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

KEITH APGAR,) Appeal from the
) Circuit County
Appellant,) Kane County.
)
v.) No. 12-MR-343
)
THE ILLINOIS WORKERS' COMPENSATION) Honorable
COMMISSION, <i>et al.</i> , (Caterpillar Inc., Appellee).) David R. Akemann,
) Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris
concur in the judgment.

ORDER

¶ 1 *Held:* The Commission did not err in denying temporary total disability benefits beyond January 20, 2010, where the claimant's doctor indicated he should be able to return to his job, a functional capacity evaluation indicated he could return to work at the modified medium to heavy physical demand level, and another doctor opined that there was no need for further procedures on the claimant's knees. The Commission did not err in denying vocational assessment and rehabilitation benefits where the claimant's injury did not result in a

loss of job security, the claimant possessed skills that could be transferred to different types of employment, and the claimant's motivation to return to work was questionable.

¶ 2 The claimant, Keith Apgar, filed two applications for adjustment of claim against his employer, Caterpillar Inc., seeking workers' compensation benefits for injuries. The applications were consolidated at the arbitration hearing. The first claim alleges that the claimant injured his left arm (shoulder), lower back, and both legs on July 6, 2006. The second claim alleges that the claimant injured his whole body on October 8, 2008, when a grinding wheel broke. The claimant only appealed the first claim. The claim proceeded to an expedited arbitration hearing under section 19(b) of the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2006)). The arbitrator found that the claimant's condition did arise out of his employment and was causally related to his job duties for the employer. The employer was ordered to pay temporary total disability (TTD) benefits in the amount of \$374.08 per week for 43 6/7 weeks, from September 14, 2006 through September 25, 2006; October 3, 2006, through October 9, 2006; October 23, 2006, through November 6, 2006; January 7, 2007, through February 12, 2007; and May 6, 2009, through January 20, 2010. It was ordered to pay any TTD benefits that had accrued from July 6, 2006, through July 11, 2011, the date of the arbitration hearing. The employer was ordered to pay \$1,090.02 for reasonable and necessary medical services.

¶ 3 The claimant appealed to the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the decision of the arbitrator. The claimant filed a timely petition for review in the circuit court of Kane County. The circuit court confirmed the Commission's decision, and the claimant appealed.

¶ 4

BACKGROUND

¶ 5 The claimant started working for the employer in August 2005. He worked as a mig welder for the boom line. The parties stipulated that on July 6, 2006, the claimant suffered accidental injuries when the ladder he was standing on gave way. He fell with his legs twisted between the ladder rungs. Incident reports were filed immediately.

¶ 6 Dr. Matthew Neu, regional medical director of the employer's Aurora and Joliet facilities, testified that he treated the claimant in connection with his July 6, 2006, work accident. Dr. Neu examined the claimant on July 7, 2006. He assessed the claimant with pre-existent patellofemoral degenerative changes on the left knee patellofemoral joint laterally. He noted that there could be some internal derangement in either knee, but at that point he felt there was just a bilateral knee sprain. He restricted the claimant from squatting, kneeling, and climbing. On July 11, 2006, Dr. Neu examined the claimant again. He recommended that the claimant have a magnetic resonance imaging (MRI) scan of his left knee.

¶ 7 On July 12, 2006, the claimant had an MRI scan of his left knee. The radiologist, Dr. Mary Roy, noted in her report that there was intermediate grade patellofemoral chondromalacia and small joint effusion. There were also degenerative changes in both menisci at the level of each posterior horn without well defined communicating tear or evidence of ligament disruption. Dr. Neu reviewed the MRI scan on July 14, 2006, and referred the claimant to Dr. Marciniak, an orthopedic specialist, for evaluation.

¶ 8 Dr. Steven Marciniak examined the claimant in July 2006. In his patient notes, Dr. Marciniak wrote that the claimant complained of left knee pain, popping, catching, and "going out of place." The claimant brought his MRI scan for Dr.

Marciniak to review. Dr. Marciniak concurred with Dr. Roy's findings. He diagnosed the claimant with left knee patellar contusion, chondromalacia. He recommended physical therapy and sedentary work.

¶ 9 On August 14, 2006, Dr. Neu examined the claimant. Dr. Neu recommended an MRI scan of the claimant's right knee. He noted that the claimant's "complaints [were] far out of proportion to findings at this point."

¶ 10 On August 14, 2006, the claimant had an MRI scan of his right knee. Dr. Roy wrote in her report that there was a degenerative signal change in the medial meniscus and mild myxoid degeneration of the anterior cruciate ligament (ACL) fibers. There was no evidence of a discrete meniscal tear or ligament disruption. She noted an area of partial thickness chondral loss along the lateral patellar facet with subchondral edema and a milder partial thickness chondral loss in the medial and lateral compartments.

¶ 11 On August 16, 2006, the claimant was examined by Dr. Neu. Dr. Neu noted the MRI scan findings. He continued the claimants' restrictions and physical therapy.

¶ 12 Dr. Raghu Pulluru first examined the claimant on August 28, 2006. Dr. Pulluru diagnosed the claimant with bilateral knee patellofemoral chondromalacia with possible meniscus tear. Dr. Pulluru recommended Cortisone injections to see if they would improve the inflammation in the claimant's knees. If the injections did not help, Dr. Pulluru recommended an arthroscopic evaluation. He limited the claimant to sedentary work.

¶ 13 On September 6, 2006, the claimant was examined by Dr. Pulluru. He complained of catching on his left knee and stated that the injections did not help either knee. Dr. Pulluru recommended arthroscopic surgery.

¶ 14 On September 14, 2006, Dr. Pulluru performed a left knee arthroscopy, partial lateral meniscectomy, patellofemoral debridement, and arthroscopic lateral release on the claimant's left knee. On September 22, 2006, the claimant returned to light-duty work.

¶ 15 On October 11, 2006, the claimant was examined by Dr. Pulluru. While his left knee had improved, the claimant complained of weakness and a bulging area on the outside of the right knee. Dr. Pulluru recommended right arthroscopic surgery and continued physical therapy on the left side. On October 23, 2006, Dr. Pulluru performed a right knee arthroscopy with medial femoral condyle chondroplasty and microfracture, patellar chondroplasty and lateral release. On November 6, 2006, the claimant returned to light-duty work.

¶ 16 On November 20, 2006, Dr. Pulluru examined the claimant for complaints of popping in his left knee causing extreme pain. Dr. Pulluru wrote in his patient notes that the claimant should continue physical therapy. Dr. Pulluru opined that the popping probably was a minor setback and that the claimant's knee appeared completely stable without any signs of complications.

¶ 17 On December 11, 2006, the claimant returned with complaints of continued significant pain as well as a catching sensation in his left knee. Dr. Pulluru performed an injection to the left knee and recommended continued restrictions.

¶ 18 Dr. Pulluru examined the claimant on December 27, 2006. The claimant told Dr. Pulluru that his left knee catches causing him to fall down. He was given an injection to his left knee. Dr. Pulluru recommended continued light duty work.

¶ 19 On January 29, 2007, Dr. Pulluru performed a left knee arthroscopy, medial femoral chondyle chondroplasty, and lateral release on the claimant. The claimant returned to work on February 12, 2007.

¶ 20 On March 14, 2007, Dr. Pulluru examined the claimant for complaints of right knee pain and giving out. Dr. Pulluru recommended that the claimant have an MRI scan to determine whether he had a new meniscus tear or other pathology. He continued restrictions to sedentary work only.

¶ 21 On March 19, 2007, the claimant had an MRI scan of his right knee. Dr. Roy found that there was a mild intrasubstance degenerative signal change in the posterior horn of the medial meniscus without discrete tear, a partial thickness chondral loss along the inner aspect of the medial femoral condyle where an area of fissuring approached the deep cartilage layers, patellofemoral chondromalacia along the lateral facet that was progressive from the previous exam, and areas of chondral loss approaching high grade with patchy areas of subchondral edema. There was no evidence of discrete meniscal tear or ligament disruption.

¶ 22 On April 11, 2007, Dr. Pulluru examined the claimant. The claimant told Dr. Pulluru that his knee was more stable, but that he still had pain in certain positions. Dr. Pulluru's exam showed that the claimant had full range of motion of bilateral knees, his quadricep strength was good, and he had good mobility of the patellae. Dr. Pulluru released the claimant for full-duty work. The claimant reported to Dr. Pulluru that he felt he could perform most of his duties, but was concerned that he would have difficulty with heavy activities. The claimant continued to have some symptoms with his patellofemoral chondromalacia and was using a brace. Dr. Pulluru recommended a functional capacity evaluation (FCE) to evaluate the extent of heavy activities that the claimant could perform.

¶ 23 On April 19, 2007, the claimant underwent an FCE. The claimant had poor lifting techniques, decreased mobility, limited strength and range of motion to his lower extremities, and decreased carry and push-pull abilities. As a result, the

evaluator concluded that the claimant was not able to return to his pre-injury welding job. It was recommended that he limit all lifting to 40 pounds with correct and safe techniques, work on level surfaces, no climbing, kneeling, or crawling, and limited squatting. It was suggested that the claimant continue physical therapy to further increase his lower extremity strength, range of motion, mobility, and functional activities.

¶ 24 The claimant continued to treat regularly with Dr. Neu. On May 4, 2007, Dr. Neu met with the claimant. Dr. Neu noted the FCE results and planned to write a restriction in conjunction with the evaluation. The claimant expressed a desire to see an orthopedist other than Dr. Pulluru. Dr. Neu arranged an appointment with Dr. Marciniak.

¶ 25 On May 14, 2007, the claimant was examined by Dr. Pulluru. Dr. Pulluru wrote in his patient notes that the claimant informed him that his employer's doctors wanted him to see a different orthopedic doctor for a possible ACL injury. Dr. Pulluru wrote that he was "not sure where he is getting the problem with an ACL tear, but certainly on MRI and arthroscopy there was no problem with his ACL and [he did] not think that requires any treatment." He wrote that the claimant "may have gotten this from the diagnosis section of the Functional Capacity Evaluation on the front page. They may have thought that that was the diagnosis coming in." Dr. Pulluru gave the claimant permanent restrictions per the FCE. He concluded that he could not offer the claimant further treatment.

¶ 26 On May 29, 2007, Dr. Neu met with the claimant. In his progress notes he wrote that Dr. Pulluru had dismissed the claimant as a patient and that the claimant had cancelled his appointment with Dr. Marciniak because he did not wish to see him. Dr. Neu arranged an appointment with Dr. Thomas Huberty.

¶ 27 Dr. Huberty examined the claimant on June 12, 2007. In his patient notes, Dr. Huberty wrote that the claimant had been treated by his colleague Dr. Marciniak. Dr. Marciniak recommended conservative treatment including physical therapy and opined that the claimant's symptoms were out of proportion to his physical and radiographic findings. Dr. Huberty noted that he reviewed Dr. Pulluru's reports, and the report of an MRI scan of the claimant's right knee done on March 19, 2007, which showed no evidence of a meniscus tear. Dr. Huberty agreed with the radiologist's report. He reported that he was concerned that the claimant's symptoms were out of proportion to his clinical and radiographic findings. He recommended a current MRI scan of the claimant's left knee to assess any structural abnormalities before he made any treatment recommendations.

¶ 28 On June 19, 2007, the claimant had an MRI scan of his left knee. Dr. Roy wrote in her report that the patellofemoral chondromalacia appeared slightly progressive from the previous examination, and it was most evident at the level of the lateral facet and apex. She noted that there was no evidence of a recurrent meniscal tear or significant ligament disruption.

¶ 29 Dr. Huberty examined the claimant on June 22, 2007. He reviewed the June 19, 2007, MRI scan of the claimant's left knee. Dr. Huberty wrote in his patient notes that he strongly suspected that the claimant's patellofemoral symptoms were complicated by complex regional pain syndrome. He told the claimant that his symptoms were well out of proportion to his radiographic and clinical findings. He encouraged the claimant to discontinue using his knee braces. Dr. Huberty recommended that the claimant be treated at a multidisciplinary pain treatment center where he could receive treatment simultaneously by physical therapy, a physiatrist, and an interventional pain management physician. He noted that he

believed the claimant's pain was such that surgical intervention would be fruitless. He concluded that he was "not saying that the patient has no organic knee problems but [he] believe[d] that his structural knee problems are of lesser importance compared to what [he] believe[d] will be a chronic regional pain syndrome."

¶ 30 The claimant began pain management care with Dr. Vohra on July 7, 2007.

¶ 31 On July 18, 2007, the claimant met with Dr. Neu. Dr. Neu noted that Dr. Huberty referred the claimant to Dr. Vohra for pain management. Dr. Neu reviewed Dr. Huberty's June 22, 2007, progress note in which Dr. Huberty opined that the claimant may have complex regional pain syndrome. Dr. Neu approved the claimant continuing with Dr. Vohra, told the claimant to maintain an adequate activity level, and suggested the claimant avoid oral pain medication.

¶ 32 In his patient notes dated August 16, 2007, Dr. Huberty wrote that he examined the claimant and that the claimant came in at the urging of Dr. Neu. Dr. Huberty wrote, "He came in initially telling me that I had told him he needed to have knee replacement surgery bilaterally and I urgently pointed out to him that that was never in any way my recommendation. He then said that perhaps it had been Dr. Neu's recommendation. My recommendation previously had been that he be evaluated and treated at multi-disciplinary pain treatment center." The recommendation was rejected by the employer, and the claimant sought out pain treatment on his own with Dr. Vohra. Dr. Huberty wrote that he informed the claimant that from a surgical perspective he had nothing further to offer him. His sole recommendation continued to be evaluation and treatment by a multi-disciplinary pain treatment center, and he believed that the course of treatment thus far recommended by Dr. Vohra was highly likely to be unsuccessful.

¶ 33 On August 24, 2007, the claimant met with Dr. Neu. Dr. Neu wrote, "Dr. Huberty's 8/16/07 note is appreciated. I did not send [the claimant] back to Dr. Huberty and I never suggested to [the claimant] that he needed knee replacement so I am not certain where [the claimant] is coming up with all this information that he is giving to Dr. Huberty."

¶ 34 The claimant continued to follow up with Dr. Neu and Dr. Vohra. On October 16, 2007, Dr. Vohra referred the claimant to Dr. Robert Daley for a second opinion regarding his continued knee issues.

¶ 35 On October 31, 2007, Dr. Daley wrote to Dr. Vohra reporting on his examination of the claimant. He recommended injections to the knees. Dr. Vohra gave the claimant Synvisc injections to his left knee on December 6, December 13, and December 20, 2007. Dr. Vohra injected the claimant's right knee with Synvisc on December 27, 2007, January 3, 2008, and January 10, 2008. The claimant reported improvement in pain, swelling, and endurance in both knees. Dr. Vohra instructed him to continue with his home exercise program.

¶ 36 Dr. Daley examined the claimant on April 1, 2009. The claimant complained of bilateral knee pain, with the most pain being located in the anterior aspect radiating down to his tibia. Dr. Daley diagnosed the claimant with bilateral knee osteoarthritis. He recommended that the claimant have a high-field MRI scan.

¶ 37 On April 6, 2009, the claimant had an MRI scan of his left knee. Dr. Roy wrote in her report that the claimant had patellofemoral chondromalacia that was progressive from the previous study. There was no evidence of recurrent meniscal tear, ligament disruption, or evidence of loose body.

¶ 38 Dr. Daley examined the claimant on April 14, 2009. He reviewed the high-field MRI scan taken of the claimant's left knee on April 6, 2009. He diagnosed the claimant with chronic left knee pain following a work injury with progressive chondral loss. Dr. Daley noted that the claimant stated he had no knee problems prior to the July 6, 2006, accident and that all his knee problems have stemmed from the accident. Dr. Daley reported that the claimant had received conservative treatment and continued to have pain and discomfort. The treatments included cortisone injections, Synvisc injections, anti-inflammatories, and physical therapy. Dr. Daley wrote in his patient notes that given the significant chondral loss of his patellofemoral joint and his continued disability, the claimant's only remaining treatment option would be a total knee replacement. On May 6, 2009, Dr. Daley performed a total knee replacement of the claimant's left knee.

¶ 39 On July 8, 2009, the claimant had an MRI scan of his right knee. Dr. Roy wrote in her report that there were degenerative changes in the medial and patellofemoral compartment slightly progressive from the previous exam, and small volume joint effusion. She noted that there was progressive myxoid degeneration in the posterior horn of the medial meniscus without well defined communicating tear or evidence of ligament disruption. On August 25, 2009, Dr. Daley performed a right total knee replacement on the claimant.

¶ 40 On December 2, 2009, Dr. Daley examined the claimant as a follow up for his bilateral total knee replacements. The claimant reported that he was better than before the surgery, but that he had some achiness in his knees, especially at the end of the day and while sleeping, and some popping in the posterolateral aspect of his right knee with walking. Dr. Daley opined that the popping was probably from his

popliteal tendon. Dr. Daley noted that his plan was for the claimant to return to full duty as a welder six months after his latest knee replacement.

¶ 41 On December 23, 2009, Dr. Neu examined the claimant. He noted that he sent Dr. Daley and Dr. Vohra a letter requesting their input on the claimant's functional limits and asking whether the claimant was able to perform a sit down job.

¶ 42 Dr. Neu examined the claimant on January 19, 2010. In his patient notes, he wrote that the claimant used a cane as a precaution with long distance walking when he had pain, popping, and instability while walking. He also used the cane on stairs to avoid falling. Dr. Neu noted that Dr. Daley responded to his letter on January 8, 2010, suggesting that the claimant have an FCE. He complained that while Dr. Daley gave his response to the claimant, the claimant did not tell him about the note or give him a copy of it.

¶ 43 On February 24, 2010, the claimant underwent a functional capacity evaluation (FCE). Alan Donley, the certified functional assessment specialist, wrote in his report of the evaluation that the claimant demonstrated functional capabilities in the modified medium to heavy physical demand level. The claimant was able to lift 73 pounds occasionally, and lift 48 pounds frequently. The claimant had difficulty with chair-to-floor lifting, kneeling, crawling, and squatting activities which resulted in the "modified" restriction. Mr. Donley wrote that the claimant was employed as a welder, which is considered a medium physical demand level position according to the U.S. Department of Labor's Dictionary of Occupational Titles. The claimant's capabilities met and exceeded this level. Mr. Donley felt that the claimant could attempt to return to work at any position that falls within the restriction of modified medium-to-heavy category, occasionally

lifting 73 pounds. The tolerance component of the evaluation showed that the claimant sat for 60 minutes during keyboard activity and history review activity. No pain was reported and no pain behaviors were noted. The claimant had a standing tolerance of 57 minutes demonstrated during assembly/disassembly activities.

¶ 44 Dr. Daley examined the claimant on March 3, 2010. The claimant complained of pain behind his knee with episodes of popping, and pain laterally in both thighs. He told Dr. Daley that he had completed a functional capacity evaluation that put him in the medium-to-heavy work level, but he felt that it aggravated his pain. Dr. Daley felt that his thigh pain might be related to his lumbar spine and recommended that he have an MRI scan of his lumbar spine.

¶ 45 Dr. Neu testified that he examined the claimant on March 8, March 15, and March 22, 2010. The claimant reported that Dr. Vohra gave him injections in his knees and the injections did not help. Dr. Vohra increased his pain medications.

¶ 46 On March 29, 2010, the claimant had sensory nerve conduction and motor nerve conduction studies, F-Wave study, H-reflex study, and a needle EMG. Based on the studies, Dr. Vohra concluded that the electrodiagnostics were within normal limits. There was no evidence for peripheral neuropathy, entrapment neuropathy, or lumbosacral plexopathy in the lower extremities bilaterally. There was also no evidence for lumbosacral radiculopathy in the lower extremities.

¶ 47 Dr. Neu testified that he examined the claimant again on April 19, 2010, and May 17, 2010. The claimant was being seen by Dr. Vohra every two weeks. He had received a cortisone shot in each knee in early May and had started an oral cortisone dosepak. He was taking Percocet 10 milligrams two to three times per day and was still in physical therapy. The claimant told Dr. Neu that he had seen

Dr. Daley about one month prior to the May 17, 2010, appointment and that there was some discussion about additional knee surgery. He stated that if he did not use his cane he had a sensation of falling and had fallen down. He stated he always used his cane outside his house and used it much of the time inside his house. His standing limit was 15 to 20 minutes, and he had to alternate between sitting and standing. The claimant was not returned to work at that time.

¶ 48 On June 18, 2010, Dr. Neu wrote a lengthy progress note. The claimant reported to Dr. Neu that he was unable to squat or kneel. Dr. Neu wrote that they discussed the FCE performed in February 2010, and the claimant indicated that his status was the same now as it was in February. The claimant said that "he was able to carry something a short distance but during the functional capacity evaluation he was on medication inferring that his knee pain was mitigated by being on medication." The claimant told Dr. Neu that he was not able to walk for one week following the FCE. He told Dr. Neu that he now has to sit every 15 minutes after he walks and stands because he cannot stand longer than 15 minutes. The claimant told Dr. Neu that when his medications wear off he will walk like a "gimp" and that he feels as though he will fall over. The claimant told Dr. Neu that he tries to limit his medication, but that he has to take Percocet two to three times per day. He also stated that he could not perform day-to-day activities and that some days his pain is so bad he cannot get out of bed. He stated that he did not use the cane in his front yard, but used it in the back. He did not use the cane inside the house except to go up and down the stairs. Dr. Neu wrote that he would write work restrictions combining the FCE and his subjective limitations. He noted that the claimant would be "pending job reassignment" after the restriction was written. Dr. Neu

testified that his physical examination of the claimant revealed minimal swelling, if any in the right knee. His range of motion was normal.

¶ 49 Dr. Neu testified that on June 28, 2010, he established some restrictions for the claimant. These included no lifting greater than 30 pounds, and no pushing or pulling greater than 20 pounds.

¶ 50 Dr. Neu saw the claimant again on July 6, 2010. The claimant told him that his left knee had given out the week prior causing him to fall. He was walking with a cane on the left with a slow antalgic gait. He still used the cane all the time except for short distances in the front yard. His restrictions were continued until July 14, 2010. The claimant was still taking two to three Percocet tablets per day.

¶ 51 Dr. Frank Russo performed a peer medical record review. In a report written on December 22, 2010, Dr. Russo wrote that based on the record there appeared to be no need for additional physical therapy, invasive testing, or procedures. He felt that the claimant's pain management was poorly documented, and did not fit the true model of a multidisciplinary program. He opined that the claimant had had an "inordinate amount of physical therapy."

¶ 52 Nathan Lopez, a private investigator, testified that he performed surveillance of the claimant at the employer's request. He took video of the claimant on May 26, May 28, May 31, June 3, June 17, and June 18, 2010, and February 7, 2011. He stated that while watching the claimant, he never saw him lose his balance, fall, or exhibit any pain behaviors. He testified that he observed the claimant standing for more than 15 minutes, carrying objects, and driving. The claimant testified that when his employment was terminated, he was shown surveillance videos and that they accurately portrayed his activities on the dates that they were made.

¶ 53 The video surveillance of the claimant was not included in the record. The surveillance reports show that on May 26, 2010, the investigator took videotape of the claimant going to Home Depot and Menards where he was observed walking around. The surveillance reports showed that on May 28, 2010, from 11:58 a.m. until 2:35 p.m., the investigator obtained periodic videotape footage of the claimant utilizing an edger on the side and rear of his residence. From 2:37 p.m. until 3:35 p.m. the investigator took periodic videotape footage of the claimant utilizing a riding lawn mower pulling a small trailer. The claimant testified that the yard work was a one time event. He claimed the work was too difficult and took too long.

¶ 54 The surveillance reports show that on June 3, 2010, videotape surveillance was taken of the claimant at a hardware store. He was seen exiting the store carrying a wet/dry vacuum to his car and depositing it in his trunk. From 9:46 a.m. until 11:28 a.m. periodic videotaped surveillance was made of the claimant performing tasks in his backyard that included lifting, bending, reaching, squatting, and repetitive movement. The claimant then was seen driving to the hardware store and returning the wet/dry vacuum.

¶ 55 The surveillance reports show that on June 17, 2010, the claimant was videotaped performing tasks in his yard, retrieving the garbage can from in front of his house, and performing tasks under the hood of his automobile. He was also seen going to a storage facility, pulling an object from the storage facility to his car, lifting the object into his car, and pushing a chair in the storage locker. The claimant was later videotaped kneeling behind his vehicle performing tasks. On June 18, 2010, videotaped surveillance was obtained of the claimant exiting his vehicle at the employer's office using his cane to enter and exit. On February 7, 2011, videotaped surveillance was taken of the claimant as he arrived at a clothing

donation box. He was recorded exiting his vehicle, unloading several bags from the car, and placing them in the donation box. He was not using a cane.

¶ 56 Dr. Neu testified that he had reviewed the surveillance videos taken of the claimant. He stated that the claimant's functional capabilities as seen in the videos were quite different from what the claimant described to him during his visits from March through July 2010. The claimant walked without a cane, with no evidence of impairment, and was able to carry objects without any hint of impairment or balance problems. He did weed whacking for an extended period of time and used a shop vac for a period of time without impairment. There was no evidence of limping or favoring one leg while doing the activities, or using a cane to help himself to walk or maintain balance. Dr. Neu noted that it was significant that the claimant could carry the shop vac up the stairs because to do that without a cane when the claimant had complained about balance problems was a sharp contrast to the functional picture he had been painting. Dr. Neu testified that the claimant told him that he used the cane almost all the time.

¶ 57 Dr. Neu testified that the June 18, 2010, surveillance video showed the claimant walking into the employer's facility. Dr. Neu noted that the video showed the claimant using his cane on one side when he walked in and on the opposite side when he walked out. He stated that if the claimant's problem was a consistent problem with one knee especially, he would use the cane in a consistent fashion during that time frame.

¶ 58 Dr. Neu testified that the activities on the surveillance video were consistent with the findings of the FCE taken in February 2010. He opined that based upon the activities he observed in the surveillance videos he would lighten or ease the restrictions he placed on the claimant on June 28, 2010. He stated that given his

demonstrated abilities, the claimant would be able to work for the employer. Dr. Neu testified that he felt that the claimant was not honest with him when he saw him over the last three to four months. He stated that he relies on the patient's input when putting together work restrictions and he had not even written a restriction from March to June 2010, because of all the input he received from the claimant during that time frame. He stated that if the claimant had accurately described his abilities as demonstrated in the surveillance video, he would have been able to return him to work at an earlier date. He testified that the claimant's medical condition had stabilized by March 8, 2010.

¶ 59 Kenneth Krska, labor relations representative for the employer, testified that he assists the coordinator who transitions personnel to different jobs in assigning jobs and assessing a person's ability to perform jobs. He stated that he met with the claimant on July 6, 2010, to find out about his portrayal of his restrictions. Prior to meeting with the claimant, he had reviewed the surveillance videos and met with Dr. Neu. At the meeting, the surveillance videos were shown to the claimant. Mr. Krska testified that after the interview with the claimant and reviewing the videos, the claimant was discharged for dishonesty based on his dishonest portrayal of his ability to work.

¶ 60 Mr. Krska testified that he met again with the claimant at the end of July 2010, or the beginning of August 2010. At that time a disciplinary hearing was conducted in conjunction with a grievance filed by the claimant. Mr. Krska stated that no new information was learned at the hearing. At the time of the arbitration hearing, the claimant's grievance was still pending.

¶ 61 Mr. Krska testified that the employer had jobs available that fit within the June 28, 2010, restrictions written by Dr. Neu. He stated that there would have

been jobs in the minor mod area, which is a light-duty assignment with ergonomic equipment, adjustable tables and stools, and potentially a job in the cylinder area. The claimant had sufficient seniority to hold a light-duty job. He testified that a job was never offered to the claimant after June 28, 2010, because the surveillance videotapes called into question the claimant's true capabilities. Mr. Krska testified that in June of 2010 there were roughly 200 to 250 jobs available that would have fit within the restrictions that the claimant was given in the February 2010 FCE.

¶ 62 On December 29, 2010, the claimant had a vocational assessment. Edward Pagella, a certified rehabilitation counselor and a licensed clinical professional counselor, performed the assessment at the request of the claimant's attorney. He testified by evidence deposition. In his written report he wrote that the claimant would be employable, but would not be able to return to his previous occupation. He testified that the claimant would benefit from vocational rehabilitation services to assist him in finding alternative work. He opined that the claimant needed help with interviewing skills and to learn how to present himself in the best light regarding his physical limitations and use of narcotic medication. Mr. Pagella testified that he did not review the surveillance taken of the claimant.

¶ 63 The claimant testified that from the time of his knee replacement until the present, the employer had not offered him any type of employment. He stated that he had attempted to find employment. He applied to the State Department in Afghanistan as an advisor, to Exelon as a maintenance supervisor, to Dresden Nuclear Plant as a maintenance supervisor, and to Menards. The claimant testified that since he was terminated, he also put a resume on Monster.com, an employment website. He has applied for Social Security disability benefits.

¶ 64 On January 18, 2011, Dr. Alexander Gordon performed an independent medical examination of the claimant. He found that, "What has been consistent throughout the record of [the claimant] and appears to be consistent to date is that his symptoms are very much greater in severity than any objective findings that were found. This was very true with the results of his knees prior to him going to knee replacement surgery. I believe that the surveillance does indicate that [the claimant] may be engaging in symptom magnification." He opined that the claimant would be cleared for sedentary or light-duty work. He would be unable to climb ladders, bend, stoop, or walk any distance or on an incline, and would likely have a permanent 20 pound weight restriction.

¶ 65 The arbitrator found that the claimant sustained an accident that arose out of and in the course of his employment on July 6, 2006. The employer was ordered to pay the claimant temporary total disability benefits of \$374.08 per week for 43 6/7 weeks, from September 14, 2006, through September 25, 2006; October 3, 2006, through October 9, 2006; October 23, 2006, through November 6, 2006; January 29, 2007, through February 12, 2007; and May 6, 2009, through January 20, 2010. The employer was ordered to pay the claimant any temporary total disability benefits that had accrued from July 6, 2006, through July 11, 2011. It was ordered to pay \$1,090.02 for reasonable and necessary medical services.

¶ 66 The arbitrator found that the claimant failed to prove he was entitled to vocational rehabilitation or maintenance benefits. She found that his claim for vocational rehabilitation and maintenance rested on the testimony of vocational rehabilitation consultant Mr. Pagella. Mr. Pagella used the 20 pound light level restriction suggested by Dr. Gordon as the basis for his opinion and ignored the February 24, 2010, FCE. The arbitrator found that restrictions based on the FCE

and prescribed by the treating physician, Dr. Daley, were more reliable than those of an examining doctor who saw the claimant only once. Because Mr. Pagella did not review the surveillance video and did not know the claimant had been terminated for dishonesty, the arbitrator felt he did not have full information about the claimant's physical and employment status. The arbitrator found Mr. Pagella not credible.

¶ 67 The arbitrator further found that the surveillance video put the claimant's credibility in doubt. He was videotaped walking normally, without the need for a cane or any evidence of difficulty, he was also able to do yard work and shop for an extended period of time. The arbitrator noted that whether the discharge was justified under the union contract remained in dispute through the union grievance procedure. The arbitrator found that the employer had work available had the claimant not been discharged for dishonesty. She found that the claimant had only contacted four potential employers and there was neither a diligent but unsuccessful job search nor a credible opinion that he was entitled to vocational rehabilitation to support his claim.

¶ 68 The claimant sought review of the arbitrator's decision. The Commission unanimously affirmed and adopted the arbitrator's decision. It remanded the case to the arbitrator for further proceedings for a determination of a further amount of TTD or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 299 N.E.2d 1322 (1980). The claimant appealed the Commission's decision to the circuit court. The circuit court confirmed the Commission. The claimant filed a timely notice of appeal.

¶ 69

ANALYSIS

¶ 70 The claimant argues that the Commission erred in denying him TTD benefits beyond January 20, 2010, and in denying vocational rehabilitation benefits. A reviewing court will set aside the Commission's decision only if its decision is contrary to law or its fact determinations are against the manifest weight of the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). "A reviewing court will not reweigh the evidence, or reject reasonable inferences drawn from it by the Commission, simply because other reasonable inferences could have been drawn." *Id.* The Commission's decision is not against the manifest weight of the evidence when there is sufficient evidence in the record to support the Commission's determination. *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870, 877 (2010).

¶ 71 The claimant argues that the issues are subject to *de novo* review because the facts essential to the analysis are susceptible to but a single inference and the review only involves the application of the law to the facts. The time during which a claimant is temporarily totally disabled is a question of fact for the Commission. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 175, 741 N.E.2d 1144, 1148 (2000). This court applies the manifest weight standard when reviewing the Commission's determination of a claimant's entitlement to TTD benefits. *Otto Baum Company, Inc. v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100959WC, ¶13, 960 N.E.2d 583. The Commission found that the claimant's request for vocational rehabilitation rested on Mr. Pagella's testimony. It found his testimony not credible. "When the credibility of witnesses is a determining issue, a question of fact remains and *de novo* review is inappropriate." *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d

177, 184, 759 N.E.2d 979, 984 (2001). The claimant's issues are subject to the manifest weight of the evidence standard of review, not *de novo* review.

¶ 72 The Commission awarded the claimant TTD benefits through January 20, 2010. From January 20, 2010, until March 7, 2010, the claimant was off work due to an unrelated condition. The Commission found that the claimant reached maximum medical improvement on March 7, 2010. The claimant argues that the Commission erred in denying him TTD benefits after January 20, 2010.

¶ 73 When determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether he is capable of returning to the work force. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146, 923 N.E.2d 266, 274 (2010). To be entitled to TTD benefits, a claimant must demonstrate both that he did not work and that he was unable to work. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759, 800 N.E.2d 819, 825 (2003). The dispositive test is whether the claimant's condition has stabilized and whether he has reached maximum medical improvement. *Id.* at 759, 800 N.E.2d at 825-26. In determining whether a claimant has reached maximum medical improvement, the court looks to whether he has been released to return to work, the medical testimony concerning his injury, the extent of the injury, and whether the injury has stabilized. *Id.* at 760, 800 N.E.2d at 826.

¶ 74 In the instant case, Dr. Pulluru began treating the claimant in August 2006, less than two months after his accident. Dr. Pulluru performed arthroscopic surgeries on the claimant on September 14, 2006, October 23, 2006, and on January 29, 2007. On April 11, 2007, Dr. Pulluru released the claimant for full-duty work. On May 14, 2007, Dr. Pulluru informed the claimant that he could offer the claimant

no further treatment. Dr. Huberty began treating the claimant in June 2007. He wrote in his patient notes dated June 22, 2007, that the claimant's symptoms were well out of proportion to his radiographic and clinical findings. He indicated that further surgical intervention would be fruitless and recommended that the claimant be treated at a multi-disciplinary pain treatment center. He felt that the claimant's symptoms were less related to structural knee problems than to chronic regional pain syndrome. In his patient notes dated August 16, 2007, Dr. Huberty concluded that he had nothing further to offer the claimant. Despite being told by two physicians that his structural knee problems had essentially stabilized and that there was no further treatment, the claimant continued to seek medical treatment.

¶ 75 Dr. Daley wrote in his December 2, 2009, patient notes that it was his plan for the claimant to return to full duty work as a welder six months after his last knee replacement. The claimant had his last knee replacement on August 25, 2009. According to Dr. Daley's plan, the claimant should have been able to return to full duty work as a welder on February 25, 2010.

¶ 76 On December 23, 2009, Dr. Neu wrote to Dr. Daley and Dr. Vohra requesting input on the claimant's functional limits and advising them of job availability for sedentary work for the claimant. Dr. Daley indicated that an FCE should be conducted. The claimant underwent an FCE on February 24, 2010. Mr. Donley concluded that the claimant demonstrated functional capabilities in the modified medium to heavy physical demand level. He wrote in his report that the claimant's capabilities met and exceeded the medium physical demand level required of a welder as set out in the U.S. Department of Labor's Dictionary of Occupational Titles.

¶ 77 Dr. Frank Russo performed a peer medical record review. In a report dated December 22, 2010, he concluded that based on the record, the claimant had no need for additional physical therapy, invasive testing or procedures. Dr. Gordon performed an independent medical examination of the claimant on January 18, 2011. He wrote in his report that the claimant had consistently described symptoms that were much greater in severity than any objective findings. He believed that the claimant engaged in symptom magnification.

¶ 78 By February 2010, although the claimant had both knees replaced, Dr. Daley indicated that he should be able to return to work as a welder, an FCE indicated that he could return to work at the modified medium to heavy physical demand level, and Dr. Russo opined that there was no need for further procedures on the claimant's knees. Based on this, the Commission could infer that the claimant had reached maximum medical improvement and was capable of returning to the work force. There was sufficient evidence in the record to support the Commission's denial of TTD benefits after January 20, 2010.

¶ 79 The claimant argues that he is entitled to a vocational assessment and rehabilitation. He argues that there was no evidence at the hearing that he would have returned to his prior position and that it is clear from the totality of the medical evidence that, if employable, he has been physically removed from his prior occupation regardless of his termination.

¶ 80 In determining whether rehabilitation is appropriate, the Commission examines whether the employee has sustained an injury which caused a reduction in earning power; whether there is evidence that rehabilitation will increase the employee's earning power; whether the employee is likely to lose job security due to his injury; and whether the employee is likely to obtain employment upon

completion of the rehabilitation training. *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 53-54, 523 N.E.2d 1265, 1268 (1988). Factors that mitigate against rehabilitation include the employee has unsuccessfully participated in similar training in the past; the employee has received training under a prior rehabilitation program which would enable him to resume employment; the employee is not trainable due to age, education, training, and occupation; and the employee has sufficient skills to obtain employment without further training or education. *Id.* at 54, 523 N.E.2d at 1268. Other factors to consider include the relative costs and benefits to be derived from the program, and the employee's motivation to undertake the program. *Id.* at 54, 523 N.E.2d at 1268-69.

¶ 81 In the instant case, there is no evidence that the claimant could not return to work as a welder. The February 24, 2010, FCE placed the claimant at the modified medium-heavy physical demand level which met or exceeded the physical demands of a welder according to the U.S. Department of Labor's Dictionary of Occupational Titles. Dr. Daley felt that the claimant should be able to return to work as a welder six months after his last knee replacement. Mr. Pagella testified that the claimant would be able to perform work as a spot welder.

¶ 82 The claimant's injury did not result in a loss of job security. There was no evidence that the claimant was unable to return to work for the employer. In December 2009, Dr. Neu wrote to Dr. Daley and Dr. Vohra requesting information on the claimant's restrictions and informing them that sedentary work was available. Dr. Neu wrote medical restrictions for the claimant on June 28, 2010. Mr. Krska testified that at that time, the employer had jobs available in the minor mod area that fit the restrictions. He stated that the claimant had the seniority to hold a light-duty job. He testified that in June 2010 there were approximately 200 to 250 jobs that fit

within the restrictions the claimant was given at his February 2010 FCE. The claimant was terminated from his job for dishonesty, not because there was no work available for him.

¶ 83 The claimant possessed transferable skills. Mr. Pagella testified that the claimant's past positions as a welder and a maintenance supervisor are skilled occupations. Through his experience, the claimant has skills in ordering and purchasing products. The claimant has a certificate in heating, ventilation, and air conditioning from Ferris State University. Mr. Pagella testified that work in that field required a heavy level of physical tolerance beyond what the claimant could handle. However, he admitted that the training would be useful in expanding the claimant's labor market in other fields such as purchasing parts, ordering parts, or doing estimates in that field. Mr. Pagella testified that the claimant's ability to supervise others and his experience in supervising others was a transferable skill.

¶ 84 Dr. Neu began the return to work process in December 2009. From then until his termination, the claimant frustrated the return to work process. At each appointment with Dr. Neu he represented his physical limitations as much more severe than they were at the February 2010 FCE and as seen in the surveillance videotapes. This brought into question the claimant's motivation to return to work.

¶ 85 The Commission found that the claimant's claim for vocational rehabilitation and maintenance rested on the testimony of Mr. Pagella. Mr. Pagella used the 20 pound light level restriction suggested by Dr. Gordon as the basis of his opinion and ignored the February 2010 FCE which placed the claimant's abilities at a modified medium to heavy physical level. Mr. Pagella did not view the surveillance videos. Mr. Pagella testified that the claimant told him that he could only sit or stand for 10 to 15 minutes at a time. This was inconsistent with the surveillance videotape

which showed him working in his yard for over two hours and his ability to stand for 57 minutes during the February 2010 FCE. Dr. Neu testified that the claimant's activities as shown on the video surveillance were in line with his abilities demonstrated at the February FCE. The Commission found that Mr. Pagella's opinion was not credible because he did not have full information.

¶ 86 The Commission further found that the claimant was not credible because of the discrepancies between how the claimant described his symptoms to physicians and at the hearing and the activities he is seen engaging in on surveillance video. The claimant told Dr. Neu that he almost always used the cane outside his house and most of the time inside his house. He reported a sensation of falling without the use of the cane. He claimed his standing limit was 15 minutes. He told Dr. Neu that he could not perform day-to-day activities and that some days he could not get out of bed due to the pain. On the surveillance videos the claimant was seen walking without the cane and with no visible signs of impairment, carrying objects, kneeling, using an edger in his yard for 2.5 hours, bending, reaching, squatting, and lifting. It is the province of the Commission to assess the credibility of witnesses and assign weight to their testimony. *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 887, 864 N.E.2d 266, 272 (2007).

¶ 87 There is sufficient evidence in the record to support the Commission's determination that the claimant failed to prove he was entitled to a vocational assessment and rehabilitation. The claimant's injury did not result in a loss of job security. Based on the February 2010 FCE, the claimant could perform work at the modified medium to heavy physical level. Welding falls within that classification. Dr. Daley anticipated that the claimant would be able to return to his job as a welder. Mr. Krska testified that there were jobs available to the claimant with the employer

that met the restrictions established by Dr. Neu. The claimant possessed skills that could be transferred to different types of employment. The claimant's motivation to return to work was questionable because of the discrepancies between the symptoms he reported and the video surveillance of the activities he actually engaged in and his performance at the February 2010 FCE. There was conflicting evidence surrounding the claimant's symptoms and his abilities, and the Commission found that Mr. Pagella and the claimant were not credible. It was within their province to judge witness credibility and assign weight to the testimony. The Commission's decision was not against the manifest weight of the evidence.

¶ 88

CONCLUSION

¶ 89 For the foregoing reasons, we affirm the judgment of the circuit court confirming the decision of the Commission and remand the cause to the Commission for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 90 Affirmed and remanded.