2015 IL App (3d) 140188WC-U

FILED: September 25, 2015

NO. 3-14-0188WC

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

KR&G EXCAVATING, LLC., Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Nicholas Porro, Appellees).	)	Appeal from Circuit Court of Will County No. 13MR408 Honorable Barbara Petrungaro, 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 Commission's award of permanent and total disability benefits was not against the manifest weight of the evidence.

(2) The Commission's finding of causal connection was not against the manifest weight of the evidence.

(3) The Commission's inclusion of overtime hours in the calculation of claimant's average weekly wage was not against the manifest weight of the evidence.

¶ 2 On December 18, 2003, claimant, Nicholas Porro, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1

to 30 (West 2002)), seeking benefits from the employer KR&G Excavating, LLC. He alleged to have suffered injury to "the body as a whole" following a work accident on October 20, 2003.

¶ 3 Following a May 18, 2011, hearing, the arbitrator concluded that (1) claimant had established an accident that arose out of and in the course of his employment; (2) claimant's current conditions of physical and psychological ill-being were causally related to the October 20, 2003, work accident; (3) claimant was owed wage differential payments of $969.35 per week under section 8(d)(1) of the Act based on an average weekly wage of $1,933.96; (4) the medical treatment received by claimant was reasonable and necessary and the employer was liable for all medical bills submitted by claimant; (5) claimant was entitled to temporary total disability (TTD) benefits for the period of October 21, 2003, through March 13, 2009; and (6) penalties and fees were not warranted.

¶ 4 On review, the Illinois Workers' Compensation Commission (Commission), with one commissioner dissenting, reversed the arbitrator's award of wage-differential benefits, finding instead that claimant's permanent and total disability (PTD) warranted PTD benefits of $1,021.01 per week for claimant's life rather than the wage-differential benefits awarded by the arbitrator. In all other respects, the Commission affirmed the arbitrator's decision. On judicial review, the circuit court of Will County affirmed the Commission's decision in all respects except for the award of medical bills, which it reduced by $6,848.

¶ 5 On appeal, the employer argues the Commission's (1) award of PTD benefits was against the manifest weight of the evidence; (2) finding of causal connection was against the manifest weight of the evidence; and (3) decision improperly included overtime hours in the calculation of claimant's average weekly wage and improperly shifted the burden of proof to the employer. We affirm the Commission's decision.

¶ 6 I. BACKGROUND

¶ 7 The following evidence relevant to this appeal was elicited at the May 18, 2011, arbitration hearing.

¶ 8 Claimant began working for the employer in the spring of 2003 as an operator of large earth-moving machinery. He testified he generally worked 10 hours per day, six days per week, and that all hours worked on Saturday were mandatory overtime, as were two of the 10 hours worked each day during the week. Working on Sunday was voluntary.

¶ 9 Claimant testified that on October 20, 2003, he was operating an earth-moving machine called a "scraper." He exited the machine for a short break and when he returned, the "air ride seat," which cushions vibrations and impacts, had no air in it. Despite the malfunctioning seat, claimant continued to operate the machine. Shortly thereafter, as claimant had rotated his body to the right so he could see behind him, the machine fell into a hole, causing defendant's body to jerk violently upward as his body was twisted. He immediately felt pain in his lower back and right leg.

¶ 10 Claimant began treating with Dr. Raymond Ruginis, a chiropractor, for low back pain on October 22, 2003. During a November 26, 2003, chiropractic appointment, claimant was transported by ambulance to the Edward Hospital emergency department, where he was diagnosed with low back pain and given intravenous pain medication. Claimant was discharged with a prescription for pain medications and a magnetic resonance imaging (MRI) test was scheduled for November 28, 2003. The results of claimant's MRI indicated "disc narrowing at L4-5 along with a very large focal right paracentral disc herniation" that "protrude[d] about 5-6mm posterior to the posterior vertebral body line." The test further indicated claimant's right L5 nerve root was likely compressed and displaced, and the right S1 nerve root was likely displaced

as well. Following his MRI, claimant again reported to the Edward Hospital emergency department complaining of back pain. He was given intravenous pain medications and was referred to Dr. Ofer Zikel, a neurosurgeon.

¶ 11 Claimant first saw Dr. Zikel on December 2, 2003. Dr. Zikel's diagnosis was L5 radiculopathy secondary to a moderate size right L4 disk herniation visible on the MRI. Dr. Zikel offered conservative treatment options at that time, including physical therapy and steroid injections. By his December 16, 2003, follow-up appointment, claimant had received two epidural steroid injections and Dr. Zikel noted claimant "looks more comfortable" and wanted to try one more epidural injection. At a January 13, 2004, follow-up appointment, Dr. Zikel noted claimant's "pain continues to improve significantly and currently he is comfortable most of the day and has only minimal pain with walking or prolonged standing."

¶ 12 On February 11, 2004, claimant first treated with Dr. Daniel Harrison, a neurosurgeon—his care having been transferred when Dr. Zikel relocated out of state. On that date, claimant reported he was not responding to the epidural steroid injections and had gained weight due to inactivity. A second MRI was scheduled for February 23, 2004. The results of that MRI indicated a "[m]oderate size right paracentral disc herniation L4-5." At a March 10, 2004, follow-up appointment, Dr. Harrison recommended surgical intervention. On March 12, 2004, claimant underwent a "[r]ight L4-L5 partial hemilaminectomy-extended-decompression resection of herniated disk." Following his surgery, claimant continued to experience pain in his lower back and right leg.

¶ 13 On September 8, 2004, claimant underwent a CT myelogram that indicated "a moderate sized right ventral lateral extra dural filling defect at the L4-5 disc space level," "mild decreased filling of the right sided exiting nerve root sleeve at the L4-5 level," "moderate to

severe disc space narrowing at L4-5," and "[a]nterior and posterior end plate spurring *** at L4-5." On October 11, 2004, Dr. Harrison performed a second surgery, an "inferior L4-L5 laminectomy, decompression, lysis of adhesions *** and removal resection of herniated disk." According to defendant, these surgeries did not resolve his pain. Dr. Harrison referred claimant to the Pain Center of Good Samaritan Hospital where he received a total of three epidural steroid injections in July and August 2005. Claimant was then referred to the Marianjoy Medical Group for pain management.

¶ 14 On September 21, 2005, claimant saw Dr. Chun-Ju Wang at the Marianjoy Medical Group who diagnosed claimant with chronic low back pain secondary to post laminectomy syndrome and recommended a comprehensive pain program. On October 17, 2005, claimant followed up with Dr. Jeffrey Oken, director of the pain clinic at Marianjoy, who also recommended a comprehensive pain program, which claimant undertook. At a December 8, 2005, follow-up appointment, Dr. Oken noted claimant had been discharged from the pain management program two weeks prior.

¶ 15 On December 20, 2005, claimant saw Dr. Howard An, an orthopedic surgeon, for an independent medical evaluation. Dr. An noted claimant had "significant disc degeneration at both L4-5 and L5-S1 with discogenic back pain and persistent right sided L5 radiculopathy." He recommended a repeat decompression and fusion surgery.

¶ 16 On February 10, 2006, claimant saw Dr. Steven Mather, an orthopedic surgeon, for a second independent medical evaluation. Dr. Mather noted claimant "had an L4-5 disc herniation consistent with his work injury of 10-20-03" and recommended a "radial discectomy at L4-5 with a fusion."

¶ 17 Claimant received trigger-point injections by Dr. Oken and Dr. Wang on February

23, 2006, March 3, 2006, and May 11, 2006.

¶ 18 On June 27, 2006, Dr. Mather performed the decompression and spinal fusion surgery on claimant. Claimant testified he experienced some relief following this surgery and was able to stand up straight, and, with the use of a cane, he no longer dragged his leg. However, he continued to experience pain while traversing stairs. Claimant continued treating with Dr. Mather for "low back syndrome" and, in February 2007, he was referred to Dr. Oken again for pain management.

¶ 19 On March 9, 2007, Dr. Oken noted that claimant continued to have significant pain in his back and down his legs, more so on the right than on the left, as well as pain in his lumbar and thoracic spine. Claimant also complained of numbness in his right foot on that date. Physical therapy was prescribed. After several months, claimant reported that the physical therapy was not helping with his pain. Dr. Mather prescribed acupuncture, increased the dosage of his pain medicine, and prescribed medication for depression. Claimant testified that at this time, "[t]hey were no longer trying to strengthen me to get me out in the big world anymore. They were teaching me how to live with this, how to pick stuff up properly, what I can carry."

¶ 20 On September 18, 2007, claimant underwent an outpatient psychology evaluation at Marianjoy Medical Group by psychologist Dr. Angelique Strand. Dr. Strand diagnosed claimant with panic disorder without agoraphobia, major depressive disorder, pain disorder associated with both psychological factors and due to a general medical condition, and sleep disorder due to pain. Individual and group psychotherapy sessions were prescribed.

¶ 21 On December 17, 2007, Dr. Mather—who prior to that day had last seen claimant approximately five months before—noted claimant continued to complain of lower back pain and right leg numbness and expressed his symptoms "are about the same." After reviewing the

results of two functional capacity evaluations, Dr. Mather opined that claimant was at maximum medical improvement (MMI). He released claimant "with a light/medium duty lifting limit, 30 pounds maximum," no bending more than 8 times per hour, and a requirement that he change positions every 45 minutes. On March 10, 2008, claimant returned to Dr. Mather to determine if additional physical therapy would help with some intermittent pain issues he was experiencing. Dr. Mather did not feel physical therapy would be helpful and continued to be of the opinion claimant had reached MMI.

¶ 22 On March 26, 2008, claimant followed up with Dr. Oken and requested further work restrictions as he felt he could not comply with Dr. Mather's work restrictions. Following a physical examination, Dr. Oken modified claimant's work restrictions, noting as follows: "[s]itting tolerance is 60 minutes, standing tolerance is 30 minutes. The patient needs to lie down for 15 minutes each hour and no lifting over 30 pounds."

¶ 23 On June 10, 2008, claimant saw Dr. Martin Lanoff , a board certified physical medicine and pain medicine specialist, at the request of the employer. Dr. Lanoff's report from that day included his opinion that claimant's ongoing pain complaints were "much more likely [the result of] his deep-seeded [*sic*] psychological issues." Although Dr. Lanoff believed claimant suffered a permanent disability due to the spinal fusion, he noted that he should be released to medium duty, around 50 pounds of lifting on a regular basis, with no restrictions regarding walking, sitting, or standing. According to Dr. Lanoff, claimant's ongoing symptomatic complaints were the result of an underlying substance-abuse issue or an underlying psychopathology, and thus, opined claimant needed no further treatment, testing, or medication from a symptomatic standpoint, but that psychological medication was in order. Dr. Lanoff opined claimant's current condition of pain in his back had nothing to do with work-related

issues but was "mostly psychologically-related."

¶ 24 During his evidence deposition, Dr. Lanoff acknowledged that he was not board certified in psychiatry or psychology. However, he testified psychology was a large part of his training and, further, that he had supervised a number of psychologists whose opinions were "second to [his]" as the head of a pain-clinic team.

¶ 25 On July 21, 2008, claimant saw Dr. Alexander Obolsky, a psychiatrist, at the request of the employer. According to Dr. Obolsky, his interview with claimant lasted approximately 2 hours and 10 minutes. In advance of the interview, claimant had taken a number of psychological and neuropsychological tests. In addition, Dr. Obolsky reviewed claimant's medical records, noting that although claimant had been released to return to work by all of his treating physicians with varying restrictions, he had not returned to work. Dr. Obolsky diagnosed claimant with (1) anxiety disorder not otherwise specified with panic, obsessive compulsive and dissociative features; (2) personality disorder not otherwise specified; (3) "child-conduct disorder"; and (4) pain disorder. According to Dr. Obolsky, all of these conditions preexisted, and were not causally related to, the October 20, 2003, work accident.

¶ 26 On April 9, 2009, claimant was examined by Dr. Samuel Chmell, an orthopedic surgeon, at the request of claimant's attorney. Dr. Chmell conducted a physical examination of claimant and reviewed the independent medical examination reports of Dr. Lanoff and Dr. Obolsky, medical records from Marianjoy, Dr. Mather, Good Samaritan Hospital, Edward Hospital, and physical therapy records from Optimal Health Institute. Dr. Chmell diagnosed claimant with (1) "L4-L5 disc herniation with right L5 radiculopathy[,] post L4-5 laminectomy, diskectomy and decompression and subsequent reoperation with repeat L4-5 laminectomy, diskectomy, decompression and lysis adhesions"; (2) "failed back syndrome secondary to

number 1"; and (3) "chronic pain syndrome secondary to number one and number two." Dr. Chmell opined that claimant's conditions were causally related to the October 20, 2003, work accident.

¶ 27 Dr. Chmell further concluded that claimant would be unable to work on a regular full-time basis because he would not be able to tolerate sitting for 6 hours out of an 8-hour shift, he could not bend or lift, and he needed to lie down for 15 minutes out of every hour. According to Dr. Chmell, claimant's conditions were permanent. Dr. Chmell disagreed with Dr. Lanoff's opinion "there [was] no objective explanation of [claimant's] symptoms." Dr. Chmell testified claimant was "beyond the point of [MMI]," that his conditions would not improve, and he should continue treatment for pain. Dr. Chmell disagreed with the results of two functional capacity evaluations conducted on claimant, one indicating claimant could lift between 23 to 30 pounds and the other 30 to 70 pounds, asserting that claimant would not be capable of doing either on a full-time basis.

¶ 28 On April 14 and April 19, 2004, claimant saw Dr. Marc Slutsky, a psychiatrist. At his evidence deposition, Dr. Slutsky testified claimant suffered from a character disorder prior to the October 20, 2003, work accident. Dr. Slutsky explained, "[a] character disorder is a condition of a person's overall level of functioning. It's really the style, the way, the pattern with which a person faces life. So it involves certain personality traits that may affect or does not affect the way a person look[s] at the world, experiences hi[s]self, faces things." Dr. Slutsky continued, "[a] character disorder is when the personality qualities are maladaptive, and they form a pattern of a person being very limited in the way the cope with the world." Dr. Slutsky saw claimant "as a very limited guy with a lot of withdrawal, denial, depression, anxiety, dissociation, isolation, easily irritable, [and] enraged." Dr. Slutsky testified that "[d]uring the last

four years when he was working, he was actually at the high point of his life because he had the self-esteem that came from his job, where he described himself and saw himself as literally on top of the world when he was at the top of this high heavy equipment that he operated." At that point in his life, "[h]e saw himself as earning a good living. He looked good physically in his own eyes." According to Dr. Slutsky, claimant's "job played a very significant role in elevating his functioning and self-esteem." When asked how the injury claimant suffered in the work accident affected him psychologically, Dr. Slutsky responded as follows:

> "It took away the very qualities that enhanced his function, so that he no longer was working, he had physical pain. It exacerbated feelings of his limited worth that he had. It altered his self-view, and all of this led to a worsening of every one of the characterologic features in his personality.
>
> He became more isolated, more suspicious, more irritable, more depressed, more anxious, which cycled around and made his recovery even more difficult, because he became a more negative and less adaptive person in recovery, because he was so limited in what he could do."

¶ 29 In Dr. Slutsky's opinion, the October 20, 2003, work accident caused "a significant trauma that shattered [claimant's] limited ability to cope and threw him over the edge to become dysfunctional" resulting in a psychological disability. According to Dr. Slutsky, the combination of the trauma, stress, and claimant's preexisting character disorder left him in a permanent, psychologically dysfunctional state. Dr. Slutsky explained that the symptoms of claimant's character disorder were aggravated by the work accident. Specifically, "[a]s a result

of the loss of the capacity to be the way he saw himself in a positive way, his depression, his anxiety, his irritability, his anger, his obsessiveness, his ruminating behavior, his withdrawal from social relationships, all became worse."

¶ 30 Julie Bose, a rehabilitation consultant for MedVoc Rehabilitation, met with claimant at the request of the employer. Her initial interview took place on March 25, 2008, and she and other MedVoc employees worked with claimant for more than a year to help him find a job. Bose testified that, in her opinion, claimant was not compliant with the vocational rehabilitation plan initiated in March 2008. She stated claimant refused G.E.D. classes, did not complete his homework in a timely manner, failed to follow up with job leads, failed to return MedVoc calls, did not present himself properly at interviews, and made only 106 employer contacts over the course of a year when he should have made 450 contacts.

¶ 31 Bose admitted that the job leads she sent to claimant did not take into consideration Dr. Oken's restriction that claimant must lie down for 15 minutes every hour because no employers would be able to accommodate that restriction. Instead, she found jobs within the restrictions of Dr. Mather, and she testified that, based on those restrictions, claimant would be capable of earning between $11 and $13 per hour.

¶ 32 Susan Entenberg, a vocational and rehabilitation counselor, met with claimant at the request of his counsel. Their initial meeting took place on March 25, 2008. Bose was also present at this meeting. Entenberg met with claimant a second time on May 1, 2009. She reviewed reports and job search logs of MedVoc Rehabilitation, and the medical records of Dr.'s Chmell, Lanoff, Obolsky, Slutksy, and Oken. After interviewing claimant and reviewing the above records, Entenberg opined that he was not capable of performing his past work as a heavy equipment operator, and further, was not an appropriate candidate for vocational rehabilitation as

no stable labor market existed for him. Entenberg based her opinion on the restrictions imposed by Dr. Oken, as well as Dr. Chmell's opinion that claimant was "unable to work regularly on a full time basis" and Dr. Slutsky's opinion that claimant's potential for full recovery of his psychological disability was unlikely. Entenberg testified she had also reviewed a report from a physical medicine and rehabilitation physician with Marianjoy Medical Group, Chanda Mayo-Ford, which indicated claimant "is not able to work and has a permanent disability." Entenburg stated if Dr. Mather's restrictions were the only restrictions considered, claimant would be able to perform light-level work earning approximately $8 to $10 per hour.

¶ 33 Claimant testified that, at the time of the hearing, he continued to be treated at Marianjoy for pain in his lower back and right leg and continued to take prescription pain medicine. He continued to use a cane to walk most places and experienced muscle spasms. Since the work accident and the loss of his job, claimant testified he felt "[h]orrible," "like an old cripple, an old man," and he had considered suicide for several days in 2008 because he felt like he was going to be crippled for the rest of his life.

¶ 34 Regarding his work potential, claimant testified he did not feel he was employable due to his restrictions and that going back to school "would be a waste of materials and time for me and the teacher" due to the medications he took which made him "incoherent half the time." Claimant explained that the reason he did not wear dress clothes to his interviews was because he could not afford new clothes and the ones he had were too restrictive due to his weight gain.

¶ 35 At the time of arbitration, Claimant testified he was volunteering as a delivery driver for Al's Pizza one to three days per week for approximately 7 hours per shift. According to claimant, he had to beg the owner to allow him to volunteer. He did not get paid for delivering the pizzas but did get to keep the tips. Claimant stated that he went to Al's Pizza

basically just to interact with people and for a free meal.

¶ 36 On October 4, 2011, the arbitrator filed a corrected arbitration decision, finding that (1) claimant established an accident that arose out of an in the course of his employment; (2) claimant's current conditions of physical and psychological ill-being were causally related to the October 20, 2003, work accident; (3) claimant was owed wage differential payments of $969.35 per week under section 8(d)(1) of the Act based on an average weekly wage of $1,933.96; (4) the medical treatment received by claimant was reasonable and necessary and the employer was liable for all medical bills submitted by claimant; (5) claimant was entitled to temporary total disability (TTD) benefits for the period of October 21, 2003, through March 13, 2009; and (6) penalties and fees were not warranted.

¶ 37 On review, the Commission, with one commissioner dissenting, reversed the arbitrator's award of wage-differential benefits, finding instead that claimant's permanent and total disability warranted PTD benefits of $1,021.01 per week for claimant's life rather than the wage-differential benefits awarded by the arbitrator. In all other respects, the majority of the Commission affirmed the arbitrator's decision. The dissenting commissioner would have reversed the arbitrator's decision having found no causal connection between the work accident and claimant's conditions of ill-being.

¶ 38 On judicial review, the circuit court of Will County affirmed the Commission's decision in all respects except for the award of medical bills, which it reduced by $6,848.

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 On appeal, the employer argues the Commission's (1) award of PTD benefits was against the manifest weight of the evidence; (2) finding of causal connection was against the

manifest weight of the evidence; and (3) decision improperly included overtime hours in the calculation of claimant's average weekly wage and improperly shifted the burden of proof to the employer.

¶ 42 A. Propriety of PTD Benefits

¶ 43 On appeal, the employer first argues the Commission's award of PTD benefits was against the manifest weight of the evidence. Specifically the employer asserts the decision was against the manifest weight of the evidence because (1) the Commission's decision was based on an erroneous reading of the medical record; (2) claimant refused to cooperate in vocational rehabilitation; (3) claimant was working in a reasonably stable labor market at the time of the award; and (4) the Commission erred in its reading of the arbitrator's decision as having found claimant permanently and totally disabled, and therefore, erred in reversing the arbitrator's award of wage-differential benefits in favor of PTD benefits.

¶ 44 "In a workers' compensation case, the claimant has the burden of establishing, by a preponderance of the evidence, the extent and permanency of his injury." *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 1007893WC, ¶ 33, 966 N.E.2d 40. The extent of a claimant's disability is a question of fact to be resolved by the Commission. *Id*. We will not disturb the Commission's determination in this regard unless it is against the manifest weight of the evidence. *Id*. A finding is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Id*.

¶ 45 "An injured employee can establish his entitlement to PTD benefits under the act in one of three ways, namely: [(1)] by a preponderance of the medical evidence; [(2)] by showing a diligent but unsuccessful job search; or [(3)] by demonstrating that,

> because of age, training, education, experience, and condition, there are no available jobs for a person in his circumstance." *Professional Transportation*, 2012 IL App (3d) 100783WC, ¶ 34, 966 N.E.2d 40.

The Illinois Supreme Court has held as follows:

> "[A]n employee is totally and permanently disabled when he 'is unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations]. The claimant need not, however, be reduced to total physical incapacity before a permanent total disability award may be granted. [Citations]. Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonable stable market. [Citation]." *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842, 845(1983).

¶ 46 The employer first asserts that the Commission's finding of permanent disability was based entirely on Dr. Mayo-Ford's July 19, 2010, report which stated that claimant was "not able to work and has a permanent disability." Citing *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 119, 561 N.E.623, 628 (1990), the employer asserts that Dr. Mayo-Ford's recommendation of physical therapy to "improve [claimant's] mobility and strengthening" was evidence she in fact did not view claimant's condition as permanent, but instead, she expected his condition to improve. In *Archer Daniels*, the Commission affirmed the arbitrator's determination that the claimant's condition had not yet stabilized, or had not reached a state of permanency, based on evidence that he remained under his physicians' care, had not been released for full-time employment by his physicians, and was subject to substantial physical

limitations. *Id*. at 11, 561 N.E.2d at 628.

¶ 47 Initially, we disagree with the employer's contention that Dr. Mayo-Ford's recommendation of physical therapy is evidence that she expected his condition to improve. Although Dr. Mayo-Ford recommended claimant begin physical therapy to improve his mobility and strengthening, she opined claimant's disability was permanent. Further, we note that the Illinois Supreme Court in *Archer Daniels* affirmed the Commission's decision regarding permanency under the manifest weight of the evidence standard, finding the "Commission could have reasonably inferred that the [claimant's] condition had not yet reached a state of permanency." Unlike in *Archer Daniels*, the appellant here is the employer who bears the heavy burden of establishing the Commission's determination that claimant's injury had reached a state of permanency is against the manifest weight of the evidence.

¶ 48 In this case, the evidence shows that as a result of the October 20, 2003, work accident, claimant suffered a low back injury that resulted in three surgeries, the last of which claimant underwent in June 2006. None of these surgeries eliminated claimant's pain in his lower back and right leg. Dr. Mayo-Ford's opinion that claimant's disability was permanent finds further support in the record. For instance, in December 2007, Dr. Mather opined that claimant had reached MMI and released him for light/medium duty work at that time—an opinion he continued to assert in March 2008 when claimant returned to him to determine if physical therapy would help with the pain he was still experiencing. In March 2008, Dr. Oken modified claimant's work restrictions in part, adding the requirement claimant lie down for 15 minutes of every hour. In February 2009, Dr. Chmell opined that claimant had reached MMI but would need ongoing treatment for pain and would be unable to work regularly on a full-time basis. In addition, Dr. Chmell testified that claimant's conditions were permanent, "beyond the point of

[MMI]," and that his limitations, including the requirement he lie down for 15 minutes of every hour, rendered him unable to work on a regular full-time basis.

¶ 49 In addition to the evidence of claimant's physical disability, Dr. Slutsky testified that the October 20, 2003, work accident caused a significant trauma to claimant that "shattered his ability to cope and threw him over the edge to become dysfunctional." According to Dr. Slutsky, in the four years leading up to the work accident, claimant was "at the high point of his life" and "saw himself literally on top of the world." After the accident, Dr. Slutsky testified "the floor dropped out from under [claimant] and he sank." Although claimant's character disorder preceded the work accident, Dr. Slutsky opined that the accident aggravated the disorder and "left him in a permanent, psychologically dysfunctional state."

¶ 50 We reject the employer's assertion that Dr. Mather's medical opinion was the sole medical opinion upon which the Commission could have found claimant reached MMI. Dr. Mather found claimant had reached MMI with permanent work restrictions, but not a permanent total disability. As noted above, however, Dr. Oken and Dr. Chmell disagreed with the limitations imposed upon claimant by Dr. Mather, finding that, in addition to Dr. Mather's restrictions, claimant needed to lie down for 15 minutes of every hour. Based on that restriction, Julie Bose and Susan Entenburg testified that no work would be available for claimant.

¶ 51 Based on this evidence, we find that the Commission could have reasonably concluded claimant's physical and/or psychological disability was permanent and that claimant was entitled to PTD benefits.

¶ 52 The employer also argues that the Commission, in making its PTD determination, disregarded (1) "indications [in the record] that [claimant] did not fully participate or cooperate in efforts at vocational rehabilitation"; and (2) claimant's work in a stable labor market. The

employer's argument in this regard is based on its erroneous contention that the Commission's finding of PTD was based on claimant's "odd-lot" status. See *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, , 865 NE.2d 342, (2007) (noting that where there is no medical evidence to support a claim of total disability, the claimant may show he falls into the odd-lot category "(1) by showing diligent but unsuccessful attempt 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"). In this case, however, the Commission's determination claimant was entitled to PTD benefits was based on its interpretation of the medical evidence. See *Professional Transportation*, 2012 IL App (3d) 100783WC, ¶ 34, 966 N.E.2d 40. Thus, it is not necessary that claimant also prove his entitlement to PTD benefits based on his participation and cooperation in searching for a job or by demonstrating that, based on his particular circumstances, no job is available for him. Nonetheless, we note that both vocational and rehabilitation counselors opined that no competitive employment opportunities existed for claimant based on the requirement that he lie down for 15 minutes of every hour. Accordingly, whether claimant cooperated with vocational rehabilitation services is irrelevant. Further, the employer's assertion that claimant's volunteer work as a pizza deliveryman constitutes work in a stable labor market is unpersuasive. See *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 362, 376 N.E.2d 206, 210 (1978) ("Evidence that the employee has been or is able to earn occasional wages or to perform certain useful services neither precludes a finding of total disability nor requires a finding of partial disability.") Here, claimant requested the owner of Al's Pizza to allow him to volunteer, which was limited to one to three days per week. Claimant was not paid by Al's Pizza for delivering pizzas, although he was allowed to keep tips from customers. According to claimant, the main purpose of going to Al's Pizza was to socialize and

receive a free meal. Based on these facts, we do not find that claimant was working in a stable labor market.

¶ 53 Last, the employer asserts that the Commission erred in its reading of the arbitrator's decision as having found claimant permanently and totally disabled, and therefore, erred in reversing the arbitrator's award of wage-differential benefits in favor of PTD benefits. Based on our reading of the arbitrator's decision, we find the Commission correctly interpreted it as setting forth the arbitrator's opinion claimant was permanently and totally disabled. For instance, under the heading which includes "the nature and extent of the petitioner's injuries," the arbitrator notes that "due to these injuries [sustained in the October 20, 2003, work accident], the petitioner is permanently and totally disabled, from both physical and psychological standpoints." Later, under the "medical services and unpaid medical bills" heading, the arbitrator again notes "petitioner is permanently and totally disabled due to a work related injury." The Commission further indicated that its finding claimant suffered from a total and permanent disability was based on Dr. Mayo-Ford's opinion that, "[t]he patient is not able to work and has a permanent disability." Thus, we reject the employer's contention that the Commission's PTD finding was based on an erroneous reading of the arbitrator's decision.

¶ 54 B. Causal Connection

¶ 55 Next, the employer argues that claimant's "current inability to work is entirely due to his psychological conditions, which predated the original work injury, and thus his continuing restrictions due to that state of ill-being are not causally connected to the original work injury."

¶ 56 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203,

797 N.E.2d 665, 671 (2003). "The 'arising out of' component is primarily concerned with causal connection" and is satisfied where it is "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id*. at 203, 797 N.E.2d at 672. Where an employee has a preexisting condition, "recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Id*. at 205, 797 N.E.2d at 672-73. In such cases, "recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury." *Id.* at 204-05, 797 N.E.2d at 672. "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." *Id*. at 205, 797 N.E.2d at 673.

¶ 57 "The question of whether a causal relationship exists between a claimant's employment and his workplace injury is a question of fact to be resolved by the Commission [citation], and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence [citations]." *Village of Villa Park v. Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, ¶ 19, 3 N.E.3d 885. "It is the Commission's duty to resolve conflicts in the evidence, particularly medical opinion evidence." *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 312 (2005). "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Mansfield v. Workers' Compensation Comm'n*, 2013 IL App (2d) 120909WC, ¶ 28, 999 N.E.2d 832. "A finding is not against the manifest weight of the evidence if there was sufficient evidence in the record to support the Commission's determination." *Certified Testing*

v. Industrial Comm'n, 367 Ill. App. 3d 938, 944-45, 856 N.E.2d 602, 608 (2006).

¶ 58 Initially, we note that the Commission did not find claimant's inability to work was entirely due to his psychological conditions. Rather, the Commission found claimant permanently disabled due to both his physical *and* psychological conditions. Further, while it is undisputed that claimant suffered from a number of psychological conditions prior to the October 20, 2003, work accident, the record supports a finding that the accident aggravated claimant's psychological conditions, and that his current condition of psychological ill-being is causally related to the accident.

¶ 59 According to Dr. Slutsky, claimant has suffered from a character disorder since his childhood. However, he explained in the four years prior to the work accident, claimant was operating at a more functional level and "was actually at a high point of his life because he had the self-esteem that came from his job" and was "earning a good living." Dr. Slutsky testified the work accident "took away the very qualities that enhanced his function," "exacerbated feelings of his limited worth that he had," and "altered his self-view, and all of this led to a worsening of every one of the characterologic features in his personality." Dr. Slutsky explained that "the floor dropped out from under him and he sank." The work accident "threw [claimant] over the edge to become dysfunctional," aggravating his character-disorder symptoms and leaving him psychologically disabled. On cross-examination, Dr. Slutsky testified that following the trauma from the accident, claimant's "symptoms multiplied many times to the point of his dysfunctionality, to the point where he couldn't sit, the point where he was in chronic pain, the point where he felt totally discouraged, felt that he lost control of the way his body looked and turned into his own self-evaluation, and unattractive, worthless, hopeless person."

¶ 60 Although Dr. Obolsky opined that claimant's psychological conditions were not

causally related to the work accident, it was for the Commission to resolve conflicts in the evidence. The Commission found Dr. Slutsky's causation opinion to be more credible. The Commission's findings were supported by the record and its decision was not against the manifest weight of the evidence.

¶ 61 C. Propriety of Including Overtime Hours in the Calculation of Claimant's Wage

¶ 62 Finally, the employer argues the Commission's decision improperly included overtime hours in the calculation of claimant's average weekly wage and improperly shifted the burden of proof to the employer.

¶ 63 "In a workers' compensation case, the claimant has the burden of establishing his or her average weekly wage." *Kawa v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120469WC, ¶ 134, 991 N.E.2d 430. "The determination of an employee's average weekly wage is a question of fact for the Commission, which will not be disturbed on review unless it is against the manifest weight of the evidence." *Id*.

¶ 64 Section 10 of the Act excludes overtime wages from the calculation of an employee's compensation. 820 ILCS 305/10 (West 2010). However, to the extent that overtime hours are consistent and required by the employer, they may be included in the calculation of an employee's average weekly wage. *Airborne Express v. Illinois Workers' Compensation Comm'n*, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979, 983 (2007).

¶ 65 In this case, claimant testified that he consistently worked 10 hours per day, six days per week weather permitting. Claimant stated that all hours worked on Saturdays were required overtime as were two of the 10 hours worked each day during the week. The Commission, by adopting the arbitrator's determination, found that the overtime hours were consistent and mandatory based on claimant's testimony, noting that the employer failed to rebut

claimant's testimony.

¶ 66 The employer's argument seems to be that since the Commission did not specifically state it found claimant's testimony regarding the mandatory nature of the overtime credible, it improperly shifted the burden to the employer. We disagree. Based on the Commission's determination that claimant's overtime hours worked on Saturdays and during the week should be included in the calculation of his average weekly wage, it is clear the Commission found his testimony in this regard credible. Accordingly, we cannot find the Commission's decision to include overtime hours in claimant's wage calculation was against the manifest weight of the evidence.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision.

¶ 69 Affirmed.