2016 IL App (1st) 160359WC-U

NO. 1-16-0359WC

Order filed December 23, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

PERSONNEL STAFFING GROUP, LLC d/b/a MOST VALUABLE PERSONNEL,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 15-L-50361
THE ILLINOIS WORKERS' COMPENSATION COMMISSION (Felipe Alvarado, Defendant-Appellee).	)	Honorable Carl Anthony Walker, Judge, presiding.

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

ORDER

¶ 1 *Held*: The Commission did not err in its determination that the claimant was entitled to permanent total disability benefits under section 8(f) of the Workers' Compensation Act under an "odd lot" theory where there was evidence in the record to support a finding that no stable labor market existed for the claimant.

¶ 2 The employer, Personnel Staffing Group, LLC, doing business as Most Valuable Personnel, appeals the judgment of the circuit court of Cook County which confirmed the

decision of the Commission awarding the claimant, Felipe Alvarado, permanent total disability benefits (PTD) pursuant to section 8(f) of the Workers' Compensation Act (the Act). 820 ILCS 305/8(f) (West 2010). For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 On October 13, 2011, the claimant filed an application for an adjustment of claim pursuant to the Act (820 ILCS 305/1 *et seq.* (West 2010)), alleging permanent and severe injury to his lumbar spine. At the arbitration hearing, the claimant testified via an interpreter, who translated all of the questions from English to Spanish, and all of the claimant's answers from Spanish to English, as follows. On October 2, 2011, the claimant was sent by the employer to work at a factory called Jet Litho (JELT). While he was performing his job duties of stacking boxes of cards onto pallets, he felt a sudden onset of pain in his low back. He notified the employer of the accident and first sought medical treatment at St. Mary of Nazareth Hospital on October 4, 2011. The following day, he presented to Health, Pain & Spine Center and underwent physical therapy with Dr. Victor Gutierrez. This provided him some relief, but he still had some complaints of pain. Dr. Gutierrez referred him for an MRI, which he had on October 6, 2011. Dr. Gutierrez then referred the claimant to Dr. Syed Naveed of Neurological Consultants Group on October 8, 2011. Dr. Naveed performed a nerve conduction test and recommended a series of three injections to the claimant's lower back. While the injections provided some relief, the claimant's pain persisted.

¶ 5 Subsequently, the claimant was referred for a surgical consultation with Dr. Mark Lorenz at Hinsdale Orthopedics, who recommended surgery. Following the

recommendation, the employer sent the claimant for an independent medical evaluation (IME) with Dr. Ghanayem at Loyola University on January 11, 2012. Dr. Ghanayem agreed that the claimant required surgery and Dr. Lorenz performed the surgery on June 1, 2012, at Adventist Hinsdale Hospital. The claimant treated with Dr. Gutierrez post-operatively for physical therapy.

¶ 6 After receiving physical therapy for some time, Dr. Lorenz recommended a Functional Capacity Evaluation (FCE). The claimant received a FCE at Best Practice Physical Therapy on February 3, 2013, and the result of the FCE was that the claimant was unable to return to work at any capacity. The claimant returned to Dr. Lorenz on March 11, 2013, who agreed with the results of the FCE and discharged the claimant, placing him at Maximum Medical Improvement (MMI).

¶ 7 On May 20, 2013, the employer sent the claimant back to Dr. Ghanayem for another IME. Dr. Ghanayem in his report indicated that he did not agree with the results of the FCE and would place the claimant back to work at sedentary and/or light duty, with the ability to sit, stand, and move throughout the day. Following Dr. Ghanayem's report, the employer stopped paying benefits to the claimant and offered the claimant a light duty position in the employer's office. This position required the claimant to work four hours per day and five days per week. The claimant testified that at first the employer wanted him to mop and sweep and the claimant had to inform the employer that these tasks fell outside of his restrictions. As a result, his duties required him to monitor the restrooms, making sure they were clean, and throwing away light garbage.

The claimant testified that these duties required too much standing, causing numbness in his buttocks region.

¶ 8 The claimant testified that in order to get to the employer's office for work, he had to take the bus. It took him 20 to 30 minutes to get to the bus stop because it was very troublesome for him to walk and he was required to stop frequently. The bus ride itself to the office took about 40 minutes. Riding the bus also caused him discomfort because he had to get up frequently and the shaking of the bus when it hit potholes caused him further pain. Once the bus left him off at this stop, the claimant testified that it then took him 20 to 30 minutes to get from the stop to the office. Twice he fell down trying to get to the office because of leg pain and weakness. The claimant worked at the employer's office for three months and then stopped because he wasn't able to do it anymore and his back gave out. He only worked for the three months because his benefits were discontinued and he needed the money.

¶ 9 Prior to the accident, the claimant lived by himself but at the time of the hearing he lived with his daughter who is married and has children. Since the accident he is no longer able to sleep through the night. He has to take ibuprofen every day to help with the pain, which is normally at a level five or six. He has a hard time showering, using the toilet, and changing his clothes, although he manages to do these tasks himself because he doesn't want anyone to help him. He receives food stamps and has applied for disability, but has not yet received a determination. The claimant testified he underwent a vocational assessment with Vocamotive which interviewed him regarding his previous job skills and education. He is a permanent resident of the United States and has lived in

this country for 25 years. He speaks and understands a little English but is unable to read or write in English.

¶ 10 On cross-examination, the claimant testified that following his surgery, his daughter would give him rides to pick up his benefits checks from the employer. The claimant was also reminded that prior to being offered the job at the employer's office, the employer offered him a job at Segherdahl Graphics but he turned it down because it was too far for him. He could not get a ride or public transportation to that location. Also, he worked at the employer's office for a little longer than three months. When he determined he could no longer perform the duties of that job, the employer offered him a job at Stampede Meat Factory, but he did not attempt that job because it was full-time hours and he had no transportation. During his testimony, the claimant requested to get up for a time and stand. He then testified that he had been documenting his job search efforts, but had left his records in his daughter's car by accident.

¶ 11 Bill Gonzalez, safety and workers' compensation director for the employer, testified regarding his efforts to provide the claimant with a job within the restrictions set by Dr. Ghanayem. First, the employer offered the claimant a position at Segherdal, one of its clients. The job was monitoring the cafeteria area and bathrooms and would not involve any heavy lifting. The claimant refused the job. The employer next placed the claimant at its office where he was assigned very light duty work, possibly sweeping, cleaning the windows, and assisting the staff with the filing of paperwork. Mr. Gonzalez testified that the claimant could sit and stand as needed at that job. The employer then offered the claimant a cafeteria monitoring job at another client, Stampede. Gonzalez

testified that this position would also allow the claimant to sit and stand as needed and there were several shifts claimant could choose from. The jobs refused by claimant were located in Wheeling and Oak Lawn but Mr. Gonzalez testified that there are other jobs that require similar levels of work capacity that he could put the claimant to work at that day, including American Marketing, located in Mundelein, Georgia Nut, located in Skokie, and Blommer Chocolate in downtown Chicago.

¶ 12 Medical records and other reports received into evidence reveal the following. The claimant presented to the emergency room at Saints Mary and Elizabeth Medical Center on October 4, 2011, complaining of, *inter alia*, right lower back pain radiating to his right leg. He was diagnosed with a low back strain and instructed to follow up with a doctor and that he may need an MRI. The claimant was then evaluated by Dr. Victor Gutierrez at Health, Pain & Spine Center, S.C., on October 5, 2011.

¶ 13 Dr. Gutierrez's notes contain a more detailed account of the claimant's workplace accident than that provided via the claimant's testimony at the arbitration hearing. Although the employer did not contest a work-related accident, and is not appealing the issue of causation, we find it relevant to note the history of the injury in order to give the context for the severity of the claimant's injury. According to Dr. Guiterrez's history, the claimant had worked at the JELT location in Downer's Grove at the behest of the employer for eight to nine months. His job entailed unloading boxes full of gift cards from "carts" to a "skid" that is on the floor in order for a forklift to carry them for shipping. Each cart contained approximately 180 boxes, which measured approximately 1 x 1 ½ feet and were piled approximately four to five feet high. The claimant was

unloading three to four boxes at a time in a "bending and twisting" manner from the cart to the skid. He performed this job for eight hours a day, five days a week from January 2011 until October 2, 2011. Approximately three months prior to October 2, 2011, the claimant started feeling back pain radiating to his right lower extremity and tried to control his pains with "over the counter medication and home remedies" and continued to perform the same job. On October 2, 2011, a sudden exacerbation of the pain in his back caused him to be unable to continue working. He informed his supervisor at JELT, who advised him to go home and seek medical help.

¶ 14 The notes from Dr. Gutierrez's initial evaluation of the claimant reveal that the claimant was experiencing constant sharp low back pain, on the right greater than on the left, and radiating to his right lower leg. He rated the pain 10/10 and the pain seemed to be aggravated by movements in general, normal, everyday lifting, bending at the waist, and activities of daily living such as walking for ½ block or more, going up three to four steps or more, getting dressed and undressed, standing for more than 10 minutes, sitting for more than 10 minutes, showering, and washing his clothes. He was also experiencing constant sharp, shooting pain in the posterior lateral aspect of his right thigh, knee, leg, and ankle, and constant numbness and weakness in his lower right leg. Based on a comprehensive orthopedic evaluation of the claimant, Dr. Gutierrez placed the claimant on temporary total disability (TTD) and recommended a course of physical therapy as well as a variety of other modalities geared toward relieving his symptoms. Finally, Dr. Gutierrez ordered an MRI of the claimant's lumbar spine.

¶ 15 An MRI was conducted of the claimant's lumbar spine on October 6, 2011, by MRI Lincoln Imaging Center. The MRI report notes prominent diffuse lumbar spondylosis as follows: a five millimeter left paracentral/neural foraminal protrusion at L2-3, a 5 millimeter broad-based right paracentral/neural forminal herniation at L4-5 with significant caudal extension of disc material within the right lateral recess, and severe right lateral recess stenosis at L4-5.

¶ 16 On October 9, 2011, the claimant presented to Dr. Syed Naveed at Neurological Consultants Group, LLC, by referral of Dr. Gutierrez. Dr. Naveed diagnosed lumbosacral radiculopathy, ordered the claimant to remain off work, to continue physical therapy, and to return in two weeks for possible electrodiagnostic testing and injections. On October 22, 2011, the claimant returned to Dr. Naveed, who conducted electrodiagnostic testing, confirming his diagnosis. Dr. Naveed continued to treat the claimant with steroidal injections. On November 12, 2011, Dr. Naveed noted that the claimant could return to work with restrictions of sitting only, no lifting, bending, or pulling, and alternating sitting and standing as tolerated. According to Dr. Naveed's records, the claimant was last seen and received a steroidal injection from Dr. Naveed on November 18, 2011. However, Dr. Gutierrez's records make reference to appointments the claimant had with Dr. Naveed on December 9, 2011, and January 28, 2012.

¶ 17 The claimant continued to treat conservatively with Dr. Gutierrez through January 30, 2012. Dr. Gutierrez's notes from that visit state that he was in complete agreement with Dr. Naveed that the claimant be referred to Dr. Mark Lorenz for a surgical consultation. In addition, in an IME of the claimant completed by Dr. Alexander

Ghanayem at the behest of the employer on January 11, 2012, Dr. Ghanayem concurred with the opinion of Dr. Lorenz regarding the necessity of a lumbar discectomy.

¶ 18 The claimant first consulted with Dr. Lorenz of Hinsdale Orthopedics on March 15, 2012. On physical examination, Dr. Lorenz noted the claimant had quite a difficulty with forward bending with pain radiating down his right lower leg when he did so. Dr. Lorenz evaluated the October 6, 2011, MRI and noted a fairly large disc herniation at L4-5 impinging the exiting nerve root and producing severe stenosis in the right lateral recess. Dr. Lorenz determined that conservative care of the claimant had failed and recommended a discectomy on the right at L4-5. Dr. Lorenz recommended that the claimant remain on sedentary work restrictions and that surgery be scheduled. After a pre-operative visit on May 29, 2012, the claimant presented at Adventist Hinsdale Hospital on June 1, 2012. After the consultation with Dr. Lorenz, the claimant elected to proceed with the recommended L4-5 laminectomy and discectomy. However, the operative report reveals that during the surgery, Dr. Lorenz also discovered the need for an interforaminal decompression and disc removal at L3, which he also conducted.

¶ 19 Dr. Lorenz executed a work status report on June 14, 2012, opining that the claimant was unable to return to work at that time. At a follow-up visit on July 12, 2012, Dr. Lorenz instructed that the claimant remain off work and begin physical therapy. Work status reports executed by Dr. Lorenz on September 5, 2012, and October 10, 2012, also indicated the claimant was unable to return to work. At a follow-up visit with Dr. Lorenz on November 26, 2012, the claimant indicated his return to physical therapy with Dr. Gutierrez had helped, but he was having increased lower back pain and a return of

numbness in his right leg. X-rays showed a right hemilaminectomy at L4-5 and lumbar spondylosis at several levels. Dr. Lorenz ordered continued physical therapy, a repeat MRI, and for the claimant to remain off work. Dr. Gutierrez's physical therapy records from the date of surgery to the end of 2012 show little improvement in the claimant's condition, and the claimant discontinued physical therapy at that time.

¶ 20 On December 14, 2012, the claimant underwent a repeat MRI at MRI Lincoln Imaging Center. This MRI report contains the following impressions: central herniation at T10-11 and left herniation at L2-3, with underlying bulge narrowing the foramina; left herniation at T12-L1; bulging of the L1-2 disk narrowing the foramina; L3-4 and L4-5 surgery with residual bulge narrowing the foramina; foraminal narrowing at L5-S1; and mild to moderate spinal stenosis. The report concluded that compared with the previous MRI, the L3-4 and L4-5 surgery changes were new, but the other findings were similar.

¶ 21 At his January 21, 2013, follow-up visit with Dr. Lorenz, the claimant was still complaining of chronic back pain and numbness in his leg. After a physical examination and review of the December 14, 2012, MRI, Dr. Lorenz recommended that the claimant remain off work, continue with pain management through medication, and undergo an FCE. Accordingly, the claimant underwent an FCE at Best Practice Physical Therapy on February 8, 2013. After reviewing the results of the FCE, which are discussed below, Dr. Lorenz, at a follow-up visit on March 11, 2013, concluded that the claimant is at MMI and unable to return to work in any capacity. Dr. Lorenz instructed the claimant to continue with pain management and discharged him from care.

¶ 22 According to the claimant's February 8, 2013, FCE report, conducted by Best Practice Physical Therapy, the FCE was based on the Dictionary of Occupational Titles-Residual Functional Capacity (DOT-RFC) Battery. The DOT-RFC consists of a battery of job-related tasks from job factors defined in the Dictionary of Occupational Titles (DOT). The reliability and validity of the DOT-RFC Battery has been established by publication in peer reviewed journals, which are cited in the report. Each job description in the DOT has a minimal or specific work capacity defined as the "demand minimal functional capacity" (DMFC), which is based on the physical demands of each occupation. The DOT is used to standardize the DMFC as to multiple job factors to allow for an accurate assessment of determining if a person can return to an occupation. Individuals must be able to meet the established DMFC for each job factor as defined in the DOT in order to return to work.

¶ 23 Claimant failed to meet the DMFC standards in each of the following areas: (1) standing - claimant was only able to stand for 15 minutes whereas 30 minutes is the DMFC; (2) sitting - claimant was only able to sit for 20 minutes whereas 30 minutes is the DMFC; (3) walking - claimant was only able to walk for .2 miles whereas one mile is the DMFC; (4) lifting - claimant was unable to lift at all and thus does not fall into any DOT strength category; (5) carrying - claimant has a maximum carrying capacity of five pounds but does not fall into any DOT strength category due to his inability to lift; (6) pushing - claimant has a pushing capacity of 15 pounds whereas 100 pounds is the DMFC; (7) pulling - claimant has a pulling capacity of 15 pounds whereas 80 pounds is the DMFC; (8) crouching - claimant was unable to meet the DMFC of crouching on a

narrow beam for at least 30 seconds, stooping at least 75 degrees while bending both knees, flexing the trunk at least 75 degrees; (9) kneeling - the claimant was unable to meet the DMFC of kneeling on one knee or both knees; (10) crawling - the claimant is unable to crawl on hands and knees or hands and feet at all whereas the DMFC is that he be able to do so for six feet.

¶ 24 Based on the above measurements, the FCE concluded that the claimant is unable to return to work at any capacity because the claimant is incapable of lifting at all and his maximum carrying capacity is five pounds. According to the DOT-RFC battery, the claimant must be capable of meeting the DMFC for both lifting and carrying strength categories in order to return to work at any capacity. The report specifies that the claimant was able to carry five pounds from waist level and was unable to lift at all because the lifting measurement starts from floor level and the claimant is unable to bend down to even begin to reach an item to be carried from floor level due to the limited range of motion in his lumbar spine. The clinician stated in the report that the FCE is valid and reliable in that the claimant provided full and consistent effort throughout the FCE testing as evidenced by the ration of increased vitals to increased effort. According to the clinician, the claimant demonstrated typical and consistent adjustment of body postures, changing facial expressions, and visible muscle fatigue consistent with the nature of his pathology. In addition, the clinician noted that the claimant did not engage in self-limiting behavior.

¶ 25 The claimant returned to Dr. Ghanayem on May 20, 2013, at the employer's request. Dr. Ghanayem disagreed with the results of the FCE, stating that "[c]learly for a

gentleman in his age group with residual symptoms after a technically well done discectomy and no motor deficits, he can return back to work at least at the sedentary, most likely the light demand level, with the ability to sit, stand, and move about throughout the course of the workday." The report concluded that claimant was at MMI.

¶ 26 The claimant also underwent a vocational evaluation by Vocamotive on January 30, 2014, and the report from that evaluation, dated February 24, 2014, was admitted into evidence. The evaluation consisted of a personal interview with claimant in the presence of his attorney and with the use of an interpreter, as well as a record review. According to the evaluation, the claimant reported that he was not taking prescription medications for pain but did use over-the-counter Ibuprofen. He used a cane to assist in ambulation and a back brace which he said helped with the pain. He also used a TNS unit for pain control on an as-needed basis. With regard to activities of daily living, he reported living with his daughter and needing assistance. He reported he was not independent with driving. He had difficulties sleeping, reporting an average of four hours of sleep per night secondary to discomfort. He felt that he could sit and stand for about 15 minutes, walk for about two blocks, and lift about five pounds on an occasional basis. He reported that he could not stoop, could not tie his shoes, and could only bend "a little bit." He reported experiencing cramps in his right leg and foot on a daily basis.

¶ 27 As for educational history, the claimant reported that he has never completed any formal education or training beyond six years of primary school education in Mexico. He is not able to read English or understand spoken English. He has no certifications, has not ever used a computer, does not have a driver's license, and has no mechanical skills

or experience related to the repair of automobiles. With regard to vocational history, the claimant reported he worked for smaller companies performing labor duties in factories from 1980-1983. From 1983-2003, he banded packages of wood into bundles for a company that cut wood. He was unemployed from 2003-2005. The claimant did not report a work history between 2005 and 2010. In 2010 he worked at a company through a staffing agency attaching plastic handles to boxes for one year at $8.50 per hour. In 2011, he began working for the employer at the job site where his injury occurred. He worked 37.5 hours per week at $8.75 per hour. He also reported working for the employer from June to October 2013, as described in his testimony before the arbitrator. He worked four hours a day as a bathroom monitor. He sat in a chair and made sure there was no vandalism done in the bathroom. He reported that he had been in too much pain and voluntarily left this position.

¶ 28 The Vocamative report indicated that the rehabilitation counselor had reviewed the IME of Dr. Ghanayem which opined that the claimant could perform at least at the sedentary level, most likely the light level, of physical demand with the ability to sit, stand, and walk throughout the workday. The report noted that the differences between sedentary and light duty function are vast, as the United States Department of Labor guidelines classify sedentary work as work involving lifting more than 10 pounds at a time on an occasional basis and being seated a majority of the day, while light work is classified as lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds, with a good deal of walking and standing.

¶ 29 The Vocamative report opined that the claimant does not have access to a substantial gainful labor market and is not able to return to work at any capacity. With regard to the claimant's age of 56, the report noted that an age above 55 is considered "advanced age" by the Social Security Administration and that advanced age significantly affects a person's ability to adjust to other work. The report noted that the majority of sedentary employment entails higher skilled positions that will require at least the completion of a high school education. These positions are typically desk jobs that will also require computer proficiency and written/oral communication skills. Thus, if functioning at a sedentary level of physical demand, the report opined that due to the claimant's lack of education, lack of transferable skills, and limited English communication skills, the claimant would not have access to a gainful labor market. If functioning at a light level of physical demand with the need to alternate sitting, standing, and walking, the report opined that the claimant does not have access to substantial gainful employment as he would require significant accommodations in any labor market. Based on a Labor Market Survey completed by Vocamotive to assess the claimant's access to positions that would be prospectively available to him given his limited education and skills, including cashier, fast-foods worker, and assembler, the report opined that such positions require physical capabilities and/or English literacy that are outside the claimant's ability.

¶ 30 On April 23, 2014, Dr. Gary Shapiro of the American Board of Orthopaedic Surgery submitted a medical record review report at the request of the employer. According to the report, Dr. Shapiro was provided with the IME reports of Dr. Ghanayem

and the FCE report from Best Practice Physical Therapy and asked to give an opinion as to whether the FCE was valid. According to Dr. Shapiro's report, he believes the FCE was not valid because the claimant's heart rate, which rose from a resting rate of 83 beats per minute to 96 beats per minute, demonstrated poor effort on the part of the claimant and therefore did not show the claimant's maximum capabilities.

¶ 31 On May 12, 2014, Corvel submitted a labor market survey at the employer's request. According to this report the occupations of food preparation, telemarketer, and inspector were explored as these occupations were considered by Corvel to be within the claimant's physical restrictions as defined by the medical reports submitted to Corvel, which included Dr. Ghanayem's IME evaluation reports and the FCE conducted by Best Practice Physical Therapy. With regard to the occupation of food preparation, a survey of available employment opportunities revealed that most of these opportunities had physical requirements such as lifting up to 50 pounds and ability to stand for long periods of time. With regard to telemarketing, verbal communication skills in English were required for most positions. With regard to Inspector, requirements included the ability to carry, lift, and/or move up to 75 pounds on a frequent basis, frequent sitting, standing, walking, and climbing, and strong verbal communication skills in English. The report opined that it is possible the claimant may need accommodations and additional training in order to help him return to work as soon as possible and that he may benefit from computer classes and GED classes. With a diligent job search, the report concluded, the claimant could obtain employment in any of these areas.

¶ 32 On June 17, 2014, the arbitrator issued a decision, finding, *inter alia*, that the claimant is entitled to PTD benefits of $473.03 per week for life, commencing May 13, 2014, pursuant to section 8(f) of the Act. 820 ILCS 305/8(f) (West 2010). First, the arbitrator found that the claimant established by medical evidence that he is permanently and totally disabled as of March 11, 2013, when Dr. Lorenz reviewed the FCE submitted by Best Practice Physical Therapy, determined it to be valid, and placed the claimant at MMI with the inability to return to work in any capacity. The arbitrator found, in the alternative, that the claimant had met his burden to prove permanent total disability under an "odd-lot" theory. According to the arbitrator, the claimant proved that he will not be regularly employed in a well-known branch of the labor market by virtue of his lack of a formal education, his lack of facility in English, his limited work history, his valid FCE, the restrictions that Dr. Lorenz and Dr. Ghanayem imposed, his ongoing lumbar spine and radicular complaints, and his vocational assessment and labor market survey. The arbitrator concluded that by virtue of this evidence, the burden shifted to the employer to show that some kind of suitable work is regularly and continuously available to the claimant, and that showing was not provided. The arbitrator commended the employer for offering the claimant positions within its organization that met the sedentary to light duty restrictions imposed by Dr. Ghanayem and found those jobs were likely available. However, the arbitrator concluded that claimant attempted to work the modified duty for three to five months but was unable to continue working even in an accommodated capacity based on the increased pain caused by job duties combined with the difficult commute. The arbitrator found that the additional positions within the employer's

organization required the same job duties and similar or further commutes. The arbitrator disregarded the Corvel vocational evaluation report, finding that the claimant's educational, language, and physical barriers disqualified him from employment in the food preparation, telemarketing, and inspecting occupational fields. For all of these reasons, the arbitrator concluded that no stable continuous labor market exists for the claimant.

¶ 33 The employer sought review of the arbitrator's decision before the Commission. On review, the Commission affirmed the decision of the arbitrator as modified. Relevant for the purposes of this appeal, the Commission adopted the opinions of Dr. Ghanayem and Dr. Shapiro that the claimant is not medically permanently totally disabled and the FCE did not truly test the claimant's physical abilities. The Commission gave little weight to the opinion of Dr. Lorenz that the claimant is medically permanently totally disabled as Dr. Lorenz based his opinion solely on the FCE, which the Commission found to be invalid.

¶ 34 Nevertheless, the Commission affirmed the arbitrator's finding of "odd lot" permanent total disability. The Commission found credence in the Vocamotive report, which found that the claimant does not have access to substantial gainful employment due to his lack of secondary education, transferrable skills, and English language skills, as well as his age. The Commission gave little weight to the labor market survey from Corvel because the positions listed in Corvel's labor market survey required good English language skills, the transferrable skills the claimant does not possess, or exceeded the claimant's restrictions per Dr. Ghanayem. Turning to the employer's job offers to the

claimant of three similar part-time monitor positions, the Commission found those job offers did not truly reflect the claimant's long term employment prospects in a competitive labor market. The Commission further noted the claimant's testimony about his persistent symptoms, long and difficult commutes to the employer's office, and that the claimant quit working because his back gave out. The Commission therefore awarded the claimant, *inter alia*, "odd-lot" PTD benefits of $473.03 per week, beginning November 2, 2013.

¶ 35 The employer filed a petition for review in the circuit court of Cook County, solely seeking review of the Commission's decision to award the claimant "odd lot" PTD benefits. The circuit court entered a judgment confirming the Commission's decision. The employer now appeals the circuit court's judgment.

¶ 36 ANALYSIS

¶ 37 The employer challenges the Commission's determination that the claimant satisfied his burden of showing "odd lot" permanent disability status. Our court has set forth the well-established standards regarding our review of the Commission's decision that a claimant is entitled to PTD benefits as follows:

> "An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. [Citation.] However, the employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. [Citation.] Rather, the employee must show that he is unable to perform services except those so limited in quantity, dependability, or quality that there is no reasonably stable

> market for them. [Citation.] If the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is on the claimant to prove by a preponderance of the evidence that he fits into the 'odd lot' category - one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. [Citation.] The claimant ordinarily satisfies this burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. [Citation.] Whether a claimant falls into the 'odd-lot' category is a factual determination to be made by the Commission, and that determination will not be set aside unless it is against the manifest weight of the evidence. [Citation.] Once the claimant establishes that he falls into the 'odd-lot' category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. [Citation.]" *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544-45 (2007).

¶ 38 In the present case, the Commission modified that part of the arbitrator's decision that determined that the claimant was medically totally disabled, finding the FCE performed by Best Practice Physical Therapy to be invalid per the opinion of Dr. Shapiro, and finding Dr. Lorenz's opinion of medical total disability to be based on the invalid FCE. Furthermore, it is undisputed that the claimant failed to prove "odd lot" status by

showing that he engaged in a diligent but unsuccessful job search. However, the Commission determined that the claimant did meet his burden to prove that he fell within the "odd lot" category of permanent total disability via the second method of such proof: that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. Further, the Commission found that the employer failed to prove that the claimant is employable in a stable labor market and that such a market exists. The employer argues that these findings were against the manifest weight of the evidence. For the following reasons, we disagree.

¶ 39 We find the Commission's analysis, which concluded that the claimant met his burden to prove that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market, to be well-reasoned and based on ample evidence. The Commission found the opinions expressed in the Vocamotive vocational report - that the claimant does not have access to substantial gainful employment due to his lack of secondary education, transferable skills and English language skills, as well as his age, to be credible. On the contrary, the Commission gave little weight to the Corvel labor market survey submitted by the employer because the positions listed in that report required good English skills, required transferrable skills the claimant did not possess, or exceeded the claimant's physical abilities per Dr. Ghanayem.[1] We have reviewed these reports, as set forth in detail above,

[1] We note that the employer argues that there were a couple of positions listed in the Corvel labor market survey that do state that physical limitations can be

and cannot say that an opposite conclusion to that reached by the Commission is clearly apparent. "It is the Commission's function 'to assess the credibility of witnesses, weigh the evidence, draw reasonable inferences from the evidence, and determine the questions of fact.'" *Alexander v. Industrial Comm'n*, 314 Ill. App. 3d 909, 915 (2000) (quoting *Meadows v. Industrial Comm'n*, 262 Ill. App. 3d 650, 653 (1994)) (citing *Pagnelis v. Industrial Comm'n*, 132 Ill. 2d 468,483 (1989)). We will not substitute our judgment in place of that of the Commission with regard to the weight and credibility of the vocational assessment reports and the inferences to be drawn from them, which resulted in the Commission's conclusion that the claimant met his initial burden of proof regarding his "odd lot" status.

¶ 40 The employer argues that even if the claimant met his initial burden to establish his "odd lot" status, that the employer met its burden to refute that status by proof that the claimant is in fact employable in an existing and stable labor market. To that end, the employer argues that it offered evidence that the claimant worked in a position that the employer provided at one of its third-party client's locations as a "restroom monitor." The claimant worked at that position for three to five months, but quit. The claimant testified he quit because he just wasn't able to do it anymore. The employer presented

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accommodated. However, our review of the report shows that these are in the food service area and the employer points out some of those positions surveyed were willing to accommodate "an otherwise qualified candidate." The vast majority of these positions required standing and English ability.

evidence, in the form of the testimony of its representative, that the employer offered the claimant three other jobs with its third-party clients with essentially the same job duties. The Commission determined that these positions did not truly reflect the claimant's long term employment prospects in a competitive labor market. We do not find this conclusion to be against the manifest weight of the evidence because an opposite result is not clearly apparent. We believe it is a reasonable conclusion that three existing temporary positions in "restroom monitoring," or the like, that the employer was able to arrange through its third-party clients, do not rise to the level of "an existing stable labor market." Again, we will not substitute our judgment for that of the Commission.

¶ 41 We find the cases relied upon by the employer to be distinguishable. In *Alexander*, there was no evidence to support a conclusion that no stable labor market existed for someone with the claimant's experience, training, education, and age. 314 Ill. App. 3d at 916. In *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d 587, 592 (1994), the only evidence the claimant presented was that he was 52 years old with an eighth grade education. In *Westin Hotel*, the claimant presented no evidence from a rehabilitation services provider or vocational counselor, and there was no evidence of any labor-market survey regarding the claimant. 372 Ill. App. 3d at 545. Here, by contrast, the claimant introduced evidence of his sixth grade education in Mexico, extremely limited English-speaking abilities, lack of transferable skills, as well as a vocational report and labor market survey. The Commission was free to give credence to the evidence submitted by the claimant and to determine the credibility of the conflicting evidence in favor of the claimant.

¶ 42 CONCLUSION

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

¶ 44 Affirmed.