2024 IL App (1st) 230526WC-U

Order filed: May 24, 2024

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| ROBERT BLANKSHAIN,<br><br>Appellant,<br><br>v.<br><br>THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Walsh Construction Co., Appellees). | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County, Illinois<br><br>Appeal No. 1-23-0526WC<br>Circuit No. 2021 L 050308<br><br>Honorable Daniel P. Duffy, Judge, Presiding. |

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PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Mullen, Cavanagh, and Barberis concurred in the judgment.

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**ORDER**

¶ 1 (1) The Commission's decision denying permanent total disability benefits under the odd-lot theory was not against the manifest weight of the evidence; (2) the Commission's decision denying maintenance benefits from August 24, 2013, through April 1, 2014, and from November 1, 2014, through May 9, 2017, was not against the manifest weight of the evidence; (3) the Commission's decision denying maintenance and/or temporary partial disability benefits while the claimant worked for another employer was not against the manifest weight of the evidence; (4) the Commission's decision denying vocational rehabilitation expenses for the claimant to obtain his undergraduate degree in finance was not against the manifest weight of the evidence; and (5) the Commission's denial of

penalties, attorney fees, and costs was not against the manifest weight of the evidence.

¶ 2 The claimant, Robert Blankshain, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for shoulder injuries causally related to injury he sustained on January 28, 2008, while working for Walsh Construction Company (employer).

¶ 3 The arbitrator denied the claimant permanent total disability benefits (PTD) and instead awarded permanent partial disability benefits (PPD) in the amount of 30% loss of use of person-as-a-whole. The arbitrator also denied wage differential benefits, certain periods of temporary total disability benefits (TTD), temporary partial disability benefits, vocational rehabilitation expense (including college tuition), maintenance benefits, prospective medical care, and penalties and attorney fees.

¶ 4 The claimant filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On July 20, 2018, the Commission issued a decision increasing the PPD award from 30% to 45% loss of person-as-a-whole. In all other respects, the Commission affirmed and adopted the arbitrator's decision.

¶ 5 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On July 29, 2019, the circuit court entered an order affirming the Commission's denial of PTD benefits, maintenance benefits, vocational costs for the claimant's DePaul University finance degree, and penalties, attorney fees, and costs. However, the court reversed the Commission's ruling on the issue of prospective medical care for Celebrex and follow-up physician visits and on the issue of the $103.07 in disputed vocational rehabilitation expenses and remanded the case back to the Commission on those issues. The circuit court instructed the Commission to decide on those issues.

¶ 6 The claimant appealed the circuit court's decision, case number 1-19-1786WC, and on October 8, 2020, we found that we were without jurisdiction to consider the appeal because the circuit court's order was not final and appealable in accordance with Illinois Supreme Court Rule 23(c)(1) (eff. July 1, 2011). We noted that the circuit court reversed the Commission's decision in part, remanded to the Commission, and directed the Commission to make a factual determination on a disputed issue of mileage reimbursement incidental to vocational expenses and prospective medical care. Therefore, we held that the Commission proceedings were not final and the claimant's petition was premature.

¶ 7 On June 18, 2021, the Commission entered an order on remand, complying with the two judicial mandates by requiring the employer to authorize and pay for a prescription for Celebrex as well as "reasonable and necessary" follow up visits with the claimant's doctor, and the Commission required the employer to reimburse the claimant $103.07 in travel costs associated with vocational rehabilitation.

¶ 8 The claimant again sought judicial review of the Commission's decision in the circuit court of Cook County. On February 27, 2023, the circuit court confirmed the Commission's decision. The claimant appealed to this court.

¶ 9 This appeal followed.

¶ 10 BACKGROUND

¶ 11 The following recitation of the facts relevant to a disposition of this appeal is taken from the evidence heard at the arbitration hearings held on May 9, 2017, and May 10, 2017.

¶ 12 The claimant worked for the employer as an ironworker. On January 28, 2008, the claimant was pulling a reinforcement bar through a doorway while at work when he felt a tear in his right shoulder. He felt pain and he could not raise his right arm above his head. After telling his

supervisor, the claimant was taken to an emergency care facility where his right shoulder was x-rayed, he was proscribed ibuprofen, and he was told to seek follow up care.

¶ 13 On February 4, 2008, the claimant had an MRI of the right shoulder which showed chronic degenerative changes and possible tear of the labrum. On February 6, 2008, the claimant was referred to Dr. Bernard R. Bach, of Midwest Orthopedic, for an orthopedic consultation. On February 12, 2008, the claimant was examined by Dr. David M. Kalainov of Northwestern Center for Orthopedics. During this visit, the claimant reported feeling a tearing sensation deep in his right shoulder. The claimant, on a medical information sheet, indicated he was having right shoulder pain. The claimant did not indicate he injured his left shoulder or that he was experiencing left shoulder pain at that time. Dr. Kalainov reviewed the MRI study and recommended physical therapy and strongly encouraged initial nonsurgical measures to address the claimant's shoulder pain. The medical records show the claimant agreed to the treatment recommendations and was given a prescription for physical therapy.

¶ 14 On February 13, 2008, the claimant was examined by Dr. Bach where the claimant completed a patient registration form indicating he hurt his right shoulder. The medical records do not identify any left shoulder injury or left shoulder complaints. Dr. Bach diagnosed the claimant with a Slap Tear and recommended surgery. On February 29, 2008, the claimant underwent a right shoulder slap repair, biceps tenotomy, and open biceps tenodesis at Rush SurgiCenter.

¶ 15 On June 17, 2008, the claimant was examined by Dr. Guido Marra of Loyola Medicine pursuant to Section 10 of the Act. The claimant provided a history of feeling a sharp pain in his right shoulder while putting together some beams. The claimant complained of left shoulder pain and Dr. Marra asked the claimant whether he injured his left shoulder at the time of the original accident. The claimant said he did not recall any injury to his left shoulder. Dr. Marra reviewed

the MRI which showed some mild heterogeneity in the proximal aspect of the biceps tendon. Dr. Marra agreed with Dr. Bach's recommendation of left shoulder arthroscopic surgery if the claimant did not respond to steroid injections. Dr. Marra wrote in his report that based upon the claimant's history he did not injure his left shoulder at the time of his accident. Dr. Marra believed the claimant aggravated an underlying pre-existing bicipital tendon tear. Dr. Marra testified the claimant's preexisting left shoulder condition was aggravated when the claimant became more dependent upon his left shoulder after the right shoulder surgery. Dr. Marra opined the claimant's left shoulder condition was casually related to the underlying January 28, 2008, accident.

¶ 16 On July 14, 2008, the claimant returned to Dr. Bach. The claimant had decreased pain in his right shoulder, and the pain in the anterior aspect of the right shoulder was gone. The claimant reported receiving no relief from the steroid injection. Dr. Bach's records indicate the claimant asked if he could play golf, and Dr. Bach felt that he could. Dr. Bach recommended the arthroscopy evaluation.

¶ 17 On October 3, 2008, the claimant underwent a left shoulder arthroscopy biceps tenotomy and open biceps tenodesis. On October 20, 2008, the claimant followed up with Dr. Bach. The claimant said his left shoulder was doing well but he was now experiencing an exacerbation of his right shoulder symptoms. Dr. Bach's records indicate the claimant was suffering an acute exacerbation of impingement syndrome of the right shoulder, secondary to overuse due to the surgery on his left shoulder.

¶ 18 The employer requested a Section 12 examination, which was performed by Dr. Marra in January 2009. Dr. Marra recommended a diagnostic arthroscopy of the right shoulder, and the claimant transferred his care and treatment to Dr. Marra who performed a decompression of the right shoulder and hardware removal in May of 2009. Then, in November of 2009, the claimant

underwent a left shoulder subacromial decompression.

¶ 19 On April 9, 2010, the claimant underwent a functional capacity evaluation (FCE) at ATI Physical Therapy. The FCE placed the claimant at the heavy physical demand level. In a letter to Dr. Marra, dated April 9, 2010, Tom Wemer, of ATI, wrote the claimant reports he doesn't feel he can safely return to work within his existing shoulder pain and limitations. Mr. Wemer additionally said the claimant may have issues with returning to work due to complaints of pain.

¶ 20 On April 20, 2010, the claimant returned to Dr. Marra. At that time, the claimant reported he was doing well. Dr. Marra reviewed the FCE and determined the claimant was at maximum medical improvement (MMI) and he could return to work within the FCE limits. Dr. Marra authored a letter returning the claimant to work within the limits of the FCE. Dr. Marra also authored a letter stating the claimant could play golf. Dr. Marra's medical records do not contain any information regarding the frequency of golf the claimant intended to play, or frequency of golf played in the past. The claimant testified, prior to his work accident, he played golf a lot and he could play 36 holes every day.

¶ 21 On August 17, 2010, the claimant returned to Dr. Marra complaining of left shoulder pain which had been increasing over the prior two months. Dr. Marra gave the claimant a steroid injection in his left shoulder. On September 28, 2010, the claimant returned to Dr. Marra complaining of pain in his left shoulder and Dr. Marra examined him. The examination was negative for impingement signs, negative for Hawkin's Test, negative Speeds Test, and negative O'Brien's Test. The crossover test was positive. Dr. Marra gave the claimant a second steroid injection. On November 9, 2010, the claimant returned to Dr. Marra complaining of left shoulder pain. Dr. Marra's notes indicate he did not recommend an MR arthrogram or any additional steroid injections.

¶ 22 On November 22, 2010, the claimant was examined by Dr. Raab, pursuant to Section 12 of the Act. The claimant reported he injured his right and left shoulders when feeding a bar inside a beam. Medical records showed the claimant is an avid golfer. Dr. Raab opined the claimant did not injure his left shoulder during the January 28, 2008, incident. Dr. Raab's records say if the history is correct, it is possible that overuse of the left shoulder contributed to the necessity for treatment of the left shoulder and ultimate surgical intervention.

¶ 23 On December 14, 2010, the claimant returned to Dr. Marra complaining of right shoulder and left shoulder pain. Dr. Marra proscribed an MR arthrogram but did not change the claimant's work restrictions. On June 5, 2012, the claimant returned to Dr. Marra to review the MR arthrogram. The films were negative. During that visit, the claimant now complained of right shoulder pain. Dr. Marra prescribed a right shoulder MR arthrogram but did not change the claimant's work restrictions.

¶ 24 On August 15, 2012, the claimant returned to Dr. Marra to review the MR arthrogram. The right shoulder MR arthrogram films were negative. At that time, Dr. Marra performed an examination. The claimant had a negative Hawkins Test, negative crossover test, negative Speeds Test, negative O'Brien's Test, and was negative for signs of impingement. The claimant did not have any AC joint tenderness. Dr. Marra did not recommend any additional treatment but prescribed Celebrex to use on an as needed basis.

¶ 25 On June 21, 2016, the claimant returned to Dr, Marra with a compact disk of surveillance footage that the claimant stated was from his lawyer showing him mulching lawns. The video was an hour and a half long. Dr. Marra's records show he told the claimant it was inappropriate for an office visit, and if his lawyer wanted him to review the video, it should be edited down to five minutes. The claimant testified he condensed the video down to five minutes and brought it back

to Dr. Marra. Dr. Marra testified he only reviewed the five-minute video the claimant had edited, and he had not reviewed the full video. The arbitrator reviewed the five-minute video provided to Dr. Marra and compared the five-minute video to the actual surveillance videos. The arbitrator found the five-minute video failed to contain several significant physical activities depicted on the surveillance videos.

¶ 26 The claimant worked as an ironworker from 2005 through 2008. The claimant testified that from 2002 until 2005 he was unemployed and did not work. From 1990 through 2000, The claimant was a stockbroker earning $250,000 a year. The claimant was senior vice president of investments for Wachovia Financial Services in 2000, the claimant had a Series 7 license for trading equities, and a Series 63 license for selling mutual funds. Prior to being a stockbroker, the claimant worked as a welder.

¶ 27 In 2008, the claimant enrolled at DePaul University to obtain a bachelor's degree in finance. At the time the claimant enrolled at DePaul, he was still undergoing medical treatment and was not at MMI. Dr. Marra found the claimant to be at MMI on April 20, 2010. The claimant graduated in June of 2011 with a 3.99 GPA. The claimant earned several honors including Golden Key Honor Society, Phi Kappa Pho Honor Society and DePaul Honor Society. The claimant testified he went back to college because he wanted to diversify his job opportunities and to improve the possibility of getting a new start in life. The claimant acknowledged that no one associated with his workers' compensation claim discussed his return to college.

¶ 28 From February 2010 through May of 2011, the claimant testified he conducted a self-directed job search. The claimant would perform his job search between 3:00-4:00 in the morning until noon every day. The claimant said he conducted the job search early in the morning because the house was quiet, and it allowed him to get his search out of the way early and have the rest of

his day.

¶ 29 The claimant testified he focused his self-directed job search toward executive positions within a salary range of $80,000 to $100,000 per year. The claimant explained he did not seek jobs in the $40,000 to $60,000 range because those jobs involved physical labor. The claimant testified he applied for medium level executive salary positions because he wanted to do executive work and he was not going to do anything physical. The claimant testified his self-directed job search did not include jobs considered heavy physical demand and he only applied for jobs based upon his educational background. The claimant acknowledged he could work within the restrictions of the FCE with pain and he could perform a medium physical demand job. The claimant did not receive any job offers.

¶ 30 The claimant testified before his work accident he played a great deal of golf, and he could play 36 holes of golf every day without pain. After the accident, the claimant could only play golf every other day and he could only play 18 holes. Before the accident, the claimant's golf handicap was 2, and after the accident his handicap was between 12 and 14. The claimant said it takes him between 3-4 hours to play a round of golf. The claimant testified playing golf causes him to experience pain. The claimant said he may not start out in pain but by the end of the round his shoulders are sore and that is why he only plays golf every other day, and only 18 holes. The claimant admitted golfing 21 times from July 26, 2013, through October 9, 2013. The claimant's golf scores were published on the website of the Chicago District Golf Association.

¶ 31 In May 2011, David Patsavas, a vocational rehabilitation consultant, was retained to assist the claimant's job search efforts. Mr. Patsavas believed the claimant could benefit from short-term vocational rehabilitation services to assist the claimant in returning to gainful employment and improve his job seeking skills and job readiness. Mr. Patsavas said the claimant qualified for 90%

of the job market because of two factors: The claimant's heavy category of physical demand capability and the claimant's transferable skills and prior work history.

¶ 32 Mr. Patsavas recommended that the claimant alter his job search to include jobs earning between $50,000 to $60,000. Mr. Patsavas testified the claimant's asking price was too high for what the claimant was bringing to the table. Mr. Patsavas believed the claimant's ten-year work history as a stockbroker was relevant to the claimant's ability to find work. The claimant possessed transferable skills in the financial sector, including securities, banking, and money handling. The claimant, additionally, had experience working with his hands, he had metalworking experience, and he had supervisory foreman experience. Mr. Patsavas testified the claimant was getting interviews, but he was not receiving any job offers, but Mr. Patsavas did not have any evidence that the claimant was sabotaging or intentionally performing poorly during the interviews.

¶ 33 Mr. Patsavas worked with the claimant for approximately two years, but ended his services on August 23, 2013, after concluding he could not offer the claimant any further assistance in his job search. Mr. Patsavas testified that after two years the claimant was using the same resources and identifying the same job leads as his service provided, so there was nothing else he could do for the claimant. Mr. Patsavas notified the claimant vocational rehabilitation services were ending because nothing else could be done for him pursuant to the *National Tea* test. *National Tea* v. *Industrial Commission*, 97 III. 2d 424 (1983).

¶ 34 On April 14, 2014, the claimant accepted a position for employment at George A. Kennedy & Associates as an assistant project coordinator earning $2,333.33 per month. The claimant testified that his girlfriend's father owned the company, and that he only worked there for approximately six months because work dried up. Documents from George Kennedy & Associates indicate the job was a temporary position with a scheduled termination date of October 31, 2014.

The claimant's first date of employment was April 15, 2014. The claimant testified he was overqualified for the position, but the job gave him something to do and occupied some of his time. Mr. Patsavas testified the claimant's job at George Kennedy only required a high school diploma, had no opportunity for advancement, and was well below the claimant's earning capacity. Thomas Grzesik, a vocational expert retained by the claimant, opined the amount the claimant earned at George Kennedy was consistent with what the labor market provided for an entry-level assistant project manager position.

¶ 35 Mr. Patsavas testified the claimant had almost completed his degree when he first met with the claimant. Mr. Patsavas testified the claimant's degree did not increase the likelihood of his finding a job but may increase his potential income. Mr. Patsavas testified he would not have recommended that the claimant work at George Kennedy & Associates because the rate of pay was artificially low compared to the claimant's earning capacity. Mr. Patsavas testified he did not think the job was appropriate given the claimant's degree and experience.

¶ 36 Mr. Grzesik met with the claimant on only one occasion, on October 16, 2014. Mr. Grzesik did not conduct a labor market survey. Mr. Grzesik did not know what grades the claimant earned while attending college. Mr. Grzesik was not aware that prior to his deposition the claimant was no longer working at George Kennedy & Associates. Mr. Grzesik testified the claimant worked as an iron worker for eight years. Mr. Grzesik acknowledged he spent only 15 minutes reviewing the claimant's self-directed job search history covering November 1, 2011, through July 31, 2015. Mr. Grzesik testified the claimant said he only occasionally played golf since his injury. Mr. Grzesik further testified the claimant told him that he could only drive for 30 minutes before experiencing pain, and he could only drive for a total of one hour. Mr. Grzesik also indicated the claimant said he experiences significant bilateral shoulder pain after walking two miles and after working on a

keyboard for a few hours.

¶ 37 Mr. Grzesik testified he disagreed with opinions of Dr. Marra and the FCE regarding the claimant's physical ability to return to iron working and whether the claimant could perform heavy-duty work. Mr. Grzesik opined the claimant was not capable of performing his prior occupation as a journeyman iron worker. Mr. Grzesik testified the claimant should be seeking light-level work based on the claimant's pain complaints. Mr. Grzesik believed the claimant should look for occupations related to what he did at George Kennedy, and that the claimant's records show he was only pursuing light to sedentary employment over the past two years.

¶ 38 Mr. Grzesik disagreed with Mr. Patsavas regarding the claimant being employable at a $50,000 salary level because Mr. Patsavas included finance jobs requiring two to five years of experience, and the experience sought was two to five years of recent experience, not two to five years of experience over the past 15 years. Mr. Grzesik did not believe the claimant had the relevant experience for the jobs he was applying while working with Mr. Patsavas. Mr. Grzesik testified that the claimant remained unemployed in finance because of his lack of experience. Mr. Grzesik further testified the claimant's lack of recent experience in the financial market, not having a higher degree, either a master's degree in business administration (MBA) or charted financial analyst certificate (CFA), and the claimant's age were factors working against him.

¶ 39 Mr. Grzesik testified he did not believe obtaining a master's degree would have been appropriate because of the claimant's age and that the claimant's finance degree did not increase his earning capacity. Mr. Grzesik testified the claimant's job search did not include jobs requiring pushing or pulling on a repetitive basis or that include driving, and, additionally, recommended vocational services going forward because he believed the claimant could find a job.

¶ 40 Dr. Marra testified the claimant's condition of ill-being with respect to the bilateral

shoulder injuries were causally related to the claimant's work accident of January 28, 2008, and the medical care, including the bilateral shoulder surgeries and steroid injections, were reasonable and necessary to cure or relieve the claimant from the effects of his condition caused by the January 28, 2008, accident.

¶ 41 Dr. Marra testified after reviewing the MR arthrogram on August 15, 2012, he did not feel there was anything further he could do for the claimant, other than prescribing anti-inflammatory medication and issuing work restrictions. Dr. Marra testified the anti-inflammatory medicine, Celebrex, was prescribed to deal with the claimant's complaints of occasional pain, and if the claimant did not complain of pain, he would not prescribe Celebrex. Dr. Marra acknowledged there were no findings from the surgery requiring the need for Celebrex, and that he prescribes Celebrex to the claimant when the claimant says his shoulders hurt. Dr. Marra testified the claimant could return to work as an ironworker if the claimant abided by his restrictions. Dr. Marra testified he did not believe the claimant could go back to iron working unless accommodation was made. However, Dr. Marra testified if the claimant wanted to return to ironworking, he would support the decision.

¶ 42 Dr. Marra testified he was aware the claimant played golf, but he did not know any specifics regarding how often he played. Dr. Marra testified he only reviewed the five-minute video The claimant edited, and he had not reviewed the unedited videos. Dr. Marra did not recall seeing the claimant carrying bags of mulch in the video.

¶ 43 The employer hired Dr. Ram Aribindi as an independent medical examination (IME) physician to examine the claimant on July 11, 2016. Dr. Marra testified he did not review Dr. Aribinid's report from that date prior to his evidence deposition. After reviewing Dr. Aribindi's report, Dr. Marra was asked to identify any differences between his last examination of the

claimant and Dr. Aribindi's examination. Dr. Marra acknowledged he could only find slight discrepancies between the findings of the two examinations. Dr. Aribindi found no evidence of impingement in either shoulder and found normal strength in manual muscle testing. Dr. Marra testified he found evidence of impingement and the claimant's strength was slightly less than normal.

¶ 44 In Dr. Aribindi's examination of the claimant on July 11, 2016, the claimant reported he injured his right shoulder on January 28, 2008, while pulling an iron bar through beams. The claimant noted a tearing sensation in his right shoulder and indicated he had some pain in the right and left shoulders with overhead activities. The claimant reported that he was doing well, that he plays golf once or twice a week, and that he denied experiencing any clicking or popping of the shoulders.

¶ 45 Dr. Aribindi performed an examination of the right shoulder and noted full active forward elevation, abduction, external rotation as well as adduction/internal rotation of the shoulders. Dr. Aribindi found the claimant's strength was five of five in all planes and no signs of impingement. The O'Brien's, Speed's, and Load Shift tests were all negative. The doctor found there was no apprehension with abduction extended rotation of the shoulder with flexion, adduction, internal rotation of the shoulder.

¶ 46 The examination of the left shoulder showed no tenderness over the clavicle or the AC joint, foil active forward elevation, abduction, external rotation as well as adduction/internal rotation. Range of motion was symmetric with the right shoulder, and strength was five of five in all planes. Dr. Aribindi found no signs of impingement and the O'Brien's, Speed's and Load Shift Tests were negative. No apprehension with abduction extended rotation of the shoulder with flexion, adduction, internal rotation of the shoulder.

¶ 47 Dr. Aribindi indicated he reviewed all the surveillance videos and the claimant's medical records. Dr. Aribindi opined that based on the medical history, exam, and review of the imaging studies and surveillance, there were no physical restrictions to performing his regular work activities at the heavy-duty level of an iron worker. The claimant was at MMI, and no further diagnostic workup or treatment was necessary. Dr. Aribindi indicated the video surveillance showing the claimant lifting and carrying multiple bags of dirt and landscaping is consistent with his findings that the claimant is capable of performing work at the heavy-duty level as an iron worker.

¶ 48 Surveillance was conducted and the reports and videos were admitted as evidence. Surveillance tapes of April 13, 2017, show the claimant assisting landscapers unloading trees from a truck, moving trees, using a large handcart, and assisting in the planting of the trees. The claimant is observed exerting force on the hand cart with his arms extended at and above his shoulders. Surveillance tapes of June 2, 2016, show the claimant unloading bags of mulch from a vehicle and performing gardening work which included lifting, carrying, and dumping large bags of mulch. The claimant is seen carrying two large bags of mulch at a time. The claimant is observed breaking branches, by holding the branches in front of him at chest or shoulder height and squeezing his hands together to break the branches, and the claimant is also observed stuffing the broken branches into a garbage can. In other surveillance videos the claimant is observed loading and unloading golf bags into and out of his trunk and playing golf.

¶ 49 ANALYSIS

¶ 50 The claimant argues that the Commission erred by denying PTD benefits under the odd-lot theory pursuant to Section 8(f) of the Act.

¶ 51 The Commission's resolution of a factual issue will not be set aside on review unless it is

against the manifest weight of the evidence. *Fed. Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n (Buza)*, 371 Ill. App. 3d 1117, 1118 (2007). "Whether a claimant is permanently and totally disabled is a question of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed by a reviewing court unless it is against the manifest weight of the evidence." *Ameritech Services, Inc.* v. *Ill. Workers' Comp. Comm'n*, 389 Ill. App. 3d 191, 203 (2009). A factual finding is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent—that is, when no rational trier of fact could have agreed with the agency. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). A reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn. *Id.*

¶ 52 "A PTD award is proper when an employee can make no contribution to industry sufficient to earn a wage." *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC. "A person is not entitled to PTD benefits if he or she is qualified for and capable of obtaining gainful employment without seriously endangering his or her health or life." *Id.* "The odd-lot category for purposes of a PTD award arises when a 'the claimant's disability is limited in nature so that he is obviously not unemployable, or if there is no medical evidence to support a claim of total disability.' " *Id.* ¶ 33 (quoting *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546-47 (1981)). A claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skill, training and work history, he will not be regularly employed in a well-known branch of the labor market. *Id.* ¶ 37 (citing *Westin Hotel v. Industrial Comm 'n*, 372 III. App. 3d 527, 544 (2007)). If the claimant establishes that he falls into the odd-lot category, the burden shifts to the employer to prove that the claimant is employable in

a stable labor market and that such a market exists. *Id*.

¶ 53 The Commission found the claimant's job search was not diligent due to several self-imposed restrictions in his search. First and foremost was the claimant's decision to only apply for jobs earning between $80,000 and $100,000. While the claimant's vocational rehabilitation services were ongoing, the claimant's vocational rehabilitation counselor, Mr. Patsavas, advised the claimant to lower his salary expectations to the $50,000 to $60,000 salary range to increase the number of possible job opportunities. Mr. Patsavas told the claimant that his asking price of $80,000 to $100,000 was too high for what the claimant had to offer. Mr. Grzesik, the claimant's vocational expert, testified the claimant's job search should include jobs with salaries lower than $50,000. Yet after Mr. Patsavas' vocational rehabilitation services ended, the claimant still only applied for executive jobs earning between $80,000 to $100,000.

¶ 54 The claimant additionally placed limitations upon his job search, rendering it ineffective, by not applying for any jobs requiring physical labor. The claimant testified he only wanted an executive position earning a higher salary because he no longer wished to do physical labor. The claimant acknowledged the FCE released him back to work at a heavy-duty level, yet he did not look for jobs with any physical demand. The claimant searched for jobs commensurate with his newly obtained college degree, despite his lack of recent business experience. The claimant further testified he did not include jobs with a salary range of $40,000 to $60,000 in his job search because he did not want to do physical labor.

¶ 55 The claimant's decision to disregard the recommendations of the vocational counselors and to eliminate multiple categories of potential jobs was an inappropriate limitation which effectively made his self-directed job search meaningless, and, therefore, not diligent.

¶ 56 The second method for a claimant to satisfy their burden of proving they fall into the odd-

lot category would be their showing that because of their age, skill, training, and work history, they will not be regularly employed in a well-known branch of the labor market. *Lenhart v. Illinois Workers' Compensation Comm 'n*, 2015 IL App (3d) 130743WC, ¶ 37.

¶ 57 Mr. Grzesik testified the claimant should have additional vocational services because he believed the claimant could find a job. Mr. Patsavas testified the claimant qualified for 90% of the job market because of the claimant's abilities and capabilities, which include being qualified to perform heavy-duty work and the claimant's transferable skills and prior work history. Subsequent to his work-related injury, the claimant had the capability to attend college, earn a degree in finance, maintain a 3.99 GPA, and to golf every other day, maintaining a 12-14 handicap. As it was clear to the Commission, it is clear to us, the claimant is capable of obtaining gainful employment and contributing to industry sufficient to earn a wage.

¶ 58 The Commission found that the claimant's conduct demonstrated a bad-faith search for work with the intent to avoid finding employment. For the reasons mentioned, we agree with the Commission's finding that the claimant's job search was rendered ineffective by not applying to entire categories of jobs due to his own restrictions, and we find the Commission's decision was not against the manifest weight of the evidence.

¶ 59 Because the claimant failed to establish he falls into the odd-lot category, we will not address whether the claimant is employable in a stable labor market.

¶ 60 The claimant argues that should he not qualify for an award of odd-lot PTD benefits, he should qualify for a wage differential under Section 8(d)(1) of the Act. The issue of wage differential was before the arbitrator and was denied on the merits. The claimant then filed a review with the Commission and abandoned his claim for a wage differential award by not seeking it from the Commission. This was affirmed by the circuit court order, and then on remand from the

appellate court the Commission once again explicitly did not include wage differential as an issue preserved by the claimant. Arguments not before the Commission are waived on appeal. *R.D. Masonry, Inc. v. Industrial Comm 'n (Hunter),* 215 III. 2d 397, 414 (2005); *Anders v. Industrial Comm'n (otr Wheel),* 332 III. App. 3d 501, 509 (2002). We find the wage differential, having been denied by the arbitrator and not raised as an issue by the claimant to the Commission, was abandoned.

¶ 61 The claimant next argues that he is entitled to maintenance benefits after the termination of vocational services on August 24, 2013, through the date he started working for George A. Kennedy & Associates, April 15, 2014, and from the termination of his employment with George A. Kennedy & Associates, November 1, 2014, through the date of the trial, May 9, 2017.

¶ 62 Whether a claimant is entitled to maintenance benefits is a question of fact to be resolved by the Commission. *W.B. Olson v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶¶ 31-39. Whether a job search is diligent or not is a factual question to be resolved by the Commission. *Alexander v. Industrial Comm'n*, 314 Ill. App. 3d 909, 916 (2000). "[T]he determination of whether a claimant is entitled to maintenance benefits is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence." *W.B. Olson*, 2012 IL App (1st) 113129WC, ¶ 39. For the reasons mentioned earlier, the Commission properly found that the claimant did not conduct a diligent job search and that it was in bad faith. Therefore, the Commission's denial of maintenance benefits from August 24, 2013, through April 1, 2014, and from November 1, 2014, through May 9, 2017, was not against the manifest weight of the evidence.

¶ 63 We next look at the Commission's denial of maintenance and/or TPD benefits while the claimant worked at George Kennedy and Associates, from April 15, 2014, through October 31,

2014.

¶ 64 The claimant testified he was hired by his girlfriend's father, the owner of George Kennedy and Associates, as an assistant project coordinator earning $2,333.33 per month. The claimant testified he worked for approximately six months and his employment was terminated because work dried up. Documents from George Kennedy and Associates indicate the job was a temporary position with a termination date of October 31, 2014. Mr. Patsavas testified the claimant's position with George Kennedy and Associates only required a high school diploma, had no opportunity for advancement, was well below the claimant's earning capacity, and was not permanent. The claimant acknowledged he was overqualified for the position.

¶ 65 The Commission's determination that the claimant's position with George Kennedy and Associates was not suitable employment and that he was therefore was not entitled to TPD benefits was not against the manifest weight of the evidence.

¶ 66 The claimant next argues that the Commission erred in denying reimbursement of $41,665 and interest for the cost of an undergraduate finance degree from DePaul University. The claimant argues that these are costs and expenses incidental to the vocational-rehabilitation program to which he is entitled.

¶ 67 "The determination of whether a claimant is entitled to an award of vocational-rehabilitation benefits is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence." *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 31. To determine whether a vocational rehabilitation award would include the cost of a degree, various factors must be considered, such as whether there is a specific job sought, whether a degree is required, evidence of jobs available in the field sought given a the claimant's age, experience, background, physical

limitations, and the existence of other positions for which a the claimant might be qualified with other remedial or vocational training. *Hunter Corp. v. Industrial Comm'n*, 86 Ill. 2d 489 (1981).

¶ 68 The Commission relied on the claimant's own testimony that he re-enrolled in college in 2008, long before he was at MMI, and before he knew whether he would be able to return to work as an iron worker. Neither Mr. Patsavas nor Mr. Grzesik testified that the claimant's college expenses were a reasonable course of vocational rehabilitation, nor did either of them offer testimony with bearing on the *Hunter* factors. *Id.* Mr. Patsavas indicated that some form of remedial education may have been appropriate, but he did not agree that a finance degree from DePaul was reasonable. Mr. Grzesik believed the claimant should seek out jobs that utilized his construction background rather than his finance degree. For these reasons, we find the Commission's finding that the claimant was not entitled to reimbursement for his college tuition was not against the manifest weight of the evidence.

¶ 69 The claimant's final argument is that the Commission erred by not awarding penalties, fees, and costs under Sections 16, 19(k), and 19(l) of the Act. The claimant argues that the employer acted unreasonably when it reduced his maintenance benefits following the termination of Mr. Patsavas' vocational rehabilitation assistance, and when it terminated all benefits following Mr. Patsavas' amended opinion that the claimant's job search had not been diligent.

¶ 70 Whether to award penalties presents a factual question and the decision of the Commission will not be disturbed unless it is against the manifest weight of the evidence. *Reynolds v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 966, 971 (2009). Sections 16, 19(k), and 19(l) of the Act "are intended to prevent bad faith and unreasonable withholding of compensation benefits from injured workers." *Board of Educ. of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9 (1982). Generally, an employer's reasonable and good-faith challenge to liability does

not warrant the imposition of penalties. *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173 (2001). When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed. *Id.*

¶ 71 Imposition of Section 19(k) penalties is discretionary and properly assessed when a benefit payment delay is deliberate or results from bad faith or "improper purpose." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 512 (1998). Section 16 applies under the same circumstances. *Id*. The imposition of section 19(k) penalties and Section 16 attorney fees require a higher standard of proof than an award of additional compensation under section 19(l). *Id*. at 514. Section 19(k) penalties may be awarded for an employer's failure to pay medical expenses. *Id*. at 512.

¶ 72 The FCE, dated April 9, 2010, found the claimant capable of working at the heavy level, and Dr. Marra found the claimant to be at MMI on April 10, 2010. The employer paid maintenance benefits after the claimant reached MMI, provided two years of vocational rehabilitation services and paid PPD advances from August 13, 2013, through March 10, 2014, and paid two additional PPD advances. The employer relied on the IME from Dr. Aribindi, and the opinion of Mr. Patsavas that he could do no more for the claimant and that the claimant's job search was not diligent. Thus, we find, the Commission's decision denying penalties, attorneys fees and costs was not against the manifest weight of the evidence.

¶ 73 CONCLUSION

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

¶ 74 Affirmed.