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Carla Bender
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2021 IL App (4th) 200488WC-U
No. 4-20-0488WC
Order filed July 21, 2021

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CITY WATER, LIGHT & POWER,	)	Appeal from the Circuit Court
	)	of Sangamon County.
Appellant and Cross-Appellee,	)	
	)	
v.	)	Nos. 19-MR-5
	)	19-MR-24
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION, *et al*.	)	
	)	Honorable
(William McCarthy, Appellee and	)	Raylene Grischow,
Cross-Appellant).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The Illinois Workers' Compensation Commission's finding that claimant's current condition of ill-being is not causally related to a second work accident occurring on November 3, 2014, was not against the manifest weight of the evidence; (2) The Illinois Workers' Compensation Commission's finding that claimant incurred $151,412.30 in reasonable and necessary medical expenses was not against the manifest weight of the evidence; (3) the Illinois Workers' Compensation Commission's decision to reduce claimant's temporary total disability benefits on the ground that he voluntarily removed himself from the labor market was against the manifest weight of the evidence; and (4) the Illinois Workers' Compensation Commission's finding that claimant is entitled to

permanent total disability benefits under an odd-lot theory was not against the manifest weight of the evidence.

¶ 2 Claimant, William McCarthy, was employed by respondent, City Water, Light & Power. Claimant sought benefits from respondent pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2012)) for injuries he allegedly sustained to his right shoulder on February 3, 2012 (case No. 14 WC 35167) and November 3, 2014 (case No. 14 WC 39420). The cases were consolidated for hearing before an arbitrator. The arbitrator found that claimant sustained accidental injuries arising out of and occurring in the course of his employment with respondent on both accident dates. The arbitrator further found that claimant's current condition of ill-being is causally related to the February 3, 2012, accident, but not to the November 3, 2014, accident. The arbitrator awarded claimant 57-4/7 weeks of temporary total disability (TTD) benefits (820 ILCS 305/8(a) (West 2012)) and $151,412.30 for reasonable and necessary medical expenses (820 ILCS 305/8(a) (West 2012)) subject to a credit pursuant to section 8(j) of the Act (820 ILCS 305/8(j) (West 2012)). In addition, the arbitrator awarded claimant lifetime permanent total disability (PTD) benefits based on the "odd-lot" theory (820 ILCS 305/8(f) (West 2012)).

¶ 3 Both parties sought review of the arbitrator's decision by the Illinois Workers' Compensation Commission (Commission). With one commissioner dissenting, the Commission reduced the period of TTD to 33-5/7 weeks, but otherwise affirmed and adopted the decision of the arbitrator. Thereafter, both parties sought judicial review of the Commission's decision in the circuit court of Sangamon County. On October 30, 2019, after consolidating the appeals, the trial court issued an order stating that it agreed with the Commission's findings of fact and law. Both parties then sought review in this court. In an order entered on September 18, 2020, a majority of this court found that although the trial court's underlying order included an analysis, it did not set forth the resulting disposition of the two cases as required by section 19(f)(2) of the Act (820 ILCS

305/19(f)(2) (West 2018)). *McCarthy v. Illinois Workers' Compensation Comm'n*, Nos. 4-19-0836WC & 4-19-0840WC cons. (2020) (unpublished summary order under Illinois Supreme Court Rule 23(c)). As such, we dismissed the appeals for lack of subject-matter jurisdiction and remanded the matter to the trial court with directions to enter a final disposition in accordance with section 19(f)(2) of the Act.

¶ 4 On remand, the circuit court, in an order dated September 24, 2020, confirmed the decision of the Commission in its entirety. On October 6, 2020, respondent filed a notice of appeal. On October 14, 2020, claimant filed a notice of cross-appeal. On appeal, respondent challenges the Commission's decision with respect to medical expenses, TTD benefits, and PTD benefits. In his cross-appeal, claimant challenges the Commission's finding that his current condition of ill-being is not causally related to the November 3, 2014, accident and its decision to reduce the period of TTD benefits. For the reasons set forth below, we find that the Commission erred in reducing the period of claimant's TTD benefits, but otherwise conclude that the Commission's findings were not against the manifest weight of the evidence. Accordingly, we affirm in part and reverse in part the judgment of the circuit court, reverse in part the decision of the Commission, and remand this case to the Commission with directions to reinstate the arbitrator's award of TTD benefits.

¶ 5 I. BACKGROUND

¶ 6 On or about October 10, 2014, claimant filed an application for adjustment of claim alleging injuries to his right shoulder and body as a whole on February 3, 2012, while in the employ of respondent (case No. 14 WC 35167). Specifically, claimant alleged that he sustained a rotator-cuff tear while pushing a log onto a stack above his head. On or about November 12, 2014, claimant filed a second application for adjustment of claim alleging injuries to his right shoulder and body as a whole on November 3, 2014, also while in the employ of respondent (case No. 14

WC 39420). With respect to the second accident date, claimant alleged that he sustained an aggravation to a preexisting degenerative shoulder condition when he was struck in the shoulder by another employee. The cases were consolidated, and an arbitration hearing was held on October 25, 2017, before arbitrator Douglas McCarthy. The following factual recitation is taken from the evidence adduced at the arbitration hearing.

¶ 7 Claimant testified that prior to the first accident date, he had had surgeries on his right shoulder in 1991, 1992, and 1993. The surgeries were necessitated by an injury he sustained while working for respondent. Following the surgeries, claimant returned to work for respondent without restrictions. Upon his return, claimant initially worked as a storeroom employee. He then worked as a storeroom foreman until 2007, when he became a "working foreman" in respondent's lake-services division. After returning to work, claimant did not have any residual issues with the right shoulder, and he did not seek any treatment for his shoulder between 1993 and February 2012.

¶ 8 Claimant testified that as a working foreman for the lake-services division, his duties involved supervising employees, mowing, cutting trees, picking up garbage, and cleaning lakes from a boat. Claimant obtained his work assignments from his supervisor. With regard to the initial accident, claimant testified that on February 3, 2012, he was instructed to load a dump truck with logs and transport them to a club on the lake. As claimant lifted one of the logs above his head, he felt a pop in his shoulder. Claimant immediately experienced pain and numbness radiating down his right arm to his hand. Claimant stopped working, notified his supervisor, and went to the emergency room. At the time of the accident, claimant was 52 years of age.

¶ 9 In the emergency room, claimant complained of pain in his right shoulder, tingling in his right ring and small fingers, and an inability to lift his arm above his shoulder. X rays were negative. The physician diagnosed a shoulder sprain. He instructed claimant to use a shoulder

immobilizer for two days and prescribed pain medication.

¶ 10 On February 6, 2012, claimant sought additional treatment from Jennifer Frank, an advanced practice nurse at Midwest Occupational Health Associates (MOHA). At that time, claimant reported that his shoulder had not improved since seeking treatment in the emergency room. Upon examination, Frank noted limited range of motion of the right shoulder and decreased strength in the right upper extremity. Frank diagnosed a right shoulder strain. She prescribed Flexeril on an as-needed basis and a tapering dose of Prednisone. Frank instructed claimant not to use his right arm, to refrain from overhead activities, and to return in four days.

¶ 11 Claimant returned to MOHA on February 10, 2012. He reported a decrease in pain and some improvement in his range of motion, but still had pain in the shoulder and biceps area with certain movements. Claimant was advised to finish his Prednisone taper, take Norco as needed, continue using Flexeril, and work within the current restrictions. On February 14, 2012, claimant returned to MOHA and reported that his condition had not improved. An MRI was performed on February 16, 2012, and claimant was referred to Dr. Christopher Wottowa.

¶ 12 Dr. Wottowa saw claimant on February 22, 2012. At that time, Dr. Wottowa recorded a history of claimant's employment, work accident, pre-accident surgeries, and more recent treatment. Claimant reported pain over the anterior aspect of the right shoulder, worse with moving away from his body. Dr. Wottowa noted that despite guarding the shoulder, claimant demonstrated a full range of motion. Dr. Wottowa reviewed the MRI and concluded that claimant had preexisting problems with his shoulder, including acromioclavicular joint arthrosis, mild glenohumeral joint arthrosis, and chronic tendinosis of the supraspinatus. Dr. Wottowa opined that the accident of February 3, 2012, exacerbated these conditions. Dr. Wottowa administered an injection to the shoulder and ordered physical therapy. Claimant was authorized to work light duty with no lifting

more than five pounds using his right upper extremity. On February 29, 2012, claimant returned to Dr. Wottowa's office. He reported no relief from the injection. Claimant also reported that since starting therapy and a home-exercise program, he began to experience "excruciating" pain in his right shoulder. Claimant was advised to continue with physical therapy, medications, and light-duty work. Claimant was also given Tramadol for pain and to help him sleep.

¶ 13 Claimant completed his course of physical therapy on April 2, 2012. Claimant was noted to have demonstrated some gains in range of motion and strength, but his pain levels remained about the same. On April 4, 2012, claimant saw Dr. Wottowa. Claimant reported pain over the anterior aspect of the shoulder and acromioclavicular joint. Claimant noted that he has been able to work with restrictions and had even done some tractor driving. Dr. Wottowa's impression was acromioclavicular joint arthrosis and rotator cuff tendinosis. Dr. Wottowa noted that claimant had been prescribed Plavix by his cardiologist and that made it difficult to recommend surgery due to the chance of bleeding. Dr. Wottowa administered an injection in the subacromial space and acromioclavicular joint on the right side.

¶ 14 On May 16, 2012, claimant told Dr. Wottowa that the injection helped his pain. Claimant was 30% of normal before the shot and 70 to 75% normal the day of the visit. Dr. Wottowa authorized claimant to "work as tolerated with no restrictions for about a month." If, after a month, claimant reported that he was doing "reasonable," Dr. Wottowa would give him "a full release and call him at MMI [maximum medical improvement]."

¶ 15 Claimant returned to Dr. Wottowa on June 20, 2012. At that time, Dr. Wottowa documented that claimant was "working full duty, which is a distinction we make only for work, because in reality, he is able to do his job and modify his job as he needs to, so he is not actually doing all of his normal activities, we just do not have him on any restrictions, and he tends to

restrict himself and he is able to do this." Dr. Wottowa noted that the relief provided by the second injection had tapered off. Dr. Wottowa diagnosed right shoulder pain with acromioclavicular joint arthritis and impingement syndrome. He administered a third injection and authorized claimant to continue working. Dr. Wottowa advised, however, that if claimant's discomfort continued to a significant degree, he "may choose to do something surgical."

¶ 16 On August 22, 2012, claimant saw Dr. Wottowa. He reported continued right shoulder pain over the acromioclavicular joint. On examination, claimant demonstrated nearly full range of motion but with guarding over the shoulder, crepitation, and impingement signs. Dr. Wottowa stated that it had "been [his] impression through most of [claimant's] treatment that it would be unlikely that [he] would be able to successfully treat [claimant] conservatively." Dr. Wottowa recommended a shoulder arthroscopy to evaluate the biceps tendon, labrum, and rotator cuff. Dr. Wottowa reiterated that claimant's symptoms were part of a "degenerative process that w[ere] exacerbated by his activities at work." Thus, Dr. Wottowa opined that claimant's condition was work related.

¶ 17 On November 13, 2012, after receiving cardiovascular clearance and workers' compensation approval, Dr. Wottowa performed a right shoulder arthroscopy with subacromial decompression, distal clavicle resection, and rotator cuff repair. The post-operative diagnosis was right shoulder pain with subacromial impingement syndrome, acromioclavicular joint arthrosis, and high-grade anterior partial-thickness rotator-cuff tear.

¶ 18 Two weeks after surgery, Dr. Wottowa ordered physical therapy and released claimant to light-duty, desk work only, with no use of the right hand. In the weeks that followed, Dr. Wottowa noted that claimant had less pain doing activities at the waist level but still had discomfort when reaching his arm away from the body. Dr. Wottowa also noted claimant was having difficulty in

physical therapy with pain over the anterior portion of his shoulder radiating down to his biceps. By January 2013, Dr. Wottowa authorized claimant to engage in light-duty work with a five-pound lifting restriction and to drive a small pick-up truck.

¶ 19 Thereafter, claimant continued to complain of severe pain over the lateral aspect of the arm and in the biceps region, especially when reaching his arm away from the body. In February 2013, Dr. Wottowa diagnosed a "bit of a frozen shoulder." He administered a fourth steroid injection and advised claimant to continue light duty and physical therapy. At an appointment in March 2013, claimant reported that the fourth injection did not provide any relief. At that time, Dr. Wottowa authorized claimant to drive a truck and tractor at work. He also authorized claimant to lift up to 20 pounds to waist level, but prohibited any overhead lifting. By May 2013, claimant reported that his shoulder was feeling better and his motion was improving, but his biceps bothered him. Dr. Wottowa told claimant to return in six weeks for further assessment and possibly a functional capacity evaluation (FCE) to determine fitness for duty.

¶ 20 On June 19, 2013, claimant returned to Dr. Wottowa complaining of continued pain over the biceps region of his right shoulder. Dr. Wottowa administered an injection to the area. At his subsequent appointment on July 17, 2013, claimant reported that the injection provided only a few hours of relief. Dr. Wottowa recommended rescoping the shoulder and a biceps tenotomy. Dr. Wottowa felt the surgery was medically necessary.

¶ 21 On August 27, 2013, Dr. Wottowa performed a right shoulder arthroscopy, biceps tenotomy, and revision rotator cuff repair. During the procedure, Dr. Wottowa noted marked fraying of the biceps tendon with lateral tearing and splitting all the way to its insertion into the glenoid, a marked change since the previous surgery. Dr. Wottowa also noted another tear of the longitudinal split of the supraspinatus, which he sutured. The postoperative diagnosis was

persistent right shoulder pain after rotator cuff repair plus new rotator cuff tear and significant biceps tendinosis. Dr. Wottowa removed claimant from work for four weeks and prescribed physical therapy. Claimant testified that the second surgery provided no relief.

¶ 22 On October 7, 2013, claimant told Dr. Wottowa that he was experiencing "severe pain deep inside his shoulder" when he holds his arm with his elbow flexed and flexes in the plane of the scapula. Despite the pain, Dr. Wottowa's examination revealed full passive range of motion and excellent strength. Dr. Wottowa expressed concern about the pain and continued claimant's work restrictions. By November 18, 2013, claimant reported some improvement, but still had pain over the anterior aspect of his right arm. Dr. Wottowa conceded that the pain the previous surgery was intended to correct was still present. Dr. Wottowa authorized claimant to return to work with a 25-pound lifting restriction and no chainsaw use. Dr. Wottowa also allowed claimant to drive a snowplow at work. Dr. Wottowa ordered an MRI arthrogram of the right shoulder, which was performed on January 10, 2014. That same date, claimant received his fifth injection to the right shoulder. The fifth injection provided claimant no relief.

¶ 23 On January 13, 2014, Dr. Wottowa noted that the MRI showed a persistent longitudinal tear of the rotator cuff which he had previously repaired. Dr. Wottowa advised claimant he had three options: (1) live with the condition; (2) undergo a mini open rotator cuff repair; or (3) consult another surgeon. Dr. Wottowa recommended the second option as he felt the tear was repairable. Claimant agreed, and on March 18, 2014, Dr. Wottowa performed a right shoulder arthroscopy with open rotator cuff repair. Claimant reported no improvement from the third surgery.

¶ 24 On April 1, 2014, claimant returned to Dr. Wottowa's office and was examined by David Purves, a certified physician's assistant. Purves documented that claimant underwent surgery to repair a "longitudinal retear." Claimant was released to desk work only with no use of the right

upper extremity and ordered to begin therapy consisting of gentle active and passive range of motion exercises. On April 30, 2014, Dr. Wottowa documented that claimant was "doing quite well." Claimant reported that his shoulder pain had improved, although he still had limited strength and range of motion. Dr. Wottowa authorized claimant to continue his employment, limited to desk work and driving a power steering vehicle. Dr. Wottowa also prescribed additional therapy.

¶ 25 On June 4, 2014, Dr. Wottowa noted that claimant had "done everything he was supposed to do," but the pain he had before surgery had returned. Specifically, claimant reported pain in the anterior aspect of the right shoulder when he brought his arm forward with his elbow flexed. Dr. Wottowa recommended continued therapy. In addition, Dr. Wottowa administered an injection to the biceps tendon remnant, which provided some relief while claimant was in the office. Dr. Wottowa also informed claimant that his rotator cuff is "deficient" and that individuals with chronic rotator-cuff tears can develop rotator-cuff-tear arthritis, eventually needing a reverse total shoulder arthroplasty. Dr. Wottowa added, however, that he and claimant "talked about this procedure only in the most abstract terms, because there is nobody in their right mind that would recommend [the surgery] for [claimant] where he is right now given the early stage of recovery and his very young age. It is something to think about for the future."

¶ 26 On July 16, 2014, claimant returned to Dr. Wottowa. He reported continued pain in the anterior aspect of the right shoulder. Upon examination, claimant demonstrated full passive range of motion, but, actively in the impingement zone, he had crepitation and grinding in his shoulder. At Dr. Wottowa's request, a two-day FCE was performed on September 9, 2014.

¶ 27 On September 17, 2014, claimant met with Dr. Wottowa. At that time, claimant continued to experience "the same discomfort" over the anterior aspect of the right shoulder with overhead lifting and reaching away from his body. Claimant also demonstrated discomfort with his arms in

the forwardly flexed position, especially when working from waist level to above-head level. Dr. Wottowa noted that the FCE identified significant limitations with claimant lifting his right upper extremity on a consistent basis from waist level and above. Dr. Wottowa declared claimant at MMI and released him to work with permanent restrictions of no lifting over 10 pounds above his head on an occasional basis and a general 20-pound lifting restriction for all other lifting with his right upper extremity. Dr. Wottowa also authorized claimant to drive a snowplow and mow using a zero-turn mower. Dr. Wottowa reviewed claimant's job description and noted that it required pushing, pulling, and lifting on a regular basis, which claimant could not do consistently with a weight of more than 20 pounds.

¶ 28 Claimant returned to work, and respondent accommodated his restrictions. On November 3, 2014, claimant attended a safety meeting at work. During the meeting, a coworker came up behind claimant and slapped his right shoulder hard in a greeting. Claimant completed an accident report at work and returned to Dr. Wottowa on November 17, 2014. Claimant told Dr. Wottowa that since the November 3, 2014, incident, he has been in "absolute agony" and unable to sleep. Dr. Wottowa noted that most of claimant's pain was in the musculature about the neck and the trapezius area. Dr. Wottowa prescribed Elavil, a topical cream, ice, and ibuprofen. Dr. Wottowa suggested holding off physical therapy for two weeks to allow the shoulder to "cool down."

¶ 29 When claimant returned to Dr. Wottowa on December 1, 2014, he reported that his shoulder was "worse," he was "miserable on a daily basis," and he could not lift his arm away from his body with any significant strength. Upon examination, Dr. Wottowa noted that claimant had pseudo paralysis and discomfort in the shoulder area. An X ray of the shoulder demonstrated mild to moderate degenerative changes to the glenohumeral joint and findings consistent with previous rotator cuff repairs and a previous acromioplasty. Dr. Wottowa felt that claimant's main

problem was "a rotator cuff deficient right shoulder." He stated that claimant had "never healed the supraspinatus and rotator [] lesion." Dr. Wottowa did not think another surgery would help claimant unless it was a reverse shoulder arthroplasty. However, Dr. Wottowa felt claimant was too young for such a procedure and that claimant should "wait longer and work with what he has." Claimant responded that waiting was "absolutely not possible because [his] right shoulder is killing him." Dr. Wottowa referred claimant to Dr. Mark Greatting, to "see if he agrees *** that it would be a reasonable consideration to proceed with a reverse total shoulder arthroplasty."

¶ 30 Dr. Greatting examined claimant on December 18, 2014. Claimant indicated that his injury occurred three years prior when throwing a log in the back of a truck. Upon examination, Dr. Greatting noted that claimant had "significant pain" with active motion of his right shoulder and that when claimant forward flexed his shoulder, it appeared that his humeral head was very prominent anteriorly. Passive range of motion of the shoulder caused significant pain, and manual muscle testing demonstrated "significant weakness and pain." Dr. Greatting felt claimant had signs of a "recurrent rotator cuff tear." Dr. Greatting did not believe that additional rotator cuff surgery would be helpful. Dr. Greatting stated that he does not typically consider a reverse shoulder arthroplasty until someone is at least 65 years of age, so the procedure "would be much easier or reasonable to consider" if claimant were older. Nevertheless, he opined that, if successful, a reverse shoulder arthroplasty would result in a significant improvement of claimant's pain and range of motion. Ultimately, Dr. Greatting opined that the reverse shoulder arthroscopy was "a reasonable thing to consider," and he referred claimant back to Dr. Wottowa.

¶ 31 Claimant returned to Dr. Wottowa on January 7, 2015. At that time, claimant told Dr. Wottowa that his pain was "severe," especially when he moved his right arm away from his body. Claimant further reported discomfort sleeping at night. Dr. Wottowa noted that Dr. Greatting's

recommendation was "about the same" as his, that is that claimant should "live with the pain until he is miserable and then *** when he is older consider a reverse total shoulder arthroplasty." Claimant wanted to proceed with the surgery, telling Dr. Wottowa that he was "to the point *** where he really cannot live with the discomfort the way it is." Claimant asked Dr. Wottowa whether his condition "was related to his previous workman's comp claim" with respondent. Dr. Wottowa responded in the affirmative, stating "of course yes because this is a continuation of the problem from his rotator cuff injury to the right shoulder."

¶ 32 On March 30, 2015, respondent sent claimant for an independent medical examination with Dr. Brian Cole. Dr. Cole reviewed claimant's medical records, interviewed claimant, conducted a physical examination, and authored a report of his findings. Dr. Cole did not observe any evidence of pseudo paralysis or drop-arm sign indicative of any full thickness rotator cuff pathology. He diagnosed rotator cuff tendinitis/tendinopathy resulting in mild to moderate impairment. Dr. Cole specified the injury was work related. Claimant advised Dr. Cole that the November 3, 2014, incident "changed things significantly from a subjective standpoint." However, Dr. Cole did not see any evidence that the incident changed claimant's pathology "structurally or anatomically" or that it represented "a new separate injury." Dr. Cole recommended "less treatment rather than more," finding that claimant "simply does not have the right findings to suggest this is an ongoing rotator cuff arthropathy." Although Dr. Cole did not believe that claimant was a candidate for a reverse shoulder arthroplasty, he opined that all of claimant's prior treatment had been reasonable and necessary. Dr. Cole opined that claimant was at MMI. He would restrict claimant's work in accordance with the FCE. Further, he suggested that claimant continue with a home-exercise program, anti-inflammatory medications, and injections for pain relief on an as-needed basis.

¶ 33 In reliance on Dr. Cole's report, respondent refused to authorize the reverse shoulder

arthroplasty. Claimant received authorization for the procedure from his group health insurer. On June 23, 2015, claimant underwent a right reverse total shoulder arthroplasty. Dr. Wottowa's operative report noted that at the open portion of the procedure, claimant had a thick quantified anterior portion of the supraspinatus and a tear at the rotator interval. Dr. Wottowa removed claimant from work after the surgery and followed his recovery.

¶ 34 After the surgery, Dr. Wottowa prescribed physical therapy and claimant initially showed improvement. On August 18, 2015, however, claimant's physical therapist noted that claimant reported that no matter what he did, he had pain in the back of the shoulder and arm. Claimant stated the pain resolved when sitting with his arm propped up. On August 20, 2015, claimant told the therapist that he had pain with quick movements, but no pain when sitting at rest. On September 3, 2015, the therapist noted that claimant continued to have sharp pain with certain activities. Claimant was educated on a new exercise plan to allow his shoulder to "calm down." Claimant returned to therapy on September 8, 2015, noting that he was doing his exercises and felt pain. Since that time, claimant noted a poor ability to move his right hand or turn his arm without feeling as if something had shifted in his shoulder.

¶ 35 In September 2015, claimant enlisted his union representative, Douglas Cycholl, to inquire whether respondent would offer him work as a "watchman," a position similar to a security guard. Specifically, claimant requested that Cycholl help him secure a watchman position at the electric department on Groth Street. Cycholl explained that there were several watchman positions that were covered by the union including those at the Groth Street facility. Cycholl contacted those in charge of hiring for respondent and spoke with Greg Yakel, the superintendent of electric distribution, and Rick Meadows, the supervisor over that area. Cycholl asked if claimant could be moved into the watchman position permanently. Without an explanation, Cycholl was told that

there was no interest in doing that. Cycholl acknowledged that respondent was eliminating these positions as workers retired or moved to other positions.

¶ 36 Claimant was examined by Purves on September 9, 2015. Purves noted that claimant had been doing "okay," but occasionally had "a catching, almost popping sensation involving the posterior aspect of the shoulder." Purves further noted that claimant had been performing isometric exercises when he felt a "pop" in his shoulder. Since then, claimant has experienced "excruciating pain and some mild swelling of the right arm." Purves noted that claimant's pain was primarily over the lateral aspect of the right arm and that he had difficulty with any type of activity and motion away from his body. An X ray of the right shoulder indicated that the arthroplasty was stable. Purves recommended a CT scan of the shoulder and provided claimant with a sling. The CT scan showed the right shoulder arthroplasty was without lucency or fracture.

¶ 37 On October 7, 2015, claimant returned to Dr. Wottowa, noting increased symptoms since experiencing the pop in his shoulder while performing exercises. Dr. Wottowa suspected a stress fracture and recommended that claimant wear a sling for four weeks. On November 4, 2015, Dr. Wottowa noted that after claimant's reverse shoulder arthroplasty "all of his pain was relieved *** and then in therapy, about 2 months ago, he felt a pop and since that time he has had nothing but pain over the lateral aspect of his arm." Dr. Wottowa noted that when claimant tries to abduct his arm, the motion causes severe pain from his deltoid firing. Dr. Wottowa ordered blood tests to rule out an infection, X rays, an indium scan, and a bone scan. The X rays were normal. The bone scan showed mild periprosthetic tracer uptake which was likely a normal postoperative change. The indium scan revealed no "scintigraphic" evidence of acute osteomyelitis of the right shoulder. The blood tests were negative for infection. Dr. Wottowa referred claimant to Dr. Aaron Chamberlain.

¶ 38 Claimant was evaluated by Dr. Kimberly Bartosiak for Dr. Chamberlain on December 7,

2015. Dr. Bartosiak documented that claimant had a complicated surgical history to his right shoulder with persistent pain localized over his deltoid insertion with significant tenderness to palpation. Upon examination, Dr. Bartosiak noted that claimant's active range of motion was severely limited with forward extension only to 10 degrees on the right. Passively, claimant achieved 30 degrees of forward extension on the right but was limited by pain. Claimant's demonstrated external rotation on the right was "to neutral" and on the left to 30 degrees. Dr. Bartosiak noted that although claimant's deltoid "fire[s]," he had significant tenderness to palpation over his deltoid insertion. Radiographs taken on December 7, 2015, showed the reverse shoulder arthroplasty well seated and in appropriate alignment. Dr. Bartosiak recommended an MRI and an ultrasound and advised claimant not to lift with his right arm.

¶ 39 Claimant returned to Dr. Wottowa on January 11, 2016. At that time, claimant told Dr. Wottowa that he was worse than he was three months earlier. Claimant felt that this was due to his arthroplasty being loose. Claimant did not want to return to Dr. Chamberlain. Instead, he wanted Dr. Wottowa to issue a full release so he could try working with just his left arm. Dr. Wottowa agreed to release claimant with permanent restrictions of no lifting over one pound with his right arm to allow him to return to work one handed "and get on with his life."

¶ 40 Respondent advised claimant by letter dated January 14, 2016, that it had received documentation from Dr. Wottowa "that indicates you have restrictions that will inhibit you from performing the essential functions of your position." Respondent stated that it would extend claimant's medical leave through March 15, 2016, but indicated that this was a "final extension" and that if claimant is unable to return to work by March 15, 2016, "without restrictions (or restrictions that could be reasonably accommodated) [he] would be subject to employment termination." On January 22, 2016, claimant submitted a "letter of retirement" to respondent

indicating that he would be retiring effective February 13, 2016.

¶ 41 Meanwhile, claimant saw Dr. Chamberlain on February 29, 2016. At that time, claimant continued to report pain at or near the deltoid insertion. An X ray demonstrated that the reverse shoulder arthroplasty was stable. An ultrasound showed no obvious or significant tear. Dr. Chamberlain could not determine why claimant was experiencing pain given that the reverse shoulder arthroplasty was stable. Dr. Chamberlain discussed claimant's care with Dr. Jay Keener. Both physicians felt that claimant would benefit from an open evaluation and possible revision of the polyethylene liner. On April 13, 2016, claimant underwent a right shoulder arthroplasty with exchange of the polyethylene liner and spacer as well as release and debridement of scar tissue deep into the joint and sub deltoid space. In the weeks after the surgery, claimant reported that the pain he had been experiencing over his deltoid insertion preoperatively had largely resolved.

¶ 42 Claimant resumed physical therapy on May 2, 2016. At an appointment with Dr. Chamberlain on May 23, 2016, claimant reported that his pain had been worsening, approaching the level it was prior to surgery. Dr. Chamberlain recommended that claimant take a break from physical therapy to let the shoulder rest. When claimant saw Dr. Chamberlain on June 20, 2016, he reported pain over the deltoid insertion like that he experienced preoperatively. Dr. Chamberlain referred claimant to Dr. Chi-Tsai Tang for further evaluation. Dr. Chamberlain also authorized claimant to return to light-duty work, but imposed a permanent restriction of no lifting more than one pound with the right upper extremity.

¶ 43 Claimant was examined by Dr. Tang on August 9, 2016. Dr. Tang opined that claimant had a right axillary nerve injury. He recommended an EMG and right glenohumeral joint injection. The EMG showed a possible right-sided teres minor syndrome and possible right-sided cubital tunnel syndrome. The glenohumeral joint injection was administered on August 18, 2016, without

any improvement. Claimant did not return to Dr. Tang thereafter.

¶ 44 In a letter dated February 9, 2017, respondent offered employment to claimant as a watchman in the water department. The letter indicated that claimant would be paid the negotiated rate for the position plus a wage differential through workers' compensation. The letter also stated that claimant would not be required to perform any duties outside his restrictions if he accepted the position. Claimant declined the position on the advice of his attorney.

¶ 45 Claimant last saw Dr. Wottowa on May 24, 2017. Dr. Wottowa noted that despite a lengthy course of treatment, claimant's pain had not subsided and he was "miserable." Dr. Wottowa noted that claimant wore an orthotic device around his shoulder which kept his shoulder from moving, since the smallest of movements caused significant pain. Dr. Wottowa discussed possible referrals to other doctors, but claimant has not sought further care.

¶ 46 Claimant's attorney retained James Ragains, a certified vocational counselor, to perform a vocational rehabilitation evaluation of claimant. Ragains interviewed claimant on October 5, 2016, and had a follow-up conversation with him on December 13, 2016. Ragains also reviewed claimant's medical records, the permanent restrictions imposed, claimant's prior work history, and claimant's educational background. Ragains authored a vocational assessment dated December 19, 2016, summarizing his findings and testified to the same by deposition.

¶ 47 Ragains documented that claimant had a GED and had been employed by respondent since 1982. Claimant received training in word processing and spreadsheet programs while working for respondent. However, claimant described his typing method as the "hunt and peck" approach. For the most recent 15 years of his employment with respondent, claimant held two positions: storeroom foreman and working foreman. As a storeroom foreman, claimant was responsible for supervising and coordinating activities of workers concerned with ordering, receiving, storing,

inventorying, issuing, and shipping materials, supplies, tools, equipment, and parts in the storeroom. Ragains noted that the Dictionary of Occupational Titles refers to this type of work as "stock supervisor" and classifies it as requiring light exertional demands. Claimant agreed, noting that he was required to lift between 10 and 15 pounds on a regular basis. More recently, claimant's position was that of working foreman. That position involved supervising a group of three to five employees in the lake services division. In the position, claimant oversaw and engaged in tasks such as landscaping, mowing, tree pruning, loading and transporting "rip rap," and removing snow. Ragains noted that the Dictionary of Occupational Titles refers to this type of work as "supervisor, landscape." Although the Dictionary of Occupational Titles classifies this occupation as requiring light exertional demands, *i.e.*, lifting up to 20 pounds on an occasional basis and 10 pounds on a frequent basis, claimant indicated that as a working foreman, he was required to lift and carry 50 pounds during a typical day's work. Ragains also documented that claimant had been a volunteer firefighter, but had no training in the field. Ragains noted that firefighting requires the ability to perform very heavy lifting and carrying, *i.e.*, more than 100 pounds on an occasional basis.

¶ 48 Ragains also conducted a transferable-skills analysis. Ragains identified the following "work-field components" related to claimant's work and volunteer history: (1) receiving, storing, issuing, requisitioning, and accounting stores of materials and the physical handling of such materials; (2) caring for plant life, pruning, digging, mowing, and mulching; (3) fabricating, installing, and repairing structures and objects; and (4) protecting life and property against destruction by fire. Ragains did not believe that the skills claimant had acquired would be transferable given his age, education level, and the physical restrictions imposed by his treating physicians. Significantly, Ragains noted that the work restrictions imposed by claimant's treating physicians limit him to one-handed work in the non-dominant left upper extremity with lifting no

more than one pound with the dominant right upper extremity. Based on his knowledge of the Springfield, Illinois labor market, his meetings with claimant, his examination of claimant's medical records, his assessment of claimant's transferable skills, and his review of claimant's permanent work restrictions, Ragains concluded that there was no stable labor market in which claimant might be employed. Additionally, Ragains did not believe that claimant was a candidate for retraining given his age and the restrictions imposed by his doctors.

¶ 49 Respondent retained Elizabeth Skyles, a certified vocational rehabilitation counselor, to perform a vocational assessment and transferable-skills analysis of claimant. Skyles met with claimant on January 24, 2017, and reviewed claimant's medical records, employment history, and educational background. Skyles prepared a report of her findings and testified to the same by deposition. Based on her assessment of claimant's education, training, employment history, work skills, medical restrictions, age, and transferable skills, Skyles believed that even with a one-pound lifting restriction, claimant could obtain gainful employment. In her report, Skyles elaborated:

> "There are employment positions currently available in [claimant's] labor market area utilizing [claimant's] current profile, which [claimant] could obtain to provide gainful employment. Additionally, [claimant] resides in a reasonably stable labor market for his field of employment. Potential employment opportunities for [claimant] could include, but are not limited to positions involving supervising, coordinating, purchasing, monitoring, ordering material, overseeing shipping, supplies and inventory, planning and coordinating, and involved in areas including but not limited to landscaping, warehousing, materials, tools, equipment, protection, and safety. Additionally, [claimant] could perform positions involving basic computer skills, communicating in-person, via phone, radio, and basic written or typed communication, overseeing records and schedules, and monitoring

> supplies and personnel. Such skills could be used in positions such as attendant, information clerk, watchman, monitor, and some overseer or management positions. These types of positions are representative, but not all inclusive of [the] types of jobs [claimant] can perform and consideration to reasonable accommodation should be addressed when needed."

Skyles also opined that claimant could perform the watchman position respondent offered him.

¶ 50 On cross-examination, Skyles admitted that on the day she testified, the watchman position was not open. Skyles further admitted that she was not asked to perform, and did not perform, a labor-market survey. Further, Skyles could not identify any open employment positions which claimant might be able to accept.

¶ 51 On July 14, 2017, Ragains prepared a labor market survey. The impetus for the labor market survey arose out of conclusions arrived at in Skyles's vocational report. In particular, Ragains addressed Skyles's opinion that claimant had acquired skills that would make him employable for "positions such as attendant, information clerk, watchman, monitor, and some overseer or management positions." The labor market survey was performed between May 30, 2017, and July 10, 2017.

¶ 52 Initially, Ragains noted that the Dictionary of Occupational Titles does not contain occupations labeled as "attendant," "management," or "watchman." Ragains further noted that the Dictionary of Occupational Titles defines the occupation of "monitor" as a position in the telephone and telegraph industry. Ragains doubted that Skyles intended this position for claimant since he had no experience in telephone operations and it requires frequent use of the hands for handling and fingering objects.

¶ 53 Next, Ragains noted that the Dictionary of Occupational Titles listed two occupations as

"overseer." One of these occupations is in the textile industry. Ragains opined that Skyles could not have intended such a position for claimant since it requires frequent use of the hands and upper extremities and because, to Ragains's knowledge, there are no employers in this industry in the Springfield, Illinois area. Ragains also found an occupation title in the Dictionary of Occupational Titles known as "overseer," whose primary responsibility is "supervis[ing] of a labor gang." Ragains noted that this overseer position requires exertional demands at the medium level, which are above the work restrictions in claimant's case.

¶ 54 Ultimately, Ragains's survey encompassed two occupations—information clerk and security guard. Regarding the latter occupation, Ragains noted that the functions of a "watchman" for respondent were closely aligned to those of a security guard. With the help of Gary Wilhelm, another certified rehabilitation counselor, Ragains searched for employers within a 50-mile radius of Springfield that had work available in the identified positions keeping with claimant's education, training, work experience, and physical restrictions.

¶ 55 The labor market survey revealed five open employment positions within the "information clerk" category. Ragains opined, however, that claimant either did not have the skills or experience to perform these positions or they were outside his physical limitations.

¶ 56 The labor market survey also identified five security guard positions. The first, with Allied Barton paid $11.50 per hour and was for 25 hours of work per week. The position fell within the light physical-demand level, and the company representative thought the position could be managed with the use of only one arm. Ragains stated that claimant could "potentially" find employment at Allied Barton. The second security guard position was with Per Mar Security. The position was full time and paid between $10 and $12 per hour. The position was not physically demanding and chiefly involved sitting or standing at a fixed position with only negligible lifting.

Ragains opined that the Per Mar Security position was also a "potential employment situation" for claimant. Wilhelm contacted respondent about the watchman position and spoke with Stephanie Barton, respondent's labor relations manager. Barton related that the watchman position was not open at the time the survey was conducted. Barton also stated that the position requires an overall exertion for lifting, pushing, and pulling of up to 20 pounds occasionally and 10 pounds frequently. Ragains did not believe that claimant could perform the watchman position based on the permanent restrictions issued by claimant's two treating doctors. Ragains opined that the remaining two security guard positions were not suitable for claimant as they would require claimant to physically intervene in potentially dangerous situations.

¶ 57 Ultimately, Ragains stated that the only positions which the labor market survey identified in which claimant might find employment were the security guard positions with Allied Barton and Per Mar. Ragains noted, however, that claimant would likely be required to undergo a physical examination for these positions. In Ragains's opinion, once the employer learned of claimant's physical limitations, the restrictions imposed by claimant's physicians, and the medications claimant is taking, it would be unlikely that he would be offered the positions. As such, Ragains opined that claimant fell into the "odd-lot" category of permanent and total disability.

¶ 58 Respondent offered the testimony of Mike Nutt, its superintendent of lake-service maintenance and claimant's immediate supervisor. Nutt testified that from September 2014 until his reverse total arthroplasty in June 2015, claimant worked within the restrictions imposed by his physician. Nutt stated, however, that respondent could not accommodate the permanent restrictions issued in January 2016 because they were more limiting and claimant would be unable to run equipment with them.

¶ 59 Respondent's water division manager, Ted Meckes, also testified. Meckes recounted that

when a watchman position opens up, it is internally posted with the union for five days. If no union member applies within that time period, the position is opened to the public. Meckes testified that when claimant provided respondent with the permanent restrictions issued in January 2016, there was no open watchman position in the water department. A watchman position opened in July or August of 2016 and was filled in December 2016. The worker hired in December 2016 resigned after one day, so the hiring process began again. At that time, the position was posted with the union. However, due to his retirement, claimant was not a union member in December 2016. Since no union members expressed interest in the job, it was opened to the public. The position was offered to claimant in February 2017. Meckes felt that claimant could perform the watchman job with certain accommodations. On cross-examination, Meckes admitted that respondent made no effort to offer claimant the watchman position when it became available in July 2016. Meckes stated that respondent did not offer claimant the open watchman position prior to February 2017 because respondent did not "think about it" before then.

¶ 60 At the arbitration hearing, claimant testified that he continues to wear a brace to prevent the movement of his right upper extremity because any movement causes severe pain. Claimant recounted that he has learned to perform many tasks with his left hand. He sleeps in a recliner because sleeping in a bed results in constant pain. Claimant does not think he can perform security-guard type work because if he cannot prop up his arm, his shoulder swells and he becomes miserable. Claimant rated his pain is at level 8 out of 10 on a regular basis. To reduce the pain, claimant takes Tylenol and ices his shoulder.

¶ 61 The arbitrator issued separate decisions for each accident. The arbitrator found that claimant sustained accidental injuries arising out of and occurring in the course of his employment with respondent on both accident dates. The arbitrator determined, however, that while claimant's

current condition of ill-being is causally related to the first accident date, it was not causally related to the second accident date. In this regard, the arbitrator reasoned that the medical evidence established that the slap from claimant's coworker caused only a temporary exacerbation of claimant's shoulder symptoms but did not change the underlying injuries and did not cause the need for further medical treatment.

¶ 62 The arbitrator next addressed the reasonableness of the medical treatment, notably the reverse shoulder arthroplasty. The arbitrator noted that the parties presented conflicting testimony regarding the necessity of the procedure. Dr. Cole, the section 12 examiner, opposed the procedure while Drs. Wottowa and Greatting recommended the procedure. The arbitrator found the opinions of Dr. Wottowa and Dr. Greatting more persuasive than the opinion of Dr. Cole, noting that the opinions of Dr. Wottowa and Dr. Greatting were "based upon their knowledge of the [claimant's] treatment history dating back to his accident." As such, the arbitrator ordered respondent to pay medical expenses totaling $151,412.30 (see 820 ILCS 305/8(a) (West 2012)), subject to a credit pursuant to section 8(j) of the Act (820 ILCS 305/8(j) (West 2012)).

¶ 63 With respect to the period of TTD, the arbitrator determined that claimant had reached MMI on August 18, 2016, when claimant last treated with Dr. Tang. The arbitrator reasoned that after that date, claimant was only treated with medication and his condition had not materially changed. The arbitrator therefore awarded claimant TTD benefits of $929.39 per week for 57-4/7 weeks, representing the period from June 23, 2015 (the date of the reverse total shoulder arthroplasty), through August 18, 2016 (see 820 ILCS 305/8(a) (West 2012)).[1]

[1] Although not raised by the parties, our calculations show that the period from June 23, 2015, through August 18, 2016, encompasses a period of 60-3/7 weeks.

¶ 64 The arbitrator next determined that claimant was entitled to PTD benefits. Relying on the testimony of Ragains, the arbitrator determined that claimant fell into the odd-lot category because he established that due to his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. The arbitrator acknowledged evidence concerning the availability of two security guard positions which were "technically" within the permanent restrictions imposed by claimant's treating physicians. However, in concluding that claimant would not be hired for the security guard positions, the arbitrator pointed to (1) claimant's "credible testimony" that he did not think he could carry out the duties of a security guard due to his complaints of pain and the need to immobilize his shoulder and (2) Ragains's testimony that it was unlikely claimant would be hired for the positions given his medical conditions and restrictions. The arbitrator further found that respondent failed to rebut claimant's case by offering evidence that suitable work was consistently available in claimant's labor market. In this regard, the arbitrator observed that Skyles did not identify any open employment positions apart from the watchman job. However, the arbitrator, relying on *Reliance Elevator Co. v. Industrial Comm'n*, 309 Ill. App. 3d 987, 993 (1999), determined that respondent's offer of the watchman position was a "sham." Accordingly, the arbitrator awarded claimant PTD benefits of $929.39 a week for life, commencing August 19, 2016 (see 820 ILCS 305/8(f) (West 2012)).

¶ 65 Thereafter, both parties sought review of the arbitrator's decision before the Commission. With respect to case No. 14 WC 35167 (the accident date of February 3, 2012), a majority of the Commission modified the arbitrator's award of TTD benefits. In this regard, the Commission determined that claimant was entitled to TTD benefits only until February 13, 2016, because claimant voluntarily removed himself from the labor market on that date when he retired and began collecting retirement benefits. Accordingly, the Commission reduced the period of TTD to 33-5/7

weeks. The Commission majority otherwise affirmed and adopted the decision of the arbitrator. Commissioner Gore dissented. He reasoned that the majority erred in discontinuing TTD benefits on February 13, 2016, because the unrebutted evidence established that claimant retired because respondent refused to accommodate the restrictions imposed by his physicians. With respect to case No. 14 WC 39420 (the accident date of November 3, 2014), the Commission unanimously affirmed and adopted the arbitrator's decision.[2]

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[2] Illinois Supreme Court Rule 341(i) (eff. Oct. 1, 2020) requires the appellant's brief to include an appendix pursuant to Illinois Supreme Court Rule 342 (eff. Oct. 1, 2019). Rule 342 provides that in cases involving proceedings to review orders of the Commission, the appendix shall include the decisions of the arbitrator and the Commission. In this case, claimant, as the cross-appellant, challenges the Commission's finding that his current condition of ill-being is not causally related to the November 3, 2014, accident (case No. 14 WC 39420). In violation of Rules 341 and 342, however, claimant's brief does not include an appendix with a copy of the Commission's decision in case No. 14 WC 39420. In addition, the record does not contain a copy of this decision. Although respondent also failed to include in its appendix a copy of the Commission's decision in case No. 14 WC 39420, the issues it raises do not implicate that decision. Where a party fails to comply with the supreme court rules, the reviewing court has the inherent authority to dismiss the appeal. *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005). However, it is undisputed that the Commission affirmed the arbitrator's finding that claimant failed to prove that his current condition of ill-being is causally related to the accident date of November 3, 2014. Accordingly, we will consider the merits of claimant's cross appeal on this issue. See *Kuzmanich v. Cobb*, 276 Ill. App. 3d 634, 636 (1995) (considering the merits of appeal despite failure to

¶ 66 Thereafter, both parties sought judicial review of the Commission's decision in the circuit court of Sangamon County. On October 30, 2019, after consolidating the appeals, the trial court issued an order stating that it agreed with the Commission's findings of fact and law. Both parties then sought review in this court. In an order entered on September 18, 2020, a majority of this court found that although the trial court's underlying order included an analysis, it did not set forth the resulting disposition of the two cases as required by section 19(f)(2) of the Act (820 ILCS 305/19(f)(2) (West 2018)). *McCarthy*, Nos. 4-19-0836WC & 4-19-0840WC cons. (2020) (unpublished summary order under Illinois Supreme Court Rule 23(c)). Accordingly, we dismissed the appeals for lack of subject-matter jurisdiction and remanded the matter to the trial court with directions to enter a final disposition in accordance with section 19(f)(2) of the Act.

¶ 67 On remand, the circuit court, in an order dated September 24, 2020, confirmed the decision of the Commission in its entirety. On October 6, 2020, respondent filed a notice of appeal. On October 14, 2020, claimant filed a notice of cross-appeal.

¶ 68 II. ANALYSIS

¶ 69 On appeal, respondent challenges the Commission's findings with respect to medical expenses, TTD benefits, and PTD benefits. In his cross-appeal, claimant challenges the Commission's finding that his current condition of ill-being is not causally related to the November 3, 2014, accident and its decision to reduce the period of TTD benefits.

¶ 70 A. Causation

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include an appendix where issues are straightforward and the brief is in all other respects adequate). Nevertheless, we remind counsel that our supreme court rules are not advisory suggestions, but, rather, rules to be followed. See *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57.

¶ 71 We first address the argument in claimant's cross-appeal that the Commission erred in finding that his current condition of ill-being is not causally related to the second work accident, which occurred on November 3, 2014. Claimant asserts that the second accident caused a significant and permanent worsening of his right shoulder pain and necessitated a reverse shoulder arthroplasty, a procedure that had not been seriously contemplated before the November 3, 2014, occurrence.

¶ 72 The purpose of the Act is to protect an employee from any risk or hazard which is peculiar to the nature of the work he or she is employed to do. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). To recover compensation under the Act, an employee must prove by a preponderance of the evidence all elements of his or her claim, including a causal connection between the injury and his or her employment. *Boyd Electric v. Dee*, 356 Ill. App. 3d 851, 860 (2005). An occupational activity need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003); *Freeman United Coal Mining Co. v. Industrial Comm'n*, 308 Ill. App. 3d 578, 586 (1999). Whether a causal relationship exists between a claimant's employment and his or her condition of ill-being is a question of fact. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984); *Bolingbrook Police Department v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130869WC, ¶ 52. It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicts in the evidence. *Hosteny*, 397 Ill. App. 3d at 674. This is especially true with respect to medical issues, to which we owe heightened deference to the Commission because of the expertise it possesses in the medical arena. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). As a reviewing court, we cannot reject or disregard permissible inferences drawn by the Commission simply because

different or conflicting inferences may also reasonably be drawn from the same facts, nor can we substitute our judgment for that of the Commission on such matters unless the Commission's findings are against the manifest weight of the evidence. *Zion-Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill. App. 3d 109, 113 (1993). A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent, *i.e.*, no rational trier of fact would have agreed with the Commission. *Ravenswood Disposal Services v. Illinois Workers' Compensation Comm'n*, 2019 IL App (1st) 181449WC, ¶ 15.

¶ 73 Applying the foregoing standards, we cannot say that the Commission's determination that claimant failed to prove that his current condition of ill-being is causally related to the November 3, 2014, accident was against the manifest weight of the evidence. It is undisputed that claimant sustained a second accident on November 3, 2014, when his coworker slapped him in the right-shoulder area. The Commission, however, in affirming and adopting the decision of the arbitrator, reasoned that the medical evidence established that the slap from claimant's coworker caused only a temporary exacerbation of claimant's shoulder symptoms but did not change the underlying injuries and did not cause the need for further medical treatment. We find ample evidence in the record to support the Commission's causation finding.

¶ 74 Significantly, in the months and years between the initial accident date of February 3, 2012, and the second accident date of November 3, 2014, claimant complained of persistent pain and decreased motion in his right shoulder. During this time, claimant underwent various forms of conservative treatment without success, including medications, physical therapy, and injections. Claimant also underwent surgical intervention on three occasions due to chronic rotator-cuff tears. These operations, however, provided claimant with little relief. By June 2014, following the third surgery, claimant had complaints of pain in the anterior aspect of the right shoulder when he would

bring his arm forward with his elbow flexed. At that time, Dr. Wottowa informed claimant that individuals with chronic rotator-cuff tears can develop rotator-cuff tear arthritis, eventually necessitating a reverse total shoulder arthroplasty. Dr. Wottowa did not recommend the procedure at that time, however, because of claimant's young age and the fact that he was in the early stages of recovery from his third operation. Dr. Wottowa recognized, however, that the reverse total shoulder arthroplasty was "something to think about for the future."

¶ 75 Thereafter, claimant continued to treat with Dr. Wottowa, reporting continued pain in the anterior aspect of the right shoulder. On September 17, 2014, the date of claimant's last visit with Dr. Wottowa prior to the November 3, 2014, occurrence, claimant reported "the same discomfort" over the anterior aspect of the right shoulder and difficulty lifting his arm over his head and reaching away from his body. Claimant also demonstrated discomfort with his arm in the forwardly flexed position, especially when working from waist level to above-head level. Despite these complaints, Dr. Wottowa, based on claimant's medical history as well as the results of an FCE that claimant underwent in September 2014, authorized claimant to return to work with permanent restrictions on his right upper extremity of lifting no more than 10 pounds overhead on an occasional basis and an overall weight limit of 20 pounds for lifting from floor to shoulder. Dr. Wottowa also pronounced claimant at MMI.

¶ 76 The accident at issue occurred on November 3, 2014, when one of claimant's coworkers came up behind claimant and slapped him in the right shoulder area. On November 17, 2014, two weeks after the incident, claimant returned to Dr. Wottowa with complaints of severe pain, mainly in the musculature around the neck and trapezius area. Dr. Wottowa prescribed medication and instructed claimant to "cool down." Claimant returned to Dr. Wottowa's office on December 1, 2014. At that time, claimant reported that his shoulder was "worse," that he was "miserable on a

daily basis," and that he could not lift his arm away from his body with any significant strength. Upon examination, Dr. Wottowa noted that claimant had pseudo paralysis and discomfort in the shoulder area, that claimant's main problem was "a rotator cuff deficient right shoulder," and that claimant had "never healed the supraspinatus and rotator [] lesion." An X ray of the right shoulder demonstrated mild to moderate changes in the glenohumeral joint and findings consistent with previous rotator cuff repair anchors in place and the previous acromioplasty. Dr. Wottowa discussed a reverse shoulder arthroplasty with claimant, but again opined that claimant was too young for the procedure. Dr. Wottowa referred claimant to Dr. Greatting, for a second opinion.

¶ 77 Dr. Greatting examined claimant on December 18, 2014. The patient history form claimant completed prior to his examination by Dr. Greatting does not reference the incident of November 3, 2014. Instead, claimant indicated that his injury occurred three years prior when throwing a log in the back of a truck. Similarly, there is no reference to the November 2014 incident in Dr. Greatting's office note of the visit, although Dr. Greatting does thoroughly discuss the February 2012 accident. Upon examination, Dr. Greatting noted that claimant experiences significant pain with active motion of his shoulder. Dr. Greatting's assessment was recurrent rotator cuff tear. He stated that a reverse shoulder arthroplasty would likely result in significant improvement in pain and range of motion, although he did not typically recommend the procedure until someone is at least 65 years of age. Nevertheless, he opined that, if successful, a reverse shoulder arthroplasty would result in a significant improvement of claimant's pain and range of motion. Ultimately, Dr. Greatting opined that the reverse shoulder arthroscopy was "a reasonable thing to consider" and he referred claimant back to Dr. Wottowa to discuss the matter further.

¶ 78 On January 7, 2015, claimant returned to Dr. Wottowa. He complained of severe pain and difficulty reaching his right upper extremity away from his body. Claimant told Dr. Wottowa that

he wanted to proceed with the reverse shoulder arthroplasty because he was "to the point where he really cannot live with the discomfort the way it is." Dr. Wottowa opined that the need for the surgery was related to claimant's "previous workmen's comp claim *** with [respondent]," explaining that the condition was "a continuation of the problem from his rotator cuff injury to the right shoulder." On March 30, 2015, Dr. Cole conducted an independent medical examination of claimant. Claimant advised Dr. Cole that the November 3, 2014, incident "changed things significantly from a subjective standpoint." However, Dr. Cole did not see any evidence that the incident changed claimant's pathology "structurally or anatomically" or represented "a new separate injury" and he saw no evidence of pseudo paralysis.

¶ 79 Considering the foregoing history, the Commission could have reasonably concluded that the occurrence on November 3, 2014, resulted in only a temporary aggravation of claimant's shoulder injury but did not change the underlying injuries or cause the need for further medical treatment and therefore his current condition of ill-being was not related to the November 3, 2014, accident. In this regard, the record establishes that claimant's right shoulder complaints before and after the November 3, 2014, were similar. To this end, in June 2014, following his third surgery, claimant reported pain in the anterior aspect of the right shoulder when he would bring his arm forward with his elbow flexed. At a subsequent visit, claimant reported "the same discomfort" over the anterior aspect of the right shoulder and difficulty lifting his arm over his head and reaching away from his body. Claimant also demonstrated discomfort with his arms in the forwardly flexed position, especially when working from waist level to above-head level. Between November 3, 2014, and June 23, 2015, the date of his reverse shoulder arthroplasty, claimant had essentially the same complaints. For instance, on December 1, 2014, Dr. Wottowa documented that claimant was in a lot of discomfort and unable to lift his arm away from his body and an X

ray taken that date showed only degenerative changes and signs of previous surgery. On December 18, 2014, Dr. Greatting noted that claimant had significant pain with active motion with the shoulder. On January 7, 2015, Dr. Wottowa documented that claimant had severe pain and difficulty reaching away from his body. Again, these complaints are consistent with claimant's complaints prior to the November 3, 2014, occurrence. It is true that Dr. Wottowa recorded pseudo paralysis shortly after the November 3, 2014, a condition not previously documented. It is significant, however, that Dr. Wottowa does not mention pseudo paralysis again. Moreover, Dr. Cole affirmatively stated in his March 2015 examination report that there was no evidence of pseudo paralysis and Dr. Cole did not see any evidence that the incident changed claimant's pathology "structurally or anatomically" or represented "a new separate injury."

¶ 80 Further, there is no indication that after the November 3, 2014, occurrence, claimant was unable to work within the restrictions imposed by Dr. Wottowa on September 17, 2014. Indeed, we observe that on the patient history form claimant submitted to Dr. Greatting in December 2014, he indicated that he was working, although he had constant pain. Further, claimant indicated that from September 2014 until his reverse total shoulder arthroplasty in June 2015, he worked within the restrictions imposed by Dr. Wottowa in September 2014. Nutt, claimant's supervisor, confirmed this. Given that the pseudo paralysis resolved, claimant's complaints remained substantially the same before and after the November 3, 2014, incident, and claimant continued to work within the restrictions imposed prior to the November 3, 2014, incident, the Commission could reasonably conclude that the November 3, 2014, accident merely resulted in a temporary aggravation of his right shoulder condition which returned to baseline.

¶ 81 Claimant advances various reasons why, in his view, the Commission's finding is incorrect. For instance, claimant asserts that the reverse total shoulder arthroplasty had not been seriously

contemplated before the November 3, 2014, accident. This is inaccurate. Dr. Wottowa discussed with claimant a reverse total shoulder arthroplasty as early as June 4, 2014, several months before the November 2014 accident. At that time, Dr. Wottowa informed claimant that individuals with chronic rotator-cuff tears can develop rotator-cuff tear arthritis, eventually necessitating a reverse total shoulder arthroplasty. However, Dr. Wottowa ruled it out at that time because (1) claimant was in the early stages of recovery from his third surgery and (2) claimant's young age. Nevertheless, Dr. Wottowa opined that the procedure was "something to think about for the future." Accordingly, contrary to claimant's assertion, a reverse total shoulder arthroplasty was seriously contemplated before the November 3, 2014, accident, but ruled out for various reasons.

¶ 82 Claimant concedes that Dr. Wottowa opined that the first accident of February 3, 2012, was a cause of his need for the right total shoulder arthroplasty. He asserts, however, this fact does not negate a finding that the accident of November 3, 2014, was also a factor in causing his need for the reverse total shoulder arthroplasty. In this regard, claimant insists that the accident on November 3, 2014, permanently aggravated his shoulder condition to such an extent that he felt that his only recourse was to undergo a reverse shoulder arthroplasty. As discussed above, however, claimant's complaints with respect to pain and the range of motion of his right shoulder were substantially similar before and after the November 3, 2014, occurrence. As such, the Commission could reasonably conclude that, to the extent claimant experienced an increase in symptoms after his coworker slapped him in the shoulder area, claimant's right shoulder condition returned to a baseline level. Moreover, claimant fails to cite any medical evidence affirmatively supporting his position that the accident of November 3, 2014, also caused the need for the reverse total shoulder arthroplasty.

¶ 83 In addition, claimant disputes Dr. Cole's finding that despite an increase in claimant's

subjective complaints of pain following the November 3, 2014, accident, there was no structural or anatomical change to the right shoulder as a result of the slap. In support of this proposition, claimant asserts that during the reverse total shoulder arthroplasty, Dr. Wottowa discovered a new rotator cuff tear. Claimant maintains that no such tear was noted during the previous arthroscopic procedure on March 18, 2014. Thus, claimant reasons, "[t]his proves a structural and anatomical change in [his] shoulder after November 3, 2014." We disagree. In this regard, we note that claimant had a history of recurrent rotator-cuff tears before the November 3, 2014, occurrence. The three surgeries claimant underwent prior to the November 3, 2014, accident all involved rotator-cuff repairs. In his surgical report of the third procedure on March 18, 2014, Dr. Wottowa described the tear as "a split of the rotator interval between the supraspinatus and the sunscap." Although Dr. Wottowa reported some improvement following the third procedure in March 2014, he noted that by June 2014, the pain claimant was experiencing before the third operation had returned. On December 1, 2014, Dr. Wottowa opined that claimant's rotator cuff lesion had never healed. In his surgical report of June 23, 2015, Dr. Wottowa noted "a tear at the rotator interval," the same spot Dr. Wottowa noted in the March 2014 surgical report. Thus, there was evidence from which the Commission could reasonably conclude that the rotator-cuff tear repaired during the reverse total arthroplasty surgery was not a new rotator cuff tear as it represented the same tear Dr. Wottowa unsuccessfully attempted to repair in March 2014 and was therefore already present prior to the November 3, 2014, accident. Indeed, claimant cites no medical evidence that the November 3, 2014, caused the rotator cuff tear repaired during the reverse total shoulder arthroplasty. Accordingly, we reject claimant's assertion that the rotator cuff tear repaired during the reverse total shoulder arthroplasty was caused by the November 3, 2014, accident.

¶ 84 Claimant also asserts that he was not required to prove that he sustained a new " 'structural

or mechanical' " injury to his shoulder as a result of the accident of November 3, 2014. According to claimant, even without that requirement, the medical evidence shows that he did have structural changes after the November 3, 2014, accident. However, claimant does not direct us to this supposed evidence. Moreover, as noted above, an X ray of claimant's right shoulder taken on December 1, 2014, showed only degenerative changes and signs of previous surgery. Additionally, Dr. Cole did not see any evidence that the incident changed claimant's pathology "structurally or anatomically" or represented "a new separate injury."

¶ 85 In short, for the foregoing reasons, we reject claimant's argument that the Commission's finding that his current condition of ill-being was not causally related to the November 3, 2014, accident was against the manifest weight of the evidence.

¶ 86 B. Medical Expenses

¶ 87 Next, we address respondent's challenge to the Commission's award of certain medical expenses. In particular, respondent argues that the Commission erred in finding that the course of claimant's medical care beginning on June 23, 2015, when he underwent the reverse total shoulder arthroplasty, was reasonable and necessary.

¶ 88 Section 8(a) of the Act (820 ILCS 305/8(a) (West 2012)) governs the payment of medical expenses. That provision states in relevant part:

> "The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to Section 8.2 [(820 ILCS 305/8.2 (West 2012))], in effect at the time the service was rendered for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is

reasonably required to cure or relieve from the effects of the accidental injury." 820 ILCS 305/8(a) (West 2012).

A claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses under section 8(a) of the Act. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 546 (2007). Questions as to the reasonableness of medical charges, the necessity of the medical services provided, and the causal relationship between the medical services and the work-related injury are questions of fact to be resolved by the Commission. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 51; *Max Shepard, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 893, 903 (2004). A court of review will not disturb the Commission's decision on a factual matter unless it is against the manifest weight of the evidence. *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Ravenswood Disposal Services*, 2019 IL App (1st) 181449WC. ¶ 15.

¶ 89 Respondent argues that the course of treatment beginning with claimant's June 23, 2015, reverse total shoulder arthroplasty "was ill-advised, unreasonable, and unnecessary" to treat claimant's right shoulder condition. In support of this argument, respondent asserts that both Dr. Wottowa and Dr. Greatting were reluctant to recommend the reverse total arthroplasty because of claimant's young age and Dr. Cole indicated that he would not recommend a reverse total shoulder arthroplasty. Respondent further asserts that the reverse total shoulder arthroplasty worsened claimant's right shoulder condition and resulted in work restrictions that are far more limited than those in place prior to the procedure.

¶ 90 Respondent correctly notes that Dr. Cole advised against the reverse total shoulder arthroplasty. Dr. Cole recommended "less treatment rather than more," finding that claimant

"simply does not have the right findings to suggest this is an ongoing rotator cuff arthropathy." Although Dr. Wottowa and Dr. Greatting initially expressed concern that claimant was too young to undergo a reverse total shoulder arthroplasty, they both ultimately approved of the procedure. In this regard, when claimant saw Dr. Wottowa on December 1, 2014, he did not think another surgery would help claimant unless it was a reverse shoulder arthroplasty. At that time, Dr. Wottowa stated that claimant was too young for the procedure and should "wait longer and work with what he has." However, given claimant's complaints, Dr. Wottowa referred claimant to Dr. Greatting to "see if he agrees with me that it would be a reasonable consideration to proceed with a reverse total shoulder arthroplasty in this very young gentleman." Dr. Greatting told claimant that if he were at least 65 years of age a reverse total shoulder arthroplasty "would be much easier or reasonable to consider." Dr. Greatting discussed other potential surgical options, but decided that they would not provide claimant with much improvement or relief. Nevertheless, he opined that, if successful, a reverse shoulder arthroplasty would result in a significant improvement of claimant's pain and range of motion. Ultimately, Dr. Greatting opined that the reverse shoulder arthroscopy was "a reasonable thing to consider" and he referred claimant to Dr. Wottowa to discuss the matter further. Dr. Wottowa found that Dr. Greatting's recommendation was "about the same" as his, *i.e.*, claimant "should live with the pain until he is miserable and then hopefully when he is older consider a reverse total arthroplasty." Observing, however, that claimant was "to the point *** where he really cannot live with the discomfort the way it is," Dr. Wottowa agreed to perform the reverse total shoulder arthroplasty. Further, Dr. Wottowa opined that the need for the surgery was related to claimant's "previous workmen's comp claim," explaining that the condition was "a continuation of the problem from his rotator cuff injury to the right shoulder."

¶ 91 As the foregoing establishes, the Commission was presented with conflicting medical

opinions concerning the necessity of the reverse total shoulder arthroplasty. Both Dr. Wottowa and Dr. Greatting opined that it was a reasonable procedure to consider. Further, Dr. Wottowa opined that the operation was causally connected to the February 3, 2012, accident. In contrast, Dr. Cole recommended against performing a reverse total shoulder arthroplasty. As noted above, the necessity of the medical services and the causal relationship between the medical services and the work-related injury are questions of fact to be resolved by the Commission. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51; *Max Shepard, Inc.*, 348 Ill. App. 3d at 903. In affirming and adopting the decision of the arbitrator, the Commission concluded that Dr. Wottowa's opinion that a reverse total shoulder arthroplasty was a reasonable treatment option following the extensive conservative and surgical intervention he had previously undergone with little success was correct. And while respondent correctly notes that claimant did not have an ideal result from the reverse total shoulder arthroplasty, it cites no authority that a less-than-ideal result automatically renders a medical procedure unreasonable or unnecessary. In short, considering the Commission's role as fact finder, we cannot say that the Commission's decision that the reverse total shoulder arthroplasty and the course of medical treatment which followed were reasonable and necessary was against the manifest weight of the evidence.

¶ 92 C. TTD Benefits

¶ 93 Both parties challenge to the Commission's award of TTD benefits. Respondent argues that the Commission's award of 33-5/7 weeks of TTD benefits was against the manifest weight of the evidence. Respondent's argument is based on the assertion that claimant failed to prove that the course of medical care beginning on June 23, 2015, when he underwent the reverse total shoulder arthroplasty, was reasonable and necessary. Having rejected the underlying contention, we also reject respondent's argument addressed to the Commission's award of TTD benefits.

¶ 94 In his cross-appeal, claimant argues that the Commission's decision to reduce his TTD award is against the manifest weight of the evidence and contrary to law. An employee is temporarily totally disabled from the time an injury incapacitates him until such time as he is as far recovered as the permanent character of the injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990); *Westin Hotel*, 372 Ill. App. 3d at 542. To be entitled to TTD benefits, the employee must establish not only that he did not work, but also that he is unable to work and the duration of that inability to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832 (2002); see also *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146 (2010) ("[W]hen determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force."). Once an injured employee has reached MMI, the disabling condition has become permanent and he or she is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). The factors to consider in determining whether an employee has reached MMI include a release to work, medical testimony or evidence concerning the employee's injury, and the extent of the injury. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2005). Whether an employee is entitled to TTD benefits and the period during which the employee is temporarily totally disabled are questions of fact for the Commission, and the Commission's decision on such matters will not be set aside on review unless it is contrary to the manifest weight of the evidence. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118-19. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Ravenswood Disposal Services*, 2019 IL App (1st) 181449WC, ¶ 15.

¶ 95 In this case, the arbitrator determined that claimant reached MMI on August 18, 2016. In

reaching this conclusion, the arbitrator noted that on August 18, 2016, claimant last treated with Dr. Tang. Although claimant received medical treatment after that date, his condition did not materially change. Accordingly, the arbitrator awarded claimant TTD benefits from June 23, 2015 (the date on which defendant underwent the reverse total shoulder arthroplasty), through August 18, 2016 (the date claimant last saw Dr. Tang), which the arbitrator calculated as a period of 57-4/7 weeks.[3] The Commission tacitly affirmed the arbitrator's finding that claimant reached maximum medical improvement on August 18, 2016. The Commission noted, however, that claimant executed a resignation letter on January 22, 2016, voluntarily retiring from respondent's employment effective February 13, 2016, and was receiving retirement benefits at the time of the arbitration hearing. The Commission therefore concluded that claimant became ineligible for TTD benefits after February 13, 2016, because he voluntarily removed himself from the labor market. As such, the Commission determined that claimant was entitled to TTD benefits only from June 23, 2015, until February 13, 2016, a period of 33-5/7 weeks.

¶ 96 Initially, we conclude that the Commission's finding that claimant reached MMI on August 18, 2016, was not against the manifest weight of the evidence. We observe that although Dr. Wottowa released claimant to return to work with restrictions on January 11, 2016, with no lifting more than one pound with his right arm, Dr. Wottowa did not declare claimant at MMI at that time. Indeed, claimant was still under the care of Dr. Chamberlain, who performed additional shoulder surgery in April 2016. Claimant reported some improvement following the operation performed by Dr. Chamberlain, but by late in May 2016, claimant's pain had worsened. On June

[3] As noted previously, our calculation shows that the period from June 23, 2015, through August 18, 2016, encompasses 60-3/7 weeks.

20, 2016, Dr. Chamberlain authorized claimant to return to work light duty with a permanent restriction of no lifting greater than one pound with the right upper extremity—the same restriction imposed by Dr. Wottowa in January 2016. Dr. Chamberlain did not declare claimant at MMI, but referred him to Dr. Tang for further evaluation. Dr. Tang ordered a nerve study and administered an injection, but claimant reported no improvement. In May 2017, claimant followed up with Dr. Wottowa. Claimant reported that despite all the treatment he has received, his pain has not subsided. Dr. Wottowa discussed possible referrals to other doctors, but claimant has not sought further care. The Commission found that claimant reached MMI as of August 18, 2016, because, although he received medical treatment after that date, his condition did not materially change. In other words, the Commission determined that as of August 18, 2016, claimant was recovered as far as the permanent character of the injury would permit. This was a reasonable conclusion based on the record above. Hence, the Commission's finding that claimant reached MMI on August 18, 2016, when he last treated with Dr. Tang, was not against the manifest weight of the evidence.

¶ 97 As noted above, when considering whether an employee is no longer entitled to TTD benefits, the dispositive test is generally whether the employee's condition has stabilized and he has reached MMI. *Nascote Industries*, 353 Ill. App. 3d at 1072. In this case, however, the Commission terminated claimant's TTD benefits prior to the date of MMI. There are three circumstances under which TTD benefits may be suspended or terminated before an employee reaches MMI: (1) if the employee refuses to submit to medical, surgical, or hospital treatment essential to his or her recovery; (2) if the employee refuses to cooperate in good faith with rehabilitation efforts; or (3) if the employee refuses work falling within the physical restrictions prescribed by his or her physician. *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 146-47; *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 47.

¶ 98 Here, there is no evidence that claimant refused to submit to medical, surgical, or hospital treatment essential to his recovery. Similarly, there is no evidence that claimant refused to cooperate in good faith with rehabilitation efforts. Thus, the Commission could terminate claimant's TTD benefits prior to the August 18, 2016, date of MMI only if claimant refused work falling within the physical restrictions prescribed by his physicians. We find no such evidence of record. On January 11, 2016, Dr. Wottowa released claimant to return to work with permanent restrictions of no lifting over one pound with his right arm. Respondent received this documentation from Dr. Wottowa and advised claimant by letter dated January 14, 2016, that Dr. Wottowa's restriction "will inhibit [claimant] from performing [the] essential functions of [his] position." As a result, respondent extended claimant's medical leave through March 15, 2016, but warned claimant that this was a "final extension" and that if claimant was unable to return to work "without restrictions (or restrictions that could be reasonably accommodated), [he] would be subject to employment termination." On January 22, 2016, after receiving the letter, claimant submitted a letter of retirement to respondent advising that he would be retiring effective February 13, 2016. Claimant did not refuse work within his restrictions. Rather, respondent would not accommodate claimant's restrictions and told claimant that he would be terminated if he did not return to work without restrictions or restrictions that it could reasonably accommodate. Thus, it was only after respondent refused to accommodate claimant's restrictions that he chose to retire. Under these circumstances, we conclude that the Commission's decision to terminate claimant's TTD benefits as of the date of his retirement was against the manifest weight of the evidence. Compare *Land & Lakes Co.*, 359 Ill. App. 3d at 595 (holding that the claimant was entitled to TTD benefits following his voluntary retirement where there was competent evidence that claimant was unable to work due to his injuries and he retired because he needed the income) with *Sharwarko*,

2015 IL App (1st) 131733WC, ¶¶ 48-49 (affirming the Commission's decision to deny TTD benefits beyond the date the claimant voluntarily retired where there was evidence that the employer would have accommodated the claimant's restrictions had he not retired). Accordingly, we reverse that portion of the Commission's decision reducing the period of claimant's TTD benefits and remand the case to the Commission to reinstate the arbitrator's award of TTD benefits.

¶ 99 D. PTD Benefits

¶ 100 Finally, respondent argues that the Commission erred in finding that claimant was entitled to PTD benefits under the odd-lot theory. Respondent's argument is two-fold. First, respondent maintains that if claimant had not undergone the "ill-advised" reverse total shoulder arthroplasty on June 23, 2015, he would still be working for respondent in his regular job. Second, respondent asserts that the Commission was "wrong" in finding that claimant fell into the odd-lot category.

¶ 101 An employee is permanently and totally disabled if he or she is obviously unemployable, *i.e.*, unable to make some contribution to industry sufficient to justify the payment of wages or there is medical evidence to establish a claim of PTD. *Sharwarko*, 2015 IL App (1st) 131733WC, ¶ 53. However, an employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87 (1983). If an employee's disability is limited and it is not obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to PTD by proving he or she fits within the "odd lot" category. *Westin Hotel*, 372 Ill. App. 3d at 544. The odd-lot category consists of employees who, "though not altogether incapacitated for work, [are] so handicapped that [they] will not be employed regularly in any well-known branch of the labor market." *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 547 (1981) (citing 2 Arthur Larson *et al.*, Workmen's Compensation § 57.51, at 10-164.24 (1980)). An employee generally fulfills the burden of

establishing that he or she falls into the odd-lot category in one of two ways: (1) by showing a diligent but unsuccessful search for employment or (2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC, ¶ 34; *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534-35 (1996). If an employee makes this showing, the burden shifts to the employer to show that some kind of suitable work is available to the employee. *Westin Hotel*, 372 Ill. App. 3d at 544. This issue presents a question of fact. *Professional Transportation, Inc.*, 2012 IL App (3d) 100783WC, ¶ 33. In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Hosteny*, 397 Ill. App. 3d at 674. We will not overturn the decision of the Commission regarding the nature and extent of an injury unless it is against the manifest weight of the evidence. *Professional Transportation, Inc.*, 2012 IL App (3d) 100783WC, ¶ 33. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Professional Transportation, Inc.*, 2012 IL App (3d) 100783WC, ¶ 33. Thus, where the Commission's inferences are reasonable, such inferences cannot be disregarded because other inferences might have been drawn from the same facts. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07 (1984).

¶ 102 In the present case, there was no evidence that claimant was obviously unemployable and there was no medical expert opinion that claimant was permanently and totally disabled. Thus, claimant was required to demonstrate an entitlement to PTD benefits by proving he fits within the "odd lot" category. In adopting and affirming the decision of the arbitrator, the Commission observed that because claimant had not performed a job search, he could only fall into the odd-lot

category by demonstrating there were no available jobs for a person in his circumstance given his age, training, education, and work history. The Commission, finding the testimony of Ragains persuasive, concluded that claimant had met his burden and that the burden therefore shifted to respondent to show that some kind of suitable work is available to claimant. The Commission determined that respondent failed to meet its burden because (1) Skyles failed to offer any evidence that suitable work was consistently available in claimant's labor market and (2) the watchman position respondent offered claimant in February 2017 was a "sham." Based on our review of the record, there is ample evidence of record to support the Commission's findings.

¶ 103 Ragains prepared a vocational assessment dated December 19, 2016. At that time, claimant was 57 years old. The vocational assessment report revealed that claimant had a GED. Claimant also had some experience with word-processing and spreadsheet programs, but used the "hunt and peck" method to type. Claimant began working for respondent in 1982 and most recently held positions as a working foreman and a storeroom foreman. Claimant also had experience as a volunteer firefighter. Ragains did not believe that the skills claimant had acquired from these positions would be transferable to other employment given his age, education level, and the physical restrictions imposed by his physicians, *i.e.*, no lifting greater than one pound with the right upper extremity, which was claimant's dominant extremity. Considering the findings of his vocational assessment, and based on his knowledge of the Springfield, Illinois labor market, Ragains concluded that there was no stable labor market in which claimant might be employed. Moreover, Ragains did not believe that claimant was a candidate for retraining given his age and the restrictions imposed by claimant's doctors.

¶ 104 Respondent hired Skyles to prepare a vocational report. Based on her assessment of claimant's education, training, employment history, work skills, medical restrictions, age, and

transferable skills, Skyles opined that claimant could obtain gainful employment. In particular, Skyles determined that claimant had acquired skills she believed would make him employable for "positions such as attendant, information clerk, watchman, monitor, and some overseer or management position." Skyles also opined that claimant could perform the watchman position respondent offered claimant in February 2017. Despite these findings, Skyles admitted that she had neither performed a labor-market survey nor identified any open employment positions which claimant might be able to accept, including the watchman position respondent offered claimant.

¶ 105 In response to Skyles's report, Ragains prepared a labor market survey. The labor market survey was performed between May 30, 2017, and July 10, 2017, in a 50-mile radius of Springfield. Of the six occupations identified by Skyles, Ragains found that three of them—attendant, management, and watchman—were not defined in the Dictionary of Occupational Titles. However, Ragains noted that the functions of a "watchman" for respondent were closely aligned to those of a security guard. While the Dictionary of Occupational Titles included a definition of "monitor," Ragains observed that the occupation is in the telephone and telegraph industry and determined that the occupation was not within claimant's experience or skills. Ragains noted that the Dictionary of Occupational Titles lists two "overseer" occupations—one is in the textile industry and the other involves supervising laborers. Ragains testified that both occupations are outside of the physical restrictions imposed by claimant's physicians. Moreover, Ragains was unaware of any textile industry employers in the Springfield area. Accordingly, Ragains limited the labor market survey to two occupations—information clerk and security guard.

¶ 106 Ragains identified five open employment positions within the information-clerk field. However, he opined that claimant either did not have the skills or experience to perform these positions or they were outside his physical limitations. Ragains also identified five security-guard

positions, including the watchman position offered to claimant by respondent in February 2017. Ragains eliminated two of the security-guard positions because they were outside claimant's physical restrictions. The watchman position was not open at the time the survey was conducted. Ragains further noted that the watchman position required an overall exertion for lifting, pushing, and pulling of up to 20 pounds occasionally and 10 pounds frequently. Ragains opined that these exertion demands placed the watchman position outside of claimant's permanent restrictions issued by claimant's treating physicians. Ragains determined that the remaining two security-guard positions—one with Allied Barton and the other with Per Mar Security—were "potential" matches for claimant. Ragains noted, however, that claimant would likely be required to undergo a physical examination for these positions. In Ragains's opinion, once the employer learned of claimant's physical limitations, the restrictions imposed by claimant's physicians, and the medications claimant is taking, it would be unlikely that he would be offered the positions. Moreover, claimant did not think that he could perform security-guard type work because if he cannot prop up his arm, his shoulder swells and he becomes "miserable."

¶ 107 As the foregoing establishes, the Commission was presented with conflicting evidence regarding whether claimant, because of his age, skills, training, and work history, will be regularly employed in a well-known branch of the labor market. Ragains answered the inquiry in the negative. Skyles answered the inquiry in the affirmative. Claimant did not think that he could perform security-guard type work because if he cannot prop up his arm, his shoulder swells and he becomes "miserable." The Commission found the testimony of Ragains persuasive on the issue and also found claimant's testimony credible. As such, the Commission determined that claimant had met his burden. Applying the standards set forth above, we cannot say that the Commission's determination was against the manifest weight of the evidence.

¶ 108 In this regard, we observe that although Skyles testified that claimant could obtain gainful employment even with a one-pound lifting restriction for his right upper extremity, she did not conduct a labor-market survey, she admitted that the watchman position respondent offered claimant was not available (as of the date of her testimony), and she was unable to identify any other open employment positions which claimant might accept. In contrast, Ragains conducted a thorough labor-market survey based on the occupations identified in Skyles's report. Ragains found only two "potential" positions. Although claimant never applied for the positions, Ragains opined that it was unlikely that claimant would be hired in either one due to his physical limitations, the restrictions imposed by his physicians, and the medications he takes. Moreover, claimant did not think that he could perform security-guard type work because if he cannot prop up his arm, his shoulder swells and he becomes "miserable." Furthermore, Ragains did not believe that claimant could perform the watchman position based on the permanent restrictions issued by claimant's physicians. He additionally noted that even if accommodations could be made, the position was not available when the survey was performed. It is the function of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Hosteny*, 397 Ill. App. 3d at 674. We will not substitute our judgment for that of the Commission with regard to the credibility of the vocational consultants, the weight to be accorded the vocational reports, and the inferences to be drawn from such evidence. As such, we cannot say that the Commission's determination that claimant met his burden of establishing that he falls into the odd-lot category by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance was against the manifest weight of the evidence.

¶ 109 Likewise, we cannot say that the Commission's finding that respondent failed to

successfully refute claimant's odd-lot status by proof that claimant is in fact employable in an existing and stable labor market was against the manifest weight of the evidence. In this regard, we note that Nutt testified that respondent could not accommodate claimant with the permanent restriction issued in January 2016 (no lifting more than one pound with the right arm) because he could not run equipment with the restriction in place. Further, respondent offered no medical evidence that the claimant could perform the work of a watchman given the physical limitations imposed by his physicians. The Commission also found that the offer of the watchman position to claimant in February 2017 was a "sham." As discussed more thoroughly below, this finding was a reasonable one based on the evidence of record. In addition, as set forth above, although Skyles testified that claimant could obtain gainful employment even with the one-pound lifting restriction for his right upper extremity, she was unable to identify any open employment positions which claimant might accept. Therefore, we affirm the Commission's finding that claimant was entitled to PTD benefits under the odd-lot theory.

¶ 110 Respondent argues, however, that if claimant had not undergone the "ill-advised" reverse total shoulder arthroplasty on June 23, 2015, he would still be working for respondent in his regular job. This argument ignores our earlier conclusion that the Commission's finding that claimant's course of medical care beginning on June 23, 2015, when he underwent the reverse total shoulder arthroplasty, was reasonable and necessary was not against the manifest weight of the evidence. Having rejected the underlying contention, we also reject respondent's argument addressed to the Commission's award of PTD benefits on this basis.

¶ 111 Next, respondent insists that claimant failed to establish that there were no jobs available to him. Respondent relies on the testimony and report of Ragains, noting he found two security guard positions claimant could possibly do. Respondent further notes that it offered claimant a job

as a watchman, but claimant declined the position. As noted above, although Ragains found two "potential" security-guard positions for claimant, he ultimately concluded that it was unlikely that claimant would be hired for either position given his physical limitations, the restrictions imposed by his physicians, and the medications claimant takes. We also observe that claimant did not think that he could perform security-guard work because if he cannot prop up his arm his shoulder swells and he becomes "miserable." On these issues, the Commission found Ragains's opinion persuasive and claimant's testimony credible as was its province as the factfinder. Respondent identifies no cogent evidence that requires us to disturb the Commission's findings.

¶ 112 We also observe that, with respect to the watchman position, the Commission found that respondent's offer in February 2017 constituted a "sham" job offer. In reaching this conclusion, the Commission cited to this court's decision in *Reliance Elevator Co.*, 309 Ill. App. 3d 987. In that case, this court defined a "sham" job offer as one that is "designed to circumvent [the employer's] responsibility under the Act." *Reliance Elevator Co.*, 309 Ill. App. 3d at 993. In that case, the Commission found the employer's offer of employment was a "sham" because it was not made until after the initial arbitration hearing and was offered at a rate of compensation "far higher than was economically justifiable." *Reliance Elevator Co.*, 309 Ill. App. 3d at 993. Further, this court noted the employer had repeatedly refused to offer the employee any position prior to the offer and that evidence demonstrated it had no intention of bringing the employee back to work. *Reliance Elevator Co.*, 309 Ill. App. 3d at 993. Accordingly, we held that the Commission was not required to consider the job offer in determining whether the employee was permanently and totally disabled. *Reliance Elevator Co.*, 309 Ill. App. 3d at 993.

¶ 113 Here, as in *Reliance Elevator Co.*, the evidence amply supports the Commission's finding that respondent's offer of the watchman position was a sham designed to circumvent its liability

under the Act. First, respondent had repeatedly refused to offer claimant a watchman position prior to February 2017. In this regard, Cycholl, claimant's union representative, testified that he contacted respondent's representatives in September 2015 about hiring claimant as a watchman for the electric department. According to Cycholl, without an explanation, he was informed that there was no interest in hiring claimant. Moreover, Meckes acknowledged that a watchman position opened in July or August 2016 at the water department and that respondent made no effort to offer claimant the position. The position opened again in December 2016. Respondent, however, made no effort to offer the position to claimant until two months later. When asked why respondent did not offer claimant the open watchman position prior to February 2017, Meckes simply responded that respondent did not "think about it" before then. Second, the timing of the job offer was suspect. It was not made until February 9, 2017, after claimant provided respondent a copy of Ragains's report concluding that claimant was not employable. Based on this record, we conclude that the Commission's finding that the February 2017 job offer was a "sham" was not against the manifest weight of the evidence and, therefore, the Commission was not required to consider the job offer in determining whether claimant was permanently and totally disabled. See *Pisano v. Illinois Workers' Compensation Comm'n*, 2018 IL App (1st) 172712WC, ¶ 76 (noting that it is within the province of the Commission to determine whether an employer's job offer is *bona fide*).

¶ 114 In short, claimant fulfilled his burden of establishing that he fell into the odd-lot category by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. This shifted the burden to respondent to prove that continuous, suitable employment existed within claimant's labor market. Respondent failed to offer sufficient evidence that suitable work was available in claimant's labor market since Skyles failed to identify any open employment positions and the Commission's finding that the

watchman position offered to claimant by respondent in February 2017 was a sham was not against the manifest weight of the evidence.

¶ 115 III. CONCLUSION

¶ 116 For the reasons set forth above, the judgment of the circuit court of Sangamon County is affirmed in part and reversed in part. We reverse that portion of the judgment confirming the Commission's decision to reduce the award of TTD benefits. The judgment of the circuit court is affirmed in all other respects. Further, we reverse that portion of the Commission's decision reducing claimant's TTD benefits and remand the case to the Commission with directions to reinstate the arbitrator's award of TTD benefits.

¶ 117 Circuit court judgment affirmed in part and reversed in part; Commission decision reversed in part and remanded with directions.