2015 IL App (1st) 141960WC-U

Order filed: November 13, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| PEOPLEASE CORP., | ) | Appeal from the Circuit Court |
| | ) | of Cook County, Illinois |
| | ) | |
| Appellee, | ) | |
| | ) | |
| v. | ) | Appeal No. 1-14-1960WC |
| | ) | Circuit No. 13-L-51180 |
| | ) | |
| ILLINOIS WORKERS' COMPENSATION | ) | Honorable |
| COMMISSION, *et al.*, (Patrick Wright, | ) | Edward S. Harmening, |
| Estate of Patrick Wright, Appellants). | ) | 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 circuit court did not err in in awarding the employer a credit of $132,369.52 against the temporary total disability and permanency awards for temporary total disability benefits the employer paid to the claimant after the claimant reached maximum medical improvement; and (2) the Commission's determination that the claimant was entitled to permanent partial disability benefits for 125 weeks in the amount of 25% person-as-a-whole was not against the manifest weight of the evidence.

¶ 2 The claimant, Patrick Wright, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries to his neck, back, and left and right shoulders which he allegedly sustained while he was working for Peoplease Corp. (employer). After conducting a hearing, an arbitrator found that the claimant sustained a work-related accident on October 31, 2008. The arbitrator awarded the claimant temporary total disability (TTD) and medical expenses from November 14, 2008, through August 17, 2009 (the date on which that the arbitrator found the claimant had reached maximum medical improvement (MMI)). However, the arbitrator found that the claimant's current condition of ill-being was not causally related to the work-related accident because the claimant had sustained "subsequent significant injuries unrelated to the accident." Accordingly, the arbitrator declined to award TTD benefits or medical expenses after August 17, 2009. The arbitrator also awarded the claimant permanent partial disability (PPD) benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)92) (West 2008)) for 125 weeks in the amount of 25 percent of the person-as-a-whole. Finally, the arbitrator awarded the employer a credit of $132,369.52 against both the TTD and the PTD awards for TTD benefits the employer had already paid, plus an additional credit of $17,952.74 for medical expenses the employer had already paid, for a total credit of $150,322.26. The arbitrator found that the claimant had waived claims for wage differential benefits under section 8(d)(1) of the Act, maintenance benefits, or vocational rehabilitation.

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission modified the arbitrator's decision by finding

that the claimant was entitled to collect TTD benefits "until he declared that he was waiving his rights under § 8(d)(1) and § 8(f) [of the Act]," which occurred during the arbitration hearing on November 15, 2012. The Commission's decision resulted in the award of an additional 169 and 2/7 weeks of TTD benefits to the claimant. The Commission also ruled that the employer "shall have credit for all amounts paid, if any, to or on behalf of the [claimant] on account of" the claimant's work-related injury. The Commission affirmed and adopted the arbitrator's decision in all other respects.

¶ 4 The employer sought judicial review of the Commission's decision in the circuit court of Cook County, which reversed the Commission's ruling in part and affirmed it in part. The circuit court reversed the Commission's award of additional TTD benefits up to the date of the arbitration hearing and ruled that TTD benefits could not be awarded after the claimant reached MMI on August 17, 2009. The court noted that the Commission had affirmed the arbitrator's finding that the claimant reached MMI on that date. Accordingly, the court remanded the matter and instructed the Commission to "follow the TTD calculation awarded by the Arbitrator." The court affirmed the Commission's causation finding and awarded the employer a credit of $132,369.52 against the TTD and PTD awards.

¶ 5 FACTS

¶ 6 The claimant worked for the employer as a truck driver. On October 31, 2008, the claimant suffered a work-related injury in Virginia.[1] On that date, the claimant was attempting

[1] The claimant was hired by the respondent in Harvey, Illinois. The employer does not dispute that the employment contract was formed in Illinois. Nor does the employer dispute the issues of

to secure a load on his trailer when one of the fasteners securing a tarp on the load snapped. The claimant attempted to dodge the fastener, which caused him to fall off the back of the trailer, landing on his right shoulder and neck. The claimant completed his delivery and sought medical treatment upon returning to his home in Arkansas.

¶ 7 On November 14, 2008, the claimant sought treatment at St. Joseph's Mercy Business Health (St. Joseph's) complaining of pain in his neck and right shoulder. He gave medical providers at St. Joseph's a history of the October 31, 2008, accident. He reported that he did not initially feel any discomfort in his shoulder but later noticed increasing pain in his right posterior cervical spine, shoulder, and right upper back. X-rays of the claimant's right shoulder did not reveal any abnormalities. The claimant was diagnosed with a right shoulder strain and right cervical strain. He was prescribed pain medication and released to light-duty work which the employer could not accommodate.

¶ 8 On November 21, 2008, the claimant returned to St. Joseph's complaining of pain in his neck and in both shoulders. He was diagnosed with bilateral shoulder strain and thoracic strain and returned to work with light-duty restrictions that his employer could not accommodate.

¶ 9 The claimant again returned to St. Joseph's on December 1, 2008, complaining of continuing pain in his neck and shoulders. X-rays of his cervical and thoracic spine showed degenerative disc disease at C5-C6. He was referred for physical therapy and was continued on light-duty restrictions. The claimant began a course of physical therapy on December 5, 2008, and reported experiencing some initial improvement from the therapy. However, he continued to

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accident and notice.

have deltoid pain and mid-thoracic pain when he moved his extremities.

¶ 10 MRIs of the claimant's cervical and thoracic spine were ordered on December 29, 2008, and performed on January 7, 2009. The cervical MRI showed mild spinal stenosis with bilateral neural foraminal narrowing at C5-C6 and mild to moderate spinal stenosis with bilateral neural foraminal narrowing at C6-C7, which was most pronounced in the right paracentral location. The thoracic MRI showed mild degenerative disc disease within the thoracic spine including disc desiccation and mild loss of disc height at multiple levels.

¶ 11 The claimant went to St. Joseph's for a follow-up visit on January 7, 2009. At that time, the claimant reported experiencing pain in both shoulders, his cervical spine, and his lumbar spine. The claimant's physical therapy was stopped and he was referred to a neurosurgeon. His light-duty work restrictions were continued.

¶ 12 On March 13, 2009, the claimant was examined by Dr. Scott Schlesinger, the employer's section 12 medical examiner. Dr. Schlesinger opined that the claimant's pain complaints and the medical treatments he sought were related to the October 31, 2008, work accident. Specifically, Dr. Schlesinger opined that the work accident had aggravated the claimant's cervical arthritis. Dr. Schlesinger ordered a lumbar MRI and recommended that the claimant undergo epidural steroid injections and possibly a functional capacity evaluation (FCE).

¶ 13 On March 31, 2009, an MRI was performed on the claimant's lumbar spine. The MRI showed compression of the superior endplate of L2 or L3 (which was chronic in nature with no associated bony edemas) and a mild disc bulging at L1-L2.

¶ 14 On May 4, 2009, the claimant saw Dr. Brent Sprinkle at the Arkansas Specialty Spine

Center. After reviewing x-rays of the claimant's cervical spine, Dr. Sprinkle opined that the claimant's October 31, 2008, work accident had aggravated a preexisting degenerative spinal condition.[2] Dr. Sprinkle recommended lumbar epidural steroid injections and continued the claimant on light-duty work restrictions. The claimant had an initial steroid injection on June 3, 2009, which marginally helped his pain. A second injection on June 23, 2009, alleviated the claimant's pain temporarily. The claimant had a third and final injection on July 13, 2009, and underwent physical therapy from July 6, 2009, through August 12, 2009. He was discharged from physical therapy on August 12, 2009, prior to meeting all of his goals due to increased pain in his upper back and cervical areas.

¶ 15 The claimant returned to Dr. Sprinkle on July 30, 2009. At that time, Dr. Sprinkle's impression was that the claimant had preexisting degenerative disc disease in his cervical, thoracic, and lumbar spine, and strains in each of those areas. Dr. Sprinkle told the claimant that he was not a surgical candidate and that there was very little that could be done medically for him at that point.[3] The doctor ordered the claimant to undergo a FCE, which he believed "could help identify the work category [the claimant] is able to tolerate now." Dr. Sprinkle opined that

[2] The claimant's x-rays showed diffuse degenerative changes, mild curvature, multiple old subclinical compression fractures with wedging, and some endplate changes consistent with subclinical osteoporotic fractures. The MRIs of the claimant's cervical, thoracic, and lumbar spine also showed diffuse degenerative changes.

[3] Dr. Sprinkle noted that two other physicians had also recommended that the claimant not undergo surgery.

the claimant had reached MMI "from a conservative treatment standpoint from his strain events." The doctor also opined that: (1) the claimant's imaging findings were "consistent with pre-existing degenerative phenomena," and his work injury "may have aggravated that"; (2) "there [was] a 0% impairment rating"; (3) the claimant "could return to work per his FCE"; and (4) "any restrictions identified in the FCE *** [would be] more heavily related to [the claimant's] pre-existing phenomena than [to] any aggravation of it." Dr. Sprinkle noted that he would continue to see the claimant on an "as-needed basis."

¶ 16 The claimant underwent a valid FCE on August 14, 2009. The FCE determined that the claimant was able to perform work at a "light physical demand level" as defined by U.S. Department of Labor Guidelines. The claimant returned to Dr. Sprinkle for a follow-up on August 17, 2009. At that time, Dr. Sprinkle reviewed the FCE results with the claimant and told the claimant that he agreed with the FCE report's conclusion that the claimant was capable of doing only light-duty work. Accordingly, Dr. Sprinkle released the claimant to work under light-duty restrictions. Specifically, Dr. Sprinkle imposed work restrictions of occasionally lifting up to 30 pounds, with the ability to frequently walk and carry up to 15 pounds and reach with 5 pounds.

¶ 17 The claimant testified by way of evidence deposition on June 14, 2012. During his deposition, the claimant acknowledged that, on August 17, 2009, Dr. Sprinkle reviewed the FCE results with him and released him to work with permanent light-duty restrictions. The claimant agreed that he was "released at maximum medical improvement" at that time.

¶ 18 The claimant testified that he never contacted the employer to see if it could

accommodate his restrictions. He acknowledged that he could not return to work as a truck driver with his current work restrictions because he could not turn his head sufficiently. He stated that he had been working full duty before the work accident but that, since the accident, he could not lift anything and had to be careful when he lifted anything. He testified that he has not worked in any capacity since the accident.

¶ 19 The claimant stated that he has been receiving Social Security benefits for rheumatoid arthritis since approximately 1969. The only time his Social Security benefits stopped was during the Reagan administration in the 1980s. He was on Social Security disability when he began working for the employer fourth months prior to the October 31, 2008 accident.

¶ 20 The claimant also testified about various injuries he suffered after the October 31, 2008, work injury. He noted that, in January 2011, he injured his back while pushing a trailer at home. He went to the emergency room for this injury and obtained medical treatment for it.[4] Later that same month, the claimant suffered a stroke. In the Spring of 2011, the claimant fell and "cracked" his skull while he was in Pennsylvania.

¶ 21 The claimant testified that he sometimes uses a wheelchair, but not always. When he is not in his wheelchair, he does not use a cane, crutches, or any other assistive device. However,

[4] On February 16, 2011, the claimant went to Levi Hospital seeking treatment for a back problem. On his patient questionnaire, the claimant indicated that he was "retired." He noted that he suffered an injury while attempting to lift a 2-ton trailer three weeks earlier and reported feeling a "pop" at that time. He was diagnosed with a fracture at L1. He underwent physical therapy from February 18, 2011, through April 12, 2011.

he admitted that his wife does help him walk due to balance issues related to his stroke. The claimant stated that he takes prescription pain medication for pain near the base of his skull. When asked if he had received any type of therapy or other treatment for any part of his spine in the two years preceding his deposition on June 14, 2012, he replied in the affirmative but he related such treatment to the January 2011 accident.

¶ 22 Edward Steffan, an expert in vocational, medical, and disability management services, testified on the claimant's behalf during the arbitration hearing.[5] Mr. Steffan testified that he had reviewed medical records he was provided concerning the claimant but could not state whether those records were complete. Steffan stated that he based his opinions upon the medical records he received and reviewed. In particular, Steffan relied heavily upon Dr. Sprinkle's August 17, 2009, work release note which indicated that the claimant could work at a light-duty capacity with occasional lifts up to 30 pounds, frequent walking and carrying up to 15 pounds, and reaching up to 5 pounds, consistent with the claimant's August 14, 2009, FCE. Steffan testified that, based upon these restrictions, the claimant could find a job earning approximately $8 to $10 per hour. He opined that the claimant could not return to his job as a truck driver, but could return to work based upon the restrictions noted in the claimant's August 14, 2009, FCE. For example, Steffan stated that (at the time of his August 14, 2009, FCE), the claimant was able

[5] The employer objected to Steffan's testimony on due process grounds because the employer was not provided with a report by Steffen, a list of documents Steffan reviewed in forming his opinions, or any information regarding his opinions prior to the arbitration hearing. The arbitrator allowed Steffen to testify over the employer's objection.

to work as a cashier, greeter, bench assembly worker, security monitor, telephone solicitor, or appointment maker.

¶ 23 During cross examination, Steffan admitted that he had not spoken with the claimant, reviewed the claimant's deposition transcript, or read a summary of that transcript. He also admitted that he was not aware of where the claimant lives and was not familiar with the job market in rural Arkansas. He did not know if there were any jobs within the claimant's restrictions within a reasonable distance from the claimant's home. Moreover, Steffan was unaware if the claimant had engaged in any sort of a job search and had no records relating to any such search. He did not know that the claimant was receiving Social Security disability benefits before he began working for the employer or that he continued receiving such benefits while he was working for the employer. However, Steffan did know that the claimant suffered from rheumatoid arthritis for over 40 years and that he had suffered a stroke in January 2011.

¶ 24 Steffan admitted he did not know the claimant's physical work capabilities as of the date of the hearing. He did not know if the claimant's work capabilities changed following the August 14, 2009, FCE report. Steffan testified that he had received no additional records since the claimant's stroke and that he had no personal knowledge that claimant was, in fact, alive as of the hearing date.

¶ 25 On redirect examination, Steffan testified that it is standard practice in Illinois for rehabilitation counselors to rely upon the physical capacities outlined by physicians from FCEs to determine employment matching those capacities. Steffan opined that the claimant had a diminished earning capacity based upon his inability to perform his former job functions.

¶ 26 On re-cross examination, Steffan admitted he could not testify to the claimant's earning capacity in rural Arkansas. He acknowledged that his opinions were based solely upon the claimant's earning capabilities at the time of the August 14, 2009, FCE. Steffan further admitted that his opinions were based upon the release provided by Dr. Sprinkle because Steffan had not had any conversations with the claimant, had not reviewed the claimant's deposition transcript, had not investigated jobs in Arkansas, and did not know the claimant's current physical condition.

¶ 27 The arbitrator found that the claimant's current condition of ill-being was not causally related to his work-related accident on October 31, 2008, because the claimant had "sustained subsequent significant injuries unrelated to the accident at issue." In support of this finding, the arbitrator noted that it was undisputed that the claimant suffered a stroke in January 2011, an injury to his back in January 2011, and a fall in Spring 2011 during which he "cracked" his skull. Moreover, the claimant testified that his stroke has caused him balance issues, which the arbitrator found have "contributed to his current condition of ill-being," along with his preexisting rheumatoid arthritis and degenerative back problems. The arbitrator concluded that the claimant's stroke and subsequent falls "have significantly contributed to his current condition of ill-being and [that] said events are not causally related to his workplace accident."

¶ 28 However, the arbitrator found that "the claimant's condition on July 30, 2009, the date he was put at MMI by Dr. Sprinkle, and on August 17, 2009, when Dr. Sprinkle formally reported [the claimant's] restrictions based on the FCE," was causally related to the October 31, 2008, work accident. Specifically, based on Dr. Sprinkle's opinions, the FCE report, and other

evidence, the arbitrator found that evidence the claimant suffered "multi-level back and bilateral shoulder strains" as a result of the October 31, 2008, work accident.

¶ 29 The arbitrator found that "[t]he evidence establishe[d] that [the claimant] was temporarily and totally disabled from November 14, 2008 until August 17, 2009." He noted that, under section 8(b) of the Act (820 ILCS 305/8(b) (West 2008)), weekly TTD benefits should be paid only "as long as the total temporary incapacity lasts," and "[t]he touchstone for determining whether a claimant is entitled to TTD benefits is whether the claimant's condition has stabilized to the extent that he is able to reenter the work force." The arbitrator noted that, when Dr. Sprinkle placed the claimant at MMI on July 30, 2009, he opined that the claimant could return to work per his FCE restrictions. After reviewing the FCE report, Dr. Sprinkle formally imposed permanent work restrictions on August 17, 2009, based upon the FCE. Accordingly, the arbitrator found that "the appropriate last date for TTD benefits would *** be August 17, 2009, when it was confirmed by [the claimant's] treating physician that [the claimant's] condition had stabilized and the work restrictions for his reentering *** the workforce were established by Dr. Sprinkle." The arbitrator therefore awarded the claimant TTD benefits and medical expenses from November 14, 2008 (when the claimant was first placed on light duty), through August 17, 2009, but declined to award TTD benefits or medical expenses after that date.

¶ 30 The arbitrator also awarded the claimant PPD benefits under section 8(d)(2) of the Act (820 ILCS 305/8(d)92) (West 2008)) for 125 weeks in the amount of 25% person-as-a-whole.[6]

[6] The arbitrator noted that the claimant had "waived recovery under Section 8(d)(1) of the Act and *** elected to proceed for recovery under Section 8(d)(2) of the Act."

However, the arbitrator found that the claimant was "not entitled to an enhanced *** PPD award based on diminished earnings capacity" because he had "failed to present sufficient evidence showing a loss of earning capacity that was causally related to the work accident." The arbitrator noted that the claimant had "presented no credible evidence showing what type of work he could have performed as of the date of the hearing." The arbitrator gave Steffan's testimony "little weight" because Steffan: (1) never spoke with the claimant or read his deposition transcript; (2) admitted that he was unfamiliar with the job market in rural Arkansas, where the claimant resides; and (3) "based the majority of his opinions on the FCE and Dr. Sprinkle's final note, when he concluded that [the claimant's] earning capacity would be limited by this accident." The arbitrator concluded that Steffan's opinion "lacked the knowledge required to determine a person's employability, since *** Steffan was unaware of the labor market in the area where [the claimant] resided or how other health issues affected [the claimant's] employability." Further, the arbitrator stressed that Steffan had "no insight into [the claimant's] present condition and could not identify when other health problems changed [his] employability. The arbitrator found that "[t]hese issues *** prevented *** Steffan from giving any convincing opinion regarding [the claimant's] employability as of the hearing date, which makes his testimony carry little if no relevance to the issue of [the claimant's] earning capacity on the hearing date."

¶ 31 Finally, the arbitrator awarded the employer a credit of $132,369.52 against both the TTD and the permanency awards for TTD benefits the employer had already paid, plus a credit of $17,952.74 for medical expenses the employer had already paid, for a total credit of $150,322.26. The arbitrator found that the "the issues of vocational rehabilitation and

maintenance were not raised by either party, and these issues are hereby considered waived."

¶ 32 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission modified the arbitrator's decision by finding that the claimant was entitled to collect TTD benefits "up to and including the date this matter was tried before the arbitrator" on November 15, 2012. In support of this finding, The Commission stated:

> "The [claimant] was released from medical care for this injury by Dr. Sprinkle after a functional capacity evaluation found [the claimant] at maximum medical improvement. Dr. Sprinkle released the [claimant] to return to work at light duty on August 17, 2009. ***
>
> Per the [claimant's] testimony, this work restriction was permanent. As a truck driver, he would be unable to return to that job with those restrictions. ***
>
> The [employer] continued to pay [the claimant] [TTD] payments until November 15, 2012. On the date of the Arbitration hearing the [claimant] waived his right to recovery under § 8(d)(l) and elected recovery under § 8(d)(2).
>
> Therefore, [the claimant] is entitled to [TTD] payments up until he declared that he was waiving his rights under § 8(d)(1) and § 8(f).
>
> It is therefore ordered by the Commission that [employer] pay to [the claimant] the sum of $636.43 per week for a period of 208 6/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act."

The Commission's decision resulted in an award of an additional 169 and 2/7 weeks of TTD benefits to the claimant. The Commission also ruled that the employer "shall have credit for all amounts paid, if any, to or on behalf of the [claimant] on account of" the claimant's work-related

injury. The Commission affirmed and adopted the arbitrator's decision in all other respects.

¶ 33 The employer sought judicial review of the Commission's decision in the circuit court of Cook County, which reversed the Commission's ruling in part and affirmed it in part. The circuit court reversed the Commission's award of additional TTD benefits up to the date of the arbitration hearing and ruled that TTD benefits could not be awarded after the claimant reached MMI on August 17, 2009. The court noted that a claimant is entitled to collect TTD benefits only "when a disabling condition is temporary and had not reached a permanent condition." Thus, the court ruled that the "dispositive" question is whether the claimant's condition has stabilized, *i.e.*, when he has reached MMI. Dr. Sprinkle opined that the claimant had reached MMI on August 17, 2009, and the arbitrator found that the claimant had reached MMI on that date. The circuit court found that, in adopting the arbitrator's decision, the Commission "conclude[d]" that the claimant had reached MMI on August 17, 2009. Moreover, the court noted that the claimant did not contest "the MMI determination" or the fact that his eligibility for TTD ceased on August 17, 2009.

¶ 34 The circuit court rejected the Commission's suggestion that the date that the claimant opted for recovery under section 8(d)(2) rather than section 8(d)(1) was somehow relevant to the claimant's eligibility for TTD benefits. The court noted that section 8(d) concerns PPD, not TTD. Moreover, the court ruled that the determinative question regarding a claimant's eligibility for TTD benefits is not "when the claimant chooses which regime to use in seeking a permanency award" but rather "when the claimant has reached stability or MMI." Accordingly, the court found that the Commission's determination that TTD benefits extended to November 15, 2012 was against the manifest weight of the evidence. It therefore remanded the matter and instructed the Commission to "follow the TTD calculation awarded by the Arbitrator."

¶ 35 The circuit court also held that the claimant had waived any argument regarding his eligibility for vocational and maintenance benefits by failing to raise such arguments before the Commission.

¶ 36 Moreover, the court affirmed the Commission's causation finding and awarded the employer a credit of $132,369.52 against the TTD and PTD awards. It rejected the claimant's argument that the employer should not receive a credit because it failed to provide him with vocational rehabilitation. The court reasoned that refusing to award the employer a credit would result in a windfall benefit for the claimant, which would contravene the Act's intent.

¶ 37 This appeal followed.

¶ 38 ANALYSIS

¶ 39 1. The Circuit Court's Award of a Credit to the Employer

¶ 40 The claimant argues that the circuit court erred in awarding the employer a credit of $132,369.52 against the TTD and permanency awards. The determination of whether to allow credit is within the discretion of the court entering the workers' compensation award. *Payetta v. Industrial Comm'n*, 339 Ill. App. 3d 718, 722 (2003); *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 733 (2000). An employer's overpayment of TTD benefits (*i.e.*, the payment of TTD benefits in excess of the amount to which the claimant is entitled) may be credited against a claimant's permanency award. *Gallianetti*, 315 Ill. App. 3d at 734.

¶ 41 In this case, the Commission ruled that the employer "shall have credit for all amounts paid, if any, to or on behalf of [the claimant] on account of" his October 31, 2008, work injury. The employer paid the claimant TTD benefits from November 14, 2008, through November 15,

2012, (the date of the arbitration hearing), for a total amount of $132,369.52.[7] It is undisputed that the claimant was not eligible for TTD benefits after August 17, 2009, the date Dr. Sprinkle determined he had reached MMI. The Commission ruled that the claimant was entitled to collect TTD benefits until the date he elected to seek permanency benefits under section 8(d)(2) of the Act rather than section 8(d)(1) (which occurred at arbitration hearing on November 15, 2012). As both parties acknowledge, that was error. The Act provides that TTD payments may be paid "as long as the total temporary incapacity lasts." 820 ILCS 305/8(b) (West 2008). A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of her injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). Accordingly, once an injured employee's condition stabilizes, *i.e.*, once the employee reaches MMI, he is no longer eligible for TTD benefits (although he may be entitled to PPD benefits). *Matuszczak v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 130532WC, ¶ 14; *Gallianetti*, 315

[7] In the written request for a hearing that the parties filed with the Commission, the parties stipulated that the employer paid $132,369.52 in "TTD" benefits. On appeal, however, both parties suggest that the payments that the employer made to the claimant after the claimant reached MMI on August 17, 2009, were intended as some time of permanency benefits rather than TTD benefits. In its brief on appeal, the employer states that it "continued to pay benefits after [the claimant] was at [MMI] pursuant to an 'odd-lot' theory" because it "believed that [the claimant] was incapable of working." Regardless, it is undisputed that all of the payments that the employer made to the claimant were intended as some type of compensation for the October 31, 2008, work injury.

Ill. App. 3d at 733. Thus, the circuit court correctly reversed the Commission on this issue. On appeal, the employer argues that the circuit court properly awarded the employer a credit of $132,369.52 for an overpayment of benefits (*i.e.*, for benefits that the employer paid after August 17, 2009, that the claimant was not eligible to receive).

¶ 42 The claimant disagrees. Although the claimant concedes that he was not entitled to receive *TTD* benefits after he reached MMI on August 17, 2009, he argues that he was entitled to receive *maintenance* benefits during that time period. Maintenance payments are paid in the same amount as TTD benefits. Accordingly, the claimant argues that there was no overpayment of benefits in this case. The claimant also notes that the employer did not prepare a written medical and vocational rehabilitation assessment, as required by section 9110.10 of title 50 of the Illinois Administrative Code (50 Ill. Adm. Code 9110.10 (2008)). For these reasons, the claimant maintains that the circuit court should not have awarded the employer a credit for the benefits the employer paid from August 17, 2009, through November 15, 2012.

¶ 43 The claimant's argument must fail. The claimant did not seek maintenance benefits or argue that he was entitled to such benefits before either the arbitrator or the Commission. He has therefore forfeited that argument. *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1090 (2004) (claimant's argument that he was entitled to maintenance was "not presented to either the arbitrator or the Commission and [was] therefore forfeited on appeal"); see also *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 336 (1980); *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020 (2005). The arbitrator expressly ruled that any claim for maintenance or vocational rehabilitation was "waived." Nevertheless, the claimant did not raise the issue or challenge the arbitrator's waiver finding when he sought review before the Commission. The Commission therefore affirmed and adopted the arbitrator's finding. The claimant did not assert an

entitlement to maintenance benefits until the case was on review in the circuit court. That is too late. *R.D. Masonry, Inc. v. Indus. Comm'n*, 215 Ill. 2d 397, 414 (2005); *Walker*, 345 Ill. App. 3d at 1090; *Manis v. Industrial Comm'n*, 230 Ill. App. 3d 657, 662 (1992).[8]

¶ 44 However, even if we were to address the claimant's argument for maintenance benefits, we would reject it. Section 8(a) of the Act permits an award of maintenance benefits "while a claimant is engaged in a prescribed vocational-rehabilitation program." *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 39; see also *Greaney*, 358 Ill. App. 3d at 1019. An employee's self-initiated and self-directed job search or vocational training may constitute a "vocational-rehabilitative program" under section 8(a). *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004); *Greaney*, 358 Ill. App. 3d at 1019. However, an employer is obligated to pay maintenance benefits only "while a claimant is engaged in" such a program. *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC at ¶ 39; see also

[8] Although many courts have used the terms "waiver" and "forfeiture" interchangeably, they are distinct concepts. "Whereas forfeiture is the failure to make the timely assertion of [a] right, waiver is the intentional relinquishment or abandonment of a known right." *People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005), quoting *United States v. Olano*, 507 U.S. 725, 733 (1993). *People v. Phipps*, 238 Ill. 2d 54, 62 (2010). In this case, the Commission found that the claimant "waived" any claim for maintenance or vocational rehabilitation by failing to raise these issues. Strictly speaking, that was error. Because the claimant did not expressly indicate that he was intentionally abandoning any such claims (but rather merely failed to raise them), the Commission should have found that the claimant "forfeited" these issues, not that he "waived" them.

*Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1075 (2004). Thus, if the claimant is not engaging in some type of "rehabilitation" (whether it be physical rehabilitation, formal job training, or a self-directed job search), the employer's obligation to provide maintenance is not triggered. In this case, there is no evidence that the claimant was engaged in any such "rehabilitation" program. Nor is there evidence that the claimant ever looked for work after Dr. Sprinkle found him at MMI and released him for work in August 2009. To the contrary, approximately nineteen months later, when the claimant sought treatment for a subsequent injury at Levi Hospital in Pennsylvania, he described himself as "retired." Moreover, after Dr. Sprinkle released the claimant for work under permanent restrictions in August 2009, the claimant never sought his job back with employer or asked for an accommodation.

¶ 45 Nor did the employer's failure to provide a written vocational rehabilitation assessment under section 9110.10 of title 50 of the Illinois Administrative Code (50 Ill. Adm. Code 9110.10 (2008)) entitle the claimant to maintenance benefits. As an initial matter, the claimant never argued before the arbitrator or the Commission that he was entitled to vocational rehabilitation and he did not challenge the arbitrator's finding that he "waived" any claim to such benefits. Accordingly, any claim for vocational rehabilitation would be forfeited on appeal. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 67; *Thomas*, 78 Ill. 2d at 336; *Walker*, 345 Ill. App. 3d at 1090. Not surprisingly, the claimant has expressly disclaimed any claim to vocational rehabilitation on appeal.

¶ 46 However, although his argument on this point is not entirely clear, the claimant appears to suggest that the employer's failure to fulfill its obligations under section 9110.10 entitles him to maintenance benefits. We do not find this argument persuasive. As noted, an employer must pay maintenance benefits only while the claimant is undergoing vocational rehabilitation. Thus,

the question becomes whether the claimant could have been entitled to vocational rehabilitation. A claimant is generally entitled to vocational rehabilitation where he sustains a work-related injury which causes a reduction in his earning power and "there is evidence that rehabilitation will increase his earning capacity." *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432 (1983); see also *Roper Contracting*, 349 Ill. App. 3d at 506. Here, there is no evidence that vocational rehabilitation would have been successful and would have increased the claimant's earning capacity. At the time of his release to work in August 2009, the claimant was 67 years old, suffered from rheumatoid arthritis, and had limited transferable job skills. He was receiving Social Security Disability benefits both before and during his employment with the employer. Thus, even though the employer failed to provide a written vocational rehabilitation assessment, (as required by section 9110.10), the evidence suggests that vocational rehabilitation would likely have been unsuccessful, and the claimant presents no evidence suggesting that he would have been entitled to vocational rehabilitation.

¶ 47 Accordingly, the circuit court correctly determined that the employer's payment of weekly TTD benefits to the claimant from the time Dr. Sprinkle declared him at MMI on August 17, 2009, through the date of the arbitration hearing on November 15, 2012, were overpayments. The claimant was not entitled to receive either TTD or maintenance benefits during that period. Thus, the circuit court's decision to credit these payments against the TTD and PPD awards was a proper exercise of the court's discretion. *Gallianetti*, 315 Ill. App. 3d at 734-35. If the circuit court did not award such a credit to the employer, the claimant would obtain thousands of dollars in benefits to which he is not entitled. That result would contravene both the Act's purposes and sound public policy. "[An] employee should not receive a windfall at the employer's expense due to an accidental overpayment of TTD benefits." *Gallianetti*, 315 Ill. App. 3d at 735; see also

*Messamore v. Industrial Comm'n*, 302 Ill. App. 3d 351, 359 (1999). Moreover, one of the goals of the Act is "to encourage employers to make prompt payments before the amount of liability is certain." *Gallianetti*, 315 Ill. App. 3d at 735. That goal "would be frustrated if we were to deny credits" for overpayments. *Id.*; see also *Messamore*, 302 Ill. App. 3d at 359. "[D]isallowing credits would encourage administrative delays as employers attempt to resolve every ambiguity before paying benefits. *Gallianetti*, 315 Ill. App. 3d at 735; *Messamore*, 302 Ill. App. 3d at 359.

¶ 48 2. Permanency Award

¶ 49 The claimant next contends that the Commission's determination that he was entitled to PPD benefits representing 25% loss of a man-as-a-whole is against the manifest weight of the evidence. The extent or permanency of a claimant's disability is a question of fact to be determined by the Commission, and its decision will not be set aside unless contrary to the manifest weight of the evidence. *Roper Contracting*, 349 Ill. App. 3d at 506-07; *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002). 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). The test is whether there is sufficient factual evidence in the record to support the Commission's determination, not whether this court, or any other tribunal, might reach an opposite conclusion. *Pietrzak*, 329 Ill. App. 3d at 833; *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 450 (1995). The determination of witness credibility and the weight to be accorded the evidence are matters within the province of the Commission. *Pietrzak*, 329 Ill. App. 3d at 833.

¶ 50 The claimant's challenge to the Commission's permanency award cannot succeed. As an initial matter, the claimant did not raise the issue before the circuit court, and has therefore forfeited the issue. *May v. Industrial Comm'n*, 195 Ill. App. 3d 468, 472 (1990). In any event,

there is sufficient evidence in the record to support the Commission's permanency finding. Dr. Sprinkle's medical records suggest that he considered the claimant's October 31, 2008, work injury to be relatively minor. He characterized the injury as a "strain" that "may have aggravated" his preexisting degenerative condition. In July 2009, Dr. Sprinkle gave the claimant a "0% impairment rating" and noted that "any restrictions identified in the FCE *** [would be] more heavily related to [the claimant's] pre-existing phenomena than [to] any aggravation of it." The medical records and diagnostic tests show that the claimant had extensive preexisting, degenerative disc disease in his cervical, thoracic, and lumbar spine (including cervical arthritis). Moreover, the claimant's stroke and the other non-work-related injuries he suffered in 2011 were clearly related to his current condition of ill-being. Based on all of this evidence, the Commission could have reasonably found that the claimant was disabled only to the extent of 25% person-as-a-whole due to the October 31, 2008, work accident, and that any further disabilities were the result of his degenerative spinal conditions or other health problems that were unrelated to the work accident.

¶ 51 The claimant asserts that the Commission should have awarded him 50% loss to the person-as-a-whole. (At one point in his brief, he raises the figure to 60% without explanation.) However, he provides little argument supporting these figures. He simply notes that he "was released with permanent restrictions that made it impossible for him to return to his occupation as an over the road truck driver," and that he "lost his occupation as a result of" the October 31, 2008, work injury. In support of these claims, he cites only Steffen's testimony. However, the Commission justifiably gave little weight to Steffan's testimony because Steffan had never spoken or met with the claimant or read his deposition transcript, and the Commission found that Steffan had "no insight into [the claimant's] present condition and could not identify when other

health problems changed [his] employability." The claimant offers nothing to rebut the evidence of the claimant's extensive preexisting, degenerative conditions or Dr. Sprinkle's opinions regarding the relatively minor nature of the October 2008 work injury.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which properly awarded a credit to the employer and which confirmed the Commission's PPD award.