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2014 IL App (5th) 120567WC-U

Order filed October 9, 2014

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

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ANTHONY MOSSA,	)	Appeal from the Circuit Court
	)	of the Twentieth Judicial Circuit,
	)	Washington County, Illinois
Appellee,	)	
	)	
v.	)	Appeal No. 5-12-0567WC
	)	Circuit No. 12-MR-6
	)	
ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION, <i>et al.</i> , (Nascote Industries,	)	Dennis G. Hatch,
Appellant).	)	Judge, Presiding.

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PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) The Commission's finding that the claimant was not entitled to wage differential benefits under section 8(d)(1) of the Workers' Compensation Act was not against the manifest weight of the evidence; and (2) The Commission did not abuse its discretion by excluding a doctor's independent medical examination report on hearsay grounds.

¶ 2 The claimant, Anthony Mossa, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), seeking benefits for an

injury to his left shoulder which he sustained on August 21, 2005, while he was working for Nascote Industries (employer). After conducting a hearing, an arbitrator found that the claimant suffered a work-related injury to his left shoulder and awarded benefits, including temporary total disability (TTD) benefits, maintenance benefits, and permanent partial disability (PPD) benefits under section 8(e)(10) of the Act (820 ILCS 305/8(e)(10) (West 2004)) for 55% loss of use of his left arm. However, the arbitrator rejected the claimant's claim for wage differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2004)). Moreover, the arbitrator found that the claimant was able to return to work without restrictions as of February 15, 2011, and denied maintenance benefits after that date. In addition, the arbitrator sustained the employer's objection to the admission of claimant's Exhibit 3 (an independent medical expert's (IME) report prepared on the employer's behalf by Dr. Michael Milne) on hearsay grounds. Finally, the arbitrator rejected the claimant's claim for mileage expenses incurred during his vocational rehabilitation because it found that the claim was "not reasonable under the circumstances of this case" and was "not identified as an issue at the time of trial."

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). Among other things, the claimant argued that the arbitrator had erred in denying him wage differential benefits and in denying him maintenance benefits after February 15, 2011. The Commission unanimously affirmed and adopted the arbitrator's decision.

¶ 4 The claimant then sought judicial review of the Commission's decision in the circuit court of Washington County, which reversed the Commission's ruling. The circuit court found that the

Commission's decision was against the manifest weight of the evidence and awarded the claimant wage differential benefits under section 8(d)(1) of the Act in the amount of \$302.67 per week for the duration of his disability. The court also found that the employer's IME's conclusion that the claimant could work without restrictions as of February 15, 2011 (upon which the Commission relied) was against the manifest weight of the evidence, and it awarded the claimant maintenance benefits from February 15, 2011, to June 8, 2011. The court also awarded the claimant \$735.50 in mileage expenses incurred during his vocational rehabilitation. In addition, the court held that the Commission erred in excluding claimant's Exhibit 3 and ruled that the exhibit was "deemed admitted." This appeal followed.

¶ 5

#### FACTS

¶ 6 The claimant worked for the employer as a senior maintenance mechanic in the employer's paint department. His responsibilities included keeping all of the equipment in the paint department running, including the robots that painted the parts made by the employer.

¶ 7 On August 21, 2005, while the claimant was trying to perform maintenance on one of the paint robots, he slipped and began falling off of the robot. To prevent himself from falling, the claimant grabbed a "lifting eye" with his left arm, overstretching and injuring his left shoulder in the process. He immediately notified his supervisor of the injury and was off work for the following two days.

¶ 8 When the claimant returned to work on August 24, 2005, the company nurse referred him to the plant doctor. The claimant treated with the plant doctor until he was terminated on September 13, 2005, for allegedly stealing company property. As a result of the employer's

allegations that he had stolen company property, the claimant was later charged with felony mail fraud, to which he pled guilty.

¶ 9 From November 2005 until July 2006, the claimant worked for National Railway as a diesel locomotive mechanic. He worked full duty without restrictions during that time period.

¶ 10 On February 24, 2006, the claimant saw Dr. Joon Ahn, an orthopedic surgeon and specialist. The claimant reported that he had been experiencing pain and popping since his August 21, 2005, work accident. Dr. Ahn diagnosed mild to moderate rotator cuff tendonopathy and impingement syndrome with a possible labral tear. He performed an injection and recommended physical therapy and an MRI arthrogram.

¶ 11 Before authorizing the treatment recommended by Dr. Ahn, the employer sent the claimant to Dr. Richard Howard for an independent medical examination. Dr. Howard diagnosed a left shoulder labral tear due to the claimant's work injury and recommended an MRI arthrogram to confirm the diagnosis. The claimant subsequently underwent an MRI arthrogram which showed no labral tear. Nevertheless, when the claimant returned to Dr. Howard on June 8, 2006, the doctor recommended surgery based on "the physical exam findings and the fact that the history is consistent with a labral tear." The claimant adopted Dr. Howard as his treating physician.

¶ 12 On July 26, 2006, Dr. Howard performed surgery on the claimant's left shoulder. The employer approved of and paid for the surgery. The postoperative diagnoses were left shoulder anterior labral tear, partial thickness rotator cuff tear, and subacromial impingement. After the surgery, Dr. Howard placed the claimant on work restrictions of no lifting of more than five pounds. The employer began paying TTD benefits, and the claimant maintained follow-up care

with Dr. Howard. On November 9, 2006, the claimant returned to Dr. Howard complaining of continuing pain in his left shoulder. The doctor ordered another MRI arthrogram, which showed a full thickness rotator cuff tear. Dr. Howard recommended surgery to repair the tear.

¶ 13 On January 12, 2007, the employer asked Dr. Michael Milne to perform an independent review of the claimant's records. After reviewing the relevant records, Dr. Milne prepared a report in which he opined that the claimant's current rotator cuff tear was related to the August 21, 2005, work injury, that there was no evidence of an intervening injury, and that Dr. Howard's surgical recommendation was reasonable and necessary.

¶ 14 On February 21, 2007, Dr. Howard performed a second surgery on the claimant's left shoulder. The procedure consisted of a left shoulder arthroscopy with debridement and repair of the rotator cuff with subacromial decompression.<sup>1</sup> The employer authorized and paid for this second surgery.

¶ 15 The claimant followed up with Dr. Howard on April 2, 2007. At that time, Dr. Howard noted that his operative findings showed that the claimant had a one-centimeter tear in his rotator cuff. The doctor recommended continued rehabilitation and therapy and kept the claimant on light duty. On May 31, 2007, Dr. Howard recommended another surgery because the claimant was experiencing persistent pain and a clicking sensation during shoulder abduction.<sup>2</sup>

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<sup>1</sup> "Subacromial decompression" is a surgical procedure designed to increase the size of the area beneath the acromion bone in the shoulder and to reduce the pressure on the underlying muscle. It involves cutting the ligament and shaving away a bone spur on the acromion bone.

<sup>2</sup> "Shoulder abduction" is the motion that occurs in the shoulder joint when a person raises his arm overhead laterally from his side.

¶ 16 On June 28, 2007, the claimant was examined by Dr. James Emanuel, the employer's IME, at the employer's request. Dr. Emanuel opined that the claimant had a "significant delaminating tear" of the supraspinatus tendon in his left rotator cuff. He noted that this was a "very tricky tear" which "can be persistent despite arthroscopic repair." Dr. Emanuel recommended a third arthroscopic surgery to repair the tear and to debride the rotator cuff. Based on his review of the medical records and his interview of the claimant, Dr. Emanuel found no evidence of "preexistent or concomitant medical conditions or prior injuries." He opined that the August 21, 2005, work accident was the "prevailing factor in the claimant's current shoulder condition." The claimant adopted Dr. Emanuel as his treating physician.

¶ 17 Dr. Emanuel performed a third surgery on the claimant's left shoulder on August 3, 2007. The employer authorized and paid for the surgery. The postoperative diagnoses were torn rotator cuff tear in the left shoulder and subacromial bursitis with a spur. As of October 3, 2007, the claimant continued to have pain in his left shoulder. On November 29, 2007, Dr. Emanuel reviewed an updated MRI arthrogram, which showed no re-tear of the claimant's rotator cuff. However, the claimant continued to complain of "clicking" and "catching" in his left shoulder. Dr. Emanuel suspected either a suture placed in the subacromial space or a torn cartilaginous homologue in the AC joint. (The acromioclavicular joint, or "AC joint," is the joint where the clavicle meets the acromion. The sides of the AC joint are covered with cartilage, with a fibrocartilagenous disk in between which is often referred to as a meniscal "homologue.") Dr. Emanuel injected the subacromial space which relieved the claimant's symptoms. However, the claimant returned to Dr. Ahn on January 4, 2008, complaining of pain.

¶ 18 Five days later, Dr. Emanuel performed another arthroscopic surgery on the claimant's

left shoulder with debridement of the subacromial space and the removal of scar tissue. The postoperative diagnosis was "scar tissue subacromial space anterior laterally with rotator cuff prominent stitch." After this surgery, the range of motion in the claimant's shoulder improved but he continued to report pain, popping, and catching in the shoulder. Dr. Emanuel could not reproduce these symptoms upon examination, nor could the claimant's physical therapists. Dr. Emanuel could not explain the claimant's ongoing complaints of pain. The AC joint appeared normal upon arthroscopic evaluation. However, when the claimant returned to Dr. Emanuel on March 11, 2008, with continuing complaints of pain and visible swelling in the AC joint, Dr. Emanuel recommended a fifth shoulder surgery. This time, Dr. Emanuel recommended an open distal clavicle resection rather than an arthroscopy.

¶ 19 On March 28, 2008, Dr. Emanuel performed an open distal clavicle resection on the claimant's left shoulder. Following surgery, the claimant reported that the popping sensation in his shoulder had disappeared but he continued to experience pain. Nevertheless, Dr. Emanuel believed that the claimant's prognosis was "excellent." On July 29, 2008, after the claimant had completed a work hardening program, Dr. Emanuel found that the claimant had reached maximum medical improvement (MMI) and released him to return to work with permanent restrictions. Specifically, Dr. Emanuel ordered lifting restrictions of 75 pounds floor to waist, 20 pounds waist to eye-level, 35 pounds bilateral carry, and 15 pounds single arm carry. He also ordered no pushing or pulling of more than 90 pounds and no overhead lifting, reaching, pushing, or pulling. These restrictions were based on the recommendations of the work hardening therapists.

¶ 20 The claimant e-mailed his permanent restrictions to the employer's insurance carrier. The

employer's insurance adjuster informed the claimant that the employer could not place the claimant and that he was obligated to search for gainful employment on his own for his benefits to continue. Eventually, the employer agreed to provide vocational rehabilitation. June Blaine, a vocational rehabilitation counselor, provided job placement assistance to the claimant from June 16, 2009, through April 2011, when the employer terminated her services.

¶ 21 On February 15, 2011, the claimant underwent another independent medical examination at the request of the employer. This time, the claimant was examined by Dr. Richard Lehman, an orthopedic surgeon who specializes in sports medicine. Based upon his review of the medical records, the physical examination he performed on the claimant, the history that he took from the claimant, and a review of surgical photographs and MRI films, Dr. Lehman prepared an IME report in which he opined that the claimant suffered only a strain to his left shoulder during the August 21, 2005, work accident. Dr. Lehman based this diagnosis on "the paucity of pathology" noted in the arthroscopic photographs taken during the claimant's shoulder surgeries. Dr. Lehman noted that the initial MRI taken before the claimant had multiple surgeries evidenced no pathology on the scan, and Dr. Lehman felt this was a "very, very good" MRI film.

¶ 22 Dr. Lehman diagnosed the claimant with a healed rotator cuff repair and scapulothoracic bursitis unrelated to work injury. He concluded the claimant's prognosis was excellent and felt that he needed no further medical treatment and care. Furthermore, Dr. Lehman opined that the claimant was able to return to work without restrictions. He stated that any problems the claimant was currently having in his shoulder were not related to his work injury. Dr. Lehman opined that the multiple surgeries the claimant had were based upon subjective criteria (*i.e.*, the claimant's symptoms) rather than objective criteria and that these surgeries were not necessarily

indicated.

¶ 23 Dr. Lehman testified on behalf of the employer during the arbitration proceeding. He stated that, when he examined the claimant on February 15, 2011, the claimant had continuing soreness in the left shoulder with pain on elevation and flexion over the shoulder. The claimant also had scapulothoracic bursa popping and mild grinding in the shoulder posteriorly where the scapulothoracic bursa anatomically resides. However, the claimant had full range of motion in the shoulder, good strength on the thumbs down position, and no instability anteriorly or posteriorly. The claimant had no medial tenderness in the shoulder and minimal tenderness in the area of the AC joint. The claimant's extensor and flexor mechanics were quite good and his strength was good in those motions. Dr. Lehman testified that, based on the physical examination, he thought the claimant was doing "quite well."

¶ 24 Dr. Lehman also stated that the mechanism of injury described by the claimant usually results in a "SLAP tear" in the upper part of the labrum. "SLAP" is an acronym for "superior labral tear from anterior to posterior." A SLAP tear occurs when there is damage to the superior (uppermost) area of the labrum. Dr. Lehman testified that the claimant's treating doctors were initially looking for a SLAP tear because of the mechanism of injury described by the claimant. He noted that the June 8, 2006, MRI of the claimant's left shoulder did not show a SLAP tear. Dr. Lehman testified he was "globally unimpressed" with that MRI and that there was very little pathology noted on the scan. He did not see any evidence of any exacerbation of impingement syndrome.

¶ 25 Dr. Lehman testified that the MRI predating the claimant's first operation, the surgical report of that operation, and the surgical photographs revealed only minimal fraying of the

claimant's rotator cuff, which was consistent for somebody of the claimant's age. Dr. Lehman noted that Dr. Howard characterized the rotator cuff as a 10% fraying, which Dr. Lehman opined was inconsistent with a traumatic event. Further, Dr. Lehman noted that there was no SLAP tear or lesion found during the first surgery and Dr. Lehman did not see any acute pathology in either the operative report from that surgery or on the MRI predating the surgery. Dr. Lehman testified that the claimant's additional surgeries were based solely upon the claimant's continued complaints of pain.

¶ 26 Moreover, Dr. Lehman stated that, at the time of the February 15, 2011, examination, the claimant was suffering from scapulothoracic bursitis. Dr. Lehman testified that this type of bursitis is a "very specific condition" that is seen only in persons who have current, active, repetitive stress in their shoulders (such as Olympic swimmers, professional volleyball players, or persons that perform some other type of repetitive shoulder activity). Dr. Lehman concluded that the claimant could not have developed this condition unless he had been extremely active with his left shoulder within six months prior to February 15, 2011. He opined that performing mechanical work and waterskiing were activities that could lead to the development of scapulothoracic bursitis. He testified that when one stops using the scapulothoracic joint, the bursal inflammation will resolve, and when one stops performing repetitive activities, scapulothoracic bursitis will typically go away within six months. Further, Dr. Lehman opined that the lack of atrophy in the claimant's left shoulder on examination was further evidence that the claimant had good strength and was actively using his shoulder.

¶ 27 Moreover, after reviewing the restrictions placed on the claimant by Dr. Emanuel, Dr. Lehman opined that the claimant could have performed his prior job with the employer without

exceeding those restrictions, including the restrictions on repetitive overhead activities or lifting greater than 75 pounds.

¶ 28 Dr. Lehman testified that in his 25 years of practice he has performed every surgery that was performed on the claimant except for the surgery performed to remove scar tissue that surrounded a suture. He testified the arthroscopic procedures performed on the claimant were minimally invasive procedures and the persons upon whom he performs these surgeries are usually able to return to their normal routine of daily living without restrictions. Dr. Lehman testified he did not see anything different in the claimant's case that would prevent him from being able to return to work without restrictions. Based on his review of the medical records, MRI scans and films, as well as his physical examination of the claimant, Dr. Lehman concluded that the claimant had sustained only a rotator cuff strain and recommended that the claimant return to work without restrictions.

¶ 29 During the arbitration proceeding, the claimant moved to admit Dr. Milne's report into evidence. The employer objected on hearsay grounds, and the arbitrator sustained the objection.

¶ 30 June Blaine testified that she was hired by the employer to provide vocational services for the claimant. Blaine is very familiar with the labor market in southern Illinois and has provided vocational assistance over one thousand workers' compensation cases. She performed a labor market survey for the claimant. Blaine noted that the claimant's work activities with the employer were rated as "heavy," and, based on her understanding of the claimant's job restrictions, he was unable to do heavy work. She agreed that the diesel mechanic job at National Railway would be a heavy job or perhaps even a "very heavy" job because it involved a lot of excessive lifting. Blaine believed that the claimant was able to do certain portions of

"medium" work within the work restrictions prescribed by Dr. Emanuel.

¶ 31 Blaine testified that, although the claimant performed an "excellent" and diligent job search and had good job skills, he was unable to find work during the 20-month period that she worked with him. Blaine testified that 20 months was considered a long job search. She opined that the unusually long duration of the job search was due to a downturn in the market and a high unemployment rate in southern Illinois. Blaine stated that no prospective employer expressly stated that it failed to offer the claimant work because of his felony conviction. However, during cross-examination, Blaine admitted that she believed that the claimant's felony conviction was a factor in his inability to obtain work. Nevertheless, Blaine testified that she would have liked to continue with the claimant because she felt that she could have eventually helped in finding him a job. She testified that, given the claimant's vocational ability and transferrable skills (such as the computer based training for mechanical equipment he received while working for the employer), she was "certain" the claimant will eventually be able to find jobs. She opined that the claimant was an appropriate match for the first 18 jobs she listed in the labor market survey.

¶ 32 On cross-examination, Blaine testified that she was focused on obtaining work for the claimant as a mechanic. Specifically, she testified that she was looking for work for claimant similar to what he was doing with the employer as a maintenance mechanic. According to Blaine, there was never any focus on the claimant finding a lower paying job. Rather, the focus of the job search was in the maintenance mechanic field with higher paying jobs. Blaine almost found the claimant work as a maintenance mechanic with Casey's General Store. That job would have required the claimant to maintain equipment in various Casey's stores throughout southern Illinois. Blaine felt that this was a good match for the claimant and that it was a maintenance

mechanic job similar to the claimant's job with the employer. Further, Blaine testified that, with his maintenance mechanic background in addition to the maintenance software education provided by the employer, she was certain that the claimant would be able to find work in that capacity once there was an upswing in the economy. According to the market survey Blaine prepared, the claimant's average earning capacity was \$14.50 per hour.

¶ 33 Joel Colvis, the employer's paint maintenance superintendent, testified for the employer. Colvis was reasonably familiar with the jobs the claimant did as a senior paint maintenance mechanic prior to leaving the employer in 2005. He testified that the job requirements of a paint maintenance mechanic changed at the end of 2006. Specifically, Colvis stated that some of the heavier pieces no longer have to be handled. According to Colvis, at the end of 2006, the employer purchased a hoist to help lift the pumps in the paint department. The pumps are now lifted with a crank so the paint maintenance mechanics do not have to do the lifting themselves. This lowered the lifting requirements of the job. However, Colvis testified that the job was still rated "heavy" as of the time of the arbitration proceeding.

¶ 34 Colvis further testified that, at the time the claimant was terminated, the pay for a paint maintenance mechanic was approximately \$20.50 or \$21 per hour. He stated that, with overtime, the claimant may have been making \$24 per hour.

¶ 35 Rolf (Jake) Jacobsen, a human resources manager for the employer, also testified. Jacobsen stated that the employer has a general workers' compensation policy of taking injured employees back within their work restrictions. He testified that the only reason the claimant was not taken back was because he was terminated. Jacobsen was aware that the claimant had applied for jobs with the employer through vocational rehabilitation. However, based upon the

claimant's history of stealing company property, the decision was made not to rehire him.

¶ 36 Jacobsen testified that the claimant probably would have been making approximately \$24 per hour if he still worked for the employer, but that he would have been making less than that at the time he was terminated in 2005. Jacobsen testified that there may have been pay raises in 2007 and 2008 with wages frozen in 2009, and that there may have been additional pay raises in 2010 and 2011 with an average annual pay increase of approximately two to two and one-half percent.

¶ 37 The claimant testified that he has had permanent work restrictions since July 2008. Although he found work as a diesel locomotive mechanic shortly after the employer terminated him in 2005, he has never obtained employment since Dr. Emanuel placed permanent restrictions on him.

¶ 38 The claimant testified that his job as senior maintenance mechanic with the employer paid approximately \$24.00 an hour and he would expect to be making more than that if he were still working for the employer today. He stated that the senior maintenance mechanic position would require him to do overhead lifting (including lifting of heavy motors and pumps), and the restrictions from Dr. Emanuel would not allow him to do that job.

¶ 39 However, the claimant also testified that he searched for a lot of jobs involving maintenance mechanic work similar to what he was doing when he worked for the employer. He stated that he still hoped to find work as a maintenance mechanic. Moreover, he admitted that the work he was looking for with June Blaine was for a similar pay rate.

¶ 40 The claimant testified that he has numerous hobbies including camping, four-wheeler riding, playing pool, boating and waterskiing, and fixing and restoring cars. He has continued to

do these activities since his work accident and his injury does not prevent him from doing so.<sup>3</sup>

However, he does not do these activities as often since his accident. The claimant also testified that, after his accident, he rehabbed two school buses and converted them into campers. That task included placing air conditioners in the overhead ceilings of the buses, installing kitchenettes, removing all of the seats from the buses, installing flat screen TVs, and "other rehab work." The claimant stated that he had help from a friend in performing the heavy work on the campers.

¶ 41 The claimant stated that he still experiences catching, popping and grinding continually in his left shoulder and he still uses a TENS unit "a couple of times a week." (A "TENS" unit is a device that applies an electrical current to stimulate the musculoskeletal nerves for therapeutic purposes, *e.g.*, to reduce pain.) However, he testified that the last time he saw a treating doctor for his shoulder condition was on July 29, 2008, when he was evaluated by Dr. Emanuel. The only other medical doctor he has seen since then was Dr. Lehman for the independent medical evaluation.

¶ 42 The claimant testified that the employer had discontinued his vocational and maintenance benefits in February 2011 (after Dr. Lehman opined that he could return to work without restrictions). He sought resumption of those benefits plus wage differential benefits and reimbursement for mileage expenses he had incurred due to the vocational rehabilitation.

¶ 43 The arbitrator found that the claimant sustained a work-related accident on August 21, 2005, "in the form of a left shoulder strain" and that he was "able to return to work without

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<sup>3</sup> The claimant testified that, when he goes waterskiing, he now uses his right hand when he is being pulled up from the water.

restrictions" as of February 15, 2011. The arbitrator based these conclusions on Dr. Lehman's opinions that: (1) the claimant had been actively using his left shoulder during the months preceding the February 15, 2011, examination; and (2) the claimant was able to return to work without restrictions as of that date. The arbitrator characterized both of these opinions as "unrebutted." The arbitrator awarded the claimant TTD benefits from July 26, 2006, through July 29, 2008, and maintenance benefits from July 30, 2008, through February 15, 2011. He also found that the claimant had suffered permanent partial disability pursuant to Section 8(e) of the Act in the amount of 55% of a left arm.

¶ 44 However, the arbitrator rejected the claimant's claim for wage differential benefits. Although the arbitrator did not explicitly address this claim, it made factual findings which support its dismissal of the claim. First, the arbitrator found that the reason the claimant was unable to be employed as a maintenance mechanic was "not due to the injury but due to the fact that [he] stole from the [employer]." The arbitrator based this finding on the following facts: (1) the employer "indicated they would have had work for the [claimant] absent his stealing from the company"; (2) "Blaine's job searches were focused upon finding the [claimant] work as a maintenance mechanic, work that is identical to that he was doing for [the employer]"; (3) "both the [claimant] and \*\*\* Blaine testified that the [claimant] was looking for work as a maintenance mechanic with a pay scale very similar to that which he was making with [the employer]"; (4) after the employer terminated the claimant, he was able to find work as a diesel mechanic; and (5) the work restrictions imposed by Dr. Emanuel on July 29, 2008, "were the type of restrictions where [the claimant] could return to work as a maintenance mechanic."

¶ 45 The arbitrator also found that the five surgeries performed upon the claimant were "reasonable and necessary secondary to the [claimant's] claimed work accident based upon [his] complaints of pain." However, the arbitrator found that the claimant's claim for mileage expenses incurred during his vocational rehabilitation was "not reasonable under the circumstances of this case" and was "not identified as an issue at the time of trial."

¶ 46 The claimant appealed the arbitrator's decision to the Commission, which unanimously affirmed and adopted the arbitrator's decision.

¶ 47 The claimant then sought judicial review of the Commission's decision in the circuit court of Washington County, which reversed the Commission's ruling. The circuit court found that the Commission's decision was against the manifest weight of the evidence and awarded the claimant wage differential benefits under section 8(d)(1) of the Act in the amount of \$302.67 per week for the duration of his disability. In support of this finding, the court noted that the claimant has had five surgeries and the claimant's treating physicians (some of whom were initially retained as IMEs by the employer) "all believed the treatments were reasonable and necessary and that [the claimant] would have permanent restrictions." The circuit court found that Dr. Lehman's conclusion that the claimant could work without restrictions as of February 15, 2011 (upon which the Commission relied) was against the manifest weight of the evidence, "especially when one considers the recommendations and approval of those recommendations by the doctors who were sought at the bequest of the [employer]." Accordingly, the court awarded the claimant maintenance benefits from February 15, 2011, to June 8, 2011, in addition to wage differential benefits.

¶ 48 The circuit court also held that the Commission erred in some of its other findings. Specifically, the court also awarded the claimant \$735.50 in mileage expenses incurred during his vocational rehabilitation. In addition, the court ruled that the Commission had improperly excluded claimant's Exhibit 3 and ruled that the exhibit was "deemed admitted." This appeal followed.

¶ 49 ANALYSIS

¶ 50 1. Wage Differential Award

¶ 51 The employer argues that the circuit court erred in reversing the Commission's denial of the claimant's claim for wage differential benefits under section 8(d)(1) of the Act. The employer maintains that the Commission's determination that the claimant was not entitled to a wage differential award was not against the manifest weight of the evidence.

¶ 52 The determination of the extent or permanency of an employee's disability is a question of fact for the Commission, and its decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC, ¶ 15. To qualify for a wage differential award under section 8(d)(1), an injured worker must prove: (1) that he is partially incapacitated from pursuing his usual and customary line of employment; and (2) that he has suffered an impairment in the wages he earns or is able to earn. 820 ILCS 305/8(d)(1) (West 2002); *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 530-31 (2006); *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 121136WC, ¶ 25. "Whether a claimant has introduced sufficient evidence to establish each element is a question of fact for the Commission to determine, and its decision in the matter will not be disturbed on appeal unless it

is against the manifest weight of the evidence." *Dawson v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586 (2008); see also *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 494 (2007). A factual finding is contrary to the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006).

¶ 53 To resolve this issue, we must first determine whether the Commission's finding that the claimant was able to return to work without restrictions of any kind as of February 15, 2011, (based upon Dr. Lehman's opinion) was against the manifest weight of the evidence. If that finding was not against the manifest weight of the evidence, then the claimant's claim for wage differential benefits fails because he cannot show that he is "partially incapacitated from pursuing his usual and customary line of employment." The sole basis for the Commission's finding was Dr. Lehman's opinion, which is flawed in several respects. First, despite the fact that the claimant had five shoulder surgeries, Dr. Lehman opined that the claimant had suffered only a "strain" to his left shoulder. He based this conclusion, in large part, on his conclusion that the MRIs and surgical photos showed no evidence of a SLAP tear or any other acute pathology. However, Dr. Lehman either ignored or failed to notice Dr. Howard's postoperative diagnosis of an anterior labral tear in the claimant's left shoulder (as well as the postoperative findings of rotator cuff tears after each of the claimant's first three surgeries). Moreover, Dr. Lehman's finding that the claimant could work without restrictions contradicts the permanent restrictions imposed by Dr. Emanuel in July 2008, and Dr. Lehman failed to discuss or even acknowledge these restrictions in his report.

¶ 54 However, Dr. Lehman's opinion that the claimant could work without restrictions as of February 15, 2011, was not entirely without evidentiary support. Dr. Lehman based this opinion in part upon his physical examination of the claimant on that date. During that examination, Dr. Lehman discovered that the claimant suffered from scapulothoracic bursitis, a very specific condition occurs only in persons who have current, active, repetitive stress in their shoulders (such as Olympic swimmers, professional volleyball players, or persons that perform some other type of repetitive shoulder activity). Dr. Lehman concluded that the claimant could not have developed this condition unless he had been extremely active with his left shoulder within six months prior to February 15, 2011. In addition, the claimant testified that he continues to pursue physically active hobbies such as waterskiing, four-wheeler riding, playing pool, and fixing and restoring cars. More importantly, the restrictions imposed by Dr. Emanuel were almost three years old by the time Dr. Lehman examined the claimant on February 15, 2011, and the claimant did not rebut Dr. Lehman's conclusions by presenting testimony from a doctor who examined the claimant after that date. Accordingly, although the evidence could have supported a contrary inference, the Commission's finding that the claimant was able to work without restrictions after February 15, 2011, was not against the manifest weight of the evidence because an opposite conclusion was not "clearly apparent." We therefore affirm the Commission's denial of wage differential benefits and reverse the circuit court's award of additional maintenance benefits after February 15, 2011.

¶ 55 2. The Exclusion of Claimant's Exhibit 3

¶ 56 The employer argues that the Commission correctly excluded claimant's Exhibit 3 (Dr. Milne's IME report) and that the circuit court erred by reversing the Commission's decision. We

agree.

¶ 57 The rules of evidence apply to all proceedings before the Commission or an arbitrator, except to the extent they conflict with the Act. 50 Ill. Adm. Code § 7030.70(a) (2002); *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 479 (1989). Evidentiary rulings made during the course of a workers' compensation proceeding will be upheld on review absent an abuse of discretion. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010-11 (2005); *National Wrecking Co. v. Industrial Comm'n*, 352 Ill. App. 3d 561, 566 (2004).

¶ 58 The opinions of a party's IME are hearsay and are therefore inadmissible unless some exception to the hearsay rule applies. *Greaney*, 358 Ill. App. 3d at 1011. A party's IME is not *per se* an agent of the party who hired him or her, and, therefore, the expert's opinions are not admissible as admissions against that party's interest. *Taylor v. Kohli*, 162 Ill. 2d 91, 96 (1994); *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527 (2007); *Greaney*, 358 Ill. App. 3d at 1011.

¶ 59 In this case, the claimant argues that Dr. Milne's IME report is admissible as a business record under Illinois Rule of Evidence 803(6). However, the claimant has cited no authority supporting this argument. Accordingly, the claimant has forfeited this argument on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208 (2009) (arguments on appeal are forfeited when a party fails to support them with citation to authority).

¶ 60 Even if we were to address the claimant's argument, however, we would reject it. Unlike an ordinary medical record prepared by a treating physician, an IME's medical report is generated in anticipation of litigation. Documents prepared in anticipation of litigation are not

admissible as business records because they "do not possess the same trustworthiness of other records prepared in the ordinary course of business." *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 819 (2006). For the same reason, Illinois Rule of Evidence 803(4)(A), which creates an exception to the hearsay rule for "statements made for purposes of medical diagnosis or treatment," does not include "statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial." Ill. R. Evid. § 803(4)(A) (eff. Jan. 1, 2011).

¶ 61 Accordingly, the Commission did not abuse its discretion by excluding claimant's Exhibit 3 on hearsay grounds.

¶ 62 **3. Mileage Expenses**

¶ 63 As noted above, the Commission denied the claimant's claim for mileage expenses incurred during his vocational rehabilitation in 2010 and the first few months of 2011. The circuit court reversed the Commission's decision without explanation or analysis and awarded the claimant the mileage expenses he sought. Although the employer appealed other aspects of the circuit court's ruling, it did not appeal the circuit court's ruling on this issue.<sup>4</sup> Accordingly, the employer has waived any objection to the circuit court's award of mileage expenses.

¶ 64 If the employer had appealed this issue, it would likely have prevailed. The Commission rejected the claimant's claim for mileage expenses because it found that the claim was "not

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<sup>4</sup> Nor is this issue included in the employer's appeal of the circuit court's award of certain maintenance benefits. The employer appeals only the circuit court's award of additional maintenance benefits after February 15, 2011, not the Commission's award of initial maintenance benefits (including vocational rehabilitation from June 2009 through April 2011).

reasonable under the circumstances of this case" and was "not identified as an issue at the time of trial." Although the claimant argued the issue of mileage expenses in his appellee's brief, he did not present any evidence or argument suggesting that either of these findings by the Commission was against the manifest weight of the evidence. Instead, he simply referred to the mileage log he had admitted into evidence during the arbitration proceeding and argued that he was entitled to be reimbursed for the mileage expenses reflected in the log. That is not sufficient to overcome the Commission's ruling on this issue. Section 8(a) of the Act provides that "[t]he 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*," and that "maintenance shall include costs and expenses incidental to the vocational rehabilitation program." (Emphasis added.) 820 ILCS 305/8(a) (West 2004).<sup>5</sup> However, nothing in the Act precludes the Commission from denying such expenses when it finds that the amount sought by the claimant is unreasonable. Moreover, a claimant waives an issue on appeal by failing to raise it before the Commission. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 40. Thus, to win reversal of the Commission's denial of mileage expenses in this case, the claimant needed to show that: (1) he properly raised the issue before the Commission;

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<sup>5</sup> We have not addressed whether mileage expenses incurred during vocational rehabilitation may be awarded under section 8(a) of the Act. The claimant cites two decision of the Commission awarding such expenses (*Newtson v. NUDO Products*, No. 10 I.W.C.C. 0218, 06 ILWC 50931 (Feb. 26, 2010); *Attebury v. Mapco Coal Co.*, No. 01 I.I.C. 0318, 96 ILWC 16319 (Apr. 27, 2001)). However, decisions of the Commission are not precedential and thus should not be cited. *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 413 (2009).

and (2) the Commission's findings of unreasonableness and waiver were against the manifest weight of the evidence. He has not done so.

¶ 65 Nevertheless, because the employer did not appeal the circuit court's reversal of the Commission's denial of mileage expenses and its award of such expenses, that issue is not before us. Accordingly, we uphold that aspect of the circuit court's decision.

¶ 66 **CONCLUSION**

¶ 67 For the foregoing reasons, we affirm the circuit court of Washington County's award of mileage expenses to the claimant and reverse the circuit court's judgment in all other respects. We reinstate the Commission's decision, except for the Commission's denial of mileage expenses, and remand the case for further proceedings.

¶ 68 Affirmed in part and reversed in part; cause remanded.