Workers' Compensation
Commission Division
Order Filed: September 29, 2017

No. 1-16-3203WC

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

METROPOLITAN PIER & EXPOSITION AUTHORITY,	)	Appeal from the Circuit Court of Cook County
Appellant,	)	
v.	)	No. 16 L 050207
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*,	)	Honorable James M. McGing,
(Ronald Young, Appellee).	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hudson, Harris, and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The finding of the Illinois Workers' Compensation Commission that the claimant sustained an injury to his cervical spine which arose out of and in the course of his employment with the Metropolitan Pier & Exposition Authority on June 1, 2010, is not against the manifest weight of the evidence. The Commission's awards to the claimant of temporary total disability benefits, medical expenses relating to the treatment of the cervical spine condition, and wage differential benefits are not against the manifest weight of the evidence.

¶ 2 Metropolitan Pier & Exposition Authority (Metropolitan) appeals from a judgment of the circuit court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Ronald Young, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2012)) for injuries to his cervical spine sustained by him while working on June 1, 2012. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on February 5, 2014.

¶ 4 Prior to the events giving rise to the instant claim, the claimant had a medical history that is relevant to the disposition of this case. On February 10, 2009, the claimant presented to Dr. Thomas Bacevich at Hammond Clinic, complaining of a "pulled muscle" in his right neck after lifting a dog above his head. Dr. Bacevich's notes of that visit state that the claimant's pain is "off and on," radiates to his head, and is "fairly mild." The doctor diagnosed the claimant with a cervical back strain, prescribed medication for pain, and told the claimant to return on an as-needed basis. The claimant testified that his neck pain resolved and he did not seek follow-up care.

¶ 5 At the time of the injuries at issue, the claimant had been employed by Metropolitan for 13 years as a union painter. The claimant worked at Navy Pier in Chicago and his responsibilities included painting the exterior portions of buildings and bridges, as well as the Ferris wheel and carousel. On rainy days, the claimant worked inside and would paint the shops, offices, and arcade. The claimant often worked at elevated heights of 80 to 200 feet and was required to operate boom lifts, scissor lifts, and condor lifts. The claimant's job also entailed climbing ladders, carrying 5-gallon buckets of paint weighing 60 to 70 pounds, and using various

power tools, grinding equipment, and “spray pump” units. The claimant further explained that his work involved repetitive overhead work.

¶ 6 The claimant testified that, on June 1, 2010, he was driving a boom lift up a ramp when the wheels suddenly “locked up” and “jerked [him] violently.” He immediately felt a “sharp burning sensation” in his right shoulder and his “neck went back.” After gathering his composure, the claimant returned the boom lift to the loading dock, walked to the paint shop and reported the incident to his foreman. The claimant also testified that he filled out an accident report, and subsequently gave a recorded statement to Metropolitan’s third-party administrator.

¶ 7 The next day, the claimant presented to Dr. Gina Dudley at Hammond Clinic, complaining of neck pain “for the past 3-4 months” and right shoulder pain. Dr. Dudley ordered x-rays of the claimant’s cervical spine and right shoulder, and took the claimant off of work until June 4, 2010. X-rays of the claimant’s cervical spine and right shoulder were taken later that same day. According to the radiologist’s report, x-rays of the claimant’s cervical spine showed “[m]oderate to severe disc space narrowing and degenerative findings at C3-4 and C5-C6.” X-rays of the claimant’s right shoulder demonstrated “moderate degenerative findings of the A/C joint with undersurface spurring” and “subchondral sclerosis and cyst formation at the superolateral margin of the humeral head suggesting possible rotator cuff abnormality.”

¶ 8 On June 4, 2010, the claimant returned to Hammond Clinic and was seen by nurse practitioner Jayne Targgart. Targgart’s notes of that visit state that the claimant presented with complaints of neck pain which “[s]eems to have started in February” and right shoulder pain which “began on Friday after a jerking motion while he was working.” Targgart ordered MRIs of the claimant’s right shoulder and cervical spine, and referred the claimant to orthopedic surgery for evaluation and treatment. She also instructed the claimant to take NSAIDs and

muscle relaxers and to limit the use of his right shoulder. Targgart authorized the claimant to return to work with restrictions of no lifting, carrying, pulling, or pushing greater than 10 pounds, no work above shoulder level, and limited use of the right arm.

¶ 9 The claimant underwent a cervical spine MRI on June 18, 2010. The radiologist's report of that scan states that a congenital fusion was present at C4-5 and a herniated disc at C3-4 was "generating severe central narrowing with resultant impingement of the cervical spinal cord with posterior displacement." The scan also disclosed mild degenerative changes at C5-6 and moderate spondylosis throughout the remainder of the cervical spine. On July 9, 2010, an MRI was performed on the claimant's right shoulder. The radiologist interpreted that scan as showing a full thickness tear of the supraspinatus tendon anteriorly with rotator cuff tendinopathy, hypertrophic changes of the AC joint with inferior spurring, and degenerative changes of the glenoid labrum.

¶ 10 Pursuant to Targgart's referral, the claimant presented to Dr. John Kung on July 13, 2010, for evaluation and treatment of his right shoulder. Dr. Kung diagnosed the claimant with right shoulder impingement and rotator cuff tendinitis, administered a subacromial injection, ordered four weeks of physical therapy, and modified the claimant's work restrictions to no work using the right arm. The claimant testified that he underwent a course of physical therapy at Accelerated Rehabilitation Centers from July 20, 2010, through August 26, 2010.

¶ 11 On July 26, 2010, the claimant saw Dr. Dwight Tyndall on referral from Targgart. The claimant reported a history of having experienced a "sudden onset of right shoulder pain and right upper arm pain" following a "work-related injury on June 2, 2010." Physical examination revealed diminished range of motion in the cervical spine and "brisk reflexes throughout the upper extremities." Dr. Tyndall noted that the claimant's cervical spine MRI disclosed "a

severely stenotic C3-4 disc level due to a large disc herniation compressing the cervical cord," an "auto fuse at the C4-5 level," and mild degenerative changes at C5-6. The doctor assessed the claimant as having: (1) cervical disc herniation at C3-4 with severe spinal cord compression causing neck pain and right upper arm radiculopathy, and (2) possible right shoulder rotator cuff tendinitis. Due to the severity of the herniation, Dr. Tyndall recommended an anterior cervical discectomy and fusion to remove the pressure off the spinal cord.

¶ 12 On August 24, 2010, the claimant followed up with Dr. Kung and reported persistent shoulder pain. The doctor noted that the claimant completed physical therapy, but his right shoulder condition had "plateaued." Having failed conservative treatment, Dr. Kung recommended that the claimant undergo a right shoulder arthroscopy with arthroscopic subacromial decompression and rotator cuff repair.

¶ 13 Also on August 24, 2010, the claimant saw Dr. Mark Chang of Midwest SpineCare, for a second opinion regarding neck surgery. According to Dr. Chang's medical records, the claimant reported a three-month history of neck pain radiating into the right arm following a "work related injury on 6-2-2010." The doctor noted that the claimant works as a painter at Navy Pier and was in a "lift boom" that "shook very violently shaking his head and neck." Dr. Chang reviewed the cervical spine MRI and interpreted it as showing a large disc herniation at C3-4, which is causing "significant spinal cord impingement and early signs of myelomalacia." The scan showed congenital fusion at C4-5 and moderate to severe degenerative changes at C5-6. Dr. Chang recorded a clinical impression of "[a]cute right C5 myeloradiculopathy secondary to C3-4 large disc herniations [and] cervical stenosis." Based upon the size and location of the disc herniation, Dr. Chang determined that the claimant is at "significant risk for developing catastrophic neurological injury," and recommended surgical intervention—namely, a C3-4 anterior

discectomy, decompression, and a fusion with fibular autograft and instrumentation. Dr. Chang discussed his findings with the claimant and stated that his plan was to wait for insurance to approve surgery.

¶ 14 On September 14, 2010, at Metropolitan's request, the claimant was examined by Dr. Srdjan Mirkovic for an independent medical examination (IME) of his right shoulder and cervical spine. In his report, Dr. Mirkovic stated that the claimant was injured at work on June 1, 2010, when the "lift boom" he was driving "jarred," causing a sharp pain in his right upper extremity and left neck. The claimant denied experiencing pain in his right neck. The claimant also reported that, in February 2009, he sustained a neck strain that lasted a few weeks but gradually improved. The claimant also stated that he experiences intermittent neck symptoms as part of performing his job requirements, but it has been manageable. Dr. Mirkovic's report further states that the claimant's right shoulder pain has persisted ever since the accident, but his left-sided neck symptoms have returned to baseline of about 3 to 4 out of 10, predating the accident. Dr. Mirkovic diagnosed the claimant with: (1) internal derangement of the right shoulder; (2) neck pain; and (3) a disc herniation with spinal stenosis at C3-4. He opined that the claimant's right shoulder condition of ill-being is causally related to the June 1, 2010, workplace accident, but his cervical spine condition is not causally related to the work accident. In support of his opinion, Dr. Mirkovic explained that the claimant had a chronic history of symptoms in his left neck and denied having experienced pain in his right neck following the accident at work. Given the severity of the claimant's spinal stenosis, Dr. Mirkovic agreed with Drs. Tyndall and Chang that the claimant is at an increased risk for a spinal cord injury and that an anterior cervical discectomy and fusion at C3-4 is reasonable. Nevertheless, Dr. Mirkovic concluded that the claimant's work accident of June 1, 2010, aggravated his "preexisting left neck pain

consistent with a sprain/strain which has since resolved with the [claimant] returning to his pre-injury neck symptomatology."

¶ 15 On October 27, 2010, at Metropolitan's request, the claimant was examined by Dr. Charles Carroll, an orthopedic surgeon, for an IME of his right shoulder. Dr. Carroll diagnosed the claimant with "right shoulder impingement and small rotator cuff tear" and he recommended that the claimant undergo a right shoulder arthroscopy with acromioplasty, distal clavicle excision, and rotator cuff repair. The doctor opined that the claimant's right shoulder condition of ill-being is "related in part" to the work injury of June 1, 2010.

¶ 16 In a letter dated December 22, 2010, Dr. Chang responded to Dr. Mirkovic's IME report by noting his disagreement with Dr. Mirkovic's causation opinion and pointing out several "flaws" in the report. For example, Dr. Chang stated that, while it is true that the claimant had an underlying degenerative disc disease and a history of left-sided neck pain, the claimant has "a central to right disc herniation," which would not cause left-sided neck pain. Dr. Chang also noted that the claimant's neck symptoms were manageable and he could perform all of his job duties as a painter. However, following the work accident of June 1, 2010, the claimant has not been able to return to work. Dr. Chang stated that it is unlikely that a large disc herniation occurred spontaneously; rather, it is more likely that the large disc herniation at C3-4 was caused by the work injury. He disagreed with Dr. Mirkovic's assessment that the claimant strained or sprained his neck or otherwise resulted in a temporary aggravation.

¶ 17 During the following months, the claimant continued to treat with Drs. Kung and Chang. The doctors' records reflect that the claimant continued to complain of pain in his right shoulder and neck. Although the workers' compensation insurance carrier approved the claimant's right shoulder surgery, it had not yet approved the cervical spine surgery. Based upon the severity of

the claimant's cervical spine condition, Drs. Kung and Chang agreed that it is not safe to proceed with shoulder surgery prior to the cervical spine surgery.

¶ 18 On February 3, 2011, Dr. Mirkovic issued a supplemental report in response to Dr. Chang's letter of December 22, 2010. While Dr. Mirkovic agreed that the claimant has a C3-4 paracentral disc herniation and that cervical spine surgery was appropriate, his causation opinion remained unchanged—namely that the claimant's C3-4 paracentral disc herniation is not related to the accident.

¶ 19 At the request of his attorney, the claimant saw Dr. Alexander Ghanayem, an orthopedic surgeon, for an IME on February 4, 2011. In his report, Dr. Ghanayem noted that the claimant had a prior neck injury in 2009 when a ladder he was carrying caused pain in the left side of his neck and shoulder region. Thereafter, the claimant developed bilateral shoulder pain and neck pain following a "jolting type injury" while at work on June 1, 2010. Dr. Ghanayem determined that the claimant has a large C3-4 cervical disc herniation that is causing spinal cord compression. He further noted that a cervical disc herniation at C3-4 will cause symptoms in the fourth nerve root distribution, which can include weakness of the deltoid and shoulder pain. He agreed with Drs. Chang, Kung, Tyndall, and Mirkovic that the claimant should have the cervical spine discectomy and fusion at C3-4 before shoulder surgery. Based upon the mechanism of injury, Dr. Ghanayem opined that the claimant's cervical disc herniation at C3-4 is causally related to the workplace accident of June 1, 2010. In support of his causation opinion, Dr. Ghanayem explained that the claimant has bilateral shoulder pain which "raise[s] a red fla[g] that *** something [is] going on in the cervical spine." The doctor opined that the claimant's accident of June 1, 2010, "could have resulted in both shoulder and cervical spine problems simultaneously."

¶ 20 The claimant returned to Dr. Tyndall on April 4, 2011, and informed him that he would like to proceed with cervical spine surgery using his own insurance. Dr. Tyndall ordered updated cervical spine MRIs and instructed the claimant to obtain medical clearance from his primary care physician.

¶ 21 On June 24, 2011, Metropolitan informed the claimant that his position was being permanently eliminated due to restructuring.

¶ 22 On June 28, 2011, Dr. Tyndall operated on the claimant, performing an anterior cervical discectomy and fusion at C3-4 with instrumentation and an iliac crest bone graft. The claimant treated with Dr. Tyndall postoperatively and underwent a course of physical therapy. In a treatment note dated August 8, 2011, Dr. Tyndall stated that the claimant had a "tremendous recovery and resolution of his symptoms" and he authorized the claimant to see Dr. Kung regarding right shoulder surgery.

¶ 23 On September 14, 2011, Dr. Kung performed a right shoulder arthroscopy with synovectomy, debridement of a type I flap lesion, subacromial decompression, and rotator cuff repair. The medical records reflect that the claimant followed up on a consistent basis with both Drs. Kung and Tyndall. By March 27, 2012, the claimant was under light-duty work restrictions of no lifting or carrying greater than 10 pounds and no overhead work.

¶ 24 On April 16, 2012, the claimant was examined by Dr. Brian Cole at Metropolitan's request. Dr. Cole's notes of that visit state that the claimant would benefit from an additional three to four weeks of physical therapy for range of motion progression and rotator cuff strengthening. He noted that the claimant was "seven months status post rotator cuff repair" and opined that the claimant's right shoulder medical treatment was reasonable and necessary. Although Dr. Cole did not know whether the claimant would be able to return to his pre-injury

job duties, he believed the claimant would "likely end up with some level of permanent restrictions restricting him from the amount of work overhead and with the amount of lifting, body support and aerial type work." Dr. Cole recommended that the claimant undergo a functional capacity evaluation (FCE).

¶ 25 On May 15, 2012, the claimant underwent an FCE. The FCE report states that the claimant demonstrated the ability to work at the "medium-heavy physical demand level" and he was capable of bilateral lifting and carrying of 60 pounds, frequent bilateral lifting of 40 pounds, and bilateral shoulder lifting of 30 pounds. It was further noted that the claimant had limitations regarding frequent overhead lifting. Although a description of the claimant's job was not provided, the evaluator noted that the claimant's position as a painter is classified within the medium-heavy physical demand level.

¶ 26 Dr. Kung reviewed the results of the claimant's FCE and, on June 5, 2012, he released the claimant to return to work with "restrictions for lifting as per the FCE" and also restricted the claimant from climbing ladders. On June 18, 2012, Dr. Tyndall released the claimant to work with limitations on returning to work as a painter due to limited cervical extension.

¶ 27 On June 20, 2012, Daniel Minnich of Rehabilitation Consulting Services conducted a "comprehensive vocational assessment" at Metropolitan's request. Minnich performed a transferable skills analysis to find jobs that were consistent with the claimant's physical capacities and within his skill-set. He identified 94 occupations that the claimant could pursue and concluded as follows:

> "[The claimant] could return to work in the general labor market. He could expect to earn experienced wages in the same occupation that he was working in at the time of injury. He could expect to earn this income working in the same

> capacity at another company in the general labor market. In addition, he has supervisory experience in the painting and construction field and could return to work with remuneration in a number of occupations. Many of these occupations are available *** at the present time and are actually projected to grow over the remainder of the year."

¶ 28 The claimant testified that, after being discharged from medical care, he began a self-directed job search. On July 8, 2012, he began working as a "yard attendant" for Era Valdivia where he earned $10 per hour.

¶ 29 On July 10, 2012, Dr. Cole authored an addendum to his IME report based upon his review of the FCE, updated medical records, and surveillance video of the claimant.[1] Dr. Cole stated that the surveillance footage did not show the claimant performing activities outside the parameters demonstrated during the FCE. While Dr. Cole agreed that the claimant can likely perform more than 90% of his job duties, he opined that it is not reasonable to expect him to perform these job duties on a "day-in-day-out" basis without significant difficulty. Dr. Cole concluded that it was reasonable to restrict the claimant per the restrictions delineated in his FCE of May 2012.

¶ 30 Kari Stafseth, a vocational rehabilitation counselor at Vocamotive, was assigned to perform a vocational rehabilitation assessment of the claimant. In her report dated September 7, 2012, Stafseth noted that the claimant was 58 years of age and did not have a high school diploma or GED. She also noted that industrial painting is considered to be a medium physical

[1] Although the surveillance video, taken of the claimant on June 2, 2010, is not contained in the record on appeal, the arbitrator noted that it depicts the claimant driving a van, closing the liftgate, going to Menards, and carrying paint supplies. The video also depicts the claimant carrying parts of a ladder, paint supplies, and tools into a house.

demand level occupation, involves working from scaffolding and ladders, and requires a "considerable amount of climbing, bending and stretching[,] *** with *** arms raised overhead." According to the FCE, however, the claimant demonstrated the ability to occasionally lift 15 pounds overhead and Dr. Kung restricted the claimant from climbing ladders. Based upon these factors, Stafseth opined that the claimant lost access to his usual and customary occupation as a painter. She also opined that the claimant's current position at Era Valdivia "is commensurate with his education and work background" and that the claimant's hourly wage of $10 falls within his earning potential of $8.25 to $10 per hour. Finally, Stafseth did not recommend vocational rehabilitation services since the claimant was able to independently find reasonable employment.

¶ 31 The claimant testified that, on October 17, 2012, he left his position at Era Valdiva because he was being asked perform tasks that were beyond his work restrictions. He explained that he continued his self-directed job search and admitted job-search logs into evidence. On December 3, 2012, the claimant began working in the shipping and receiving department at Continental Midland, a position he secured through Staff Source. The claimant earns $10 per hour.

¶ 32 On August 21, 2013, Stafseth authored an addendum to her initial vocational assessment. Noting the claimant could not climb ladders and did not have the cervical extension or overhead-lifting capabilities required of union painters, Stafseth opined that the claimant lost access to his usual and customary occupation as a union painter. She reiterated her belief that the claimant's earning capacity equaled $8.25 to $10 per hour, and noted that the claimant's current position at Staff Source fell within that range. She again concluded that vocational rehabilitation services were not necessary.

¶ 33 On January 14, 2014, Minnich authored an updated vocational assessment report. He noted that the claimant works at Midland Continental where he "pull[s] orders for Ford/GM/Chrysler." The job duties include lifting 31 to 36 pound boxes and he assists loading and unloading trucks. Minnich stated that the job is within the claimant's physical capabilities, but he is making $9 per hour. He opined that "working in a significantly lower paying job at $9.00 per hour is not suitable employment and is not close to [the claimant's] maximum vocational potential." Minnich reiterated his belief that the claimant "can and should return to work earning similar wages to what he made at the time of injury."

¶ 34 According to a "wage rate sheet," which was admitted into evidence as Petitioner's exhibit No. 5, the wage for a union painter between June 1, 2013, and May 31, 2014, was $40.75 per hour. The wage statements from Staff Source were admitted into evidence as Petitioner's exhibit No. 7 and established that the claimant earned $24,745.53 between December 3, 2012, and November 23, 2013.

¶ 35 At the arbitration hearing, Austin Kelly testified that he was the director of operations at Navy Pier on June 1, 2010. Although Kelly could not recall the date, he corroborated the claimant's testimony that he was injured at work.

¶ 36 The claimant testified that, at the time of his injury, union painters at Metropolitan earned a wage of $38 per hour. When he was released to return to work, the hourly rate had increased to $40 per hour. The claimant also explained that he sought to return to work as a painter but the business representative at his union informed him that no employers were willing to accommodate his restrictions. As a result, the claimant initiated a self-directed job search and ultimately accepted Staff Source's offer to place him at Midland Continental. He explained that he seeks to generate new skills and maintain a history of employment, which he hopes will make

him competitive for future employment opportunities. The claimant stated that he continues to search for new employment opportunities.

¶ 37 Following a hearing held on February 5, 2014, the arbitrator found that the claimant suffered injuries to his right shoulder and cervical spine, which arose out of and in the course of his employment with Metropolitan on June 1, 2010. The arbitrator awarded the claimant 106 2/7 weeks of temporary total disability (TTD) benefits for the period from June 2, 2010, through June 18, 2012, and maintenance benefits for 2 3/7 weeks, from June 19, 2012, through July 8, 2012. The arbitrator ordered Metropolitan to pay reasonable and necessary medical expenses incurred by the claimant pertaining to the treatment he received for his right shoulder and cervical spine conditions. In addition, the arbitrator awarded the claimant wage differential benefits in the sum of $800 per week pursuant to section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2012)), finding that the claimant has a partial incapacity that prevents him from pursuing his usual and customary line of employment and that he suffered an impairment in earning capacity.

¶ 38 Metropolitan sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). In a unanimous decision, the Commission modified the arbitrator's decision in part and affirmed and adopted it in part. In that portion of the decision modified, the Commission reduced the wage differential award from $800 per week to $764.50 per week. The Commission's wage differential calculation was based upon the difference between the claimant's current average weekly wage of $483.25 at Staff Source and the current weekly wage of $1,630 being paid to union painters. The Commission otherwise affirmed and adopted the arbitrator's decision.

¶ 39 Metropolitan filed a petition for judicial review of the Commission's decision in the circuit court of Cook County. On November 29, 2016, the circuit court entered an order confirming the Commission's decision. This appeal followed.

¶ 40 We first address Metropolitan's argument that the Commission's determination that the claimant sustained an injury to his cervical spine on June 1, 2010, is against the manifest weight of the evidence.

¶ 41 To obtain compensation under the Act, a claimant bears the burden of showing that he suffered an injury arising out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). "The determination of whether an injury arose out of and in the course of one's employment is generally a question of fact." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). In resolving issues of fact, it is the Commission's role to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine the relative weight to accord the evidence, and resolve conflicts in the testimony, including conflicting expert testimony. *Id.* We will not overturn the Commission's decision regarding whether an injury arose out of and in the course of employment unless it is contrary to the manifest weight of the evidence. *Id.* For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal. *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 42 Applying these standards, we cannot conclude that the Commission's finding that the claimant sustained an injury to his cervical spine on June 1, 2010, was against the manifest weight of the evidence. The Commission found that the claimant testified credibly when he explained that he was driving a "boom lift" up a ramp at work when the wheels suddenly "locked up," causing him to jerk violently and his "neck [to go] back." The claimant explained that he immediately felt a "sharp burning sensation" in his right shoulder. In assessing the claimant's credibility, the Commission noted that the claimant reported the accident to his foreman immediately after the occurrence, filled out an accident report, and subsequently gave a recorded statement to Metropolitan's third-party administrator. The Commission further noted that neither the accident report nor the recorded statement were submitted into evidence, but that Kelly, the director of operations, corroborated the claimant's testimony that he sustained an accident while working at Navy Pier.

¶ 43 The Commission also supported its decision by relying upon the medical records, which demonstrate that the claimant sought treatment the next day for pain in his right shoulder and neck. While it is true, as Metropolitan asserts, that the claimant's initial treatment records demonstrate that he gave inconsistent histories regarding the date and mechanics of his neck injury, the Commission specifically found that the inconsistencies are not "fatal" to the claimant's claim "after consideration of all of the evidence." Indeed, the medical records of Drs. Tyndall, Chang, Mirkovic, Carroll, Ghanayem, and Cole all reflect that the claimant reported a history of having injured his right shoulder and neck while driving a boom lift at work on June 1, 2010. As such, although the claimant initially attributed his neck pain to an injury occurring in February, it was for the Commission to resolve conflicts in the medical records and draw reasonable inferences therefrom. *Hosteny*, 397 Ill. App. 3d at 674. Based upon the record before

us, we conclude sufficient evidence exists to support the Commission's decision that the claimant proved the occurrence of an injury arising out of and in the course of his employment. Its decision in that regard is, therefore, not against the manifest weight of the evidence.

¶ 44 Next, Metropolitan argues that the Commission's finding that the claimant's condition of ill-being in his cervical spine is causally connected to his work accident of June 1, 2010, is contrary to the manifest weight of the evidence. In support of this argument, it challenges several factual findings underlying the Commission's decision. Specifically, it disputes the Commission's reliance upon the opinions of Drs. Tyndall, Chang, and Ghanayem, who opined that the claimant's cervical spine condition was causally connected to the workplace accident of June 1, 2010.

¶ 45 In cases such as this one, where the claimant suffers from a preexisting condition, "recovery will depend on [his] ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that [his] current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). Whether a claimant's condition of ill-being is attributable solely to a degenerative process of his preexisting condition or to an aggravation or acceleration of that preexisting condition, because of a work-related accident, is a factual determination to be decided by the Commission. *Id.* at 205. The Commission's resolution of such a matter will not be disturbed on review unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984).

¶ 46 In this case, the Commission determined that the claimant's current condition of ill-being in his cervical spine is causally related to the workplace accident of June 1, 2010. In support of

its finding, the Commission relied upon the opinions of Drs. Tyndall, Chang, and Ghanayem, who opined that the work accident of June 1, 2010, caused, or at the very least, aggravated the claimant's preexisting degenerative disc disease. We see no basis to disturb the Commission's finding that the opinions of Drs. Tyndall, Chang, and Ghanayem were more reliable than the opinions of Dr. Mirkovic. The Commission specifically found that the opinions of Dr. Tyndall were "credible, persuasive and best comport[ed] with the evidence" and observed that Drs. Chang and Ghanayem reached the same conclusion as Dr. Tyndall—namely, that the claimant's cervical spine condition of ill-being is causally related to the work accident of June 1, 2010. While Dr. Mirkovic gave a conflicting opinion in this regard—namely, that the claimant's cervical spine condition is degenerative in nature and that he sustained a temporary aggravation as a result of his work accident—the resolution of such conflicting medical opinions falls within the province of the Commission. Here, the Commission gave no weight to Dr. Mirkovic's opinions, finding his opinions "not persuasive" and his statement that the claimant's neck pain "returned to baseline" to be rebutted by the record. The Commission reasoned that the claimant sought medical treatment for his neck on only one occasion in February and that his symptoms resolved, allowing him to continue performing his regular job duties. After the June 2010 accident, however, the claimant experienced ongoing neck and shoulder pain and was not able to perform his job duties as a union painter.

¶ 47 It was the function of the Commission to judge the credibility of the witnesses, determine the weight to be accorded their testimony, and to resolve the conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). According the required deference to the Commission's resolution of the conflict in medical opinions and the weight it attached to the opinions of Drs. Tyndall, Chang, and Ghanayem, we are unable to find that the Commission's

finding that the claimant's cervical spine condition of ill-being is causally related to his workplace accident of June 1, 2010, is contrary to the manifest weight of the evidence.

¶ 48 For its next assignment of error, Metropolitan argues that the Commission's award of wage differential benefits is against the manifest weight of the evidence. It maintains that the claimant failed to prove that he is incapacitated from pursuing his usual and customary line of employment and failed to show that he suffered an impairment in earning capacity.

¶ 49 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 (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 (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 (2008).

¶ 50 "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 (2007). "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Id.*

¶ 51 Here, we find Metropolitan's contention that the Commission erred in awarding wage differential benefits to be without merit as the record contains sufficient support for the

Commission's decision. The claimant presented evidence establishing that he was incapacitated from working as a painter—*i.e.*, his usual and customary line of employment. He testified that his job duties required repetitive overhead work, working on ladders and "lift booms," and involved carrying 5-gallon buckets of paint weighing 60 to 70 pounds. The claimant testified that Metropolitan would not accommodate his work restrictions and the business representative at his union could not find work for him. The claimant also presented the vocational rehabilitation assessment of Stafseth, who wrote in her report that the claimant's "medical records indicate that [he] does not have the climbing, cervical extension and overhead lifting capabilities required of painters." Based upon his physical capabilities, Stafseth opined that the claimant lost his usual and customary line of employment. Although Minnich offered a contrary opinion in this regard, "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. Here, the Commission expressly stated that it found the opinions of Stafseth to be "credible and persuasive" and the report of Minnich "not persuasive" and the record reflects no error in that determination.

¶ 52 Next, the record also shows the claimant presented sufficient evidence to establish the second requirement for a wage differential award—that he suffered an impairment of earning. First, the claimant presented evidence regarding what he would be earning if he continued to work for Metropolitan in his previous position. Additionally, a "wage rate sheet" established that the hourly wage for a union painter between June 1, 2013, and May 31, 2014, was $40.75. Second, the claimant presented evidence that he was currently employed by Staff Source and earned $24,745.53 between December 3, 2012, and November 23, 2013. He testified that, at the time of arbitration, he accepted Staff Source's offer to place him at Midland Continental because

he wants to build a work history and skill set, which he hopes will help him find better employment opportunities.

¶ 53 Metropolitan claims that the claimant made a personal choice to accept a lower-paying position and failed to prove that he suffered an impairment of earning. Citing *Durfee v. Industrial Comm'n*, 195 Ill. App. 3d 886 (1990), Metropolitan asserts that when a claimant has not maximized his earning potential because of a matter of personal preference, he does not qualify for a wage-differential award pursuant to section 8(d)1. However, *Durfee* is clearly distinguishable from the present case.

¶ 54 In *Durfee*, the claimant was a repairman who injured his stomach and groin area while lifting heavy equipment. *Id.* at 887. The claimant's treating physician placed no physical restrictions on him and suggested that he attempt to return to his position as a repairman on a trial basis. *Id.* at 888. Instead, the claimant obtained a position as a school administrator at a church, a job that the claimant enjoyed and which coincided with his clerical interests. *Id.* at 889. We noted that while the claimant testified that the school administrator position was "the best job he could find," there was no evidence that he attempted to obtain any other form of employment. *Id.* at 890. In light of these facts, we held that the Commission could reasonably conclude that the claimant had not shown a loss of earning capacity. *Id.* at 890-91. *Durfee* was based in part on the fact that the claimant made a personal choice to accept a lower-paying position and failed to prove that he could not obtain a higher-paying job. See *Copperweld Tubing Products Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 634 (2010) (discussing *Durfee*).

¶ 55 Unlike in *Durfee*, the claimant's physicians in this case placed physical restrictions on him and opined that he would not be able to carry out his job duties as a painter on a day-in, day-

out basis. Nevertheless, the claimant sought to return to work but was informed by his union that no employers were willing to accommodate his work restrictions. Thus, unlike the claimant in *Durfee*, the claimant in this case was never offered his prior, higher-paying position as a painter. This case is also distinguishable from *Durfee* because the claimant testified that he continued to search for new employment opportunities even after securing a position at Midland Continental. Thus, unlike in *Durfee*, the record in this case does not support Metropolitan's claim that the claimant made a "personal choice" to accept a lower paying position.

¶ 56 In sum, the record contains sufficient evidence to support the Commission's decision that wage differential benefits were appropriate. Specifically, the 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 the claimant was entitled to a wage differential award is not against the manifest weight of the evidence.

¶ 57 Finally, Metropolitan challenges the Commission's wage differential calculation. Although it argues that the Commission erred by comparing the claimant's pre- and post-injury wages, it does not develop its argument or otherwise identify the appropriate measure for calculating a wage differential award. Pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), 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. By failing to develop its argument and explain how the wage differential award should have been calculated,

Metropolitan has failed to present a proper argument as to this issue. Therefore, we deem it forfeited.

¶ 58 Based upon the foregoing analysis, we affirm the circuit court's judgment confirming the Commission's decision.

¶ 59 Affirmed.