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2013 IL App (2d) 120876WC-U

NO. 2-12-0876WC

NOTICE
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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

LYNCH CONSTRUCTION CORP.,)	Appeal from the
)	Circuit Court of
Appellant,)	Lake County.
)	
)	
v.)	No. 11-MR-2035
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, (Donald Minorini),)	Honorable
)	Christopher Starck,
Appellees.)	Judge, presiding.

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

ORDER

¶ 1 Held: The Commission's determination that the claimant was permanently and totally disabled under the odd-lot category was not against the manifest weight of the evidence.

¶ 2 The issue in this case is whether the finding of the Illinois Workers' Compensation Commission (the Commission) that the claimant, Donald Minorini, is permanently and totally disabled pursuant to section 8(f) of the Illinois Workers' Compensation Act (the Act), 820

ILCS 305/8(f) (West 2010), is against the manifest weight of the evidence.

¶ 3 The claimant worked as a project manager for the employer, Lynch Construction Corp. On May 6, 2003, the claimant was involved in a work-related accident when he slipped and hyperextended his right knee. The claimant then underwent three failed knee replacement surgeries. The claimant declined to undergo a fourth attempt at a right knee replacement. The arbitrator found that the claimant was permanently and totally disabled as a result of the conditions of his right knee caused by the workplace accident. The Commission affirmed and adopted the arbitrator's award of permanent and total disability (PTD) benefits. The circuit court entered a judgment that confirmed the Commission's decision, and the employer now appeals the circuit court's judgment.

¶ 4 **BACKGROUND**

¶ 5 The claimant's work for the employer as a project manager required him to perform all phases of custom home construction, from concrete work to building custom cabinetry. He had to walk in mud, climb ladders, and carry objects. The claimant's accident occurred on May 6, 2003, when he slipped on mud and hyperextended his right knee. On May 15, 2003, he saw Dr. Chams. Dr. Chams' impression was that there was a tear of the medial meniscus or an anterior cruciate ligament (ACL) tear. An MRI showed an ACL tear as well as preexisting tricompartmental osteoarthritis, calcified loose bodies, and joint effusion.

¶ 6 On August 5, 2003, at the request of the employer, Dr. Zoellick examined the claimant. Dr. Zoellick concluded that there was a work-related tear of the medial meniscus

and that the claimant also had significant preexisting tricompartmental arthritis of the knee. Dr. Zoellick also noted that the claimant had an ACL tear, but he believed that to be unrelated to the claimant's work.

¶ 7 On September 8, 2003, Dr. Chams performed surgery to repair the right medial and lateral medial tears in the claimant's right knee as well as degenerative arthrosis of all three compartments. The claimant's recovery after the surgery did not go well, and he continued to have discomfort in his knee. Therefore, the claimant underwent a total right knee replacement surgery on May 7, 2004, performed by Dr. Chams. Again, after the knee replacement surgery he continued to experience pain and swelling in his right knee. He worked light duty and underwent prescribed physical therapy.

¶ 8 On September 22, 2005, the claimant began treating with Dr. Shapiro. The claimant complained of constant aching, sharp to moderate pain, stiffness, and swelling in the right knee. Dr. Shapiro ordered a revision surgery for the right knee. On September 27, 2005, the claimant underwent a second knee replacement because the first joint replacement had failed. The claimant lost significant range of motion in his knee after the operation and continued to complain of right knee pain. The claimant's records indicate that his limited range of motion might have been caused by scar tissue in the knee. On November 11, 2005, Dr. Shapiro performed manipulation of the knee under anesthesia.

¶ 9 Dr. Bush-Joseph conducted an evaluation of the claimant on January 31, 2006. Dr. Bush-Joseph wrote in his report that the claimant "most likely had preexisting asymptomatic

osteoarthritis of his right knee that allowed him to function normally in both his work occupation and activities of daily living." He opined that the work accident produced "objective findings and necessitated treatment." The doctor concluded that the claimant's May 6, 2003, work-related accident contributed to the claimant's need for the right knee surgeries and accelerated his preexisting osteoarthritis of his knee. He felt that the claimant was at maximum medical improvement (MMI) with regards to the function of his right knee.

¶ 10 The claimant followed up with Dr. Shapiro on March 20, 2006. At that time, the claimant suffered from lateral pain and swelling in his knee, and he reported that his pain had gotten worse over the last couple of weeks. Dr. Shapiro aspirated the right knee and prescribed a bone scan. The bone scan suggested a loosening of the tibial tray. On April 10, 2006, Dr. Shapiro opined that the claimant needed another revision surgery to revise the tibial component.

¶ 11 The claimant returned to Dr. Bush-Joseph on November 7, 2006. In his report, the doctor wrote that the bone scan showed "some increased uptake at the tibial prosthesis bone interface but no obvious evidence of loosening." According to the doctor's report, the claimant continued to work "with deteriorating function and increasing pain." Dr. Bush-Joseph acknowledged in his report that he was not a joint replacement expert, but opined that he did not think that the claimant's prosthesis was loose. He believed that the claimant's symptoms were the result of mechanical overload and that the claimant could not "tolerate the high levels of work, standing and climbing that his current occupation and job require."

He referred the claimant to his associate, Dr. Sporer, who is an expert in revision joint replacement surgery.

¶ 12 The claimant saw Dr. Sporer on December 13, 2006. At that time, the claimant reported significant knee pain. The claimant's knee pain worsened with prolonged standing, walking, and sitting. Dr. Sporer reported that x-rays showed an aseptic loosening of the right tibial component. He aspirated the knee, took a culture to rule out an infection, and prescribed another right knee replacement.

¶ 13 On January 29, 2007, the claimant underwent a third right knee replacement. The claimant discontinued working light-duty for the employer one week prior to this surgery and has not worked since then. In his notes dated April 27, 2007, Dr. Sporer noted that the claimant was functioning at a very high level until two weeks prior, but the claimant "overdid" it and started noticing increased pain and discomfort in the right knee. Dr. Sporer felt that the pain was due to the over exertion that the claimant placed on the knee shortly out of surgery, but overall, the claimant was having a gradual resolution of the pain and discomfort, and the doctor was happy with the result.

¶ 14 On June 13, 2007, Dr. Sporer noted that the claimant was experiencing increased knee pain. At that time, the doctor felt that the increased pain was secondary to the physical therapy which was causing a breakup of scar tissue that had formed after multiple knee surgeries. He prescribed a Functional Capacity Evaluation (FCE) which took place on July 5, 2007.

¶ 15 The evaluator who conducted the FCE noted that the claimant could lift 19.2 pounds from 30 to 63 inches, 21 pounds from 18 to 30 inches, and 23 pounds from the floor to 18 inches. The claimant could push/pull 54 pounds and carry 17 pounds in either arm. The evaluator found that the claimant's tolerance for sitting and standing was limited to 15 minute durations and that his work tolerance was two to three hours per day. The evaluator stated that the claimant gave full effort during the evaluation, and the results represented the claimant's safe capability level.

¶ 16 Approximately a week after the FCE, the claimant followed up with Dr. Sporer. Dr. Sporer's notes from July 13, 2007, state that the claimant was given a work restriction form that day. Dr. Sporer's July 13, 2007, work restriction form, however, is not included in the record on appeal. A later report by Dr. Zoellick states that Dr. Sporer's work restrictions following the July 2007 FCE were as follows: "returning to work with frequent lifting up to 10#, occasional lifting up to 20# and no kneeling, climbing ladders with occasional bending, stooping, working with machines and climbing stairs or scaffolds." In addition, according to Dr. Zoellick's report, Dr. Sporer did not mention a work tolerance of 2 to 3 hours per day in his work restrictions. The Commission found that Dr. Sporer did not expressly state in his medical reports and records that the claimant was limited to two to three hours of work at a time. The Commission, however, assumed that the doctor agreed with that limitation because he had sent the claimant for the FCE.

¶ 17 On September 12, 2007, Dr. Sporer noted an increase in pain and discomfort in the

claimant's right knee. The doctor noted tenderness along the knee cap area and the lateral side of the knee up to the thigh. X-rays showed that the knee's components were in good position and well fixed. In November 2007, Dr. Sporer noted that the claimant continued to have a large effusion of the right knee with limited range of motion. He noted radiolucency beneath the tibial base plate. He aspirated the knee and gave the claimant a Marcaine injection.

¶ 18 In December 2007 and January 2008, Dr. Sporer noted that the claimant continued to have swelling in his right knee. The claimant ambulated without any assistive devices or a limp, but the doctor noted that he had persistent right knee pain. A subsequent bone scan was positive for bone resorption adjacent to the horizontal component, as well as posterior to the proximal half of the shaft of the tibia. Dr. Sporer's diagnosis was aseptic tibial loosening, and he believed that the claimant's swelling and knee pain were related to the aseptic tibial loosening. He recommended another revision with cementation of the entire stem.

¶ 19 The claimant testified that he did not want to undergo another surgery until the doctors could tell him why the three previous knee replacement surgeries failed. Dr. Sporer told the claimant to stay as active as possible, and he scheduled the claimant to visit with him once per year to monitor any further deterioration of the knee prosthesis or sooner as needed.

¶ 20 The employer provided the claimant the opportunity to attend some computer courses at a community college in order to provide him with some employment opportunities. The claimant took several computer courses, but testified that he could take only one or two

classes per semester. When the claimant attended a class for one or two hours, he experienced significant right knee pain which caused him to lose focus. He stayed in the back of the classroom so he could stand or move. He had to lay down when he got home and could work on assignments at home in front of a computer for only 15 to 20 minutes at a time. The claimant hoped to go back to work for the employer as an administrative assistant after taking computer classes. However, due to a downturn in business, the employer decided that it would not have a position for him and stopped authorizing computer classes.

¶ 21 In May 2009, Dr. Sporer noted that x-rays of the claimant's knee showed that the claimant continued "to have a progressive radiolucent line beneath the tibial component suggestive of aseptic loosening." The claimant wanted to continue with "nonoperative management," and Dr. Sporer directed the claimant to return for an annual followup or sooner if other problems developed.

¶ 22 On December 14, 2009, a certified rehabilitation consultant, Kari Stafseth, evaluated the claimant. Stafseth noted that the claimant's "advanced age" affected his ability to adjust to other work. She also noted that the claimant had a considerable amount of transferable skills, but his work history consisted only of construction related work and that there was limited availability of positions within the construction industry during the winter months and due to economic conditions. Stafseth opined that the claimant had "lost access to his usual and customary job, as well as his usual and customary line of occupation." She also concluded that "based on [the claimant] being released to part time work 2 to 3 hours daily,

education and economic conditions, *** [the claimant] does not have access to a viable stable labor market offering gainful employment." She believed that his circumstances were unlikely to improve without a change in his physical status and/or situational factors and that vocational rehabilitation would only make sense if the claimant was capable of working a greater number of hours per day. The claimant would "only have access to a limited, if any, amount of part time work which is not considered to be viable, stable labor market offering gainful employment." She concluded her report with her opinion that the claimant's disability was "total and most probably permanent."

¶ 23 The claimant was reexamined by Dr. Zoellick at the employer's request on February 2, 2010. Dr. Zoellick opined that the claimant was limited to sedentary type work and that if he were allowed to alternate between sitting and standing, there was no medical reason why he needed to be limited to a 2-3 hour work day. Dr. Zoellick, however, agreed that the claimant's x-rays showed what "appears to be lucency under the tibial tray suggestive of loosening," and he agreed that Dr. Sporer's restrictions were reasonable restrictions. Dr. Zoellick also agreed that the claimant should not kneel on his right knee, should alternate between sitting and standing as tolerated, should not be climbing ladders or scaffolds, and could sit and drive as tolerated. He could not place a limit on the claimant's abilities and recommended that he perform those activities "as tolerating, alternating sitting and standing as needed." Dr. Zoellick believed that the claimant would need at least one knee revision surgery due to the loosening of the tibial component.

¶ 24 The employer's vocational rehabilitation specialist, Michelle Peters-Pagella, conducted a vocational assessment on March 16, 2010. She opined that the claimant could not return to work as a project manager for the employer, but that he had transferable skills that would assist him in obtaining positions as a contractor supply clerk with a retail home improvement setting, a counter clerk in a building supply house, or an inside sales representative.

¶ 25 Peters-Pagella's assessment included a Labor Market Survey she performed that purported to include ten employers that had positions available within the claimant's restrictions. The claimant testified that he contacted every prospective employer listed on the survey, but was unable to obtain employment from the contacts. He also testified that none of the jobs were within his restrictions. Peters-Pagella recommended that the claimant undergo vocational rehabilitation services, including completion of the classes he needed for an office technology certification program and a computer certification program.

¶ 26 The claimant saw Dr. Sporer again on May 20, 2010, and Dr. Sporer noted that the claimant had developed aseptic loosening of the tibial component after the previous knee replacements had failed. On May 28, 2010, Dr. Sporer noted that the claimant had significant knee swelling, ongoing pain, and required crutches for ambulation. X-rays revealed the aseptic loosening of the tibial component with no further progression. He prescribed another FCE, noting that the previous FCE was performed when the claimant had a "well fixed implant" which he no longer had.

¶ 27 The second FCE took place on July 14, 2010. The evaluation indicated that the

claimant could occasionally tolerate repetitive bending, bilateral pinching, stair climbing, walking, standing for a maximum of five minutes without assistive device, standing a maximum of ten minutes with an assistive device, squat lifting ten pounds, power lifting ten pounds, shoulder lifting 15 pounds, overhead lifting 15 pounds, unilateral lifting ten pounds from the floor to waist, and pushing/pulling five pounds of force for ten feet. The evaluator concluded that the claimant needed frequent position changes from standing to sitting during the day and should avoid crawling, dynamic balance, repetitive kneeling, sustained kneeling, ladder climbing, static balance, repetitive squatting, sustained squatting, frequent material handling, left and right unilateral carrying, and bilateral carrying. An addendum to the FCE report noted that the claimant could be placed at a job working two hours per day but would not be able to demonstrate a consistent five day work week. Although Dr. Sporer referred the claimant for the second FCE, nothing in the record indicates that the doctor had an opportunity to review the FCE or restricted the claimant's work activities pursuant to the results of the second FCE.

¶ 28 At the time of the arbitration hearing, Dr. Sporer was still treating the claimant for the loose prosthesis in his right knee. The claimant testified about his disability, and the arbitrator described it as an "extreme disability, and the inability to function for prolonged periods of time while doing almost anything." The claimant testified that he could not work eight hours a day, five days a week, and the arbitrator found that the "evidence supports that testimony." The claimant said that he has right knee pain from the moment he wakes up in

the morning and all through the day. He walks with a cane, and the right knee pain causes sleeplessness at night. He has been offered medications for his knee pain, including Percocet, Vicodin, Oxycontin, and Naproxen. He declined the medications, however, because they make him "very, very ill."

¶ 29 At the conclusion of the hearing, the arbitrator found that the claimant carried his burden of showing that given his age, restrictions, education, and transferable skills, there was no stable job market that existed within which he may be employable. In reaching this conclusion, the arbitrator made a factual finding that the claimant was unable to work more than two or three hours a day and that "even that would probably not be on a five day a week basis." The arbitrator further found that "no reasonably stable market exists within which the [claimant] could be employed, given those limitations."

¶ 30 Although the claimant did not present a medical record to show that Dr. Sporer opined that he was limited to two or three hours of work at a time, the arbitrator noted that Dr. Sporer sent the claimant for both FCEs and assumed that the doctor agreed with the FCE findings concerning the claimant's limitations. The arbitrator noted that Dr. Sporer specifically sent the claimant for a second FCE because the claimant had a "well fixed implant" during the first FCE, and his implant was no longer well fixed. The arbitrator concluded that it "seems logical that he was assuming the second FCE would therefore have even greater restrictions." (Emphasis in original.) The arbitrator found the claimant's description of his pain and limited function to be credible.

¶ 31 The arbitrator concluded that, because the claimant met his burden of proof, the burden shifted to the employer, but the employer did not meet its burden of proving that the claimant would be able to find work in a competitive labor market. The arbitrator, therefore, found that the claimant's work-related accident caused permanent and total disability.

¶ 32 The employer appealed the arbitrator's award to the Commission, and the Commission affirmed and adopted the arbitrator's decision with one commissioner dissenting. The dissenting commissioner believed that the claimant did not meet his burden of proving that he was entitled to PTD benefits. The employer appealed to the circuit court, and the circuit court entered a judgment that confirmed the Commission's decision, finding that the Commission's findings are not against the manifest weight of the evidence. The employer now appeals the circuit court's judgment.

¶ 33 ANALYSIS

¶ 34 The issue before us in this appeal is whether the Commission's finding that the claimant was permanently and totally disabled pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2012)) is against the manifest weight of the evidence. We agree with the circuit court that the Commission's finding with respect to PTD benefits is not against the manifest weight of the evidence. Accordingly, we affirm the circuit court's judgment that confirmed the Commission's decision.

¶ 35 The claimant has the burden of establishing the extent and permanency of his injury by a preponderance of the evidence. *Chicago Park District v. Industrial Comm'n*, 263 Ill.

App. 3d 835, 843, 635 N.E.2d 770, 776 (1994). This is a factual question to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256, 402 N.E.2d 607, 608 (1980). Accordingly, the initial determination of whether a claimant is totally and permanently disabled under section 8(f) of the Act is a question of fact to be determined by the Commission, and its determination on this issue cannot be overturned on review unless it is against the manifest weight of the evidence. *Economy Packing Co. v. Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 283, 293, 901 N.E.2d 915, 924 (2008).

¶ 36 "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).

¶ 37 "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 v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). Resolution of conflicts in medical testimony is the responsibility of the Commission. *Sisbro*,

Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003). 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." *Id.*

¶ 38 An employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 845 (1983). Instead, a PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357 (2007). "The focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability." *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534, 668 N.E.2d 21, 24 (1996). A person is not entitled to PTD benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life. *Interlake, Inc. v. Industrial Comm'n*, 86 Ill. 2d 168, 176, 427 N.E.2d 103, 107 (1981).

¶ 39 This case presents an issue of whether the claimant established that he is permanently and totally disabled under the "odd-lot" category. The odd-lot category for purposes of a PTD award arises when a "claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability." *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill. 2d 538, 546-47, 419 N.E.2d 1159,

1163 (1981). In these situations, the claimant can establish that he is entitled to PTD benefits under the "odd-lot" category by proving the unavailability of employment to persons in his circumstances. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 204, 904 N.E.2d 1122, 1133 (2009). "The claimant can satisfy his burden of proving that he falls into the 'odd-lot' category by showing diligent but unsuccessful attempts to find work or by showing that he will not be regularly employed in a well known branch of the labor market." *Id.* "In determining whether a claimant falls within an 'odd-lot' category for purposes of an award of PTD benefits, the Commission should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training, and capabilities." *Id.*

¶ 40 In the present case, the Commission awarded PTD benefits based on a finding that, because of the claimant's age, training, education, experience, and condition, there are no available jobs for a person in his circumstances. The record contains sufficient evidence to support this finding.

¶ 41 The claimant was 56 years old at the time of the arbitration hearing, had completed high school and one semester of college, and had worked as a project manager for the employer which required him to perform manual labor and construction work. His work duties included lifting, flexing at the knees, and crawling from time to time. His work experience was only within the construction industry.

¶ 42 After the workplace accident, the claimant underwent three knee replacement

surgeries, but he continued to experience pain and swelling in his right knee. At the time of the arbitration hearing, his third knee replacement had failed. He testified about the knee pain he continued to experience and that he could not sit or be on his feet for any extended length of time. He is limited in his ability to walk, sit, stand, or drive for sustained periods of time due to his knee pain. These limitations are supported in the reports of his treating physician, Dr. Sporer, as well as the opinions of the employer's independent medical expert, Dr. Zoellick.

¶ 43 Dr. Zoellick agreed that following the third right knee replacement surgery, the claimant's tibial component became loose and that he was limited in his ability to walk, stand, sit, or drive. He agreed that the claimant had to alternate between sitting and standing. Importantly, Dr. Zoellick could not place any limit on the claimant's abilities, and instead recommended that the claimant perform the activities "*as tolerated*." (Emphasis added.) Evidence of the "*as tolerated*" portion of the claimant's limitations came from the claimant's testimony that he could tolerate only very brief intervals of sitting or standing. The Commission found that the claimant's testimony was credible and established an "*extreme disability*." The assessment of the claimant's credibility and the weight to be given to his testimony lies solely within the province of the Commission. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 184, 759 N.E.2d 979, 984 (2001). Based on evidence in the record, including Dr. Zoellick's opinions, the Commission found that the workplace accident limited the claimant's ability to work more than two or three hours per

day and that "even that would probably not be on a five day a week basis." This finding is amply supported by the medical records when they are considered in light of the claimant's credible testimony.

¶ 44 The Commission also relied on the two FCEs and on the evaluation conducted by the certified rehabilitation consultant, Stafseth.

¶ 45 The first FCE took place while the claimant had a secure knee prosthetic, and that evaluation revealed that the claimant's tolerance for sitting and standing was limited to 15 minutes and that his work tolerance was two to three hours per day. The second FCE took place after Dr. Sporer and Dr. Zoellick both determined that there was a loosening of the tibia component of the claimant's knee implant. Dr. Sporer ordered a second FCE because the claimant no longer had a "well fixed implant." The second FCE showed diminished lifting and carrying capacity since the first FCE, and the second evaluator also concluded that the claimant could be placed at a job working two hours per day but would not be able to tolerate a consistent five day work week.

¶ 46 The certified rehabilitation consultant, Stafseth, noted that the claimant's "advanced age" affected his ability to adjust to other work. She also noted that the claimant had a considerable amount of transferable skills, but that his work history has solely consisted of construction related work and that there was limited availability of positions within the construction industry during the winter months and due to economic conditions. She concluded that, based on the claimant's circumstances, he would "only have access to a

limited, if any, amount of part time work which is not considered to be viable, stable labor market offering gainful employment." She concluded her report with her opinion that the claimant's disability was "total and most probably permanent."

¶ 47 In finding that the claimant carried his burden, the Commission considered all of this evidence and found that there are no available jobs for a person in the claimant's circumstances. We believe that the record taken as a whole is sufficient for the Commission to make that finding.

¶ 48 For example, in *Ameritech Services, Inc.*, the evidence was sufficient to establish that the claimant fell into the odd-lot category for purposes of a PTD award where the employee was a sales representative who was injured in a fall down some stairs. The employee was 30 years old and had earned an M.B.A. from Northwestern University while off work following the accident. However, the evidence also established that after the accident, the employee experienced constant pain that increased with activity and that his treating physician restricted him from lifting more than 10 to 15 pounds or driving more than 15 minutes at a time. A vocational expert testified that the employee was permanently and totally disabled and that he had to change position frequently and needed to lie down to relieve pain. The employee was a skilled worker with an above average level of abilities. However, due to the employee's physical limitations and restrictions, he was not a candidate for any of the jobs the vocational expert had found that fit the employee's transferable skills. The vocational expert opined that it was unlikely that an employer would hire the claimant

over an able-bodied candidate. *Ameritech Services, Inc.*, 389 Ill. App. 3d at 204-05, 904 N.E.2d at 1134.

¶ 49 In the present case, in challenging the Commission's PTD award, the employer argues that the claimant did not present sufficient evidence to establish a diligent but unsuccessful job search. However, an unsuccessful job search is not a prerequisite for a finding of permanent and total disability when the claimant's age, training, education, and condition indicate that there are no available jobs for a person in his circumstances.

¶ 50 The employer also objects to the Commission's finding because the record does not establish that Dr. Sporer opined that the claimant was unable to work an 8-hour day or otherwise offer an opinion concerning the claimant's physical ability to work. However, as noted above, Dr. Zoellick assessed the claimant's limitations and opined that he could perform work related tasks, including standing, sitting, and driving, only as tolerated. The claimant testified about his tolerances for these activities, and after considering the claimant's testimony, the Commission found that the claimant's disability was extreme and limited his ability to work. The Commission could rely on the claimant's testimony in evaluating the weight to be given to the conclusions in the FCE reports and in Stafseth's report, particularly when the employer's own expert opined that the claimant's ability to perform work related functions was limited to his tolerance.

¶ 51 The employer attempts to discredit and impeach the conclusions contained within the two FCE reports and within Stafseth's report, but the weight to be given to the reports as well

as any reasonable inferences to be drawn from the evidence in light of the reports are solely determined by the Commission. The Commission found the reports to be credible, persuasive, and consistent with the medical evidence, and we have no basis to second guess these factual findings. Accordingly, the evidence before the Commission was more than sufficient to support its findings with respect to the extent and permanency of the claimant's injury to his knee. See, *Id.* at 205, 904 N.E.2d at 1134 ("Taken as a whole, the medical evidence coupled with [the vocational rehabilitation expert]'s opinion are sufficient to satisfy the claimant's burden of establishing that he falls into an 'odd-lot' category for purposes of determining his entitlement to PTD benefits.").

¶ 52 In an odd-lot case, "once the employee has initially established that he falls in what has been termed the 'odd-lot' category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market) *** then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant." *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 547, 419 N.E.2d 1159, 1163 (1981). The burden of production shifts to the employer "to demonstrate that the employee is employable in a stable labor market and that such a market exists." *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1092, 871 N.E.2d 765, 776 (2007). In the present case, the Commission correctly found that the burden shifted to the employer to prove that the claimant would be able to find work in a competitive labor market, but the employer

failed to meet its burden.

¶ 53 For example, in *Chicago Rotoprint v. Industrial Comm'n*, 157 Ill. App. 3d 996, 509 N.E.2d 1330 (1987), the employee worked as a maintenance machinist. He was involved in a workplace accident that involved a crushing injury to his left groin, and he underwent two low back surgeries. The court held that there was sufficient evidence to support a claim for total and permanent disability where the employee "testified at length as to the pain and discomfort he continued to suffer despite the frequent hospitalization and continuous medical treatment he was receiving." *Id.* at 1004, 509 N.E.2d at 1336. As a result of the accident and surgeries, the employee had a drop foot, weaknesses in his legs, drug controlled pain, and the inability to walk without the aid of a foot brace, a quad cane, and a knee support. *Id.* The reports of two doctors indicated that his condition was permanent. *Id.*

¶ 54 After noting the evidence supporting a finding of total and permanent disability, the *Chicago Rotoprint* court noted that it was the employer's "duty to prove that suitable employment was reasonably available." *Id.* The court then concluded as follows: "The most that can be said of [the employer]'s evidence in this respect was that [the employee]'s job title suggested more skilled than arduous work when actually the opposite was the case. We do not find therefore that [the employer] has met its burden here." *Id.*

¶ 55 In the present case, the employer did not present evidence that some kind of work is regularly and continuously available to the claimant. The only evidence it presented was a labor market study conducted by Peters-Pagella that included ten employers, but the claimant

contacted all ten employers, and none of them offered him any employment. Under these facts, the Commission's award of PTD benefits is not against the manifest weight of the evidence.

¶ 56

CONCLUSION

¶ 57 For the foregoing reasons, we affirm the Circuit Court's judgment that confirmed the Commission's decision.

¶ 58 Affirmed.