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2019 IL App (1st) 181429WC-U

Order filed: May 31, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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| WALTER W. KOHUT, | ) | Appeal from the Circuit Court |
| | ) | of Cook County Illinois |
| | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | Appeal No. 1-18-1429WC |
| | ) | Circuit No. 17-L-50872 |
| | ) | |
| ILLINOIS WORKERS' COMPENSATION | ) | Honorable |
| COMMISSION, *et al.*, (Bakers Square, | ) | James M. McGing, |
| Appellees). | ) | Judge, Presiding. |

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PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Cavanagh, and Barberis concurred in the judgment.

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**ORDER**

¶ 1 *Held*: The Commission's determination that the claimant was entitled to a permanent partial disability benefit rather than a permanent total disability benefit was neither contrary to law nor against the manifest weight of the evidence. The Commission's decision to terminate the claimant's temporary total disability benefits on the date he refused an offer of light duty work within his prescribed work restrictions was not against the manifest weight of the evidence.

¶ 2 The claimant, Walter Kohut, filed an application under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for right shoulder, neck, right knee and ankle, and low back injuries, allegedly incurred as the result of an industrial accident occurring on August 21, 2008. The application maintained that the claimant was injured while working as a cook for Bakers Square (the employer). A hearing was held before Arbitrator Robert Williams on June 23, 2015, in Chicago, Illinois. On July 16, 2015, the arbitrator issued a written decision finding that certain injuries to the claimant's right shoulder were causally related to an industrial accident occurring on August 21, 2008, while other conditions of ill-being related to the right shoulder were not causally related to the claimant's employment. The arbitrator further determined that the claimant's current condition of ill-being regarding his neck, right knee and ankle, and low back were not causally related to his employment. The arbitrator awarded the claimant temporary total disability (TTD) benefits covering 45 weeks (August 21, 2008, through July 1, 2009) at the rate of $220 per week. The arbitrator further ordered the employer to pay all reasonable and necessary medical expenses related to the shoulder injury. Additionally, the arbitrator awarded permanent partial disability (PPD) benefits equal to 40% loss of the use of the right arm pursuant to section 8(d) of the Act. (820 ILCS 305/8(d) (West 2008)). The PPD award was calculated by the arbitrator as $207.67 per week for a period of 101.2 weeks for a total PPD award of $21,016.20.

¶ 3 The employer sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the decision of the arbitrator with modification. Specifically, the Commission held that, "[c]onsistent with *Will County Forest Preserve v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 11077WC, the arbitrator's award of [PPD benefits] for the 40% loss of use of the right arm is

modified to an award based on 20.25% of the loss of use of the man as a whole." The Commission further noted that "[t]his modification does not change [the claimant's] overall award" and "[a]ll else is otherwise affirmed, and adopted."

¶ 4 The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision, finding that the decision of the Commission was not against the manifest weight of the evidence. The claimant then filed this timely appeal.

¶ 5 BACKGROUND

¶ 6 The following factual recitation is from the evidence presented at the arbitration hearings. The claimant testified that he had been working for the employer as a cook for approximately three weeks. On August 21, 2008, the claimant's manager dropped an avocado slice on the floor, the claimant stepped on the avocado and slipped. The claimant testified that he flew backwards and placed his right hand on the counter to brace himself, but kept going down. He stated he felt two loud pops in his right shoulder and lost strength all the way down to his hand.

¶ 7 The claimant continued working until 5:00 pm and later sought emergency room treatment. The records of his initial medical care are not in evidence. On August 28, 2008, the claimant sought treatment for shoulder, neck and back pain from Dr. Gregory Primus. The claimant reported that the precipitating cause was a fall at work a week earlier. Dr. Primus reported symptoms of neck pain and lower back pain with numbness and tingling distally. Diagnostic x-rays of the shoulder were negative. Dr. Primus diagnosed general traumatic shoulder pain for which he advised the claimant to avoid excessive range of motion, any overhead activities and any weight bearing with his right arm.

¶ 8 On September 2, 2008, the claimant again treated with Dr. Primus. He reported symptom improvement, especially in his lower back and neck. He further reported that his right elbow and shoulder pain persisted. On September 6, 2008, Dr. Primus noted that the results of a right shoulder MRI showed abnormal signal of the anterior labrum, rotator cuff tendonitis, and joint arthrosis. He also noted that there were no Hill-Sachs or SLAP lesions. Dr. Primus diagnosed shoulder and upper arm sprain and strain, a superior glenoid labrum lesion and an anterior labrum tear.

¶ 9 On November 13, 2008, a cervical spine MRI revealed mild degenerative changes but no central canal or neuroforaminal stenosis. A chest and right shoulder x-ray revealed no definitive evidence for a right brachioplexus injury.

¶ 10 On November 18, 2008, at the request of the employer, the claimant was evaluated by Dr. Sean Salehi, a board certified orthopedic neurosurgeon. Dr. Salehi opined that during the physical examination the claimant exhibited significant positive Waddell signs, indicating possible symptom magnification. Dr. Salehi further noted that, in light of the claimant's unremarkable cervical MRI, the claimant exhibited unjustified cervical spine limitations. Dr. Salehi further opined that the claimant had reached maximum medical improvement (MMI) no more than six weeks post injury. Dr. Salehi further opined that the claimant was currently capable of performing his pre-injury job duties as it related to his cervical and lumbar spine.

¶ 11 On January 6, 2009, the claimant was evaluated at the request of the employer by Dr. Guido Marra, a board certified orthopedic specialist, at Loyola University Medical Center. Dr. Marra opined that the claimant was a candidate for a right shoulder arthroscopic repair of his anterior-inferior labral tear.

¶ 12 On March 24, 2009, Dr. Primus performed a subacromial decompression, arthroscopic

SLAP lesion repair, suprascapular nerve block, and insertion of a pain pump. Dr. Primus noted objective findings of an intact glenohumeral joint, no rotator cuff tear or irritation, fraying along the superior labrum with partial detachment of the biceps anchors, moderate synovitis about the superior aspect of the joint, significant thickened bursitis in the subacromial space, a moderate-sized spur, and mild irritation of the rotator cuff. The diagnosis was a right shoulder impingement and superior labral lesion. Dr. Primus order six weeks of postoperative physical therapy.

¶ 13 On May 26, 2009, Dr. Primus released the claimant to sedentary work with ten-pound restrictions and a projected release to full-duty in three months. Pain medications were discontinued and physical therapy was continued.

¶ 14 On July 1, 2009, the employer offered the claimant work consistent with Dr. Primus's sedentary work restrictions. The claimant did not accept the job offer.

¶ 15 On August 12, 2009, the claimant sought treatment at Cook County Health Systems for neck, back, right knee, and right ankle pain. X-rays of the right knee and shoulder were unremarkable.

¶ 16 On August 26, 2009, the claimant sought treatment from Dr. Joseph Thometz, a board certified orthopedic surgeon. The claimant reported neck pain with posterior radiating pain into his head, diffuse right shoulder pain with radiating pain into his neck, and intermittent right hand numbness, tingling and weakness. Dr. Thometz opined that the claimant was not capable of regular work. Dr. Thometz ordered additional diagnostic tests. A cervical MRI performed on October 22, 2009, revealed mild multilevel disc degeneration consistent with prior MRIs of the neck and cervical spine. A right shoulder MRI revealed mild fraying along the anterior distal bursal surface of the supraspinatus, subscapularis tendinosis but no labral tears. On November 4,

2009, Dr. Thometz recommended additional physical therapy with the claimant to remain off work until the therapy was completed.

¶ 17 On January 26, 2010, Dr. Marra reviewed the claimant's treatment records and opined that the claimant had a profound loss of motion in his shoulder, both active and passive, and that the latest MRI did not show any tearing of the rotator cuff or labrum. Dr. Marra opined that the claimant could return to work with lifting restrictions of five pounds.

¶ 18 On March 3, 2010, the claimant returned to the Cook County Health Systems reporting neck pain of three-day duration with headaches and increased neck pain with movement. Treatment notes established a diagnosis of cellulitis and swelling of the right side of his neck. Cervical spine, chest, right shoulder, and right knee x-rays were all normal. A CT scan of the neck, head and brain was normal. CT scans of the facial bones and the soft tissue of his neck were compatible with cellulitis along his right neck and jawline. On April 21, 2010, Dr. Thometz prescribed a pain injection and continued physical therapy.

¶ 19 On April 19, 2010, the employer again offered the claimant employment within his restrictions. The claimant did not accept the offer of work.

¶ 20 On November 15, 2010, the claimant was evaluated at the employer's request by Dr. Bryan Cole, a board certified orthopedic surgeon. Dr. Cole opined that the October 2009 MRI of the shoulder had revealed a bursa-sided partial thickness tear of the supraspinatus and an intact rotator cuff. He further opined that the claimant's condition was consistent with a neurologic injury and that further surgical interventions in the right shoulder would not provide any relief. Dr. Cole also opined that the claimant could work with sedentary work restrictions.

¶ 21 On May 18, 2011, Dr. Thometz examined the claimant and noted no significant changes, objectively or subjectively.

¶ 22 On June 1, 2011, the claimant returned to Cook County Health Systems primarily for right shoulder and right knee pain. Treatment notes indicated that right shoulder, knee, and ankle x-rays were normal and cervical and lumbar CT scans showed straightening of his upper cervical lordosis, levoscoliosis of the lumbar vertebrae, and bulging discs most prominent at L5-S1 without evidence of foramina narrowing. The claimant also reported shoulder pain to Dr. Thometz on June 29, 2011, and August 24, 2011.

¶ 23 The record established several medical encounters by the claimant over the ensuing months. On September 26, 2011, x-rays of the lumbar spine and right hand were negative. On March 21, 2012, the claimant received care at Cook County Health Systems for right leg, right arm, bilateral shoulders, neck, and back pain. On April 3, 10, 17 and 24, 2012, the claimant sought treatment complaining of low back, right leg, and right shoulder pain. The claimant received care at Ingalls Memorial Hospital in Harvey, Illinois, on June 5, 2012, for generalized pain and low back pain. Treatment records established that his upper extremity examination was normal and a diagnosis of myalgia was recorded. The claimant received physical therapy for his right shoulder at Cook County Health Systems periodically from October 16, 2012, through January 15, 2013. A cervical MRI on March 29, 2013, revealed mild degenerative changes at C2/3, C3/4, C4/5 and C5/6 and a slight narrowing of the left neural foramen between C3/4 and C5/6. He had follow up treatments at Cook County on January 22, 2013, and April 2, 2013.

¶ 24 On July 25, 2013, Dr. Marra again examined the claimant and opined that the treatment for his right shoulder has been reasonable and necessary. He recommended additional testing of the right shoulder to rule out any major structural abnormalities. The claimant returned several times to the Cook County Health for treatment of depression from August 9, 2013, through November 20, 2013.

¶ 25 On December 5, 2013, an upper-extremity MRI reported conditions compatible with a large SLAP tear of the glenoid labrum. Dr. Thometz opined on December 11, 2013, that the MRI showed abnormalities in the superior labrum suggestive of a superior labral tear.

¶ 26 On April 16, 2014, Dr. Marra opined that the MRI scans did not show evidence of a SLAP tear or a recurrent rotator cuff tear and no structural lesions that could account for the claimant's complaints. Dr. Marra opined that the claimant did not need any further treatment and that he could return to work at the "medium" physical demand level. Dr. Marra disagreed with the opinions regarding the MRI showing SLAP tear of the glenoid labrum. He read the test result as within normal parameters.

¶ 27 On June 19, 2014, Dr. Thometz read the latest lumbar and cervical MRIs to reveal only minimal central canal stenosis at L3/4 and L4/5 and mild reversal of normal cervical lordosis with minimal central disc protrusion at C7-T1. Dr. Thometz recommended that the claimant undergo arthroscopic evaluation and treatment on June 25, 2014.

¶ 28 On March 20, 2015, the claimant began treatment for his right shoulder with Dr. Nickolas Garbis at Loyola Medical Center. Dr. Garbis recommended arthroscopy and debridement of the bicep tendon. The claimant reported no change in his shoulder pain to Dr. Thometz on March 25, 2015. Dr. Thometz recommended an arthroscopic evaluation and, possibly, a biceps tendon and labral repair.

¶ 29 The claimant testified that he has not returned to work since the accident, except for periodic work as an election judge. He testified that he has looked for work within his restrictions, but has turned down work that he believed exceeded his physical abilities. He also testified that he has a GED and took some college courses at the local community college. The claimant did not present any logs or other documents to substantiate an active job search. The

claimant further testified that he continues to suffer pain and instability in his right arm and shoulder, and stabbing pain in his neck and low back. He testified that he wears a sling on his right arm most of the time. The claimant further testified that he has pain and instability in his right leg and he uses a cane when he walks.

¶ 30 The arbitrator determined, based upon the testimony and the evidence in the record, that the claimant had proven that his current condition of ill-being of his right shoulder was work related. However, the arbitrator determined that the current condition of the neck, back, and right knee and ankle were not causally related to the work injury.

¶ 31 Regarding the low back and right leg, the arbitrator noted that the medical evidence did not support the claim that those conditions were related to his work accident. The arbitrator noted that: 1) the claimant did not report or receive treatment for right knee or ankle symptoms until he sought treatment for such at Cook County Health Systems on August 29, 2009; 2) on September 2, 2008, the claimant reported overall improvement, especially in the lower back and neck; 3) the cervical MRI on November 13, 2008, showed only mild degenerative changes; 4) there was no central canal or neuroforaminal stenosis; and 5) Dr. Salehi opined on November 18, 2008, that the claimant exhibited significant positive Waddell signs and unjustified significant cervical spine limitations and opined that the claimant should have been at maximum medical improvement for his cervical and lumbar spine strains approximately six weeks after the injuries.

¶ 32 Regarding the claimant's right shoulder condition, the arbitrator credited Dr. Marra's opinion that SLAP lesions were misdiagnosed and his additional opinion that the tear diagnosed by Dr. Thometz was not in a position expected to result from the accident as described and was thus a new tear unrelated to the accident. Additionally, the arbitrator observed that Dr. Thometz's opinions are not consistent with the surgical report on March 24, 2009, and the MRI

on December 5, 2013.

¶ 33 Regarding TTD benefits, the arbitrator awarded TTD benefits from the date of the accident, August 21, 2008, through July 1, 2009, the date the employer offered light-duty work within the restrictions imposed by Drs. Primus and Thometz.

¶ 34 Regarding the permanent nature of the claimant's injuries, the arbitrator determined that the claimant had failed to prove that he was obviously incapable of employment or that he could not perform any services except those so limited in quantity, dependability, or quality that there is no reasonably stable labor market for them. Thus, he did not meet the burden required to establish entitlement to permanent total disability benefits. The arbitrator found that the claimant was capable of performing some form of employment, within his restrictions, without seriously endangering his health or life. In support of this conclusion, the arbitrator noted that the claimant had declined job offers and had not established that he engaged in a diligent search for employment. The arbitrator determined, however, that the claimant had established his entitlement to PPD benefits where the restrictions imposed by Dr. Thometz were permanent in nature, and limited his employment capabilities. Additionally, the arbitrator noted that the claimant uses a sling for his right arm, which would limit his movement during employment.

¶ 35 The arbitrator determined, based on the facts in evidence, that the claimant was entitled to an award of "$206.67/week for a further period of 101.2 weeks, as provided in section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to claimant to the extent of 40% loss of use of his right arm."

¶ 36 After the employer sought Commission review of the arbitrator's decision, the Commission affirmed and adopted the findings and conclusions of the arbitrator with one modification. Noting the binding precedent of our decision in *Will County Forest Preserve v.*

*Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 11077WC, ¶¶ 19-21, the Commission determined that the claimant's shoulder injury was not compensable as a percent of the loss of use of the arm. Rather, the injury was compensable as a percent of the loss of the man as a whole. *Id*. The Commission then issued a decision finding that the claimant was entitled to compensation for 20.25% loss of the use of the man as a whole. The Commission noted that the change in statutory authority for the award did not change the claimant's "overall" award.

¶ 37 The claimant sought administrative review in the circuit court of Cook County, which confirmed the decision of the Commission. This appeal followed.

¶ 38 ANALYSIS

¶ 39 On appeal, the claimant first maintains that the Commission's decision must be vacated and remanded because it relied upon an incorrect legal analysis by the arbitrator. He argues that, because the arbitrator based his calculations of permanent impairment on a percentage of the loss of the use of the arm, the Commission's modification to reflect a calculation based upon a percentage loss of the use of the man as a whole was "not correct or sound." He further maintains that because the arbitrator's decision was not "sound" it is not possible for a reviewing court to determine whether the Commission's decision relied upon proper or improper arbitral determinations. In short, the claimant argues, that if the arbitrator's legal analysis is incorrect, the Commission cannot simply articulate its own legal analysis without also specifically rejecting the arbitrator's factual findings. We find no legal support for the claimant's position.

¶ 40 It is a fundamental proposition that the Commission exercises original jurisdiction and is not bound or limited by any findings or conclusions of the arbitrator. *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279 (2004); *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483 (1989); *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 405 (1984); *R&D Thiel v. Illinois Workers*

*Compensation Comm'n*, 398 Ill. App. 3d 858, 866 (2010). In all workers' compensations matters, the Commission is the ultimate decision maker and it is the decision of the Commission, not the circuit court or the arbitrator that is subject to appellate review. *Farris v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130767WC, ¶ 67; *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009) ("our supreme court has consistently held that when the Commission reviews an arbitrator's decision, it exercises original, not appellate, jurisdiction and that the Commission is not bound by the arbitrator's findings"). Where there is any factual support in the record, we will affirm the Commission even though we may not agree with the Commission's rationale for reaching that decision. *Crittenden v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 160002WC, ¶ 25.

¶ 41 The claimant cites *R&D Thiel* for the proposition that a Commission decision lacking in specific factual finding to support its decision should be remanded to the Commission with directions to make the necessary findings. *R&D Thiel*, 398 Ill. App. 3d at 862. However, the holding in that case does not help the claimant here. *R&D Thiel* involved a case where the Commission rejected the credibility determinations of the arbitrator. The appellant maintained that the Commission was not free to reject the arbitrator's credibility findings without specifically articulating its reasons for rejecting the arbitrator's findings. The court acknowledged that where a Commission decision gave no reason for rejecting the arbitrator's findings as to credibility, it would be appropriate to remand the matter to the Commission with directions to make specific findings since it had not relied upon the findings of the arbitrator. *Id.* at 866. However, the court also noted that remand was not required where the record contained facts that could support the Commission's credibility findings. *Id.*

¶ 42 *R&D Thiel* is distinguishable from the instant matter. In *R&D Thiel* the court recognized,

that where the Commission specifically rejected the factual findings of the arbitrator without making its own factual findings, remand was appropriate. In the instant matter, however, the Commission did not reject the arbitrator's factual findings. Rather, it adopted the arbitrator's factual findings regarding the nature and extent of the claimant's permanent impairment, but applied its own legal analysis to those facts. As the *R&D Thiel* court noted, where there is evidence of record to support the Commission's award, the question on review is not whether the Commission analysis of the evidence was correct, but whether the manifest weight of the evidence supports the Commission's determination. *Id.* at 867. Here, the Commission adopted the arbitrator's factual findings regarding the nature and extent of the claimant's permanent impairment. The fact that the Commission applied a different legal analysis to those facts does not necessitate a remand for further factual findings. We reject the claimant's argument that the record is not sufficient for appellate review of the Commission's decision.

¶ 43 Moreover, the claimant's argument that because neither the arbitrator nor the Commission made specific findings regarding his inability to pursue his customary employment, we must remand the matter for additional findings fails. The record established no evidence that the claimant was unable to return to his prior employment as a cook. In addition, Dr. Marra opined that the claimant could return to work at a "medium" level. While there is no evidence in the record that the job duties of a cook were within the medium level of work, it would be well within the Commission's purview to reach that conclusion. Given that the record contained no evidence as to the physical demand level of the claimant's prior job, we cannot say that the Commission's implicit equation of the claimant's prior job with a medium level of physical exertion was contrary to the manifest weight of the evidence. *Caterpillar Tractor Co. v. Industrial Comm'n*, 124 Ill. App. 3d 650, 653 (1984) (a reviewing court will not disregard or

reject reasonable inferences drawn from the record by the Commission).

¶ 44 Turning to the substance of the Commission's decision, the claimant next maintains that the Commission erred in its award of a PPD benefit of 20.25% loss of the use of the man as a whole. The nature and extent of a claimant's disability is a question of fact to be determined by the Commission, and that determination will not be overturned on appeal unless it is against the manifest weight of the evidence. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256 (1980). For a finding to be against the manifest weight of the evidence the opposite conclusion must be clearly apparent from the record. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 312-13 (2009).

¶ 45 Here, the record supports the Commission's finding that the claimant was entitled to PPD benefits related to the loss of the use of 20.25% of the man as a whole. The medical opinion testimony supported a finding that the claimant was partially, as opposed to totally, disabled. Dr. Marra opined that the claimant was at MMI, displayed diagnostic results within normal parameters, and was capable of a "medium" level of work. Dr. Salehi opined that the claimant exhibited signs of symptom magnification and was able to return to pre-accident employment. While these opinions conflicted with the opinion of Dr. Thometz, the Commission gave greater credence to the opinions of Drs. Marra and Salehi than Dr. Thometz, and we cannot say that the decision to do so was against the manifest weight of the evidence.

¶ 46 Similarly, the Commission's finding that the claimant failed to establish that he was permanently totally disabled is not against the manifest weight of the evidence. Since he was not obviously total disabled based upon the medical evidence, the claimant had the burden of proving that he was otherwise not employable in the relevant labor market. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). To do so he was required to establish, by a

preponderance of the evidence, that he fit into the "odd-lot" category of permanent total disability by demonstrating either: (1) a diligent but unsuccessful search for employment; or (2) that because of his age, skills, training, and work history, he would be unable to find regular employment in the relevant labor market. *Id*. The record established that the claimant was in fact employable in the relevant market where the employer offered the claimant a job within his work restrictions. The Commission's rejection of the claimant's self-serving testimony that he would not be able to handle the work cannot be said to be against the manifest weight of the evidence. Moreover, there is little or no evidence of a diligent job search, nor is there evidence establishing how the claimant's age, skills, training or work history made him unable to find employment in the labor market. The Commission's finding that the claimant was entitled to a partial disability benefit, rather than a total disability benefit, was not against the manifest weight of the evidence.

¶ 47 The last issue raised by the claimant is whether the Commission erred in terminating his TTD benefits on July 1, 2009. Whether a claimant is entitled to TTD benefits is a question of fact for the Commission and its determination on that issue will not be overturned on appeal unless it is against the manifest weight of the evidence. Here, the Commission terminated TTD benefits on the same date that the claimant declined work that had been offered to him by the employer. It is well-settled that benefits may be suspended or terminated if the employee refuses an offer of employment that falls within physician prescribed restrictions. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146 (2010). While the claimant may argue that the offered work was not within his restrictions, the Commission rejected that argument. We cannot say that the Commission's finding was against the manifest weight of the evidence.

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of Cook County, which confirmed the decision of the Commission, is affirmed.

¶ 50 Affirmed.