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2015 IL App (1st) 143185WC-U

FILED: December 23, 2015

NO. 1-14-3185WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CHICAGO PARK DISTRICT,)	Appeal from
Appellant,)	Circuit Court of
v.)	Cook County
THE ILLINOIS WORKERS' COMPENSATION)	Nos. 14L50068
COMMISSION <i>et al.</i> (Robert McLean, Appellees).)	14L50113
)	Honorable
)	James M. McGing,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Stewart
concur in the judgment.

ORDER

¶ 1 *Held:* (1) The Commission's finding that claimant failed to establish his entitlement to permanent total disability benefits was not against the manifest weight of the evidence and the circuit court erred by reversing the Commission's decision.

(2) When finding claimant entitled to permanent partial disability benefits, the Commission erred in failing to consider claimant's entitlement to a wage differential award.

¶ 2 On January 17, 2008, claimant, Robert McLean, filed an application for adjustment of claim (case No. 08WC02385) pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2006)), alleging a work-related injury to his right knee that occurred on

October 19, 2007, and seeking benefits from the employer, Chicago Park District. On August 18, 2008, he filed a second application (case No. 08WC35994), also seeking benefits from the employer but alleging a work-related injury to his right knee that occurred on July 22, 2008. His claims were consolidated and, following a hearing, the arbitrator found claimant sustained work-related accidents on both alleged accident dates. However, she also determined claimant's current condition of ill-being was causally related to only his July 2008 accident and denied claimant benefits associated with his October 2007 accident. In connection with his July 2008 accident, the arbitrator (1) ordered the employer to pay for vocational rehabilitation services claimant received; (2) awarded claimant 186-6/7 weeks' temporary total disability (TTD) benefits; (3) awarded claimant 1-5/7 weeks' maintenance benefits; and (4) awarded claimant permanent total disability (PTD) benefits for life, beginning December 15, 2012.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision with respect to claimant's October 2007 accident. However, with one commissioner dissenting, the Commission reversed the arbitrator's award of PTD benefits associated with claimant's July 2008 accident and, instead, awarded him permanent partial disability (PPD) benefits for a 60% loss of use of the person as a whole. The Commission otherwise affirmed and adopted the arbitrator's decision with respect to that accident.

¶ 4 On judicial review, the circuit court of Cook County reversed the Commission's denial of PTD benefits. The employer appeals, arguing the Commission's reversal of the arbitrator's award of PTD benefits and decision to, instead, award claimant PPD benefits for a 60% loss of use of the person as a whole was correct and not against the manifest weight of the evidence. Claimant disagrees, arguing he established his entitlement to PTD benefits. Alternatively, claimant maintains the Commission erred in failing to consider a wage differential award when

awarding PPD benefits. We reverse the circuit court's judgment but remand to the Commission with directions that it vacate the portion of its decision awarding claimant PPD benefits and determine claimant's entitlement to a wage differential award on the merits.

¶ 5

I. BACKGROUND

¶ 6 The arbitration hearing in this matter was conducted in November and December 2012. Claimant, who was 52 years old at the time of arbitration, testified he graduated from high school in 1978. Thereafter, he worked as a railroad switch man, a delivery man in the parts department of a car dealership, and a union laborer for two construction companies. In May 1988, claimant began working for the employer as "a building construction laborer," which he described as a union job that received union scale pay. His job duties involved "working with all trades except electricians" and included activities such as digging holes, stretching fences, putting in fence posts, tearing up flooring by hand, and unloading trucks. Claimant testified he received no specialized training through either the employer or the union. Further, he worked for the employer until October 10, 2012, when he was terminated from his employment.

¶ 7 In August 1993, claimant injured his right knee while working for the employer. The parties entered into a settlement agreement pursuant to which claimant received benefits for a 20% loss of use of his right leg.

¶ 8 Claimant testified that, while working on October 19, 2007, and driving a pickup truck owned by the employer, he was involved in a motor vehicle accident. He stated another driver ran a red light and he was "broad-sided." The impact from the collision drove his right knee into the steering column of his work vehicle. Following the accident, claimant noticed swelling in his right knee and sought medical treatment. He testified he was taken off work and, on October 25, 2007, began seeing Dr. Dirk Nelson, who continued him off work. On Novem-

ber 9, 2007, claimant underwent a magnetic resonance imaging (MRI) at Dr. Nelson's recommendation.

¶ 9 On December 5, 2007, Dr. Nelson performed arthroscopic surgery on claimant's right knee. The record reflects his postoperative diagnosis was "[m]edial meniscal tear, right knee plus patellofemoral athrosis, grade III." Claimant testified he continued to follow up with Dr. Nelson after surgery. Dr. Nelson kept claimant off work and prescribed physical therapy. Ultimately, he authorized claimant to return to regular-duty work on February 4, 2008. Claimant testified he returned to full-duty work for the employer and experienced only "[a]verage aches and pains" in his right knee.

¶ 10 Claimant stated he continued to perform his regular work duties for the employer without incident until July 22, 2008. On that date, he was "pull[ing] benches" for the employer, which required him to "dig around the bench bottom *** and then physically pull them out." Claimant testified he was using a shovel to dig a bench out, his right foot slipped off the shovel, and he "felt a twist in [his right] leg and a pop" in his right knee. He stated his right knee began to swell.

¶ 11 Claimant testified he reported the incident to his boss and sought medical treatment the same day. Medical records show claimant provided a history of his work accident and reported right knee pain. He was initially diagnosed with a right knee sprain and taken off work. On August 12, 2008, claimant was referred to Dr. Brian Cole at Midwest Orthopedics, whom he began seeing on August 25, 2008. Dr. Cole noted claimant had a recent MRI that demonstrated degenerative joint disease and a degenerative medial meniscus tear. Dr. Cole prescribed claimant medication, gave him a cortisone injection in his right knee, and took him off work for a couple of days.

¶ 12 Claimant testified, on September 2, 2008, he returned to work but his right knee felt "[l]ike a throbbing toothache." On September 29, 2008, he followed up with Dr. Cole, who recommended surgery but also stated claimant could "continue to work full duty, no restrictions." However, Dr. Cole subsequently revised his recommendation and restricted claimant to sedentary work. Claimant testified he performed light-duty work until November 5, 2008, when Dr. Cole performed surgery on his right knee in the form of a diagnostic arthroscopy and debridement of a medial meniscal tear. After surgery, claimant was taken off work and continued to follow up with Dr. Cole, who provided him with a series of injections in his right knee. From November 21, 2008, through January 30, 2009, he also underwent physical therapy at Dr. Cole's recommendation.

¶ 13 Claimant testified, on February 5, 2009, he followed up with Dr. Cole. He stated, at that time, he continued to experience pain in his right knee that was a 7 or 8 out of 10. Dr. Cole noted claimant's pain was "debilitating" and narcotic medication had not helped. He referred claimant to Dr. Brett Levine at Midwest Orthopedics and found claimant "capable of a desktop job only with no squatting, kneeling[,] or climbing." Claimant testified, on February 20, 2009, he returned to work for the employer.

¶ 14 On March 2, 2009, claimant began seeing Dr. Levine. Dr. Levine noted claimant had a history of multiple right knee arthroscopies and old radiographs that showed some degenerative joint disease. He opined claimant was a good candidate for knee replacement surgery.

¶ 15 On April 22, 2009, claimant was examined by Dr. Ira Kornblatt at the employer's request. He complained "of ongoing pain and weakness with giving out of the right knee." Dr. Kornblatt noted claimant had suffered multiple injuries to his right knee and his "recent injury of [July] 2008 was an acute episode in the face of chronic osteoarthritis." He opined claimant's July

2008 accident "resulted in an aggravation of [claimant's] preexisting arthritis" and "likely accelerated [claimant's] need for [a] total knee arthroplasty." Dr. Kornblatt further opined that claimant had a "significant disability" and stated claimant was "capable only of doing a desk job[,] which he is doing at the present time."

¶ 16 On July 16, 2009, Dr. Levine performed a total right knee arthroplasty on claimant. Claimant testified, following surgery, he underwent physical therapy, continued to follow up with Dr. Levine, and was off work. He stated the condition in his knee did not improve and he continued to experience pain. On October 9, 2009, claimant had manipulation while under anesthesia at Dr. Levine's recommendation. However, he testified his pain continued and he was continued off work.

¶ 17 On February 5, 2010, claimant returned to see Dr. Levine. He testified, around that time, his pain "continued to be bad." He felt a pinching sensation around his right knee cap, had difficulty navigating stairs, and could not bend his right leg. Dr. Levine referred him to Dr. Cole to discuss the possibility of additional surgery.

¶ 18 On March 31, 2010, Dr. Cole performed surgery on claimant in the form of a right knee extensive synovectomy, capsular release, and lateral release. Claimant testified his knee felt the same after surgery. Following surgery, Dr. Cole recommended physical therapy and continued claimant off work.

¶ 19 On May 10, 2010, Dr. Cole recommended continued physical therapy and refilled claimant's prescription for Norco. He found claimant was "capable of a desktop job only" but if his job would not allow him to attend physical therapy during daytime hours, "he must remain off of work." On July 12, 2010, Dr. Cole noted claimant was making slow progress but continued to have pain and difficulty with some activities of daily living. Again, he recommended con-

tinued physical therapy and refilled claimant's Norco prescription. Dr. Cole also gave claimant a corticosteroid injection and a work status note "keeping him on desktop duty until his next visit."

¶ 20 On August 11, 2010, Dr. Cole spoke with claimant by telephone and recommended he undergo a functional capacity evaluation (FCE), which was performed on September 3, 2010. The FCE showed claimant "demonstrated the physical capabilities and tolerances to function between the Medium and Medium-Heavy categories of work, which is indicative of [two]-hand occasional lift of [60 pounds] from floor-waist level." The FCE report further noted the job description the employer provided for claimant required him "to function at the Heavy category of work."

¶ 21 On September 10, 2010, claimant followed up with Dr. Cole, who stated he reviewed claimant's FCE. Dr. Cole found claimant's FCE "to be valid" but "not a job match fit." He recommended permanent restrictions for claimant as defined in the FCE. Dr. Cole also ordered claimant's prescription for Darvocet refilled, noting he should be taking it "just at night" and switched claimant's anti-inflammatory medication to Mobic.

¶ 22 Claimant testified, on September 13, 2010, he returned to work for the employer in a light-duty capacity. He testified that, on September 16, 2010, he spoke on the telephone with Andre Taylor, the employer's director of risk management. Taylor told claimant to take sick pay the following day and that he could not return to work "since [he] was on Norco." Claimant stated September 16, 2010, was the last day he physically worked for the employer. Thereafter, he "started back on temporary total disability benefits."

¶ 23 Claimant testified he continued to have follow-up appointments with Dr. Cole. On May 5, 2011, he saw Dr. Cole and complained of "increasing medial sided pain" that was "worse with standing." Claimant reported that his pain was persistent and "about the same as

before surgery." Dr. Cole recommended either Tylenol or Tramadol for pain in addition to claimant's anti-inflammatory medication. He also referred claimant back to Dr. Levine.

¶ 24 On June 14, 2011, claimant saw Dr. Levine and reported continued pain on his right side. Dr. Levine recommended a bone scan to determine if claimant's implants were loose. He also prescribed pain medication, which claimant testified included Norco, and took claimant off work "until we have a better grasp as to what is going on within his knee."

¶ 25 On August 9, 2011, claimant followed up with Dr. Levine, who noted he had reviewed claimant's bone scan. Dr. Levine stated the scan showed "uptake along the medial aspect of [claimant's] knee, particularly where it is painful, consistent with the possibility of loosening just along the medial aspect of his knee." He stated he discussed with claimant that he was "really not sure that his knee is loose" but suggested following it closely. Dr. Levine recommended considering revision surgery "if his tibia was loose." Further, he stated as follows:

"I would suggest maybe a surveillance follow up to see how he does. I do not think he is going to be able to return to work the way he is. I am no[t] even sure if we even revise the knee he could return to work. My suggestion is to continue to follow this and see him back in about 3 to 6 months. At that point in time, we can make any changes in our treatment plan or decision process."

¶ 26 On January 17, 2012, claimant returned to see Dr. Levine, who noted claimant had "a history of total knee arthroplasty on the right side with pain and a bone scan which show[ed] evidence of loosening." He stated claimant continued to have trouble and suggested considering revision surgery on claimant's right knee. However, Dr. Levine noted claimant "was getting another opinion with worker[s'] compensation" and they would wait to get that opinion

before moving forward. He refilled claimant's pain medications and continued him off work.

¶ 27 On January 25, 2012, claimant returned to see Dr. Kornblatt at the employer's request. He complained "of ongoing anterior medial pain about the right knee with stiffness of the right knee" and reported he was taking Norco three times a day to control his pain. Dr. Kornblatt stated he reviewed an x-ray of claimant's right knee, which revealed "a total knee arthroplasty in satisfactory position without evidence of loosening or infection." He opined claimant's ongoing disability remained a direct problem related to his work accident. Dr. Kornblatt further stated claimant had reached a "plateau of improvement" and it was "unlikely he [would] improve substantially." He believed claimant would require ongoing treatment and follow up and would "never return to his previous level of function." Dr. Kornblatt stated it was possible claimant would need a revision total knee replacement in the future. With respect to claimant's work restrictions, Dr. Kornblatt stated as follows:

"[Claimant] will require restrictions on a permanent basis. At the present time he is capable, with respect to his right knee, of carrying out a sedentary job. However, he also does require ongoing narcotic medication and apparently [the employer] will not allow him to return to the job while taking narcotics. If he can be weaned from the narcotics, it is then possible that he would be capable of carrying out a sedentary job."

¶ 28 Claimant testified he followed up with Dr. Levine in June 2012, but was told Dr. Levine's office lost all of his records for his patients on that particular day. On August 17, 2012, he saw Dr. Levine for the last time prior to the arbitration hearing. Dr. Levine noted as follows:

"[Claimant] still reports he is having pain in the knee. It is really unchanged, but is very manageable with oral pain medications. He takes this sparingly and it seems to get him through the day. He is really otherwise not terribly limited in those activities of daily living.

* * *

PLAN: I discussed with [claimant] at this point in time that I think revision surgery is probably not the best idea for him due to the fact that he is doing well with oral pain medications. I think this is the best option for him. I would do this for as long as possible and since he is relatively young even if we did revise him now he would still need another operation in his future and if we could buy him another 10-12 years we could always revise this at that time to get some more motion and that would probably be the last surgery he would need. *** Again, I think [revision surgery] would be a little bit overkill at this time due to the fact that his limitations are not tremendous and he is still being able to perform his activities of daily living on a regular basis. He does understand that at this time and will continue the oral pain medications on an as needed basis and see him back every year for routine radiographic and clinical followup."

¶ 29 Claimant testified Dr. Levine prescribed 90 Norco pills for a 30-day period. He stated he took approximately two pills per day.

¶ 30 At arbitration, claimant presented the testimony of his vocational expert, Dr. Jeff Lucas. Lucas testified he held a Ph.D. in human service, disability, and rehabilitation; was a certified rehabilitation counselor; and owned a company called Effective Rehabilitation Management. On March 19, 2012, Lucas met with claimant for the first time. He reviewed claimant's vocational and medical background and performed various tests on claimant. Lucas stated he tested claimant's scholastic level and determined claimant "performed at the 4th to 6th Grade level," which was congruent with claimant's past history of working "at the unskilled level." He found claimant had been "working at his potential" and "had no transferable skills."

¶ 31 Lucas testified he conducted labor market surveys for claimant. He looked at various positions, including security guard, desk clerk, café attendant, cashier, flagger, route service merchandiser, shipping coordinator, loss prevention agent, valet driver, club attendant, retail sales associate, and customer service employee. Lucas stated he found no jobs that claimant was qualified to perform, stating the jobs were either outside of the physical demands specified by claimant's physicians or were outside of claimant's education, training, and experience. He testified he relied on Dr. Kornblatt's medical opinion that claimant might be able to perform sedentary work but would have issues due to his ongoing use of narcotic medication and Dr. Levine's statement in August 2011 that that he did not think claimant was " 'going to be able to return to work the way he is.' "

¶ 32 Lucas identified exhibits, which he testified contained two of the labor market surveys he performed for claimant. He stated those two surveys contained approximately 80 in-depth evaluations of jobs. Lucas reiterated that he was unable to find any jobs suitable for claimant. Again, he believed each position was outside of claimant's physical capacities or functional abilities, noting the jobs "required typing. They required lifting. They required previous

experience, and things that he was not trained or able to perform."

¶ 33 Lucas further testified he conducted a job search for claimant and identified an exhibit containing a job search diary he compiled. The diary contained 100 jobs. Lucas asserted he was unable to find a job for claimant.

¶ 34 Lucas opined claimant had suffered a permanent loss of earning capacity, there was no stable labor market available to him, and he was not employable. He testified claimant's age factored into his opinion, noting claimant was over 50 and older candidates had more difficulty finding jobs. Lucas also considered claimant's lack of transferrable skills and his lack of education or training over and above high school. He testified claimant was not computer literate, was unable to type, and had "not taken any classes at all." Additionally, Lucas stated he based his opinion on claimant's physical condition. He noted claimant was "relegated to sedentary work," had narcotic necessities for pain, and was unable to do the walking and standing necessary for many of the available jobs.

¶ 35 In a report, dated May 15, 2012, Lucas stated as follows:

"Unskilled sedentary jobs take minimal skills in office procedures or customer service. [Claimant] does not have any marketable skills for sedentary positions and would have a difficult time performing a sedentary job for [eight] hours and [five] days a week."

Additionally, that report reflects Lucas relied on Dr. Kornblatt's January 25, 2012, report and Dr. Levine's August 2011 opinions that claimant could not return to work "the way he is" and might be unable to return to work following knee revision surgery.

¶ 36 Lucas also determined claimant's size and appearance factored into his opinion and "would not lend itself to [claimant] doing [certain] types of positions." He noted claimant

was approximately "six, five," weighed close to 300 pounds, had visible tattoos all over his arms, and wore earrings. Lucas testified as follows:

"Well, [claimant], he's bald. He has a long gray beard, and that is not the type of persona that most companies would want for a sales position. It may be perfectly applicable to other positions, but in terms of a company that is utilizing employees to put forth their business, he does not present that type of persona size-wise, persona-wise[,] or testing-wise."

¶ 37 Lucas testified he prepared a vocational rehabilitation plan for claimant. The plan required claimant to contact friends and work acquaintances for job possibilities and keep a record of the places he visited and contacted. Claimant testified he began actively looking for employment in May 2012. He stated he conducted a job search and identified exhibits containing various jobs for which he applied. Ultimately, his job search was unsuccessful. Lucas testified he received claimant's job search logs and noted claimant applied for "maybe 100 positions." On cross-examination, claimant acknowledged that his job search included positions as forklift operator and laborer.

¶ 38 On cross-examination, Lucas acknowledged that while he was not a medical doctor, his opinions were based, in part, on claimant's use of prescribed medication. He also testified that while he relied on Dr. Levine's opinions, he was unaware that Dr. Levine's final report, dated August 17, 2012, indicated claimant was using oral medication sparingly. He testified that was not what claimant reported to him. However, he stated the information contained in Dr. Levine's August 17, 2012, report did not change his opinions regarding claimant's employability.

¶ 39 At arbitration, the employer presented its own vocational expert, Jacky Ormsby.

Ormsby testified she was a certified rehabilitation counselor and a licensed clinical professional counselor. She also held a Master's Degree in Rehabilitation Counseling. Ormsby met with claimant on June 5, 2012 and performed a vocational assessment. She testified she obtained claimant's medical information, educational background, work history, and information regarding his activities of daily living.

¶ 40 Ormsby stated the last medical report she reviewed was Dr. Kornblatt's report dated January 25, 2012, and her review of claimant's medical records showed claimant was restricted to "[a] sedentary work level." She noted claimant graduated high school and reported a previous work history that included working as a parts delivery driver and a counter clerk for a car dealership. According to Ormsby, claimant reported that he owned a computer and used e-mail and the internet. However, claimant asserted he was not the best typist and utilized "the hunt and peck method."

¶ 41 Ormsby identified a labor market survey she performed for claimant, dated July 6, 2012. She testified she identified 13 different companies with positions in which claimant could earn an average of \$11.83 per hour. Ormsby stated the majority of the 13 positions were sedentary in nature but some required lifting over 20 pounds. She testified she asked those potential employers if claimant's work restrictions could be accommodated and "[s]ome said they would accommodate them." She noted which employers would be accommodating on her survey report. On cross-examination, Ormsby identified two potential employers that stated they would accommodate claimant's restrictions. She testified the remaining positions were within the sedentary work level.

¶ 42 Ormsby opined claimant was able to work at a sedentary physical demand level. She believed he had "certain skills that he [could] use from his past and prior experience and

could take and use for another job." Ormsby testified, on November 14, 2012, she drafted a rehabilitation plan for claimant. In connection with her plan, Ormsby recommended claimant meet with her and identify appropriate job goals based on his educational background, work history, and physical demands. She testified she would provide training to claimant regarding how to post resumes online, how to look for jobs, and how to prepare a resume. She would also teach claimant job seeking skills and train him on how to talk to potential employers about his injury. On cross-examination, Ormsby testified she believed Lucas helped claimant with some job interviewing skills and "[p]ossibly" tried to do most everything she outlined and suggested in her plan.

¶ 43 Ormsby testified that during her time as a certified rehabilitation counselor she had seen people work with restrictions and while taking medication. Additionally, she stated she reviewed Lucas's labor market surveys. She found them unusual because "they were printouts of *** Internet ads" and had a "range of different job physical demand levels" that "went anywhere from sedentary to heavy work levels."

¶ 44 Lucas testified he reviewed Ormsby's labor market survey and found the jobs listed in the survey were inappropriate for claimant. He stated the survey contained 13 jobs and all of them were well above claimant's general education development and 8 of them were above sedentary level. Claimant testified he applied for 5 of the 13 positions listed in Ormsby's survey without success.

¶ 45 At arbitration, the employer also submitted a Vocamotive labor market survey dated January 5, 2012, and signed by certified rehabilitation counselors Lisa Helma and Joseph Belmonte. The survey report states claimant was not personally interviewed or evaluated. Further, Vocamotive personnel relied on claimant's September 2010 FCE, showing he was capable

of functioning at a medium to medium-heavy level of physical demand. The report stated that, although claimant had lost access to his usual and customary line of employment, based on the FCE results, he remained employable. Available positions for claimant were identified as including customer service representative, dispatcher, hotel clerk, and administrative clerk. Further, the report identified claimant's wage earning potential as being between minimum wage and \$11.00 per hour.

¶ 46 Lucas testified he reviewed the labor market survey prepared by Vocamotive. He did not agree with the findings and conclusions contained in the Vocamotive report. Specifically, Lucas disagreed with the jobs that were chosen. He testified the jobs were not appropriate for claimant as they were above claimant's general educational development, functional capacities, and the releases that were given to claimant by his physicians.

¶ 47 Claimant testified the only thing he knew how to do was be a laborer, which he had done for over 30 years. He identified a letter he received from the employer, notifying him of his termination in October 2012. Claimant further stated that, as of the time of arbitration, he noticed his knee was "the same as it was since [his] surgery." He testified he felt "a pinching" sensation in his right knee and described a "constant throbbing" that was "like a toothache." Claimant stated his condition kept him from doing everyday things. He felt stiffness in his right leg all day long and would experience cramps and numbness when driving a car. Claimant testified he continued to take Norco but did not like to take pain medication because it made him "get loopy" and affected his concentration. Further, he noted that he had two motorcycles that he enjoyed riding prior to his accident. Claimant stated he currently rode them very little.

¶ 48 On cross-examination, claimant testified he was a member of the East Side Athletic Club. In the past he had acted as the club's president, vice president, and secretary. He was

also on the board of directors. Claimant testified he was capable of walking and driving. Additionally, he agreed that, as of August 17, 2012, he had been taking oral medication "sparingly."

¶ 49 On March 7, 2013, the arbitrator issued her decision in the matter. As discussed, she found claimant sustained work-related accidents on both of his alleged accident dates, October 19, 2007, June 22, 2008, but determined only his July 2008 accident was causally related to his current condition of ill-being. In connection with claimant's July 2008 accident, the arbitrator awarded benefits, including PTD benefits for life, beginning December 15, 2012. She agreed with claimant's contention that he was permanently and totally disabled under an "odd-lot" theory of recovery. The arbitrator found claimant "established by a preponderance of evidence that his training, education, experience, and physical condition prevent[ed] him from engaging in stable and continuous employment."

¶ 50 On December 20, 2013, the Commission issued decisions in the matter. It affirmed and adopted the arbitrator's decision with respect to the October 2007 accident. However, with one commissioner dissenting, the Commission reversed the arbitrator's award of PTD benefits associated with claimant's July 2008 accident and, instead, awarded him PPD benefits for a 60% loss of use of the person as a whole. The Commission otherwise affirmed and adopted the arbitrator's decision with respect to that accident.

¶ 51 In reaching its decision, the Commission first found the medical evidence alone failed to support claimant's assertion that he was unemployable. It stated both Dr. Cole and Dr. Kornblatt agreed claimant was capable of returning to sedentary work "although Dr. Kornblatt opined [claimant] might need to be weaned off narcotics before returning to work." The Commission further noted Dr. Levine found claimant "was not very limited in the activities of daily living and recommended against a total knee replacement as long as he was doing well with the

oral medications."

¶ 52 The Commission also determined claimant failed to prove his entitlement to PTD benefits under the odd-lot theory. In particular, it held claimant failed to demonstrate that he was unable to make some contribution to the work force sufficient to justify the payment of wages. In so holding, the Commission stated that, although claimant conducted a job search, his search was not diligent. The Commission also found the opinions of the employer's vocational expert, Ormsby, more credible and persuasive than those of claimant's expert, Lucas.

¶ 53 On October 2, 2014, the circuit court of Cook County reversed the Commission's denial of PTD benefits in connection with the July 2008 accident.

¶ 54 This appeal followed.

¶ 55 II. ANALYSIS

¶ 56 A. PTD Benefits

¶ 57 On appeal, the employer argues the circuit court erred by reversing the Commission's finding with respect to claimant's entitlement to PTD benefits. In particular, it maintains the Commission's decision to reverse the arbitrator's award of PTD benefits and, instead, award claimant PPD benefits for a 60% loss of use of the person as a whole was correct and not against the manifest weight of the evidence.

¶ 58 A claimant is entitled to PTD benefits under the Act when he suffers a "complete disability, which renders the employee wholly and permanently incapable of work." 820 ILCS 305/8(f) (West 2006). "[A] PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage." *Lenhart v. Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 32, 29 N.E.3d 648. "The claimant need not *** be reduced to total physical incapacity before a permanent total disability award may be granted." *Ceco Corp. v. Industrial*

Comm'n, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 845 (1983). "Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them." *Westin Hotel v. Industrial Comm'n of Illinois*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357 (2007).

¶ 59 "The odd-lot category for purposes of a PTD award arises when a 'claimant'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.' " *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 33, 29 N.E.3d 648 (quoting *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill. 2d 538, 546-47, 419 N.E.2d 1159, 1163 (1981)). "The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing 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, 865 N.E.2d at 357. "Once the claimant establishes that he falls into the 'odd-lot' category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists." *Westin Hotel*, 372 Ill. App. 3d at 544, 865 N.E.2d at 357.

¶ 60 "[W]hether a claimant is permanently and totally disabled under section 8(f) of the Act is a question of fact to be determined by the Commission, and its determination on this issue cannot be overturned on review unless it is against the manifest weight of the evidence." *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 31, 29 N.E.3d 648. When making its factual determinations, it is the Commission's function "to judge the credibility of the witnesses, determine the weight to be given their testimony, and resolve the conflicting medical evidence." *Sharwarko v. Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 56, 28 N.E.3d 946. "For a

finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Levato v. Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶ 21, 14 N.E.3d 1195. "The appropriate test is whether there is sufficient evidence in the record to support the Commission's decision" (*Sharwarko*, 2015 IL App (1st) 131733WC, ¶ 57, 28 N.E.3d 946) not "[w]hether a reviewing court might reach the same conclusion" (*Levato*, 2014 IL App (1st) 130297WC, ¶ 21, 14 N.E.3d 1195).

¶ 61 Here, the Commission determined claimant failed to establish his entitlement to PTD benefits either through the weight of the medical evidence or under an odd-lot theory of recovery. Although the record contains conflicting evidence as to this issue, we find there was sufficient evidence to support the Commission's decision.

¶ 62 First, the record shows both the arbitrator and the Commission determined the medical evidence failed to support claimant's permanent and total disability claim. The Commission stated as follows:

"Dr. Cole and *** Dr. Kornblatt[] agreed that [claimant] was capable of returning to work at sedentary duty, although Dr. Kornblatt opined [claimant] might need to be weaned off narcotics before returning to work. Dr. Levine *** found that [claimant] was not very limited in the activities of daily living and recommended against a total knee replacement as long as he was doing well with oral medications."

¶ 63 The record contains medical evidence that supports the Commission's finding that, although claimant could not return to his previous position of a laborer, he was not permanently and totally disabled. In July 2008, claimant sustained an accidental work-related injury to

his right knee and underwent surgical procedures with Dr. Cole and Dr. Levine in November 2008, July 2009, and March 2010. Subsequent to his final surgery, Dr. Cole recommended "desktop duty for claimant" and an FCE. Claimant's September 2010 FCE showed he had physical capabilities in the medium and medium-heavy categories of work. That same month, Dr. Cole recommended permanent restrictions for claimant as defined in his FCE. Although in August 2011, Dr. Levine reviewed a bone scan performed on claimant and found evidence of loosening, he also stated, he was "really not sure that [claimant's] knee [was] loose." Additionally, one year later, in August 2012, Dr. Levine found claimant was "really otherwise not terribly limited in those activities of daily living" and opined revision surgery was unnecessary at that time "due to the fact that [claimant's] limitations [were] not tremendous and he [was] still being able to perform the activities of daily living on a regular basis."

¶ 64 Additionally, in January 2012, Dr. Kornblatt opined claimant was "capable, with respect to his right knee, of carrying out a sedentary job." While he also noted the employer would "not allow [claimant] to return to the job while taking narcotics" and stated "if [claimant] can be weaned from narcotics, it is then possible that he would be capable of carrying out a sedentary job," Dr. Levine's records show that by August 2012 claimant was only "sparingly" using his narcotic medication.

¶ 65 We find that an opposite conclusion from that reached by the Commission with respect to the medical evidence is not clearly apparent. Thus, its finding that the medical evidence failed to establish that claimant was permanently and totally disabled was not against the manifest weight of the evidence.

¶ 66 Second, the Commission also found claimant failed to establish his entitlement to PTD benefits under an odd-lot theory of recovery. Initially, the Commission determined that,

while claimant did conduct a job search, his search was not diligent. It noted claimant "applied for many jobs which were outside of his work restrictions" and found such "applications were not serious attempts to find work." The Commission also found claimant's choice of appearance reflected "a disingenuous attempt to find suitable work." In particular, it concluded claimant's visible tattoos and earrings "hurt [his] attempt to find work."

¶ 67 Again, the record contains support for the Commission's findings. Evidence showed claimant worked as a laborer for the employer but, due to his knee condition, could no longer perform that type of work. Nevertheless, both claimant's testimony at arbitration and the job search records he submitted showed his search for employment included many positions as a laborer or maintenance worker. Additionally, Lucas, claimant's own vocational expert, testified claimant's appearance, which included visible tattoos on his arms and earrings, negatively impacted claimant's search for employment. Given the evidence presented, we cannot say an opposite conclusion from that reached by the Commission was clearly apparent. Its finding that claimant failed to perform a diligent job search was not against the manifest weight of the evidence.

¶ 68 Finally, the Commission also found Ormsby's opinions more credible and persuasive than those of Lucas. It stated as follows:

"Lucas concluded that [claimant] tested to the 4th or 5th [*sic*] grade level and had no transferable skills from prior positions. In contrast to [Lucas's] conclusions, the undisputed testimony shows that [claimant] has a high school education, has a computer, and can use e[-]mail and the Internet. Further, [claimant] himself admitted that he worked for a car dealership in the parts department and

served as the Secretary, Vice-President, President[,] and on the Board of Directors of the East Side Athletic Club. [Claimant's] own testimony regarding his experience demonstrates transferable job skills and rebuts [Lucas's] conclusions."

¶ 69 Here, the record contained conflicting opinions from the parties' vocational experts, Ormsby and Lucas. However, it was within the province of the Commission to weigh the evidence, judge witness credibility, and resolve conflicts in the evidence. We find no error in the manner in which the Commission performed its functions. The record contains support for the Commission's findings as to Lucas's conclusions and we decline to reweigh the evidence.

¶ 70 Additionally, we note that, while not expressly referenced by the Commission, the record indicates Lucas was either unaware or failed to consider Dr. Levine's most recent August 2012 medical opinions regarding claimant. Lucas's testimony and records show he relied heavily on Dr. Levine's opinions; however, he referenced only the opinions expressed by Dr. Levine in August 2011 when forming his own opinions as to claimant's employability. Specifically, at arbitration, Lucas acknowledged that he was not aware that Dr. Levine's August 2012 note stated claimant was using his narcotic medication only "sparingly." Further, the record indicates he also failed to consider Dr. Levine's August 2012 opinion that claimant was "not terribly limited in those activities of daily living" and that "his limitations [were] not tremendous." We find these facts lend further support to the Commission's decision.

¶ 71 Based on the circumstances presented, the Commission committed no error in finding claimant failed to establish that he was permanently and totally disabled based on an odd-lot theory of recovery. The Commission's ultimate denial of PTD benefits was not against the manifest weight of the evidence.

¶ 72

B. PPD—Wage Differential Benefits

¶ 73

On appeal, claimant argues that, if the Commission committed no error in finding that he failed to prove his entitlement to PTD benefits, it did commit error when awarding PPD benefits. He contends that, rather than award PPD benefits based on a 60% loss of use of the person as a whole under section 8(d)(2) of the Act, the Commission should have awarded him wage differential benefits under section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1), 8(d)(2) (West 2006)). Claimant maintains he never waived a wage differential award, such an award is preferred over PPD benefits under section 8(d)(2) of the Act, and the record contains sufficient evidence to support an award of wage differential benefits. The employer responds, arguing claimant failed to present sufficient evidence at arbitration to support a wage differential award.

¶ 74

"Section 8(d) details two types of compensation for employees who are permanently and partially disabled; subparagraph 1 provides for a wage differential award and subparagraph 2 provides for a percentage of the person as a whole award." *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 42, 29 N.E.3d 648. "To qualify for a wage differential award under section 8(d)(1), [the] claimant must prove (1) partial incapacity which prevents him from pursuing his 'usual and customary line of employment,' and (2) an impairment of earnings." *Gallianetti v. Industrial Comm'n of Illinois*, 315 Ill. App. 3d 721, 730, 734 N.E.2d 482, 489 (2000). "[T]he plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity." *Gallianetti*, 315 Ill. App. 3d at 728, 734 N.E.2d at 488.

¶ 75

In *Levato*, 2014 IL App (1st) 130297WC, 14 N.E.3d 1195, this court addressed similar circumstances to those in the case at bar. There, the Commission found the claimant was not entitled to PTD benefits and awarded PPD benefits based on a 35% loss of use of the person

as a whole without commenting on the claimant's eligibility for a wage differential award. *Levato*, 2014 IL App (1st) 130297WC, ¶ 18, 14 N.E.3d 1195. We reversed and remanded to the Commission, finding the "question of the claimant's entitlement to an award under section 8(d)(1) appear[ed] from the evidence of record in th[e] case" and the Commission "should have decided the issue on the merits." *Levato*, 2014 IL App (1st) 130297WC, ¶¶ 25-26, 14 N.E.3d 1195.

¶ 76 In so holding, we noted the expressed preference in case law for wage differential awards over scheduled awards. *Levato*, 2014 IL App (1st) 130297WC, ¶ 27, 14 N.E.3d 1195 (citing *Gallianetti*, 315 Ill. App. 3d at 727, 734 N.E.2d at 487). Further, although the employer in the case argued the claimant waived his right to a wage differential award by failing to introduce evidence at arbitration to support such an award, "our reading of the record disclose[d] that the claimant introduced evidence of his incapacitation and the amount he was earning at the time of his injury, and the [employer] supplied evidence regarding the claimant's post-accident earning capacity." *Levato*, 2014 IL App (1st) 130297WC, ¶ 29, 14 N.E.3d 1195. Thus, we concluded that, because the record disclosed "an issue concerning the propriety of a wage differential award, *** the Commission was obliged to resolve the question." *Levato*, 2014 IL App (1st) 130297WC, ¶ 30, 14 N.E.3d 1195.

¶ 77 More recently, in *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 49, 29 N.E.3d 648, we held that the claimant's failure to request a wage differential award did not constitute a waiver of his right to recover such an award. In particular, we noted "[t]he claimant made no election concerning PPD benefits because he sought PTD benefits." *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 49, 29 N.E.3d 648. We stated as follows:

"In cases where a claimant unsuccessfully seeks PTD benefits and does not make an alternative request for PPD benefits, the claimant is still entitled to PPD benefits when the evidence supports such an award. Likewise, in such cases, we believe that the Commission is obligated to consider a wage differential award when there is evidence in the record that could support a wage differential award (regardless of which party presented the evidence), and when nothing in the record suggests that the claimant elected to waive his right to recover such an award." *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 52, 29 N.E.3d 648.

In that case, we rendered no opinion on whether the claimant was entitled to a wage differential award but, again, found "the Commission erred in failing to decide the issue on the merits." *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 41, 29 N.E.3d 648.

¶ 78 Here, claimant sought PTD benefits and the record fails to indicate any express waiver of a wage differential award. Additionally, the question of the claimant's entitlement to a wage differential award appears from the evidence of record. Specifically, the evidence introduced at arbitration clearly demonstrates claimant could no longer pursue his usual and customary line of employment as a laborer. Also, the record shows the parties stipulated to claimant's earnings in the year preceding his injury, claimant introduced evidence as to the hourly earnings of union laborers at the time of arbitration, and the employer submitted evidence regarding claimant's post-accident earning capacity.

¶ 79 Thus, like in *Levato* and *Lenhart*, we find the Commission erred in failing to consider a wage differential award. As a result, we vacate the portion of the Commission's decision

that awarded claimant PPD benefits and remand with directions that it decide claimant's entitlement to a wage differential award on the merits.

¶ 80

III. CONCLUSION

¶ 81 For the reasons stated, we reverse the circuit court's judgment, reversing the Commission's denial of PTD benefits and reinstate that portion of the Commission's decision. We also remand the matter to the Commission with directions that it vacate the portion of its decision awarding claimant PPD benefits and determine claimant's entitlement to a wage differential award on the merits.

¶ 82

Reversed and remanded with directions.