

2015 IL App (1st) 142637WC-U
No. 1-14-2637WC
Order filed: December 18, 2015

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

CITY OF CHICAGO,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	Nos. 12-L-50777
)	13-L-50432
THE ILLINOIS WORKERS')	14-L-50054
COMPENSATION COMMISSION and)	
JOSE DUARTE,)	Honorable
)	Edward S. Harmening,
Defendants-Appellees.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The evidence of record was sufficient to support the Commission's initial finding that claimant failed to demonstrate his unemployability either through a diligent job search or with credible evidence that there is no stable labor market for him. Accordingly, the Commission's conclusion that claimant was not entitled to permanent and total disability benefits under an odd-lot theory is not against the manifest weight of the evidence.

¶ 2 Claimant, Jose Duarte, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) for injuries allegedly sustained while working for respondent, the City of Chicago. Following a hearing, an arbitrator concluded that claimant's current condition of ill-being was causally related to his work injury. Finding that claimant was permanently partially disabled, the arbitrator awarded claimant a wage-differential benefit in the amount of \$591.77 per week for the duration of his disability. See 820 ILCS 305/8(d)1 (West 2006). The Illinois Workers' Compensation Commission (Commission) modified certain aspects of the arbitrator's decision, but affirmed the arbitrator's finding that claimant was entitled to a wage-differential benefit. However, the circuit court of Cook County set aside the Commission's finding that claimant was permanently partially disabled and remanded the matter to the Commission for entry of an order finding claimant permanently and totally disabled pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2006)).

¶ 3 In accordance with the remand order, the Commission awarded claimant \$941.92 per week for life because the injuries claimant sustained caused permanent and total disability. On judicial review, the circuit court of Cook County confirmed the Commission's decision. In this appeal, respondent argues that the Commission's initial decision rejecting an award for permanent and total disability benefits was not against the manifest weight of the evidence because claimant failed to demonstrate his unemployability either through a diligent job search or with credible evidence that there is no stable labor market for him. For the reasons set forth below, we agree with respondent.

¶ 4

I. BACKGROUND

¶ 5 The following factual recitation is taken from the testimony and evidence presented at the arbitration hearing held on November 29, 2010. Claimant, a native of Mexico, testified with the aid of an interpreter that he worked as a farm laborer in Mexico before moving to the United States. Claimant testified that he did not receive any formal education while living in Mexico. He later reported that he was educated “[u]p until 6th,” but clarified his statement by adding, “16 probably.” Claimant denied receiving a GED or any other type of high school equivalency degree thereafter and testified that he understands only about 20% of the English he hears in conversation. Upon his move to the United States in 1973, claimant was employed as a meat packer and cutter until 1978, when he began a career as a member of Carpenters Local #1539.

¶ 6 In 1997, claimant began working as a carpenter for respondent. Claimant testified that, in his employment for respondent, his supervisor spoke to him in English, and he was able to understand directions. Claimant also spoke with some of his co-workers in English. On December 12, 2005, claimant injured his right shoulder and lower back at work while assisting two co-workers lift a large block that weighed over 500 pounds. At the time of the injury, claimant, who is right-hand dominant, was 50 years old.

¶ 7 Claimant initially treated for his injuries at MercyWorks, where he was referred to Dr. William Heller. Dr. Heller diagnosed a partial thickness tear of the rotator cuff in claimant’s right shoulder. Dr. Heller initiated treatment with a corticosteroid injection, referred claimant to physical therapy, and released him to his regular work duties. During a follow-up appointment, claimant reported that his pain was becoming worse. At that time, Dr. Heller ordered an MRI arthrogram of the right shoulder and restricted claimant to work that involved no use of his right arm. The MRI arthrogram was normal, and Dr. Heller recommended a second steroid injection.

Claimant reported no improvement with the second injection, so Dr. Heller recommended, and claimant underwent, arthroscopic surgery to repair the rotator-cuff tear of the right shoulder. Following surgery, Dr. Heller prescribed physical therapy and work conditioning.

¶ 8 In August 2006, claimant received a second opinion from Dr. Gregory Nicholson, who diagnosed claimant with a post-operative stiff shoulder. Claimant underwent a second arthroscopic surgery on his shoulder and was placed in post-operative physical therapy. On April 1, 2008, Dr. Nicholson determined that claimant was at maximum medical improvement (MMI) for his right shoulder. At that time, Dr. Nicholson released claimant from care with permanent work restrictions of no lifting more than 20 pounds floor to waist, no lifting more than 15 pounds waist to chest, no working over shoulder height, and no repetitive lifting.

¶ 9 Meanwhile, claimant also consulted several physicians regarding his lower back. In February 2006, claimant saw Dr. Julie Wehner, who recommended physical therapy. In May 2006, Dr. Wehner released claimant to full-duty work. Claimant saw Dr. Srdjan Mirkovic for a second opinion. Dr. Mirkovic released claimant to full-duty work on June 7, 2006. In January 2007, claimant saw Dr. Howard An about his back. Dr. An diagnosed degenerative disc disease and mild stenosis. He recommended physical therapy, anti-inflammatory medication, and epidural steroid injections. The steroid injections did not provide relief, so claimant underwent an L4-S1 fusion in June 2007. On May 16, 2008, Dr. An determined that claimant was at MMI for his back condition. Dr. An discharged claimant from his care with permanent restrictions limiting him to sedentary work with occasional lifting of no more than 10 pounds and no twisting, bending, climbing ladders, or kneeling. Dr. An noted that although a sedentary job is defined as one that involves sitting, “a certain amount of walking and standing are required”

occasionally, and he limited claimant to no more than 30 consecutive minutes of sitting, standing, or walking.

¶ 10 Claimant testified that he began to look for work in July 2010, and continued to do so through the date of the arbitration hearing. To document his search, claimant filled out several “Injury on Duty Job Search Log” forms developed by respondent. Claimant completed the forms in English. Claimant testified that he did not understand all of the words on the forms, but he was able to complete them after his daughter translated the portions he did not understand. Claimant’s job search log contains approximately 180 entries and includes employers in the fields of food service, construction, roofing, mechanics, and landscaping. Claimant found the job leads in Spanish-language newspapers. Patrick Conway, a vocational counselor hired by respondent, also provided claimant with 15 job leads. Of the 180 positions identified on the job-search log, claimant visited 15 personally. He contacted the remaining employers by telephone. Claimant initially testified that he could not drive, so his daughter drove him to some of the employers, including a restaurant and a construction job. Claimant later testified that he can drive for five to ten minutes before feeling pain. Claimant did not complete any job applications, and he did not receive any job offers. Moreover, he acknowledged that positions in the construction and roofing fields are not within his restrictions.

¶ 11 Claimant retained vocational counselor Susan Entenberg to conduct a vocational rehabilitation evaluation. Entenberg authored a report of her findings on March 24, 2010. In the report, Entenberg noted that she spoke with claimant by telephone in May 2009 and that claimant used an interpreter for the conversation. Claimant told Entenberg that he cannot read or write in English and that he understands only “a little English that he needed in his work.” Claimant told Entenberg that a typical day for him involves sitting, walking around the house, watching

television, doing a little exercise, and taking naps every few hours. Claimant stated that he does not perform any household chores and has no hobbies or computer skills. Claimant also reported that he can lift no more than a gallon of milk, walk for no more than a block, stand for no more than 10 to 15 minutes, and sit for no more than 20 minutes. Claimant told Entenberg that he can drive “very little” because braking hurts his back and steering hurts his right arm. Entenberg opined that carpentry is a skilled trade with no transferable skills within claimant’s restrictions, that claimant is not an appropriate candidate for vocational rehabilitation, and that no stable labor market exists for him. Entenberg based her opinion on claimant’s age (then 55), his limited education, his lack of English literacy, his lack of clerical or computer skills, and the restrictions imposed by claimant’s physicians.

¶ 12 In August 2010, Conway met with claimant and conducted a vocational evaluation, transferable-skills analysis, and a labor-market survey. Claimant brought an employee from his attorney’s office to translate. Claimant told Conway that he has difficulty reading written English but that he understood English “well enough to function on the job.” Claimant also told Conway that he understood “about 50% of what [Conway] said during the interview,” and Conway noted that claimant responded to many of his questions in English. Conway also noted that claimant participates in a job-search program offered by respondent. As part of that program, claimant provided respondent, on a weekly basis, with written documentation in English of the employers he had contacted. Conway opined that, based on claimant’s work history in carpentry, meat packing, and farming, he had vocational strengths, including a steady work history, current driver’s license, easy access to downtown Chicago by public transportation, and carpentry experience including reading blueprints. Conway further opined that someone with claimant’s experience is likely to have average math, language, and reasoning

skills, as well as the ability to make judgments and decisions, perform a variety of duties, and direct the activities of others. Conway noted that barriers to some jobs would be a lack of a high school diploma or GED, language limitations, current work restrictions, and lack of computer skills. Conway then conducted a labor-market survey and concluded that there was a stable labor market with positions available within claimant's limitations and within a reasonable commute from his home in the pay range of \$8 to \$12 per hour. Among the positions identified by Conway were assembly worker, painting crew leader, account service manager, dispatcher, cashier, and security guard.

¶ 13 After reviewing Conway's reports, Entenberg authored an addendum reiterating her opinion that no stable labor market exists for claimant. Entenberg concluded that the positions cited by Conway were not appropriate for claimant given his limited communication skills, his work restrictions, and his educational level.

¶ 14 At the time of the hearing, claimant testified that he continues to experience pain in his right shoulder for which he takes extra-strength Tylenol. He also continues to have pain in his right arm and lower back while engaging in certain activities such as walking, brushing his teeth, reaching overhead, eating, standing, sitting, and getting dressed. Claimant testified that the pain becomes worse in cold weather and while sleeping on his right side.

¶ 15 Based on the foregoing evidence, the arbitrator found that claimant's right shoulder and lumbar spine conditions are causally related to his work-related accident of December 12, 2005. The arbitrator further determined that, while claimant had suffered some significant permanent injuries, he was not "totally disabled from performing any type of work." Instead, claimant was limited to "light to sedentary duty" in accordance with the restrictions imposed by Drs. An and Nicholson. The arbitrator rejected Entenberg's opinion that no stable labor market existed for

claimant, finding she relied heavily on claimant's purported lack of English skills and failed to take into account all of his work experience. The arbitrator determined that Entenberg underestimated claimant's English skills, based, in part, on his own observations of claimant at the arbitration hearing. The arbitrator noted that although a translator had been used at the arbitration hearing, claimant appeared to understand many of the questions posed in English and he answered some of the questions in English before they were translated. The arbitrator further noted that claimant had lived in the United States since 1973 and had been able to find work and understand work instructions notwithstanding some difficulty with the English language. The arbitrator found it "highly unlikely" that claimant could only understand about 20% of the English he hears spoken in conversation, as he had testified. The arbitrator instead placed greater weight on Conway's report, in which he determined that claimant could understand about half of what Conway said in English during the interview. Conway concluded there are positions that claimant could perform, even considering his limitations.

¶ 16 The arbitrator also noted inconsistencies in claimant's testimony about his education and his ability to drive. The arbitrator found that claimant was "evasive" about his educational history where he initially testified that he had no formal education, but later reported that he went to school "up until 6," and even later indicated that he was in school until age "16 probably." The arbitrator found it "difficult to believe that [claimant] had 'no formal education in anything' " where he had been able to successfully work as a union carpenter for so many years. Further, claimant initially stated that he could not drive, but later testified that he could drive for short distances before he would feel pain. The arbitrator also found that claimant "appeared to be exaggerating his disability" with respect to his ability to perform tasks associated with daily living as claimant's complaints were not corroborated by the medical records. In this regard, the

arbitrator observed that claimant seemed fairly comfortable sitting during the length of his testimony, which lasted about one hour.

¶ 17 Additionally, the arbitrator found that claimant did not conduct an “appropriate” job search. Claimant filled out a job-search log for respondent between July and November 2010, which indicated that he contacted many employers who were not likely to have jobs within his restrictions, such as landscaping, roofing, and construction. The arbitrator also noted that claimant limited his job search to only Spanish-language newspapers. Yet, claimant was able to obtain employment as a union carpenter and he was able to participate in respondent’s job-search program in English.

¶ 18 The arbitrator concluded that claimant was not totally disabled, but respondent could not accommodate him based on his permanent job restrictions. Because claimant had suffered a loss of trade and could not earn the same salary as he had while working as a carpenter, the arbitrator awarded claimant a wage-differential benefit in the amount of \$591.77 per week commencing on November 29, 2010, and lasting for the duration of his disability. See 820 ILCS 305/8(d)1 (West 2012).

¶ 19 Thereafter, claimant sought review of the arbitrator’s decision. In conjunction with his request for review, claimant posed several interrogatories (see 820 ILCS 305/19(e) (West 2006); 50 IL Adm. Code § 7040.40(c) (2006)), including: (1) whether he should be awarded maintenance through the date of the hearing based on “the un rebutted fact that [claimant] was conducting a job search from July 13, 2010 through the date of the hearing;” (2) whether the arbitrator’s decision should be “found in error” based on an “overabundance of factual errors” about “the details of *** Entenberg’s reports, opinions and practice;” and (3) whether there was any evidence to support the arbitrator’s determinations that claimant was “evasive” in his

testimony, “exaggerated his disability,” and was not credible in his testimony about his education and his level of English literacy.¹

¶ 20 On May 7, 2012, the Commission entered a decision and opinion on review in which it modified the arbitrator’s decision in part, but otherwise affirmed and adopted the arbitrator’s decision, and answered claimant’s section 19(e) interrogatories. Relevant here, the Commission rejected each of claimant’s allegations of error. The Commission agreed with the arbitrator that claimant’s job search had been inappropriate, and so claimant was not entitled to maintenance through the date of the hearing. The Commission explained that claimant’s job search “was not designed to secure employment for him” because (1) it was directed at employers unlikely to have positions within claimant’s restrictions and (2) it was limited to employers advertising in Spanish-language newspapers even though claimant was capable of speaking and understanding English sufficiently to apply for and perform his job as a union carpenter for respondent and to perform a local job search in English. The Commission also agreed that Entenberg’s opinion was entitled to less weight because it was based “in large part upon [claimant’s] inability to communicate in English,” which the arbitrator considered exaggerated after he “evaluate[d] [claimant’s] English skills at [the] hearing” and observed claimant answer questions before translation. The Commission further concluded that claimant’s testimony that he understood only 20% of the English he heard in conversation was questionable in light of the 30 years

¹ Claimant also posed a question about whether the arbitrator erred in awarding a credit for temporary total disability and maintenance benefits that it did not award, “thereby creating an overpayment of \$235,839.02.” The Commission subsequently entered an award for temporary total disability and maintenance benefits pursuant to a stipulation by the parties.

claimant had lived in the United States, with a proven “ability to function in jobs where directions were provided in English.”

¶ 21 Additionally, the Commission noted that Entenberg had simply accepted claimant’s assertion that he was “unable to do anything around the house and napped frequently,” without accounting for the doctors’ findings that claimant could perform “light or sedentary jobs.” Accordingly, the Commission found that, although claimant had “significant physical restrictions,” there is “no medical reason for [his] inactivity.” The Commission also noted that the arbitrator properly discounted claimant’s credibility based on discrepancies in his testimony about his ability to drive and his education.

¶ 22 Claimant petitioned for administrative review. In an order entered November 1, 2012, the circuit court ruled that the Commission’s decision was against the manifest weight of the evidence because it was based on “impermissible inferences,” which included the Commission’s finding that claimant could likely speak more English than he and Entenberg suggested. The court remanded the matter to the Commission with directions that it enter an order finding claimant permanently and totally disabled pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2012)). On December 20, 2013, the Commission entered a Corrected Decision and Opinion on Remand in compliance with the circuit court’s order and awarded claimant permanent total disability (PTD) benefits of \$941.42 per week for life. Respondent thereafter petitioned for administrative review. On July 24, 2014, the circuit court confirmed the Commission’s decision. This appeal by respondent followed.

¶ 23

II. ANALYSIS

¶ 24 On appeal, respondent contends the Commission’s May 2012 decision that claimant was not permanently and totally disabled was not against the manifest weight of the evidence because

claimant failed to demonstrate his unemployability either through a diligent job search or with credible evidence that there is no stable labor market for him.

¶ 25 An employee is permanently and totally disabled when he is unable to make some contribution to industry sufficient to justify payment of wages. *Interlake Steel Corp. v. Industrial Comm'n*, 60 Ill. 2d 255, 259 (1975). However, the employee need not be reduced to total physical incapacity before an award of PTD benefits may be granted. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286 (1983). Rather, the employee must show that he is, for all practical purposes, unemployable, *i.e.*, he is unable to perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable labor market for them. *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534 (1996). “The focus of the Commission’s analysis must be upon the degree to which the claimant’s medical disability impairs his employability, and ‘if an employee is qualified for and capable of obtaining gainful employment without seriously endangering his health or life, such employee is not totally and permanently disabled.’ ” *Alano*, 282 Ill. App. 3d at 534 (quoting *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill.2d 353, 362 (1978)).

¶ 26 If the employee’s disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is on the employee to establish by a preponderance of the evidence that he falls into the “odd lot” category, that is, one who, although not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Westin Hotel v. Illinois Workers’ Compensation Comm’n*, 372 Ill. App. 3d 527, 544 (2007). Once the employee establishes that he falls into the odd-lot category, the burden shifts to the employer to

prove that some type of regular and continuous employment is available to the employee. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091 (2007).

¶ 27 The Commission's determination regarding the extent and permanency of an employee's disability and whether he has met his burden of establishing that he falls into the odd-lot category present questions of fact. *E.R. Moore & Co.*, 71 Ill. 2d at 361; *City of Chicago*, 373 Ill. App. 3d at 1092-93; *Alano*, 282 Ill. App. 3d at 538 (Colwell, J., specially concurring); *Esposito v. Industrial Comm'n*, 186 Ill. App. 3d 728, 737 (1989). It is the function of the Commission to decide questions of fact, including assessing the credibility of witnesses, resolving conflicting evidence, assigning weight to the evidence, and drawing reasonable inferences from the evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). The Commission's determination on a factual matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 856-57 (2004). "Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence." *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 203 (2009). Rather, a decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Hosteny*, 397 Ill. App. 3d at 675. Moreover, we are mindful that where, as here, the trial court reverses the Commission's initial decision and the Commission enters a new decision on remand, this court must decide whether the Commission's initial decision was proper. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 785-86 (2005); *Inter-City Products Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 185, 196 (2001).

¶ 28 In the present case, there was no evidence that claimant's disability was so limiting in nature as to render him obviously unemployable. Similarly, we find no medical evidence to support a claim of total disability. In mid-2008, both Dr. Nicholson and Dr. An released claimant from their care with permanent work restrictions. Although Dr. An limited claimant to sedentary work, such a restriction does not require a finding of total disability. See *Hallenbeck v. Industrial Comm'n*, 232 Ill. App. 3d 562, 569 (1992) (noting that the ability to perform sedentary work militates against a finding of permanent and total disability). Accordingly, to successfully establish a claim for permanent and total disability benefits, claimant was required to show by a preponderance of the evidence that he falls into the "odd lot" category. See *Westin Hotel*, 372 Ill. App. 3d at 544. An employee satisfies this burden by showing either (1) a diligent but unsuccessful attempt to find work or (2) that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. *Westin Hotel*, 372 Ill. App. 3d at 544. In its May 2012 decision, the Commission, affirming and adopting the finding of the arbitrator, determined that claimant failed to establish his entitlement to PTD benefits under the "odd lot" category. Based on our review of the record, we cannot say that the Commission's finding is against the manifest weight of the evidence.

¶ 29 The evidence supports the Commission's finding that claimant failed to prove his disability through a diligent job search. Claimant began his job search in July 2010, just five months prior to the arbitration hearing, notwithstanding that he was released from medical care with restrictions more than two years earlier. Claimant contacted approximately 180 employers, including 10 of the 15 identified by Conway in his labor-market survey. Although several of the employers identified by Conway indicated that they were accepting applications for current and *future* needs, claimant admitted that he did not complete any job applications. More significant,

as the Commission emphasized, claimant's job search was directed at employers unlikely to have positions within the permanent work restrictions imposed by claimant's physicians. With respect to claimant's right shoulder, Dr. Nicholson imposed restrictions of no lifting more than 20 pounds floor to waist, no lifting more than 15 pounds waist to chest, no working over shoulder height, and no repetitive lifting. Dr. An, who treated claimant for his back injury, restricted claimant to sedentary work, with occasional lifting of no more than 10 pounds, no twisting, no bending, no climbing ladders, no kneeling, and no prolonged sitting, standing, or walking. Despite these restrictions, claimant contacted businesses involved in landscaping, roofing, and construction, fields which claimant readily acknowledged would not have positions within his permanent work restrictions. By focusing on positions for which he was clearly not qualified, the Commission could reasonably conclude that claimant failed to establish that his job search was diligent. See *Alexander v. Industrial Comm'n*, 314 Ill. App. 3d 909, 916-17 (2000) (upholding Commission's finding that the employee failed to establish a diligent job search where his search was focused on positions for which he was not qualified).

¶ 30 The Commission also found that claimant improperly limited his job search by consulting only Spanish-language newspapers notwithstanding evidence that his understanding of English was sufficient to conduct a broader job search. The Commission noted, for instance, that claimant was capable of speaking and understanding English sufficiently to apply for and perform his job as a union carpenter. The record also shows that claimant demonstrated his ability to understand English in other ways. Claimant acknowledged that he spoke with some of his co-workers in English. Further, although a translator had been used during claimant's arbitration testimony, the arbitrator noted that claimant appeared to understand many of the questions posed in English and he answered some of the questions in English before they were

translated. The arbitrator's observations were mirrored by Conway, who testified that during his interview, claimant responded to many questions in English even though an interpreter was present. Moreover, although claimant testified at the arbitration hearing that he understood only 20% of conversational English, he told Conway that he understood substantially more—about 50% of what Conway said during his interview. In addition, claimant completed respondent's job-search forms in English. Although respondent insists that his daughter assisted him in completing these forms, the Commission was free to reject this explanation in light of its finding that claimant exaggerated his limited ability to communicate in English.

¶ 31 Claimant raises various objections to the Commission's May 2012 determination that his job search was inappropriate. Claimant first contends that he "performed the most diligent job search he could" given his "severe permanent disabilities and limited transferrable skills." However, the Commission was entitled to find otherwise given that: (1) claimant waited more than two years after he had been released from medical care with restrictions before beginning his job search; (2) his job search was directed principally at positions for which claimant was not qualified; and (3) claimant failed to submit applications to any employer, including those accepting applications for future openings. Claimant also complains that respondent never offered him a job or vocational services. Claimant cites no authority for the proposition that respondent's failure to offer him a job establishes that there is no stable labor market for him. Moreover, this court recently upheld a determination by the Commission that a claimant failed to meet his burden of proving permanent and total disability through a job search directed at "employers who were not hiring" even though the employer had "never offered [the claimant] vocational services to assist with his job search." See *Levato v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶¶ 14, 17, 24.

¶ 32 Claimant also complains that the Commission improperly criticized his use of Spanish-language newspapers in his job search. According to claimant, the Commission made “unfounded and unsupportable inferences regarding [his] English speaking abilities without any facts, witnesses or expert opinions to support such a finding.” We disagree. The Commission had before it ample evidence from which it could reasonably conclude that claimant exaggerated the limits of his ability to communicate in English. See *Hosteny*, 397 Ill. App. 3d at 674 (noting that it is within the province of the Commission to draw reasonable inferences from the evidence). For instance, claimant had been living and working in the United States for more than 30 years. Claimant acknowledged at the arbitration hearing that while working for respondent, his supervisor spoke to him in English and he was able to understand directions. Claimant also admitted speaking to some of his co-workers in English. Claimant told Conway he understood about 50% of what Conway said during his interview. Further, Conway indicated that claimant replied to many of his questions in English despite the presence of a translator. At the arbitration hearing, the arbitrator also personally observed claimant answer questions in English before translation. This evidence undermines claimant’s contention that the Commission’s finding with respect to his ability to communicate in English was “unfounded and unsupportable.”

¶ 33 We also conclude that the Commission could have reasonably concluded that claimant failed to establish that he falls into the odd-lot category on the basis that there are no jobs available to a person of his age, skills, training, and work history. In this regard, the Commission had before it the reports of two vocational counselors—Entenberg and Conway. Conway opined that a stable labor market exists for claimant while Entenberg reached the opposite conclusion. The Commission credited Conway over Entenberg. The Commission explained that the grounds upon which Entenberg relied, *e.g.*, claimant’s inability to sufficiently communicate in English,

his lack of education, severe limitations on claimant's physical abilities, and lack of transferrable skills were based on statements made by claimant over the telephone rather than Entenberg's own observations of claimant or anything in the medical records. Thus, for instance, although Entenberg's conclusions regarding claimant's employability were based in large part upon his inability to communicate in English, she relied only upon claimant's own statements during a phone interview in which an interpreter was used and she simply accepted claimant's assertion that he "only understands a little English that he needed in his work."² As noted earlier, the Commission cited several specific reasons for rejecting Entenberg's conclusion that claimant's difficulty communicating in English constituted an impediment to finding employment.

¶ 34 Beyond Entenberg's underestimation of claimant's ability to understand English, she also failed to address the doctors' findings that claimant could perform light or sedentary work. As the Commission explained, Entenberg simply accepted claimant's statement that all he was

² The circuit court reversed the Commission's decision on the ground that it was based upon "impermissible inferences," including an inference that claimant could likely speak more English than he and Entenberg suggested. In deciding an appeal from a judgment of the circuit court which was rendered on judicial review of a decision of the Commission, we review the Commission's decision, not that of the circuit court. *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 33. In any event, we fail to see what was impermissible about this inference given the Commission's role as fact finder (see *Hosteny*, 397 Ill. App. 3d at 674) and the fact that it provided several specific reasons for rejecting the conclusion that claimant's difficulty communicating in English was as serious an impediment to finding employment as Entenberg believed.

capable of doing was sitting around his house and napping frequently without any medical explanation to support this behavior. Since claimant's medical records indicate that he is capable of sedentary work with restrictions on lifting and physical movements, and Conway's labor-market survey identified numerous companies that hire employees for light or sedentary work, the Commission could reasonably conclude that there is a stable labor market for jobs within claimant's capabilities.

¶ 35 Additionally, the Commission provided several reasons for rejecting claimant's credibility about other physical limitations. For instance, the Commission observed that claimant gave conflicting testimony about his driving ability and that his testimony regarding his educational level was not consistent. These inconsistencies, coupled with claimant's own demonstration of an ability to understand English well enough to answer questions, find work, and follow his supervisors' directions, undermined his credibility.

¶ 36 Likewise, the Commission properly rejected Entenberg's determination that claimant had no transferable skills. Again, Entenberg simply relied on claimant's statement that all he was capable of doing was sitting or walking around the house and napping every few hours with no medical records to support such severe physical limitations. Entenberg also failed to consider claimant's previous work experience. Conway's analysis, in contrast, was performed on the assumption that claimant was capable of light to sedentary work, as the medical records reflect. Conway also considered claimant's full work history and found that claimant had transferrable skills that could help him obtain a variety of jobs. These skills included average math, language, and the ability to read blueprints. Since Conway's opinion is more aligned with the evidence of record, the Commission properly found it to be more reliable than Entenberg's report.

¶ 37 Claimant criticizes Conway’s labor-market survey. Claimant asserts that the survey cited only 15 jobs. According to claimant 10 of those employers “did not indicate that they currently had jobs” and the remaining employers required qualifications claimant did not have. However, claimant misrepresents the information contained in the survey. At the time Conway prepared the survey, five of the employers were hiring, three additional employers indicated that they were accepting applications for current and future needs, and at least four others indicated that they were accepting applications for future needs. Claimant contacted only two-thirds of the employees identified in the survey, and he did so more than a month after the survey was completed. This latter factor could explain any discrepancies in the number of employers hiring. In any event, as respondent notes, identifying existing openings encompassed only part of Conway’s labor-market survey. The survey also involved assessing how frequently positions falling within claimant’s restrictions are available with each employer, whether those employers anticipated openings in the future, and whether the employer accepts applications for future positions. As noted above, several employers indicated that they were accepting applications for future positions. Yet, claimant did not submit an application to any of them. Moreover, there is no indication that claimant used the information gathered in the survey to focus his job search on the types of positions identified by Conway as falling into his permanent work restrictions.

¶ 38

III. CONCLUSION

¶ 39 In short, considering the evidence presented at the arbitration hearing in light of the Commission’s role as fact finder, we cannot say that the Commission’s May 2012 decision is against the manifest weight of the evidence. As such, we will not disturb the Commission’s finding that claimant failed to establish that he is permanently and totally disabled under an odd-lot theory. Hence, we reverse the judgment of the circuit court of Cook County setting aside the

Commission's May 2012 decision, we vacate the Commission's December 2013 corrected decision after remand, we vacate the circuit court's decision confirming the Commission's December 2013 decision, and we reinstate the Commission's May 2012 decision.

¶ 40 Circuit court judgment entered on November 1, 2012, reversed. Corrected Commission decision after remand entered on December 20, 2013, vacated. Circuit court judgment entered on July 24, 2014, vacated. Commission decision entered on May 7, 2012, reinstated.