2013 IL App (3d) 120010WC-U

NO. 3-12-0010WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

G.F. STRUCTURES,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Whiteside County.
	)	
	)	
v.	)	No. 11-MR-31
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, (Martin Guerrero),	)	Honorable
	)	Stanley B. Steines,
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 finding that the claimant proved that he fell within the odd-lot category of permanent total disability is not against the manifest weight of the evidence; the Commission's failure to award vocational rehabilitation is not against the manifest weight of the evidence; and the Commission's awards of attorney fees and penalties pursuant to sections 16 and 19(k) of the Act (820 ILCS 305/16, 19(k) (West 2010)), are not contrary to the manifest weight of the evidence.

¶ 2 The parties agree that the claimant, Martin Guerrero, was involved in a workplace accident while working for the employer, G.F. Structures, and suffered injuries to his right lower extremity as a result of the accident. The claimant filed a claim under the Illinois Workers' Compensation Act (the Act), 820 ILCS 305/1 to 30 (West 2010). After an arbitration hearing, the arbitrator found that the claimant was permanently and totally disabled as a result of the accident and awarded him permanent total disability (PTD) benefits in the amount of $763.14/week for life. In addition, the arbitrator awarded the claimant $2,672.17 in attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2010)) and $13,360.85 in penalties pursuant to section 19(k) of the Act (820 ILCS 305/19(k) (West 2010)). The employer appealed the arbitrator's decision to the Commission, and the Commission unanimously affirmed and adopted the arbitrator's decision. The employer appealed to the circuit court, and the circuit court confirmed the Commission's decision, holding that the decision "in all respects is not against the manifest weight of the evidence." This appeal ensued. On appeal, the employer challenges the Commission's finding that the claimant fell within the "odd-lot" category of permanent total disability and

challenges the Commission's failure to award vocational rehabilitation. In addition, the employer maintains that the Commission's awards of penalties and attorney fees are contrary to the manifest weight of the evidence and are contrary to law. The parties agree that the Commission erred in calculating the amount of the penalties and fees.

¶ 3 BACKGROUND

¶ 4 The claimant can read only a small amount of English, can write English even less, and does not understand some English words. Therefore, the claimant testified at the arbitration hearing through an interpreter. He testified that he attended school in Mexico through approximately the 6th grade. He also attended some compulsory classes one weekend per month, as is required of all adult Mexican males under the age of 40. The classes, however, did not further any job skills and were merely instructive classes about the Mexican military. The claimant's work experience prior to working for the employer included labor on a cattle ranch in Mexico, working as a picker/packer for Monterey Mushrooms in the United States, and installing fences for Midwest Fence.

¶ 5 The claimant began working for the employer as an ironworker on September 1, 2005. He started working out of Ironworkers Local #63 beginning in 1997 after passing a pre-employment physical examination. The claimant's job duties for the employer included installing guard rails and signs on local highways. The parties stipulated that the claimant sustained accidental injuries that arose during the course of his employment as a result of a slip and fall accident that occurred on September 1, 2005.

¶ 6 On the day of the accident, the claimant was working on installing posts every 200 feet on a highway approximately 10 miles from Rock Falls, Illinois. The claimant worked from a truck that was pulling a heavy air compressor. The accident occurred when the claimant attempted to get into the truck; he slipped, fell, and the air compressor ran over his legs. He heard cracking noises when the accident occurred. Records from the emergency room state that the claimant fell off the truck and that a heavy object rolled over his right ankle. The emergency room records further indicate that the claimant had a Grade 2 open tibia fracture, a fracture of the fibula, and that the claimant required surgery. Dr. Stephen Gabriel operated on the claimant's right leg on the same day as the accident. His operative report states that he performed an irrigation debridement with insertion of an intramedullary rod into the right tibia.

¶ 7 After the surgery, the claimant followed up with Dr. Steven Potaczek. Dr. Potaczek expected the claimant to require at least 4 to 6 months to recover from the accident and believed that the rod, or at least the screws, in the claimant's leg would have to come out at some point. The claimant began a course of physical therapy.

¶ 8 By October 2005, the claimant was bearing partial weight on his right leg. In November 2005, he was 50% weight bearing. In December 2005, Dr. Potaczek noted that the claimant's ankle motion was good but that he tended to externally rotate his foot when he walked. In January 2006, Dr. Potaczek noted that the claimant was "ambulating essentially putting all of his weight on the opposite side externally rotating his foot when he

walks." Dr. Potaczek instructed the claimant to bear weight on his right leg with the use of a cane or crutch. Dr. Potaczek's work restriction was "no work for now or light duty if available."

¶ 9 From February through June 2006, the claimant continued to have pain, and X-rays of the claimant's leg indicated that the fractures were not healing properly. In June 2006, the claimant met with Dr. Paul Perona. Dr. Perona noted that the claimant's leg pain had not significantly improved since his surgery. The claimant reported moderate pain which was worse with weight bearing. He was also experiencing numbness and tingling in his right foot, had difficulty walking, and walked with a limp. Dr. Perona's impression was nonunion of the right tibia and fibula.

¶ 10 Dr. Perona performed a second surgery on the claimant's right leg on June 16, 2006. He performed a right tibial intramedullary nail exchange with a dynamite reamed intramedullary nail, fibular osteotomy, and a posterior mold splint. In July 2006, the claimant reported that he was doing well with minimal pain and had been using one crutch. Dr. Perona's plan at that time was to discontinue use of the crutch and begin full weight-bearing as tolerated. The claimant was to remain off work. In addition, the claimant resumed physical therapy three times per week.

¶ 11 In August 2006, Dr. Perona noted that the claimant came to his office wearing a regular high-top work boot, had full weight bearing, and utilized no assist devices, but that he complained of a small amount of pain with ambulation. Dr. Perona's plan included

continued physical therapy for range of motion and strengthening of the ankle. The claimant followed up with Dr. Perona in September 2006, and reported swelling in the ankle and weakness while maneuvering stairs. Dr. Perona switched the claimant from physical therapy to work conditioning five days per week for four weeks. In October 2006, the claimant completed the work conditioning, but he continued to complain of pain with all activities. He reported that some days were good and some days were bad and that cold weather complicates it.

¶ 12 On November 7, 2006, the claimant underwent a functional capacity evaluation (FCE). The evaluator concluded that the claimant was unable to perform tasks that required acute dorsiflexion or plantar flexion, such as kneeling and crawling, due to pain. The claimant was "extremely labored" in descending stairs, and he avoided any walking other than very short distances. The evaluator noted that he was able to lift significant amounts of weight, but that the scope of that assessment did not require carrying the weight while walking. The evaluator reported that the claimant used poor body mechanics during some of the lifting tasks.

¶ 13 On December 5, 2006, Dr. Perona authored a letter to the medical case manager assigned to the claimant's workers' compensation case. Dr. Perona reported that the claimant complained of pain to the lateral portion of his lower leg, especially when descending stairs. The doctor reported that the claimant had completed physical therapy, and an FCE, and he had been off work since his injury. Dr. Perona stated that, after reviewing the FCE, he

believed that the claimant could return to work with the following restrictions: no climbing, squatting, crawling, or stair or ladder climbing. The claimant was to avoid lifting greater than 25 pounds.

¶ 14 On January 18, 2007, the claimant followed up with Dr. Perona and complained that he continued to have sharp pain in the anterior portion of his lower leg when he takes his first few steps and is unable to walk long distances because of pain. At that time, Dr. Perona's plan for the claimant's treatment included shoe insert arch supports, discontinuing physical therapy, increasing home exercise, and returning the claimant back to regular job duties. The doctor noted that if the claimant continued to have pain, removing some of the hardware in the claimant's leg was an option.

¶ 15 The claimant testified that he returned to his regular work duties in January 2007. However, he continued to experience pain and swelling in his right leg. Therefore, he returned to Dr. Perona on March 13, 2007. Dr. Perona restricted the claimant to light duty work. He suggested that the claimant limit the amount of his lifting and walking and limit his walking on uneven surfaces. After March 13, 2007, the claimant returned to work for the employer on light duty.

¶ 16 On June 1, 2007, at the request of the employer, the claimant submitted to an independent medical examination (IME) conducted by Dr. J.S. Player. Dr. Player opined that the claimant "manifests objective evidence of work restrictions" which included being "restricted from excessive kneeling, crawling, stair climbing[,] and long distance walking and

should be restricted from climbing ladders." He further opined that the claimant did not require any further treatment of his right lower extremity. The claimant submitted to a second IME conducted by Dr. Player on November 12, 2008. He reiterated his previous restrictions of the claimant being "restricted from excessive kneeling, crawling, stair climbing, and long distance walking especially on uneven surfaces."

¶ 17 On June 2, 2008, at the request of his attorney, the claimant submitted to an IME conducted by Dr. Robert Eilers. Dr. Eilers testified at the arbitration hearing by way of an evidence deposition that was taken in January 2009. Dr. Eilers testified that he believed that the claimant was limited to light duty work. He noted that the claimant had a great deal of pain with plantar flexion and dorsiflexion, and that he should be restricted from climbing, walking, steps, stairs, or having to push off with his right leg. The most preferable position for the claimant was one in which he could alternate sitting, standing, and walking in a sedentary to light position.

¶ 18 Dr. Eilers explained that, with respect to the right ankle, the claimant was going to have some pain, some arthritic changes, and an altered gait pattern. He did not believe that the claimant could return to work as an unrestricted iron worker. He also believed that the claimant was limited to lifting around 35 pounds only on an occasional basis.

¶ 19 In his report, he wrote that the claimant "is probably going to have difficulty returning to the heavy job he has done and probably should look at a job that would alternate sit, stand[,] and walk, and would be in a sedentary work position, light position, maybe a light-

medium position, and one that would not be on unlevel ground on a continuing basis." He believed that the claimant's "defects will continue to be permanent" and that he was going to have some arthritic problems in his ankle in the future. He testified that his opinions concerning the claimant's work capabilities took into consideration only his physical capabilities and not his education, the labor market, language skills, transferable skills, or other non-physical factors.

¶ 20 In September and October 2008, the claimant's attorney requested the employer to present a rehabilitation plan for the claimant. The record does not include the employer's responses to these requests, if any.

¶ 21 Dr. Perona testified by way of an evidence deposition that was taken on June 30, 2009. He believed that the restrictions he imposed on the claimant's work were necessary because the claimant continued to experience ankle pain in his right leg which caused increased difficulty with uneven surfaces. The doctor believed that the claimant should restrict his lifting to between 25 and 30 pounds because after 30 pounds, a person starts to require leg strength to lift objects. He believed that if the claimant exceeded 30 pounds of lifting, he could exacerbate his ankle condition or his ankle pain. He also testified that the claimant's restrictions were permanent restrictions because his ankle pain was "most likely secondary to slight malalignment of the fibula and possibly tibia." He testified: "I think that the pain that he's having is secondary to an underlying planovalgus deformity that has become painful or has resulted in discomfort because of the accident." He did not recommend any further

treatment "other than to possibly have him fitted for orthotics to see if that would help unload the ankle."

¶ 22 The claimant worked light duty for the employer until August 15, 2008, when the employer laid him off work because it no longer had light duty work available. The claimant testified that, since he was laid off work, the employer has paid him temporary total disability (TTD) benefits sporadically.

¶ 23 At the time of the arbitration hearing, the claimant felt that his right leg was very weak and that it seemed "like it is a little tilted to the right." He testified that it seemed to be a little shorter than the left leg because he has a special support inside his shoe. When he tries to move the leg, it hurts. He experiences difficulty descending a ladder and walking on grass, on slippery or uneven floors, or on gravel. He experiences pain in his foot when he walks, and when he walks for an extended period of time, the foot swells. He takes Hydrocodone for pain

¶ 24 The claimant is unemployed, and he does not know how to look for a job on the Internet or how to prepare a resume. His prior work experience included labor on a cattle ranch in Mexico, working as a picker/packer at Monterey Mushrooms in the United States, and installing fences and guard rails for the employer and Midwest Fence. He currently holds a commercial driver's license, but he testified that when it was renewed, he was only required to take the vision test, not a physical examination. Since he became unemployed, he has looked for work at local warehouses, gas stations, Wal-Mart, Menards, Monterey

Mushrooms, Ace Hardware, and Pioneer Seed Company, but he has not been successful. He testified that he often contacts his union seeking work, but they have no work for him.

¶ 25 Prior to the arbitration hearing, on August 3, 2009, the employer's attorney authored a letter to the claimant's attorney in which he stated that the employer had work available for the claimant within his physical restrictions and that the job would be available beginning on August 10, 2009. However, on August 7, 2009, the employer's attorney authored a second letter to the claimant's attorney that advised the claimant not to appear for work on August 10, 2009, and that the employer was preparing a revised employment offer. The employer, however, never conveyed a revised employment offer.

¶ 26 On August 10, 2009, Edward Pagella, a clinical professional counselor, prepared a vocational report on behalf of the claimant. In his report, Pagella wrote as follows:

¶ 27

> "[I]t is my professional opinion *** that [the claimant] is unemployable based on the following vocational profile: 1) He is severely limited in his ability to stand throughout the day and is limited to the light level of physical tolerance by Dr. Perona who is also recommending additional treatment 2) He is taking narcotic medication in which he will never pass a drug test with an employer and many employers will see him as a liability 3) He has no High School diploma or GED 4) The United States department of transportation will not allow him to drive a truck as it states in [its] regulations that individuals who have any injury to their upper or lower extremities

that may affect their ability to safely operate a commercial vehicle are prohibited from driving as well as he is not allowed to be taking narcotic medication that may affect his driving ability, thus he is unable to utilize his CDL license 5) He does not speak, read or write the English Language 6) He does not know how to perform an internet job search 7) He has no computer skills 8) He has no resume 9) He is unsure as to what occupations he can perform based on his physical limitations and 10) he has no interviewing skills and does not know how to present himself to a potential employer."

¶ 28 Pagella testified at his deposition that not only was the claimant unemployable, but that, even with significant vocational rehabilitation, he would have a very difficult time finding employment.

¶ 29 The employer also submitted a vocational assessment report authored by Gary Wilhelm, a vocational case manager, and David Patsavas, a vocational rehabilitation consultant. The employer's vocational experts noted that the claimant's physical limitations preclude him from employment similar to his past work history and that his vocational alternatives are somewhat limited due to his inability to communicate in English and his sixth grade education from Mexico. They concluded that the claimant was a "candidate for [v]ocational [r]ehabilitation [s]ervices which would focus on enrolling him in English as a [s]econd [l]anguage classes and providing significant amount of [j]ob [r]eadiness [t]raining and [v]ocational [c]ounseling with regards to return to work opportunities." The employer's

experts concluded that "opportunities in [m]anufacturing, [w]arehouse, and [t]ransportation environments would be explored to return [the claimant] to work where he can use his medium-level lifting capabilities, as long as the job does not require him to be on his feet all day."

¶ 30 On December 1, 2009, the employer's counsel authored a letter to the claimant's counsel indicating that he would discuss with the employer the possibility of enrolling the claimant in an English as a second language course and a basic job seeking skills course, as well as having Wilhelm contact the claimant's attorney regarding an appointment to begin vocational rehabilitation services. The employer's attorney added that he had instructed the employer "to begin maintenance benefits at the temporary total disability rate." The record does not indicate that the employer ever provided any vocational assistance.

¶ 31 The arbitration hearing on the claimant's claim under the Act began on January 28, 2010. However, the arbitrator delayed the closing of the proofs for the purpose of allowing the employer to take the evidence deposition of its vocational expert, Gary Wilhelm. The arbitrator ultimately closed the proofs on April 7, 2010, and as of that date, the employer had not obtained Wilhelm's deposition or otherwise procured his testimony.

¶ 32 At the conclusion of the arbitration hearing, the arbitrator found in favor of the claimant on a number of issues. With respect to the nature and extent of the claimant's injury, the arbitrator found that the claimant established by a preponderance of the evidence that he fell within the odd-lot category of permanent total disability. The arbitrator found that

the claimant "met his burden by providing evidence of a diligent yet unsuccessful, self-directed job search, through the testimony of his vocational expert, Edward Pagella, the medical records establishing his disability, and through the testimony of Dr. Perona, Dr. Eilers, Dr. Player, and the report of Gary Wilhelm."

¶ 33 On the issue of section 16 attorney fees and section 19(k) penalties, the arbitrator noted as follows:

¶ 34

> "[The employer]'s IME establishes causation and [the employer]'s vocational expert opined that [the claimant] required vocational assistance. However, no such assistance was ever provided by [the employer] beyond the initial vocational meeting with Mr. Wilhelm. No real controversy exists, and there is no reason for the [employer] to pay benefits so sporadically that it is now approximately $12,285.79 behind in maintenance benefits as of the date of closing of proofs, 4/7/10."

¶ 35 The arbitrator also noted that the employer continued the arbitration hearing to secure the testimony of Wilhelm, but it never did so. The arbitrator concluded that the employer's "refusal to regularly provide benefits, its failure to secure the testimony for which the trial was bifurcated[,] and its failure to provide vocational assistance were vexatious and unreasonable and that the [employer] is liable to [the claimant] for penalties and fees." The arbitrator calculated the section 19(k) penalty by granting the claimant 50% of the underpaid amount of TTD benefits awarded and 50% of the total unpaid medical benefits awarded. The

arbitrator calculated his award of attorney fees under section 16 by granting the claimant attorney fees in the amount of 20% of the penalties it awarded under section 19(k). The arbitrator calculated the 19(k) penalties to be $13,360.85, and the section 16 attorney fees to be $2,672.17.

¶ 36 The employer appealed the arbitrator's decision to the Commission, and the Commission unanimously affirmed and adopted the arbitrator's decision. The circuit court subsequently confirmed the Commission's decision. The employer now appeals the Commission's decision to this court.

¶ 37 ANALYSIS

¶ 38 I.

¶ 39 Nature and Extent of the Claimant's Injury

¶ 40 The first issue the employer raises 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. It argues that the Commission's finding that the claimant proved that he fell within the odd-lot category of permanent total disability is against the manifest weight of the evidence. We disagree.

¶ 41 In a workers' compensation case, the claimant has the burden of establishing, by a preponderance of the evidence, the extent and permanency of his injury. *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 843, 635 N.E.2d 770, 776 (1994). The extent of a claimant's disability is a question of fact 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 issue 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 will not 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).

¶ 42 "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).

¶ 43 "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 also within the province 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*.

¶ 44 An employee is permanently and totally disabled when he is unable to make some contribution to industry sufficient to justify payment of wages. *Interlake Steel Corp. v. Industrial Comm'n*, 60 Ill. 2d 255, 259, 326 N.E.2d 744, 747 (1975). 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).

¶ 45 When a claimant's disability is not so limited in nature that he is not obviously unemployable or if there is no medical evidence to support a claim of total disability, 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*.

¶ 46 In the present case, the evidence presented at the arbitration hearing supports the Commission's finding that the claimant fell within an odd-lot category. Accordingly, the Commission's award of PTD benefits was not contrary to the manifest weight of the evidence.

¶ 47 All of the medical and vocational experts agreed that the claimant could no longer perform his previous job duties. The employer's IME expert, Dr. Player, restricted the claimant from excessive kneeling, crawling, stair climbing, and long distance walking. Likewise, the claimant's IME expert, Dr. Eilers, believed that the most the claimant should lift was 35 pounds on an occasional basis, and the most preferable position for the claimant was one in which he could alternate sitting, standing, and walking with sedentary to light job duties. The claimant's treating physician, Dr. Perona, believed that the claimant should be restricted from lifting more than 25 to 30 pounds and believed that his light-duty restrictions were permanent.

¶ 48 The employer's vocational expert, Wilhelm, admitted that the claimant's physical limitations precluded him from employment similar to his past employment and that the claimant's inability to communicate in English and his sixth grade education in Mexico limited his vocational alternatives. The claimant's vocational expert, Pagella, believed that the claimant was unemployable and that even with significant vocational rehabilitation, the claimant was going to have a difficult time finding a job due to the narcotic medications he took to manage his pain, as well as his other physical limitations and lack of transferable skills.

¶ 49 The claimant testified to the pain from which he suffers and stated that the pain made it difficult for him to go down a ladder or walk on grass, gravel, or uneven surfaces. He experiences pain in his foot when he walks, and his foot swells when he walks for an extended period of time. At the time of the arbitration hearing, the claimant was 49 years old, did not speak fluent English, and did not know how to look for a job on the Internet or prepare a resume. Nonetheless, he testified about his self-directed job search and identified several potential employers, including his union, where he unsuccessfully sought employment. The claimant's testimony concerning his unsuccessful job search supports Pagella's finding that the claimant was unemployable, and the evidence as a whole, including records, reports, and testimony from medical experts, reports and testimony from vocational experts, and the claimant's testimony, was sufficient for the Commission to find that the claimant is so handicapped that he will not be employed regularly in any well-known branch

of the labor market.

¶ 50 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. *Id*. at 204-05, 904 N.E.2d at 1134.

¶ 51 In *Baldwin Associates v. Industrial Comm'n*, 232 Ill. App. 3d 928, 598 N.E.2d 999 (1992), a finding of permanent and total disability was sustained where the employee had problems mounting and dismounting steps, often experienced knee pain, was uncomfortable sitting in a confined area, could lift only 25 pounds, could probably not return to his job as a pipefitter, and had to rest five minutes every hour. The employee's condition was

permanent and would not improve. He was 64 years old and had been employed as a pipefitter continuously since he was 18 years old. *Id*. at 933-34, 598 N.E.2d at 1002. See also, *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1095, 871 N.E.2d 765, 777-78 (2007) (employee was 54-year old high school graduate, worked his entire adult career as a pipefitter, could no longer work in that field of work, and possessed few transferable skills that would translate into a sedentary-type position).

¶ 52 Likewise, in the present case, for the reasons noted above, the evidence supports the Commission's finding that the claimant proved the unavailability of employment to a person in his circumstances. The testimony from his vocational expert, Pagella, was sufficient for the Commission to find in his favor on the nature and extent of his injury as Pagella opined that the claimant was unemployable and was likely to have difficulty finding a job even after extensive vocational rehabilitation. Therefore, the burden shifted to the employer; the burden of production "to demonstrate that the employee is employable in a stable labor market and that such a market exists." *Id*. at 1092, 871 N.E.2d at 776.

¶ 53 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). In the present

case, the employer failed to meet its burden.

¶ 54 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 1003-04, 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*. at 1004, 509 N.E.2d at 1336. The reports of two doctors indicated that his condition was permanent. *Id*.

¶ 55 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*.

¶ 56 In *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 447 N.E.2d 842 (1983), the employee testified at length about his persistent pain, numbness, and frequent

hospitalizations, and two medical experts agreed that he was permanently disabled. The employee was 32 years old, had a ninth-grade education in Mexico, and was employed as welder for five years prior to his injury. *Ceco Corp*., 95 Ill. 2d at 287-88, 447 N.E.2d at 846. The supreme court held that the claimant met his initial burden of proof concerning his disability and that it was the employer's duty to prove that suitable employment was reasonably available. *Id*. at 288, 447 N.E.2d at 846. The court held that the employer failed to meet its burden as follows: "The most that can be said is that [the employer]'s evidence indicated [that the employee] was capable of performing his prior job as a welder or other tasks involving 'light duty.' However, the availability of such employment was insufficiently established." *Id*. The court concluded, after "an evaluation of the evidence and the medical testimony," that the Commission could have found that the employee "is unable to secure permanent employment." *Id*.

¶ 57 In the present case, the employer's IME physician restricted the claimant from excessive kneeling, crawling, stair climbing, and long distance walking. The claimant's IME expert opined that the most preferable position for the claimant was one in which he could alternate sitting, standing, and walking with sedentary to light job duties. In their report, the employer's vocational experts concluded that "opportunities in manufacturing, warehouse, and transportation environments would be explored to return [the claimant] to work where he can use his medium-level lifting capabilities, as long as the job does not require him to be on his feet all day." The report from the employer's vocational expert falls far short of

carrying the employer's burden of showing that work is regularly and continuously available to the claimant in the competitive job market. The employer's vocational experts did not identify any jobs that fit within the claimant's restrictions, much less establish the availability of such jobs. *Id. (*"the availability of such employment was insufficiently established."). The arbitrator gave the employer the opportunity to secure Wilhelm's testimony by bifurcating the arbitration hearing and continuing the closing of the proofs, but the employer elected not to call him as a witness. Under these facts, the Commission's findings with respect to the nature and extent of the claimant's injury must be affirmed.

¶ 58 II.

¶ 59 Vocational Rehabilitation

¶ 60 Next, the employer argues that the Commission should have ordered vocational rehabilitation instead of determining that the claimant is permanently and totally disabled. It argues that the Commission's failure to order vocational rehabilitation is against the manifest weight of the evidence. We disagree.

¶ 61 Section 8(a) of the Act provides that an "employer shall * * * pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a) (West 2010). A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. *National Tea Co. v. Industrial*

Comm'n, 97 Ill.2d 424, 432, 454 N.E.2d 672, 676 (1983). Whether a claimant is entitled to vocational rehabilitation is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence. *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 39, 981 N.E.2d 25.

¶ 62 In the present case, we cannot find that the Commission's refusal to award vocational rehabilitation was against the manifest weight of the evidence because the record does not establish that vocational rehabilitation would have increased the claimant's earning capacity. In fact, prior to the arbitration hearing, the claimant's attorney made several requests for vocational rehabilitation (in September and October 2008 and in December 2009), but the employer never offered such services. The facts outlined above that support the Commission's award of PTD benefits also support its denial of an award for vocational rehabilitation benefits.

¶ 63 III.

¶ 64 Section 19(k) Penalties and Section 16 Attorney Fees

¶ 65 Finally, the employer takes issue with the Commission's award of penalties and attorney fees. Section 19(k) penalties are intended to address situations where the employer deliberately delays payment of compensation under the Act or when the employer's delay in payment is the result of bad faith or improper purpose. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553 (1998). With respect to attorney fees, Section 16 of the

Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2010). The imposition of penalties and attorney fees under section 19(k) and section 16 fees is discretionary. *Id*.

¶ 66 A review of the Commission's decision concerning penalties and attorney fees pursuant to sections 19(k) and 16 involves a two-part analysis. First, we must determine whether the Commission's finding that the facts justified section 19(k) penalties and section 16 attorney fees is "contrary to the manifest weight of the evidence." *Id*. at 516, 702 N.E.2d at 553. Second, we must determine whether it would be an abuse of discretion to award such penalties and fees under the facts of the case. *Id*. In the present case, the Commission's award of 19(k) penalties was not contrary to the manifest weight of the evidence, was not an abuse of discretion, and was not contrary to law.

¶ 67 There is no dispute between the parties that the claimant was entitled to either temporary total disability (TTD) benefits or maintenance benefits prior to the arbitration hearing after the employer no longer had light duty work for the claimant. The employer, however, did not regularly pay the claimant weekly benefits, but withheld payment of these benefits for weeks at a time, and it did not pay the benefits regularly or consistently. As of the close of proofs on April 7, 2010, the employer was behind in payment of these benefits in the amount of $12,285.00. The employer did not present any evidence to justify any delay in payment of the claimant's benefits. It has not presented reliance on a reasonable defense or conflicting medical evidence to justify its delay. Accordingly, we must affirm the

Commission's award of penalties and fees. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579, 658 N.E.2d 838, 840 (1995) (when the employer has delayed payment of compensation, it has the burden to show that it reasonably believed that the delay was justified).

¶ 68 IV.

¶ 69 Agreed Miscalculation of Penalties and Fees

¶ 70 The parties agree that the Commission miscalculated the amount of penalties and fees. The outstanding TTD/maintenance benefits and unpaid medical benefits totaled $12,734.02 ($12,285.79 – TTD/maintenance benefits; $448.23 – unpaid medical), and a penalty at 50% of this outstanding balance should be in the amount of $6,367.01. Section 16 fees at 20% of the penalties should be in the amount of $1,273.40.

¶ 71 CONCLUSION

¶ 72 For the foregoing reasons, we modify the Commission's award for penalties and fees, but otherwise affirm the circuit court's judgment that confirmed the Commission's decision.

¶ 73 Affirmed as modified.