2017 IL App (4th) 160894WC-U

NO. 4-16-0894WC

FILED
October 27, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JO-ANN STORES, INC.,	)	Appeal from
Appellant,	)	Circuit Court of
	)	Adams County
v.	)	No. 16MR82
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Terri Robbins, Appellee).	)	Honorable
	)	Mark A. Drummond,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) The Commission committed no error in awarding claimant wage differential benefits.

(2) The Commission did not abuse its discretion in overruling the employer's objection to the deposition of claimant's evaluating doctor.

¶ 2 On September 3, 2013, claimant, Terri Robbins, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2012)), seeking benefits from the employer, Jo-Ann Stores, Inc. Following a hearing, the arbitrator found claimant sustained accidental injuries arising out of and in the course of her employment on June 26, 2013, and awarded her (1) 26-6/7 weeks' temporary total disability (TTD) benefits; (2) 7-6/7 weeks' maintenance benefits; (3) medical expenses incurred for treatment to claimant's lumbar spine from June 26, 2013, to March 5, 2015; and (4) permanent partial disabil-

ity (PPD) benefits in the form of a wage differential award under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2012)).

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Adams County confirmed the Commission's decision. The employer appeals, arguing the Commission erred in (1) awarding claimant wage differential benefits and (2) denying the employer's motion to bar the deposition of claimant's evaluating doctor. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On March 5, 2014, an arbitration hearing was conducted in the matter. Evidence showed that, beginning on April 15, 2013, claimant worked as a store manager for the employer, a fabric retailer. She testified she oversaw "all aspects of the business," including merchandise coming into the store, stocking shelves, customer service, scheduling, hiring, firing, auditing the store, and ordering supplies. Claimant testified the employer's merchandise included large rolls of fabric that were up to five feet long. She stated her job required handling items that weighed from 5 to 60 pounds. Claimant also stated that she lived on a farm, which she and her husband operated.

¶ 6 On June 26, 2013, claimant was injured at work while attempting to lift a commercial grade janitor's mop bucket. She testified "something popped" and she experienced severe, excruciating pain in her lower back. Claimant acknowledged having back-related issues and medical care that predated her June 2013, work accident. Specifically, in May 2006, she began seeing Dr. Arden Reynolds, a neurosurgeon, for a herniated disc in her lower back, which required fusion surgery. Also, in July 2010, claimant's primary care physician, Dr. Korhan Raif, recommended a magnetic resonance imaging scan of claimant's lower back after she reported

experiencing pain and difficulty ambulating. Claimant denied having back pain in 2013 prior to her work accident.

¶ 7 Immediately following her June 2013, work accident, claimant sought treatment from Dr. Raif. She provided a history of her work accident and Dr. Raif assessed her as having back pain with radiation and lumbar disc disorder. Dr. Raif also referred claimant to a neurosurgeon to check the possible movement of hardware from her previous surgery. Further, he recommended a CT scan and took claimant off work.

¶ 8 On June 27, 2013, claimant's CT scan was performed, showing "[p]ostsurgical changes [in the] lumbar spine without acute osseous abnormality." Dr. Reynolds reviewed claimant's CT scan and determined her fusions were "solid" with "no hardware complication." Dr. Reynolds noted claimant "bent over and felt a pop," which he determined was "[a]lmost certainly *** some kind of muscular event."

¶ 9 On July 2, 2013, claimant returned to see Dr. Raif and reported continued pain. He assessed claimant as having back pain with radiation and lumbar disc disorder. Dr. Raif recommended physical therapy and that claimant continue using Tylenol and ibuprofen for pain.

¶ 10 On July 9, 2013, Dr. Raif noted claimant's "[CT] scan was stable" and had been reviewed by Dr. Reynolds. Claimant reported experiencing pain that was "sharp and intermittent" but also that her pain was improving. Dr. Raif assessed claimant as having a lumbar sprain or strain and low back pain. He recommended continued physical therapy and that claimant remain off work. On July 16, 2013, Dr. Raif recommended continued physical therapy and found claimant could return to light-duty work the following Sunday. He recommended a 10-pound weight restriction and 80% desk work.

¶ 11 Claimant testified she returned to work for the employer on July 21, 2013, but ex-

perienced excruciating pain. The following day, she saw her physical therapist and then followed up with Dr. Raif. Dr. Raif assessed claimant as having low back pain and lumbar disc disorder. He recommended she decrease her work day to four hours per day and continue with physical therapy. Claimant testified she continued working within all of her restrictions but still experienced pain. In particular, she asserted that leaning forward, stretching, and reaching hurt "extremely bad." She also had difficulty arranging shelves, stating that activity required putting herself in awkward positions and she "could just not do it." Additionally, claimant testified scanning items at the cash register involved a twisting motion that bothered her.

¶ 12 On August 19, 2013, claimant reported to Dr. Raif that she did not feel like she was "progressing as well." Claimant asserted she felt better when she was not working and that she experienced "more pain and muscle tension with work." Dr. Raif noted claimant was "currently [working four] hours per day, 80% office work, [with a] 10[-pound] weight restriction." He recommended continued physical therapy and use of a TENS unit. He also noted claimant experienced difficulty at work with prolonged sitting and standing. He took claimant off work for two weeks.

¶ 13 On September 4, 2013, Dr. Raif noted claimant's pain was "much better." He assessed her as having a lumbar sprain or strain. Dr. Raif also recommended that claimant return to work on a trial basis with a 20-pound weight restriction. He noted she might need to consider more sedentary work if she continued to have persistent low back pain.

¶ 14 Claimant testified she contacted the employer about returning to work and spoke with Amy McCartney, the employer's "disability specialist." According to claimant, the employer wanted Dr. Raif to fill out a form letting it know what claimant's restrictions were; however, Dr. Raif refused on the basis that claimant needed further functional capacity testing. Claimant

testified the employer's insurer would not authorize such testing and, ultimately, she was told that the employer "had nothing in [her] restrictions."

¶ 15 On October 7, 2013, claimant followed up with Dr. Raif, who noted she was slowly improving. He continued claimant's 20-pound weight restriction until she underwent a work capacity assessment.

¶ 16 Claimant testified, on March 3, 2014, she obtained a functional capacity evaluation (FCE) on her own. The FCE report stated claimant provided a "[v]alid [e]ffort" and that her "[m]aximum weight achieved to waist height" was 26.33 pounds. According to the report, claimant met "material handling demands for a Medium demand vocation." However, elsewhere in the report, its stated claimant met "a Sedentary demand vocation." Further, claimant was described as exhibiting deficits with respect to her lifting capabilities and her ability to tolerate sustained standing and sitting. Claimant's predicted lifting capacities were identified as 26.33 pounds occasionally, 13.165 pound frequently, and 5.266 pounds constantly. Additionally, it was recommended that claimant undergo a work conditioning program.

¶ 17 On March 10, 2014, claimant followed up with Dr. Raif. He determined claimant had reached maximum medical improvement (MMI) and noted she had weight restrictions of 20-25 pounds. Dr. Raif also recommended that claimant consider a work hardening program.

¶ 18 At arbitration, claimant acknowledged that she was evaluated by Dr. Peter Mirkin, an orthopedic surgeon, at the employer's request. At arbitration, the employer submitted into evidence Dr. Mirkin's initial report, dated January 10, 2014; a March 26, 2014, addendum report prepared by Dr. Mirkin; and Dr. Mirkin's deposition. That evidence showed Dr. Mirkin's impression was that claimant had preexisting degenerative spine disease, a disc protrusion at L4-5, and signs of a fusion at L5-S1. He determined claimant sustained a lumbar strain at work in June

2013, but that her strain had resolved. He opined claimant was at MMI and could return to full-duty work without restrictions. Dr. Mirkin stated patients who had lumbar fusions and disc bulges or protrusions were likely to have episodic back pain, but such circumstances did not preclude claimant from returning to work. Further, Dr. Mirkin opined claimant's FCE restrictions were not reasonable or necessary. He stated there was no objective reason that claimant needed permanent restrictions.

¶ 19 Claimant testified she was also evaluated by Dr. Michael Watson, an orthopedic surgeon, at her attorney's request. Dr. Watson's report and deposition were submitted by claimant at arbitration. The employer's counsel objected to the admission of Dr. Watson's deposition on the basis that Dr. Watson reported reviewing six to seven inches of documents related to claimant when preparing his evaluation report and claimant's counsel produced only one inch of medical records to the employer. Claimant's counsel responded as follows:

> "My response to that is that the doctor simply made a mistake giving the quantity of the record he reviewed, that the records we sent to [the employer's] counsel were all of the records we sent to the doctor when he performed his examination.
>
> And this was an [independent medical examination] basically that we requested of the doctor. He's not a treating doctor. We provided all of the records that we sent to him and he did not have the records with him because they had been destroyed in a change of office that he had undergone. His memory was [that he reviewed] six or seven inches. His memory as to the quantity was inaccurate, it was only the records we sent to counsel, the one[-]inch records that we sent. The doctor's memory of quantity was in error but his memory of the content of those

> records was not. I think his testimony in his report regarding the content of what he reviewed is consistent with what we sent to [the employer's] counsel and is attached as their exhibit so I don't think there's any basis for barring the doctor's testimony arising from the fact that he made a mistake in the quantity of records that he reviewed."

The arbitrator overruled the employer's objection and allowed the admission of Dr. Watson's deposition into evidence.

¶ 20 In his report, dated October 7, 2014, Dr. Watson indicated he reviewed Dr. Raif's medical records following claimant's work accident, claimant's March 2014 FCE report, and Dr. Mirkin's report. He diagnosed claimant with degenerative disc disease. Further he opined claimant's condition was preexisting but aggravated and accelerated by her work accident. Dr. Watson stated claimant needed work restrictions as a result of her work accident and that her restrictions "should include no lifting greater than 15 pounds occasionally, and no lifting greater than 5 pounds frequently." Additionally, he opined claimant could perform sedentary work but would "be required to stand or walk occasionally, perhaps 10 to 15 minutes out of every hour to alleviate her low back pain." Dr. Watson determined claimant was at MMI and her restrictions were permanent.

¶ 21 During his deposition, Dr. Watson offered the same opinions set forth in his report. On questioning by the employer's counsel regarding "how many years or how many pages of records [he] reviewed [from] Dr. Reynolds," Dr. Watson responded: "I can estimate the thickness of the pile to be about six to seven inches of records. That's just an estimation." Further, he stated that he had looked for records he had with respect to claimant but could not find them. Dr. Watson testified he was forwarded claimant's records for review and did not independently gath-

er them.

¶ 22 Claimant testified she began looking for alternative employment within her work restrictions when she was unable to return to work for the employer. She stated she looked for jobs online and submitted an exhibit containing records of her job search. Those records show claimant publicly posted her resume online at Monster.com and submitted online applications for positions with 14 different employers.

¶ 23 Claimant testified she was eventually offered employment by Whitetail Properties (Whitetail), a real estate company. On March 24, 2014, she began working for Whitetail with a starting salary of $25,000 a year. As of the date of arbitration, Whitetail paid claimant $28,000 per year. Claimant testified she worked for three of Whitetail's top real estate agents. She had her own office but could also work from home. Additionally, claimant's position did not require any lifting and she was able to sit and stand as needed. Claimant submitted an exhibit at arbitration containing pay stubs she received from Whitetail.

¶ 24 At arbitration the employer submitted a MedVoc labor market survey report, dated August 14, 2014, and prepared by Julie Bose, a rehabilitation counselor. In the report, Bose stated she reviewed various records provided to her, including job descriptions for both claimant's position at Whitetail and her position with the employer; reports from Dr. Mirkin and Dr. Raif; claimant's FCE report; personnel records from two retail stores, Christopher and Banks and Claire's Boutique; and claimant's resume. Bose noted claimant was 43 years old at the time of her report and resided in Barry, Illinois. Claimant had a high school education, had taken classes in pet grooming, and completed on-the-job training in retail store management.

¶ 25 Bose described claimant's work for the employer as being "classified as medium in physical demand level." She stated claimant was earning a salary of $42,000 per year. Accord-

ing to Bose, prior to working for the employer, claimant worked as a store manager for Christopher and Banks, which required the ability to lift up to 30 pounds and was classified in the light-medium physical demand level and skilled in nature. Claimant also previously owned her own business, worked as a head bank teller, and worked as a store manager for Claire's Boutique. Bose stated claimant's position with Whitetail appeared "to be sedentary in physical demand level and semi-skilled in nature."

¶ 26 Based on her records review, Bose determined claimant had transferrable skills to positions "such as a retail store manager and retail district manager trainee." She targeted those positions in a telephonic labor market survey and determined claimant "was currently employable as a retail store manager or retail district manger trainee at an entry-level salary of $38,633 per year." Bose asserted prospective employers were advised of claimant's work history and her restrictions, including her need to alternate position after prolonged activity. She stated she contacted 34 prospective employers, 16 of which did not respond to the survey and 18 of which agreed to participate. Bose further stated as follows:

> "Of the 18 prospective employers that participated, three indicated that [claimant] would not be an appropriate candidate for a position in their organization, two [because] they would be unable to accommodate [claimant's] work restrictions, and the third indicating that they require a bachelor's degree. It is important to note that 15 prospective employers were of the opinion that [claimant] had both the work history and residual functional capabilities necessary to perform work at their organization.
>
> Of the 15 prospective employers who answered this survey favorably, eight indicated that they were hiring, and seven stated that they did not have a hir-

ing need. Each of the prospective employers that completed this survey were asked to give a salary range for the position. The salary range varied from $30,000 to $50,000 annually. The mean salary of the positions targeted was $38,633."

¶ 27 Bose attached to her report a list of the prospective employers she contacted. Of the 18 employers who agreed to participate in the survey, 14 were located in Springfield, Illinois; 2 were located in Quincy, Illinois; 1 was located in Lincoln, Illinois; and 1 was located in Hannibal Missouri. Additionally, of the eight employers who were hiring and could accommodate claimant's restrictions, six were located in Springfield, one was located in Quincy, and one was located in Lincoln. At arbitration, claimant testified Springfield was located "a good hour and 15 minutes," or 90 miles, from her home. Additionally, the employer submitted records of claimant's previous employment, including records from retailer Christopher & Banks that showed claimant had worked at its Springfield location.

¶ 28 Claimant testified that, as of the date of arbitration, she continued to experience pain on the right side of her lower back on a daily basis. She stated she would get very uncomfortable if she sat for too long and needed to "get up and walk and stretch." She also experienced pain while vacuuming and making her bed. Additionally, claimant stated she avoided certain activities she enjoyed prior to being injured, including helping on her farm, riding a motorcycle, and "[p]hysical things" with her husband. Claimant testified she was not as active as she used to be and had gained a lot of weight. Further, she asserted she took Tylenol and Motrin as needed for her back pain, and had a TENS unit she could wear "if the pain [got] really bad."

¶ 29 On March 24, 2015, the arbitrator issued her decision in the matter, finding claimant sustained accidental injuries arising out of and in the course of her employment on June 26,

2013, and awarding her (1) 26-6/7 weeks' TTD benefits; (2) 7-6/7 weeks' maintenance benefits; (3) medical expenses incurred for treatment to claimant's lumbar spine from June 26, 2013, to March 5, 2015; and (4) wage differential benefits of $179.69 per week, beginning on March 24, 2014. With respect to permanency, the arbitrator determined claimant "became partially incapacitated from pursuing her usual and customary line of employment" based "on the fact that [claimant] was found capable of working at the medium physical demand level as a result of her valid FCE and [claimant's] job with [the employer] was not within [the FCE's] restrictions." Additionally, the arbitrator noted that, after the employer did not offer claimant vocational rehabilitation, she began her own self-directed job search, resulting in employment with Whitetail, earning $28,000 annually. Further, she noted as follows:

> "Bose determined [claimant] could anticipate a starting salary of $38,633 per year, based on the [eight] jobs she determined were hiring and were within [claimant's] restrictions. However, the arbitrator finds [the employer] offered [claimant] no assistance in trying to acquire these positions, and most of these positions were 90 miles from her home. Therefore, the arbitrator finds Bose's opinion that [claimant] could secure a job with a starting salary of $38,633[] annually, speculative at best. *** The arbitrator finds the job [claimant] secured, based on her own independent job search, is suitable employment upon which to determine a wage differential pursuant to *** the Act."

¶ 30 On February 8, 2016, the Commission affirmed and adopted the arbitrator's decision. On October 31, 2016, the circuit court of Adams County confirmed the Commission's decision.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 A. Wage Differential Benefits

¶ 34 On appeal, the employer argues the Commission erred in finding claimant entitled to wage differential benefits. First, it contends claimant failed to prove that she was partially incapacitated from pursuing her usual and customary line of employment, *i.e.*, employment in "the retail sector of the economy." The employer argues the Commission erred in construing the statutory language "usual and customary line of employment" too narrowly to encompass only the specific position claimant was in at the time of her work injury. Rather, it maintains the Commission should have required claimant to show that she was unable "to return to work within the retail sales section of the economy." Further, it complains that claimant did not present any expert testimony to establish that her "customary line of employment inside retail sales establishments [was] precluded by" the FCE's findings. Second, the employer argues that claimant failed to prove that her work for Whitetail constituted "suitable employment" from which a wage differential award could be calculated under the Act.

¶ 35 With respect to wage differential benefits, the Act provides that an employee who becomes "partially incapacitated from pursuing his usual and customary line of employment" as a result of his accidental injury shall be entitled to compensation "equal to 66-2/3% of the difference between the average amount which he 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." 820 ILCS 305/8(d)(1) (West 2012). Thus, to establish an entitlement to wage differential benefits, a claimant must prove (1) a partial incapacity from his "usual and customary line of employment" and (2) an impairment of earnings. *Cassens Transport Co. v. Industrial Comm'n*,

218 Ill. 2d 519, 530-31, 844 N.E.2d 414, 422 (2006). The purpose of such an 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).

¶ 36 Initially, the parties disagree on the appropriate standard of review. The employer argues the issues presented involve matters of statutory construction and are subject to *de novo* review. See *Cassens Transport*, 218 Ill. 2d at 524, 844 N.E.2d at 418 (stating matters of statutory construction present questions of law that are reviewed *de novo*). It also suggests that *de novo* review is appropriate because the underlying facts essential to our appellate review are undisputed. See *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 104-05, 853 N.E.2d 799, 803 (2006) ("If the facts are undisputed and are susceptible to only a single reasonable inference, the question of whether an injury arose out of the claimant's employment is one of law to be reviewed *de novo*."). Conversely, claimant maintains the Commission's factual findings are reviewed under the manifest-weight-of-the-evidence standard. See *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 494, 867 N.E.2d 1063, 1069 (2007) ("Whether a claimant has introduced sufficient evidence to establish each element [necessary 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.").

¶ 37 Here, to the extent we consider issues of statutory construction, we agree that a *de novo* standard of review applies. However, we disagree that the relevant underlying facts are undisputed, or that any undisputed facts are subject to only a single reasonable inference. Therefore, we will review the Commission's factual findings and its determination that the evidence presented was sufficient to support a wage differential award under the manifest-weight-of-the-

evidence standard. A finding of fact is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Id.*

¶ 38 As stated, the employer argues the Commission interpreted "usual and customary line of employment" too narrowly when finding claimant established her entitlement to wage differential benefits. It maintains, in this instance, that the statutory language should be broadly interpreted to mean employment in "the retail sector of the economy." We disagree.

¶ 39 In *First Assist*, the claimant, who worked for the employer as an operating room nurse, sustained a work-related injury to her shoulder and was awarded weekly wage differential benefits. *Id*. at 489, 867 N.E.2d at 1064-65. On appeal, the employer challenged the Commission's wage differential award on the basis that the claimant failed to establish that her injury prevented her from pursuing her "usual and customary line of employment" because the evidence showed she "was employed as a registered nurse both at the time of her injury and at the time of the arbitration hearing." *Id*. at 495, 867 N.E.2d at 1069. This court rejected the employer's argument, finding the evidence established "that, although all registered nurses might be members of the same profession, they do not all perform the same functions." *Id*. at 495, 867 N.E.2d at 1070. We held "that the Commission's determination that the claimant's usual and customary line of employment at the time of her injury was that of an operating room nurse" was not, as the employer argued, "too narrow and restrictive." *Id*.

¶ 40 In this case, claimant worked for the employer, a fabric store, as a store manager. Like in *First Assist*, we find that the Commission did not construe the phrase "usual and customary line of employment" too narrowly or restrictively by looking to claimant's specific position at the time of her injury to determine her usual and customary line of employment. We note evidence submitted by the employer indicates not all retail store manager positions require the same

physical capabilities. Specifically, Bose's labor market survey showed that although some employers said they could accommodate lifting restrictions of up to 26.33 pounds, others required individuals in a store manager position to lift 50 to 75 pounds or up to 100 pounds. Further, claimant's testimony in this case showed she handled materials weighing up to 60 pounds while working for the employer and the employer was unable to accommodate claimant's work restrictions of no lifting more than 20 to 25 pounds as recommended by Dr. Raif and no more than 15 pounds as recommended by Dr. Watson.

¶ 41 Additionally, in its brief, the employer interprets the statutory language to mean that claimant's "usual and customary line of employment" was in the "retail sector" or in "retail sales." Such a broad interpretation does not account for claimant's managerial status. Ultimately, we find no support in either case law or the Act for the employer's expansive interpretation of the statutory language.

¶ 42 The employer next challenges the Commission's wage differential award on the basis that claimant failed to present expert vocational testimony or evidence to establish that she was precluded from returning to her usual and customary line of employment. Citing *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 545, 865 N.E.2d 342, 358 (2007), the employer argues such evidence was required for claimant to establish her entitlement to a wage differential award.

¶ 43 In *Westin*, we held the claimant did not meet his burden of establishing that he was permanently and totally disabled under the "odd-lot" category. *Id*. at 544, 865 N.E.2d at 358. A claimant ordinarily satisfies such a burden "in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor mar-

ket." *Id*. at 544, 865 N.E.2d at 357. In that case, we noted that the claimant "did not present any evidence that he conducted any job search" and the only witness to testify regarding his unemployability was the claimant's doctor, a specialist in occupational medicine. *Id*. at 544-45, 865 N.E.2d at 358. Further, we held that "the most recent cases making an odd[-]lot determination on the basis that there is no stable job market for a person of the claimant's age, skills, training, and work history *** required evidence from a rehabilitation services provider or a vocational counselor." *Id*. at 545, 865 N.E.2d at 358.

¶ 44 Again, we disagree with the employer's argument on appeal. This court's holding in *Westin*—that evidence from a rehabilitation services provider or vocational counselor was necessary for the claimant to establish his entitlement to benefits—was limited to situations where the claimant is attempting to establish his unemployability "because of his age, skills, training, and work history." *Westin* did not address the circumstances presented by this case. Further, we note that even under *Westin*, an injured employee can establish his entitlement to permanent and total disability benefits through an unsuccessful job search alone and without the aid of a vocational expert.

¶ 45 Here, claimant testified regarding the requirements of her work for the employer and submitted evidence of permanent work restrictions. The evidence showed claimant's work restrictions did not meet the physical demands of her position as the manager of a fabric store, which included lifting requirements of up to 60 pounds. Under the circumstances, this evidence was sufficient to meet claimant's burden and expert vocational testimony or evidence was not required.

¶ 46 Finally, with respect to the issue of wage differential benefits, the employer argues that claimant failed to prove that her work for Whitetail constituted "suitable employment"

under the Act. It points to evidence it presented that claimant could have "returned to the retail establishment sector of the economy" and earned wages ranging from $38,000 to $50,000 per year.

¶ 47 "Suitable employment is employment *** which the claimant is both able and qualified to perform." *Crittenden v. Workers' Compensation Comm'n*, 2017 IL App (1st) 160002WC, ¶ 24, 73 N.E.3d 654. Here, claimant presented evidence of a self-directed job search, which resulted in her employment with Whitetail, wherein she earned an annual salary of $28,000. She testified that position fell within her work restrictions, in that it required no lifting and she could sit and stand as needed. There is no dispute that claimant earned approximately $42,000 per year while working for the employer. Thus, based on her actual earnings after returning to work, claimant established an impairment of earnings. See *Gallianetti*, 315 Ill. App. 3d at 730, 734 N.E.2d at 489 ("A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment.").

¶ 48 Although the employer presented evidence through Bose that claimant could earn $38,633 per year based on the labor market survey she conducted, the Commission found Bose's opinions were "speculative." In particular, it determined most of the positions referenced by Bose were located in Springfield, Illinois, 90 miles from claimant's home. The record supports the Commission's factual findings, showing that Bose contacted eight employers who agreed they were hiring and could accommodate claimant's restrictions and only one of those employers was located in claimant's immediate geographic location. While the employer points out that claimant previously worked for a retailer in Springfield, the record sets forth little regarding the circumstances surrounding that previous employment.

¶ 49 Based on the evidence presented, we cannot find an opposite conclusion from that reached by the Commission was clearly apparent. The Commission's decision that claimant established her entitlement to a wage differential award was not against the manifest weight of the evidence.

¶ 50 B. Motion to Bar Dr. Watson's Testimony

¶ 51 On appeal, the employer next argues the Commission erred in denying its motion to bar Dr. Watson's testimony. It argues Dr. Watson unequivocally testified he reviewed six to seven inches of records prior to his examination of claimant but those records were never produced to the employer.

¶ 52 "We review evidentiary rulings made during the course of a workers' compensation proceeding under the abuse of discretion standard." *Jackson Park Hospital v. Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, ¶ 47, 47 N.E.3d 1167. "An abuse of discretion occurs when no reasonable person would take the view adopted by the Commission." *Id*.

¶ 53 Initially, we note the employer cites section 12(a) of the Act (820 ILCS 305/12(a) (West 2012)) as supportive of its argument. That section provides that when the claimant obtains a doctor for an examination, the doctor has a duty to deliver to the employer "a statement in writing of the condition and extent of the examination and findings to the same extent that said [doctor] reports to the employee." *Id*. If the doctor refuses to furnish such a statement to the employer, the doctor "shall not be permitted to testify at the hearing next following said examination." *Id*.

¶ 54 As claimant points out, section 12(a) of the Act does not contain a requirement "that an examining doctor produce copies of every record that he has relied upon in reaching his opinions." It provides only that the doctor furnish a written statement of his examination and

findings to the same extent as he reports to the employee. There is nothing in the record on appeal to establish Dr. Watson's noncompliance with section 12(a).

¶ 55 Additionally, as stated, the employer objected to the admission of Dr. Watson's deposition into evidence on the basis that Dr. Watson reviewed more records than were provided to the employer. The Commission overruled the employer's objection, finding as follows:

> "Dr. Watson's estimate that he reviewed [six] to [seven] inches of records was simply a mistake and his testimony during his deposition is consistent with [claimant's] medical records offered into evidence by [claimant] and not objected to by [the employer]. The Commission [finds] that [the employer] failed to show that there was any testimony during Dr. Watson's deposition from which one could reasonably infer that it was based on medical records of [claimant] that were not offered into evidence."

¶ 56 The record shows claimant provided Dr. Watson with the records he reviewed prior to his section 12 examination of claimant. At the arbitration hearing, claimant's counsel asserted that only approximately one inch of records were provided to Dr. Watson and Dr. Watson's estimate that he reviewed six to seven inches of records was a mistake. As the Commission points out, nothing in Dr. Watson's report or deposition testimony indicates he reviewed any records outside of what was presented at arbitration. Thus, the record reflects no abuse of discretion by the Commission in overruling the employer's objection to Dr. Watson's deposition.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the circuit court's judgment, which confirmed the Commission's decision.

¶ 59 Affirmed.