

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 141023WC-U

Order filed December 18, 2015

NO. 4-14-1023WC

Modified upon denial of rehearing March 25, 2016

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MONTEREY COAL COMPANY,)	Appeal from
)	Circuit Court of
Appellant,)	Macoupin County
)	No. 13MR63
v.)	
THE ILLINOIS WORKERS' COMPENSATION)	
COMMISSION <i>et al.</i> (Donald Stewart, Appellee).)	Honorable
)	Kenneth R. Deihl,
)	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:* The Commission's wage differential award is affirmed as modified where claimant presented sufficient evidence to establish his entitlement to wage differential benefits but the Commission's wage differential calculation was against the manifest weight of the evidence.

¶ 2 On November 28, 2007, claimant, Donald Stewart, filed an application for adjustment of claim pursuant to the Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 *et seq.* (West 2006)), seeking benefits from the employer, Monterey Coal Company. Following a hearing, the arbitrator found claimant developed coal worker's pneumoconiosis (CWP) and an aggravation of his preexisting asthma as a result of his work as a coal miner and his "exposure to various [coal] mine dust and fumes." He found claimant entitled to wage differential benefits of \$505.09 per week, beginning September 21, 2007, and "for the duration of the disability."

¶ 3 The Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision without further comment. On judicial review, the circuit court of Macoupin County confirmed the Commission. The employer appeals, arguing the Commission's determination that claimant was entitled to wage differential benefits was against the manifest weight of the evidence. We modify the Commission's decision by reducing its wage differential award to \$334.84 but otherwise affirm the circuit court's judgment, confirming the Commission's decision.

¶ 4 I. BACKGROUND

¶ 5 On June 12, 2012, an arbitration hearing was conducted in the matter. Claimant, who was then 57 years old, testified that, beginning in July 1976, he worked for the employer as an underground coal miner for over 30 years. He stated that, during that time, in addition to coal dust, he regularly inhaled silica dust, diesel exhaust, rock dust, glues used in the vulcanizing process to repair belt lines, and plant glues used to repair coal shoots with ceramic tile.

¶ 6 Claimant acknowledged having allergy-related issues and asthma prior to working for the employer. He testified as follows:

"I recall severe allergies all my childhood life. You want to know what I recall about my asthma? I maybe had some mild symptoms but I really didn't have too much trouble with my lungs until I got in that coal mine, and I talked about, with my wife, not even working there but I had two kids to raise and it was the best job around."

¶ 7 Claimant testified he was first exposed to vulcanizing glue at work in November or December of 1976. He noticed a reaction in his lungs from the glue. Claimant stated he expe-

rienced "tightness," sought medical treatment from Dr. Glennon Paul, and spent a week in the hospital. He reported that he got better "through aggressive treatment" and went back to work. Claimant stated he also received "a lot of medicine" from Dr. Paul.

¶ 8 On another occasion, claimant testified he experienced problems after being exposed to "special glue" used to repair "the long wall" at the mine. He described the long wall as a machine that was "a thousand feet long." During the last 10 to 12 years that he worked at the mine, two instances occurred when the employer was in danger of losing the long wall "because the rock above the coal seam was falling." Claimant testified mining operations ceased and a contractor was called in to fix the problem with the "special glue." The contractor's workers used special suits and breathing equipment because of the danger of the glue. Claimant testified he was a mine examiner and was responsible for taking an air reading before coal mining operations could resume. He believed some part of the glue "had not been set up enough" while he was taking his reading and he felt "a burning sensation in [his] lungs for a month." He returned to Dr. Paul and received an "IV treatment," a nebulizer treatment, and Prednisone.

¶ 9 According to claimant, other instances occurred when he was exposed to roof bolting glue. He testified it was common that the glue would be "run over by equipment," break open, and "lay there for weeks on end." Claimant stated that there were several occasions when the glue bothered him but he recalled one instance when he had an acute reaction after he "stuck [his] head right over" a box he did not know had been run over.

¶ 10 Claimant testified he "pretty much was on medicine [his] last 15, 20 years at the mine" and had "probably taken every kind of asthma medicine." Currently, he was taking Advair Diskus daily; 300 milligrams of Theophylline twice a day; Albuterol when he had an acute episode; and Tussionex, which he believed contained Vicodin, as needed when he had dif-

ficulty sleeping due to coughing. Claimant testified he also always had Prednisone on hand and took an antihistamine quite a bit. On cross-examination, he testified he was "able to work at the mine taking all [of his] medication, [and] it kept [him] going."

¶ 11 Claimant last worked for the employer on September 29, 2006, and testified he was exposed to coal dust on that date. He quit work "a little bit before" the mine closed. Claimant asserted he quit because he believed his "lungs were shot." He noted he could not "do near the work, near the walking [he] was doing before." Claimant acknowledged he had been "on restricted duty for [his] back" and people helped him with his route. He testified he had a bad nerve in his back that was not fixable. On cross-examination, claimant testified he initially injured his back in November 2005, and then reinjured his back in approximately March 2006. He agreed that after March 2006 he went on restricted duty, which continued until September 2006, when he stopped working for the employer. Claimant further testified as follows: "I had multiple health issues and, you know, my lungs and back basically was a big one. Basically my lungs sent me home."

¶ 12 On cross-examination, claimant agreed that a number of miners retired around the same time he left the mine because the mine was rumored to have been sold and they wanted to retire under the medical plan that was then in force. Claimant asserted, given his health, he could not have worked for any coal company. However, he agreed that, due to "the disease [he had] it would be fair to say [he] was concerned about having insurance." Further, claimant acknowledged that he had been told there was no permanent light-duty or restricted-duty work available with the employer.

¶ 13 Both before and after his last day of work for the employer, claimant worked as the local union president and on the State Mining Board for the Illinois Department of Natural

Resources. He stated his job as the local union president required him to represent 300 retired coal miners and their spouses and he earned \$3,000 per year in that position. Claimant testified the State Mining Board had six members and a director. His position with the board was an appointed position that paid around \$12,500 per year and provided him with medical and retirement benefits. Claimant testified the insurance he had through his work with the board was as good as or better than the medical plan he had through the employer. Further, with respect to employment, the following colloquy occurred between claimant and his attorney:

"Q. Do you think that's the best work you could get outside of coal mining?

A. Well, considering the fact that—yes, with my back and lungs and the—yeah, I really do. It's what I did—all I ever did as an adult, something in the mining industry. I've been on two different boards since 2003 and I have a long history of representing miners in different areas. It's actually a perfect fit for me and my health conditions."

¶ 14 Claimant testified that he did not believe he could work as a coal miner. When asked whether his back or his breathing gave him the most problems, he stated as follows:

"Well, when my asthma's bad I can't think of nothing worse than feeling like you're suffocating and since that exposure I explained earlier I think I have permanent lung damage getting exposed to that glue that they glued the face up with and my lungs are—there's a tightness in there even with my medicine all the time so I don't think I could go back to the coal mine, no."

Additionally, claimant testified that over the course of his coal mining career the frequency of his "attacks" increased. He also believed they increased in severity.

¶ 15 Claimant testified that if he was working as a coal miner at the time of arbitration and in the position of a mine examiner—the classification he had when he left the coal mine—he would be earning a little over \$25 per hour. He submitted an exhibit containing a copy of the National Bituminous Coal Wage Agreement, which he testified established \$26.41 as the hourly rate for his position in 2012. That agreement notes the hourly rate was computed by dividing the standard daily wage rate of \$211.32 by eight hours.

¶ 16 At arbitration, claimant presented the testimony of James Chronister, who also worked for the employer. Chronister stated he worked with or near claimant on a regular basis during claimant's last 10 years at the mine. Chronister noticed that claimant had breathing problems. He observed that claimant had to go sit down and use his inhaler after picking up materials that were broken or had been run over, including roof bolting glue. Chronister testified he routinely saw broken tubes of glue in the mine. Further he stated claimant used inhalers at work on a regular basis. Chronister also observed claimant have reactions to diesel exhaust, which he stated claimant was exposed to every day.

¶ 17 Claimant further presented Dr. Paul's deposition, taken on April 11, 2011. Dr. Paul testified he was the senior physician at the Central Illinois Allergy and Respiratory Clinic, which specialized in allergy and pulmonary diseases. He had written a book on asthma and had occasion to treat coal miners for coal mine-induced lung disease. Dr. Paul's testimony showed he began treating claimant in 1976 pursuant to a referral from Dr. Ross Billiter. Since that time, he saw claimant approximately four times per year. He described claimant's main problem as asthma and stated he provided ongoing treatment and medication for that condition. Dr. Paul

stated he also provided treatment to claimant for allergies. In December 1976, he provided care for claimant while he was hospitalized for his asthma. At that time, he prescribed claimant medication.

¶ 18 On February 22, 2008, Dr. Paul examined claimant and made a report. He recorded a history of coughing, wheezing, and shortness of breath, which he attributed to claimant's asthma. Dr. Paul testified those type of symptoms had been present since he began treating claimant. At the time of his examination, he reviewed an x-ray of claimant's chest and found multiple small nodules throughout claimant's lung fields with some small areas of fibrosis. Dr. Paul testified the fibrosis was scarring of the lungs and stated as follows: "It could be from coal dust. It could be from an old pneumonia. More than likely, it's just from his chronic exposure to coal dust." Dr. Paul's impression from his February 2008 examination was that claimant had "simple [CWP] complicated by asthma and complicated by gastroesophageal reflux disease."

¶ 19 Dr. Paul testified at the time of his February 2008 report he considered a report by Dr. Henry Smith, a certified B-reader, who interpreted a chest x-ray performed on claimant on September 21, 2007. Dr. Smith's impression was "[p]neumoconiosis with interstitial fibrosis p/s, all zones involved, profusion 1/0 with mild thickened interlobar fissures." Dr. Paul testified Dr. Smith's findings were consistent with his own findings regarding claimant. Further, he stated that although he was not a certified B-reader, for the past 35 years, he read approximately 100 chest x-rays per week.

¶ 20 Dr. Paul stated that earlier chest x-rays performed on claimant and contained within his treatment records were not interpreted by a B-reader and not read for the purpose of finding the presence of CWP. He agreed with an impression from a May 2003 chest x-ray of claimant that included mild COPD. Further, Dr. Paul believed a November 2002 x-ray, showing

minimal chronic extenuated interstitial markings about the middle lobe and chronic interstitial changes at the left base was consistent with his finding of CWP.

¶ 21 During his deposition, Dr. Paul reiterated that his opinion was that claimant had asthma and CWP caused by coal dust. He agreed that, to have pneumoconiosis, you must have coal mine dust deposited in your lungs and a tissue reaction to it. The tissue reaction can be called scarring or fibrosis. Dr. Paul testified that when CWP is present there is necessarily "some impairment in the function of the lung at the site of the scarring." However, he stated it was possible to have injury or disease in the lung and have normal pulmonary function test results. Further, Dr. Paul testified that a person with radiographically significant CWP could have no shortness of breath, have normal pulmonary function testing, normal blood gases, and a normal physical examination of the chest. Additionally, aside from coal mine dust, there were other "exposures in the environment of a coal mine" that could injure the lungs, including silica, diesel fumes, fumes from other petroleum products, smoke and fumes from high sulfur coal fires, smoke and fumes from electrical cable fires, fumes from glue used in the roof bolting process, and welding fumes.

¶ 22 Initially during his testimony, Dr. Paul asserted he was unaware of any doctor diagnosing claimant with asthma before he made that diagnosis and that he did not start seeing claimant until after claimant began working as a coal miner. Further, he testified there was a temporal relationship between claimant's asthma and his work for the employer because his asthma "started right after he went to work as a coal miner." However, on cross-examination, Dr. Paul acknowledged that his medical records showed he saw claimant on June 15, 1976, prior to when claimant began working for the employer. He also agreed those records showed claimant had already been experiencing mild asthma symptoms.

¶ 23 Dr. Paul testified that throughout his treatment of claimant, claimant discussed and complained about fumes he was exposed to from various glues and adhesives while working in the coal mine. Claimant reported experiencing asthma symptoms when inhaling those fumes. Despite the treatment claimant was receiving for his condition he would still experience a reaction if he got too close to the adhesives. Dr. Paul testified claimant's treatment might lessen his attacks but it would not prevent them.

¶ 24 Dr. Paul opined that claimant's health would be endangered by further exposure to the environment of a coal mine. He testified that when a person has asthma they have good and bad days or a waxing and waning of problems. Dr. Paul testified claimant would not be able to do any kind of labor if he was having a bad day. He characterized a bad day as "a bad allergy day," noting claimant had "a lot of allergies." Dr. Paul stated claimant could also have a bad day if he got a viral infection or if he was exposed to a lot of irritants "like diesel fumes and things like this that would cause him to have asthma." He testified diesel fumes and a coal mine environment would aggravate claimant's asthma even when the asthma was a preexisting condition. Further, the following colloquy occurred between claimant's counsel and Dr. Paul:

"Q. *** Based on all the data available to you, does this man have clinically significant pulmonary impairment in the form of pulmonary symptoms, complaints, and signs?

A. Yes.

Q. What caused that?

A. Coal dust.

Q. When you say coal dust, do you include all the exposures in the coal mine to include the glues and things?

A. Yes. The coal dust, I should say coal mine exposure.

Q. Does he have x-ray evidence that's consistent with radiographically apparent pulmonary impairment?

A. Yes.

Q. What caused that?

A. Coal dust in the coal mine.

* * *

Q. Does this man have physiologically significant pulmonary impairment as demonstrated on pulmonary function testing, including Methacholine challenge?

A. Yes.

Q. What caused that?

A. Coal mine environment."

¶ 25 Ultimately, Dr. Paul opined that, based on his observations and diagnoses, claimant was totally disabled from working as a coal miner. He believed claimant's impairment was permanent. Dr. Paul testified there was no cure for CWP and that claimant would be troubled by his asthma for the rest of his life. He defined occupational asthma as asthma that was either caused or aggravated by employment.

¶ 26 Dr. Paul further testified that CWP was considered to be a progressive disease, which may progress once exposure to coal mine dust ends. The progression is usually gradual and a person could have CWP for some time before it is recognized. Dr. Paul opined that claimant, and any person with CWP, could not have further exposure to coal mine dust without endangering his health. Continued exposure could result in life threatening conditions, including pro-

gressive massive fibrosis, complicated pneumoconiosis, or a heart-related condition called cor pulmonale. On cross-examination, Dr. Paul agreed that, after cessation of exposure, there is only a small chance that claimant's CWP would progress.

¶ 27 Dr. Paul acknowledged that a person could have mild asthma, stating people "get asthma and don't need any treatment for it" and "[i]t goes away." He testified claimant was not a mild asthmatic. He testified as follows: "Asthma can change in severity from mild to severe. But he's bad enough to go into the hospital. He's bad enough to take medicines his entire life. He took allergy shots his entire life. He's not a mild intermittent asthmatic."

¶ 28 On cross-examination, Dr. Paul acknowledged that, with medical treatment, claimant was able to work as a coal miner for 30 years even though he had asthma. On re-direct, he testified that having asthma would make it more difficult to work any job but, for coal miners, it would be "even that much harder." Dr. Paul characterized claimant as "not the type of guy that would throw in the towel." Further, he testified that claimant had occupational asthma, stating "[h]e still gets aggravated" and "[i]f he gets around in that environment again, it's going to aggravate it."

¶ 29 At arbitration, claimant also presented Dr. Billiter's deposition, taken May 18, 2012. Dr. Billiter, a general practitioner, testified he began treating claimant when claimant was in high school. He stated claimant suffered from asthma and opined that his work as a coal miner contributed to the worsening of that condition. Dr. Billiter also opined that further exposure to the environment of a coal mine "would present a risk to claimant's health in terms of a possible continuing worsening of his asthma."

¶ 30 On cross-examination, Dr. Billiter testified he last saw claimant as a patient in July 2007. Over the years he only treated claimant for asthma and allergies "on a pinch hit basis"

and assumed treatment for those conditions was being done by Dr. Paul. Further, Dr. Billiter agreed that claimant had allergic symptoms and asthma symptoms since either childhood or young adulthood. He testified claimant was "[a]pparently" able to work as a coal miner with treatment for his allergies and asthma.

¶ 31 The record shows, on September 15, 2010, claimant saw Dr. Peter Tuteur at the employer's request. Dr. Tuteur's deposition was admitted into evidence at arbitration. Dr. Tuteur testified he was board certified in internal medicine and the subspecialty of pulmonary diseases. At the time he examined and evaluated claimant, he reviewed chest x-ray films and the results of a pulmonary function study performed on claimant. Dr. Tuteur also took a history from claimant and testified claimant reported that he retired from the coal mine in September 2006 in anticipation that the mine was going to be sold and due to a back injury that was causing him discomfort.

¶ 32 Dr. Tuteur also testified he had been reviewing chest x-rays for over 40 years. He found no evidence of occupational lung disease on claimant's chest x-ray films. A report he prepared following his examination of claimant states he "reviewed the PA and lateral chest radiographs dated 9/15/10" and noted "[o]ld healed partially calcified infectious granulomatous disease." Dr. Tuteur stated he found "absolutely no evidence whatsoever to indicate an interstitial process consistent with [CWP]." He opined claimant did not have CWP "or any other coal mine dust-related disease process of sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function, or radiographic abnormality."

¶ 33 Dr. Tuteur's report states claimant did have "mild intermittent asthma associated with a minimal obstructive abnormality and improvement following the administration of aerosolized bronchodilator." His report showed he reviewed a pulmonary function study performed

on claimant on September 15, 2010. Dr. Tuteur stated the study "demonstrate[ed] a minimal obstructive abnormality that does improve significantly following the administration of aerosolized bronchodilator." He also noted that both claimant's diffusing capacity and arterial blood gas analysis were normal.

¶ 34 Dr. Tuteur identified outside medical data he reviewed as including a note from Dr. Paul dated June 15, 1976; a medical evaluation from Dr. Paul dated February 22, 2008; "[r]eports regarding care provided by Prairie Cardiovascular Consultants in 2003 and thereafter"; and "a B-reader interpretation by [Dr. Smith]." Dr. Tuteur's report showed a chest radiograph taken the day of his evaluation was "entirely within normal limits." He opined that "[w]hatever caused Drs. Paul and Smith to read the 2008 radiograph at a 1/0 profusion [was] no longer present. Since [CWP] is an irreversible pulmonary process whatever caused the abnormalities seen on the 2008 film could not have been [CWP]."

¶ 35 On cross-examination, Dr. Tuteur acknowledged that claimant's work as a coal miner could have aggravated his asthma; however, he did not believe that was the case as claimant's records showed "he got better over that time from before he started the coal mine industry till the time that Dr. Paul even forgot to mention that he had asthma in his final report." The following colloquy occurred between Dr. Tuteur and claimant's attorney:

"Q. Would the best persons to determine the—whether his asthma was getting better or not be treating physicians who see him on a fairly regular basis?

A. Well, it depends.

Q. You don't deny he's got asthma?

A. No. I think he does have asthma. He had asthma before he went in the mines.

Q. And that the—

A. He had multiple hospitalizations. He had multiple aggressive treatments in Dr. Paul's office. Dr. Paul mentioned it in 2004, when he had his cardiac workup, but when he evaluated him in 2008, the words 'asthma' and 'allergy' never showed up in his report, and there's no record of any pulmonary medications that Dr. Paul prescribed at that time, and I think that's important.

Q. That was not the only time he saw him, though?

A. Well, I don't know. I only have the records that I have.

* * *

Q. And you didn't see his deposition; right?

A. I did not."

According to Dr. Tuteur, claimant also reported that he had not been "bothered by exposure to the glue adhering ceramic plates to the metal chutes" or "breathing anything associated with the glue bolts." He stated claimant did report that diesel exhaust "was somewhat irritating" when he was exposed to it in the 1980s.

¶ 36 Dr. Tuteur did not characterize claimant's asthma as occupational asthma because it was a condition that had been established prior to his work in the coal mines. However, he acknowledged that "potential triggers" present in a coal mine included roof bolting glues, adhesive used to seal holes in coal chutes, and diesel fumes. Dr. Tuteur also agreed that a person with asthma could have a waxing and waning of results on pulmonary function testing. Further, he

testified it was best that a person with asthma avoid "exposures that can trigger asthma attacks." Dr. Tuteur agreed that inhalation of coal mine dust could result in shortness of breath and a cough.

¶ 37 Additionally, Dr. Tuteur testified that with continued exposure, CWP could progress to life-threatening conditions, including progressive massive fibrosis and cor pulmonale. He agreed that if he diagnosed a person as having radiographically significant CWP, he would recommend that he or she have no further exposure to coal mine dust. Dr. Tuteur testified it was possible for a person with radiographically significant CWP to have normal pulmonary function testing and a normal physical examination of the chest.

¶ 38 Finally, at arbitration, the employer also submitted a report from Dr. Jerome Wiot, a certified B-reader. Dr. Wiot's report states he "reviewed a PA and lateral chest x[-]ray" of claimant from September 15, 2010. He found "no evidence of [CWP]," noting "a calcified primary complex from the right upper lobe to the right hilum."

¶ 39 On August 9, 2012, the arbitrator issued a decision in the matter. He determined claimant proved he sustained a work-related occupational disease. Specifically, the arbitrator found claimant's "exposure to various [coal] mine dust and fumes *** resulted in pneumoconiosis and an aggravation of [claimant's] pre-existing asthma." In so holding, the arbitrator expressly stated he found Dr. Billiter, Dr. Paul, and Dr. Smith more credible than Dr. Tuteur. He awarded claimant wage differential benefits of \$505.09 per week "commencing September 21, 2007," and "for the duration of the disability." The arbitrator determined claimant proved he was "precluded from returning to working in the coal mine because of the risk it would be to his health in the form of potential worsening of his pneumoconiosis and asthma."

¶ 40 On June 19, 2013, the Commission affirmed and adopted the arbitrator's decision

without further comment. On November 7, 2014, the circuit court of Macoupin County confirmed the Commission.

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 On appeal, the employer argues the Commission's award of wage differential benefits is against the manifest weight of the evidence. It maintains claimant's respiratory issues were not the reason he stopped working as a coal miner. Further, the employer complains that claimant failed to show what he could earn in other suitable employment. It argues claimant did not look for alternate work after he stopped working for the employer in September 2006, and failed to establish that no other work was available to him.

¶ 44 To obtain a 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). The purpose of a wage differential award "is to compensate an injured claimant for his reduced earnings capacity, and if an injury does not reduce his earning capacity, he is not entitled to compensation." *Gallianetti v. Industrial Comm'n of Illinois*, 315 Ill. App. 3d 721, 730, 734 N.E.2d 482, 489 (2000). Further, such an award "presumes that but for his injuries, the claimant would have been in full performance of his duties." *Dawson v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586, 888 N.E.2d 135, 139 (2008). "[T]he Commission should calculate wage-differential awards based on the amount the claimant would be able to earn at the time of the hearing if he were able to fully perform the duties of the occupation in which he was engaged at the time of the accident." *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830,

841, 639 N.E.2d 886, 893 (1994); see also 820 ILCS 305/8(d)(1) (West 2006) (providing wage differential compensation must be "equal to 66-²/₃ % of the difference between the average amount which [a claimant] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident").

¶ 45 "Whether a claimant has introduced sufficient evidence to establish each element [to qualify for a wage differential award] is a question of fact for the Commission to determine, and its decision in the matter will not be disturbed on appeal unless it is against the manifest weight of the evidence." *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 494, 867 N.E.2d 1063, 1069 (2007). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *First Assist*, 371 Ill. App. 3d at 494, 867 N.E.2d at 1069.

¶ 46 Initially, we note the employer complains that the Commission awarded wage differential benefits "for the duration of the disability." In a single sentence in its brief, the employer argues "[t]he Arbitrator did not specify when the entitlement would end, and the employer believes there should be an end date." Pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), an appellant's brief must contain an argument section "which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." "The 'failure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument.' [Citation.]" *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 33, 28 N.E.3d 181. By setting forth its contention in one lone sentence in its brief, the employer has failed to present a proper argument as to this issue. Therefore, we deem it forfeited.

¶ 47 Next, we find the employer's contention that the Commission erred in awarding wage differential benefits is without merit as the record contains sufficient support for the Commission's decision. Initially, claimant presented evidence establishing he was incapacitated from working as a coal miner, *i.e.*, his usual and customary line of employment. Claimant testified regarding the substances to which he was exposed at the coal mine and the reactions he had following exposure. Further, he reported that, although he stopped working for the employer "a little bit before" the coal mine closed, he quit work because his "lungs were shot." Claimant acknowledged having multiple health issues, but stated his "lungs sent [him] home." Given his health, claimant did not believe he could work for any coal company. We note "it is the province of the Commission to determine the credibility of witnesses and the weight to be accorded their testimony." *Sunny Hill of Will County v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, ¶ 36, 14 N.E.3d 16. The Commission's decision indicates it found claimant credible and the record reflects no error in that determination.

¶ 48 Additionally, both Dr. Billiter and Dr. Paul offered opinions that claimant's health would be endangered by continued exposure to the coal mining environment. Dr. Billiter testified claimant had asthma, which he opined became worse due to claimant's employment. Dr. Billiter also opined further exposure to the coal mining environment "would present a risk to claimant's health in terms of possible worsening of his asthma."

¶ 49 The employer points out that Dr. Tuteur testified claimant's asthma was mild and had not worsened over time. However, the Commission clearly found him less credible than Dr. Billiter and Dr. Paul and the record supports its decision. Specifically, medical evidence showed claimant had mild asthma when he first began seeing Dr. Paul in 1976, around the same time he began working at the coal mine. Dr. Paul testified asthma was claimant's main problem and that

he provided ongoing treatment for that condition. He also opined claimant's asthma was aggravated by his employment and testified claimant was not a mild asthmatic, stating: "Asthma can change in severity from mild to severe. But [claimant's] bad enough to go into the hospital. He's bad enough to take medications his entire life." Additionally, the record reflects Dr. Tuteur was not aware of the extent of Dr. Paul's treatment of claimant. Dr. Paul testified he saw claimant four times a year beginning in 1976. In his report, Dr. Tuteur referenced only two medical records he reviewed from Dr. Paul regarding claimant.

¶ 50 The record also reflects Dr. Paul testified claimant had CWP caused by coal dust. He opined claimant's health would be endangered by further exposure to the environment of a coal mine and that claimant was totally and permanently disabled from working as a coal miner. The Commission found claimant had CWP and that his condition arose out of and in the course of his employment. Significantly, on appeal, the employer does not challenge the Commission's finding of work-related CWP. Additionally, even Dr. Tuteur acknowledged that he would recommend that a person with CWP have no further exposure to coal mine dust.

¶ 51 On appeal, the employer maintains that the opinions expressed by Dr. Billiter and Dr. Paul—that further exposure to the coal mining environment would endanger claimant's health—were inconsistent with their actions of providing medical treatment to claimant for 30 years so that he could continue working as a coal miner. We disagree. The record fails to reflect either doctor was asked to render an opinion as to claimant's ability to work prior to the time he quit working for the employer. Additionally, the record indicates claimant's respiratory problems developed or progressed over time and he was not diagnosed with CWP until after he stopped working as a coal miner.

¶ 52 Next, the record also shows claimant presented sufficient evidence to establish the

second requirement for a wage differential award—that he suffered an impairment of earnings. First, claimant presented evidence regarding what he would be earning if he continued to work for the employer in his previous position. Additionally, the employer's own evidence—a wage statement setting forth claimant's earnings—and its position at arbitration was that claimant earned \$38,320.15 during the last year he worked for the employer. Second, claimant presented evidence that he was currently employed and able to earn approximately \$15,500. He testified that, at the time of arbitration, he worked as the local union president, earning \$3,000 per year and held a position on the State Mining Board, earning in excess of \$12,500 per year. Claimant testified his positions with the union and board were the best work he could get outside of coal mining considering his back and lungs. Further, at the time of arbitration, claimant was 57 years old and had worked as a coal miner in excess of 30 years. He noted that "all [he] ever did as an adult" was something in the mining industry.

¶ 53 The employer complains that there was "no evidence claimant tried to find any suitable full[-]time employment" after he stopped working for the employer and he simply retired and took himself out of the work force. We note, however, that when seeking a wage differential award "[t]here is no affirmative requirement *** that a claimant even conduct a job search." *Gallianetti*, 315 Ill. App. 3d at 731, 734 N.E.2d at 490. Instead, he "need only demonstrate an impairment of earnings" and "[e]vidence of a job search is but one way to show impairment of earnings." *Gallianetti*, 315 Ill. App. 3d at 731, 734 N.E.2d at 490. Additionally, "the testimony of the claimant, if not impeached, is sufficient to support an award." *Thrall Car Manufacturing Co. v. Industrial Comm'n*, 64 Ill. 2d 459, 463, 356 N.E.2d 516, 518 (1976).

¶ 54 In this instance, claimant's testimony was sufficient to demonstrate an impairment of his earnings. Although he did not engage in a job search after he quit working for the em-

ployer, he was employed in positions, which his own testimony indicated were suitable given his health and work history. Notably, the employer did not present any evidence showing claimant's earning capacity was greater than the amount asserted by claimant at arbitration.

¶ 55 Here, the record contains sufficient evidence to support the Commission's decision that wage differential benefits were appropriate. Specifically, claimant submitted sufficient evidence to demonstrate both that he was incapacitated from performing his usual and customary line of employment and that he suffered an impairment of earnings. Thus, the Commission's decision that claimant was entitled to a wage differential award was not against the manifest weight of the evidence.

¶ 56 Finally, on appeal, the employer also challenges the Commission's wage differential calculation. "Whether the Commission's calculation of the amount of the weekly wage differential based upon the evidence presented was correct involves a question of fact and will not be disturbed on review unless it is against the manifest weight of the evidence." *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 121136WC, ¶ 28, 991 N.E.2d 458.

¶ 57 In this instance, the arbitrator set forth the manner in which he calculated claimant's wage differential award, stating as follows:

"[Claimant] presently has post mining income of \$15,535.39 per year. When this amount is divided by 52 it computes to a weekly post mining income rate of \$298.76 per week. If [claimant] had been able to continue to work as a miner[,] his weekly wage would be \$1,056.40 and the difference between those

two is \$757.64. Two-thirds of this latter amount computes to a wage differential rate of \$505.09."

In finding claimant's weekly wage as a miner was \$1,056.40, the arbitrator noted claimant's testimony that, if he were still working in the mines at the time of the 2012 arbitration hearing, he would be earning \$26.41 an hour. The arbitrator then multiplied that hourly rate by a 40-hour work week ($\$26.41 \times 40 = \$1,056.40$). As noted, the Commission affirmed and adopted the arbitrator's decision.

¶ 58 Initially, the employer challenges the \$26.41 hourly rate relied upon by the Commission to determine what claimant would have been earning in the full performance of his duties as a coal miner. It maintains the employer's "mine closed in 2007 so there are no jobs with this employer" and the record failed to show claimant would be entitled to that hourly rate based on his job classification. We disagree with the employer's arguments.

¶ 59 "[T]he calculation of a claimant's wage differential award should be based on the amount the claimant would have been able to earn at the time of the arbitration hearing, not the amount he was actually earning at the time of his injury." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1022, 832 N.E.2d 331, 349 (2005). At arbitration, claimant testified he held the position of mine examiner at the time he left the employer's coal mine. Further, he submitted an exhibit containing a copy of the National Bituminous Coal Wage Agreement and testified that the agreement established \$26.41 as the hourly rate for his position in 2012. The employer presented no contrary evidence and we find the record sufficient to support the Commission's reliance on the \$26.41 wage rate.

¶ 60 The employer also challenges the Commission's decision to the extent it was based on a finding that claimant worked a 40-hour work week for the employer. It contends the

Commission's finding was not supported by the record and points to the wage statement it submitted (the employer's exhibit No. 4), showing claimant's earnings and hours in the last year he worked for the employer (from October 2005 through the end of September 2006). After reviewing that document, we find it supports the employer's contention "that claimant very rarely worked a 40[-]hour work week in the year preceding his last date of employment." In fact, the wage statement presented by the employer shows claimant worked 40 hours per week only four times during a 52-week period. Additionally, although claimant suffered from an unrelated back injury that required him to perform restricted-duty work during the last year he worked for the employer, claimant agreed at arbitration that his restricted-duty work only began after March 2006. The employer's exhibit reflects no significant change in the number of hours claimant worked per week after he began restricted-duty work.

¶ 61 Given the evidence presented, the record fails to support the Commission's finding that claimant routinely worked a 40-hour work week for the employer. Thus, its calculation of claimant's wage differential award is against the manifest weight of the evidence. Further, we find the employer's exhibit No. 4 actually shows claimant worked an average of 30.33 hours per week during the last year he worked for the employer. Based on that exhibit, we modify the Commission's decision by reducing its award of wage differential benefits from \$505.09 per week to \$334.84 per week. (30.33 hours per week x \$26.41 hourly rate claimant could earn at the time of arbitration = \$801.02 claimant could earn per week) (\$801.02 – \$298.76 weekly post-mining income = \$502.26 difference) (2/3 of \$502.26 = \$334.84 wage differential award).

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we modify the Commission's decision by reducing its award of wage differential benefits to \$334.84 per week and otherwise affirm the circuit court's

judgment, confirming the Commission's decision.

¶ 64 Affirmed as modified.