NO. 3-10-0148-WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

KAREN MCCURRIE,	) Appeal from the
	) Circuit Court of
Appellant,	) Will County.
	)
v.	) No. 09-MR-501
	)
ILLINOIS WORKERS' COMPENSATION COMMISSION,	) Honorable
	) Bobbi N. Petrungaro,
(Grove Dental Associates, Appellee).	) Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice McCullough, and Justices Hoffman, Hudson, and Holdridge concur in the judgment.

O R D E R

Held: The following findings by the Workers' Compensation Commission's were not against the manifest weight of the evidence: that the claimant failed to prove that her fibromyalgia, chronic fatigue syndrome, and headaches were related to her work accident; that the claimant was entitled to an award of permanent partial disability benefits, as opposed to permanent total benefits; that the claimant's permanent partial disability benefits should be calculated based on a percentage of the person as a whole, as opposed to a wage differential; the period in which the claimant was entitled to temporary total disability benefits; and the calculation of the claimant's average weekly wage.

The claimant, Karen McCurrie, worked as a dental hygienist for the employer, Grove Dental Associates. On December 10, 2002, the claimant slipped on a puddle of Lysol on the floor at work. On July 2, 2003, the claimant filed an application for adjustment of claim pursuant to the Workers' Compensation Act (the Act) (820 ILCS

305/1 *et seq.* (West 2002)), alleging that she injured her lumbar spine as a result of the slip and fall. After a hearing, the arbitrator found that the claimant's accident arose out of and in the course of her employment. The arbitrator found that the claimant's conditions of ill-being in her lower back were related to the work accident because the fall aggravated a pre-existing condition. However, the arbitrator found that the claimant's other complaints of ill-being, including fibromyalgia, chronic fatigue syndrome, and chronic headaches were not related to the accident. The arbitrator concluded, among other things, that the claimant suffered a temporary total disability (TTD) as a result of the accident from December 11, 2002, through June 19, 2003, a total of 27-2/7 weeks, and that the claimant suffered a permanent partial disability (PPD) to the extent of 25% of the person as a whole.

The Commission affirmed and adopted the arbitrator's decision except that the Commission found that an award of PPD benefits in the amount of 30% of the person as a whole was more appropriate, and it modified the arbitrator's decision accordingly. The circuit court confirmed the Commission's decision, and this appeal ensued. The claimant argues on appeal that the Commission's finding that her fibromyalgia was not related to the work accident and its award of PPD benefits, instead of permanent total disability (PTD) benefits, were against the manifest weight of the evidence. The claimant also argues, alternatively, that assuming she was not permanently and totally disabled, the Commission's award of PPD benefits based on a percentage of the person as a whole, rather than a wage differential, was against the manifest weight of the evidence. Finally, the claimant argues that the Commission's determination of the period in which she was entitled to TTD benefits and its calculation of her average weekly wage were against the manifest weight of the evidence.

STATEMENT OF FACTS

The evidence presented at the arbitration hearing established that the claimant had two separate work related accidents: one on June 3, 1999, and one on December 10, 2002. Only the December 10, 2002, accident is the subject matter of the present case.

I.

The Claimant's Medical Treatments Prior to the December 10, 2002 Accident

The June 1999, work related accident resulted in the claimant injuring her lower back, and she settled her claim stemming from that accident prior to the proceedings in the present case. After the June 1999 accident, an x-ray and an MRI of the claimant's lumbar spine revealed disc herniation at L4-5 and spondylolisthesis at L5-S1 as well as degenerative changes. The claimant began receiving medical care beginning July 29, 1999, through November 2000, from Dr. Zindrick, for her back injury and right and left leg pain. The claimant also reported left arm numbness, intermittent dorsal spine pain, and intermittent numbness in her left leg. On January 12, 2000, the claimant reported that her legs had been "jumping all night long." The claimant reported that "she did not get this feeling during the day, just at night when she lays down and attempts to sleep." By February 2000, the claimant had returned to working on a regular basis, and her diagnosis at that time was chronic back and leg pain, controlled with exercise, Aleve, Tylenol #3 and Flexeril. Dr. Zindrick's records from February 11, 2000, state that the claimant reported increasing neck pain and dorsal spine pain and that the neck pain "started a month ago for no apparent reason." In March 2000, the claimant began receiving treatment from a chiropractor, Dr. Bean, for back and neck pain.

Dr. Zindrick's records state that the claimant sustained another injury in May 2000, at which time she slipped and caught her foot on equipment, twisting her back and almost falling. At that time, she reported increasing pain and discomfort in her neck and headaches. The claimant's medical records from Hindsdale Orthopedic Associates dated

May 23, 2000, report that the claimant had "increasing neck pain, discomfort, migraines that are as bad as a 9 on a scale of 10 in severity." On June 21, 2000, the records indicate that the claimant was "still having symptoms of neck and back pain" and that she "gets headaches with her neck pain."

On October 20, 2000, the claimant reported to Dr. Zindrick that she was "having 70% neck, 20% leg symptoms and 10% low back pain." In addition, the claimant was "getting some numbness and tingling in her hands." On January 19, 2001, the claimant's neck conditions continued "to be bothersome with associated headaches." The claimant continued to take Tylenol # 3 and Flexeril. Magnetic resonance imaging (MRI) of the claimant's cervical spine in January 2001 showed no abnormality, and her spinal cord appeared normal.

Dr. Zindrick's records from January 2001 through April 2001 indicate that the claimant continued to be bothered by headaches, neck and low back pain. The claimant reported that "her headaches and neck pain [got] so severe that sometimes she [had] difficulty even working." On March 9, 2001, the claimant was diagnosed at Hinsdale orthopedics with "cervical myofacial pain with headaches." The claimant continued with physical therapy and medication management for her pain.

In April 2001, the claimant saw an orthopedist, Dr. Bardfield. Dr. Bardfield's records indicate that by June 2001, the claimant reported that she continued to have some low back pain, but mainly neck and upper back pain associated with persistent headaches. By July 2001, the claimant reported that her discomfort in her neck and upper back tended to flare-up with her work activities.

The claimant saw Dr. Chinnici in May 2002. On May 13, 2002, Dr. Chinnici wrote a report stating that the claimant had "a history of chronic headache, neck pain, as well as low back pain." The report states that the claimant had previously been "placed

on Ativan, Paxil, Buspar, Amitriptyline, Imitrex, and Maxalt." The claimant told Dr. Chinnici that her headache was "a tightening type of sensation" and noted "a diplopia associated with her headaches and blurry vision." In addition, the claimant reported pain radiating from her neck into her shoulder blades. The claimant also complained of "a recent bout of ringing in her ears as well as dizziness associated with her headache without nausea." The claimant told Dr. Chinnici of "excessive daytime somnolence, restless legs" and sleep walking. Dr. Chinnici recommended that the claimant "see a medical neurologist for evaluation of her severe headaches as well as dizziness, tinnitus and muffled hearing." Dr. Chinnici wrote, "Examination of the dorsal spine reveals *** tenderness and trigger points within the soft tissue structures." His impressions of the claimant's conditions included grade 2 spondylolisthesis, degenerative disk at L5S1, and "[s]evere occipital headaches with associated myofascial trigger points, diplopia with tinnitus and dizziness associated with the headache."

An MRI report dated May 22, 2002, stated that the claimant suffered from "[p]ersistent headaches, double vision, ringing in the ears, dizziness and numbness in the face and hands." An MRI of the claimant's brain did not evidence any abnormal findings. In a report dated June 15, 2002, the claimant's chiropractor, Dr. Kandilakis, wrote that the claimant had "extreme muscle spasms in the cervical paraspinal and thoracic regions as well as the mid and lower paraspinal regions" and pain from the base of her skull to the upper trapezia muscle. Dr. Kandilakis wrote, "The [claimant] relates headaches three times a week stemming from these regions, and has [sought] relief of muscle spasming and chronic pain." Dr. Kandilakis stated in his letter that the claimant was diagnosed with myofascial pain syndrome and muscle contraction headaches, as well as a grade 2 spondylolisthesis and bilateral pars defects in the lumbar region.

The claimant completed a medical form on August 1, 2002, in which she filled in

boxes concerning her past medical history. Her medical history on that date included, frequent ringing in the ear, occasional dizziness/fainting, frequent sinus infections, coughing, rare allergy induced asthma, leg pain when walking due to back pain, muscle weakness on occasion, numbness and tingling sensations, frequent headaches, recurrent back pain, spondylolisthesis, rashes and hives.

II.

The Claimant's Work Accident and Subsequent Medical Care

The work related accident that is the subject matter of this appeal occurred on December 10, 2002, when the claimant slipped and fell on a puddle of Lysol on the floor in her work area. In testifying about the fall, the claimant stated, "I slid in the Lysol, caught myself on my unit which we have L-shaped Formica countertops, caught myself, slid underneath, tried not to hit my head on the stainless steel sink and prevented myself from falling." She said she initially grabbed to the left, but then grabbed to the right and twisted the lower and mid sections of her back. She felt immediate pain. She took some of the prescription pain medications that she had with her for headaches, tried to walk off the back pain, and went on to her next patient. She testified that she was "literally in tears trying to finish his cleaning" and that she could not "do more than that," so she left work.

The next morning, on December 11, 2002, the claimant called Dr. Bardfield. One of the doctor's staff members told her that the doctor was on vacation. The claimant told the staff member that she was in extreme pain and that she had seen a chiropractor in the past. The staff member told the claimant to go to her chiropractor and have an ultrasound done, but not to let them manipulate her back. On December 12, 2002, the claimant saw her chiropractor, Dr. Kandilakis, who took x-rays and performed an ultrasound on her back.

Dr. Kandilakis' report dated December 12, 2002, states that the claimant slipped

and twisted her mid thorax. The report stated that the claimant's medications at the time were Norco, Fiorinal, Skelaxin, Naproxen Sodium, Neurontin, Welbutrin, and Prozac. Dr. Kandilakis stated in his report that the claimant had "a grade 2 spondylolisthesis *** of the Meyerding's classification with a severely compromised disk space at L5S1 of approximately 10% to 15% of its normal height." In addition, the report indicated that the claimant had "a questionable herniated nucleus pulposus and may have an internal disk disruption at L5S1," had a "lumbar radiculopathy," and had "post traumatic myofascitis and exquisite trigger points."

The claimant saw Dr. Bardfield on December 17, 2002, and he recommended physical therapy and that the claimant be taken off of work. The claimant started physical therapy on January 23, 2003. Dr. Bardfield's impression of the claimant's condition was a lumbar strain injury with possible facet strain and a history of spondylolisthesis. The claimant's physical therapy notes from January 2003 stated that she was functioning at the sedentary-light physical demand level as outlined by the U.S. Department of Labor. The claimant reported low back pain with tingling, numbness, and radiating pain into the lower extremities at times. An MRI taken of the claimant's lumbar spine in January 2003 suggested spondylolisthesis of L5 over S1, and a bulging disc at L5-S1.

The claimant testified that by March 2003, she felt that she was getting worse. The therapy helped with her lower back, "but the pain itself seemed to be traveling throughout her body." In addition, she testified that fatigue was setting in at that point, but she "continued to ignore it thinking it was either the medication or viral illnesses." On March 14, 2003, x-rays were taken of the claimant's skull, and they came back negative. Her physical therapist's progress notes stated that in March and April 2003, the claimant was functioning at the medium physical demand level as outlined by the U.S. Department of Labor.

In April 2003, the claimant was experiencing shooting, burning pain in her sacroiliac joints that radiated down her legs. As noted above, prior to the December 10, 2002, accident, the claimant had problems with a previous back injury and headaches. She testified that the previous problems did not compare with what she went through after the December 10, 2002, accident.

On April 21, 2003, and April 25, 2003, the claimant underwent functional capacity evaluation testing. Based on the test results, Dr. Bardfield felt that the claimant had reached maximum medical improvement (MMI). He wrote in his May 21, 2003, report that he did "not think based on her performance and limitations in forward flexion that [the claimant would] be able to return to her job as a dental hygienist" and that, in his opinion, the claimant was at maximum medical improvement. In his June 24, 2003, report, Dr. Bardfield wrote that he told the claimant to continue with her home exercise program and that he had "advised her to participate in job activities that do not involve heavy lifting or static-fixed position." Dr. Bardfield's notes in June 2003 and August 2003 indicate that the claimant reported no changes in her symptoms.

On August 1, 2003, the claimant began working as an ophthalmologist assistant for a new employer, Suburban Eye Care Associates. The claimant worked eight hours per day, Monday through Friday, earning $12.50 per hour. She greeted patients, brought them to the examining area, took a full medical eye history and performed computerized testing of the patients. The job had virtually no physical requirements except walking 20 feet down a hall. There was no "flexion" required for the job.

The claimant's new employment resulted in a change in her insurance coverage. Her new primary care physician under her new insurance coverage was Dr. Vora. Dr. Vora referred the claimant to a neurologist, Dr. Maken, and Dr. Maken, in turn, referred the claimant to Dr. Raglavendra for pain management.

On September 15, 2003, the claimant had a yearly physical, and the notes from that exam state that the claimant complained of "headaches for 3 years. Began after she found out about spondylolithesis in her back after a fall..." The claimant reported that the headaches were daily. The notes state that the claimant was diagnosed with chronic headaches, low backaches, chronic fatigue, and allergies.

The claimant saw Dr. Maken on November 5, 2003, and Dr. Maken's records reflect the claimant's history of headaches for four years after a fall in June 1999. Dr. Maken also noted that the claimant reported that she experienced restless sleep, difficulty falling asleep, and numbness and tingling in her hands and parts of her face.

The claimant saw Dr. Raglavendra on November 17, 2003, for pain management, and he performed nerve blocks, which provided the claimant only hours of temporary relief from her pain. Dr. Raglavendra's initial patient report stated that the claimant presented with headache, which was occipital radiating to the frontal regions. The report stated that the onset "began three years ago when she was doing physical therapy for low back pain" and was gradually getting worse.

On February 1, 2004, the claimant's manager at Suburban Eye Care Associates approached the claimant about her excessive absences from work. The manager told the claimant that she had missed 16 days of work and had left work early on several occasions. The claimant testified that she had missed the 16 days of work because of fatigue and pain and that she had left work early on several occasions because of pain, headaches, or both. The claimant felt that she was more of a burden to Suburban Eye Care Associates, rather than an asset, and that she was creating a burden on her coworkers. Therefore, she concluded that it was in her best interest and the best interests of Suburban Eye Care Associates for her to quit and seek medical care on a full-time basis rather than trying to schedule it around a 40 hour work week. She testified that, at that

time, she was always in pain even though she was taking more pain medications. She resigned from her employment as an ophthalmologist assistant on February 1, 2004, and has not been employed or sought employment since that day.

The claimant testified that she searched for a doctor that treated headaches and that performed "radio frequency obliteration." Through her search, she found Dr. Lipov and met with him on March 9, 2004. She testified that she gave her medical history to Dr. Lipov's staff. She told Dr. Lipov of her headaches and the neck pain that was radiating down her arms. Dr. Lipov's report states that the claimant had been complaining of headaches since September 1999. The pain was always behind her eyes with blurred vision and double vision. His notes indicated that the claimant had received occipital nerve blocks in the past, but they provided only a few hours of pain relief. At that time, the claimant was taking Norco once per week for pain control, as well as Neurontin and Wellbutrin for the headache. The claimant denied any pain radiating to her shoulders or arms. Dr. Lipov referred the claimant to a chiropractor, Dr. Batson, to address her neck and radiating pain.

She saw Dr. Batson on March 10, 2004. On that day, the claimant complained of "severe head, cervical spine and upper back pain with radicular symptomatologies into the upper extremity regions." Dr. Batson's March 10, 2004, report stated that the claimant had a history of migraine headaches, but the current headaches were not migraine typical.

On March 18, 2004, the claimant saw Dr. Ghanayem. In his report dated March 18, 2004, Dr. Ghanayem noted that the claimant first hurt her back in June 1999. The pain was in her low back and referred into her buttock and thighs bilaterally. He stated in his report that her medical history was otherwise unremarkable. His impression was that the claimant had "two aggravations of her underlying lumbar spondylolisthesis" and a soft tissue neck injury that was not a cause of any significant ongoing disability. He

believed that it would be difficult for the claimant "to function as a dental hygienist given the forward posture that she would have to sit in for prolonged periods of time." He stated in his report: "She did have an FCE which found that she could lift at a light-medium work capability. I think this is reasonable given the nature of her back problem which was aggravated from the work injury. I do not think she will be effective as a dental hygienist given her symptomatic spondylolisthesis that she has developed from her two work injuries. She has reached MMI relative to her work injury."

The claimant testified that on March 23, 2004, Dr. Lipov performed a facet joint injection of Bupivcaine into her neck, and for the next year, he continued to give her nerve injections and performed radio frequency obliteration of the nerve. She testified that the radio frequency obliteration provided her with some temporary relief in certain nerves, but never provided full relief from her pain.

The claimant testified that by March 2005, her pain became "more global." More parts of her body were being affected than just her back. An MRI of the claimant's brain in April 2005 came back normal.

On April 19, 2005, the claimant saw Dr. Papernik with complaints of chronic fatigue and headaches. The history the claimant gave to Dr. Papernik was that her headaches started after a fall on a slippery floor without head trauma in December 2002. Dr. Papernik's initial impression was fibromyalgia/chronic fatigue syndrome. Dr. Papernik's June 14, 2005, medical records reference an episode of syncope, which the claimant described as "fainting, black out." The claimant testified that she had a couple of previous episodes of blacking out in high school. She testified, "I had what's called ortho static hypotension, just meaning if you get up too quickly, the blood doesn't make it to your brain and you black out." She testified that after high school, she had an occasional episode but "for the most part" she grew out of it.

Dr. Papernik's notes dated September 12, 2005, references "pain into the joints." The claimant testified that at that time, her joints were swelling and she was experiencing pain in her fingers, toes, and some of her large joints. The claimant also continued to complain of chronic fatigue and headaches, and she described an incident where she lost her peripheral vision. She saw a bright light that obscured one-third of her vision that lasted for about five minutes. On January 3, 2006, Dr. Papernik ordered an EKG and echo testing of the claimant's heart, and the tests came back normal. On January 17, 2006, further x-rays came back normal.

On February 18, 2006, Dr. Papernik ordered lab work to check for heavy metals, arsenic, lead, mercury and creatine. The lab work came back negative. On February 20, 2006, Dr. Papernik diagnosed the claimant as having fibromyalgia. The claimant testified that from the first day that she saw Dr. Papernik, she was under the impression that he believed that she had fibromyalgia.

On May 25, 2006, the claimant returned to Dr. Bardfield. His progress notes of that date stated that the claimant had undergone "extensive conservative physical therapy and work conditioning activities" that were helpful but "did not get her symptoms resolved." According to the notes, the claimant had been treated for various conditions, including cervicogenic headaches and cervical facet joint syndrome, and had been diagnosed with fibromyalgia. Dr. Bardfield's notes stated that "a pain specialist had been treating [the claimant's] neck condition with a number of injection strategies, including, nerve blocks, epidural injections, facet joint injections, and radiofrequency ablation, all of which allowed a temporary relief of her symptoms only."

Dr. Bardfield's impression was "L5-S1 grade 2 spondylolisthesis, which is stable" and "[c]ervical myofascial pain with cervicogenic headaches and fibromyalgia syndrome." Dr. Bardfield recommended that the claimant "not participate in any work related or daily

activities, which [could] exacerbate symptoms or put her at risk for further injury, or symptomatic flare-up." He wrote in his progress notes: "Job activities involving sedentary positions are more likely than not to be tolerated by this patient." He did not believe that the claimant's job activities should include any sort of repetitive bending, twisting, lifting, or prolonged static positions that put stress on the neck or low back.

At the time of the hearing, the claimant testified that some days she would sleep all day, and other days she would stay awake but was unable to function because of fatigue, pain, or both. On rare occasions, she could get out of bed and function well enough to pick up her prescriptions or do a load of laundry or light shopping. Pressure changes in the weather and cold weather both cause her aches and pains. She never knows from day-to-day how she is going to feel or how her sleep will be affected. She also experiences what she called "fibrofog" which was cognitive difficulties that affected her short-term memory. She testified than an ADD drug, Daytrana, helps with her concentration.

III.

Evidence Concerning Causation of the Claimant's Conditions of Ill-Being

Dr. Papernik testified at the hearing by an evidence deposition taken on July 19, 2006. Dr. Papernik testified that the claimant's headaches "started after a fall on a slippery floor without head trauma on or about December of 2002." The headaches were intermittent and debilitating. Dr. Papernik testified, "They're sharp stabbing at the base of her neck with - - and also behind the eyes." According to Dr. Papernik, the claimant had trigger points in her neck, back, and thighs, which were consistent with fibromyalgia. Dr. Papernik explained that patients with fibromyalgia can have a triad of symptoms, with pain as the most common, plus fatigue and irritable bowel syndrome. Dr. Papernik believed that the claimant's fatigue was consistent with a diagnosis of fibromyalgia as

well as chronic fatigue syndrome.

Dr. Papernik believed that there was a causal relationship between the injury that the claimant suffered on December 10, 2002, and her subsequent development of fibromyalgia and chronic fatigue syndrome. The basis of his opinion was "that she did not have those symptomatologies prior to that particular incident that happened in 2002 and she's had them since." Specifically, he referred to the fatigue and diffuse pain. Dr. Papernik testified that he was aware that the claimant had headaches prior to the 2002 accident and that, in reaching his conclusion, the medical history of the patient was very important.

Dr. Papernik opined that the claimant was unable to work because of the extent of her pain, fatigue, and cognitive deficiencies. Dr. Papernik testified that the claimant was "in chronic pain, has chronic headaches, both of which can interfere with sleep which causes chronic fatigue which then also in turn causes memory loss, concentration difficulties."

During cross-examination, Dr. Papernik testified that if the claimant had a history of headaches since September 1999, then "her headaches may not be directly causally related to the injury." However, he believed that the diagnosis of fibromyalgia and headaches were separate diagnoses and that the claimant's fibromyalgia started in December 2002 because she had no symptomatology consistent with fibromyalgia prior to then. He noted that the symptomatology included diffuse pain, positive trigger point tenderness, and fatigue. Dr. Papernik agreed that fibromyalgia and chronic fatigue syndrome could develop without any trauma.

The claimant went to see Dr. Kale on September 20, 2006, for an independent medical examination. She testified that she selected Dr. Kale to perform an independent medical examination because he was one of the few experts in the area of fibromyalgia.

She testified that she spent an hour with Dr. Kale, and approximately 10 minutes of the hour was spent on discussing her past medical history.

Dr. Kale wrote on September 20, 2006, that the claimant had "developed signs and symptoms of classic fibromyalgia syndrome which did not precede her work injury of 12/10/2002." According to Dr. Kale, the claimant's symptoms arose soon after the injury and progressed to the point that she was incapable of working gainfully. At that time, the claimant was taking Norco or Oxycodone, Fioricet, Ritalin, Cymbalta, Prozac, Verelan, USENIX, and Zelnorm. She had daily headaches and considerable "fibro-fog or mental cloudiness." Dr. Kale wrote in his report that the claimant had "restless legs, generalized body pain, poor balance, increasing clumsiness, nonanatomic numbness in her hand and feet, intermittent Raynaud's phenomenon, marked depression, intermittent palpitations with periodic fainting not always orthostatic, and marked generalized fatigue which interfere with her capacity to perform any job involving prolonged exertion lasting longer than one-half hour to one hour."

Concerning her past medical history, Dr. Kale wrote on September 20, 2006, that the claimant's preexisting medical history included low back ache and intermittent palpitations. "All other elements of her current complaints followed her 12/10/2002, injury."

The evidence deposition of Dr. Kale was taken on October 23, 2007, and the claimant presented the evidence deposition testimony at the arbitration hearing. Dr. Kale testified that the claimant's symptoms developed shortly after the 2002 accident, and the symptoms were not present prior to the accident. The symptoms were progressive, and by the time he saw the claimant, she was "incapable of working gainfully as she was experiencing marked sleep reduction and nonrestorative sleep; generalized pain; daily headaches; irritable bowel syndrome, having alternating diarrhea with constipation;

something called fibrofog, which is really another way of saying poor concentration, poor memory and a generalized mental cloudiness." The claimant was also experiencing restless leg syndrome, poor balance, clumsiness, and numbness and tingling in her hands. The claimant was having intermittent Raynaud's phenomenon, which involved painful color changes in her hands. The claimant suffered from depression, intermittent palpitations, and intermittent fainting as well as generalized fatigue.

Dr. Kale testified that prior to the accident, the claimant "had a history of low backache and some palpitations" but the substance of the problems he found occurred after the 2002 injury, not before. Dr. Kale relied on the claimant to give him her medical history. He did not review her medical records that were dated prior to the December 10, 2002, accident. He testified that an important element in forming his opinion on causal connection was that he was told that the claimant's symptoms did not appear until after December 10, 2002. However, he testified that if the claimant had headaches prior to the 2002 accident that did not change his opinion because "the headaches were a single symptom." Dr. Kale was concerned with the "constellation of symptoms." In addition, the claimant's history of blackouts during high school did not concern him because they "may or may not be related to the history of periodic fainting that she described" in September 2006.

According to Dr Kale, the claimant had 18 out of 18 trigger points that are found in fibromyalgia patients. Dr. Kale did not believe that the claimant would be able to return to work as a dental hygienist because that work "requires neck flexion, neck extension, standing, all kinds of exercise to the upper extremities" that she would not be capable of doing regularly and reliably. He did not think that the claimant's irritable bowel syndrome or her Raynaud's phenomenon had a bearing on her ability to work.

On cross-examination, Dr. Kale testified that the claimant reported to him that her

cervical and lumbar pain started with the December 10, 2002, accident. The claimant did not tell Dr. Kale anything about having had headaches since September 1999 or that the headaches could be triggered by her menstrual cycle. She did not report to Dr. Kale that she had seen a neurologist for headaches and that she had used narcotics for headaches prior to the 2002 accident.

At the arbitration hearing, the employer presented the evidence deposition testimony of Dr. Delheimer that was taken on August 25, 2006. Dr. Delheimer conducted two independent medical examinations of the claimant and reviewed her medical records. He first examined the claimant on March 28, 2003. The claimant told Dr. Delheimer about the two work related accidents and that she was pain free for two and a half years after her first injury, but the pain reoccurred with the "near slip" in 2002. However, Dr. Delheimer testified that "even though [the claimant] said she was pain-free during that period, it should be noted that she was on narcotics, which include Tylenol No. 3 and Norco, which would indicate to me some degree of pain during that period of time." Dr. Delheimer stated that the pain was likely "manifestations of spondylolisthesis, which was known to happen as people age."

The claimant told Dr. Delheimer of current pain involving her back and radiating into both legs, the left being worse than the right, and she described tingling and numbness involving her ankles and feet. According to Dr. Delheimer, she also described "the onset of headaches after the second injury." However, he testified that headaches were not commonly associated with spondylolisthesis and "were more likely to be related to some *** factor other than a condition involving the low back area."

He saw her again on June 6, 2003. At that time, the claimant maintained that she was not able to return to work as an oral hygienist because she was unable to maintain a fixed forward position for any length of time because of pain. She had completed her

physical therapy and work hardening and was released to return to a medium-heavy physical demand level.

Dr. Delheimer's impression was that the claimant "had congenital spondylolisthesis" and believed that she was capable of returning to her position as a dental hygienist, except for the inability to maintain a flexed position. The inability to maintain a flexed position was due to her spondylolisthesis and not to the December 10, 2002, accident. He believed that periodic manifestations of the congenital spondylolisthesis began in 1999 and that the claimant did not suffer any permanent injury as a result of the December 10, 2002, incident. Medically, he believed that the claimant had reached her pre-injury level and did not need further medical treatment related to the December 2002 accident. According to Dr. Delheimer, the claimant was at MMI.

He testified that the claimant's medical treatments after June 6, 2003, were related to her underlying congenital spondylolisthesis and not the December 2002 accident and that there was no relationship between her headaches and neck pain and the work-related injury. With respect to the claimant's diagnosis of fibromyalgia, Dr. Delheimer testified that it was a "wastebasket diagnosis that physicians use to explain pain that they can't find a cause for. And there are no x-rays, including MRIs, or blood tests that can prove this condition, so it doesn't have any scientific basis." He also testified that there was no diagnostic testing that can prove chronic fatigue syndrome. He testified that after the December 10, 2002, accident or within a reasonable amount of time after the accident, the claimant did not make any complaints about her cervical spine, headaches, or fatigue. He testified, "Her diagnosis of back pain in 2002 was a legitimate complaint related to the lumbosacral strain that she had combined with her underlying congenital spondylolisthesis." The lumbosacral strain and congenital spondylolisthesis were not related to her current diagnosis of fibromyalgia.

IV.

The Commission's Findings

The arbitrator entered his decision on the claimant's claim on July 6, 2005. The arbitrator's decision contains detailed findings of fact concerning the claimant's medical history. The arbitrator found that the claimant had a compensable accident on December 10, 2002, which aggravated the underlying condition in her lower back. The arbitrator also found that prior to the 2002 accident, the claimant had complaints of headaches and chronic fatigue, among other symptoms, which were eventually diagnosed in 2005 as fibromyalgia and chronic fatigue syndrome. The arbitrator concluded as follows: "In reviewing the treating records following the accident of December 10, 2002, the Arbitrator finds that [the claimant's] condition of ill-being about her lower back was related to the accident of December 10, 2002, but her prior and subsequent and present complaints diagnosed as fibromyalgia, chronic fatigue syndrome, and headaches are unrelated to the accident of December 10, 2002. While [the claimant] may very well be unable to work at the present time, that inability to work is related to the non-work related conditions of fibromyalgia, chronic fatigue syndrome, and headaches." The arbitrator further found that the claimant's "condition of ill-being as a result of the work related accident of December 10, 2002 does include certain work restrictions about the lumbar spine, however, those restrictions do not prevent her from working and any inability of [the claimant] to work at all is the result of non-work related conditions, namely, fibromyalgia, chronic fatigue syndrome, and chronic headaches."

The arbitrator found that the claimant's average weekly wage was $1,028.52 and that she was temporarily totally disabled (TTD) from December 11, 2002, through June 19, 2003, for a total of 27-2/7 weeks. The arbitrator also found that the claimant suffered 25% permanent partial disability (PPD) to the person as a whole as a result of the

December 10, 2002, accident.

The Commission unanimously affirmed and adopted the arbitrator's decision, except that the Commission modified the arbitrator's decision to find that the claimant suffered a loss of 30% use of the person as a whole. The Commission ordered the employer to pay the claimant $685.68 per week for a period of 27 2/7 weeks for her TTD. The Commission awarded the employer a credit of $7,217.56 for the employer's overpayment of TTD benefits. It ordered the employer to pay the claimant $547.17 per week for a period of 150 weeks for her PPD. The circuit court confirmed the Commission's decision, and the claimant appeals.

ANALYSIS

The claimant's first argument takes issue with the Commission's finding that her fibromyalgia, chronic fatigue syndrome, and chronic headaches were not causally connected to the December 10, 2002, accident.

Under the Act, a compensable injury is one that both "arises out of" and is "in the course of" a claimant's employment. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). The claimant had the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment. 820 ILCS 305/2 (West 2008). "An injury is said to 'arise out of' one's employment when there is a causal connection between the employment and the injury; that is, the origin or cause of the injury must be some risk connected with the claimant's employment." *Hosteny*, 397 Ill. App. 3d at 676, 928 N.E.2d at 483. "[E]ven though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 672-73 (2003).

"[W]hether an injury arose out of and in the course of one's employment is generally a question of fact." *Hosteny*, 397 Ill. App. 3d at 674, 928 N.E.2d at 482. Similarly, "[w]hether a claimant's disability is attributable solely to a degenerative process of the preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the *** Commission." *Sisbro*, 207 Ill. 2d at 205-06, 797 N.E.2d at 673. "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, 928 N.E.2d at 482. Resolution of conflicts in medical testimony is also within the province of the Commission. *Sisbro*, 207 Ill. 2d at 206, 797 N.E.2d at 673.

On review, a court "must not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor should a court substitute its judgment for that of the Commission unless the Commission's findings are against the manifest weight of the evidence." *Sisbro*, 207 Ill. 2d at 206, 797 N.E.2d at 673. "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009). The appropriate test is not whether this court might have reached the same conclusion, but whether the record contains sufficient evidence to support the Commission's determination. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010).

In the present case, the Commission's findings with respect to causation of the claimant's conditions of ill-being were not against the manifest weight of the evidence. As noted by the circuit court, the arbitrator provided an extremely detailed decision and

a lengthy outline of the claimant's treatments from which he determined that there were numerous inconsistences between her testimony and the histories she gave to various doctors. For example, the claimant relied on the testimony of Dr. Papernik to establish causation between the 2002 accident and her fibromyalgia. Dr. Papernik testified that the history of the patient was very important in forming opinions of diagnosis and causation. Dr. Papernik's office notes stated that the claimant did not have any symptomatologies prior to 2002, including fatigue, diffuse pain, or headaches. He testified that he was aware that the claimant's headaches started prior to 2002, but on cross-examination, he changed his opinion concerning the headaches, concluding that they were not related to the December 2002 accident. He then explained that the relevant symptomatology of fibromyalgia was diffuse pain, positive trigger points, and fatigue which were lacking prior to December 10, 2002. However, as the arbitrator noted, the claimant presented to Dr. Chinnici on May 13, 2002, with severe occipital headaches with associated myofascial trigger points, diplopia with tinnitus, and dizziness associated with headaches. The claimant also told Dr. Chinnici of "excessive daytime somnolence" and "restless legs."

In evaluating Dr. Papernik's testimony concerning the causation of the claimant's fibromyalgia and chronic fatigue syndrome, the arbitrator noted as follows: "Dr.[Papernik] did admit that fibromyalgia and chronic fatigue syndrome can be non-traumatic in nature, even infectious or viral. [citation] Dr. [Papernik] further admitted that it is possible that [the claimant] had an accident to her lower back in December 2002, and that some time subsequent and independent of that accident she developed fibromyalgia and chronic fatigue syndrome."

The claimant also relied on the testimony of Dr. Kale. In evaluating Dr Kale's testimony, however, the arbitrator noted that Dr. Kale attached significance to the fact that

the claimant told him that she did not have any of her symptoms prior to the 2002 accident. The arbitrator stated: "When confronted with the numerous inconsistencies in the medical records, he indicated that that was disconcerting to him and then changed his causal opinion to modify same in the sense that he was then of the opinion that the accident of December 10, 2002, aggravated a pre-existing condition in some way or another."

In evaluating Dr. Delheimer's testimony, the arbitrator noted that the claimant told Dr. Delheimer that her headaches began after the December 10, 2002, accident, but Dr. Delheimer reviewed the claimant's medical records and discovered she had a history of chronic headaches prior to the work accident of December 10, 2002. The arbitrator ultimately concluded that there were "numerous inconsistencies between the [claimant's] testimony at the time of [a]rbitration, the histories given to various doctors depending on whom she was seeing and for what medical condition, and histories given examining doctors."

The record supports the Commission's finding that the December 10, 2002, accident resulted in an injury to the claimant's lower back that aggravated her preexisting condition of spondylolisthesis. The record also supports the Commission's finding that the claimant failed to prove that her diagnoses of fibromyalgia, chronic fatigue syndrome, and headaches were causally related to the accident. The claimant's medical records indicate that she suffered from headaches, pain, and fatigue prior to the accident, and the Commission was not persuaded by the opinions of the claimant's medical experts because their opinions were based on questionable medical histories. The interpretation of medical testimony is particularly the function of the Commission. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 286 Ill. App. 3d 1098, 1103, 677 N.E.2d 1005, 1008 (1997). "It is also well settled that the determination of how much weight to assign to a

particular piece of evidence is a matter for the Commission, and a reviewing court will not reweigh the evidence and substitute its opinion for that of the Commission's." *ABB C-E Services v. Industrial Comm'n*, 316 Ill. App. 3d 745, 750, 737 N.E.2d 682, 686 (2000). The Commission reviewed the conflicting medical evidence, and the Commission's decision was not against the manifest weight of the evidence.

The claimant also argues that the Commission's award of TTD benefits was against the manifest weight of the evidence. The Commission found that the claimant was temporarily, totally disabled from December 11, 2002, until June 19, 2003. The claimant argues that she is also entitled to TTD benefits from June 20, 2003, through July 31, 2003, and March 9, 2004, through September 20, 2006. September 20, 2006, was the date that the claimant was examined by Dr. Kale, who found her to be unable to work due to her symptoms associated with his diagnoses of fibromyalgia, chronic fatigue, and chronic headaches. The claimant's argument concerning the Commission's TTD award is based on the assertion that she proved that "a causal connection does exist" between the work accident and her "fibromyalgia, chronic fatigue syndrome, and headaches." Because we find that the Commission's decisions on the issues of causation were not against the manifest weight of the evidence, we also find that the Commission's award of TTD benefits was not against the manifest weight of the evidence.

The claimant next argues that the Commission's award of PPD benefits instead of PTD benefits was against the manifest weight of the evidence. The extent of a claimant's disability is a factual question to be determined by the Commission, and its decision will not be set aside unless it is against the manifest weight of the evidence. *Cropmate Co. v. Industrial Comm'n*, 313 Ill. App. 3d 290, 296, 728 N.E.2d 841, 845 (2000). "A claimant is permanently and totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists." *Waldorf Corp. v. Industrial*

Comm'n, 303 Ill. App. 3d 477, 483, 708 N.E.2d 476, 481 (1999).

The claimant's argument that she is entitled to PTD benefits rather than PPD benefits is based on the assertion that she proved that "a causal connection exists between her diagnosis of fibromyalgia and her work accident." Accordingly, for the reasons noted above, we affirm the Commission's award of PPD benefits as opposed to PTD benefits.

The claimant argues, alternatively, that if the Commission's decision concerning permanency is upheld, then her PPD benefits should be determined by a wage differential, rather than based on a percentage of the person as a whole. The Commission's PPD benefits award was not against the manifest weight of the evidence.

Section 8 of the Act governs the "amount of compensation which shall be paid to the employee for an accidental injury not resulting in death." 820 ILCS 305/8 (West 2008). Section 8(d) details two types of compensation; subparagraph 1 provides for a wage-differential award and subparagraph 2 provides for a percentage-of-the-person-as-a-whole award. 820 ILCS 305/8(d) (West 2008); *Dawson v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 585, 888 N.E.2d 135, 138 (2008).

In order to qualify for a wage-differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents her from pursuing her "usual and customary line of employment" and (2) an impairment in earnings. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 730, 734 N.E.2d 482, 489 (2000). Whether a claimant has introduced sufficient evidence to establish each element is a question of fact for the Commission to determine, and its decision in the matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Dawson*, 382 Ill. App. 3d at 586, 888 N.E.2d at 139. The purpose of a wage-differential award is "to compensate an injured claimant for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation." *Dawson*, 382

Ill. App. 3d at 586, 888 N.E.2d at 139.

Under section 8(d)(2), "a claimant receives compensation for that percent of 500 weeks that his partial disability bears to his total disability." *Gallianetti*, 315 Ill. App. 3d at 729, 734 N.E.2d at 488. "As a general matter, section 8(d)(2) applies to those cases in which a claimant suffers injuries that partially incapacitate him from pursuing the usual and customary duties of his line of employment, but do not cause him to suffer an impairment of earning capacity." *Gallianetti*, 315 Ill. App. 3d at 728-29, 734 N.E.2d at 488.

With respect to the first element the claimant had to prove to establish her qualification for a wage-differential award, the Commission found that the claimant is prevented from returning to work as a dental hygienist as a result of her work-related injury to her low back. However, with respect to the second element, i.e., an impairment in earnings, the claimant presented insufficient evidence. "A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment." *Dawson*, 382 Ill. App. 3d at 586, 888 N.E.2d at 139.

In the present case, the Commission noted that the claimant "testified that she has not looked for work in any capacity since 2003/2004 as according to two of her doctors, she is permanently and totally disabled." The arbitration hearing was held on July 7, 2008, over four years after the claimant resigned from her position as an ophthalmologist assistant. The claimant did not prove actual earnings for a substantial period of time and did not prove what she is able to earn in suitable employment. Her position at the arbitration hearing and on appeal is that she is permanently and totally disabled, but the Commission determined that her inability to work was due to non-work related conditions, and that finding was not against the manifest weight of the evidence.

Accordingly, the Commission's PPD award based on a percentage of the person as a whole was not against the manifest weight of the evidence because the claimant did not present sufficient evidence of the impairment of her earnings due to the work-related injury.

The final argument the claimant raises is that the Commission's determination of her average weekly wage was against the manifest weight of the evidence. We disagree.

At the arbitration hearing, the employer offered the claimant's wage statement showing that she earned $51,426.45, during the period of December 9, 2001, through December 8, 2002, a 52 week period through the last full week of her employment with the employer. The Commission determined the claimant's average weekly wage was $1,028.52 by dividing $51,426.45 by 50 weeks. Accordingly, the claimant got the benefit of a 2 week deduction from the average weekly wage calculation. The claimant argues that the Commission should have found that she missed 29 days of work during the period in question, but the claimant did not present any testimony concerning missed days from work during the 52 week period prior to the date of her work accident. The claimant had the burden of establishing her average weekly wage. *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 437, 440, 887 N.E.2d 888, 891 (2008).

"The determination of an employee's average weekly wage is a question of fact for the Commission, which will not be disturbed on review unless it is against the manifest weight of the evidence." *United Airlines, Inc.*, 382 Ill. App. 3d at 440, 887 N.E.2d at 891. The Commission's calculation of the claimant's average weekly wage was not against the manifest weight of the evidence.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court that confirmed the decision of the Commission.

Affirmed.