documents after the deadline is immaterial. The claimant clearly "commenced" his proceeding for review in a timely fashion under section 19(f).

FOOTNOTES

[9] Krause also swore that an "affidavit" arrived from the claimant's counsel's office with these documents. She does not describe the content of the affidavit or state whether it established that the probable cost of copying the record had been paid. However, the employer has not argued that the proof of payment was untimely filed. The record is therefore undeveloped as to this issue, and we will not address it.

The employer argues that Krause's testimony that the documents arrived before May 5, 2009, is "not credible" because she also testified that her affidavit did not reflect a date on which the claimant's petition for review was received **[*26]** because she was not sure when it arrived. However, the fact that Krause could not identify the exact date that the petition arrived does not contradict her consistent, sworn testimony that it arrived some time before May 5, 2009. In any event, credibility determinations are "within the special competence of the trial courts," and we "accord deference to those trial court decisions." *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 593, 912 N.E.2d 250, 332 Ill. Dec. 64 (2009) (quoting *In re Marriage of Rife*, 376 Ill. App. 3d 1050, 1058-59, 878 N.E.2d 775, 316 Ill. Dec. 53 (2007)).

The employer argues that a party cannot satisfy the requirements of section 19(f) merely by "placing the appropriate documents in the United States mail" within the 20-day deadline. It also argues that the jurisdictional deadline prescribed by section 19(f) cannot be satisfied by "substantial compliance." This is a red herring. According to Krause's unrebutted testimony, the appropriate documents *arrived in the clerk's office* (and were therefore "filed") within the deadline; they were not merely "placed in the mail" within the deadline. Therefore, the claimant *actually complied* with section 19(f)'s requirements. As the claimant notes, "substantial compliance" **[*27]** is not at issue here.

B. The Claimant's Appeal

The claimant argues that the Commission's finding that he failed to prove that he was permanently and totally disabled was contrary to law and against the manifest weight of the evidence. The question of 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, 904 N.E.2d 1122, 328 Ill. Dec. 612 (2009). For a finding of fact to be contrary to the manifest weight of the evidence, the opposite conclusion must be "clearly apparent." *Id.* Whether a reviewing court might reach the same conclusion is not the issue. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial*

Comm'n, 91 Ill. 2d 445, 450, 440 N.E.2d 90, 64 Ill. Dec. 538 (1982).

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, 397 N.E.2d 804, 34 Ill. Dec. 132 (1979). Our supreme **[*28]** court has stressed, however, that 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, 447 N.E.2d 842, 69 Ill. Dec. 407 (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, 871 N.E.2d 765, 313 Ill. Dec. 38 (2007).

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, 419 N.E.2d 1159, 50 Ill. Dec. 710(1981); *City of Chicago*, 373 Ill. App. 3d at 1089. 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; *City of Chicago*, 373 Ill. App. 3d at 1089. In determining whether a claimant falls within an "odd-lot" category for purposes of an award of PTD benefits, the Commission **[*29]** 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; *Ameritech Services, Inc.*, 389 Ill. App. 3d at 204.

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; *City of Chicago*, 373 Ill. App. 3d at 1091. 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. 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; **[*30]** *City of Chicago*, 373 Ill. App. 3d at 1091. 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.

Here, the claimant attempted to establish that he was permanently totally disabled by proving that he fell into the odd-lot category. He did not argue that he had performed a diligent but unsuccessful job search. Accordingly, in order to meet his initial burden, the defendant was required to prove by a preponderance of the evidence that, because of his age, skills, training, experience, education, and the extent of his injuries, he will not be regularly employed in a well-known branch of the labor market. *City of Chicago*, 373 Ill. App. 3d at 1091; *Ameritech Services, Inc.*, 389 Ill. App. 3d at 204. We cannot conclude that the Commission's finding that the claimant failed to meet this burden was against the manifest weight of the evidence.

In attempting to prove his "odd-lot" status, the claimant relied almost entirely on Pagella's testimony. Pagella testified that the claimant would be incapable of performing any sedentary positions available in the labor market because of his medical work **[*31]** restrictions, his limited education, and his limited ability to read, write, and understand English. However, in determining the claimant's educational limitations, Pagella relied entirely upon the claimant's representations and did not independently test the claimant's abilities. The claimant told Pagella that he had attended school only through the eighth grade, even though he had actually received a twelfth-grade education in Macedonia, as he later admitted before the arbitrator. Thus, Pagella's conclusions regarding the claimant's limited education were based at least in

part on false information.

Moreover, the testimony of the claimant's supervisor (Harris) suggested that the claimant could read and understand English well enough to successfully perform the tracking and routing functions of his prior forklift operator job, which required some reading in English. In order to qualify for that job, the claimant had to read a manual printed in English and pass a test demonstrating his understanding of what he had read. The fact that he passed the test [10] and was able to successfully perform the routing and tracking functions of the job countered Pagella's dim view of the claimant's **[*32]** intellectual abilities and undermined Pagella's claim that the claimant's ability to read and understand English was severely limited.

FOOTNOTES

[10] During cross-examination, Harris admitted that he was not present when the claimant took the test and, therefore, was not aware of whether someone may have helped him read the test. However, the claimant did not testify that he received any such help. Nor does he make such a claim on appeal. It is the Commission's province to resolve such factual issues, and we cannot say that a finding that the claimant passed the test on his own would be against the manifest weight of the evidence.

More importantly, as the arbitrator recognized, the employer identified at least one sedentary position that was potentially within the claimant's work restrictions. According to Harris, the wood sorter/control panel operator position merely required the employee to push buttons on a control panel. Harris testified that this could be done with a single hand. Moreover, unlike writing, which typically requires the use of the dominant hand, pressing buttons can be done with either hand, even by someone who is not ambidextrous. Thus, it is likely that the claimant could have **[*33]** performed this position with his left hand without using his right arm or hand at all. In addition, Harris's testimony suggested that the wood sorter /control panel operator position was a legitimate, existing light-duty position available at one of the employer's facilities, not a **sham** position that was created or modified specifically for the claimant in order to avoid a finding that he is totally permanently disabled. This suggests that there was at least one type of regular, gainful employment that the claimant could have pursued notwithstanding his limitations. The claimant did not show that he was unable to do the work that this position required. Accordingly, he failed to prove by a preponderance of the evidence that he could not be employed in any branch of the labor market. See, *e.g.*, *Hallenbeck v. Industrial Comm'n*, 232 Ill. App. 3d 562, 569, 597 N.E.2d 797, 173 Ill. Dec. 823 (1992) ("The ability to perform sedentary work has been considered as a factor militating against a finding that one is permanently and totally disabled."); see also *Interlake, Inc. v. Industrial Comm'n*, 86 Ill. 2d 168, 178-79, 427 N.E.2d 103, 56 Ill. Dec. 23 (1981) (holding that claimant "ha[d] not carried the burden necessary to demonstrate his inability to return **[*34]** to gainful employment" under the odd-lot standard where the evidence showed that he was capable of performing some of the duties of his former position and where, "[n] otwithstanding his age and ninth-grade education, [claimant] made no showing that the *** work he could perform was unavailable").

The claimant argues that, even if he were capable of performing one of the positions offered by the employer, "it would not bar the finding of odd lot total disability" because "the [employer] clearly has the burden of showing that [the claimant] will be 'regularly employed in a well-known branch of the labor market'." We disagree. It is the *claimant's* burden to make the opposite showing, *i.e.*, to show by a preponderance of the evidence that "because of his age, skills, training, experience, education, and the extent of his injuries, he will *not* be regularly employed in a well-known branch of the labor market." (Emphasis added.) *City of Chicago*, 373 Ill. App. 3d at 1091; see also *Hallenbeck*, 232 Ill. App. 3d at 569 ("The employee bears the burden of proving each element of his case, including the extent and permanency of his injury.") The employer assumes the burden of showing that some such **[*35]** regular

employment is available only if the claimant first makes this initial showing. As noted above, the claimant never made this showing. Thus, the burden never shifted to the employer, and the Commission properly rejected the claimant's assertion of total permanent disability without requiring a showing from the employer.

We acknowledge, however, that the Commission could have provided a clearer and more thorough analysis in support of its decision. Moreover, the Commission's reliance on Dr. Lazar's opinion that the claimant was "capable of performing sedentary work" was misplaced. First, Dr. Lazar's opinion was conditional. He opined that the claimant would be capable of performing sedentary work *only if* his neuropathic pain was treated more aggressively with certain drugs. There is no evidence that the claimant was ever given such "aggressive" drug treatment or that such treatment was effective. Moreover, Dr. Lazar expressly noted that he did not render *any* opinion on the state of the claimant's shoulder and knee injuries because he was "not an orthopedic surgeon." Thus, Dr. Lazar's opinion did not take into account the work restrictions relating to the claimant's shoulder and **[*36]** knee that were imposed by the claimant's orthopedic surgeons. Moreover, Dr. Lazar is not a vocational expert, and he did not perform any analysis of the labor market in determining that the claimant could do sedentary work. For all these reasons, Dr. Lazar's opinion that the claimant might be able to do sedentary work if certain conditions were met is of little relevance. See, *e.g.*, *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 545, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007) (rejecting doctor's opinion that claimant was unable to perform any type of work where, *inter alia*, the doctor had not conducted a labor market survey or prescribed a FCE). In addition, the Commission improperly relied on the claimant's refusal of a sedentary position that the employer offered him in September 2006 during a time that Dr. Goodman had held the claimant off work.

Nevertheless, although we do not agree with all aspects of the Commission's analysis, "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, 829 N.E.2d 810, 293 Ill. Dec. 885 (2005). As noted above, there is sufficient **[*37]** 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" approach. Whether we would have reached the same conclusion if we were deciding the case in the first instance is immaterial. The Commission's decision was not against the manifest weight of the evidence. We therefore affirm.

CONCLUSION

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

Affirmed.

*2012 Ill. App. Unpub. LEXIS 953, **

BARBARA NADOR, Appellant, v. ILLINOIS **WORKERS' COMPENSATION** COMMISSION et al. (Hoyleton Youth and Family Services, Appellee).

No. 5-10-0409WC

APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT, **WORKERS' COMPENSATION** COMMISSION DIVISION

2012 Ill. App. Unpub. LEXIS 953; 2012 IL App (5th) 100409WU

April 26, 2012, Order Filed

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).

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Washington County. No. 09-MR-9. Honorable Dennis G. Hatch, Judge, Presiding.

DISPOSITION: Affirmed.

CORE TERMS: claimant, arbitrator, interview, vocational, job offer, opined, interviewed, skill, arbitration hearing, knee, disability, typing, disabled, employable, advertised, internally, resume, labor market, permanently, totally, temporary, turned down, rehabilitation, externally, volunteer, posted, log, total disability, evidence to support, manifest

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

OPINION BY: HUDSON

OPINION

ORDER

Held: Commission's award of permanent partial disability benefits in lieu of permanent total disability benefits is not against the manifest weight of the evidence. Claimant failed to establish that a reasonably stable labor market was not available to her where she turned down at least one legitimate job offer and she failed to diligently pursue other employment.

Claimant, Barbara Nador, appeals an order of the circuit court of Washington County which confirmed a decision of the Illinois **Workers' Compensation** Commission (Commission) awarding her permanent partial disability (PPD) benefits under section 8(d)(2) of the **Workers' Compensation** Act (Act) (820 ILCS 305/8(d)(2) (West 2004)) in lieu of a permanent total disability (PTD) award under section 8(f) of the Act (820 ILCS 305/8(f) (West 2004)). Claimant maintains she should have been found totally and permanently disabled because (1) she established that **[*2]** a reasonably stable labor market does not exist for her and (2) the only job offer she received was not legitimate. We affirm.

I. BACKGROUND

Respondent, Hoyleton Youth & Family Services, operates a resident home for troubled youth. Claimant was employed by respondent as a youth care coordinator. On October 15, 2005, claimant, then 43 years old, was playing basketball with a resident when she tripped and fell with both knees striking the floor. Claimant sought medical treatment for complaints of bilateral knee pain and was eventually diagnosed by Dr. Kevin Baumer with chondromalacia, a medial meniscal tear of the right knee, and contusions to both knees. By January 2006, following a course of conservative treatment, claimant's left knee was markedly better, but the right knee had not improved.

Thereafter, claimant sought a second opinion from Dr. George Paletta. Dr. Paletta diagnosed post-traumatic patellofemoral pain in both knees and a lateral collateral ligament strain in claimant's right knee. Dr. Paletta did not believe that surgery would benefit claimant, and he recommended continued conservative treatment. In March 2006, Dr. Paletta ordered a functional capacity examination (FCE). **[*3]** The FCE showed that claimant was capable of working at a sedentary physical-demand level. This was outside the parameters of the minimum work-demand level required of claimant's position as a youth care coordinator. In April 2006, Dr. Paletta concluded that claimant was at maximum medical improvement. He opined that claimant's work accident aggravated preexisting arthritic complaints of the knees and reiterated that surgery was unlikely to relieve claimant's symptoms. Dr. Paletta recommended weight loss, activity modification, non-impact exercise, and anti-inflammatory medication. He also indicated that claimant's condition was likely to wax and wane. Dr. Paletta imposed various permanent work restrictions, including sedentary work with no climbing, kneeling, or squatting and walking no more than 15 minutes out of every hour.

Respondent initially accommodated claimant's restrictions. Further, late in May 2006, respondent referred claimant to William Newman for a vocational evaluation. In his report, Newman noted that claimant has two bachelor degrees, one in psychology and one in sociology. Newman's report also indicated that in addition to claimant's work for respondent, her employment **[*4]** history included stints as a cook and as a case manager for disabled children and adults with the Cerebral Palsy Foundation. On or about June 12, 2006, respondent informed claimant that it did not have a position available within her permanent restrictions. In the meantime, claimant continued to work with Newman, who opined that given claimant's education and experience, she was employable. Early in 2007, respondent instructed Newman to close claimant's file. Respondent subsequently retained Liala Slaise of Blaine Rehabilitation Management to provide claimant with vocational services. Claimant first met with Slaise on January 18, 2007, just weeks before a hearing was held on claimant's application for adjustment of claim.

At the arbitration hearing, which was held on February 6, 2007, Slaise testified that she only

met with claimant twice prior to testifying. At the first meeting, Slaise interviewed claimant to develop a return-to-work plan. During the second meeting, Slaise modified claimant's resume and updated her profile with the Illinois Skills Match program. In addition, Slaise testified that she provided claimant with some job leads. Slaise opined that claimant was employable **[*5]** and that she could potentially find a job for claimant within three months. Slaise also indicated that claimant's job search efforts from June 2006 through January 2007 were consistent with the advice and vocational direction provided by Newman. Slaise testified that her next meeting with claimant was scheduled for February 8, 2007.

Claimant initially testified about her education and work history. She then testified regarding her job search efforts. Claimant related that between June 2006 and January 2007, she spent approximately 30 to 35 hours per week searching for a job. During that time, claimant obtained leads from Newman, local newspapers, and the internet. She also registered with the Illinois Skills Match program. Claimant maintained a detailed job log which revealed that she made a total of 789 "new" job contacts and 469 "old" job contacts. Claimant explained that a "new" contact consisted of an initial communication with a potential employer, *i.e.*, claimant sent out a resume or inquired about a position. Claimant categorized an "old" contact as a response from a potential employer she had previously contacted or a follow-up call or email to a potential employer from her. **[*6]** Claimant testified that of these contacts she received 14 face-to-face interviews, but no job offers. She further testified that her next meeting with Slaise was scheduled for February 8, 2007, and that she planned to continue looking for work.

Based on the foregoing testimony, the arbitrator determined that claimant's current condition of ill-being is causally related to the accident at work on October 15, 2005. The arbitrator awarded claimant 46-3/7 weeks of temporary total disability benefits and reasonable and necessary medical expenses. Further, the arbitrator found that claimant proved by a preponderance of the evidence that she fell into the "odd lot" category and that respondent failed to establish the availability of work to someone in claimant's position. As such, the arbitrator found claimant was entitled to PTD benefits for life under section 8(f) of the Act (820 ILCS 305/8(f) (West 2004)).

Respondent sought review of the arbitrator's decision, and the Commission affirmed on all issues except for nature and extent. The Commission concluded that the arbitrator's finding that claimant was permanently and totally disabled was "premature." The Commission was not convinced that **[*7]** a person of claimant's age, credentials, and experience could not find a job. The Commission acknowledged that claimant had been cooperative with her vocational experts. However, it noted that when the job market is soft, it is not unreasonable for someone to spend more than six months searching for employment. As such, the Commission remanded the case to the arbitrator so that claimant could continue her employment search with Slaise's assistance.

Following remand, a second arbitration hearing was held on August 29, 2008. Claimant testified that since the first arbitration hearing, she had not received any additional medical treatment and that her education, work experience, and restrictions remained unchanged. Claimant further testified that following remand, she began additional vocational rehabilitation on February 25, 2008, and spent an average of between 8 and 10 hours per day on her job search. Claimant testified that she worked with Slaise until June 12, 2008, when Slaise went on maternity leave. Thereafter, claimant worked with June Blaine. Claimant stated that she had face-to-face contact with a vocational expert every two weeks plus phone and internet contact an additional **[*8]** one to five times per week. Claimant's job search log reflected that between February 25, 2008, and August 29, 2008, she had 1,127 "new" contacts with potential employers and 660 "old" contacts. These contacts resulted in nine in-person interviews.

Claimant testified that at some point, Blaine presented her with six jobs from respondent. Claimant and Blaine determined that two of the positions were possibly within claimant's restrictions—a transitional housing case manager and a foster care case manager. Blaine later received information for a quality improvement assistance (QIA) position with respondent.

Claimant did not recall seeing the QIA position advertised in any newspaper or on the internet. Claimant stated that the position paid more than her previous position with respondent. Gayle Fisher and Jeremy Vasquez interviewed claimant for the QIA position on July 17, 2008. According to claimant, neither her physical restrictions, her vocational rehabilitation, nor her accommodations were mentioned during the interview until claimant brought them up. Claimant stated that she was offered the job, but rejected it. Claimant thought the QIA position was a "**sham**" job and that the decision **[*9]** to hire her was made prior to the interview. Since turning down the QIA position, claimant has continued to search for work, but has not been extended any other offers. According to claimant, the QIA position was the only job ever offered to her.

On cross-examination, claimant admitted that at the first arbitration hearing she indicated that she intended to keep searching for work following the end of the hearing. Claimant stated that she did in fact look for jobs in the newspaper between the end of the first arbitration hearing and January 2008, but she did not apply for any positions. She also testified that except for the nine interviews, none of the other job contacts she made after the first arbitration hearing were face to face.

Fisher testified that the respondent's protocol for hiring initially involves advertising a position internally. If an individual is hired internally, the position is not advertised externally. Fisher also testified that the QIA position was created in September 2007 and is a permanent position. The primary responsibilities of the QIA position are to take care of the foster care files and ensure that the files are kept in order. Fisher stated that the position **[*10]** is located at respondent's East St. Louis facility. Although the East St. Louis facility is a two-story building, the QIA position is confined to the first floor. Fisher stated that the individual who was initially hired for the QIA position resigned in April 2008. The position was then filled after being advertised internally. The second person to hold the position resigned in early to mid-July 2008. At that time, the position was again posted internally and the only internal application respondent received was from claimant. Following an interview, a job offer was made to claimant. After claimant declined the offer, the position was advertised externally in various newspapers. Interviews were conducted, and an individual was hired. Fisher denied that the decision to hire claimant was made prior to the interview.

Fisher also testified that she previously worked with claimant in 2005, when claimant was on light duty. Fisher recalled that during that time, claimant's tasks involved computer work, including working with spreadsheets. Fisher testified that this involved keyboarding. Fisher described the quality of claimant's work as "fine."

Vasquez testified that he works for respondent **[*11]** as the director of administrative services and that he is familiar with the QIA position. Vasquez stated that the QIA position is "indirectly" under his authority in that the position reports to Fisher and Fisher reports to him. Vasquez verified that when respondent has a job opening, the position is posted internally first. He stated that if there are not enough applicants after five days, the position is posted externally. Vasquez testified that the QIA position was posted internally and claimant was the only applicant. He and Fisher interviewed claimant and offered her the job the following day. After claimant turned down the position, it was advertised externally. Vasquez testified that the QIA position is a permanent, full-time job, and he also denied that the decision to hire claimant was made prior to the interview.

Slaise testified that shortly after the first arbitration hearing, claimant informed her that she would not be continuing with vocational rehabilitation. Slaise testified that the next time she had contact with claimant was on February 25, 2008, about one year later. At that time, Slaise inquired what steps, if any, claimant had taken to find work during the intervening **[*12]** year. Claimant responded that she had not looked for work at all during that time. Slaise opined that a one-year gap in a job search would raise flags with potential employers regarding one's motivation and interest in working and it would make it more difficult to find work. Slaise worked with claimant between February 25, 2008, and June 12, 2008, when she went on

maternity leave. During that time, Slaise and claimant met face to face on a biweekly basis and kept weekly contact by phone or email. Slaise recalled that it was sometimes difficult to reach claimant by telephone.

Slaise then testified regarding some of claimant's contacts with potential employers. She recalled that claimant interviewed for a position with Allsup, but was not offered the position. When Slaise asked claimant about the interview, claimant indicated that she was not interested in the position anyway because it involved telemarketing. Slaise told claimant she was mistaken as the position involved informing individuals about their Social Security options. Slaise also recalled that claimant was contacted by the American Red Cross. Claimant stated that she was not interested in that position because it was temporary. **[*13]** Slaise contacted the American Red Cross and was told that although the position was not temporary, it was part time. Slaise further recounted that claimant interviewed for a social services manager position with the Salvation Army. Although the position was outside of her restrictions, claimant was asked to interview for a volunteer position. Claimant declined because the position was unpaid. Slaise believed that the volunteer position would have been beneficial to claimant as it involved writing grants, a skill that would have helped claimant find a job. Slaise also testified that claimant was eligible to work as a substitute teacher. As such, in May 2008, she and claimant discussed this possibility. Initially, claimant indicated that she was not interested. However, after speaking with her attorney, claimant agreed to pursue this avenue.

Slaise questioned the quality of the jobs for which claimant applied. She testified that claimant was not realistic in that she applied to positions for which she was not qualified. Moreover, Slaise stated that claimant was only somewhat cooperative regarding the instructions and suggestions Slaise provided to her. For instance, claimant did not always **[*14]** keep Slaise abreast of her interviews. Further, Slaise opined that presenting oneself in person more often to potential employers makes a better impression. Yet, claimant did not heed this advice. In addition, Slaise testified that she corrected some errors on claimant's resume and cover letters, yet claimant continued to use the uncorrected documents. Ultimately, Slaise opined that given claimant's educational and work background, she is employable even with her restrictions. Nevertheless, Slaise was unsure whether further job searches would be fruitful given claimant's lack of motivation and her failure to focus on realistic opportunities.

Blaine testified that after Slaise went on maternity leave, claimant began working with her. Blaine met with claimant in person every two weeks. At other times, she had contact with claimant by telephone and email. Blaine noted that it was difficult to reach claimant in the afternoon, so she would try to contact her in the morning.

Blaine testified that while she was working with claimant, she became aware of potential openings with respondent. Blaine reviewed the positions to determine whether they were within claimant's physical restrictions and **[*15]** her educational and work backgrounds. Blaine testified that when she learned of the QIA position, claimant's attorney asked her to obtain more information regarding the location of the position, the duties of the job, and whether any climbing was involved. Blaine did so, and claimant interviewed for the position. Claimant's attorney later told Blaine that claimant would be turning down the job. Subsequently, Blaine had several meetings with claimant, but other than indicating that the QIA position was not "legitimate," claimant refused to discuss her reasons for not accepting the position. Blaine opined that based on her work as a vocational counselor, the QIA job was legitimate.

Blaine also testified about other job opportunities presented to claimant. Claimant told Blaine that she wanted to utilize her degrees and that she wanted to help people. To this end, Blaine provided claimant with a lead for a position as an advocacy specialist with the State of Missouri. Blaine stated that the position required a typing test. Claimant followed up and told Blaine that there was a 50-words-per-minute requirement for the position, although Blaine was never able to verify this information. Blaine **[*16]** stated that claimant took the typing test and told her that she had scored zero words per minute. Blaine testified that prior to the typing test, she was not aware that claimant was unable to use a keyboard, especially since claimant's resume

indicated that she had some computer skills, including working with spreadsheets. Blaine also testified that claimant applied for a qualified mental retardation professional (QMRP) position with the Epilepsy Foundation of Southwestern Illinois. According to Blaine, claimant was qualified for the position and it was within her physical restrictions. The organization tried to contact claimant numerous times to schedule an interview, but was unable to reach claimant. Blaine encouraged claimant to call the organization, but that was never done. As a result, claimant was never considered for the position.

Blaine also testified that she reviewed the list of prospective job leads that claimant prepared. Blaine noted that all of claimant's job logs were typed. Blaine did not believe that claimant was eligible for a lot of the jobs because they were clerical-related, receptionist-type positions and claimant had verified that her keyboarding speed was zero **[*17]** words per minute. Blaine informed claimant not to spend time applying for jobs that require typing unless she intended to improve her typing skills. Blaine also told claimant that when she applied for a position that has been posted on the internet to pull the job description to determine if she was qualified for the position. Ultimately, Blaine opined that claimant was employable given her educational and work background and her restrictions. Blaine further opined that claimant had yet to find a position because she was not "focusing on the right things." In particular, Blains stressed that claimant was applying for inappropriate jobs and failing to adequately follow up.

Claimant testified in rebuttal that the American Red Cross contacted her about a position that was temporary and part time. Claimant testified that she declined to go any further with the process because she thought she was supposed to be looking for full-time employment. Claimant further testified that the position with the Salvation Army was a "dual" position involving office management and social work. Claimant testified that the position involved grant writing, with which she had no experience. In addition, claimant **[*18]** testified that she did not have much in the way of office skills and the position involved carrying groceries up and down stairs. Claimant admitted that she was asked to volunteer in the future. However, she denied that a stint as a volunteer would allow her to learn how to write grants. Finally, claimant testified that she followed up with the Epilepsy Foundation, but was unable to reach anyone.

Based on the foregoing testimony, the arbitrator concluded that claimant did not fall into the category of odd-lot permanent total disability. The arbitrator questioned the legitimacy and diligence of claimant's job search and found that the evidence showed that claimant does not want to work. She noted that Slaise and Blaine testified that claimant was difficult to contact and that claimant failed to promptly respond to at least one prospective job. The arbitrator further noted that despite the fact that claimant had two college degrees and computer skills, she was unable to type. The arbitrator found that claimant's alleged inability to type was contradicted by the voluminous typed job search logs that were introduced into evidence and which were prepared by claimant. The arbitrator credited **[*19]** the testimony of Slaise and Blaine that claimant was employable. The arbitrator concluded that claimant was "resistant" to vocational assistance and that she had been conducting a "misdirected" job search. The arbitrator found that claimant created obstacles that made pursuing certain jobs difficult, if not impossible. In addition, the arbitrator pointed out that claimant turned down a job offer from respondent for a position that paid more than her former position. The arbitrator determined that other than claimant's personal belief that the QIA position was not legitimate, there was no evidence to support that notion. The arbitrator awarded claimant 150 weeks of PPD benefits, representing 30% of the person as a whole. The Commission affirmed and adopted the decision of the arbitrator and the circuit court of Washington County confirmed. This appeal ensued.

II. ANALYSIS

On appeal, respondent argues that the Commission should have awarded her PTD benefits under section 8(f) of the Act (820 ILCS 305/8(f) (West 2004)) instead of PPD benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2004)). An employee is permanently and totally disabled when he is unable to make some **[*20]** contribution to industry sufficient to justify payment of wages. *Interlake Steel Corp. v. Industrial Comm'n*, 60 Ill. 2d 255, 259,

326 N.E.2d 744 (1975). However, the employee need not be reduced to total physical incapacity before an award of PTD benefits may be granted. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 69 Ill. Dec. 407 (1983). Rather, the employee must show that he is, for all practical purposes, unemployable, *i.e.*, he is unable to perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable labor market for them. *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534, 668 N.E.2d 21, 217 Ill. Dec. 836 (1996). "The focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability, and 'if an employee is qualified for and capable of obtaining gainful employment without seriously endangering [his] health or life, such employee is not totally and permanently disabled.' " *Alano*, 282 Ill. App. 3d at 534 (quoting *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 362, 376 N.E.2d 206, 17 Ill. Dec. 207 (1978)).

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 **[*21]** a claim of total disability, the burden is on the employee to establish by a preponderance of the evidence that he falls into the "odd lot" category, that is, one who, although not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007). An employee satisfies this burden by showing either (1) a diligent but unsuccessful attempt to find work or (2) that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. *Westin Hotel*, 372 Ill. App. 3d at 544. Once the employee establishes that he falls into the odd-lot category, the burden shifts to the employer to prove that some type of regular and continuous employment is available to the employee. *City of Chicago v. Illinois* ***Workers' Compensation*** *Comm'n*, 373 Ill. App. 3d 1080, 1091, 871 N.E.2d 765, 313 Ill. Dec. 38 (2007). Whether the employee has met his burden of establishing that he falls into the odd-lot category and whether the employer has shown that some type of regular and consistent employment is available to the employee are questions of fact **[*22]** for the Commission, and its decisions on these issues will not be disturbed on appeal unless they are against the manifest weight of the evidence. *City of Chicago*, 373 Ill. App. 3d at 1092-93; *Alano*, 282 Ill. App. 3d at 538 (Colwell, J., specially concurring). "Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence." *Ameritech Services, Inc. v. Illinois* ***Workers' Compensation*** *Comm'n*, 389 Ill. App. 3d 191, 203, 904 N.E.2d 1122, 328 Ill. Dec. 612 (2009). Rather, a decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Hosteny v. Illinois* ***Workers' Compensation*** *Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009).

In this case, there was no evidence that claimant's disability was so limiting in nature to render her obviously unemployable. Similarly, we find no medical evidence to support a claim of total disability. See *Hallenbeck v. Industrial Comm'n*, 232 Ill. App. 3d 562, 569, 597 N.E.2d 797, 173 Ill. Dec. 823 (1992) (noting that the ability to perform sedentary work has been considered as a factor militating against a finding that one is permanently and totally disabled). As such, **[*23]** claimant attempted to satisfy her burden of proving that she fell into the "odd lot" category by presenting evidence of a diligent but unsuccessful job search. To this end, claimant testified that between June 2006 and January 2007, she initiated 789 job contacts, which resulted in 14 face-to-face interviews, but no job offers. In addition, claimant testified that between February 2008 and August 2008, she initiated 1,127 job contacts, resulting in nine in-person interviews, and one job offer from respondent. Claimant insists that when the only job offer over 14 months and 1,916 contacts is a position with respondent, a reasonably stable labor market does not exist for her. Claimant further insists that respondent only offered her a job to avoid a section 8(f) award and therefore the QIA position was not legitimate. We disagree.

The Commission, in adopting the decision of the arbitrator, rejected claimant's request for PTD benefits. The Commission questioned the legitimacy and diligence of claimant's job search,

ultimately finding that claimant was "resistant" to vocational assistance and that she had been conducting a "misdirected" job search. The evidence of record supports these **[*24]** findings. All three vocational experts who worked with claimant testified that despite her physical restrictions, claimant was employable given her education and work experience. On remand, both Slaise's and Blaine's testimony suggest that claimant's job search was unsuccessful because claimant was not motivated and did not focus on realistic opportunities. Slaise testified, for instance, that claimant did not heed advice to present herself in person more often to potential employers, as this makes a better impression. Slaise also noted that she corrected errors on claimant's resume and cover letters, yet claimant continued to use the uncorrected documents when inquiring about jobs. In addition, there was evidence that claimant often sent her resume to positions for which she was not qualified. We also note that shortly after the first arbitration hearing, claimant informed Slaise that she was not going to continue with vocational rehabilitation despite her testimony to the contrary at the initial hearing. Slaise noted that a one-year gap in a job search would raise flags with potential employers regarding one's motivation and interest in working and that it would make it more difficult **[*25]** to find a job.

Moreover, the evidence also supports the Commission's finding that when claimant was interviewed or an employer requested more information from her, she often created obstacles that made pursuing those jobs more difficult. For instance, Slaise and Blaine indicated that claimant was not easy to reach and that, as a result, claimant was not considered for a position with the Epilepsy Foundation. Further, claimant was required to take a typing test for a position as an advocacy specialist with the State of Missouri. Claimant scored zero words per minute on the typing test despite the fact that she typed her job search logs and possesses two college degrees and computer skills. Claimant also expressed disinterest in many of the jobs for which she interviewed. Claimant indicated that she would not have accepted the Allsup position because, she opined, it involved telemarketing. Claimant stated that she was not interested in a position with the American Red Cross because it was supposedly temporary and part time. Claimant declined an offer to volunteer for the Salvation Army despite Slaise's opinion that the position would have improved claimant's job skills.

The Commission **[*26]** further noted that claimant's job search bore fruit in that she was in fact offered a job—the QIA position with respondent. The Commission rejected the notion that the QIA position was a **sham** to avoid a section 8(f) award, noting that there was no evidence to support this contention other than claimant's personal beliefs. Indeed, Blaine opined that based on her work as a vocational counselor, she believed the QIA position was legitimate. Further, respondent presented evidence that the QIA position was a permanent, full-time position originally created in September 2007 and that prior to the job being offered to claimant, it had been held by two other employees. Respondent also presented evidence that after claimant turned down respondent's job offer, the QIA position was advertised externally and an individual was hired for the position.

Claimant now questions whether the QIA position fell within her permanent restrictions. However, there is no indication that claimant turned down the position because it was outside of her physical capabilities. In fact, claimant refused to tell Blaine why she rejected the position, other than her belief that it was not legitimate. Moreover, Blaine **[*27]** testified that she reviewed the job openings offered by respondent to determine whether they were within claimant's physical restrictions and her educational and work backgrounds. Blaine also testified that when she learned of the QIA position, claimant's attorney asked her to obtain more information regarding the location of the position, the duties of the job, and whether any climbing was involved. Blaine complied with this request, and claimant interviewed for the position.

Claimant also insists that the QIA position was not legitimate as it was offered only 19 days before her case was originally scheduled to be heard on remand, she was not extended an opportunity to interview for the QIA position when it opened up in April 2008, and she was the only person interviewed for the position. The timing of the job offer is certainly relevant to a determination of the legitimacy of the job offer as are the other factors cited by claimant. See

Reliance Elevator Co. v. Industrial Comm'n, 309 Ill. App. 3d 987, 993, 723 N.E.2d 326, 243 Ill. Dec. 294 (1999) (holding that job offer was a **sham** designed to avoid liability where it was not made until after the initial arbitration hearing, the rate of compensation was far higher than **[*28]** was economically justifiable, and prior to job offer at issue the respondent repeatedly refused to offer the claimant a position despite the claimant's repeated requests for work). However, the Commission was certainly aware of the timing of the job offer and the other factors cited by claimant, but did not find them determinative of the legitimacy of the QIA position. We are mindful that it is within the province of the Commission to determine the credibility of the evidence and determine the weight to assign thereto. *Reliance Elevator Co.*, 309 Ill. App. 3d at 993. Given the other testimony suggesting that the QIA position was legitimate, we decline to overturn the Commission's finding on this basis.

III. CONCLUSION

In sum, we cannot say that a conclusion opposite to the one reached by the Commission is clearly apparent. Accordingly, we affirm the judgment of the circuit court of Washington County, which confirmed the decision of the Commission awarding claimant PPD benefits.

Affirmed.