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

JOHN KENO & COMPANY,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 09—MR—1607
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION and MICHAEL RAUSCH,)	
)	Honorable
Defendants-Appellees.)	Margaret J. Mullen,
)	Judge, Presiding

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

ORDER

Held: (1) Commission's award of a wage-differential award in lieu of the permanent partial disability benefit awarded by the arbitrator is not against the manifest weight of the evidence. Although Commission determined that claimant was not "totally cooperative" with job search efforts, the pay rate of the position claimant ultimately obtained was within the pay range of the potential areas of employment identified in a labor market survey. Further, while the position claimant accepted was only part time, there was conflicting evidence regarding the parameters of claimant's work capabilities. (2) Commission's finding that claimant is entitled to a maintenance award is not improper where record established that the claimant sustained a work-related injury, that the restrictions arising from that injury impaired the claimant's

earning power, and that the claimant's participation in rehabilitation increased his earning capacity. (3) Commission properly credited respondent for overpayment of TTD benefits.

I. INTRODUCTION

Claimant, Michael Rausch, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 205/1 *et seq.* (West 2000)) alleging that he injured his left ankle and right shoulder on October 24, 2001, while working for respondent, John Keno & Company. On August 8, 2007, the arbitrator issued a decision finding that claimant's current condition of ill-being was causally related to the incident of October 24, 2001. Among other things, the arbitrator awarded claimant 121-1/7 weeks of temporary total disability (TTD) benefits and 141 weeks of permanent partial disability (PPD) benefits (representing 60% loss of use of the right arm). The arbitrator also found that respondent was entitled to a credit of \$20,773.03 for overpayment of TTD benefits. Upon review, a majority of the Illinois Workers' Compensation Commission (Commission) increased the period of TTD benefits to 124-6/7 weeks, awarded claimant 8-1/7 weeks of maintenance benefits, and modified respondent's credit to reflect the maintenance award. In addition, the Commission vacated the PPD award and substituted in its stead a wage-differential award under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2000)). The circuit court of Lake County confirmed the decision of the Commission. On appeal, respondent disputes the Commission's award of a wage-differential, its award of maintenance benefits, and its calculation of the credit for overpayment of TTD benefits.

II. BACKGROUND

In March 2001, claimant was placed with respondent by his union as a heavy equipment operator. This position entailed running and maintaining machinery such as loaders, bulldozers, and

small trackhoes. As such, claimant was required to climb in and out of these machines and operate levers using his arms. On October 24, 2001, claimant, then 54 years of age, was using a loader bucket to install three-inch stone. As claimant was descending from the machine to take a break, he twisted his left ankle and fell on his right side. Claimant testified that when he landed, a three-inch stone struck him on the right side, resulting in “[e]xtreme pain” in the shoulder area. Unable to walk after the fall, claimant got back into the loader, drove to his supervisor’s office, and reported the incident. Claimant then continued working for the rest of the day.

On the evening of October 24, 2001, claimant sought care at the Burlington Hospital emergency room. An X ray of the right shoulder was negative. The diagnosis was right shoulder contusion and left ankle sprain. Claimant’s left ankle improved, and he did not require any further medical care for that injury. Claimant continued working full duty for the next couple of months, operating the same types of heavy equipment and working full time and overtime hours.

Claimant returned to the Burlington Hospital emergency room on November 19, 2001, with “constant pain” to the right upper extremity. He was referred to Dr. T. W. Grossman. In an initial evaluation on November 29, 2001, claimant complained of pain in the right shoulder. An X ray showed a healed fracture of long-standing origin involving the junction of the middle and distal third of the right clavicle with degenerative changes at the acromioclavicular joint. Dr. Grossman suspected a rotator-cuff tear and aggravation of pre-existing degenerative changes in the right shoulder. Dr. Grossman allowed claimant to continue working full duty and referred him for physical therapy.

Dr. Grossman saw claimant in follow up on January 17, 2002. Dr. Grossman’s notes indicate that at this time claimant had related that he had been able to shovel snow without any difficulties,

that his right shoulder was better, that he had greater range of motion, and that he had no pain. Claimant denied this history at the arbitration hearing. Dr. Grossman reviewed an MRI that he had ordered which was taken on January 10, 2002. The MRI showed a chronic complete rotator-cuff tear with superior migration of the humeral head, tendon retraction, and degenerative changes in the acromioclavicular joint. Claimant testified that Dr. Grossman told him he had a longstanding pre-existing problem, an “old injury,” “probably something [he] had done [to his right shoulder] before,” and that the condition was inoperable. Dr. Grossman authorized claimant to continue physical therapy and instructed him to return in a month.

Claimant opted not to follow up with Dr. Grossman. Instead, he sought a second opinion from Dr. Roger Collins on January 31, 2002. Dr. Collins’ records indicate that he had treated claimant in the past for right shoulder problems, including an incident in September 1998 when claimant struck his right shoulder on a sharp edge of steel. Dr. Collins’ records also reflect a history that before October 24, 2001, claimant reported having pain with overhead activities or vigorous use of the right arm, although it never limited him. Claimant denied that history at the arbitration hearing. Dr. Collins reviewed the X ray taken on November 29, 2001, and the MRI taken January 10, 2002. Dr. Collins suspected a massive tear of the rotator-cuff tendon of claimant’s right shoulder, and he recommended surgery.

On March 5, 2002, claimant underwent an independent medical examination by Dr. Howard Freedberg. Dr. Freedberg’s assessment was degenerative changes to the right shoulder acromioclavicular joint with a chronic rotator-cuff tear. Dr. Freedberg felt that there was “definite” preexisting factors present, including arthrosis of the acromioclavicular joint and rotator cuff tear. Dr. Freedberg concurred with Dr. Collins’ surgical recommendation. Although Dr. Freedberg did

not believe that claimant's condition was caused by the industrial accident, he opined that, based on the history provided by claimant, there was an exacerbation of a preexisting condition. Dr. Freedberg expected claimant to be at maximum medical improvement (MMI) six to twelve months after shoulder surgery.

Claimant testified that he continued working full duty with overtime until bad weather forced respondent to cancel all jobs. However, he was not officially taken off work until Dr. Collins performed arthroscopic surgery on March 8, 2002. The procedure consisted of a subacromial decompression and a partial repair of the rotator cuff. Following surgery, Dr. Collins placed claimant in physical therapy.

Claimant continued to treat with Dr. Collins after the operation. During this time, Dr. Collins felt that claimant could return to "very, very light duty" with minimal use of the arm if such work was available. Claimant testified he made no attempt to look for light-duty work at this time, and specifically stated he was not willing to do less than full duty. By October 2002, Dr. Collins felt that the rotator-cuff repair had failed and that claimant's prognosis was guarded. He discussed the possibility of further surgery and prescribed an MRI scan. Claimant was then reexamined at the request of respondent by Dr. Freedberg. Dr. Freeberg recommended an arthroscopic lysis of adhesions and a capsular release. Dr. Collins performed this procedure on January 17, 2003. Claimant testified that following the second surgery, he did have better range of motion but still felt pain in his right shoulder.

On July 31, 2003, claimant was examined by Dr. Brian Cole. Dr. Cole recommended a latissimus transfer. Dr. Collins concurred with this recommendation, and Dr. Cole performed the procedure on October 22, 2003. Thereafter, claimant was placed in therapy. By April 1, 2004, Dr.

Cole recorded that claimant was doing very well following surgery. He cleared claimant to return to work with limited use of his right arm, no overhead lifting or activities, and no lifting, pushing or pulling greater than five pounds. Dr. Cole also authorized claimant to continue with therapy and opined that claimant's prognosis was excellent.

At Dr. Cole's request, claimant underwent a functional capacity evaluation (FCE) on June 15, 2004. The FCE report reflects sub-maximal effort and minor inconsistencies with subjective reports of pain. The evaluator felt that claimant could at times do more than was demonstrated during testing, and claimant was deemed capable of full-time work in a medium-strength category with occasional lifting from 12 inches to knuckle height up to 25 pounds. The FCE also indicated that claimant is capable of performing work in sustained sitting and standing situations. It was noted, however, that claimant would not be able to return to his position as a heavy equipment operator because of the physical requirements that job entails. The evaluator also believed that claimant might be a difficult rehabilitation candidate due to symptom magnification. On July 1, 2004, Dr. Cole reviewed the FCE, found claimant to be at MMI, and cleared claimant to return to work within those limitations as of July 5, 2004. He specifically concluded that claimant did not require further medical care or any work conditioning.

Claimant had initially been evaluated and an initial vocational assessment performed by Mary Schmit at CorVel on September 5, 2003, however further efforts were suspended pending claimant's third surgery. Following the FCE, claimant had an interview with CorVel on July 26, 2004. At that time, claimant's case was assigned by Schmit to vocational case manager Susan Sineni. Claimant advised Sineni that he would be out of town on vacation for a couple of weeks and that he was also having some non-work-related problems with his knees.

Claimant next met with Sineni on August 19, 2004, after he returned from vacation. At that time, claimant was provided a resume, a re-employment plan, and job-search verification records to complete. In addition, claimant was shown various resources for locating potential employers including local newspapers. Claimant was given the specific assignment of contacting 25 employers, completing two applications, and registering at Illinois Skills Match. During this meeting, claimant advised Sineni that he only had one car, and since his wife worked he might not be able to go out to complete job applications or attend interviews. When claimant again met with Sineni on August 25, 2004, he admitted that he completed no job search logs. At this time, he was given 11 job leads at companies that were hiring.

On September 1, 2004, claimant advised Sineni of his interest in a job as a bus driver. In a subsequent meeting, claimant had been directed to complete 25 contacts. However, he only made three contacts. He was then given 10 new leads for actual job positions. On September 9, 2004, claimant canceled his CorVel meeting due to lack of transportation. At this time, he did advise CorVel that the bus driver job was not full time. On September 14, 2004, claimant's wife contacted CorVel, notifying the firm that claimant had accepted the school bus driver position. On October 22, 2004, CorVel completed a labor market survey for claimant, which identified three potential areas of employment (cleaner/housekeeper, delivery driver, and security guard) and listed several contacts for each type of position. The salary range for the positions identified in the labor market survey was between \$5 and \$15 per hour.

Claimant testified he began working as a school bus driver on September 24, 2004. He works 20 hours per week and earns \$10 per hour. He stated that the position is similar to driving a truck and explained that to let the children on and off the bus he has to grab the bus door handle with

his right hand to pull and snap the door shut. Claimant testified his right shoulder is sore after a few hours but that he has been able to complete his work from September 2004 through the time of the arbitration hearing on March 20, 2007. He testified he is off when there is no school, during summer breaks, and holidays. During those periods, claimant collects unemployment of between \$90 and \$92 per week. The parties stipulated that if claimant were still working his union job he would earn \$39.20 per hour as of June 1, 2006.

Claimant testified that since taking the position as a school bus driver, he has applied for other positions that he learned of by “word of mouth.” He admitted, however, that he did not have any documentation to support these applications. Claimant also testified that he met with CorVel on November 2, 2005 for the express purpose of listing his name on a light-duty, full-time employment list with the union. Claimant acknowledged, however, that he refused to place himself on that list. He explained that some time subsequent to obtaining the part-time job as a school bus driver, he applied for and began receiving union pension benefits, and he cannot work for the union off their light-duty list while collecting the pension benefits. He also applied for and began receiving social security disability benefits effective September 2004. As of the time of the arbitration hearing, it had been two or three years since claimant had seen a doctor for his shoulder.

In a letter dated March 30, 2005, Dr. Collins wrote that he “would not ask [claimant] to be driving a bus anymore than he is” and that he is “surprised that he is able to do as much as he is doing.” Dr. Collins opined that claimant could “easily go back to an office job if one were available,” but he did not believe that claimant should engage in any activities that involve reaching, pushing, pulling, or moderate use of the arm. In addition, Dr. Collins limited claimant’s lifting to 10 to 15 pounds at waist level. Dr. Collins believed claimant had reached MMI.

At the request of respondent, claimant was examined by Dr. Charles Carroll on November 3, 2006. Dr. Carroll opined that the accident of October 24, 2001, contributed to the condition of ill-being of claimant's right shoulder. Dr. Carroll concluded that claimant did not require further medical treatment relative to his right shoulder. Further, Dr. Carroll believed that, at a minimum, claimant was capable of working at the levels demonstrated in the 2004 FCE, and that he may in fact have greater capabilities which could be demonstrated on an updated FCE. Dr. Carroll felt that claimant could work certain jobs as a heavy equipment operator, but could not work "unrestricted" in that position.

Mary Schmit of CorVel testified on behalf of respondent via deposition. She related that her activities with respect to claimant began when she performed a job analysis of his position with respondent on June 25, 2002. This included videotaping and taking weights and measurements of all of the activities and equipment used by claimant in his work with respondent. She classified claimant's position with respondent as a "light" position, finding that it did not require carrying over 20 pounds; that there was minimal pushing, pulling, reaching, and climbing; and that claimant spent most of the day sitting. Schmit reviewed the FCE of June 2004 and concluded that claimant would have been capable of returning to his prior employment with respondent, noting that no specific climbing limitations had been imposed by either the FCE or Dr. Cole and that climbing would have been limited to getting into and out of the truck cab.

Susan Entenberg, a vocational rehabilitation counselor, testified by deposition that she met with claimant on one occasion in April 2005 at the request of claimant's attorney. At that time, she also reviewed various documents, including claimant's medical records and the records from CorVel. Entenberg stated that she did not perform a labor market survey for claimant, contact any employers

for potential job leads, or speak with a union representative regarding the availability of light-duty work for someone with claimant's restrictions. Entenberg opined that claimant was unable to return to his position as a heavy equipment operator because it was beyond his medical restrictions. In particular, Entenberg noted that Dr. Collins had imposed restrictions of lifting up to 10 to 15 pounds at waist level, no use of the dominant right arm above waist level, and no reaching, pushing or pulling with the right dominant arm. In addition, she noted that Dr. Cole recommended that claimant not lift more than 25 pounds. Entenberg explained that these restrictions would preclude the work of claimant's prior position, which requires pushing, pulling, lifting, and constant use of the arms. Entenberg also questioned claimant's ability to work a full eight-hour day five days a week based on Dr. Collins' March 30, 2005, letter.

Entenberg did not find the three areas of employment identified by CorVel in the labor market survey appropriate for claimant. Entenberg explained that delivery positions require lifting beyond claimant's capabilities or pay only minimum wage. Entenberg noted that claimant earns more than the hourly minimum wage as a school bus driver. Entenberg also testified that claimant would not be able to work as a housekeeper because it requires reaching, pushing, pulling, using one's arms, lifting, and pushing/pulling carts weighing 50 to 100 pounds. Entenberg believed that claimant could be capable of working as a security guard in those positions involving patrolling a closed site, but nothing that would require firearms or the apprehension of unruly individuals.

Ultimately, Entenberg believed that claimant's position as a bus driver was appropriate. She pointed out that driving positions were recommended as part of the labor market survey conducted by CorVel and claimant was able to handle that position. She also noted that his earnings of \$10 per hour were consistent with the average wage set forth in the labor market survey. Finally, she stated

that claimant was doing an appropriate job based on his background, his restrictions, and his functionability.

Based on the foregoing evidence, the arbitrator found that claimant's present condition of ill-being is causally related to the injury of October 24, 2001. With respect to the period of temporary total disability, the arbitrator noted that claimant was first taken off work contemporaneous with his first surgery on March 8, 2002, and that he was cleared to return to work with permanent restrictions on July 5, 2004. As such, the arbitrator found that claimant was entitled to TTD benefits of \$777.57 per week from March 8, 2002, through July 5, 2004, a period of 121-1/7 weeks, for a total TTD award of \$94,197.16. However, the arbitrator noted that claimant had already been paid a total of \$114,970.08 in TTD benefits by respondent. Accordingly, the arbitrator awarded respondent a credit of \$20,773.03

The arbitrator found that claimant failed to demonstrate entitlement to wage-differential benefits under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2000)). The arbitrator noted that claimant was released to full-time work with restrictions. Further, he only allowed one month of vocational assistance before voluntarily taking a part-time job paying \$10 per hour, 20 hours per week. The arbitrator found that claimant made no real attempt to obtain better paying or full-time employment since that time. Further, claimant admitted that he was not willing to take anything less than full duty with the union and he declined to place himself on a light-duty job listing. The arbitrator found therefore that claimant failed to perform an adequate job search and failed to fully comply with the vocational efforts provided to him. In addition, the arbitrator placed little weight on Dr. Collins' March 30, 2005, letter, finding it incredible. The arbitrator concluded that the limitations imposed by Dr. Collins are not supported by the results of the FCE, operating surgeon

Dr. Cole's release to full-time work, and the opinions as later expressed by Dr. Carroll. The arbitrator also disregarded the report of Susan Entenberg and her testimony. The arbitrator acknowledged that claimant did testify that he continues to experience pain and a "popping" sensation in his right shoulder as well as some loss of range of motion due to pain. As such, the arbitrator concluded that claimant sustained a 60% loss of use of his right arm, and awarded claimant PPD benefits for a period of 141 weeks.

A majority of the Commission noted that although the arbitrator found that claimant was temporarily totally disabled from March 8, 2002 through July 5, 2004, respondent stipulated in the Request for Hearing form that claimant was temporarily totally disabled through July 28, 2004. The Commission found this stipulation binding. See *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1088 (2004). As a result, the Commission modified the period of TTD to run from March 8, 2002, through July 28, 2004, a period of 124-6/7 weeks.

Relying on section 8(a) of the Act (820 ILCS 305/8(a) (West 2000)) and *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170 (2000), the Commission also found that maintenance benefits should have been awarded to claimant. In determining the period of maintenance benefits, the Commission noted that claimant did not return to gainful employment until September 24, 2004. Prior to that, claimant met with respondent's vocational rehabilitation consulting firm, CorVel, beginning on July 6, 2004. The Commission noted that the purpose of that meeting was not to put claimant back to work with respondent, but to provide vocational rehabilitation and to assist claimant in finding a job. The Commission found that CorVel provided claimant with a series of job leads as well as a structure for applying for employment. Claimant secured a position outside of the list provided by CorVel on September 24, 2004, when he became

employed as a bus driver for 20 hours per week earning \$10 per hour. The Commission noted that this rate of pay was within the range of pay for those positions recommended by CorVel. As such, the Commission awarded claimant 8-1/7 weeks of maintenance benefits from July 29, 2004, through September 23, 2004, at the TTD rate of \$777.57 per week.

The Commission also determined that claimant was entitled to a wage-differential award under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2000)) in lieu of the PPD award authorized by the arbitrator. Citing to *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721 (2000), the Commission noted that in order to receive a wage-differential award, the employee must demonstrate a partial incapacity which prevents him from pursuing his usual and customary line of employment and an impairment of earnings. The Commission further noted that per *Gallianetti*, there is no affirmative requirement under section 8(d)1 that a claimant conduct a job search. The Commission recognized that claimant was not “totally cooperative” with the job search due to “his personal circumstances,” but noted that the position claimant secured was within the restrictions of Dr. Cole and the FCE and the pay rate was within the rate of pay for the jobs recommended by CorVel. As such, the Commission found that claimant established his entitlement to a wage-differential benefit of \$534.16 per week beginning September 24, 2004, and continuing for the duration of his disability.

Finally, the Commission modified the credit awarded respondent to take into consideration the maintenance award. In particular, the Commission modified respondent’s credit to reflect a deduction of the sum of \$777.57 per week for the period of 8-1/7 weeks of maintenance benefits. The Commission therefore reduced the credit from \$20,773.03 to \$14,457.67.

Commissioner Lindsay dissented. She would have awarded claimant maintenance benefits commencing no earlier than August 19, 2004. She pointed out that claimant was not engaged in any vocational rehabilitation between July 28, 2004, and August 18, 2004. She noted that it was not until August 19, 2004, that claimant returned from vacation and met with CorVel regarding his vocational rehabilitation efforts. Commissioner Lindsay also would have found that claimant failed to prove his entitlement to a wage-differential award. She noted that claimant was released to work with permanent restrictions. However, the restrictions did not preclude claimant's return to full-time employment. She also noted that claimant was involved in one month of vocational assistance before he voluntarily began a part-time job as a school bus driver. Prior to that time, he had only self-imposed limited involvement in vocational efforts. Commissioner Lindsay also pointed out that as of August 25, 2004, claimant had not completed any job-search logs. Since claimant failed to cooperate with vocational efforts and he failed to look for employment, Commissioner Lindsay believed that claimant failed to prove a sufficient loss of earning capacity or that he looked for suitable employment. She also noted that claimant elected to go with part-time work and may have found a higher earning job had he cooperated more fully.

On judicial review, the circuit court of Lake County confirmed the decision of the Commission. This appeal followed.

III. ANALYSIS

A. Wage-Differential

On appeal, respondent first contends that the Commission's award of a wage-differential benefit is against the manifest weight of the evidence. The purpose of the Act's wage-differential provision is to compensate an injured worker for his reduced earning capacity. *Albrecht v. Industrial*

Comm'n, 271 Ill. App. 3d 756, 759 (1995). The provision is set forth in section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2000)) and provides:

“If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to $66\frac{2}{3}$ % of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.” 820 ILCS 305/8(d)1 (West 2000).

Thus, to qualify for a wage-differential benefit, an employee must establish (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. 820 ILCS 305/8(d)1 (West 2000); *Gallianetti*, 315 Ill. App. 3d at 730. If the injury does not reduce the employee’s earning capacity, the employee is not entitled to a wage-differential benefit. *Albrecht*, 271 Ill. App. 3d at 759. Whether an employee has presented sufficient evidence of entitlement to a wage-differential is a question of fact to be resolved by the Commission. *Durfee v. Industrial Comm’n*, 195 Ill. App. 3d 886, 890 (1990). We will not disturb the Commission’s findings on factual matters unless they are against the manifest weight of the evidence. *Copperweld Tubing Products Co. v. Workers’ Compensation Comm’n*, 402 Ill. App. 3d 630, 633 (2010). For a finding to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Morton’s of Chicago v. Industrial Comm’n*, 366 Ill. App. 3d 1056, 1061 (2006).

In this case, respondent does not dispute that claimant established a partial incapacity that prevents him from pursuing his employment as a heavy equipment operator. Rather, respondent argues that the Commission erred in awarding claimant a wage-differential benefit because claimant failed to establish an impairment of earnings. Respondent asserts that the wage-differential provision of the Act was not intended to reward an employee who “fail[s] to show effort to return to employment within his or her restrictions.”

The Commission acknowledged that claimant was not “totally cooperative with the job search recommendations made by CorVel” because of “his personal circumstances.” However, as we recognized in *Gallianetti*, 315 Ill. App. 3d at 731, a job search is only one way of showing an impairment of earnings. In this case, the record shows that any suitable job claimant could obtain would result in an impairment of earnings. CorVel, the vocational rehabilitation firm engaged by respondent, identified three potential areas of employment for claimant in its labor market survey. The salary range for these positions was between \$5 and \$15 per hour, well below the \$39.20 per hour claimant would be making at his union job. Although claimant did not obtain a position in one of the precise fields identified by CorVel (cleaner/housekeeper, delivery driver, or security guard), he did locate a position as a driver of a school bus on his own. He was eventually hired in that position at a salary of \$10 per hour. Thus, claimant’s pay rate fell within the pay range of the jobs identified by CorVel. Based on this evidence, the Commission could have reasonably concluded that claimant established an impairment of earnings.

Respondent also argues that claimant failed to choose “a suitable job at comparable earnings.” In this regard, respondent questions whether the record supports the notion that “part-time employment is [claimant’s] true earnings capacity.” As noted above, section 8(d)1 specifies that the

amount of a wage-differential award shall be based on “66-2/3 % of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some *suitable employment* or business after the accident.” (Emphasis added.) 820 ILCS 305/8(d)1 (West 2000). Respondent notes that Dr. Cole found that claimant was capable of returning to work within the limitations set forth in the June 15, 2004, FCE. The FCE indicated that although claimant would be unable to perform work as a heavy equipment operator, he was capable of returning to full-time employment in the medium-strength category with certain lifting restrictions. Thus, respondent suggests, claimant is “suitable” for full-time work and his failure to obtain a full-time position should preclude him from receiving a wage-differential benefit. Respondent also points out that Schmit reviewed the FCE and opined that claimant was capable of returning to his prior employment with respondent. However, these opinions were not unanimous. Notably, in his letter of March 30, 2005, Dr. Collins was “surprised that [claimant] is able to do as much as he is doing.” Dr. Collins added that he “would not ask [claimant] to be driving a bus anymore that he is.” Claimant’s vocational expert, Entenberg, deferred to the judgment of Dr. Collins. It is within the province of the Commission to weigh and resolve conflicts in the evidence. *City of Springfield, Illinois Police Department v. Industrial Comm’n*, 328 Ill. App. 3d 448, 452 (2002). Given this conflicting evidence, the Commission could have reasonably concluded that a part-time job constituted “suitable employment” for an individual with claimant’s capabilities.

Respondent directs us to two cases which, it suggests, support its position that claimant is not entitled to a wage-differential benefit. In *Durfee*, 195 Ill. App. 3d 886, the claimant was injured while working as a repairman. The claimant’s treating physician placed no physical restrictions on

him and suggested that he attempt to return to his position as a repairman. Instead, the claimant obtained a position as a school administrator at a church, a job that the claimant enjoyed and which coincided with his clerical interests. We noted that while the claimant testified that the school administrator position was “the best job he could find,” there was no evidence that he attempted to obtain any other form of employment. *Durfee*, 195 Ill. App. 3d at 890. Based on these facts, we held that the Commission could reasonably conclude that the claimant had not shown a loss of earning capacity. *Durfee*, 195 Ill. App. 3d at 890-91. *Durfee* was based in part on the fact that the claimant made a personal choice to accept a lower paying position and failed to prove that he could not obtain a higher-paying job. See *Copperweld Tubing Products Co.*, 402 Ill. App. 3d at 634 (discussing *Durfee*). In the present case, claimant was the subject of a labor market survey which identified potential areas of employment and pay ranges for the identified position. Claimant eventually obtained a position at a rate of pay within the pay range outlined in the labor market survey. Because of this distinction, we do not find that the *Durfee* case requires us to disturb the Commission’s award of a wage-differential benefit in this case.

We also find distinguishable *Pietrzak v. Industrial Comm’n*, 329 Ill. App. 3d 828 (2002), the other case cited by respondent. In *Pietrzak*, we affirmed the Commission’s finding that the claimant was not entitled to a wage-differential award. Aside from the fact that the claimant in *Pietrzak* failed to establish that he was incapable of pursuing his usual and customary employment, we also agreed with the Commission that the claimant failed to establish an impairment of earnings. *Pietrzak*, 329 Ill. App. 3d at 835-36. In particular, we noted that a labor market survey showed claimant was employable at a salary near his pre-injury level, but he accepted a position with only the second company that he contacted at a salary that was below the pay range identified in the labor market

survey. *Pietrzak*, 329 Ill. App. 3d at 835-36. As noted above, in this case, claimant accepted a position within the pay range identified in the labor market survey. Thus, *Pietrzak* is not on point.

In sum, given the evidence of claimant's impairment of earnings and the conflicting evidence regarding whether claimant was capable of full-time work, we find that the Commission's award of a wage-differential benefit is not against the manifest weight of the evidence.

B. Maintenance Award

Next, respondent argues that the Commission's award of maintenance benefits is against the manifest weight of the evidence. The Commission noted that beginning on July 6, 2004, claimant met with a representative from CorVel to provide vocational rehabilitation and to assist claimant in finding a new job. CorVel furnished claimant with a series of job leads as well as a structure for applying for employment. Claimant eventually secured a position outside of the recommendations made by CorVel, and, as of September 24, 2004, claimant was employed as a bus driver for 20 hours per week earning \$10 per hour. The Commission therefore awarded claimant 8-1/7 weeks of maintenance benefits for the period from July 29, 2004 (the date through which the parties stipulated that claimant was temporarily totally disabled), through September 23, 2004 (the day before claimant began working as a school bus driver).

According to respondent, claimant failed to establish that he is entitled to maintenance benefits because he failed to cooperate with rehabilitation efforts and to make a good-faith effort to obtain a job. In particular, respondent contends that claimant delayed the commencement of vocational rehabilitation efforts until he returned from vacation, he did not pursue the job leads provided to him by CorVel, and he accepted a part-time position even though he had been released to work full time.

We recently addressed the propriety of an award of maintenance benefits in *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019-20 (2005). In *Greaney*, we concluded that the Commission properly awarded the employee maintenance benefits during the time he was participating in a vocational rehabilitation program because (1) the employee sustained a work-related injury; (2) the restrictions arising from that injury impaired the employee's earning power; and (3) there was evidence that the employee's participation in rehabilitation increased his earning capacity. *Greaney*, 358 Ill. App. 3d at 1019-20. Likewise, in this case, the evidence demonstrates that claimant sustained a work-related injury and that the restrictions arising from that injury impaired his earning power. Moreover, the record shows that claimant's participation in the CorVel program coupled with his own initiatives increased his earning capacity as demonstrated by the positive results of the job search. See *Greaney*, 358 Ill. App. 3d at 1019-20; *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004). While we recognize, as the Commission acknowledged, that claimant was not "totally cooperative" with the job search recommendations made by CorVel, we emphasize that the job claimant eventually obtained was within claimant's restrictions and the salary was within the pay range of the positions identified by CorVel in its labor market survey. Moreover, the part-time nature of the position was within the limitations suggested by Dr. Collins and Entenberg. For these reasons, we reject respondent's argument that the Commission's award of maintenance benefits is improper.

C. Credit

Finally, respondent contends that the Commission failed to properly credit it for TTD benefits paid to claimant "due to the fact that the Commission's decision to award maintenance benefits is against the manifest weight of the evidence." However, having rejected respondent's claim that the

maintenance award is against the manifest weight of the evidence, we decline to adjust the credit on this basis.

In his brief, claimant also asks us to adjust the credit, albeit for a different reason. According to claimant, the Commission failed to take into account the increase in the TTD award when calculating respondent's credit. However, claimant neither moved to correct the alleged error with the Commission pursuant to section 19(f) of the Act (820 ILCS 305/19(f) (West 2000)) nor did he file a cross-appeal in this court raising this issue. Accordingly, we find that claimant's argument has been waived (see *Ameritech Services, Inc. v. Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 209 (2009) (declining to address the claimant's contention that his average weekly wage was miscalculated where he failed to file a cross appeal raising the issue)), and we decline claimant's invitation to correct the Commission's error pursuant to Illinois Supreme Court Rules 366(a) (eff. Feb. 1, 1994).

IV. CONCLUSION

For the reasons set forth above, we affirm the judgment of the circuit court of Lake County which confirmed the decision of the Commission.

Affirmed.