

**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).

2014 IL App (1st) 131375WC-U

Order filed: August 4, 2014

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT  
WORKERS' COMPENSATION COMMISSION DIVISION

---

JACOBO DELGADO,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 1-13-1375WC
	)	Circuit No. 12-L-50910
	)	
ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION, <i>et al.</i> , (Wilmette Real	)	Patrick J. Sherlock,
Estate & Management, Appellees).	)	Judge, Presiding.

---

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

---

**ORDER**

- ¶ 1 *Held:* The Commission's findings that the claimant failed to establish (1) a causal connection between his work accident and his current condition of ill-being, (2) his entitlement to additional medical expenses and TTD benefits, and (3) his permanent and total disability under the "odd-lot" category were not against the manifest weight of the evidence.
- ¶ 2 The claimant, Jacobo Delgado, filed a claim under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)) seeking benefits for injuries he allegedly sustained

while working for respondent Wilmette Real Estate and Management (the employer). The arbitrator found that the claimant had suffered a work-related injury and was permanently partially disabled to the extent of 25% loss of the person as a whole. The arbitrator awarded the claimant temporary total disability (TTD) benefits through April 24, 2008, and permanent partial disability (PPD) benefits in the amount of 25% person as a whole. However, the arbitrator concluded that the claimant's current condition of ill-being was not causally related to his work accident and that all reasonable and necessary medical services had been provided and paid for by the employer. Accordingly, the arbitrator denied any further TTD benefits or medical expenses. The arbitrator also denied the claimant's claim that he was permanently and totally disabled under the "odd lot" theory.

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling. This appeal followed.

¶ 4 **FACTS**

¶ 5 The claimant worked for the employer as a tuck pointer, painter, and plasterer. He began working for the employer in 1985. On October 5, 2006, the claimant was working when he slipped from a scaffold and fell approximately six to eight feet to the ground, landing first on his head and then on his right side. He was taken by ambulance to St. Francis Hospital. The hospital emergency room records indicate that the claimant complained of a headache and pain in his right lower back. A CT scan of the claimant's lumbar spine revealed extensive

degenerative changes, acute fractures of the transverse processes<sup>1</sup> of L1, L4, and L5, and a fracture of the superior portion of the right sacral wing.<sup>2</sup> A CT scan of the claimant's head showed extracranial hematomas, larger on the right side, but no skull fractures. The claimant was admitted to the hospital's trauma floor where he was evaluated by pain management specialists and given physical therapy. He was released on October 9, 2006.

¶ 6 Two days later, the claimant began treating with a chiropractor of his choice, Dr. Victor Gutierrez. On his first visit, the claimant reported experiencing frequent dull headaches, constant pain in his neck, right hip, and pelvic region, and pain in his lower back which radiated into his right lateral thigh and posterior knee. Dr. Gutierrez 's examination revealed tenderness to palpation in the cervical and lumbar spine and decreased range of motion in the cervical spine, lumbar spine, and right hip. Dr. Gutierrez diagnosed the claimant with hematomas, post-concussion syndrome, cervical disc disorder, right sacral ala fracture, right hip sprain/strain, and myospasm. The doctor kept the claimant off work, ordered physical therapy, and referred the claimant to a neurologist and an orthopedic surgeon.

¶ 7 On October 30, 2006, the claimant saw Dr. J. Michael Morgenstern, an orthopedist. Dr. Morgenstern's records do not contain a referral slip. The claimant complained of pain in his

---

<sup>1</sup> A "transverse process" is a small bony projection off the right and left side of each vertebrae. The two transverse processes of each vertebrae function as the site of attachment for muscles and ligaments of the spine.

<sup>2</sup> The sacral region is at the bottom of the spine and lies between the fifth segment of the lumbar spine (L5) and the coccyx (tailbone). The first three vertebrae in the sacral region have transverse processes that come together to form wide lateral wings called alae.

neck, lower back, right hip, and right leg. He exhibited tenderness to palpation in his neck and lower back and muscle stiffness and pain with lumbar range of motion. Dr. Morgenstern administered myotrigger injections to the claimant's lumbar spine, continued the claimant's physical therapy, and kept him off work. Two weeks later, the claimant followed up with Dr. Morgenstern, reporting some improvement. The doctor gave him two more injections at that time.

¶ 8 On November 15, 2006, the claimant returned to Dr. Gutierrez. At that time, he reported that his headaches had resolved.

¶ 9 Three days later, the claimant was evaluated by Dr. Eugene Averbuch, the neurologist recommended by Dr. Gutierrez. The claimant told Dr. Averbuch that he had been experiencing headaches, forgetfulness, poor sleep, and lower back pain since his October 5, 2006, work accident. Dr. Averbuch diagnosed sub-concussion syndrome. During his physical examination of the claimant, Dr. Averbuch noted that the claimant had a head tremor. The claimant told Dr. Averbuch that he had a head tremor for several years before his work accident and reported a family history of head tremors. Based on the claimant's radicular complaints, Dr. Averbuch ordered an EMG of the claimant's lower extremities, which was performed on December 9, 2006. The EMG showed chronic right L5 radiculopathy and moderate to severe peripheral neuropathy. Dr. Averbuch opined that the moderate to severe peripheral neuropathy identified in the claimant's EMG study was most likely due to his diabetes and was not a result of the work injury. Dr. Averbuch also stated in his report that he did not believe the claimant had developed any radiculopathy as a result of his fall.

¶ 10 When the claimant followed up with Drs. Morgenstern and Gutierrez in December 2006, he continued to complain of pain in his neck and lumbar spine. His back pain initially improved

but he reported that his neck pain was severe. He was kept off work and continued therapy. On January 8, 2007, Dr. Morgenstern administered trigger point injections to the claimant's neck. When the claimant returned to Dr. Morgenstern on January 31, 2007, he continued to complain of pain in his neck and lumbar spine but his range of motion and tenderness to palpation had improved. Dr. Morgenstern released to claimant to work light duty with no lifting over 10-15 pounds. However, the claimant did not return to work at that time.

¶ 11 Over the next several weeks, the claimant continued with physical therapy. His neck and back pain improved to some degree but he continued to have some pain, particularly in his lower back. On February 2, 2007, Dr. Gutierrez released the claimant to work with a 10-pound lifting restriction. On April 20, 2007, the claimant told Dr. Gutierrez that his neck pain had resolved. He reported experiencing occasional pain in his right hip and pelvic region and intermittent pain in his lower back. Dr. Gutierrez increased the claimant's lifting tolerance from 10 to 20 pounds.

¶ 12 The claimant saw Dr. Morgenstern again on April 23, 2007. At that time, the claimant told Dr. Morgenstern that he was not experiencing any neck pain. The claimant had full range of motion in his neck and upper extremities. However, he complained of low back pain with some pain radiating into his buttocks. Dr. Morgenstern ordered a lumbar MRI, which was performed on April 25, 2007. The MRI revealed multi-level degenerative changes but no evidence of disc herniation. On April 30, 2007, the claimant reported some residual tenderness and minimal muscle tightness. After reviewing the MRI results, Dr. Morgenstern released the claimant from his care with a permanent 20-pound lifting restriction. However, the claimant did not return to work at that time.

¶ 13 The claimant was reevaluated by Dr. Gutierrez on June 13, 2007. At that time, the claimant reported ongoing pain in his right hip/pelvic region and bilateral lower lumbar area. He

exhibited tenderness to palpation in his lumbar area and slightly reduced lumbar extension. Dr. Gutierrez noted that the claimant's subjective complaints had "increased in frequency from [his] last date of his therapy (06/01/07)." Dr. Gutierrez concluded that "this outcome [was] not unexpected" due to "the nature of [the claimant's] injuries (multiple fractures)" and the fact that he fell onto a brick floor from a height of six or seven feet and landed on his right side. The doctor opined that the claimant "may well require supportive care to assist him in the activities of daily living." Dr. Gutierrez discharged the claimant from his care and released him to work with permanent restrictions of no lifting greater than 20 pounds and minimal bending, squatting, pushing, pulling, kneeling, crawling, grasping, or reaching. However, the claimant did not return to work. There is no indication in Dr. Gutierrez's final treatment records of any referral for further treatment of the claimant's alleged work injuries.

¶ 14 On October 18, 2007, the claimant was evaluated by Dr. David Shapiro, the employer's section 12 independent medical examiner. Dr. Shapiro reviewed the claimant's medical records (including the records of the claimant's treating doctors, the MRI reports and the EMG report) and conducted a physical examination. Dr. Shapiro concluded that the claimant exhibited four out of five positive Waddell's signs<sup>3</sup> during the examination. Specifically, the claimant reported feeling tenderness to superficial palpation of the lumbar spine, pain on axial compression, pain on axial rotation, and pain which improved with distraction. Dr. Shapiro also noted that the claimant showed no manifestation of back pain until he was asked to bend, and that there

---

<sup>3</sup> "Waddell's signs" are a group of physical signs which may indicate non-organic or psychological component to chronic low back pain. They have also been used to detect malingering or symptom magnification in patients who complain of back pain.

appeared to be no difficulty with sitting. Dr. Shapiro concluded that the claimant was magnifying his pain symptoms.

¶ 15 Dr. Shapiro opined that the claimant had suffered a neck strain and most likely also suffered a lumbar strain during the October 5, 2006, work accident. Based on his review of the medical records and his examination of the claimant, Dr. Shapiro concluded that the claimant's neck strain resolved within three months of the accident and that the low back pain caused by the lumbar strain resolved when the claimant's transverse process fractures healed. The doctor noted that the claimant suffered from chronic lumbar stenosis (as revealed in the April 25, 2007, MRI) and chronic L5 radiculopathy (as evidenced by the EMG results), both of which "clearly predate[d]" the October 5, 2006, work injury. He opined that the claimant's current neck symptoms and his current low back pain symptoms were not related to the October 5, 2006, work accident. Dr. Shapiro also opined that the claimant's diabetes was "contributing to the current symptoms of leg pain and numbness that can be due to both spinal stenosis and peripheral neuropathy."

¶ 16 Dr. Shapiro opined that the claimant had reached maximum medical improvement (MMI) and that no future medical treatment relating to his work accident was warranted. He concluded that he was "unable to say" what the claimant's restrictions were because he believed that the claimant was "self-limited." However, Dr. Shapiro noted that he "[did] not believe that any of the restrictions that [the claimant] would have now would be related to his work injury." He concluded that a functional capacity evaluation (FCE) would be helpful to determine the claimant's final work status.

¶ 17 The claimant underwent an FCE on April 24, 2008. The physical therapist who administered the FCE concluded that the claimant was "presently unable to return to his former

Medium level job" as a construction manager because of his inability to meet the physical demands of construction work, such as working while standing with his arms overhead, bending and stooping, kneeling, squatting, and crouching. The claimant scored "Light" in position tolerance tests relating to these tasks. The therapist also concluded that the claimant was unable to meet the "dynamic strength demands" for lifting floor to waist, waist to eye level, and two-handed carrying, or the "mobility demands for trunk rotation" while standing. Moreover, due to the claimant's impaired balance and dizziness, the therapist concluded that the claimant was unable to work on a ladder, scaffolding, balance beam, or any irregular surface. She stated that the prognosis for the claimant to return to full level work was poor "due to the chronicity of medical problems related to the diabetes, post-concussion syndrome, and lumbar and cervical degenerative changes." The therapist opined that the claimant would "better tolerate work that requires alternate sitting, standing, and walking and doing work mainly at waist level." She concluded that, if the claimant observed these restrictions, he would be able to work at the medium level for an eight-hour day. The therapist noted that, if the claimant is unable to return to his previous job with the restrictions outlined above, "he would benefit from vocational counseling to train him in work he can do with his current abilities."

¶ 18 On March 31, 2008, the employer contacted the claimant and asked him to return to work. The claimant testified that he worked a full day for the employer on April 28, 2008, and from 9:00 a.m. through noon the following day. He did plastering work during those two days. The claimant testified that the owner had arranged for other workers to carry his work materials so he did not have to lift anything. He was not allowed to go on any scaffolding. When asked during direct examination whether he did any "overhead work" when he returned to the employer, the claimant responded "[n]o, they didn't let me. They just told me to do it until this

height, only standing, and only where I can reach." On cross-examination, the employer's counsel asked the claimant to confirm that the plastering work he did when he returned to work was "no higher than waist level." The claimant responded, "[n]o, it was overhead. It was like my height." The employer's counsel then asked, "[o]n direct examination you testified the work you did was not overhead, correct?" The claimant responded, "[y]eah, it was within my height." At that point, the arbitrator interjected and noted that, "on direct [the claimant] was pointing slightly over his head" when describing the plastering work he did. The claimant testified that he stood during his entire shift. He stated that he only worked until noon on the second day and did not return after that because he could not stand any longer. According to the claimant, standing was bothering him because he had pain in his forehead, neck, waist, and back. The claimant testified that he told his coworkers that he was in a lot of pain and that he was going to see a doctor, and he left the jobsite.<sup>4</sup> The claimant admitted that the owner of the company contacted him again to come back to work after April 29, 2008, but he did not return.

¶ 19 On May 2, 2008, the claimant chose to treat with Dr. Edward Herba. The claimant was referred to Dr. Herba by his former attorney. Dr. Herba ordered MRIs of the claimant's lumbar and thoracic spine. Both scans were performed on May 6, 2008. The lumbar MRI showed multilevel lumbar degenerative disease with significant central spinal stenosis and foraminal stenosis. The thoracic scan was unremarkable. The claimant returned to Dr. Herba on May 9, 2009, complaining of head and neck pain. Dr. Herba ordered MRIs of the claimant's brain and cervical spine, which were performed on May 12, 2008. The cervical MRI revealed spondylotic and dessication changes at C4-C7 with moderately advanced trefoil narrowing of the canal.

---

<sup>4</sup> The claimant stated that his supervisor was not at the jobsite when he left on April 29, 2008.

After reviewing the MRI scans of the claimant's lumbar and cervical spine, Dr. Herba noted "very significant arthritic disc complex pathology in both regions although less so in the lumbar when compared with the cervical." Dr. Herba concluded that the claimant was unable to return to work. However, the doctor opined that there was "no other treatment plan or protocol" that could be offered. On May 16, 2008, Dr. Herba released the claimant from his care without prescribing any further therapy or other treatment.

¶ 20 On February 12, 2009, the claimant began treating with Dr. Lorenz at Hinsdale Orthopedics.<sup>5</sup> A lumbar examination revealed restricted forward bending, pain with extension, a negative straight leg raise, and diminished reflexes. A cervical exam showed that the claimant had a limited and painful range of motion. After reviewing the MRIs, the EMG, and the FCE results, Dr. Lorenz opined that the claimant probably had some asymptomatic preexisting degenerative changes in his lumbar spine which were aggravated and rendered symptomatic by his October 5, 2006 work accident, resulting in chronic low back pain, radicular symptoms, and claudication.<sup>6</sup> Dr. Lorenz concluded that conservative measures had failed and that the claimant

---

<sup>5</sup> The claimant claims that he was referred to Dr. Lorenz by Dr. Morgenstern. The record contains a note written by Dr. Morgenstern that appears to include the name "Dr. Lorenz." The note is otherwise mostly illegible. The Hinsdale Orthopedics intake form, which was signed by the claimant, indicates that the claimant was referred by a friend, not by a doctor. Dr. Lorenz's initial treating record contains no reference of any referral by Dr. Morgenstern or any other treating doctor. No doctor is copied on Dr. Lorenz's office notes. The claimant did not testify that any of his doctors had referred him to Dr. Lorenz.

<sup>6</sup> "Claudication" is limping, pain, discomfort, or tiredness in the legs that occurs during walking

was a candidate for lumbar decompression surgery. He recommended a myelogram and restricted the claimant from all work. The claimant underwent a myelogram and a post-myelogram CT scan on February 20, 2009. Those tests demonstrated severe spinal stenosis at L2-L5 (most marked at the L4-L5 level), with narrowing of the neural foramina bilaterally at L2-L3 and L3-L4.

¶ 21 On July 9, 2009, the claimant sought a consultation with Dr. Wayne Kelly. Dr. Kelly's records contain no evidence of any referral. The claimant reported neck pain radiating into the back of his head with secondary headaches and "a new onset of neck and head tremors which [has] only been present following his injury." Dr. Kelly diagnosed the claimant with several conditions, some of which he opined were caused or aggravated by the October 5, 2006, work accident. Specifically, Dr. Kelly found that the claimant was suffering from: (1) a "symptomatic C2-3 cervical radiculopathy" with secondary headaches "since his fall on the job in 2006"; (2) "[a] probable C5-6 cervical radiculopathy accounting for his neck pain radiating to bilateral shoulders"; and (3) "significant cervical spinal stenosis at multiple levels due to herniated discs with narrowing of his central canal." Dr. Kelly opined that "[t]hese changes \*\*\* are definitively related to prior trauma consistent with his injury on the job \*\*\* in 2006." Dr. Kelly also diagnosed a "symptomatic L5-S1 lumbosacral radiculopathy" which "has only been present since [the claimant's] injury on the job in 2006" and "chronic neuropathic pain syndrome." Dr. Kelly did not address the impact of claimant's diabetes on the neuropathic pain diagnosis.

¶ 22 Dr. Kelly ordered an EMG and a series of cervical and lumbar epidural steroid injections and ordered the claimant off work. On July 23, 2009, Dr. Kelly performed two cervical

---

or other exercise.

injections. The claimant underwent an EMG two days later, which revealed chronic lumbar radiculopathy.

¶ 23 The claimant followed up with Dr. Lorenz on July 29, 2009. After reviewing the results of the myelogram, Dr. Lorenz recommended a decompressive laminectomy at L2-L3, L3-L4, and L4-L5. The claimant told Dr. Lorenz that he did not want surgery and would rather proceed with the injections recommended by Dr. Kelly. Dr. Lorenz had no objection and kept the claimant off work. Thereafter, the claimant received a series of cervical and lumbar injections from Dr. Kelly. He testified that these injections provided significant relief of his symptoms. The claimant last saw Dr. Kelly on October 31, 2009. At that time he was feeling much better overall but still had significant localized neck pain. Dr. Kelly recommended waiting three to four months before administering any further injections. In the meantime, he prescribed pain medication.

¶ 24 During the arbitration hearing (which took place on August 4, 2010, and March 1, 2011), the claimant testified that he had not treated with any doctors for his injuries since October 31, 2009. He also stated that he was not taking any pain medication and had no additional medical appointments scheduled. The claimant also testified that he had not looked for work at all since the October 5, 2006, accident.

¶ 25 The employer presented the testimony of Neftali Gomez, who worked for the employer as a construction painter and remodeler. Gomez testified that he was working with the claimant in the same building during the two days the claimant returned to work in April 2008. However, the claimant and Gomez were working in separate apartments at the time and there was "hardly any communication" between the two. Gomez had no responsibility to supervise the claimant's work, and the two men had different supervisors. Gomez testified that claimant did not approach

him during the two days they worked in the same building in April 2008, and the claimant did not tell Gomez that he was unable to perform any of the activities he had been assigned. Gomez stated that, after the second day the claimant returned to work, he never heard from the claimant again.

¶ 26 The employer also presented the testimony of its owner and president, Cameel Halim. Halim stated that he has known the claimant for approximately 25 years, since the claimant was hired as a painter and plasterer. Halim testified that he coordinated the claimant's return to work in April 2008 and that he spoke with the claimant personally in his office to schedule the work. At that time, Halim told the claimant that the employer was going to put him in a "very light duty job to comply with the doctor['s] instruction" and that "if he has any problem in what was assigned to him, he should come back to us and we will rethink." Halim testified that, during the two days the claimant returned to work, he was taping drywall and plastering. He was not required to carry or lift any materials. Other employees on the job site performed the lifting.

¶ 27 Halim testified that he was never approached by or contacted by the claimant regarding difficulty or inability to do the work that the claimant had been assigned. Halim stated that if the claimant were experiencing problems during his return to work, the claimant could have reported any such problems to him or to Gomez. Halim further testified that if the claimant had contacted him regarding complaints or difficulty with the work he had been assigned, there was additional work the claimant could have been assigned. For example, Halim stated that if the claimant was physically unable to perform the light duty job he was initially assigned, he could have been reassigned to a supervisory position. Halim testified that, "if [the claimant had] come to us and said I could not do any more plastering, we would have put him in a supervisory position." However, the claimant never contacted Halim regarding this issue.

¶ 28 Halim stated that, after the claimant left the job on the second day, he never heard from the claimant again regarding continued work. He claimed that, when he asked other employees if they had heard from the claimant, none of them knew where the claimant was.

¶ 29 The arbitrator found that the claimant had sustained an accident arising out of and in the course of his employment with the employer on October 5, 2006.<sup>7</sup> However, the arbitrator found that the claimant had failed to prove a causal connection between the work accident and the claimant's ongoing complaints of pain and other symptoms in his head, cervical spine and lumbar spine which necessitated medical treatment after October 18, 2007. In reaching this conclusion, the arbitrator relied upon Dr. Shapiro's opinion that the claimant had reached MMI by October 17, 2007 and Dr. Averbuch's opinion that the claimant's peripheral neuropathy and radicular symptoms were not caused by the work accident. The arbitrator also found it significant that the two of the claimant's treaters (Drs. Gutierrez and Morgenstern) had discharged the claimant from care without further treatment recommendations and released him to work with lifting restrictions in April and June of 2007. Moreover, the arbitrator noted that the claimant had reported resolution of his headaches in November 2006 and resolution of his neck pain in April 2007, and that the claimant sought no further treatment until he saw Dr. Herba approximately one year later. At that time, Dr. Herba also released the claimant from care, stating that there was no other treatment plan or protocol that he could offer. The arbitrator noted that "it was not until the claimant began treating with Dr. Lorenz in February 2009, more than 18 months after the release from Dr. Morgenstern, that surgery was ever recommended." The claimant did not want surgery, and stopped treating with Dr. Lorenz after just one visit. Accordingly, the

---

<sup>7</sup> The employer stipulated that the claimant suffered a work-related accident on that date.

arbitrator found no causal connection between the work accident and the claimant's complaints after October 2007 and his alleged need for surgery.

¶ 30 For these same reasons, the arbitrator also found that the employer had paid all reasonable and necessary medical treatment and that any treatment rendered after October 17, 2007 (with the exception of the April 24, 2008 FCE), was not reasonable or necessary. In further support of his denial of additional medical expenses, the arbitrator found that the claimant's treatment with Drs. Lorenz and Kelly, and any corresponding diagnostic testing ordered by those doctors, "exceed[ed] the claimant's choice of two treating physicians" provided for under the Act.

¶ 31 Moreover, based on the medical opinions of Dr. Shapiro and the FCE results (which the arbitrator found to be "credible" and "reliable"), the arbitrator concluded that the claimant was entitled to TTD benefits for the period between October 6, 2006 and April 24, 2008. In reaching this conclusion, the arbitrator also relied upon: (1) the fact that the claimant's treaters had released him for work with restrictions by June 2007; (2) the employer's "credible" testimony that light work was available for the claimant; (3) Halim's testimony that, when the claimant returned to work in April 2008, the claimant never contacted him regarding any difficulty or inability to do the work that he had had been assigned and that, had he done so, the claimant would have been assigned supervisory work; and (4) the claimant's admission that he has not looked for work since April 29, 2008.

¶ 32 Regarding the nature and extent of the claimant's injury, the arbitrator found that the claimant had sustained injuries to the extent of 25% loss to the person as a whole under Section 8(d)(2) of the Act. In support of this finding, the arbitrator noted that the claimant was released to return to work by Drs. Gutierrez and Morgenstern with a 20-pound lifting restriction, that he

was released to return to work by Dr. Shapiro, and that the FCE deemed him capable of returning to medium duty work with alternating sitting, standing, and walking. The arbitrator also relied upon the testimony of Michelle Peters-Pagella, a certified and licensed rehabilitation counselor who performed a vocational assessment and labor market survey and who testified on behalf of the employer. The arbitrator also relied upon Halim's "credible" testimony that if the claimant had come to him with complaints regarding difficulty with the light duty he had been assigned in April 2008, there was additional light duty work that the claimant could have been assigned to, including supervisory work. The arbitrator did not find that the claimant was permanently and totally disabled under the "odd lot" classification.

¶ 33 The claimant appealed the arbitrator's decision to the Commission, which affirmed and adopted the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling. This appeal followed.

¶ 34

## ANALYSIS

¶ 35

### 1. Causal Connection

¶ 36 The claimant argues that the Commission's finding that he failed to prove a causal connection between the October 5, 2006, work accident and his current condition of ill-being is against the manifest weight of the evidence. We disagree.

¶ 37 To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant

had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. *Sisbro*, 207 Ill. 2d at 205; *Swartz v. Illinois Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating or accelerating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981); *Swartz*, 359 Ill. App. 3d at 108.

¶ 38 Whether an accident aggravated or accelerated a preexisting condition is a factual question to be decided by the Commission. *Sisbro*, 207 Ill. 2d at 206. In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). A reviewing court may not substitute its judgment for that of the Commission on these issues merely because other inferences from the evidence may be drawn. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 407 (1984). We will overturn the Commission's causation finding only when it is against the manifest weight of the evidence, *i.e.*, only when the opposite conclusion is "clearly apparent." *Swartz*, 359 Ill. App. 3d at 1086. The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002). When the evidence is sufficient to support the Commission's causation finding, we will affirm. *Id.*

¶ 39 Applying this deferential standard, we cannot say that the Commission's causation finding was against the manifest weight of the evidence. The Commission found that the claimant failed to prove a causal connection between the October 5, 2006, work accident and the claimant's head, neck, and lower back symptoms (and need for treatment) after October 17, 2007. This finding is amply supported by the record evidence. On October 17, 2007, Dr. Shapiro opined that the claimant had reached MMI, that no further medical treatment was warranted, and that all of the claimant's neck and lower back pain related to the accident had resolved. Dr. Shapiro noted that the claimant suffered from chronic lumbar stenosis and chronic L5 radiculopathy (both of which predated the work accident), and he opined that the claimant's current neck symptoms and his current low back pain were not related to the October 5, 2006, work accident. He also opined that the claimant's current symptoms of leg pain and numbness "can be due to both spinal stenosis and peripheral neuropathy" and that the claimant's diabetes was contributing to his leg symptoms. Similarly, Dr. Averbuch opined that the claimant's peripheral neuropathy was caused by his diabetes, not by the work accident, and that the claimant's radicular symptoms were not the result of the work accident.

¶ 40 The medical records of several of the claimant's treating doctors also support the Commission's causation finding. These records show that, on November 15, 2006, the claimant told Dr. Gutierrez that his headaches had resolved. On April 23, 2007, he told Dr. Morgenstern that he was no longer experiencing any neck pain. Drs. Gutierrez and Morgenstern each discharged the claimant from care without further treatment recommendations and released him to work with lifting restrictions in April and June 2007, respectively.<sup>8</sup> The claimant sought no

---

<sup>8</sup> The claimant notes that, on June 13, 2007, Dr. Gutierrez observed that the claimant's subjective

further treatment for his alleged work-related injuries until he saw Dr. Herba approximately one year later. At that time, Dr. Herba also released the claimant from care without recommending any further treatment. Although Drs. Lorenz and Kelly opined in 2009 that the claimant's ongoing neck and low back symptoms were causally related to the October 5, 2006, work accident and that further treatment was required, the Commission was entitled to credit the opinions of Drs. Shapiro, Averbuch, Gutierrez, Morgenstern, and Herba over those of Drs. Lorenz and Kelly. It is the Commission's province to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the medical opinion testimony. *Hosteny*, 397 Ill. App. 3d at 675; *Fickas*, 308 Ill. App. 3d at 1041.

¶ 41 The claimant argues that Dr. Shapiro's opinion failed to address whether the claimant's preexisting spinal conditions were aggravated by the October 5, 2006, work accident. We disagree. Although he acknowledged the claimant's preexisting conditions, Dr. Shapiro opined that all of the claimant's neck and lower back symptoms related to the accident had resolved by October 17, 2007, and that the claimant's current neck symptoms and his current low back pain were "not related" to the work accident. Thus, Dr. Shapiro rejected the possibility that the work accident aggravated or accelerated the claimant's preexisting condition.

¶ 42 The claimant also argues that the "chain of events" evidence in this case requires a

---

complaints had increased in frequency since his last therapy session two weeks earlier and opined that the claimant "may and will require ongoing supportive care to assist him in his activities of daily living." However, the fact that the claimant might require ongoing *supportive care* does not alter the fact that Dr. Gutierrez determined that no further *medical treatment* was required and that the claimant was able to work with restrictions.

finding that his current symptoms are causally related to the work accident. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 39 (quoting *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63–64 (1982)); see also *Illinois Power Co. v. Industrial Comm'n*, 176 Ill. App. 3d 317, 328 (1988) ("proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury"). In this case, the evidence shows that the claimant was free of any neck or back symptoms and was fully able to perform the demands of his job before the October 5, 2006, work accident. After the accident, the claimant had pain and other symptoms in his head, neck, low back, and legs and was unable to perform his job. However, this evidence does not conclusively demonstrate that the neck and back symptoms that the claimant experienced *after October 2007* were causally related to his work accident. Those symptoms could have been the result of the progression of the claimant's underlying degenerative spinal conditions, not the October 2006 work accident. Dr. Shapiro's opinion supports the conclusion that the symptoms related to the October 2006 work accident had fully resolved by October 2007, and that any symptoms after that date were causally unrelated to the work accident. The fact that the claimant sought no treatment for any such symptoms for almost one year after Drs. Gutierrez and Morgenstern released him from care supports Dr. Shapiro's opinion. Moreover, contrary to the claimant's suggestion, the fact that the claimant has declined from his "pre-injury baseline condition" does not establish that the symptoms he experienced and the medical treatment he received after October 2007 was causally related to his work accident. The Commission's finding of no such causal relationship was not

against the manifest weight of the evidence

¶ 43 2. Medical Expenses

¶ 44 The claimant argues that the Commission's denial of all medical expenses incurred by the claimant after October 17, 2007, was against the manifest weight of the evidence. We disagree. Section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)) entitles a claimant "to recover reasonable medical expenses, the incurrence of which are *causally related to an accident arising out of and in the scope of her employment* and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." (Emphasis added.) *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (2011); see also *University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1992) ("Under section 8(a) of the Act, an employee is only entitled to recover reasonable medical expenses which are causally related to the accident."). "Whether medical expenses are reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 51. As noted above, the Commission committed no error in finding that the conditions of ill-being in the claimant's neck, lower back, and legs after October 17, 2007, were unrelated to the work accident. Thus, the Commission properly denied all medical expenses associated with those conditions.<sup>9</sup>

---

<sup>9</sup> For this reason, we do not need to address the employer's alternative argument that the Commission properly denied medical expenses relating to any treatment provided by Drs. Lorenz and Kelly because such treatment exceeded the claimant's choice of two treating physicians as allowed by the Act.

¶ 45 3. TTD Benefits after April 24, 2008

¶ 46 The Commission concluded that the claimant was entitled to TTD benefits from the date of his work accident through April 24, 2008, the date the claimant underwent an FCE which released him to work with certain restrictions. The Commission found that the claimant was not entitled to receive any TTD benefits after that date. That finding was not against the manifest weight of the evidence.

¶ 47 A claimant is temporarily and totally disabled "from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 149 (1990). To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 148 (2010); *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45. The dispositive question is whether the claimant's condition has stabilized, *i.e.*, whether he has reached MMI. *Land and Lakes Co.*, 359 Ill. App. 3d at 594.

¶ 48 The factors to consider in assessing whether a claimant has reached MMI include a release to return to work, medical testimony or evidence concerning the claimant's injury, and the extent of the injury. *Id.* Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004).

¶ 49 The determination whether claimant was unable to work and the period of time during which a claimant is temporarily and totally disabled are questions of fact to be determined by the Commission, and the Commission's resolution of these issues will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill. 2d at

119–20; *Pietrzak*, 329 Ill. App. 3d at 832–33.

¶ 50 In this case, Dr. Shapiro opined that the claimant had reached MMI by October 17, 2007. The April 24, 2008, FCE released the claimant to medium level work with restrictions. The claimant's own treating doctors (Drs. Gutierrez, Morgenstern, and Herba) all agreed that no surgery or other additional medical treatment was needed, and Drs. Gutierrez and Morgenstern also opined that the claimant was capable of returning to work. Drs. Gutierrez and Morgenstern reached these conclusions in April and June of 2007, respectively. Accordingly, although Drs. Lorenz and Kelly disagreed with these opinions, there was ample evidence supporting the Commission's conclusion that the claimant's condition had stabilized by April 24, 2008, and that he was not entitled to TTD benefits after that date.

¶ 51 The claimant argues that the employer did not offer the claimant employment within the work restrictions outlined in the FCE report. Specifically, when the claimant returned to work in April 2008, the plastering job the employer assigned the claimant required him to stand all day and work with his arms at or over his head. However, the claimant concedes that the employer accommodated his lifting restrictions by directing other employees to carry the claimant's equipment. Moreover, Halim (the employer's owner and president) testified that: (1) he told the claimant that "if he ha[d] any problem in what was assigned to him, he should come back to us and we will rethink"; (2) the claimant never contacted him regarding any difficulty or inability to do the work that he had been assigned; and (3) if the claimant had told the employer that he could not do any more plastering, the employer would have put him in a supervisory position or assigned some other, less physically demanding tasks. Nevertheless, the claimant never asked the employer for any such accommodation and never returned to work. The arbitrator found that the employer had presented "credible evidence" that light duty work was available. The claimant

challenges the credibility of Halim's testimony, but it is the Commission's province to assess the credibility of witnesses. *Hosteny*, 397 Ill. App. 3d at 675; *Fickas*, 308 Ill. App. 3d at 1041. The Commission's findings that Halim's testimony was credible and that the claimant was not entitled to TTD benefits after April 24, 2008, were not against the manifest weight of the evidence.

¶ 52 4. Permanent Disability under the "Odd-lot" Classification

¶ 53 The claimant argues that the Commission's finding that he failed to prove that he was permanently and totally disabled under the "odd-lot" category was against the manifest weight of the evidence. We disagree.

¶ 54 The question whether a claimant is permanently and totally disabled is one of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 203 (2009). For a finding of fact to be contrary to the manifest weight of the evidence, the opposite conclusion must be "clearly apparent." *Id.*

¶ 55 An employee is permanently and totally disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). The employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286–87 (1983). Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1089 (2007).

¶ 56 If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, he may qualify for "odd-

lot" status. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546–47 (1981); *City of Chicago*, 373 Ill. App. 3d at 1089. An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Valley Mould*, 84 Ill. 2d at 547; *City of Chicago*, 373 Ill. App. 3d at 1089. In determining whether a claimant falls within the "odd-lot" category for purposes of an award of PTD benefits, the Commission should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training, and capabilities. *A.M.T.C. of Illinois*, 77 Ill. 2d at 489; *Ameritech Services*, 389 Ill. App. 3d at 204.

¶ 57 An employee seeking to establish odd-lot status must "initially establish [ ]" by a preponderance of the evidence that he falls within the odd-lot category. *Valley Mould*, 84 Ill. 2d at 547; *City of Chicago*, 373 Ill. App. 3d at 1091. Ordinarily, the employee satisfies this burden either by presenting evidence of a diligent but unsuccessful attempt to find work or by showing that, because of his age, skills, training, experience, and education, he will not be regularly employed in a well-known branch of the labor market. *City of Chicago*, 373 Ill. App. 3d at 1091. Whether the employee has successfully carried this burden presents a question of fact for the Commission to determine. *Id.* If the employee establishes by a preponderance of the evidence that he falls into the odd-lot category, the burden of production shifts to the employer to show that the employee is employable in a stable labor market and that such a market exists. See *Valley Mould*, 84 Ill. 2d at 547; *City of Chicago*, 373 Ill. App. 3d at 1091. The question whether the employer has satisfied its burden also presents a question of fact for the Commission. *City of Chicago*, 373 Ill. App. 3d at 1091.

¶ 58 In this case, the claimant failed to establish that he was permanently and totally disabled. As noted, Drs. Gutierrez, Morgenstern, and Shapiro all concluded that the claimant was able to

work with restrictions. The FCE determined that the claimant was capable of returning to work in the medium duty capacity with certain restrictions (such as weight restrictions, restrictions on overhead lifting, and alternate standing, sitting, and walking). Halim credibly testified that the employer had light duty work available and would have offered the claimant alternative work more suitable to his condition had he asked the employer to do so. This evidence strongly supports the conclusion that the claimant was "able to make some contribution to industry sufficient to justify payment of wages to him" and therefore was not permanently and totally disabled. The Commission was entitled to rely on this evidence and reject the claimant's claim of permanent total disability on this basis alone.

¶ 59 In any event, the claimant failed to prove his claim under the "odd lot" theory. He attempted to meet his initial burden to establish odd-lot status by presenting evidence that, because of his age, skills, training, experience, and education, he will not be regularly employed in a well-known branch of the labor market.<sup>10</sup> Specifically, the claimant presented the expert opinions of Joseph Belmonte, a certified rehabilitation counselor who conducted a vocational rehabilitation assessment of the claimant. Belmonte opined that the claimant was permanently and totally disabled and "there would be very little probability that [the claimant] would be able to achieve alternative placement." Belmonte based this opinion on what he characterized as the claimant's lack of transferrable skills, his limited education and English language skills (including the likelihood that he was "functionally illiterate" in English), his "advanced age" (58 years old), his lack of formal training in the trades, the narrow and limited nature of the carpentry

---

<sup>10</sup> The claimant conceded that he did not make a "diligent but unsuccessful attempt to find work." In fact, he admitted that he has not looked for work since his work accident.

work he performed, and his physical limitations (especially his inability to stand for long periods of time, which, according to Belmonte, rendered him unable to perform most of the light and medium duty jobs in the "industrial or construction or warehousing environments").

¶ 60 As noted above, the Commission could have rejected the claimant's claim of permanent total disability based on Halim's testimony and the medical evidence alone. However, even assuming *arguendo* that Belmonte's testimony established by a preponderance of the evidence that the claimant fell into the odd-lot category (thereby shifting the burden of production to the employer), the claimant's claim to "odd-lot" status would fail because the employer presented evidence that the claimant was employable in an existing, stable labor market. The employer presented the testimony of Michelle Peters-Pagella, a certified and licensed rehabilitation counselor who completed a vocational assessment of the claimant and a labor market survey. Peters-Pagella testified that the claimant could work within the restrictions outlined by the FCE. She noted that the claimant's prior job duties included ordering supplies and materials for the worksite, reading blueprints, and supervising up to five other employees. She opined that the claimant was capable of working in certain entry level positions, such as a hand assembler, hand packager, or sorter. Although she conceded that the claimant would be a "very difficult candidate to place" "[g]iven his age, education, and lack of English skills," Peters-Pagella testified that it would be possible to place the claimant in such entry level positions. She stated that she had previously worked with vocational candidates of similar age with similar education and language skills and was able to place them in entry level manufacturing jobs, such as hand assembler, hand packager, or sorter.

¶ 61 Peters-Pagella also performed a labor market survey which confirmed that the claimant is employable in an existing, stable labor market. The survey took into account the claimant's prior

relevant work experience, education, and physical capabilities as outlined by the FCE. The survey identified 14 potential employers within a 50-mile radius of the claimant's home which offered positions consistent with the claimant's qualifications and physical restrictions. Of those 14 employers, 3 were hiring at the time Peters-Pagella performed the survey.

¶ 62 Although Belmonte disagreed with Peters-Pagella's conclusions and challenged the validity of her labor market survey, he did not conduct a labor market survey of his own. Accordingly, based on the evidence presented, it would not have been against the manifest weight of the evidence for the Commission to credit Peters-Pagella's opinions and conclude that the claimant was employable in an existing, stable labor market.

¶ 63 In sum, there is sufficient evidence in the record to support the Commission's decision that the claimant failed to prove that he was permanently and totally disabled under the "odd-lot" category.

¶ 64 **CONCLUSION**

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which confirmed the Commission's decision.

¶ 66 Affirmed.