2015 IL App (2d) 131178WC-U

FILED: March 20, 2015

NO. 2-13-1178WC

IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

STEVEN KLUBER, Plaintiff-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Preferred Electric, Appellee).	)	Appeal from Circuit Court of Kane County No. 13MR348 Honorable David R. Akemann, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The testimony of uncertified vocational rehabilitation personnel at the arbitration hearing did not violate section 8(a) of the Workers' Compensation Act (820 ILCS 305/8(a) (West 2006)), which requires vocational rehabilitation counselors who provide services under the Act to "have appropriate certifications which designate the counselor as qualified to render opinions relating to vocational rehabilitation."

(2) The Commission's reliance on the opinions of the employer's vocational rehabilitation expert was not against the manifest weight of the evidence.

(3) The Commission's decision to award claimant permanent partial disability

benefits for a 40% loss of the person as a whole rather than wage-differential benefits was not against the manifest weight of the evidence.

¶ 2 On May 5, 2008, claimant, Steven Kluber, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2006)), seeking benefits from the employer, Preferred Electric. The employer did not dispute that claimant sustained an accident that arose out of and in the course of his employment on April 12, 2007, and following a hearing in July 2011, the arbitrator determined (1) claimant's low back condition of ill-being was causally connected to his work accident and (2) claimant was entitled 43-6/7 weeks' maintenance benefits from August 11, 2010, through June 13, 2011, the day he refused to attend a job interview arranged by his job placement specialist. Neither party sought review of the arbitrator's decision.

¶ 3 In February and March 2012, further arbitration hearings were conducted in the matter regarding the issue of permanency. Following those hearings, the second arbitrator issued a decision, finding claimant entitled to 200 weeks' permanent partial disability (PPD) benefits for a 40% loss of use of the person as a whole. Claimant sought review with the Illinois Workers' Compensation Commission (Commission), which deleted several paragraphs of the arbitrator's decision but otherwise affirmed that decision. On judicial review, the circuit court of Kane County confirmed the Commission. Claimant appeals, arguing (1) the Commission erred in allowing the employer to present the testimony of uncertified vocational rehabilitation personnel, (2) the Commission erred by assigning probative value to the testimony of the employer's vocational rehabilitation expert, and (3) the Commission's decision to award claimant PPD benefits for a 40% loss of the person as a whole rather than wage-differential benefits was against the manifest weight of the evidence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Claimant (age 51 at the time of his accident) worked as an electrician for 32 years. The parties agreed, on April 12, 2007, he sustained accidental injuries while working for the employer. On July 8, 2011, an initial arbitration hearing was conducted in the matter pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)). Issues in dispute included whether claimant's current condition of ill-being was causally connected to his work injury and maintenance benefits. On August 2, 2011, arbitrator Jacqueline Kinnaman issued a decision, finding claimant's low back condition of ill-being was causally connected to his April 2007 work accident and ordering the employer to pay claimant 43-6/7 weeks' maintenance benefits. The arbitrator determined claimant's maintenance benefits should end as of June 13, 2011, the "day [claimant] refused to attend a job interview arranged by [his] job placement specialist." Neither party sought review of the arbitrator's decision.

¶ 6 Evidence presented at the arbitration hearing showed claimant was injured at work on April 12, 2007, while helping to unload conduit. He was carrying weight on his shoulder when he twisted and felt a sharp pain down his low back and into his right leg. Following his accident, claimant sought medical care. On April 26, 2007, he underwent a magnetic resonance imaging, which revealed a spondylolisthesis at L4 and L5, a disc herniation at L4-5, a spondylolisthesis of L5 over S1, and a posterior annular tear at L5. On January 2, 2008, Dr. Gurvinder Deol performed surgery on claimant in the form of an L4 to S1 decompression and fusion. On July 29, 2009, he underwent revision surgery performed by Dr. Steven Mather. A functional capacity evaluation (FCE) performed on June 14, 2010, showed claimant could work at a light-medium level, occasionally lift 35 pounds, and frequently lift 20 pounds. On June 21, 2010, Dr. Mather reviewed claimant's FCE, found claimant had reached maximum medical improvement (MMI), and released him to return to light-medium duty work with a permanent 35-

pound lifting restriction.

¶ 7 On August 12, 2010, claimant began seeing Dr. Akil Moinuddin, who prescribed him pain medication. On a patient self-history form, claimant identified his occupation as "retired."

¶ 8 In August 2010, claimant began a vocational rehabilitation program with MedVoc Rehabilitation (MedVoc). He worked with Laura Roberts and Diamond Warren, job placement specialists. Roberts and Warren provided claimant with job leads on a weekly basis and asked him to research his own leads. Claimant testified he submitted 18 job applications based upon his own leads and made 658 job contacts during the course of his search. He acknowledged his contact count included inquiries he made by phone and did not mean that he visited 658 potential employers or submitted 658 job applications.

¶ 9 The record reflects MedVoc performed two labor market surveys with respect to claimant. First, a labor market survey was performed in August and September 2010, from which it was determined that claimant was "employable in positions such as bidding, estimation, material ordering, and light electrical." The wage range for the targeted positions was $23.73 to $25.73 per hour. In June 2011, an "updated" labor market survey was performed and "targeted additional position." Claimant was deemed "employable in positions such as bidder/estimator, light electrical, material order, dishwasher, maintenance, and machine operator." His wage range was identified as being $14.38 to $16.38 per hour.

¶ 10 Warren scheduled an interview for claimant at Steak 'n Shake on June 5, 2011, for a dishwashing job—the first interview claimant obtained from his job search. However, claimant testified that, after walking in a Memorial Day parade and performing gardening and yard work in early June 2011, he noticed that his back had tightened up and sought medical care. He

informed Warren he would not go to the Steak 'n Shake interview due to back pain. Warren rescheduled the interview for June 8, 2011. Claimant did not attend the June 8 interview and Warren again rescheduled it for June 13, 2011. On June 10, 2011, claimant saw Dr. Mather and complained of thoracic pain and low back soreness. Dr. Mather recommended claimant get off narcotics, which he believed were unnecessary, and that claimant resume his home exercises and quit smoking. He renewed claimant's 35-pound lifting restriction but did not restrict him from doing a job search. Nevertheless, claimant did not go to the June 13, 2011, interview.

¶ 11 The employer presented the testimony of both Warren and Roberts at the arbitration hearing. Warren testified the Steak 'n Shake job was within claimant's work restrictions and in his geographical area. She believed the interview would have allowed claimant to work on his interviewing skills. Warren testified the Steak 'n Shake job paid $9.45 an hour and claimant might have gotten the job if he had gone to the interview. She identified other concerns she had regarding claimant's participation in vocational services. Specifically, claimant failed to follow up in a timely manner on a job application for another potential employer and was not completing employment applications in connection with his own job search.

¶ 12 Roberts described her interactions with claimant during his job search. She discussed with him the importance of making in-person contact with potential employers and submitting applications. Roberts testified claimant declined her suggestion that he consider a volunteer position, which she believed could have expanded his job skills, made him more marketable, and given him experience in networking. She testified other problems she had while working with claimant included two instances when his friends or family members came with claimant to visit a potential employer. Additionally, on one occasion, claimant discussed stomach problems he was having due to his medications in front of a potential employer. Roberts told him not to

speak that way in front of the employer and claimant responded that he did not care as it was just a minimum wage job. On cross-examination, Roberts testified no one had recommended termination or suspension of claimant's vocational rehabilitation prior to the Steak 'n Shake incident. She also acknowledged claimant informed her he had been doing volunteer work with veterans.

¶ 13 On August 2, 2011, the arbitrator issued her decision in the matter. As stated, she determined claimant's low back condition of ill-being was causally connected to his April 2007 work accident. However, she determined, according to Dr. Mather, "the narcotic medication being prescribed [to claimant] by Dr. Moinuddin [was] not necessary or causally connected to the accident." With respect to maintenance benefits, she stated as follows:

> "[Claimant] was entitled to maintenance benefits commencing Aug[ust] 11, 2011[,] through June 13, 2011. That day [claimant] refused to attend a job interview arranged by job placement specialist Warren and rescheduled to accommodate [claimant's] flare-up of pain and desire to see Dr. Mather for a check up [*sic*]. He saw the doctor on June 10, 2011. The doctor did not find a need for any additional treatment but advised [claimant] to stop smoking and using narcotic pain medication and to resume exercise. [Claimant] had no valid reason not to attend the interview of June 13, 2011. [The employer] did not dispute [claimant's] testimony that he made 658 job contacts in the eight months of his job search. But *** Warren and *** Roberts both testified [claimant] was contacting employers who were not hiring and therefore was not completing applications. The MedVoc reports support their testimony

> and show they discussed their concerns with [claimant]. By [claimant's] own count, he made only 18 applications based on his 658 job contacts. The interview scheduled for June 13, 2011, would have been his first in his eight[-]month job search. The Arbitrator concludes vocational rehabilitation has run its course and should now end, albeit without success."

As noted, neither party sought review of the arbitrator's decision.

¶ 14 In February and March 2012, additional arbitration hearings were conducted in the matter before arbitrator Gregory Dollison to address issues relating to the permanency of claimant's injury. Claimant testified he was a union member, IBEW Local 461, at the time of his work accident. His work classification was journeyman electrician. When working, he was scheduled to work 40 hours per week but testified there were occasions he lost time from work due to a lack of available work. Claimant stated he "[f]airly mostly" worked year-round and the current rate of pay for an electrician was $43.56 per hour. He testified the union gave him "a disability retirement," which was something for which he applied and submitted medical evidence.

¶ 15 Claimant also testified he had continued receiving medical care since the last arbitration hearing. Specifically, he saw Dr. Moinuddin, his primary care physician, who prescribed him pain medication. Claimant stated he had not received any vocational assistance since June 13, 2011, he did not have a driver's license, and his physical condition had remained the same. Further, he recalled conversations with Warren during which she told him the Steak 'n Shake job paid $8.25 per hour.

¶ 16 On cross-examination, claimant testified he acquired Social Security disability

benefits before applying for disability with the union. He acknowledged that he applied for disability with the union prior to June 2010, and before Dr. Mather determined he had reached MMI. Claimant testified he had not seen Dr. Mather since before the last arbitration hearing. Additionally, he stated he had not returned to work and agreed he could not work as an electrician without losing his pension.

¶ 17 Claimant presented the testimony of Joel Pyle, who stated he worked for IBEW Local 461—first as an electrician for 21 years and then as a business manager for the previous 7 months. He testified claimant was a family friend and his position with the union was as a journeyman electrician. Pyle stated the current pay rate for a journeyman electrician was $43.56 per hour and individuals in that position worked 40 hours per week (five, eight-hour days). He asserted electrical work performed by journeymen electricians was year-round, but some electricians were laid off in the winter. Pyle testified some electricians lost days of work due to inclement weather or because there was sometimes a lack of available work.

¶ 18 On cross-examination, Pyle acknowledged the number of hours claimant could work with the union would depend on whether there were jobs available for him. He agreed there was no guarantee that an electrician would get 40 hours of work per week, which would result in approximately 160 hours per month. Pyle reviewed a union member ledger, which the employer submitted into evidence. He agreed it identified the location and number of hours claimant worked during the months preceding his work accident. The ledger showed claimant worked 145 hours in March 2007, 97 hours in February 2007, and 8 hours in January 2007. After reviewing the ledger, Pyle testified there did not appear to be any month in the two years preceding claimant's injury when he worked a full 40-hour week for an entire month. On redirect, he testified electricians had to be available for 40 hours of work per week.

¶ 19 Jacky Ormsby testified she was a certified vocational rehabilitation counselor and owned MedVoc Resources (a different entity than MedVoc Rehabilitation where claimant received vocational rehabilitation services). She had worked as a vocational rehabilitation counselor for 18 years and participated in hundreds of vocational rehabilitation cases. Claimant submitted Ormsby's curriculum vitae into evidence. On September 21, 2011, Ormsby performed an initial vocational rehabilitation assessment on claimant at his attorney's request. She reviewed some of claimant's medical records, including his June 2010 FCE and Dr. Mather's June 2010 release. Ormsby also took background information from claimant and reviewed some of MedVoc's records regarding their services to claimant. Ormsby prepared a report, which claimant submitted into evidence.

¶ 20 In her report, Ormsby identified claimant's June 2010 FCE as placing him at a light-medium physical demand level and giving him the following restrictions:

> "[Claimant] can lift 35-pounds occasionally floor to knuckle and 30-pounds waist to overhead and 30-pounds frequently floor to knuckle and 20-pounds waist to overhead. He can carry (2-handed) 40-pounds rarely, 35-pounds occasionally and 20-pounds frequently. He can push (2-handed) 43-pounds rarely, 38-pounds occasionally and 17-pounds frequently. He can pull (2-handed) 37-pounds rarely, 32-pounds occasionally and 16-pounds frequently. He can bend/stoop and climb (stairs and ladders) occasionally. He can frequently squat and reach overhead. He can sit 0-2 hours per day [for] 5-6 hours per day. He can stand/walk 0-2 hours at a time for 7-8 hours per day."

Ormsby's report shows she called several employers previously contacted by MedVoc and identified in the labor market surveys MedVoc performed. She found wages specified in the MedVoc surveys appeared similar, which she found "peculiar" because many companies do not like to provide wage information.

¶ 21 Ormsby concluded less physical positions identified by MedVoc's June 2011 survey required strong computer experience, which claimant did not have, and other positions were too physical and claimant could not physically perform them. In her report, Ormsby set forth her opinion that no stable labor market existed for claimant and, "[a]t best, he could earn minimum wage of $8.25 per hour, provided he finds something within his restrictions." She stated as follows:

> "It appears there are limited choices with jobs for [claimant]. His experience is in electrical/electrician and those positions have been requiring lifting over 35-pounds. They also require frequent standing and walking. His FCE states he is limited in walking and standing 0-2 hours a day for 7-8 hours total. He is also limited with occasional bending/stooping and climbing stairs and ladders. Even most entry level minimum wage type of positions requires [*sic*] more physical activity than this. [Claimant] would need some type of desk job where he could sit and stand as needed. He does not have the skills to perform these types of positions. He would need to be retrained. I feel there is no stable labor market for [claimant]."

¶ 22 Ormsby testified she was familiar with the job duties of a dishwasher, which she

believed was not sedentary work and included standing all day, doing some occasional walking, twisting, turning, bending, stooping, and lifting. She did not believe a dishwashing job was appropriate for claimant because it was more physical than his restrictions allowed. Ormsby testified Dr. Mather's lifting restrictions were the same as those contained in claimant's FCE, as was his release of claimant to work within a light-medium range. However, she acknowledged Dr. Mather did not discuss anything regarding claimant's ability to bend, climb, squat, reach, sit, stand, or walk.

¶ 23 During her testimony, Ormsby reiterated her opinion that, based on claimant's education, work history, and restrictions, there was no stable labor market for him. She added that "if [claimant] could make any type of wage, he could make minimum wage" but she did not "know if there [were] any jobs out there that he could do right now." Ormsby stated that given claimant's age, limited computer ability, and that his entire career was as a union electrician he would not "be anybody's first or second choice." She believed it would be difficult for claimant to find a minimum wage job within his restrictions but "[t]here might be a job out there." On cross-examination, Ormsby acknowledged that a bad motivation to return to work would make claimant "lower down on the list of choices" for an employer. Further, she testified she met with claimant on only one occasion and made no effort to locate any job for him.

¶ 24 The employer presented the testimony of Anthony Mulizio, the owner and president of the employer, and submitted time sheets reflecting the hours claimant spent working for the employer. Mulizio reviewed claimant's time sheets and noted several occasions in February, March, and April 2007, when claimant did not work a full 40-hour week. However, he agreed his electricians were scheduled to work eight hours a day and five days a week, and had to be available for work 40 hours per week.

¶ 25 Christy Schrenk testified she was a registered nurse and a nurse case manager. She was assigned to do medical case management on claimant's case, requiring her to attend doctor's appointments with him and assist him with coordinating his treatment plan. Schrenk stated she had a cordial relationship with claimant and spoke with him about issues related to his work status and work restrictions. She noted, in 2008, claimant mentioned he was considering options with his union regarding retirement and, in June 2010, he stated "he didn't think that he would *** return to work because he was receiving some type of disability payment through his union *** and his retirement." According to Schrenk, claimant also stated "he did not think he would participate in [a vocational rehabilitation program] to the extent of finding work." In June 2011, she went with claimant to his appointment with Dr. Mather. Claimant informed her that he experienced an increase in back pain after mowing his lawn but, prior to that, had been feeling "great" and felt the best he had since undergoing surgery.

¶ 26 Schrenk stated that, while working with claimant, his activity level varied depending upon where he was at in his recovery. Following his second surgery and prior to being placed at MMI, claimant "had become quite functional" and could do work around his home. She noted he performed some remodeling of his home, planted a garden, went on some vacations, and moved about without significant difficulty. Schrenk testified claimant told her his remodeling work included changing light fixtures, installing ceiling fans, and doing some work in the basement. During his testimony, claimant initially denied that he performed remodeling work, stating he paid someone else to do it. However, he later acknowledged that he had done "certain things around the home," including remodeling work. Schrenk also testified claimant occasionally drove himself to medical appointments but informed her he did not have a driver's license and should not have been driving.

¶ 27 Schrenk stated, in June 2011, Dr. Mather's restriction for claimant was no lifting over 35 pounds. His records did not indicate that any other restrictions were recommended.

¶ 28 The employer also presented the testimony of MedVoc employees Jacqueline Bethell and Diamond Warren. Claimant's counsel objected to both witnesses on the basis that neither was a certified vocational rehabilitation counselor. He argued the Act requires any person who renders opinions regarding vocational rehabilitation to be certified and, without certification, the witnesses were not qualified to render opinions. The parties each argued their position and then engaged in a discussion off the record (which the record indicates resulted in some type of agreement between the parties as to the witnesses' testimony). Ultimately, the arbitrator allowed Bethell and Warren to testify.

¶ 29 Bethell testified she was a rehabilitation counselor with MedVoc. She worked for MedVoc for seven and a half years and began as a job placement specialist, helping injured workers search for alternate employment. After several years, she began doing more case management and overseeing job placement specialists. Bethell testified her work was supervised by Julie Bose. She met with claimant on one occasion to perform an initial vocational assessment. She identified various reports generated by MedVoc regarding claimant during the course of his vocational rehabilitation. The employer submitted various MedVoc reports into evidence.

¶ 30 Warren, who testified at the initial arbitration hearing, stated she was asked to update information previously included in MedVoc's labor market surveys because information in MedVoc's reports had been called into question by Ormsby. Warren rechecked information in the previous reports by re-contacting the employers addressed in Ormsby's report. She testified at length regarding those actions, describing individuals she spoke with and the information obtained. With respect to Ormsby's criticism regarding wages listed in the MedVoc reports, War-

ren agreed that employers are often reluctant to give a wage so she would attempt to obtain a wage range. She further testified that it was important to determine whether potential employers she contacted could accommodate an employee's restrictions and she made such inquiries when working with claimant.

¶ 31 Finally, the employer presented the testimony of Julie Bose, MedVoc's owner. Bose testified she had been a vocational rehabilitation counselor since 1983 and was certified. The employer submitted her curriculum vitae and she testified she had a master's degree in rehabilitation counseling; had taken class work after her master's degree; was published in the field of vocational rehabilitation; and taught as an adjunct instructor at the Illinois Institute of Technology, which has a master's level rehabilitation program. Bose testified MedVoc's staff included a rehabilitation nurse, rehabilitation counselors, a rehab case manager, and job placement specialists. Regarding MedVoc's operations, she stated as follows:

> "Typically how we work at MedVoc and what is industry specific is there's a rehab case manager, a certified rehab counselor that is assigned to the case and works the case to closure. However, if the case is referred for job placement services, there's also a job placement specialist that works on the case."

¶ 32 Bose testified MedVoc performed vocational services for claimant and MedVoc employees met with him one to three times per month for almost one year. She stated Bethell was in the process of becoming certified and the only way she could do that was "to have a certain amount of clock hours, man hours working on files under the supervision of a" certified rehabilitation counselor. Also, according to Bose it was "considered customary in [the vocational rehabilitation] field for job placement people who are not certified to work on files under the su-

pervision of a rehab counselor."

¶ 33 Bose testified Bethell worked on claimant's case as a rehabilitation case manager. She stated Warren was a job placement specialist. Bose asserted she was directly involved in claimant's case and supervised Bethell and Warren. She met with Bethell on a weekly basis and took phone calls from Bethell, Warren, and Roberts (the other MedVoc worker involved in the case) after every visit with claimant. Bose was also familiar with the reports prepared in connection with claimant's case and agreed her signature appeared on the reports as a rehabilitation consultant. Her signature indicated either that she wrote the report or that she reviewed its contents and agreed with them. Further, Bose testified she had discussions with Bethell and Warren about the contents of the reports. She stated she signed progress reports in the case every time one was written.

¶ 34 Bose was familiar with the job lead information that was sent to claimant. She testified she helped Bethell determine what jobs would be appropriate for claimant given his education, work background, and physical limitations. With Bose's assistance, they came up with a plan and the specific jobs that were searched. She also reviewed job contact logs prepared by claimant and became familiar with his level of cooperation with the vocational program. Bose discussed issues related to claimant's cooperation with Bethell.

¶ 35 Bose identified claimant's initial vocational rehabilitation report, dated August 13, 2010. She reviewed the report prior to signing it and agreed with the plan set forth in the report—to utilize claimant's work experience as an electrician to find positions in his same field but not actually as an electrician. According to the report, Dr. Mather's records identified claimant as having permanent work restrictions of no lifting in excess of 35 pounds, placing him at a light-medium work activity level. Bose testified she personally reviewed claimant's medical rec-

ords. Further, she stated that, in the context of vocational rehabilitation, an individual's restrictions are identified by his or her physician rather than an FCE because a treating physician has the most experience with a patient and "[n]ot just one snapshot like" an FCE.

¶ 36 Bose opined jobs existed for claimant, which were both within his field and within his restrictions. She noted claimant had extensive experience as an electrician, including some supervisory responsibilities, high voltage experience, and fire alarm experience. He was also certified as an electrical estimator. Bose opined those skills "transferred to light[-]medium positions such as a consultant at an electrical supply establishment or an electrical maintenance supervisor in a facility like a hotel or big office building or work as an estimator."

¶ 37 Bose next identified a September 2010 labor market survey report that she signed. She stated she wrote that report, which was cosigned by Roberts. Bose testified Roberts was the job placement person working with claimant at that time and the individual who actually called the prospective employers identified in the survey. Based on the results of the survey, Bose opined claimant "was a candidate for positions like an estimator/bidder, electrical material orderer for electrical supply house and that he could anticipate a wage range of approximately [$]23.73 to [$]25.73 per hour." However, she later decided to expand his job search to look for other types of positions, noting claimant had not yet been offered employment and expansion of his job search was appropriate. MedVoc conducted a second labor market survey in June 2011, due to expanding claimant's job search and because the first survey became dated. Bose identified the second labor market survey, which she signed. She testified she reviewed all of the labor market survey information and agreed with the report's contents. Bose stated the survey found claimant was employable with a wage range of $14.38 to $16.38 per hour. Additionally, she clarified that the second survey was not intended to replace the first survey and MedVoc con-

tinued to look for higher paying positions for claimant in the electrical field.

¶ 38 Bose testified she reviewed Ormsby's report and had a number of concerns. She noted Ormsby's report was identified as a vocational assessment and plan but there was no plan within the report to enhance claimant's employability. Bose also found Ormsby utilized incorrect restrictions for claimant by concluding he could only perform sedentary work and finding claimant was under restrictions not given by Dr. Mather. Additionally, she also disagreed with both Ormsby's criticisms of MedVoc's labor market survey and the way in which Ormsby called prospective employers. Bose noted Ormsby did not always speak to the same people MedVoc spoke to, did not always speak to the department head regarding the job that MedVoc targeted, and did not ask about accommodations. She testified as follows:

> "Well when we do a labor market survey, we specifically give the work restriction, the work history, the educational history and then say [']can you accommodate the following restrictions.['] And document whether they can or they can't.
>
> Apparently the—that question was not asked. Rather a more general question was asked, [']what are the physical demands of this position.[']
>
> Same goes with the wage. When we do a labor market survey, we ask for a wage range. We start at minimum wage up because that's the only way that we can truly get an employer to respond because wages vary based on experience, based on education, based on the person's perception of that individual at the time of the interview.

> If we just say what is a wage for this position, they're going to say [']I don't know. I can't give you that information.['] Miss Ormsby repeatedly stated that she had difficulty obtaining wage information. And I believe it was how it was asked."

¶ 39 Bose testified she did not agree with Ormsby's opinion that claimant was either permanently totally disabled or limited to minimum wage employment. She asserted MedVoc was able to forward claimant numerous job leads, he was scheduled for interviews, and he had "transferrable skills that would allow him to work within the parameters of the ranges on the labor market surveys." Bose noted Ormsby did not actually look for any employment positions for claimant, nor did she attempt to find a particular labor market for him. Following her review of Ormsby's report she instructed her staff to follow up on some of Ormsby's criticisms. Specifically, she instructed them to contact the employers identified in Ormsby's report as providing Ormsby with a different response than what was contained in MedVoc's reports.

¶ 40 Bose stated MedVoc issued two reports in response to Ormsby's report. She identified a report dated November 1, 2011, which concerned MedVoc's efforts to re-contact employers identified in their second labor market survey. Bose signed that report and testified the opinions contained within the report were her own. Further, she testified that, as a result of re-contacting employers, she determined that the information originally obtained by MedVoc at the time of their second labor market survey was accurate. Bose also identified a report dated December 6, 2011, which concerned MedVoc's efforts to re-contact employers identified in their first labor market survey. She also signed that report, indicating she agreed with the opinions and statements contained therein. Both reports were admitted into evidence.

¶ 41 Bose opined claimant would have been able to find employment if he had put a

full effort into vocational rehabilitation. Overall, she concluded he was not fully compliant with MedVoc's vocational program, in that he did not attend the Steak 'n Shake interview, his search deteriorated over time, he went to places that were not hiring rather than targeting employers who were hiring, he would visit employers with someone accompanying him, he indicated he had a felony conviction on a job application when he did not have one, and he volunteered information against MedVoc's advice. Bose testified an individual's motivation to find work was relevant "to a great extent" in obtaining employment. Further, she believed a reasonably stable labor market existed for claimant based on his age, qualifications, and physical restrictions. Bose did not believe claimant was limited to a minimum wage position.

¶ 42 On cross-examination, Bose acknowledged that the Steak 'n Shake job would have been an appropriate placement for claimant. Further, she admitted that she never met claimant and that Bethell met him on only one occasion when performing the initial vocational rehabilitation assessment. Bose agreed Roberts and Warren performed all of the job placement skills training in claimant's case and supervised claimant's job search. She also acknowledged Bethell, Roberts, and Warren generated all of the data contained in the vocational rehabilitation reports. Bethell dictated 90% of the reports. Bose agreed Bethell, Roberts, and Warren were not certified vocational rehabilitation counselors when they worked with claimant. Additionally, Bose agreed claimant never received a job offer while working with MedVoc.

¶ 43 On April 20, 2012, arbitrator Dollison issued a decision and awarded claimant 200 weeks' PPD benefits for a 40% loss of the person as a whole. Initially, he noted he reviewed the transcript of the previous arbitration proceedings and incorporated arbitrator Kinnaman's findings and conclusions in his decision. Regarding the nature and extent of claimant's injury, the arbitrator found the only evidence presented by claimant to support his position that he was

permanently and totally disabled was Ormsby's testimony. However, the arbitrator found Ormsby equivocated on whether claimant was actually permanently and totally disabled. Additionally, he determined Ormsby based her analysis and opinions on restrictions above and beyond those recommended by Dr. Mather, whose recommendations were limited to a 35-pound lifting restriction. Further, the arbitrator gave greater weight to Bose's opinions and stated as follows:

> "The Arbitrator does not agree with [claimant's] contention that non-certified job placement personnel are totally precluded from assisting [claimant] in his job search activities. Ms. Bose testified that such activities are common in the field and, in fact, required in order to ultimately obtain certification as a Rehabilitation Counselor."

The arbitrator further rejected claimant's position that he was entitled to wage-differential benefits, finding that "[d]ue to his lack of full cooperation with vocational efforts," the evidence did not support "a determination of a specific wage rate that [claimant] was capable of earning."

¶ 44 On May 14, 2013, the Commission issued a decision in the matter. It modified the arbitrator's decision by deleting several paragraphs in his analysis but otherwise affirmed that decision. On October 16, 2013, the circuit court of Kane County confirmed the Commission.

¶ 45 This appeal followed.

¶ 46 II. ANALYSIS

¶ 47 Initially, we note the employer argues claimant's brief fails to comply with Illinois Supreme Court Rule 341(h)(3) (eff. Feb. 6, 2013) because he fails to indicate the applicable standard of review for each issue he raises. As a result, it asks this court to strike the argument

section of claimant's brief.

¶ 48 Pursuant to Rule 341(h)(3), "[t]he appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument." Ill. S. Ct. R. 341(h)(3) (eff. Feb. 6, 2013). Here, claimant's brief contains a general statement of the standards of review applicable to the case under a separate heading. Also, in the argument section of his brief, he sets forth the standards of review, with citation to authority, that he believes applies specifically to each issue he raises. Thus, we find compliance with Rule 341(h)(3) and nothing which would warrant striking any portion of claimant's brief.

¶ 49 On appeal, claimant first argues the Commission erred in failing to strike the testimony of Bethell and Warren, whom he identifies as uncertified vocational rehabilitation personnel. He notes he objected to both witnesses' testimony at arbitration on the basis that neither witness was a certified vocational rehabilitation counselor as required by section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)). Claimant argues the Act does not permit noncertified vocational rehabilitation personnel to render opinions relating to vocational rehabilitation, supervise a job search, or counsel for a job search.

¶ 50 Issues involving the interpretation of a statute present a question of law and are subject to *de novo* review. *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Gruszeczka*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. "The language used in the statute is normally the best indicator of what the legislature intended" and "[e]ach undefined word in the statute must be given its ordinary and popularly understood meaning." *Gruszeczka*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. Additionally, "[e]videntiary

rulings made during the course of a workers' compensation proceeding will be upheld on review absent an abuse of discretion." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010, 832 N.E.2d 331, 340 (2005).

¶ 51 Section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)) provides as follows:

> "Any vocational rehabilitation counselors who provide service under this Act shall have appropriate certifications which designate the counselor as qualified to render opinions relating to vocational rehabilitation. Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution."

¶ 52 Here, the plain language of section 8(a) specifies that it applies to vocational rehabilitation counselors. As discussed, claimant challenges the testimony of Bethell and Warren, arguing their participation in his vocational rehabilitation services violated the act because they were not certified. However, the record clearly reflects that neither Bethell nor Warren participated in claimant's vocational rehabilitation services *as a counselor*. Instead, although Bethell was in the process of becoming a certified vocational rehabilitation counselor, she worked on claimant's case as a rehabilitation case manager. Warren acted as a job placement specialist. Neither individual was required to be certified under the Act. Moreover, both Bethell and Warren were supervised by Bose, MedVoc's owner and a certified vocational rehabilitation counselor. Bose testified at length regarding the manner in which she oversaw, directed, and supervised claimant's services. We find nothing in the Act which would prohibit noncertified personnel from participating in vocational rehabilitation services under the direction and supervision of a

certified counselor.

¶ 53 Additionally, Bose testified at arbitration and offered opinions regarding claimant and his ability to find employment. The record reflects she was qualified to render opinions in the matter and it was her testimony that the arbitrator and Commission relied upon. That Bose never personally met claimant went only to the weight to be given her opinions.

¶ 54 Under these circumstances, we find no violation of the Act. Claimant received vocational rehabilitation services under the direction of Bose—a certified vocational rehabilitation counselor who rendered opinions in the case. Bethell and Warren each testified at the hearing regarding their actions in assisting claimant—under Bose's direction—but claimant has failed to point to any specific testimony from either individual that would constitute an opinion regarding vocational rehabilitation. Thus, the Commission did not abuse its discretion in allowing Bethell and Warren's testimony.

¶ 55 On appeal, claimant next argues the Commission erred in assigning probative value to Bose's testimony. He argues Bose failed to establish a reliable foundation for her opinions. Specifically, he complains that no certified vocational rehabilitation counselor met with claimant while he was receiving services from MedVoc and Bose's opinions were based entirely on information obtained by her uncertified personnel.

¶ 56 " 'Expert opinions must be supported by facts and are only as valid as the facts underlying them.' " *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶ 24, 960 N.E.2d 587 (quoting *In re Joseph S.*, 339 Ill.App.3d 599, 607, 791 N.E.2d 80, 87 (2003)). "The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion." *Gross*, 2011 IL App (4th) 100615WC, ¶ 24, 960 N.E.2d 587. "If the basis of an expert's opinion is grounded in guess or surmise, it is too

speculative to be reliable." *Gross*, 2011 IL App (4th) 100615WC, ¶ 24, 960 N.E.2d 587.

¶ 57 Further, "[i]t is the function of the Commission to decide questions of fact, judge the credibility of witnesses, determine the weight that their testimony is to be given, and resolve conflicts in the evidence." *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 35, 976 N.E.2d 1. "The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 35, 976 N.E.2d 1. "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 35, 976 N.E.2d 1.

¶ 58 To the extent claimant argues the vocational rehabilitation services MedVoc provided to claimant violated the certification requirements in section 8(a) of the Act, we disagree. As discussed, the Act requires that vocational rehabilitation counselors who provide services under the Act must obtain certifications that designate them as qualified to render opinions relating to vocational rehabilitation. It is undisputed that Bose was appropriately certified. Thus, she was qualified to render opinions as to vocational rehabilitation matters.

¶ 59 With respect to claimant's specific case, evidence at arbitration showed the extent to which Bose directed and participated in the services claimant received at MedVoc. The evidence also demonstrated her familiarity with his case and showed her opinions were based on information obtained by MedVoc personnel that Bose supervised and who met with claimant one to three times per month for approximately one year. Given the evidence presented, we find claimant's position that Bose lacked a sufficient foundation for her opinions is unpersuasive. As stated, the fact that Bose never personally met with claimant went to the weight to be accorded her testimony and was for the Commission to decide.

¶ 60 In this instance, the Commission found Bose's opinions persuasive and relied upon her opinions over those of Ormsby, claimant's vocational expert. The Commission, in adopting the arbitrator's decision, set forth several reasons to support its reliance on Bose. In particular, the Commission noted Ormsby met with claimant on only one occasion, equivocated in her opinions, relied on physical restrictions for claimant over and above those recommended by claimant's treating physician, could not recall whether she reviewed all of claimant's vocational rehabilitation records, did not look for employment for claimant, and did not attempt to identify potential labor markets. Conversely, the Commission found MedVoc personnel met frequently with claimant and concluded "Bose, who had the opportunity to review all aspects of the vocational process on an ongoing basis, was clearly in a stronger position to render an opinion regarding [claimant's] employability in the labor market." The Commission's factual findings are supported by the record and an opposite conclusion is not clearly apparent. The Commission's reliance on Bose's opinions was not against the manifest weight of the evidence.

¶ 61 Finally, on appeal claimant argues the Commission's award of PPD benefits pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)) for a 40% loss of use of the person as a whole was against the manifest weight of the evidence. Rather, he maintains the Commission should have entered an award of wage-differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)).

¶ 62 Section 8(d) of the Act, pertaining to PPD, specifies two distinct types of compensation: (1) wage-differential awards under subparagraph 1 of section 8(d) (820 ILCS 305/8(d)(1) (West 2006)) and (2) a percentage-of-the-person-as-a-whole award under subparagraph 2 of section 8(d) (820 ILCS 305/8(d)(2) (West 2006)). *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482, 487 (2000). The supreme court has expressed a pref-

erence for wage-differential awards and "where a claimant proves that he is entitled to a wage-differential award, the Commission is without discretion to award a section 8(d)(2) award in its stead." *Gallianetti*, 315 Ill. App. 3d at 727-29, 734 N.E.2d at 487-88.

¶ 63 To receive a section 8(d)(1) wage-differential award "an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 530-31, 844 N.E.2d 414, 422 (2006). "A claimant's voluntary decision to remove himself from the work force does not preclude a wage differential award." *Wood Dale Electric v. Illinois Workers Compensation Comm'n*, 2013 IL App (1st) 113394WC, ¶ 23, 986 N.E.2d 107. However, "[a] claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment." *Gallianetti*, 315 Ill. App. 3d at 730, 734 N.E.2d at 489. Further, "liability under the Act cannot be premised on speculation or conjecture but must be based solely on the facts contained in the record." *Deichmiller v. Industrial Comm'n*, 147 Ill. App. 3d 66, 74, 497 N.E.2d 452, 457 (1986) (holding "an earnings loss award cannot be based on speculation as to the particular employment level or job classification which a claimant might eventually attain").

¶ 64 Whether a claimant has shown his entitlement to a wage-differential award is a question of fact for the Commission, whose decision will not be disturbed on review unless it is against the manifest weight of the evidence. *Copperweld Tubing Products, Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633, 931 N.E.2d 762, 765 (2010). "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be

clearly apparent." *Copperweld*, 402 Ill. App. 3d at 633, 931 N.E.2d at 765.

¶ 65 In this case, the Commission determined claimant was "disabled from his usual and customary employment" but failed to meet his burden of proving his entitlement to a wage-differential award. It concluded as follows:

> "On the question of entitlement to Section 8(d)(1) benefits, [claimant] has suggested that he is entitled to a wage differential based on minimum wage employment. He points to the fact that [he] was offered an interview with Steak ['n] Shake, for a job paying $9.25 an hour, and that this fact somehow establishes a wage[-] differential amount. *** [Claimant's] position in this regard is not well taken. It is notable that [claimant] is attempting to establish a wage differential based on a job for which [claimant] specifically refused to interview, resulting in the termination of his weekly benefits. *In fact, evidence was presented regarding multiple job classifications, with various rates of pay, in which [claimant] might have been placed had he given his full cooperation*. In light of this fact, [claimant] cannot meet his burden of proving a wage differential. Due to his lack of full cooperation with vocational efforts, the evidence does not support a determination of a specific wage rate that [claimant] would be capable of earning." (Emphasis added.)

¶ 66 Under the circumstances presented, we cannot say an opposite conclusion from that of the Commission is clearly apparent. To prove his entitlement to wage-differential bene-

fits, claimant was required to establish what he was "able to earn in some suitable employment." 820 ILCS 305/8(d)(1) (West 2006). He relies on Ormsby's testimony to support his position that he was capable of earning no more than minimum wage. However, the Commission was not persuaded by Ormsby's testimony. As discussed, it set forth several reasons for choosing not to rely on Ormsby's opinions and its findings in that regard were not against the manifest weight of the evidence.

¶ 67 The Commission also found claimant did not put forth a full effort toward vocational rehabilitation and that "evidence was presented regarding multiple job classifications [for claimant], with various rates of pay." These findings were supported by the testimony of Bose, whose opinions the Commission did find persuasive; the testimony of other MedVoc personnel; and claimant's vocational rehabilitation records. Claimant argues that the effort he put forth toward vocational rehabilitation was not dispositive of the issues presented. Although we agree with this statement, we also find his effort, or lack thereof, in obtaining suitable employment was a factor for the Commission to consider in determining whether claimant established an amount he was able to earn.

¶ 68 Additionally, although we acknowledge that the Commission should consider and enter a wage-differential award where the record contains sufficient evidence—whether presented by the claimant or the employer—to support such an award, this case does not present such a situation. In *Levato v. Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶ 29, 14 N.E.3d 1195, we reversed the Commission's decision on the basis that it failed to consider a wage-differential award even though "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." Specifically, the employer submitted a

labor market survey report identifying appropriate positions for the claimant which paid between $8 and $20 per hour. *Levato*, 2014 IL App (1st) 130297WC, ¶ 13, 14 N.E.3d 1195. We found that since "the record disclose[d] an issue concerning the propriety of a wage[-]differential award, *** the Commission was obliged to resolve the question and remanded to the Commission "with directions to decide the claimant's entitlement to a wage[-]differential award on the merits." *Levato*, 2014 IL App (1st) 130297WC, ¶ 30, 14 N.E.3d 1195.

¶ 69 The circumstances here are distinguishable from *Levato*. Initially, the record in this case clearly shows the Commission considered and rejected a wage-differential award. Thus, we are not presented with a situation where the Commission overlooked evidence and failed to address the claimant's entitlement to wage-differential benefits.

¶ 70 Additionally, the Commission's findings indicate it determined the evidence presented regarding claimant's post-accident earning capacity was too speculative to establish claimant's entitlement to a wage-differential award. While the employer supplied evidence regarding potential wages claimant could earn following his accident, as the Commission pointed out, that evidence concerned "multiple job classifications, with various rates of pay." In particular, Bose testified two labor market surveys were performed, both of which targeted positions that were appropriate for claimant. The first survey identified an applicable wage range of $23.73 to $25.73 per hour while the second survey identified a wage range of $14.38 to $16.38 per hour. Further, Bose agreed the Steak 'n Shake job—which the record indicated paid $9.45 per hour—would also have been an appropriate placement for claimant. The issue was further complicated by evidence showing claimant failed to put forth a full effort toward vocational rehabilitation, which the Commission determined negatively impacted its ability to accurately determine claimant's post-accident earning capacity. As stated, the Commission's factual findings

were supported by the record and, given the evidence presented, we cannot say its rejection of a wage-differential award was against the manifest weight of the evidence.

¶ 71 Here, we find the Commission's determination that claimant—and the evidence presented in general—failed to establish an amount he was capable of earning after his accident was not against the manifest weight of the evidence. As a result, claimant failed to prove his entitlement to wage-differential benefits and the Commission had the authority to enter a percentage-of-the-person-as-a-whole award pursuant to section 8(d)(2).

¶ 72 III. CONCLUSION

¶ 73 For the reasons stated, we affirm the circuit court's judgment.

¶ 74 Affirmed.