2016 IL App (1st) 150473WC-U

Workers' Compensation
Commission Division
Order Filed: February 5, 2016

No. 1-15-0473WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DARRIN CESKA,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 14 L 50396
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	Honorable
	)	Carl Anthony Walker,
(CITY OF CHICAGO, Appellee).	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The Illinois Workers' Compensation Commission's finding that the claimant, Darren Ceska, did not suffer a work related accident on August 27, 2012, is not against the manifest weight of the evidence. As it relates to the claimant's work accident of May 18, 2011, the Commission's finding of no causal connection to his cervical spine condition is not against the manifest weight of the evidence. The Commission's determinations that the claimant is not entitled to temporary total disability benefits after November 10, 2011, and that he is not entitled to recover for medical expenses incurred after October 6, 2011, are not against the manifest weight of the evidence. The claimant has procedurally forfeited the issues of permanent total disability, wage differential, vocational rehabilitation,

penalties and attorney fees as those issues were never raised before the Commission.

¶ 2 The claimant, Darrin Ceska, appeals from an order of the circuit court of Cook County which confirmed a decision a decision of the Illinois Workers' Compensation Commission (Commission). The claimant argues that: (1) the Commission's finding that he did not suffer a work related accident on August 27, 2012, is against the manifest weight of the evidence; (2) the Commission's finding of no causal connection between his work accident of May 18, 2011, and the current condition of his cervical spine is against the manifest weight of the evidence; (3) the Commission's determination that he is not entitled to temporary total disability (TTD) benefits after November 10, 2011, is against the manifest weight of the evidence; (4) the Commission's determination that he is not entitled to recover medical expenses incurred after October 6, 2011, is against the manifest weight of the evidence; (5) the Commission erred in failing to decide whether he is permanently and totally disabled under an odd-lot theory or is entitled to wage differential benefits; (6) the Commission erred in failing to order vocational rehabilitation benefits; and (7) the Commission erred in failing to award him penalties under sections 19(k) and 19(l) of the Workers Compensation Act (Act) (820 ILCS 305/19(k), 19(*l*) (West 2012)) and attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2012)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence adduced at the arbitration hearing conducted on July 9, 2013.

¶ 4 Prior to the events giving rise to the instant claim, the claimant had a medical history that is relevant to the disposition of this case. On February 22, 2011, the claimant was involved in a non-work-related car accident. He went to the emergency room at Adventist Midwest Health,

complaining of neck and back pain. The attending emergency room physician examined the claimant and noted tenderness in his cervical spine and diffuse tenderness to palpation in the lumbar spine. X-rays of the cervical and lumbar spine were unremarkable. The claimant was diagnosed with acute cervical and lumbar strain and was prescribed medication for pain.

¶ 5 On March 7, 2011, the claimant sought care from Dr. James R. Lovell, a chiropractor. According to Dr. Lovell's records, the claimant complained of moderate pain in the neck and shoulders, restricted movement and inflexibility with achy pain in the right cervical area, lower back pain, and headaches. The claimant told Dr. Lovell that he was stopped at a red light when a "SUV van" rear-ended him at "full speed, no brakes," totaling his Toyota Avalon. The claimant testified that he was not placed on restricted duty or prescribed any type of medication as a result of this treatment.

¶ 6 At the time of the injuries at issue, the claimant had been employed by the City of Chicago (City) for 18 years as a truck driver. The claimant testified that, on May 18, 2011, he was assigned to pick up traffic cones near Hollywood Avenue and Sheridan Road. As he was stopped in northbound traffic on Lake Shore Drive, his work vehicle, a Ford F-250, was rear-ended at "full blast speed" by a Jeep Cherokee. Although the claimant was wearing a seatbelt, the force of the collision caused him to strike the front of his head against the rearview mirror and the back of his head against the headrest and rear window. The claimant testified that he felt nauseous and vomited shortly after the accident. He notified the dispatcher of the accident and his foreman drove him to MercyWorks, the City's occupational health clinic.

¶ 7 The records of MercyWorks reflect that the claimant presented on May 18, 2011, complaining of neck pain and headache. The claimant denied any history of neck injury or

surgery. Dr. Nagib Ali examined the claimant and observed mild to moderate tenderness over the paracervical and trapezius muscles. He found that the claimant had full range of motion in the neck, with discomfort. Dr. Ali noted that the x-ray of the claimant's cervical spine did not show any fracture or dislocation. He diagnosed the claimant as suffering from cervical strain and headaches. Dr. Ali prescribed Norco, Motrin and Flexeril, and took the claimant off work. Dr. Ali advised the claimant to seek follow up care at MercyWorks on May 20, 2011.

¶ 8 The claimant returned to MercyWorks on May 20, 2011, as instructed. He reported no improvement and rated his neck and head pain at an intensity level of 7 or 8 out of 10. A physical examination revealed diffuse tenderness over the cervical spine and paracervical muscles and decreased range of motion. Dr. Ali kept the claimant off work and scheduled a follow up visit for May 23, 2011.

¶ 9 Also on May 20, 2011, the claimant returned to Dr. Lovell, the chiropractor. Dr. Lovell's notes from that visit state that the claimant had experienced a great deal of improvement in the severity of his cervical spine and lower back pain. Additionally, the claimant reported that his headaches were not as bad as previously reported. Dr. Lovell discharged the claimant from treatment. The claimant testified, however, that he did not continue treatment with Dr. Lovell because he did not want him to manipulate his neck due to pain. When asked why he did not tell Dr. Lovell that he was in pain, the claimant explained that he took several pain medications throughout the day, which alleviated his pain.

¶ 10 The claimant returned to MercyWorks on May 23, 2011, for a follow up. Dr. Homer Diadula's records state that the claimant complained of neck pain radiating to his right shoulder, low back pain, and headaches. His physical examination was essentially unchanged. Dr.

Diadula diagnosed cervical and right shoulder strain, and post-traumatic headaches. He ordered an MRI of the cervical spine, prescribed pain medication, and kept the claimant off work.

¶ 11 The MRI, performed May 26, 2011, was interpreted by the radiologist as showing a small central disc protrusion at C4-C5, with mild indentation on the anterior spinal cord, without abnormal spinal cord signal. The radiologist's report identified no significant disc herniation and no central canal or foraminal narrowing.

¶ 12 The claimant followed up with the doctors at MercyWorks on June 1, 2011, reporting no improvement and complaining of headaches and neck pain shooting down to his right shoulder. The claimant was prescribed pain medication and kept off work.

¶ 13 On June 9, 2011, the claimant sought treatment from Dr. Mark Lorenz of Hinsdale Orthopaedics. The claimant gave a history of having injured his neck and back on February 22, 2011, and again on May 18, 2011, when the vehicles he was driving were rear-ended by other vehicles. He complained of neck pain radiating to his right shoulder and significant headaches. Dr. Lorenz's report states that, upon examination, the claimant had limited range of motion in the neck. Dr. Lorenz noted that extension and a Spurling maneuver reduplicated pain radiating towards the right shoulder. Dr. Lorenz reviewed the x-rays and found "no particular abnormality." Dr. Lorenz's report also notes that the MRI, performed May 26, 2011, disclosed evidence of a C4-C5 disc herniation with indentation of the anterior cervical spinal cord at that level. Dr. Lorenz diagnosed the claimant with C4-C5 disc herniation, radiculopathy, and post-concussion syndrome. He opined that the claimant suffered an aggravation of preexisting neck and back pain. Dr. Lorenz recommended conservative care. He prescribed a Medrol Dosepak, physical therapy, and referred the claimant to Dr. Armita Bijari, a neurologist.

¶ 14 The claimant saw Dr. Bijari on June 30, 2011. The claimant gave a history of his accident on May 18, 2011, which was consistent with his testimony at arbitration. Dr. Bijari noted that the claimant had a concussion, but also reported that there was no loss of consciousness and no focal neurologic complaints (*e.g.*, weakness or numbness). The claimant complained of persistent headaches, describing them as "behind the eyes and ears," with nausea and photophobia. The claimant also complained of neck pain, radiating to his right shoulder. Dr. Bijari's neurologic examination was unremarkable. She diagnosed the claimant with post-concussive syndrome and neck pain due to disc herniation. Dr. Bijari ordered an MRI of the claimant's brain, prescribed Elavil, and told the claimant to stay off work until his neck pain resolved.

¶ 15 On July 1, 2011, the claimant began physical therapy at ATI as prescribed by Dr. Lorenz. The claimant testified that physical therapy made his symptoms worse. For example, on July 8, 2011, the claimant was riding a stationary bike when he developed a severe headache and "bloody eyes." The physical therapist stopped the session and advised the claimant to seek emergency care. Emergency room records from Hinsdale Hospital show that the consulting physician believed the redness was "unlikely to be anything neurologic" and referred the claimant to an eye doctor, who prescribed eye drops.

¶ 16 On July 11, 2011, the claimant underwent an MRI of his brain as recommended by Dr. Bijari. The MRI scan was unremarkable.

¶ 17 The claimant followed up with Dr. Lorenz on July 20, 2011, complaining of persistent neck pain radiating to his right arm. The claimant reported no relief with the Medrol Dosepak and minimal relief with physical therapy. Dr. Lorenz's records note that the claimant had

ongoing neck and shoulder pain and had not responded to conservative treatment. Dr. Lorenz re-examined the claimant's cervical MRI, finding that it showed a C4-C5 disc herniation with some impingement on the spinal cord. He recommended that the claimant undergo a C4-C5 anterior cervical discectomy. As an alternative to surgery, Dr. Lorenz recommended a functional capacity evaluation (FCE) with restrictions. He referred the claimant to Dr. Stanley Fronczak, a neurosurgeon, for a second opinion.

¶ 18 On July 20, 2011, the claimant followed up with the doctors at MercyWorks, reporting pain in his neck, right shoulder, and headaches. Physical examination revealed improved range of motion in his cervical spine, no swelling, but tenderness in the trapezius and deltoid muscles. The claimant was diagnosed with cervical strain and sprain and post-traumatic headaches. The claimant was asked to follow up on August 10, 2011, or after his next visit with Dr. Lorenz.

¶ 19 The claimant consulted with Dr. Fronczak on July 25, 2011. In a letter to Dr. Lorenz, Dr. Fronczak noted that the claimant reported a whiplash injury in February 2011, but the injury was minor "and after a period of weeks, the [claimant] became totally normal." The claimant also told Dr. Fronczak that he was involved in a work-related car accident on May 18, 2011, in which the vehicle he was driving was rear ended by a Jeep Cherokee traveling 40 or 50 miles per hour. The claimant vomited after the accident, but he did not lose consciousness. He also felt "immediate neck pain with some radiation to the shoulder." Dr. Fronczak's physical examination revealed "definite weakness of deltoid function, specifically flexion and extension, and to a lesser extent, abduction of the right shoulder joint." Dr. Fronczak opined that the neurodiagnostic studies "demonstrate findings consistent with C4-C5 dis[c] herniation." However, he noted that he had only reviewed the MRI report and had not reviewed the MRI

films. Dr. Fronczak diagnosed "C4-C5 cervical spondylosis with resulting right C5 radiculopathy." Based upon the claimant's "complaints, duration of complaints, need for medications, etc., as well as interference with his normal daily abilities and work," Dr. Fronczak opined that "surgery would be a reasonable option."

¶ 20 On July 28, 2011, the claimant followed up with Dr. Bijari, reporting a decrease in the frequency of headaches, but not severity. Dr. Bijari expected the headaches to resolve "over the next few weeks to months." She increased the claimant's headache prophylactic medication, Elavil, and kept him off work.

¶ 21 On August 1, 2011, Dr. Carl Graf, a spine surgeon, performed an independent medical examination (IME) of the claimant at the City's request. He wrote in his report that the claimant complained of constant neck pain radiating to his right shoulder with a pain intensity level of 5 or 6 out of 10. The claimant provided a history of his workplace accident and told Dr. Graf that he is taking Ibuprofen, a muscle relaxer, and medication from the neurologist for headaches. Dr. Graf's physical examination revealed full, but painful, range of motion in the cervical spine. The claimant complained of pain to palpation in the neck, spinal musculature, and trapezius muscle. The physical examination was otherwise unremarkable. Dr. Graf interpreted the cervical MRI, taken May 26, 2011, as showing a very small disc bulge at C4-C5, without foraminal stenosis or nerve root compression. Dr. Graf opined that the claimant suffered a cervical strain with a small cervical disc bulge at C4-C5 with headaches. He concluded that the claimant did not require surgery and recommended an epidural steroid injection. Dr. Graf also opined that the claimant could return to work on sedentary duty.

¶ 22 On August 2, 2011, Dr. Richard Lazar, a neurologist, performed a second IME of the claimant at the City's request. Dr. Lazar's report states that the claimant complained of headaches beginning at the base of the neck and radiating to the right ear and behind the eyes, with associated photophobia. The claimant related that his headaches initially occurred every couple of days, but now occur every four or five days and "are definitely decreasing." On physical examination, Dr. Lazar noted a sustained tremor of the arms which was non-parkinsonian, benign, and unrelated to the accident on May 18, 2011. The claimant had full range of motion in the cervical spine and physical examination was otherwise unremarkable. Dr. Lazar opined that the claimant suffered a soft tissue injury resulting in spasms of the neck and paracervical muscles, causing headache and neck pain. Dr. Lazar noted that the soft tissue injury was slowly improving, according to the claimant. Dr. Lazar did not think the claimant suffered a concussion or post-concussive syndrome.

¶ 23 Regarding causal connection, Dr. Lazar opined that the accident on May 18, 2011, aggravated the claimant's preexisting whiplash injury from his car accident on February 22, 2011, and lead to a soft tissue injury which is causing episodic headaches. Dr. Lazar strongly disagreed that the disc protrusion at C4-C5 was a pain generator, noting that the protrusion was midline, whereas the claimant complained of right-sided pain. He noted that such a protrusion is a normal finding and exists in many patients who have never experienced neck pain. Dr. Lazar found no evidence of herniation in the claimant's MRI exam or clinically. He explained that the claimant's symptoms radiate to the right, but the protrusion is midline, which does not correlate anatomically. Dr. Lazar further noted that the claimant had not undergone any electrodiagnostic studies.

¶ 24 Moreover, Dr. Lazar "adamantly" opposed the cervical spine surgery recommended by Drs. Lorenz and Fronczak, stating that the claimant "would get zero benefit, and have all of the risks of a major surgical procedure." Instead, Dr. Lazar concurred with Dr. Bijari's approach by recommending physical therapy. He discouraged the long-term use of Norco due to addiction potential and recommended Limbitrol or Fiorinal to treat the claimant's headaches. Lastly, Dr. Lazar believed the claimant's condition would improve sooner rather than later; in the event the claimant did not significantly improve in the next four to six weeks, Dr. Lazar suspected "motivational issues."

¶ 25 On September 7, 2011, the claimant followed up with Dr. Bijari, reporting improvement in the frequency and severity of his headaches. Dr. Bijari expected the headaches and post-concussive syndrome to resolve "over the next few weeks."

¶ 26 On September 14, 2011, the claimant followed up with Dr. Lorenz, continuing to complain of neck pain. Dr. Lorenz reviewed the IME reports prepared by Drs. Lazar and Graf, but continued to recommend surgery.

¶ 27 On October 6, 2011, the claimant followed up with Dr. Bijari, reporting two severe headaches in the past month. Dr. Bijari prescribed Elavil and released the claimant to return to work at full duty.

¶ 28 On November 9, 2011, the claimant returned to Dr. Lorenz and expressed his desire to proceed with the cervical spine surgery. Drs. Lorenz and Fronczak performed the surgery on November 11, 2011, which consisted of a discectomy and fusion at C4-C5. The claimant testified that he had a difficult time following the fusion surgery. He explained he was in the hospital five nights after the surgery and experienced swelling in his face and neck.

¶ 29 On November 28, 2011, the claimant reported to Dr. Lorenz that he was very pleased with the results of his surgery and had only mild neck discomfort. The claimant reported "no arm pain at all anymore." Also on November 28, 2011, the claimant followed up with the doctors at MercyWorks. The clinical notes from that visit state that the claimant reported neck pain at a pain intensity level of 6 out of 10 and difficulty swallowing. Physical examination revealed good range of motion in the claimant's right shoulder and tenderness in the trapezius and deltoid muscles.

¶ 30 On December 8, 2011, the claimant followed up with Dr. Bijari, reporting that his headaches were "nearly resolved" and indicating significant improvement in his neck symptoms with the surgery. Dr. Bijari declared the claimant at maximum medical improvement (MMI) with respect to post-concussive syndrome and discharged him from care.

¶ 31 The claimant followed up with Dr. Lorenz on December 12, 2011, complaining of neck pain, trouble sleeping, and occasional tingling in the right arm. The claimant said he was taking six to eight Norco tablets a day for pain. Dr. Lorenz refilled the claimant's Norco prescription, prescribed Valium, recommended physical therapy, and kept the claimant off work.

¶ 32 On January 18, 2012, Dr. Graf reexamined the claimant at the City's request. The claimant complained of neck pain and reported having headaches in cold weather. Dr. Graf's physical examination revealed that the claimant had limited and painful range of motion of his cervical spine and mild pain to palpation in the neck. The physical examination was otherwise unremarkable. Dr. Graf opined that the surgery performed by Drs. Lorenz and Fronczak was not medically necessary, noting that postoperatively the claimant continued to complain of neck pain

and headaches. Dr. Graf did not provide an opinion as to causation because he did not have copies of the claimant's medical records from February 2011.

¶ 33 On January 23, 2012, the claimant saw Dr. Lorenz. He reported no improvement and complained that his pain became worse with physical therapy. Dr. Lorenz refilled the claimant's Norco and Valium prescriptions, prescribed Naprosyn, ordered a CT scan of the cervical spine, and kept the claimant off work. The CT scan, performed February 14, 2012, showed normal postoperative changes.

¶ 34 On March 5, 2012, the claimant followed up with Dr. Lorenz, reporting no improvement. Dr. Lorenz discontinued physical therapy, ordered an FCE, and kept the claimant off work.

¶ 35 An FCE, performed March 22, 2012, placed the claimant at the light physical demand level. That is, the claimant was capable of occasional floor-to-chair lifting of 23.6 pounds, desk-to-chair lifting of 21.4 pounds, and lifting of 25.8 pounds above shoulders bilaterally.

¶ 36 On April 4, 2012, the claimant followed up with Dr. Lorenz, reporting significant improvement in his neck and complete resolution of his headaches and "arm pain." Dr. Lorenz declared the claimant at MMI and released him to return to work at a permanent light duty restriction with a maximum lift of 25 pounds.

¶ 37 On April 16, 2012, Steven Blumenthal, a vocational rehabilitation counselor, interviewed the claimant at the request of the claimant's attorney. In a report dated May 17, 2012, Mr. Blumenthal noted that the claimant exhibited pain behaviors, such as standing up to stretch and holding his hand to his throat frequently. Furthermore, the claimant complained of daily pain, which he rated a 5 to 8 out of 10, and migraine headaches. The claimant reported taking Hydrocodone mostly at night, unless the pain was a 6 or 7 out of 10, in which case he also took it

during the day. Further, the claimant reported taking Naprosyn three times a day. The claimant described significant physical limitations due to his neck and low back conditions, including difficulty driving. Mr. Blumenthal performed vocational testing, noting that the claimant was a high school graduate, with no specialized certifications other than a CDL class A driver's license. Mr. Blumenthal opined that the claimant's most direct opportunity to return to work would be as a dispatcher.

¶ 38 On May 23, 2012, the claimant saw Dr. Lorenz for a follow up. Dr. Lorenz continued the claimant at a permanent light duty restriction, but stated he is not to lift more than 8 pounds frequently or more than 20 pounds occasionally. He ordered a refill of the claimant's prescriptions for Norco and Naprosyn.

¶ 39 The claimant's job search logs were admitted into evidence, showing that he began looking for work on June 25, 2012.

¶ 40 The claimant testified that on August 24, 2012, the City offered him a temporary job in Roaming Control, which required driving a van or a truck for eight hours a day. The claimant introduced into evidence an e-mail from Angie Matos in the Personnel Division of the City's Department of Streets and Sanitation, stating that the claimant's temporary assignment was within the restrictions imposed by Dr. Lorenz. However, the claimant testified that the assignment "broke his doctor's restrictions." The claimant explained that since he held a class A CDL license, he was not permitted to drive under the influence of medication. However, the City told him to take his medications after working hours.

¶ 41 After he stopped taking his medications on August 27, 2012, the claimant reported for work. He testified that he was "having withdrawal symptoms really bad" and did not believe he

could drive a large vehicle all day. When asked how he injured himself that day, the claimant described the August 27, 2012, accident as follows:

> "I reinjured my neck driving the van. We were going through alleys and over speed bumps and through the city streets. Because the van was heavy and it's a very heavy duty van, it vibrates a lot. The vibrations and the bounciness totally killed my neck. I wasn't on medicine that I'm normally on every day; so it really, really messed my neck up."

The claimant called his supervisor and stated he could not drive anymore because of the pain. The claimant stated that, when he returned to the garage, his supervisors refused to take him to a doctor, declined to write an accident report, and "threw [him] off the property." The claimant testified that he drove home and his wife took him to Hinsdale Hospital for emergency care.

¶ 42 The medical records from Hinsdale Hospital show that the claimant sought emergency care for right-sided neck pain, stiffness and muscle spasms. The record describes the claimant's "chief complaint" as "work injury to neck from May 18[,] 2011." The records also state that the claimant "presents with neck pain. The onset was pt injured neck 5/2011 surgery last year today was first day back to work and while driving in van [h]itting bumps has stiffness and soreness R trapezius neck area non radiating no weakness no trauma." As to the type of injury, the emergency report states, "none. *** The character of symptoms is stiff and sore." The claimant also related that he was upset that he was forced back to work and was not able to take his pain medication. X-rays showed normal postoperative changes. The attending physician prescribed Norco, Ibuprofen, and Flexeril and instructed the claimant to see his primary care physician.

¶ 43 On August 29, 2012, the claimant saw his primary care physician, Dr. Miran. The claimant reported that he had to leave work on August 27, 2012, because the van he was driving aggravated his neck pain. The claimant also stated that he stopped taking pain medication prior to working that day, which also aggravated his neck pain. Dr. Miran prescribed Medrol Dosepak and instructed him to see a spine surgeon. He also took the claimant "[o]ff work until evaluated by and released by spine surgeon."

¶ 44 The City introduced into evidence an "Injury on Duty Report," prepared by Jonathan Fah on September 5, 2012. The report states that the claimant was driving a cargo van when he "was bounced about, driving over pot holes [and] speed bumps" causing pain in his neck, right shoulder, and lower back. The claimant informed his supervisors, George Esquivel and Pearlesa Ford, that he was in pain and Esquvel told the claimant to "bring [the] truck in." Ford and Esquivel met the claimant in the lot and asked him if he was injured. The claimant said he was not injured, but was in pain "and was not allowed to take his pain medication after 14:30." Ford told the claimant that if he was not injured he would have to see his own doctor. Ford refused to write-up an occupational injury report or give the claimant a "blue card" for medical treatment. The claimant was told to sign out and vacate the property.

¶ 45 On September 17, 2012, the claimant saw Dr. Lorenz, complaining of neck pain, which he rated a 7 out of 10. The claimant gave a history of being assigned a new driving job on August 27, 2012, and experiencing increased neck pain after driving a box truck all day. Dr. Lorenz ordered an MRI and a CT scan, prescribed physical therapy and kept the claimant off work. The claimant testified that he had not undergone the MRI or CT scans due to lack of authorization.

¶ 46 On October 20, 2012, Dr. Graf issued an addendum to his IME report. Dr. Graf opined that the claimant "appears to be misleading in his documentation of pain and abruptly discontinues months of treatment for claimed pain and disability." Dr. Graf further opined that the claimant intentionally misled his treating providers and that the claimant's pain is not related to the May 18, 2011, accident. Dr. Graf recommended that the matter be referred for review to the State of Illinois Worker's Compensation Fraud Investigation unit.

¶ 47 The claimant followed up with Dr. Lorenz on November 12, 2012, reporting no improvement and complaining of neck pain. Dr. Lorenz discontinued physical therapy, kept the claimant off work, reordered the MRI and CT scans of the claimant's cervical spine, and refilled Norco, Valium, and Naprelan prescriptions. The MRI and CT scans, performed November 14, 2012, showed normal postoperative changes.

¶ 48 On January 9, 2013, the claimant returned to Dr. Lorenz complaining of neck pain, "spasms in the front of his neck," and "tremors in his arms." Physical examination was grossly normal, except the claimant exhibited "some essential tremors in the upper extremities." Dr. Lorenz kept the claimant off work, refilled Norco and Valium prescriptions, and referred him to Dr. Bijari.

¶ 49 On February 21, 2013, the claimant followed up with Dr. Lorenz reporting no improvement in his neck pain. Dr. Lorenz released him to return to work on sedentary duty and instructed him to follow up as needed.

¶ 50 On March 25, 2013, the claimant returned to Dr. Lorenz complaining of neck pain and stating that he was not able to work because of the pain. The claimant also informed Dr. Lorenz

that he had not received authorization to see Dr. Bijari. Dr. Lorenz declared the claimant at MMI and kept him on sedentary duty.

¶ 51 On May 21, 2013, Dr. Lorenz issued a narrative report at the request of the claimant's attorney. In his report, Dr. Lorenz explained that he recommended surgery because the claimant "failed conservative care" and did not benefit from physical therapy or oral steroids. The report also states that the claimant was suffering from "ongoing severe and disabling neck pain with radiation toward the right upper extremity" and the MRI scan revealed "a disc herniation at the C4-C5, with indentation of the cord." Regarding causal connection, Dr. Lorenz opined:

> "the [claimant]'s condition of ill-being, that is in particular a disc herniation at C4-C[5] was caused by the motor vehicle accident of May 18, 2011. I further believe that the [claimant]'s neck pain that started when driving a box truck on August 27, 2012, was a temporary and minor aggravation of his cervical condition that subsequently reverted to baseline."

¶ 52 The claimant testified that he continues to suffer from persistent neck pain and takes Norco, Valium and Naprosyn every day. He has difficulty lifting more than 8 to 10 pounds, performing repetitive motions, and driving a car that does not have a smooth ride. The claimant also testified that he wants the City to provide him with a job within his restrictions.

¶ 53 The two applications for adjustment of claim filed by the claimant for the injuries he sustained as a result of the accident on May 18, 2011, and August 27, 2011, were consolidated at a hearing pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2012)). Following that hearing, the arbitrator issued a single decision. The arbitrator found that the claimant's accident of May 18, 2011, arose out of and in the course of his employment. As to causation, the

arbitrator found that "[the claimant's] current condition of ill-being *is in part* causally related to the accident on [May 18, 2011]" in that it caused or aggravated the soft tissue injuries in his neck and paracervical muscles and aggravated his preexisting headaches. The arbitrator held that the claimant reached MMI by October 6, 2011, when Dr. Bijari released him to return to work full duty. The arbitrator awarded the claimant 25 2/7 weeks of TTD benefits for the period from May 18, 2011, through November 10, 2011, and ordered the City to pay the claimant's medical expenses incurred through October 6, 2011, the date he reached MMI. As to the alleged workplace injury of August 27, 2012, the arbitrator found that the claimant failed to prove that he sustained a work accident.

¶ 54 The claimant filed for a review of the arbitrator's decision before the Commission. The Commission affirmed and adopted the arbitrator's decision and remanded the matter pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 55 The claimant sought a judicial review of the Commission's decision in the circuit court of Cook County. On January 22, 2015, the circuit court entered an order confirming the Commission's decision. This appeal followed.

¶ 56 Before reaching the merits, we note the claimant's brief fails to comply with Illinois Supreme Court Rule 341 (eff. Feb. 6, 2013). The purpose of the rules governing the contents of briefs is to require the parties before the appellate court to present orderly and clear arguments so that this court can properly identify and dispose of the issues raised. *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 7. In this case, the claimant's brief is a copy-and-paste version of the "Statement of Exceptions and Supporting Brief" filed before the

Commission. The claimant's brief fails to properly develop arguments or support them with citations to the record or relevant authority, among other deficiencies.

¶ 57 This court will not assume the role of an advocate, and our duties do not include searching the record for error or performing the legal research that the appellant should have performed. *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). A brief that lacks any substantial conformity to the pertinent supreme court rules may justifiably be stricken. *Hall*, 2012 IL App (2d) 111151, ¶ 7. We recognize that striking an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the violations hinder our review. *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005).

¶ 58 In this case, we do not condone the claimant's failure to comply with the rules. However, because we have the benefit of cogent decisions of the arbitrator and circuit court, as well as a brief filed by the City, which shored up some of the claimant's deficiencies, we will not strike the claimant's brief or impose the sanction of dismissal of the claimant's appeal. We will not, however, consider any inappropriate matters or unsupported assertions contained in the claimant's brief. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) (mere contentions, without argument or citation to authority, do not merit consideration on appeal and are forfeited).

¶ 59 Turning to the merits of this appeal, the claimant first contends the Commission's finding that he did not sustain an accident arising out of and in the course of his employment with the City on August 27, 2012, is against the manifest weight of the evidence.

¶ 60 In order to recover benefits under the Act, a claimant has the burden to show by a preponderance of the evidence that he suffered a disabling injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). Whether

a work-related accident occurred is a question of fact, and the Commission's resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Pryor v. Industrial Comm'n*, 201 Ill. App. 3d 1, 5 (1990). For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal. *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005).

¶ 61 In this case, no one witnessed the claimant sustaining a workplace accident on August 27, 2012, and the Commission's decision on this issue is based upon its assessment of the credibility of the claimant's testimony. In resolving issues of fact, it is the Commission's role to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine the relative weight to accord evidence, and resolve conflicts in the testimony, including conflicting expert testimony. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). A reviewing court may not substitute its judgment for that of the Commission on questions of credibility. *Gallego v. Industrial Comm'n*, 168 Ill. App. 3d 259, 270 (1988).

¶ 62 Here, the Commission did not believe the claimant when he testified that he injured his neck at work on August 27, 2012, while driving over potholes and speed bumps. In assessing the claimant's credibility, the Commission noted that he exaggerated his symptoms in an attempt to "game the system," was taking addictive pain medication, and tried to avoid returning to work. Thus, although the claimant testified that he "killed his neck" while driving over potholes and speed bumps on August 27, 2012, the Commission gave no weight to this testimony.

¶ 63 The Commission also concluded that the medical records failed to show any history of an accident having occurred on August 27, 2012. In support of this finding, the Commission explained that when the claimant presented to the emergency room on August 27, 2012, and to

Dr. Miran on August 29, 2012, his complaints of neck pain were essentially no different than they were before the alleged accident. Indeed, the record shows that on April 16, 2012, the claimant told Mr. Blumenthal, a vocational rehabilitation specialist, that he experiences neck pain of 5-8 out of 10 "on a daily basis." The Commission also noted that after the claimant followed up with Dr. Miran on August 29, 2012, he did not receive any other treatment until he saw Dr. Lorenz on September 17, 2012, at which time his complaints of pain remained the same.

¶ 64 Our review of the record reveals additional evidence from which the Commission could have reasonably inferred that an accident did not occur on August 27, 2012. According to the City's "Injury on Duty Report," the claimant specifically denied being injured and instead complained that he "was not allowed to take his pain medication." The City's report states, in pertinent part, as follows:

> "Notes: I have a written statement from Mrs. Ford that on 8/27/12 at around 13:15, Mr. Esquivel *** informed me that [the claimant] was not feeling well, and that Mr. Esquivel told [the claimant] to bring truck in. Mrs. Ford & Mr. Esquivel went to meet [the claimant] in the lot. Mrs. Ford asked [the claimant] if he was injured. [The claimant] stated no, but that he was in pain, and was not allowed to take his pain medication after 14:30. Mrs. Ford told [the claimant] if he was not injured that he would have to see his own doctor. [The claimant] was then told to fill our edit and go home."

¶ 65 We further note, when the claimant presented to the emergency room at Hinsdale Hospital on August 27, 2012, his chief complaint was neck pain and soreness. However, the emergency room records do not reference any work-related injury occurring earlier that same

day. Rather, the claimant attributed his neck pain to an old injury occurring in May 2011. The hospital records also note that the claimant was "upset" because he "was forced back to work" and was "unable to take pain med's." Similarly, when the claimant followed up with Dr. Miran a few days later, he complained of neck pain. Dr. Miran's office note from that visit states that the claimant underwent a "c4-c5 fusion" surgery a year earlier and "stopped taking pain meds" which aggravated his neck pain. Although the records of Dr. Miran also state that the claimant's neck pain was "aggravated by driving Van," it was for the Commission to resolve conflicts in the medical records and draw reasonable inferences therefrom. *Hosteny*, 397 Ill. App. 3d at 674. Here, the Commission concluded that the claimant's neck symptoms at the time of his August 29, 2012, visit were essentially the same as they were on April 16, 2012, and May 23, 2013. In light of the fact that the medical records from the emergency room reflect that the claimant did not report any accident or new injury, we cannot say that the Commission's finding that the claimant failed to sustain his burden of proving an accident on August 27, 2012, is against the manifest weight of the evidence.

¶ 66 Next, the claimant asserts that the Commission's determination that the current condition of ill-being in his cervical spine is unrelated to his work accident of May 18, 2011, is contrary to the manifest weight of the evidence. In support of this argument, he challenges several factual findings underlying the Commission's decision. Specifically, he disputes the Commission's reliance upon the opinions of Drs. Lazar and Graf over those of Drs. Lorenz and Fronczak, who opined that the claimant's cervical spine condition was causally connected to the work-related accident of May 18, 2011.

¶ 67 We will not reverse a decision by the Commission unless it is contrary to law or against the manifest weight of the evidence (*Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006)), meaning that no rational trier of fact could have agreed with the outcome. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120 (1996). Whether we may have drawn variant inferences or reached a different conclusion is immaterial; we must defer to the determination of the Commission as long as there is sufficient evidence to support it. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Where medical testimony might be construed as conflicting, the resolution of such a conflict falls within the province of the Commission, and its findings will not be reversed unless contrary to the manifest weight of the evidence. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 37 (1982); *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206 (2003). Further, in cases involving a preexisting medical condition, the employee must establish that his work-related accident aggravated or accelerated the preexisting injury such that his current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. *Caterpillar Tractor Co.*, 92 Ill. 2d at 36-37; *Sisbro*, 207 Ill. 2d at 205. In addition, liability under the Act cannot rest upon imagination, speculation or conjecture; it must be based upon facts affirmatively connecting the employee's duties as a cause of the resulting injury. *Arbuckle v. Industrial Comm'n*, 32 Ill. 2d 581, 585 (1965).

¶ 68 At the outset, we note the Commission determined that the claimant's workplace accident of May 18, 2011, aggravated his preexisting headaches and soft tissue injuries to the neck and paracervical muscles resulting from his car accident on February 22, 2011. In support of its conclusion, the Commission relied upon the opinion of Dr. Lazar who opined that the accident

on May 18, 2011, aggravated the claimant's preexisting whiplash injury from his car accident on February 22, 2011, and lead to a soft tissue injury which is causing episodic headaches. The claimant does not challenge the Commission's finding in this regard. Rather, the claimant argues that the Commission's determination that his cervical spine condition is not causally related to the May 18, 2011, accident is against the manifest weight of the evidence.

¶ 69 As noted above, the claimant disputes the Commission's reliance upon the opinions of Drs. Lazar and Graf over that of Drs. Lorenz and Fronczak, who opined that the claimant's cervical spine condition was causally connected to the work-related accident of May 18, 2011. We see no basis to disturb the Commission's finding that the opinions of Drs. Lazar and Graf were more reliable than that of Drs. Lorenz and Fronczak on the issue of causation of the claimant's cervical spine condition. The Commission gave "a great deal of weight to Dr. Lazar's thorough report." While Dr. Lazar acknowledged that the claimant's May 18, 2011, accident aggravated his preexisting "soft tissue, whiplash injury" of February 22, 2011, he found no evidence of a "cervical herniated disc." Dr. Lazar supported his opinion with reference to the claimant's MRI, which showed a disc protrusion, *not herniation*, at C4-C5. He explained that such a protrusion at C4-C5 is normal and is not a pain generator since many patients who have never experienced neck pain have similar protrusions at C4-C5. Dr. Lazar further noted that the claimant's neck pain, which radiated to the right, did not correlate anatomically to the C4-C5 protrusion, which is midline. The Commission also gave "substantial weight" to the opinions of Dr. Graf that cervical fusion surgery was medically unnecessary and that the claimant was dishonest about his complaints.

¶ 70 While Drs. Lorenz and Fronczak provided a conflicting opinion in this regard—namely, that the cervical spine surgery was medically necessary—the resolution of such conflicting medical opinions falls within the province of the Commission. Here, the Commission gave "substantial weight" to the opinions of Drs. Lazar and Graf, and "no weight" to the opinions of Drs. Lorenz and Fronczak. The Commission noted that Drs. Lorenz and Fronczak recommended a highly invasive surgery based almost exclusively upon the claimant's subjective complaints. It found that Dr. Lorenz hastily concluded that the claimant failed conservative care because the claimant reported no benefit from the oral steroids or physical therapy. The Commission also noted that Dr. Lorenz never ordered electrodiagnostic tests to help determine the origin of the claimant's pain; failed to comment on the "lack of correlation" between the MRI which Dr. Lorenz interpreted as showing a C4-C5 disc herniation and the claimant's right-sided complaints; and did not attempt any type of meaningful pain management, such as injections. As to Dr. Fronczak, the Commission noted that he recommended cervical spine surgery without reviewing the "MRI films/disc" and, like Dr. Lorenz, he did not comment on the lack of correlation between the MRI findings and the claimant's right-sided complaints. The Commission concluded that the opinions of Drs. Lorenz and Fronczak "lack [a] sound basis." Based upon the record before us, we are unable to conclude that the Commission's rejection of Drs. Lorenz and Fronczak opinions is against the manifest weight of the evidence.

¶ 71 The claimant also challenges the Commission's rejection of his testimony as not credible. He claims that there is no evidence to support the arbitrator's finding that he exaggerated his symptoms and took addictive pain medication. We are not persuaded.

¶ 72 The claimant's argument amounts to nothing more than an invitation to reweigh the evidence, which is not the function of this court. See *Chicago Transit Authority v. Illinois Workers' Compensation Comm'n,* 2013 IL App (1st) 120253WC, ¶ 24 ("The appropriate test is whether there is sufficient evidence in the record to support the Commission's finding, not whether this court might have reached the same conclusion."). Here, the Commission, in adopting the arbitrator's decision, specifically found that the claimant's testimony was not credible. The arbitrator noted that the claimant exaggerated the severity of his accident and magnified his symptoms. For example, the claimant testified he was rear-ended by a Jeep Cherokee at "full blast speed" while his vehicle was stopped in traffic. However, the photograph of the Jeep shows damage to the front fender, grille and driver's side headlight, and slight bending of the hood. The arbitrator "expected to see far greater damage to the Jeep from a 'full speed' collision with a stopped Ford F-250." The arbitrator also noted that the claimant failed to introduce a photograph of the damage to his work truck.

¶ 73 Moreover, the arbitrator's finding that the claimant magnified his symptoms is supported by Dr. Graf's IME report in which he concluded that the claimant mislead his treatment providers, as well as the medical records showing that the claimant provided inconsistent and conflicting reports of pain. For example, the treatment records of MercyWorks, dated May 20, 2011, reflect that the claimant complained of neck pain at a 7 or 8 out of 10. However, the treatment records of Dr. Lovell from that same date, state that the claimant reported "a great deal of improvement in the severity of the left and right cervical pain and discomfort" and "is feeling much better."

¶ 74 The claimant also asserts the arbitrator's finding that he was taking pain medication since May 2011 is "without any support in the record." We disagree. We find ample support in the claimant's medical records which show he was repeatedly prescribed Norco beginning February 22, 2011, and continuing through the date of the arbitration hearing on July 9, 2013. Indeed, the claimant testified that he takes Norco every day. Based on our review of the record, we cannot say that no rational trier of fact could have found the claimant not credible or that an opposite conclusion is clearly apparent from the evidence.

¶ 75 In sum, we conclude that the Commission's causation determination is supported by sufficient evidence and an opposite conclusion from that reached by the Commission is not clearly apparent. Consequently, the Commission's finding that the claimant's current condition of ill-being in his cervical spine is not causally connected to his work accident of May 18, 2011, is not against the manifest weight of the evidence.

¶ 76 The claimant further contends that the Commission's denial of TTD benefits after November 10, 2011, is against the manifest weight of the evidence.

¶ 77 It is well settled that, when a claimant seeks TTD benefits, the dispositive inquiry is whether his condition has stabilized, meaning whether the claimant has reached MMI. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142 (2010). An employer's obligation to pay TTD benefits to an injured employee ends when the claimant's condition has stabilized. *Id.* at 149. The period of TTD constitutes a question of fact to be resolved by the Commission, whose determination will not be disturbed unless it is against the manifest weight of the evidence. *Id*. at 142.

¶ 78 In this case, the Commission found that the claimant reached MMI by October 6, 2011, when Dr. Bijari released him to return to work full duty. Thus, the claimant was not entitled to TTD benefits after October 6, 2011. It is unclear from the record, however, why the Commission awarded the claimant TTD benefits through November 10, 2011. Nonetheless, any claim of error as a consequence of the Commission's excessive award of TTD benefits has been forfeited as the City did not file a cross-appeal. *Ruff v. Industrial Comm'n*, 149 Ill. App. 3d 73, 79 (1986) ("If the appellee fails to file the cross-appeal, the reviewing court is confined to only those issues raised by the appellant"). Here, we are confined to the issue raised by the claimant that the TTD award was too low. Since the Commission awarded TTD benefits through October 6, 2011, the date the claimant's condition stabilized, we cannot say its determination is against the manifest weight of the evidence.

¶ 79 Next, the claimant argues that the Commission's determination that he was not entitled to medical expenses incurred after October 6, 2011, is against the manifest weight of the evidence.

¶ 80 We initially note the claimant makes no argument and cites no authority as to why the Commission's determination regarding medical expenses is contrary to the manifest weight of the evidence. The claimant's failure to properly develop an argument and cite to relevant authority constitutes a forfeiture of the argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Forfeiture aside, the claimant's argument must fail.

¶ 81 Under section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to a work-related accident and are required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (2001). What is 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. *Id.*

¶ 82 Here, the Commission found that the claimant proved that his accident of May 18, 2011, caused or aggravated soft tissue injuries to the neck and paracervical muscles and aggravated his preexisting headaches, but failed to prove that his cervical spine condition was related to the accident. As noted above, that finding was not against the manifest weight of the evidence. The Commission also found that the claimant's condition had stabilized by October 6, 2011, the date Dr. Bijari returned him to fully duty, and he did not require further medical treatment. Since the medical expenses incurred by the claimant after October 6, 2011, were related to his cervical spine condition and were not necessary to relieve the effects of the accidental injury, the Commission denied medical expenses incurred after that date. Based upon this record, we cannot find that the Commission's award of medical expenses from May 18, 2011, through October 6, 2011, is against the manifest of the evidence.

¶ 83 The claimant also argues that he is permanently disabled under an odd-lot theory or entitled to a wage differential award. He maintains that the Commission erred in failing to decide the issues on the merits because he never waived his right to wage differential benefits.

¶ 84 As we discuss more thoroughly below, the record establishes that the claimant's two applications for adjustment of claim were before the arbitrator and the Commission pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2012)). Section 19(b) provides in pertinent part as follows:

> "The Arbitrator *may* find that the disabling condition is temporary and has not yet reached a permanent condition and *may* order the payment of

> compensation up to the date of the hearing, which award shall be reviewable and enforceable in the same manner as other awards, and in no instance be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, but shall be conclusive as to all other questions except the nature and extent of said disability." (Emphasis added.) 820 ILCS 305/19(b) (West 2012).

¶ 85 While section 19(b) gives the arbitrator discretion to rule on the issue of permanent disability, our supreme court has held that it is improper for this court to address permanency where the issue was never raised before the arbitrator or the Commission on review. *Thomas*, 78 Ill. 2d at 333-34; see also *Brinkmann v. Industrial Comm'n*, 82 Ill. 2d 462, 470 (1980). In the case at bar, the question of permanent disability was not raised before the arbitrator or the Commission on review. The arbitrator, having determined that the claim is compensable, not only awarded TTD and medical benefits, but also stated that: "In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any." This language is taken from section 19(b), which the claimant invoked for an immediate hearing on the issue of temporary compensation. The record is clear that the claimant did not argue that he was entitled to compensation for a permanent disability. The Commission, which adopted and affirmed the arbitrator's decision, remanded this case to the arbitrator for a "determination of a further amount of temporary total compensation or of compensation for a permanent disability, if any, pursuant to *Thomas*." Accordingly, the claimant may seek permanent disability benefits under an odd-lot theory or a wage differential award on remand.

¶ 86 Next, the claimant disputes the Commission's denial of vocational rehabilitation benefits, arguing that such denial is against the manifest weight of the evidence. Our review of the record shows, however, that neither the arbitrator nor the Commission addressed whether the claimant was entitled to vocational rehabilitation benefits. Instead, the record reveals that the claimant expressly "reserved" the issue. We further observe that the claimant never argued that he is entitled to vocational rehabilitation benefits in the Petition for Review or Statement of Exceptions he filed with the Commission. As discussed above, the failure to raise an issue before the arbitrator and the Commission results in forfeiture. *Thomas*, 78 Ill. 2d at 333-34; *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020 (2005). Therefore, the claimant has forfeited for purposes of this appeal any argument concerning his entitlement to vocational rehabilitation benefits.

¶ 87 Finally, the claimant asserts that the Commission's failure to award penalties under sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), 19(*l*) (West 2012)) and attorneys' fees under section 16 of the Act (820 ILCS 305/16 (West 2012)), is against to the manifest weight of the evidence. Once again, our review of the record shows that the claimant did not seek penalties and fees before either the arbitrator or the Commission. Accordingly, he has forfeited this claim as well. *Greaney*, 358 Ill. App. 3d at 1020.

¶ 88 Based on the foregoing analysis, we affirm the judgment of the circuit court which confirmed the Commission's decision and remand this matter to the Commission.

¶ 89 Affirmed and remanded.