

No. 1-14-0390WC

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DONNA HALTERS,)	Appeal from the
)	Circuit Court of
Appellant,)	Cook County
)	
v.)	No. 13 L 050174
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	Honorable
)	Patrick J. Sherlock,
(City of Chicago, Appellee).)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The judgment of the circuit court confirming a decision of the Commission, denying the claimant's petition under section 19(h) of the Workers' Compensation Act (820 ILCS 305/19(h) (West 2004)) was affirmed.

¶ 2 The claimant, Donna Halters, appeals from an order of the circuit court which confirmed the decision of the Illinois Workers' Compensation Commission (Commission) denying her petition brought pursuant to section 19(h) of the Workers' Compensation Act (Act) (820 ILCS 305/19(h) (West 2004)). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence adduced at the section 19(h) hearing on June 11, 2012.¹ The transcripts of the original arbitration hearing and the arbitrator's decisions were offered into evidence at that hearing, and the relevant portions are summarized here in chronological order.

¶ 4 The claimant testified that she had worked for the City of Chicago (City) as an asphalt helper since 1995. In that position, she performed heavy labor, including lifting chunks of asphalt and concrete and placing the material into a truck. She was also required to swing a pick and climb into and out of a large truck.

¶ 5 On November 21, 1997, the claimant fell at work, injuring her right shoulder, neck and low back. Despite this accident, she continued to work for the City and underwent a course of physical therapy. She saw Dr. Daniel Sullivan on January 9 and February 13, 1998, for treatment of her low back and neck pain. The medical records show that all treatment for the claimant's shoulder pain ceased on February 28, 1998.

¶ 6 On July 2, 1998, the claimant had a second accident in which she re-injured her right shoulder while lifting a piece of asphalt. The claimant sought treatment for her shoulder from Mercyworks on July 17, 1998. A magnetic resonance imaging (MRI) scan was taken that day and revealed an anterior labral tear in her right shoulder. Mercyworks referred the claimant to Dr. Anthony Romeo, whom she first saw on July 30, 1998. Dr. Romeo initially recommended a course of physical therapy. The claimant continued working during this time.

¹ The claimant timely filed her section 19(h) petition on January 24, 2004, but she requested numerous continuances thereafter, which delayed the actual hearing until June 11, 2012.

¶ 7 On September 14, 1998, the claimant again fell at work and injured her right knee. An MRI, taken September 18, 1998, revealed a sprain of the medial collateral ligament and a meniscus tear. On October 16, 1998, Dr. Romeo ordered that the claimant work with restrictions, including no squatting, minimal walking, and carrying no more than 10 pounds when walking.

¶ 8 After physical therapy failed to relieve the claimant's shoulder symptoms, Dr. Romeo performed a right shoulder arthroscopy and acromioplasty procedure on November 25, 1998. Thereafter, the claimant completed additional physical therapy and was off work until Dr. Romeo released her to full-duty work on May 3, 1999.

¶ 9 The claimant was evaluated by Dr. Scott Kale, her independent medical examiner (IME), on October 28, 1999. In his report, dated October 29, 1999, Dr. Kale opined that, "as a consequence of the [right shoulder] injury and surgery, [the claimant] has chronic weakness, reduction in range of motion and reduction in comfort, all of which, are *** permanent and directly related to her" employment with the City. He noted that her prognosis was "guarded" and that she may require additional medical and/or surgical attention for her shoulder.

¶ 10 The claimant saw Dr. Romeo on a number of occasions in 1999 for treatment of her knee pain. On December 17, 1999, after a course of conservative treatment failed to relieve the claimant's symptoms, Dr. Romeo scheduled her for right knee surgery on January 19, 2000.

¶ 11 On January 18, 2000, the claimant fell from a truck at work, injuring her right knee, neck and low back.²

² Because surgery had already been scheduled for the right knee, the arbitrator addressed all of the claimant's knee benefits in the pending claim involving the September 14, 1998, accident date.

¶ 12 On January 19, 2000, Dr. Romeo operated on the claimant's right knee, and she thereafter underwent a course of physical therapy treatment. The doctor released the claimant to full-duty work on July 5, 2000. The claimant returned to work on July 9, 2000.

¶ 13 Subsequent to the January 18, 2000, accident, the claimant reported persistent neck and low back pain to Dr. Romeo, who referred her to Dr. Howard An, an orthopedic surgeon specializing in the spine.

¶ 14 Dr. An saw the claimant on April 18, 2000, and ordered MRI scans of her cervical spine and lumbar spine. The MRI's were completed that same day. The cervical MRI revealed a bulging disc at C3-4, herniations at C4-5 and C5-6, and cervical lordosis. The lumbar MRI also revealed herniations at L3-4 and L4-5, and minimal bulging at L5-S1.

¶ 15 Dr. Kale examined the claimant a second time on October 19, 2000. In his report of that date, Dr. Kale stated that his examination of the claimant demonstrated that she had lost the ability to elevate and rotate her right shoulder at normal levels. He also determined that she had lost the ability to rotate her neck and flex her low back. Dr. Kale was of the opinion that the claimant's current condition was related to her work for the City. Dr. Kale was deposed and transcripts thereof were submitted into evidence at the original arbitration hearing. At his deposition, Dr. Kale testified that his prognosis for the claimant was "poor" and that she had "permanent pain and dysfunction as a result of these injuries and surgeries."

¶ 16 On May 24, 2001, Dr. David Spencer examined the claimant at the request of the City. In his report of that examination, Dr. Spencer opined that the claimant had not suffered any significant injury to her cervical spine or lumbar spine on January 18, 2000. He reported that the claimant had no abnormalities in her neck or low back, other than the degenerative changes

which appeared on her MRI scans. Dr. Spencer did not recommend any further treatment or tests for the claimant's spine.

¶ 17 On September 12, 2001, following a consolidated hearing on the claimant's four claims, the arbitrator awarded her benefits as follows. The arbitrator entered no award for the accident date of November 24, 1997, finding that the claimant had re-injured her right shoulder on July 2, 1998, and re-injured her neck and low back on January 18, 2000. Thus, the arbitrator entered awards for those injuries under the claims involving those accident dates.

¶ 18 Regarding the right shoulder injury exacerbated on July 2, 1998, the arbitrator awarded the claimant temporary total disability (TTD) benefits for $23\frac{6}{7}$ weeks from November 17, 1998, through May 3, 1999; and permanent partial disability (PPD) benefits pursuant to section 8(e) of the Act (820 ILCS 305/8(e) (West 1998)) for $70\frac{1}{2}$ weeks, because the injury caused a 30% loss of use of her right arm/shoulder.

¶ 19 Next, regarding the January 18, 2000, workplace accident involving the claimant's cervical spine and lumbar spine, the arbitrator awarded her medical expenses related to that injury; TTD benefits for $24\frac{2}{7}$ weeks, from January 19, 2000, through July 9, 2000; and PPD benefits pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2000)) for 125 weeks because the neck and back injuries resulted in a 25% loss of use of a man-as-a-whole.

¶ 20 With regard to the claimant's right knee injury sustained on September 14, 1998, the arbitrator awarded the claimant medical expenses related to the injury and PPD benefits pursuant to section 8(e) of the Act (820 ILCS 305/8(e) (West 1998)) for 50 weeks, because the injury caused a 25% loss of use of her right leg.

¶ 21 The City filed for a review of the arbitrator's decision before the Commission. On June 14, 2002, the Commission, in a unanimous decision, affirmed and adopted the arbitrator's decision. No appeal was taken from that decision.

¶ 22 On January 21, 2004, the claimant filed a petition pursuant to sections 8(a) and 19(h) of the Act (820 ILCS 305/8(a), 19(h) (West 2004)), seeking to re-open her case on the basis that her condition had recurred or worsened within 30 months of the Commission's final decision and seeking medical expenses for subsequent treatment required for her conditions.

¶ 23 After numerous continuances, the section 19(h) hearing was held on June 11, 2012, at which the following evidence was adduced.

¶ 24 The claimant testified that, after the June 2001 arbitration hearing, she worked nine-hour days at full-duty, was not taking any medication, and was not treating with any doctor for her right shoulder, right knee, neck or lumbar spine injuries. However, the claimant stated that, on November 26, 2001, she re-injured all four areas while lifting asphalt and proceeded to seek medical treatment for her pain. The claimant testified that she stopped working as of February 1, 2002, in order to proceed with cervical spine surgery. (No medical records are contained in the record describing treatment that the claimant received between November 26, 2001, and the date of her cervical spine surgery in April 2002.)

¶ 25 On April 28, 2002, the claimant underwent an anterior cervical discectomy and fusion at C4-5, which was performed by Dr. An. Dr. An also diagnosed the claimant with degenerative

disc disease. Following the surgery, the claimant underwent a course of physical therapy and continued to follow-up with Dr. An and Dr. David Weiss.³

¶ 26 In a report dated May 21, 2003, Dr. Weiss wrote that he believed the claimant had "myofascial pain syndrome of her cervical paraspinal muscles/splenius capitus muscles." He prescribed pain medications, a back brace, a muscle stimulator unit, and a course of physical therapy for the claimant.

¶ 27 On June 19, 2003, the claimant had an MRI of her lumbar spine, which revealed no significant changes from her May 18, 2000, scan.

¶ 28 On August 5, 2003, Dr. An released the claimant to work with permanent restrictions of no lifting more than 15 to 20 pounds and avoiding frequent bending and twisting of the neck. Shortly thereafter, the claimant saw Dr. Ahmed Elborno for her low back pain. The doctor diagnosed her with lumbar radiculopathy and spinal stenosis. Dr. Elborno administered caudal epidural steroid injections on October 14 and 28, 2003.

¶ 29 Also, in October 2003, the claimant was treated by Dr. Pietro Tonino for her right knee condition. In a report dated October 30, 2003, Dr. Tonino opined that the claimant's knee MRI⁴ showed abnormalities in the medial meniscus which had not improved with conservative care.

³ Unrelated to any of the claims at bar, the claimant had surgery on her left shoulder on February 24, 2003, and was released to work by Dr. Guido Marra on July 13, 2003, with restrictions on lifting no more than 25 pounds occasionally.

⁴ Dr. Tonino's note and subsequent operative report do not include a date of the MRI in which he referred to nor does the record include a report of an MRI exam of the right knee taken subsequent to the one taken on September 18, 1998. Further, both the written decisions of the circuit court and the Commission refer to Dr. Elborno as the author of this note, but the record reveals Dr. Tonino was the author and treating physician of the claimant' right knee between 2003 and 2006.

He recommended that the claimant continue on a home exercise program, and if her symptoms did not improve, surgery should be considered.

¶ 30 At the request of the City, Dr. William Heiler evaluated the claimant on November 3, 2003. In his report, Dr. Heiler noted that the claimant had cervical radiculopathy following cervical fusion, and that he could not determine when she would reach maximum medical improvement. He recommended that the claimant follow up with Dr. An.

¶ 31 On November 7, 2003, the claimant had a cervical MRI, which was ordered by Dr. Elborno. That MRI revealed "straightening of the normal cervical lordosis which may be due to muscle spasm or the prior fusion."

¶ 32 Dr. Elborno then performed a discography on the claimant's lumbar spine on December 16, 2003, which revealed "significant canal foraminal stenosis level L4-5 secondary to a large herniated disc," "degenerative disc disease level L3-4" and "level L5-S1," and left foraminal stenosis at L5-S1. On January 21, 2004, the claimant had a nucleoplasty and disc decompression procedure at L3-4 and L4-5, which was performed by Dr. Elborno.

¶ 33 Upon Dr. An's referral, the claimant had an MRI of her right shoulder on February 19, 2004, which revealed supraspinatus tendinopathy with no evidence of a rotator cuff tear. On March 19, 2004, the claimant underwent a nerve conduction study, which revealed mild right median neuropathy.

¶ 34 The claimant testified that she had been off work since her April 2002 cervical spine surgery and tried to return in 2005, hanging signs at a construction site. However, the claimant stated that she had to stop working after 1½ days because of the pain in her hands and arms.

¶ 35 On July 5, 2005, Dr. Bernard Coniglio, the claimant's primary care physician, wrote in a note to the City that she was under his care, and, in his medical opinion, she was "permanently and totally disabled."

¶ 36 On January 31, 2006, Dr. Tonino performed a right knee arthroscopic partial medial meniscectomy for a medial meniscus tear to the claimant's right knee. On May 25, 2006, Dr. Tonino released the claimant to full-duty work. However, the claimant did not return to work.

¶ 37 Upon Dr. Coniglio's referral, the claimant had a cervical spine MRI on February 27, 2007, which showed a slight protrusion of the disc at C6-7, minimal foraminal narrowing at C4-5 on the left and C5-6 on the right, but no evidence of disc herniation or spinal stenosis.

¶ 38 A cervical spine MRI report, dated February 4, 2008, states that the claimant's exam was normal and showed "stable findings in the cervical spine with fusion changes of C4-5 bodies, minimal wide-based posterior herniation or posterior bulging of C6-7 intervertebral disc and minimal bulging of C3-4 intervertebral disc."

¶ 39 With regard to the claimant's section 19(h) petition, Dr. Kale was deposed on January 11, 2010. The doctor testified that he examined the claimant a third time on April 13, 2007, finding that she had abnormal ranges of motion in her neck, shoulder and low back, and weak, but a normal range of motion in her knee. He noted that her gait was "limping or antalgic favoring her right leg." Dr. Kale testified that he believed that the claimant's surgeries which occurred subsequent to her initial arbitration hearing were caused by her workplace injuries. He also was of the opinion that her condition was "permanent in nature" and that she "certainly was not" capable of returning to work.

¶ 40 On cross-examination, Dr. Kale admitted that he was unaware of Dr. Romeo's 1999 and 2000 full-duty work release notes. He was also unaware of Dr. Tonino's full-duty 2006 work

release. Additionally, Dr. Kale admitted that he did not review Dr. An's work release note of August 5, 2003. Dr. Kale explained that, while he did not have knowledge of the claimant's treating physician's work release notes, he understood those notes to mean she was released back to work at "something other than" her heavy labor job. It was his opinion that, "from the standpoint of her job *** she would be permanently disabled. She couldn't do her job." When questioned further, Dr. Kale admitted that the claimant was not permanently disabled from all types of work and that he was "addressing [her] capacity" to perform her asphalt helper job.

¶ 41 On May 27, 2010, the claimant had an MRI of her right knee upon the referral of Dr. Coniglio. Page one of the MRI report states that a Baker's cyst was present, along with arthritic changes, and abnormalities in the meniscus; page two is missing from the record. During his July 20, 2010, evidence deposition, Dr. Coniglio testified that he had treated the claimant for approximately 15 years, and that, despite having two knee surgeries, the claimant continued to complain of right knee pain, swelling, and instability. According to Dr. Coniglio, the claimant was totally and permanently disabled from any gainful employment and had been since 2002. Dr. Coniglio admitted, however, that the claimant could walk, talk on a phone, sit for periods of time, drive, and read and write.

¶ 42 While holding firm on his position that the claimant was totally disabled, Dr. Coniglio acknowledged that: Dr. Romeo had released the claimant to full-duty work in 1999, after her right shoulder surgery, and in 2000, after her right knee surgery; Dr. Guido Marra released the claimant to work with restrictions on July 13, 2003, after her left shoulder surgery; Dr. An released the claimant to work with restrictions on August 5, 2003, after her cervical spine surgery; and Dr. Tonino released her to full-duty work on May 25, 2006, after her second right knee surgery. However, Dr. Coniglio explained that each specialist was releasing the claimant

only with respect to the body part he was treating, but that he was looking at the "total picture" as the claimant's primary care physician.

¶ 43 Dr. Coniglio further testified that the claimant reported that, on February 7, 2010, she had fallen on a sidewalk and injured her right knee, prompting him to order another MRI. While he acknowledged that the fall could have caused the meniscus tear that appeared on the claimant's May 2010, MRI scan, Dr. Coniglio did not believe the tear was new as the claimant's prior MRI exams had also shown a meniscus tear. After receiving the May 2010 MRI results, Dr. Coniglio recommended that the claimant have a total knee arthroplasty surgery, and he referred her to Dr. Nikhil Verma for further evaluation.

¶ 44 In a letter dated August 17, 2010, Dr. Verma stated that he believed the claimant had symptomatic arthrosis of the knee and prescribed anti-inflammatory medication. Dr. Verma recommended an injection if her symptoms worsened.

¶ 45 On June 10, 2011, the claimant had an MRI of her lumbar spine and cervical spine, which was ordered by Dr. Coniglio. The lumbar spine scan revealed degenerative changes with facet arthritis, diffuse degeneration of the intervertebral disc, left posterolateral herniation of L4-5 disc, and minimal bulging of L1-2, L2-3, L3-4, and L5-S1. The cervical spine scan also revealed degenerative changes, along with central canal spinal stenosis at the C3-4 and C5-6 levels, mild left foraminal stenosis at the C3-4, mild bilateral foraminal stenosis at C5-6, and mild disc bulging at C6-7. Based on these scans, Dr. Coniglio referred the claimant to Dr. Lenny Cohen, a neurologist, for an evaluation of her spine.

¶ 46 In a letter dated June 17, 2011, Dr. Cohen opined that the claimant "most likely" was suffering from radiculitis. He recommended that the claimant follow up with her primary doctor to rule out any cardiology issues, and he ordered a chest x-ray to rule out any bone pathology.

Additionally, Dr. Cohen ordered an electromyography (EMG) of the claimant's upper and lower extremities to evaluate for possible radiculopathy. Dr. Cohen noted that the claimant declined physical therapy, stating that it had not helped her much in the past. He also noted that the claimant had some "psychological component to her presentation and had a tendency to dramatize her symptoms."

¶ 47 The EMG test, which was performed on July 5, 2011, revealed "evidence of mild chronic C5 on the left, as well as C[7]/T1 radiculopathy on the right and left."

¶ 48 Susan Entenberg, a vocational rehabilitation counselor for the claimant, testified that she interviewed the claimant on January 11, 2010, regarding her work experience and medical conditions. She also reviewed the claimant's medical records, including those associated with her various surgeries, and prepared a four-page report. Entenberg testified that the claimant appeared for the interview wearing braces on her right knee, right wrist, and back, and had a hot pad on her right shoulder. The claimant, 54 years old at that time, had no education beyond high school and no technical training or certifications. According to Entenberg, the claimant reported that she was in constant pain and had the ability to sit in only 10-minute increments. The claimant also reported having worked for the City since 1994 as an asphalt helper and had last worked in July 2005, earning \$31.15 per hour. Prior to 1994, the claimant had worked for Bloom Roofing for three years as a billing and payroll clerk and had raised her family before that.

¶ 49 Based on her evaluation, Entenberg rendered two opinions: (1) the claimant was incapable of performing her asphalt helper duties; and (2) the claimant was not a candidate for vocational rehabilitation. Her first opinion was based on the fact that the claimant had not been released to work by her treating physicians and had been deemed disabled. Regarding her

second opinion, Entenberg stated that no treating physician had released her to perform any type of work, noting Dr. Coniglio's report and the IME report from Dr. Kale. Entenberg testified that the doctors noted that the claimant had very limited physical abilities, including the inability to sit, walk, or stand beyond short time periods, which were incompatible with "sustaining and maintaining gainful employment eight hours a day, five days a week." In her opinion, no stable labor market existed for the claimant for this reason.

¶ 50 On cross-examination, Entenberg admitted that she was unaware that Dr. An released the claimant to work with restrictions in August 2003 or that Dr. Tonino released her to work on an unrestricted basis in May 2006. Entenberg also admitted that she did not conduct a labor market survey before concluding that no stable work market existed for the claimant. She explained, however, that in order to perform a labor market survey, she needed some type of work release to know what type of restrictions were imposed on the claimant.

¶ 51 At the section 19(h) hearing, the claimant testified that she currently has pain throughout her spine and has severe pain in her legs. According to the claimant, her shoulder and knee pain disrupts her sleep, her back "locks," and she gets "charl[ey] horses" in her neck. She stated that she cannot perform routine tasks, such as cleaning her house.

¶ 52 On cross-examination, the claimant admitted that, after the arbitrator decided her original four claims on September 12, 2001, she worked at full-duty until February 1, 2002. She admitted that she had another work accident on November 26, 2001, but she denied that the accident was the cause of her worsened current condition. According to the claimant, she continued to require medical care for her knee, shoulder, neck and back since the original arbitration decision.

¶ 53 On December 7, 2010, Dr. Thomas Gleason examined the claimant at the request of the City. He concluded that she was capable of full-time, light-duty work consistent with the recommendations of her various treating physicians. At his deposition, Dr. Gleason testified that his opinion was based upon the work-release orders of Drs. An, Marra, and Romeo.⁵ He further testified that he did not believe that the claimant was in need of any further medical treatment for her current condition.

¶ 54 In addition, the City presented the testimony of Pamela Nelligan, a vocational rehabilitation consultant, who interviewed the claimant on January 2, 2011. Based on the interview and her review of the claimant's medical records, work and educational history, and work restrictions, Nelligan concluded that the claimant was employable. Nelligan conducted a labor market survey targeting greeter, information clerk, and gate guard positions. Of the 33 prospective employers Nelligan contacted, 15 employers indicated that they could accommodate the claimant's restrictions. According to Nelligan, the average wage for these potential positions was \$9.67 per hour. Nelligan testified consistently with her written report.

¶ 55 On January 25, 2013, the Commission, with one dissenting commissioner, denied the claimant's section 19(h) petition on the basis of an intervening accident. The Commission noted in its written decision that the claimant's section 19(h) petition had alleged a material change in the condition of her neck and low back, but that she briefed and litigated her arguments for all body parts at issue in the original four claims. Thus, the Commission addressed all four body

⁵ Dr. Gleason also offered opinions regarding his belief that the accidents of July 2 and September 18, 1998, and January 18, 2000, did not worsen the claimant's condition of ill-being. However, as the arbitrator noted, the causation issue had already been adjudicated in the prior arbitration hearing and the section 19(h) petition concerned only whether the claimant's condition had worsened since that decision had been rendered. Thus, we do not discuss Dr. Gleason's causation opinions as they involve the prior accident dates.

parts—right knee, right shoulder, cervical spine, and lumbar spine. In addition, the Commission wrote that, during the hearing, the parties confirmed that the claimant had two pending workers' compensation claims relating to a right ring finger injury allegedly sustained on July 24, 2000, and spine, bilateral shoulder, and right knee injuries allegedly sustained on November 26, 2001. Based on the entire record, the Commission concluded that there was "no causal relationship" between the original four accidental injuries and the claimant's "current condition of ill-being or any additional medical services post-arbitration." The Commission explained that the claimant had "failed to prove a material increase in her disability" as to each body part.

¶ 56 The Commission wrote in its decision that, following the initial arbitration decision, the claimant had returned to full-duty work. Regarding the right knee, the Commission noted that there was no record that the claimant had any medical treatment post-arbitration until after her November 26, 2001, accident. In fact, the next medical record documenting right knee issues was a note of Dr. Tonino, dated October 30, 2003. Similarly, the Commission found the record devoid of any evidence that the claimant had received any post-arbitration right shoulder treatment until February 19, 2004, when she had an MRI scan. Likewise, the first instance of post-arbitration medical treatment that she received for her lumbar spine was June 19, 2003, when she had an MRI scan which revealed no changes when compared to her May 18, 2000, scan. Finally, the claimant did not receive medical treatment for her cervical spine until after the November 26, 2001, accident, when in April 2002, she had surgery. In addition to the medical records, the Commission found Dr. Kale's April 2007 report relevant as he wrote that the November 26, 2001, accident had caused injuries to the claimant's shoulders, lumbar spine, and cervical spine. The Commission found the opinions of Drs. Gleason and Nelligan persuasive.

¶ 57 The dissenting commissioner wrote that, in his opinion, the record established that the claimant's conditions have increased and that she will be permanently disabled for life. He found Dr. Coniglio's opinion persuasive, especially because he had been treating the claimant as a whole for over 15 years and was in "the best position to render diagnosis and more importantly her ultimate prognosis." In sum, the dissenting commissioner believed that the claimant's award should be increased to provide permanent total disability benefits in a weekly amount of \$621.49 for the duration of her life.

¶ 58 The claimant sought a judicial review of the Commission's decision in the circuit court of Cook County. On January 9, 2014, the circuit court confirmed the Commission's decision, and this appeal followed.

¶ 59 For her first argument, the claimant asserts that the Commission's finding, that she failed to prove a substantial and material change in her disability after the June 2001 arbitration hearing, is against the manifest weight of the evidence. We disagree.

¶ 60 The purpose of a proceeding under section 19(h) of the Act (820 ILCS 305/19(h) (West 2004)) is to determine if a petitioner's disability has subsequently "recurred, increased, diminished or ended" since the time of the original award. *Gay v. Industrial Comm'n*, 178 Ill. App. 3d 129, 132 (1989). "To warrant a change in benefits, the change in a petitioner's disability must be material." *Id.* In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the original decision. *Id.* Whether there has been a material change in a petitioner's disability is an issue of fact, and the Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. *Id.* For a finding of fact

to be contrary to the weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 61 Here, we cannot find that an opposite conclusion from the Commission's is clearly apparent from the record. In its decision, the Commission pointed out that the claimant had returned to work at full-duty following the initial arbitration hearing and had not continued medical treatment for her conditions until subsequent accidents occurred. Specifically, the Commission noted that the claimant did not seek medical treatment for any of her conditions until after another workplace accident occurred on November 26, 2001. Additionally, the record establishes that the claimant reinjured her right knee after falling on the sidewalk in February 2010, prompting Dr. Coniglio to order an updated MRI exam which revealed a meniscus tear. While Dr. Coniglio was of the opinion that the claimant was permanently and totally disabled since 2002, that her conditions were caused by her previous four accidents, and that her sidewalk fall of 2010 did not contribute to the current condition of her knee, Dr. Gleason offered opposite opinions. It is the duty of the Commission to determine factual questions, including the resolution of conflicting medical testimony. *Johns-Manville Corp. v. Industrial Comm'n*, 60 Ill. 2d 221, 228-29 (1975). Thus, it was the Commission's prerogative to decide which of the conflicting medical opinions to accept, and we will not disturb its decision on that matter. See *id.* As there is evidence in the record to support the Commission's finding that the claimant failed to prove that her conditions substantially and materially changed after the original arbitration hearing, we find that an opposite conclusion is not clearly apparent.

¶ 62 Next, the claimant contends that she proved a substantial material change in her condition by establishing by a preponderance of the evidence that she was permanently and totally disabled under the odd-lot theory. We disagree.

¶ 63 Pursuant to the odd-lot theory, a claimant may establish that she is permanently and totally disabled by showing either a diligent but unsuccessful job search or that her age, training, experience, education, and condition prevent her from obtaining stable and continuous employment. *Bob Red Remodeling, Inc. v. Workers Compensation Comm'n*, 2014 IL App (1st) 130974WC, ¶ 37. If the claimant is successful, the burden shifts to the employer to show that a stable job market nevertheless exists for the employee.

¶ 64 In this case, the Commission determined that the claimant failed to prove that she was permanently and totally disabled as a result of the four work injuries at issue in her section 19(h) petition. While Dr. Coniglio opined that the claimant had been permanently and totally disabled since 2002, the Commission noted that he had considered her subsequent accidents in forming his opinion. Further, the Commission found it relevant that Dr. Kale failed to consider the claimant's treating physicians' work release orders when he rendered his opinion of permanent disability. Dr. Kale also admitted that he did not believe that the claimant was unable to perform all types of work, but simply that she could not perform her duties as an asphalt helper. Moreover, the claimant did not submit evidence of a diligent but unsuccessful job search, and the Commission accepted Nelligan's opinion that a stable labor market existed for the claimant persuasive over the opinion of Entenburg, who failed to consider the claimant's complete medical records. As the record supports the Commission's finding that the claimant had failed to prove that she was permanently and totally disabled under the odd-lot theory, an opposite conclusion is not clearly apparent. Accordingly, we cannot conclude that the Commission's determination, that the claimant is not an odd-lot disabled person, is against the manifest weight of the evidence.

¶ 65 Based upon the foregoing analysis, we affirm the judgment of the circuit court which confirmed the Commission's decision.

¶ 66 Affirmed.