

Workers' Compensation
Commission Division
Filed: March 4, 2013

No. 1-12-0717WC

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

ANNA SMELTZ,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Appellant/Cross-Appellee,)	COOK COUNTY
)	
v.)	No. 11 L 50767 and
)	10 L 50732
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, et al.,)	
(MARRIOTT INTERNATIONAL, Inc.,)	HONORABLE
)	MARGARET ANN
)	BRENNAN,
Appellee/Cross-Appellant).)	JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hudson and Harris concurred in the judgment.
Justice Stewart specially concurred in the judgment.

ORDER

¶ 1 Held: The findings of the Illinois Workers' Compensation Commission that 1) the claimant suffered injuries in July 1998 and 1999 which arose out of and in the course of her employment, 2) that she is not permanently disabled, and 3) that Marriott acted unreasonably and vexatiously in failing to pay the claimant temporary total disability benefits following her 1999 accident are not against the manifest weight of the evidence. The circuit court erred in vacating the Commission's award of penalties and attorney fees. The Commission properly entered two benefit awards for the claimant's permanent-partial disability.

¶ 2 Both parties appeal from an order of the circuit court of Cook County which confirmed in part and vacated in part a decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Anna Smeltz, temporary-total disability (TTD) benefits, permanent-partial disability (PPD) benefits, penalties, and attorney fees pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2000)) for injuries she allegedly sustained while in the employ of Marriott International, Inc. (Marriott). The claimant contends that the Commission erred in not awarding her permanent-total disability (PTD) benefits under the Act, and the circuit court erred in vacating the Commission's award of penalties and attorney fees. For its part, Marriott contends that the Commission erred in finding that the claimant sustained injuries which arose out of her employment.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearings conducted on July 20, August 19, October 21, and November 19, 2009.

¶ 4 The claimant was born on October 14, 1965, and has three children. She never completed high school or obtained a GED. Prior to working for Marriott, she was employed making sandwiches, answering telephones, and making deliveries at Ricobene's Pizzeria, a job she held for approximately 12 years.

¶ 5 In May 1994, the claimant complained to her family doctor, Dr. Jerrold Schwartz, that she had "pulled out" her back. In February 1995, she complained of shooting pains in her lower back, which she said were radiating into her right leg and had been present for two days. Dr. Schwartz noted that she had chronic lumbar pain. In October 1995, the claimant again complained of lower back pain, stating that it had persisted for two weeks and was more severe than usual. At that time, she was issued a work restriction of no lifting more than 30 pounds and no repetitive bending. In January 1996, she again complained of back pain to Dr. Schwartz.

¶ 6 The claimant commenced her employment as a housekeeper for Marriott in October 1996. Her duties included cleaning hotel rooms and making beds. The claimant cleaned between

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11 and 13 rooms per day and put sheets on two to three beds per day. Marriott did not provide fitted sheets and required that beds be made with flat sheets only. In addition, she was required to fold the sheets under the mattress twice to form "hospital corners" so that the sheets stay tight. Prior to July 1998, she had never lost any time from work due to any back problems. On July 9, 1998, the claimant was bending over and holding up a king-size mattress in order to fold the bed sheet underneath the corner of the mattress, when she noticed a sudden, stabbing feeling in her lower back, which caused her to fall to the floor.

¶ 7 Marriott sent the claimant to Dr. Vivian Levy at Mercy Medical on July 21, 1998. Noting a consistent history of accident and that the claimant exhibited radiculopathy, Dr. Levy took her off work and prescribed medication and physical therapy.

¶ 8 Marriott subsequently sent the claimant to Mercy Works, where she was first seen on September 30, 1998. The diagnosis at Mercy Works was chronic low-back pain. Conservative treatment was prescribed and light-duty work restrictions were ordered.

¶ 9 On November 7, 1998, the claimant underwent a lumbar MRI, which revealed central bulging disks at L3-L4 and L4-L5, with a central disk protrusion at L2-L3, which produced a compromise of the spinal canal. Mercy Works referred the claimant to Dr. Charles Slack, who first examined her on November 20, 1998. Dr. Slack recommended light duty and conservative care, and ultimately, a functional capacity evaluation (FCE), which was performed on February 11, 1999. That evaluation revealed that the claimant was able to perform at the sedentary to light work level, including frequent lifting up to 13 pounds and a maximum lifting of 18 pounds. Thereafter, on May 20, 1999, Dr. Slack released the claimant to return to work within the limits as determined by the FCE and stated that her injury had reached a permanent state.

¶ 10 At Marriott's request, the claimant was examined by Dr. Marshall Matz on June 22, 1999. Following that examination, Dr. Matz stated that he did not believe the claimant's 1998 employment accident caused her any significant low-back derangement. In addition, he did not

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believe that the claimant's bulging disks represented any permanent condition "from a perspective of disability or incapacity." Dr. Matz also stated that the claimant was not disabled and could return to work if allowed to do so and if she were appropriately motivated. In addition, he found no indication that any work limitation was warranted, but he acknowledged that it would be helpful to restrict the amount of weight she lifted for a couple of weeks. According to Dr. Matz, there was no indication that the claimant was in need of any further treatment, and he expressed his belief that her symptoms would resolve if "left alone."

¶ 11 The claimant returned to work on July 10, 1999, and resumed performing her regular duties as a hotel housekeeper until she suffered a second employment accident on July 20, 1999. On that date, the claimant again experienced shooting pain in her low back while she was bending and lifting a king-size mattress while making a bed. She saw Dr. Slack two days after this incident and has remained off work ever since. Dr. Slack's examination revealed positive straight-leg raising on the right, as well as decreased hamstring, hip flexor, and quadriceps strength on the right. Dr. Slack reiterated the need for work restrictions, as indicated by the prior FCE performed in February 1999. During a follow-up visit on August 12, 1999, Dr. Slack recommended epidural steroid injections. The claimant stopped seeing Dr. Slack because she did not have insurance and had no ability to pay for further care by him. Thereafter, the claimant began treating at Cook County Hospital.

¶ 12 The claimant was first seen at the Occupational Medicine Clinic at Cook County Hospital on December 21, 1999. There, physical therapy was prescribed. The claimant continued to receive conservative treatment from Cook County Hospital through April 4, 2000, when she was referred to Dr. Terry Nicola, a neurologist at UIC Medical Center.

¶ 13 Dr. Nicola examined the claimant and performed an EMG/NCV test on April 19, 2000. The electromyography was unremarkable for any lumbar radiculopathy.

¶ 14 In April 2000, the claimant obtained a medical card from the Illinois Department of

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Public Aid, so she commended treatment for her back with her long-time family physician, Dr. Schwartz. He first saw the claimant in connection with her back injuries on April 20, 2000. Dr. Schwartz ordered a second MRI, which was performed on May 1, 2000. That MRI revealed disk herniations at L2-L3, L3-L4, L4-L5, and L5-S1.

¶ 15 Dr. Schwartz then referred the claimant to Dr. Raymond Schlueter, who first examined the claimant on May 9, 2000. Dr. Schlueter noted that the claimant had been suffering with low-back pain, with varying intensities, on a daily basis ever since her work accident. Her symptoms were primarily in the low back, radiating to the right buttock. She noticed weakness in the right, lower extremity, as over the last several months she has had several episodes of buckling of her right, lower leg as a result of the weakness. Further, Dr. Schlueter noted that the claimant had decreased tolerance for activity with her right leg, such as walking up stairs. Although she noted occasional numbness of the anterior thigh, her main problem was low-back pain on the right and into the right buttock. Dr. Schlueter diagnosed herniated nucleus pulposus at L3-L4, L4-L5, and L5-S1, with degenerative disk disease and degenerative joint disease at both the levels of the lumbar spine. He recommended an epidural steroid injection, which was performed on June 28, 2000.

¶ 16 In a November 14, 2000, office note, Dr. Schlueter stated that the claimant's right ankle and calf had been "giving way." Upon Dr. Schlueter's recommendation, the claimant underwent a CT/diskogram on October 31, 2000. That test revealed spinal stenosis which was most severe at L3-L4, and stenosis at L4-L5. Ultimately, on March 27, 2001, Dr. Schlueter performed a discectomy at L5-S1. On May 15, 2001, Dr. Schlueter noted that the claimant's right, lower extremity paresthesias had significantly improved. However, the claimant was still complaining of low-back pain, especially on the right side.

¶ 17 Because of the claimant's persistent low-back pain, Dr. Schwartz referred her for another MRI, which was performed on October 23, 2001. That MRI revealed degenerative joint disease

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at L2, L3, L4, L5, and S1, with central posterior herniation, a pronounced disk herniation at L2-L3, which is right paracentral with pronounced facet arthropathy with ligamentum flavum hypertrophy and obliteration of the neural foramen on the right.

¶ 18 Dr. Schlueter then referred the claimant to Dr. Earman, who first saw her on November 26, 2001. Dr. Earman prescribed a myelogram and a post-myelogram CT. That test was performed on March 12, 2002, and revealed spondylosis at multi-segments, as well as significant stenosis of the canal at L2-L3 and narrowing at L3-L4, as well as multi-level ligamentum flavum hypertrophy. Dr. Earman then indicated that the claimant was likely suffering from significant spinal stenosis and was going to require a lumbar decompression and right laminectomy at L2-L3.

¶ 19 On April 3, 2002, Dr. Earman performed a right lumbar laminectomy at L2-L3 with a nerve root decompression at L3. Because the claimant experienced minimal improvement after the surgery, Dr. Earman referred her to the UIC Pain Center. There, she underwent four injections during late 2003 and early 2004.

¶ 20 Dr. Schwartz ordered another MRI, which was performed on August 16, 2003. That MRI revealed a disk herniation at L4-L5 and post-surgical changes at L2-L3 with circumferal bulging, as well as a broad -based disk protrusion at L3-L4. Subsequently, a CT of the lumbar spine, performed on November 11, 2004, revealed degenerative disk disease at L3-L4 and L5-L5, with post-laminectomy changes at L2-L3, with granulation tissue at the right paracentral disk space extending inferiorly and partially narrowing the right neural foramen, with a suggestion of compression of the left L1 nerve root.

¶ 21 Dr. Schwartz then referred the claimant to Dr. Ronald Michael, who examined the claimant on January 17, 2005. Noting that the claimant was an "extremely poor historian," Dr. Michael diagnosed her with post-laminectomy syndrome secondary to work-related injury. He prescribed a lumbar diskogram.

¶ 22 Dr. Slack examined the claimant on October 3, 2005. He recommended that she attempt a trial of a spinal cord stimulator.

¶ 23 At the request of Marriott, the claimant underwent an independent medical examination by Dr. Leonard Kranzler on December 14, 2005. After Dr. Kranzler noted the claimant's medical history, he concluded that she was suffering from lumbar radiculopathy on the right; that she was not able to work; that she should undergo further diagnostic testing to determine whether a spinal cord stimulator would be appropriate. Additionally, Dr. Kranzler opined that the claimant's current condition of ill-being is causally related to her July 9, 1998, and July 20, 1999, employment accidents.

¶ 24 Thereafter, Dr. Slack referred the claimant to Dr. Konstantin Slavin. Dr. Slavin first examined the claimant on November 27, 2006, and recommended neuropsychological testing and possible implantation of a spinal cord stimulator.

¶ 25 At Dr. Slavin's request, Dr. Neil Pliskin performed a neuropsychological evaluation on December 7, 2006. Dr. Pliskin concluded that the claimant "has the cognitive capacity and necessary understanding of the procedure to undergo a spinal cord stimulator implant. However, Dr. Pliskin also noted that the claimant is of low-average intellectual functioning with problems of cognitive efficiency secondary to chronic pain, medications and mood. His testing revealed that the claimant was "clearly slow and inefficient in problem solving efficiency."

¶ 26 Ultimately, Dr. Slavin implanted the spinal cord stimulation electrodes on January 17, 2007, and implanted the spinal cord stimulation generator on January 24, 2007. Postoperatively, Dr. Slavin followed up with the claimant on February 26, 2007, at which time he released her to return as needed.

¶ 27 On June 25, 2007, Dr. Slack again examined the claimant and concluded that the condition of ill-being in her back had reached a permanent state, and he referred her for an FCE to assess the level of necessary restrictions. The claimant underwent the FCE on July 26, 2007.

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That test was considered valid, as the claimant exhibited a "full and consistent effort" during the evaluation. The FCE showed that the claimant could function at the light physical demand level, carrying 20 pounds occasionally and 10 pounds frequently. She also exhibited decreased tolerance to repetitive stooping, twisting, or prolonged walking. Dr. Slack adopted the findings of the FCE and concluded that the claimant was at maximum medical improvement (MMI) with permanent restrictions at the light physical demand level and that she was unable to return to work as a housekeeper on a permanent basis.

¶ 28 The claimant testified that, as of the date of the arbitration hearing, she could no longer perform many activities she used to do, such as dancing, playing volleyball, or bowling. She stated that those activities cause too much pain in her lower back and in the back of her right leg. Further, the claimant testified that her ability to play with her grandchildren and do personal housekeeping chores has been limited as a result of her pain. The claimant stated that she spends approximately four to eight hours each day using the spinal cord stimulator. However, in order to operate the device, she must be sitting or lying down or standing very still because physical movement deactivates the device. In addition, she takes Vicodin four to six times per day.

¶ 29 The claimant stated that, with the stimulator in place, she is able to "do a few things more," such as take the garbage out of the house and carry a gallon of milk. The claimant also testified that she has not worked anywhere since her July 20, 1999, employment accident and that Marriott had not offered her any work. She further stated that Marriott never offered her any vocational rehabilitation services and that Joseph Belmonte, Marriott's rehabilitation counselor, never contacted her for the purpose of arranging vocational testing or providing any vocational rehabilitation assistance.

¶ 30 The claimant testified that she has filled out approximately 75 job applications, and she presented documentation of more than 100 job-search contacts from 2003 to 2008. The claimant also testified that she contacted all of the potential employers listed in Marriott's labor market

survey, but she had not received any job offers as a result of her employment-search activities. In addition, the claimant testified that she does not possess any job searching skills and that Marriott never offered her any assistance with her job search.

¶ 31 David Patsavas testified that he is a vocational rehabilitation counselor and that he conducted a vocational assessment of the claimant on December 21, 2007. Patsavas determined that, given the claimant's educational and employment history, she was qualified to work in an unskilled position. In addition, vocational testing revealed that the claimant's reasoning, math, and language skills were at the 8th-grade level. Patsavas went on to conclude that the claimant was not a viable candidate for vocational rehabilitation services and that, given her unskilled work history, limited transferable skills, limited education, permanent restrictions limiting the level of her physical demand, as well as her level of medication and use of the spinal cord stimulator, no viable or stable labor market was available to the claimant. Patsavas opined that, after reviewing the claimant's job-search efforts, she had made an honest effort to return to gainful employment, but she had not received any employment offers.

¶ 32 Marriott presented the testimony of Joseph Belmonte, its vocational expert, who prepared a vocational analysis and labor market survey report for the claimant. Though Belmonte did not interview the claimant, he reviewed numerous medical records and diagnostic test results, as well as the vocational assessment prepared by Patsavas and the claimant's application for employment with Marriott. Belmonte determined that the claimant is functional at the light-duty level of physical demand and that she should have available to her a considerable number of jobs consistent with her physical capacity. Belmonte also noted that there was no definitive indication that the claimant has any cognitive impairment and that, without additional testing, it could not be determined whether she would benefit from further study to obtain a GED. He further concluded that, given the claimant's background, education, training, skills, and medical restrictions, there was no clear indication that she would not be capable of performing in a "basic

unskilled to low semiskilled" position. In addition, Belmonte observed that there was no clear indication that the claimant could not develop basic computer literacy skills. Finally, Belmonte opined that the claimant was employable, and he documented several specific employment opportunities that might be available to her.

¶ 33 Marriott also presented the testimony of Jack O'Reilly, a private investigator who conducted video surveillance of the claimant on July 18 and July 28, 2006, and the videotapes that he recorded during his surveillance. Those video recordings depict the claimant engaging in various physical activities, such as lifting a baby, walking to and from a store, and hanging several articles of clothing on a clothes line.

¶ 34 Following the arbitration hearing, the arbitrator found that the claimant sustained accidental injuries arising out of and in the course of her employment with Marriott and awarded her TTD benefits for 461 3/7 weeks. The arbitrator determined that the claimant had not proven that she was entitled to PTD benefits under the odd-lot category, but found that she sustained a PPD to the extent of 20% of the person as a whole, as a result of the 1998 accident, and a subsequent PPD to the extent of 40% of the person as a whole, as a result of the 1999 accident. Consequently, the arbitrator awarded the claimant PPD benefits under section 8(d)2 of the Act (820 ILCS 305/8(d)2 (West 2000)) for 100 weeks and 200 weeks for the 1998 and 1999 injuries, respectively. The arbitrator further determined that Marriott was liable for compensation that had accrued from July 9, 1998, through the final date of the hearing and for \$895 in reasonable and necessary medical expenses. In addition, the arbitrator ordered Marriott to pay \$39,793.11 in penalties, as provided in section 19(k) of the Act (820 ILCS 305/19(k) (West 2000)), \$2,500 in penalties, as provided in section 19(l) of the Act (820 ILCS 305/19(l) (West 2000)), and \$7,958.63 in attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2000)). Finally, the arbitrator found that Marriott was liable for \$32,445.11 in medical treatment, which was payable to the Illinois Department of Public Aid pursuant to its reimbursement claim.

¶ 35 In making these determinations, the arbitrator specifically found that the testimony of the claimant was credible and was supported by the bulk of the medical evidence. The arbitrator further found that the opinion of Dr. Matz, that the claimant did not suffer from any disability, was not entitled to any weight because the bases of that opinion were contradicted by the record. With regard to the surveillance tapes of the claimant's activities, the arbitrator stated that none of the activities reflected on the videotapes were inconsistent with the claimant's testimony or the corroborating medical evidence regarding her restrictions. The arbitrator also found that the claimant had not met her burden of proving that she falls into the odd-lot category for PTD, where her vocational expert did not address the question of whether she could obtain a GED certificate and whether she should benefit if she did so.

¶ 36 Both the claimant and Marriott sought review of the arbitrator's decision before the Commission. On review, the Commission, with one commissioner dissenting, corrected a typographical error relating to the final date of the claimant's TTD, but otherwise affirmed and adopted the decision of the arbitrator, including the findings relating to Marriott's liability for two compensable accidents, the amount of TTD, PPD, and medical-expense benefits, as well as the determination that the claimant had not proven that she was entitled to PTD benefits under the odd-lot category.

¶ 37 The claimant and Marriott both sought review of the Commission's decision in the circuit court of Cook County. The circuit court confirmed the Commission's decision in part but vacated its imposition of penalties and the award of attorney fees against Marriott. Marriott has appealed and the claimant has filed a cross appeal.

¶ 38 We initially consider Marriott's claim on appeal, challenging the Commission's finding that the claimant's injuries arose out of her employment. Marriott argues that the injuries sustained by the claimant in July 1998 and 1999 did not arise out of her employment because they resulted from a risk commonly faced by the general public and not from an enhanced risk

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precipitated by her job duties. We disagree.

¶ 39 A claimant has the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of the employment. 820 ILCS 305/2 (West 2000); *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). Whether an injury arises out of the claimant's employment is a question of fact to be resolved by the Commission, and its decision in this regard will not be disturbed unless it is against the manifest weight of the evidence. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 164, 731 N.E.2d 795 (2000). For a finding of fact to be against the manifest weight of the evidence, an apposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992). A reviewing 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, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206, 797 N.E.2d 665 (2003).

¶ 40 The "arising out of" component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665 (1989). Courts have recognized three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523 (2007). Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill.

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App. 3d 149, 163, 731 N.E.2d 795 (2000). Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Potenzo*, 378 Ill. App. 3d at 117, citing *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49 (2000) (Rakowski, J., specially concurring).

¶ 41 In this case, the evidence established that the claimant was injured on two separate occasions while she was holding up a mattress and folding a sheet under its corner in order to make a bed. As Marriott has asserted, the potential for injury associated with this activity is a common risk faced by the general public. However, the Commission found that, because the claimant was exposed to this risk more frequently than the general public, she faced an increased risk of injury as a result of her employment. This finding was predicated on the determination that the claimant was required to clean multiple hotel rooms each day, which included making king-size beds with flat sheets that had to be tucked under the mattress twice in order to form "hospital corners."

¶ 42 In challenging this determination, Marriott relies on census data that was not presented at the hearing and essentially asks us to reweigh the evidence that was presented at the hearing and disregard the inferences drawn by the Commission. However, it was within the province of the Commission to judge the credibility of the witnesses, resolve any conflicts in the testimony, and draw reasonable inferences from the evidence presented. See *Sisbro Inc.*, 207 Ill. 2d at 207; *O'Dette*, 79 Ill. 2d at 253. A reviewing 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, Inc.*, 207 Ill. 2d at 206. Based on the record presented, we decline to overturn the Commission's inference that the claimant faced an increased risk of injury based on her job duties. Accordingly, we cannot say that the

Commission's finding, that the claimant's injuries arose out her employment, is against the manifest weight of the evidence.

¶ 43 Marriott also contends that the Commission erred in entering two PPD awards for multiple injuries to the same body part. In support of this contention, Marriott relies primarily on *City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 258, 947 N.E.2d 863 (2011). That case, however, is factually distinguishable and, therefore, is not controlling here. In *City of Chicago*, the court held that the claimant, who sustained two injuries, was not entitled to receive a PPD award under section 8(d)2 and a wage-differential award under section 8(d)1, where both injuries involved the same body part and where there was no permanent disability resulting from the first accident that was discernable from the disability caused by the second accident. *Id.* at 265.

¶ 44 Here, the Commission found that the claimant had suffered a distinct permanent disability as a result of her first accident in 1998. This finding was premised on the medical evidence demonstrating that, prior to the second accident in July 1999, the claimant suffered from a central disk protrusion at L2-L3 and bulging disks at L3-L4 and L4-L5, which accompanied minimal compromise of the spinal canal. In addition, the FCE, performed in February 1999, revealed that the claimant was capable of performing light duty, with her lifting capacity limited to 13 pounds frequently and up to 18 pounds occasionally. In May 1999, Dr. Slack determined that the limitations reflected by the FCE were permanent. The claimant returned to work in July 1999 and performed her regular job duties until she sustained the subsequent injury. Following the second injury, the severity of the claimant's symptoms increased significantly. Her exacerbated symptoms caused the claimant to undergo extensive medical treatment, including multiple surgeries and daily use of narcotic pain medications and the spinal cord stimulator. In addition, her functional capacity had diminished in that her frequent lifting level decreased from 13 to 10 pounds and she had a reduced tolerance to repetitive stooping and twisting, as well as to

prolonged walking. These circumstances prevented her from performing her employment responsibilities and hampered her ability to engage in the activities of daily life. Thus, the July 1999 accident necessitated more aggressive treatment than the claimant had undergone previously. Upon consideration of this evidence, the Commission found that the claimant also suffered a permanent disability after her second accident in 1999.

¶ 45 Based on our review of the record, we find that the testimony of the claimant and the extensive medical records documenting her treatment provide sufficient evidence to support the Commission's finding that the claimant sustained a PPD to the extent of 20% of the person as a whole, as a result of the 1998 accident, and a subsequent PPD to the extent of 40% of the person as a whole, as a result of the 1999 accident. See *Consolidated Freightways v. Industrial Comm'n*, 237 Ill. App. 3d 549, 556-57, 604 N.E.2d 962 (1992). Consequently, we cannot conclude that the Commission's determination in this regard is against the manifest weight of the evidence.

¶ 46 We next address the claimant's argument that the Commission's finding, that she had not proven that she is permanently and totally disabled under the odd-lot category, is against the manifest weight of the evidence. This argument is without merit.

¶ 47 An employee is totally and permanently disabled when she is unable to make some contribution to industry sufficient to justify payment of wages to her. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842 (1983); *A.M.T.C. of Illinois v. Industrial Comm'n*, 77 Ill. 2d 482, 487, 397 N.E.2d 804 (1979). Yet, an employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842 (1983). Instead, the employee may show that she is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534, 668 N.E.2d 21 (1996). Where an employee's disability is

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limited in nature so that she is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, she may qualify for permanent disability under the odd-lot category. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546-47, 419 N.E.2d 1159 (1981).

¶ 48 A claimant can establish a permanent and total disability under the odd-lot category by presenting evidence of a diligent but unsuccessful job search, or by demonstrating that, because of her age, training, education, experience, and condition, she will not be regularly employed in a well-known branch of the labor market. *Valley Mould*, 84 Ill. 2d at 547; *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091, 871 N.E.2d 765 (2007). To prove such a claim, a claimant must initially establish by a preponderance of the evidence that she falls within the odd-lot category. *Valley Mould*, 84 Ill. 2d at 547. Once a claimant has established that she qualifies for odd-lot status, the burden shifts to the employer to show that the claimant is employable in a stable labor market and that such a market exists. *Valley Mould*, 84 Ill. 2d at 547; *City of Chicago*, 373 Ill. App. 3d at 1091. The determination of whether the burden of each party has been carried successfully is a question of fact for the Commission to determine (*City of Chicago*, 373 Ill. App. 3d at 1091) and will not be set aside on appeal unless they are against the manifest weight of the evidence (*Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987); *City of Chicago*, 373 Ill. App. 3d at 1093). For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *City of Chicago*, 373 Ill. App. 3d at 1093.

¶ 49 In this case, the Commission found that the claimant met her initial burden of showing that she is permanently and totally disabled by presenting medical evidence of her physical disabilities, as well as her own testimony and that of Patsavas, her vocational rehabilitation counselor, who opined that no stable labor market exists for the claimant, given her physical limitations, background, employment history, and education level. Yet, the Commission also

determined that Marriott had sufficiently rebutted the claimant's a prima facie case by presenting the testimony and report of Belmonte, its vocational rehabilitation counselor. Belmonte reviewed Patsavas' report, which reflected that the claimant completed 10th grade at a vocational high school and that she attended classes for a portion of the following year, but then left school to begin working. Belmonte determined that, considering the lack of a definitive indication that the claimant has any cognitive impairment, it could not be determined whether she would benefit from further study to obtain a GED. He further concluded that, given her background, education, training, skills, and medical restrictions, the claimant might be capable of performing in a "basic unskilled to low semiskilled" position. In addition, Belmonte observed that the information provided did not clearly indicate that the claimant could not obtain her GED or develop basic computer literacy skills. Lastly, Belmonte opined that the claimant was employable, and he documented several specific employment opportunities that might be available to her.

¶ 50 Based on this evidence, the Commission found that the claimant had not sustained her burden of proving that she falls within the odd-lot category, where her vocational expert did not address whether she was capable of obtaining her GED or whether she could benefit from doing so. It is the function of the Commission to determine the weight of the evidence, judge the credibility of the witnesses, and resolve conflicting evidence. *City of Chicago*, 373 Ill. App. 3d at 1095-96. Upon consideration of the evidence presented, we cannot say that the Commission's decision, that the claimant failed to establish that she was permanently and totally disabled, is against the manifest weight of the evidence.

¶ 51 Finally, the claimant asserts that the awards of penalties and attorney fees by the Commission are not against the manifest weight of the evidence and were improperly set aside by the circuit court. We must agree.

¶ 52 The question of whether to award penalties and fees presents a factual question, and the findings of the Commission will not be disturbed unless they are against the manifest weight of

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the evidence. *McKay Plating Co. v. Industrial Comm'n*, 91 Ill. 2d 198, 209, 437 N.E.2d 617 (1982); *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 413-14, 911 N.E.2d 1042 (2009). A factual finding is against the manifest weight of the evidence when an opposite conclusion is clearly apparent. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶ 21; *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72 (2006).

¶ 53 Penalties may be imposed under section 19(l) where the employer or its insurance carrier fails, neglects, or refuses to make payment or unreasonably delays payment without good and just cause. 820 ILCS 305/19(l) (West 2000); *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998). A section 19(l) award is in the nature of a late fee. *McMahan*, 183 Ill. 2d at 515. Thus, if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of additional compensation is mandatory. *McMahan*, 183 Ill. 2d at 515.

¶ 54 Generally, penalties and fees are not warranted when the employer acts in reliance upon a reasonable medical opinion or when there are conflicting medical opinions. *Global Products*, 392 Ill. App. 3d at 414; *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805, 829 N.E.2d 810 (2005). In such a circumstance, the relevant question is " 'whether the employer's reliance was objectively reasonable under the circumstances.' " *Global Products*, 392 Ill. App. 3d at 414 (quoting *Electro-Motive Division v. Industrial Comm'n*, 250 Ill. App. 3d 432, 436, 621 N.E.2d 145 (1993)); see also *McMahan*, 183 Ill. 2d at 515. The employer bears the burden of establishing that it had a reasonable belief that the delay in payment was justified. *Global Products*, 392 Ill. App. 3d at 414; *Zitzka v. Industrial Comm'n*, 328 Ill. App. 3d 844, 848, 767 N.E.2d 405 (2002).

¶ 55 Section 19(k) provides that penalties may be imposed where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or

where the party who is liable to pay the compensation has instituted or pursued proceedings that do not present a real controversy, but are merely frivolous or intended to delay. 820 ILCS 305/19(k) (West 2000). Imposition of penalties under section 19(k) is discretionary and is intended to address situations where the delay in payment is deliberate or the result of bad faith or an improper purpose. McMahan, 183 Ill. 2d at 515. Section 16 similarly authorizes an award of attorney fees where the employer has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy within the purview of section 19(k). 820 ILCS 305/16 (West 2000). The imposition of section 19(k) penalties and section 16 attorney fees requires a higher standard of proof than an award of additional compensation under section 19(1). McMahan, 183 Ill. 2d at 514.

¶ 56 Here, the Commission entered awards for penalties and attorney fees based on Marriott's unreasonable and vexatious failure to pay TTD benefits and medical expenses after the claimant's second injury in July 1999. The circuit court vacated those awards based on Marriott's contention that its failure to make such payment was justified because it (1) had a reasonable defense that the claimant's second injury did not arise out of her employment, (2) reasonably relied on the medical opinion of Dr. Matz, who concluded that the claimant was not disabled and that her symptoms would resolve if "left alone," and (3) had paid the claimant's medical bills, some TTD benefits, and a \$5,000 advance. Yet, careful review of the record demonstrates that Marriott's reliance on these three grounds was unwarranted.

¶ 57 First, Marriott did not raise the "arising-out-of" defense until after the arbitration hearing had commenced in 2009, 10 years after the claimant's second accident occurred. Marriott did not provide the claimant with a timely, written explanation of the basis for its denial of benefits after the July 1999 accident, as required by the Commission's administrative rules. See 50 Ill. Adm. Code 7110.70(a)(2) (2006) (mandating that, if an employer denies liability for payment of

temporary total compensation, it must provide the employee with a written explanation of the basis for the denial within 14 days after notification of the employee's inability to work). Also, the failure to provide such explanation, without good and just cause, shall be considered in the decision of whether to award additional compensation under section 19(l) or attorneys fees and costs under section 16 of the Act. 50 Ill. Adm. Code 7110.70(e) (2006). In light of the fact that Marriott did not provide the claimant with the requisite notification and waited 10 years to assert the "arising-out-of" defense, any claim of doubt as to the compensability of the July 1999 injury was insufficient to justify the failure to pay the claimant's medical bills and TTD benefits.

¶ 58 Second, the medical opinion of Dr. Matz was rendered on June 22, 1999, four weeks prior to the second accident. Thus, that opinion related only to the claimant's condition of ill-being resulting from the first accident in July 1998, almost a year earlier. In light of the fact that Dr. Matz' opinion predated and, consequently, had absolutely no bearing on the injury sustained in July 1999, it could not have provided a valid justification for the failure to pay benefits after the second injury. Moreover, the Commission found that Marriott apparently ignored the opinion of its own evaluating physician, Dr. Kranzler, who determined that the condition of ill-being in the claimant's low-back was causally related to her employment accident and that she was temporarily totally disabled in December 2005. Therefore, Marriott cannot legitimately claim that its failure to pay benefits after July 1999 was excused because it was based on a reasonable medical opinion or because there were conflicting medical opinions. See *Global Products*, 392 Ill. App. 3d at 414; *USF Holland, Inc.*, 357 Ill. App. 3d at 805.

¶ 59 Third, Marriott's reliance on the fact that it had paid some TTD benefits and medical expenses is similarly unjustified, where those payments related to the claimant's first injury in 1998. The evidence presented at the hearing reflected that Marriott did not pay the claimant any TTD or medical benefits after the 1999 accident, and the Commission made a factual finding to

that effect.¹

¶ 60 Moreover, the Commission specifically found that Marriott had engaged in an unreasonable and vexatious delay by failing to pay any TTD benefits for the July 1999 accident. The mere fact that the dissenting commissioner agreed with Marriott's position that the claimant's injuries did not arise out of her employment is insufficient to set aside the Commission's finding as to its unreasonable and vexatious delay of payment. In addition, Marriott has not offered any good and just cause for its failure to timely provide the claimant with a written explanation of the reason for its denial of benefits. This circumstance is relevant and must be considered in determining whether attorney fees under section 16 of the Act are appropriate. See 50 Ill. Adm. Code 7110.70(e) (2006).

¶ 61 Because none of the alleged justifications are supported by the record, Marriott cannot claim that it had a good faith belief in its right to delay or withhold payment of benefits for the July 1999 accident. Accordingly, the Commission's finding that the claimant is entitled to penalties under sections 19(k) and 19(l) and to attorney fees under section 16 of the Act is not against the manifest weight of the evidence, and we reverse the circuit court's decision to vacate those awards.

¶ 62 Based upon the foregoing analysis, we reverse that portion of the judgment of the circuit court, which vacated the Commission's imposition of penalties under sections 19(k) and 19(l) and its award of attorney fees under section 16, and affirm the decision of the circuit court in all other respects.

¶ 63 Affirmed in part and reversed in part.

¹ Marriott also relies on the fact that it had paid a \$5,000 advance, which was considered to be a mitigating factor by the Commission. We note, however, that the request for hearing form completed by the parties clearly reflects that this payment was designated as a portion of the benefits paid for the first accident in 1998.

¶ 64 JUSTICE STEWART, specially concurring:

¶ 65 Although I agree with the ultimate disposition reached by my distinguished colleagues in this case, I cannot agree with the majority's analysis of whether the claimant's injuries arose out of her employment. In my view, there is no reason to engage in a neutral-risk analysis in this case. As the majority noted, the claimant was employed at a hotel as a housekeeper, and her job duties included cleaning rooms and making beds. She injured her back on two occasions while making beds. Accordingly, the risk of injury was distinctly associated with her employment.

¶ 66 The law to be applied in determining whether a worker's injury "arises out of" her employment is well known. "Arising out of the employment refers to the origin or cause of the claimant's injury." *Potenzo*, 378 Ill. App. 3d at 116, 881 N.E.2d at 526. "For an injury to 'arise out of' the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Caterpillar Tractor Co.*, 129 Ill. 2d at 58, 541 N.E.2d at 667. "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Id.* "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Id.* "There are three categories of risk an employee may be exposed to: 1) risks distinctly associated with the employment; 2) risks personal to the employee; and 3) neutral risks which have no particular employment or personal characteristics." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162, 731 N.E.2d at 806. "Whether an injury caused by a neutral risk arises out of employment is dependent upon whether claimant was exposed to a risk to a greater degree

than the general public." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163, 731 N.E.2d at 807.

¶ 67 From the foregoing, it seems evident that the first step in analyzing whether an injury arises out of a worker's employment is to determine whether, when viewed in the context of that worker's job duties, the risk of injury is distinctly associated with the employment. If it is, the claim arises out of the worker's employment and there is no reason to perform a neutral-risk analysis. The worker's risk of injury should only be compared to that of the general public if it is first determined that the injury did not arise out of a risk distinctly associated with the employment. Here, however, the majority makes no determination of whether the claimant's injuries resulted from a risk distinctly associated with her employment. Instead, as urged by the employer, the majority simply identifies the risk of injury while making a bed as "a common risk faced by the general public," and performs a neutral-risk analysis. In my view, this analysis is flawed. If an injury results from a risk which is inherent in the job duties the worker has been employed to perform, the injury arises out of the employment and it is irrelevant whether the general public faces the same risk.

¶ 68 The claimant in this case was a housekeeper at a hotel. Her job duties included cleaning rooms and making beds. She was paid by her employer to perform the specific task of making beds. She was injured while performing that task. Viewed in the context of her job duties as a housekeeper, it is clear that the claimant was injured while performing the duties she was assigned to perform by her employer, and the risk of injury while performing those duties is a risk distinctly associated with her employment. Consequently, her injuries arose out of her employment. There is no need to perform a neutral-risk analysis or determine whether the general public faces the same risk.

¶ 69 "Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes,

bombing, and hurricanes." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163, 731 N.E.2d at 807. This is true because workers' job duties generally do not include being shot, bit by dogs, attacked by lunatics, struck by lightning, bombed or injured in a hurricane. Likewise, "[i]n the context of falls, neutral risks include falls on level ground or while traversing stairs." *Illinois Consolidated Telephone Co. v. Industrial Comm'n.*, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49, 54 (2000) (Rakowski, J., specially concurring). Again, these are neutral risks because workers are generally not specifically paid to simply walk on level ground or on stairs. If a worker is injured in one of these ways while performing her job duties, then it is necessary to determine whether she was exposed to that risk to a greater degree than the general public. However, these are not risks which are distinctly associated with most workers' employment.

¶ 70 The problem with starting an "arising out of" analysis by asking whether the general public performs the same task, and is therefore subject to the same risk, is that many workers are hired specifically to perform tasks which are also performed by the general public. This method of analysis then leads us, as in this case, to perform a neutral-risk analysis when a worker has been injured performing the very tasks she was hired to perform. Further, if we engage in this flawed analysis, employers are encouraged to withhold compensation from a worker injured doing her job on the basis that the worker was injured performing a task that is performed by the general public. A short-order cook in a diner who is burned may be denied compensation because anyone in the general public could be injured while cooking. The claim of a window washer who falls from a ladder may be questioned because members of the public stand on a ladder to wash windows. A butcher who cuts himself may have his claim denied because members of the general public are subjected to the risk of injury when cutting meat. As in this case, a maid who is hired to make beds, and injures her back while doing so, must prove

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that she makes more beds per day than the general public in order to obtain compensation for her injury. In these examples, the claimants' injuries do not arise out of their employment because they were subjected to a neutral risk to a greater degree than the general public. They are entitled to compensation because they were injured as a result of a risk distinctly associated with their employment. In other words, they were injured performing the very tasks they were hired to perform.

¶ 71 To reiterate, I would analyze whether the claimant's injuries in this case arose out of her employment by first determining whether she was injured as a result of a risk that is distinctly associated with her employment. Unquestionably, when a housekeeper who is hired to make beds injures her back while doing so, she has been injured as a result of a risk distinctly associated with her employment. Put another way, the origin of her injuries was in a risk connected to her employment so as to create a causal connection between the employment and her accidental injury. Put still another way, her injuries arose out of her employment because she was injured performing the tasks she was instructed by her employer to perform. Viewed in the context of her job duties, the risk of injury to this claimant while making a bed was not a neutral risk. In my view, the majority is in error by engaging in a neutral-risk analysis in this case.