2017 IL App (1st) 161915WC-U

Workers' Compensation
Commission Division
Order Filed: July 14, 2017

No. 1-16-1915WC

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOSEPH AGRESTO,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 15 L 050822
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*,	)	Honorable
	)	Carl Walker,
(City of Chicago, Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: We affirmed the circuit court's order confirming the decision of the Illinois Workers' Compensation Commission limiting the benefits to which the claimant is entitled under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010)).

¶ 2 The claimant, Joseph Agresto, appeals from an order of the circuit court which confirmed the November 23, 2015, decision of the Illinois Workers' Compensation Commission (Commission), limiting the benefits to which he is entitled under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)) for injuries he sustained while in the employ of the City of Chicago (City) on June 9, 2010. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence introduced at the arbitration hearings on September 1, 2010, and March 25, 2015.

¶ 4 At all times relevant, the claimant was employed at the City, working in the Department of Fleet and Facility Management. Before the events giving rise to the instant claim, the claimant suffered a L4-L5 herniated disc and underwent surgery on January 6, 2006, which was performed by Dr. Wesley Yapor. The surgery consisted of an L4 hemilaminotomy and an L4-L5 discectomy. Following that surgery, the claimant returned to work for the City in a light-duty capacity with restrictions of no sitting for longer than one-half hour, and no bending, lifting, twisting, jerking, stair climbing, bouncing, or any other activity which would jar his back. The claimant had successfully worked under those restrictions from the fall of 2006 until the accident giving rise to the instant claim.

¶ 5 On June 9, 2010, while the claimant was working, a wheel on the chair in which he was sitting broke, causing the front of the chair to drop approximately three inches. The claimant testified that, as he tried to catch himself, he felt a pinch in his low back. According to the claimant, the pain was similar to the pain he experienced when he herniated a disc, only more extreme.

¶ 6 Pursuant to instructions from his supervisor, the claimant reported to MercyWorks' medical facility for treatment on the day of his accident. The records of that visit reflect that the claimant gave a history of having jarred his back at work when a wheel on the chair in which he was sitting broke. He complained of pain in his low back at a level of 7 on a scale of 10. The claimant was seen by Dr. Jayant Sheth who instructed him to remain off of work and return to MercyWorks for follow-up treatment on June 16, 2010.

¶ 7 The claimant returned to MercyWorks as instructed on June 16, 2010, and was again seen by Dr. Sheth who diagnosed the claimant as suffering acute back pain with left leg radiculopathy. The claimant was instructed to remain off of work, begin physical therapy, and return to MercyWorks for follow-up treatment on June 21, 2010. Dr. Sheth also recommended that the claimant have an MRI of his lumbar spine. On that same day, the claimant went to Advantage Imaging and had the recommended MRI. The radiologist's report states that the scan revealed a broad based central disc herniation at L3-L4 and a new or recurrent disc herniation at L4-L5 with no compromise of the foramen at either level.

¶ 8 On June 18, 2010, the claimant began physical therapy at Bryn Mawr Physical Therapy. He returned to MercyWorks for follow-up treatment on June 21, 2010, and was seen by Dr. Norman who instructed him to remain off of work, continue physical therapy, and return to MercyWorks for follow-up treatment on July 1, 2010.

¶ 9 The claimant returned to MercyWorks on July 1, 2010, complaining of low back and left leg pain. Dr. Sheth again instructed the claimant to remain off of work and continue physical therapy.

¶ 10 The claimant sought treatment from Dr. Yapor on July 20, 2010. The doctor's notes of that visit reflect that the claimant gave a history of having injured his back at work, and he

complained of pain in the left gluteal area, extending down the posterior of the thigh, but denied any right-sided complaints. Dr. Yapor noted numbness and tingling in the bottom of the claimant's left foot. On examination, Dr. Yapor noted a limited range of motion in the claimant's spine but found no neurological deficit or focal weakness. Dr. Yapor reviewed the claimant's MRI of June 16, 2010, and noted that it showed minimal disc disease in the three lower lumbar discs with no significant stenosis. Dr. Yapor instructed the claimant to remain off of work until he returned for a follow-up visit in one month and prescribed an additional month of physical therapy.

¶ 11 On August 11, 2010, Dr. Yapor authored a note stating that the claimant should be excused from work due to his inability to sit for prolonged periods.

¶ 12 An arbitration hearing was held on September 1, 2010, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2010)). The arbitrator issued a decision on September 30, 2010, finding that the claimant suffered an accident on June 9, 2010, which arose out of and in the course of his employment with the City and that his current condition of ill-being is causally related to that accident. The arbitrator awarded the claimant 11 6/7 weeks of temporary total disability (TTD) benefits and $2,150 in medical expenses. In addition, the arbitrator denied the claimant's petition for penalties pursuant to sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2010)) and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16 (West 2010)). Neither party sought a review of the arbitrator's decision.

¶ 13 The claimant returned to MercyWorks on October 25, 2010, complaining of low back pain and reporting an inability to sit or lie down. Dr. Sheth advised the claimant to go to an emergency room and follow up with Dr. Yapor. He also recommended that the claimant remain off of work.

¶ 14 When the claimant returned to MercyWorks on November 9, 2010, he reported no improvement in his condition. Dr. Sheth noted that the claimant denied any radicular complaints and described the claimant's gait as normal. Dr. Sheth again recommended that the claimant remain off of work and advised him to follow up with Dr. Yapor.

¶ 15 When the claimant next saw Dr. Yapor on November 23, 2010, he reported feeling fine but experienced increased symptoms with prolonged sitting or standing. Dr. Yapor recommended that the claimant have a discogram, and possibly a stabilization procedure. The doctor's notes of that visit indicate that the claimant declined to undergo the recommended surgery. Dr. Yapor authorized the claimant to return to full-duty with no restrictions on November 29, 2010.

¶ 16 The claimant returned to MercyWorks on December 1, 2010, and was seen by Dr. Patel who noted that the claimant had refused surgery and intended to see Dr. Spiros Stamelos for a second opinion. Dr. Patel also released the claimant to return to full-duty work.

¶ 17 The claimant also saw Dr. Stamelos on December 1, 2010. The doctor's notes of that visit state that the claimant complained of significant activity-related back pain and that he was unable to perform light-duty work and wanted to go to physical therapy and "get off of work." On examination, Dr. Stamelos noted positive straight leg raising and a positive Kaufman knee sign and described the claimant's gait as altered. Dr. Stamelos administered an injection to relieve the claimant's pain, prescribed physical therapy, and recommended that the claimant remain off of work. According to his deposition, Dr. Stamelos reviewed the claimant's MRI which showed disc herniations at L3-L4 and L4-L5. Dr. Stamelos opined that the claimant's work accident of June 9, 2010, was a cause of his pain.

¶ 18 On December 2, 2010, the claimant began a course of physical therapy at United Rehab Providers. The notes of his first visit reflect that he complained of back pain which he rated an 8 on a scale of 10.

¶ 19 The claimant returned for follow-up visits with Dr. Stamelos on December 13, 2010, and January 3, 2011, complaining of low back pain. Dr. Stamelos administered additional injections which the claimant reported did not result in a change in his symptoms. Dr. Stamelos's notes of the claimant's January 3 visit reflect that he complained of both back pain and right shoulder pain which the doctor described as "non-related to work." He testified that the claimant's neck problems are not related to his work accident. Dr. Stamelos diagnosed a rotator cuff tear, cervical strain and back conditions, including spondylolysis and spondylolisthesis. He ordered EMG/NCV testing and found the claimant to be "100% disabled for work at this time."

¶ 20 On January 7, 2011, Dr. Patel performed the recommended EMG/NCV testing. In his report, Dr. Patel described the results of the testing as "essentially normal." On examination, Dr. Patel found the claimant's leg strength to be 5/5 in both legs with negative straight leg raising. When deposed, Dr. Stamelos acknowledged that the EMG was negative, but opined that EMG's are "not valid" for 40% of patients.

¶ 21 The claimant was next seen by Dr. Stamelos on January 24, 2011, complaining of pain in his low back, right shoulder, and right hand. He reported that he injured his right hand when he fainted. Dr. Stamelos recommended an x-ray of the claimant's right hand and continued to recommend that the claimant remain off of work.

¶ 22 On March 18, 2011, the claimant returned to MercyWorks, complaining of low back pain and stiffness. Dr. Sheth authorized the claimant to return to sedentary work.

¶ 23 On April 5, 2011, the claimant resumed light-duty work for the City. When he returned to MercyWorks on April 11, 2011, the claimant reported to Dr. Sheth that he was still experiencing pain and stiffness in his low back.

¶ 24 Dr. Stamelos next saw the claimant on April 20, 2011. The notes of that visit state that the claimant complained of low back pain, neck pain radiating to the left arm, and numbness and pain in his hand. Dr. Stamelos testified that the claimant's neck problems are not related to his work accident. According to Dr. Stamelos, the claimant suffered from sciatica and low back pain. He diagnosed spondylolisthesis, a "shift of the spine" or a sliding of one vertebrae over another which causes pain when sitting. Dr. Stamelos prescribed medication and physical therapy for the claimant's lumbar spine condition and authorized him to return to light-duty work but instructed him to avoid excessive sitting, driving, twisting, bending forward, and lifting.

¶ 25 When the claimant saw Dr. Stamelos on May 18, 2011, he complained of pain in his neck, low back, and right shoulder. Dr. Stamelos released the claimant to return to light-duty work with no lifting, pushing or pulling over 5 pounds; no overhead work; and no excessive walking or standing. On the release form, the doctor wrote that the claimant "can't drive, can't sit, can't stand—may work with restrictions only when he can—may need to be on disability." Dr. Stamelos also prescribed additional physical therapy.

¶ 26 The claimant continued performing light-duty work for the City, five days per week, until June 8, 2011, when, according to the claimant, he stopped working due to "massive" back pain. The claimant admitted that the work he was performing was lighter than his prior sedentary position.

¶ 27 The claimant returned to see Dr. Stamelos on June 8, 2011, complaining of back pain, anxiety, and depression. According to Dr. Stamelos, the claimant's low back pain is work

related, but his cervical problem is not. In addition, Dr. Stamelos testified that the claimant's depression is not work related. Dr. Stamelos authorized the claimant to remain off of work and, on an accompanying form, wrote that the claimant "needs [a] spinal fusion" and "needs to be on disability."

¶ 28 When he was deposed, Dr. Stamelos testified that, on July 11, 2011, he diagnosed the claimant with failed back syndrome. Dr. Stamelos stated that he advised the claimant to go to a pain center, but he declined, stating that he wished to continue treating with him. He stated that as of that date he would have allowed the claimant to try to return to work but "there was no work for *** [him] to go back to."

¶ 29 On July 8, 2011, the claimant presented to Dr. Espinosa, a neurosurgeon, on referral from Dr. Leon-Jauregui. In a letter dated the same day, Dr. Espinosa related that the claimant gave a history of an accident while working. The doctor noted that the claimant reported that he initially developed low back pain after the accident and, about a month later, developed severe neck and left arm pain which was aggravated by activity. On examination, Dr. Espinosa noted a severe reduction of motion in both the cervical and lumbar spine, weakness of the intrinsic muscles in the left hand, absent left biceps and brachioradialis reflexes, and an antalgic gait. His review of the claimant's MRI revealed a shallow protrusion of no clinical significance at C4-C5, a left paracentral disc protrusion deforming the spinal cord at C5-C6, and a right paracentral disc protrusion deforming the right anterior surface of the spinal cord at C6-C7. Dr. Espinosa recommended that the claimant undergo a surgical decompression at C5-C6 and C6-C7. However, he noted that the claimant did not wish to undergo the surgery as it would affect his singing ability and interfere with a scheduled singing engagement.

¶ 30 On August 5, 2011, the claimant returned to MercyWorks where he was again seen by Dr. Sheth. The doctor noted that the claimant reported having injured his shoulder at home three days earlier. On examination of the claimant's lumbar spine, Dr. Sheth noted diffuse tenderness, a moderately restricted range of motion with severe pain, and no neurovascular deficit. He diagnosed the claimant as suffering from chronic low back pain and left leg radiculopathy. Dr. Sheth found the claimant to be at maximum medical improvement (MMI) and discharged him from care.

¶ 31 As of September 28, 2011, Dr. Stamelos found the claimant to be "100% disabled."

¶ 32 On October 3, 2011, the claimant underwent a microdiscectomy and instrumental fusion at C5-C6 and C6-C7 which was performed by Dr. Espinosa. Dr. Espinosa continued to treat the claimant postoperatively and, on October 14, 2011, noted that the claimant had reported high levels of pain immediately following surgery, but was managing the pain with medication and a cervical collar he used when in a car. Dr. Espinosa recommended that the claimant undergo a cervical x-ray.

¶ 33 At the City's request, the claimant was examined on December 28, 2011, by Dr. Edward Goldberg, an orthopedic surgeon. Dr. Goldberg reviewed the reports of the MRI's taken of the claimant's lumbar spine on August 2, 2005, April 25, 2006, and June 16, 2010. He also reviewed the records of Dr. Yapor, MercyWorks, Dr. Patel and Dr. Stamelos. On examination, he noted negative straight leg raising, intact sensation, and a well-healed, but tender, incision at C4-C5. In his report of that visit, Dr. Goldberg wrote that "it appears that [the claimant] does have a herniation at L3-4 and a herniation to the right at L4-5." It was Dr. Goldberg's belief that the claimant's symptoms are work related. He testified that he believed that the claimant injured his spine as the result of his work accident. Dr. Goldberg found the claimant capable of

sedentary work where he is allowed to change positions once per hour. Dr. Goldberg noted the claimant's recent cervical spine surgery, but found that he "did not injure his neck at work." Dr. Goldberg recommended that the claimant undergo a functional capacity evaluation (FCE).

¶ 34 The claimant underwent carpal tunnel release surgery performed by Dr. Espinosa. In his notes of a March 12, 2012, visit, the doctor recorded that the claimant reported improvement in both his carpal tunnel and neck symptoms. On examination, Dr. Espinosa noted that the claimant's gate was a "little slow but otherwise normal." He also noted a decreased sensation over the first and second digit of the claimant's left hand. Dr. Espinosa released the claimant to return to work in two weeks.

¶ 35 On March 14, 2012, Dr. Espinosa noted that the claimant had a cervical CT scan which revealed that his fusion was solid at both C5-C6 and C6-C7. The doctor authorized the claimant to begin therapy for his neck and left hand.

¶ 36 After reviewing the film of claimant's lumbar MRI taken on June 16, 2010, Dr. Goldberg issued an addendum to his report, stating that the MRI showed no evidence of a herniation at any level and no left-sided nerve compression; an opinion which he reasserted when deposed. According to the report, the claimant's work accident aggravated a mild degenerative disc at L4-L5. Dr Goldberg testified that he noted only a right L4-L5 hemilaminotomy defect, attributable to the claimant's prior surgery with some minimal stenosis on the right. He found no evidence of nerve root compression. Dr. Goldberg opined that the claimant could return to sedentary work and did not require any further medical treatment other than medication in the event that he should become symptomatic. When deposed, Dr. Goldberg testified that, after reviewing the claimant's MRI film, he believed that the claimant was capable of sitting in one place for more than two hours and would, therefore, not restrict the claimant from sitting. Dr. Goldberg

admitted that an individual with no disc herniations can still experience radiculitis and would be wise to get up and move around on an hourly basis.

¶ 37 On April 25, 2012, Dr. Espinosa found the claimant's sensory examination to be normal. He recommended that the claimant continue physical therapy.

¶ 38 When the claimant returned to see Dr. Espinosa on June 8, 2012, he complained of low back pain. Dr. Espinosa recorded a concern that the claimant might be developing left ulnar neuropathy. He recommended that the claimant undergo four additional weeks of hand and neck therapy, followed by a cervical CT scan.

¶ 39 On July 11, 2012, Dr. Stamelos found the claimant to be at MMI, but prescribed physical therapy and pain medication. As of that date, Dr. Stamelos described the claimant as "100% disabled from any kind of work."

¶ 40 Dr. Espinosa released the claimant from care on July 19, 2012, noting that he had improved, although still exhibiting neck stiffness with rotation and numbness and tingling in his left hand.

¶ 41 The claimant returned to see Dr. Stamelos on August 8, 2012. He prescribed additional physical therapy and again found the claimant to be 100% disabled.

¶ 42 At the request of the City, the claimant was again examined by Dr. Goldberg on August 17, 2012. The doctor noted the claimant's cervical fusion and carpal tunnel surgery and recorded that the claimant complained of ulnar nerve pain. On examination, Dr. Goldberg found that the claimant voluntarily limited forward flexion. He also noted negative straight leg raising and diminished sensation diffusely at L4 to S1, bilaterally, intact in the upper extremities from C5 to T1. He also noted a positive Tinel's sign at the left carpal tunnel. Dr. Goldberg opined that it was the claimant's cervical condition that was limiting him the most. As for the claimant's

lumbar spine, Dr. Goldberg found that he was capable of working with a 10 pound lifting restriction, but again recommended that the claimant undergo an FCE after finishing care for his cervical condition.

¶ 43 On a disability form completed on August 29, 2012, Dr. Stamelos wrote a diagnosis of "work-related discogenic back pain syndrome" and noted that the claimant might need surgery. When the doctor saw the claimant on October 8, 2012, and November 5, 2012, he prescribed pain medication and again found the claimant to be 100% disabled.

¶ 44 On January 8, 2013, Dr. Goldberg issued an addendum to his report after examining additional medical records. He reported that the claimant was capable of sedentary work and disagreed with Dr. Stamelos's opinion that the claimant is 100% disabled. According to Dr. Goldberg, the claimant was at MMI for his lumbar spine condition.

¶ 45 When the claimant saw Dr. Stamelos on February 4, 2013, the doctor noted that the claimant continued to see him for medication and work status. The note states: "apparently, we are his documenter and supporter for his being off of work." According to Dr. Stamelos's note, the claimant "is never going to go back since he feels that he cannot drive or sit and does not want to have surgery." Again, Dr. Stamelos found the claimant to be 100% disabled.

¶ 46 On a disability form completed on May 14, 2013, Dr. Stamelos wrote: "[the claimant] claims inability to work or travel—cannot return to his work—discogenic back pain."

¶ 47 On June 11, 2013, the claimant saw Dr. Stamelos, complaining of increased back pain when he attempted to return to work. The doctor renewed the claimant's pain medication and again found him to be 100% disabled.

¶ 48 When the claimant saw Dr. Stamelos in July, August, September, and October 2013, the doctor noted that he continued to experience low back pain and remained 100% disabled.

¶ 49 Dr. Stamelos testified that he initially tried to get the claimant back to work, but after a while "gave up" on the idea. He stated that the fact that the claimant refused to undergo a lumbar fusion meant that he probably would never work again. Dr. Stamelos testified that the claimant "needed to have a job where there would be a cot next to his desk and he'd have to lie down for a couple of hours if he couldn't handle the pain." He opined that the claimant is "100% disabled for any work" and that his condition is "permanent and severe." He did not expect the claimant's condition to improve. According to Dr. Stamelos, a lumbar fusion is the only thing which might help the claimant, if it were successful.

¶ 50 On cross-examination, Dr. Stamelos admitted that the claimant was "resistant" to the idea of returning to work. He stated that, based upon his objective findings on examination, the claimant has spondylolisthesis.

¶ 51 Dr. Goldberg was deposed on June 9, 2014. It was his opinion that the claimant's June 9, 2010, work accident resulted in an aggravation of some mild disc degeneration at L4-L5, and that he is at MMI from his lumbar spine condition. Although the claimant might have some residual symptoms, Dr. Goldberg stated that he would not impose any restrictions on his walking, standing, climbing, bending or twisting. However, Dr. Goldberg admitted that these activities could increase the claimant's symptoms, but stated that such an increase could be addressed with medication.

¶ 52 The claimant continued to treat with Dr. Stamelos. In his notes of the claimant's visit on August 19, 2014, Dr. Stamelos wrote that the claimant "continues to come on a regular basis for secondary gain and documentation of his illness of back pain that he experienced at work when a chair broke, which is interesting satire on workers' compensation." In his notes of the claimant's September 16, 2014, visit, Dr. Stamelos wrote: "I think the patient is using me to be his doctor

of records [*sic*] so that he can go through these actions of proving his disability and stopping his return to work or not being able to return to work."

¶ 53 When the claimant returned to see Dr. Stamelos on October 14, 2014, the doctor noted that the medication which he was prescribing was having "diminishing return," rendering the claimant unable to function independently. Dr. Stamelos again noted that the claimant is 100% disabled.

¶ 54 Dr. Stamelos wrote in his notes of the claimant's December 9, 2014, visit that there is something "very, very wrong" with the claimant's back. However, he also noted that the claimant appeared desperate because "he needs some doctor to write the status and agree with his, I believe, exaggerated work disability status."

¶ 55 In January and February 2015, Dr. Stamelos continued to prescribe pain medication for the claimant and noted that he was dependent on prescription medication. He continued to describe the claimant as "truly disabled."

¶ 56 When he saw the claimant on March 3, 2015, Dr. Stamelos found his back condition unchanged. He again noted that the claimant is "100% disabled [from] any kind of work."

¶ 57 A second arbitration hearing was held on March 26, 2015.

¶ 58 The claimant presented the testimony of James Boyd, a vocational counselor hired by his attorney. Boyd testified that he met with the claimant, reviewed the depositions of Dr. Stamelos and Dr. Goldberg, and the claimant's medical records. According to Boyd, he administered a variety of tests to the claimant which revealed that he read at a seventh-grade level, performed math at a fifth-grade level, and had an IQ of 85. In addition, the clamant scored in the first percentile on a dexterity test. Boyd admitted that the claimant could control his responses on the tests, and noted that the results of the tests were below what he would have anticipated from an

individual like the claimant who completed his GED. He stated that, although the tests which he administered had no built-in factors to determine effort, he did not notice the claimant exhibiting sub-maximal effort. Based upon the deposition transcripts and medical records he reviewed, the claimant's test scores, his complaints of back pain, and Dr. Stamelos's opinion that the claimant is 100% disabled, Boyd concluded that the claimant has no transferable skills, is not a candidate for vocational rehabilitation, and is not capable of competitive-level employment.

¶ 59 Kurt Peterson, the deputy commissioner for the City's Bureau of Human Services, testified that he met with the claimant on March 1, 2013, and advised him that the City had work available for him at the police motor maintenance garage. According to Peterson, the work was sedentary and within Dr. Goldberg's restrictions. The claimant acknowledged the offer, but contended that he is unable to perform the job.

¶ 60 The City presented the testimony of Julie Bose, its vocational expert. She stated that she reviewed the claimant's medical records and Boyd's report. She discounted the results of the tests which Boyd administered to the claimant as they lacked external validity measures. She also was of the opinion that the results were inconsistent with what one would expect from an individual like the claimant who completed his GED, had a past history of semi-skilled work, and possessed the bilateral dexterity necessary for playing drums. Based upon Dr. Goldberg's opinion, Bose stated that the claimant was employable. She stated that she agreed with Dr. Goldberg that the claimant could perform his previous clerical work. On cross-examination, Bose admitted that she never met with the claimant and that her opinions are based upon the documents which she reviewed.

¶ 61 The claimant testified that he experiences constant low back pain. Some days the pain is tolerable with medication, but on other days the pain is unbearable, requiring that he lie on the

ground. He stated that he is a musician and plays the drums. He admitted to playing on March 14, 2015, for which he was paid $500. According to the claimant he took pain medication which enabled him to play, but on the next day, he could not move. He also admitted to performing on two occasions in 2014 and one or two occasions in 2012. He could not recall if he played in 2013. The claimant testified that he declined to undergo lumbar fusion surgery out of fear of becomming paralyzed.

¶ 62 During the claimant's testimony, his attorney attempted to inquire as to a statement which Dr. Sheth allegedly made concerning his ability to return to work. The City's attorney objected on hearsay grounds, and the arbitrator sustained the objection. Subsequently, the claimant was permitted to make an offer of proof on the issue. His counsel asked the following question: "During your visit to MercyWorks on August 5, 2011, your last visit there, what recommendation do you recall Dr. Sheth making to you in regards to your ability to return to work?" The claimant responded: "Um, he told me I was totally disabled from work."

¶ 63 Following the second arbitration hearing, the arbitrator issued her decision on May 5, 2015, finding again that the claimant sustained an accident on June 9, 2010, which arose out of and in the course of his employment with the City. The arbitrator found that, "based upon the 'law of the case' " doctrine, the claimant's accident resulted in lumbar disc herniations at two levels. According to the arbitrator, the "law of the case" doctrine prevented the City from denying the existence of the disc herniations and their causal relationship to the claimant's work accident, but did not bar the City from arguing that the claimant did not suffer left-sided nerve compression or spondylolisthesis. Nor did the doctrine prevent the City from arguing that the claimant does not require any further treatment for his back other than medication or that he could resume his former sedentary employment. After recounting the claimant's complaints, his

medical records, the results of his MRI, and the causation opinions of Drs. Stamelos and Goldberg, the arbitrator found that the claimant's work accident did not result in left-sided neural compression or spondylolisthesis. In so concluding, the arbitrator found the opinions of Dr. Goldberg to be more persuasive than those of Dr. Stamelos. The arbitrator noted that her findings in this regard would be unchanged even if she had accepted the claimant's offer of proof that Dr. Sheth told him on August 5, 2011, that he was totally disabled from work. Finding that the claimant reached MMI on January 8, 2013, the arbitrator awarded the claimant 84 1/7 weeks of TTD benefits and certain specified additional medical expenses subject to the statutory fee schedule. In addition, the arbitrator found that the claimant suffered a 25% loss of a person as a whole and awarded him 125 weeks of permanent partial disability (PPD) benefits. In response to the claimant's argument in support of permanent total disability (PTD) benefits, the arbitrator found that the claimant's work accident of June 9, 2010, did not decrease the claimant's already reduced work capacity or render him permanently and totally disabled; rather it aggravated his previous lumbar spine condition, necessitating only conservative treatment. In so holding, the arbitrator again relied upon Dr. Goldberg's opinions. Finally, the arbitrator denied the claimant any award for penalties pursuant to section 19(k) and 19(*l*) of the Act and attorney fees pursuant to section 16 of the Act.

¶ 64 The claimant sought a review of the arbitrator's decision before the Commission. In a unanimous decision dated November 23, 2015, the Commission affirmed and adopted the arbitrator's decision.

¶ 65 The claimant filed a petition for judicial review of the Commission's November 23, 2015, decision in the circuit court of Cook County. On June 30, 2016, the circuit court entered an order confirming the Commission's decision, and this appeal followed.

¶ 66 Before addressing the claimant's assignments of error, we again find need to comment on the deficiencies in a litigant's brief. Illinois Supreme Court Rule 341(h)(3) (eff. Jan. 1, 2016) requires an appellant's brief to include "a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument." The claimant's brief contains a section entitled "Standard of Review" in which he sets forth, in general terms, the standards of manifest weight, *de novo*, and clearly erroneous. However, the standards are never related to the issues raised in his brief, leaving this court to guess which standard the claimant contends is applicable to which issue. In addition, Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) requires that the argument section of an appellant's brief contain his or her contentions with citation of the authorities relied on. The claimant's brief contains six contentions of error. However, the argument addressed to two of those contentions fails to cite a single case.

¶ 67 The Illinois Supreme Court Rules are rules to be followed, not mere suggestions. This court is not charged with the responsibility of performing research to sustain a litigant's assignments of error. Failure to adhere to the rules applicable to appellate briefs has ramifications which will be addressed later in this decision.

¶ 68 For his first assignment of error, the claimant argues that the Commission erred in adopting the opinions of Dr. Goldberg as to his condition of ill-being. The claimant contends that Dr. Goldberg's opinions are contrary to the findings of the unappealed arbitrator's decision following the section 19(b) hearing. The claimant's argument appears to be predicated on the fact that the unappealed decision following the 19(b) hearing established that the claimant

suffered two herniated discs as a result of his June 9, 2010, accident; whereas, Dr. Goldberg opined that the claimant did not suffer two herniated discs.

¶ 69 The flaw in the claimant's reasoning is that the Commission did not rely upon Dr. Goldberg's opinion to find that he did not suffer two herniated discs. Rather, the Commission specifically found that the "law of the case" doctrine prevented the City from relitigating the question of whether the claimant suffered two herniated discs as a consequence of his work accident. The Commission relied upon Dr. Goldberg's opinion that the claimant did not suffer either left-sided nerve compression or spondylolisthesis; issues which were never addressed in the 19(b) decision. On the merits of Dr. Goldberg's opinion that he did not suffer either left-sided nerve compression or spondylolisthesis, the claimant asserts that Dr. Goldberg testified that he had radiculopathy, and it is "common knowledge that radiculopathy is caused by nerve compression." We are unaware of the "common knowledge" of which the claimant speaks. In any case it is not a matter over which we will take judicial notice.

¶ 70 The extent of a claimant's disability is a question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256 (1980). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the

evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 71 The Commission relied upon Dr. Goldberg's opinion that the claimant did not suffer either left-sided nerve compression or spondylolisthesis and gave its reasons for so doing. It rejected Dr. Stamelos's contrary opinions, noting that he recorded examination findings on only two occasions out of the numerous times that the claimant was seen by him. Further, the MRI scan of June 16, 2010, although revealing a broad based central disc herniation at L3-L4 and a new or recurrent disc herniation at L4-L5, failed to reflect any compromise of the foramen at either level. We are unable to conclude based upon the record before us that the Commission's reliance upon Dr. Goldberg's opinion in support of its determination that the claimant did not suffer either left-sided nerve compression or spondylolisthesis is against the manifest weight of the evidence.

¶ 72 Next, the claimant argues that the Commission erred in "ignoring the City of Chicago's examining doctor's opinion that [he] is permanently and totally disabled." According to the claimant, "[t]he Commission's decision ignores the opinion of Dr. Sheth at the City's handpicked occupational clinic, MercyWorks, that [he, the claimant] *** is permanently and totally disabled and 'will be off work permanently' due to low back." First, the statement is inaccurate. The Commission did not ignore Dr. Sheth's alleged opinion. Although the arbitrator sustained the City's objection to the claimant testifying to Dr. Sheth's recommendation concerning his ability to return to work, the arbitrator's decision, which the Commission adopted, specifically states that the arbitrator would have reached the same decision, that the claimant does not have any left-sided compression or spondylolisthesis, had she allowed the claimant to testify that Dr. Seth told him that he was totally disabled from work. Secondly, there

is no evidence in the record or any offer of proof that Dr. Sheth opined that the claimant is permanently and totally disabled. As noted earlier, in his offer of proof, the claimant stated only that he was "totally disabled from work." There is nothing in the record suggesting that Dr. Sheth was of the opinion that the claimant is permanently disabled as a result of his low back condition. Dr. Sheth's written notes of the claimant's visit on August 5, 2011, state: "IS spine diffuse tenderness positive, moderately restricted with severe pain. No neurovascular deficit over extension." Dr. Sheth found the claimant to be at MMI with a diagnosis of chronic low back pain with left leg radiculopathy and recommended "[n]o work until further notice."

¶ 73 In his argument on this issue, the claimant asserts that the Commission ignored the contradiction between Dr. Sheth's alleged opinion that the claimant is totally disabled from work and Dr. Goldberg's opinion that he is capable of sedentary work. He makes a passing reference to the "law of the case" doctrine, but fails to relate the doctrine to the assignment of error. He appears to be again arguing that, contrary to Dr. Goldberg's opinion, the medical evidence supports the conclusion that he sustained herniated discs at L3-L4 and L4-L5. As noted earlier, the Commission found that the disc herniations were established at the section 19(b) hearing and the City was barred from denying their existence or causal relationship to the claimant's work injury. We fail to see, however, how that fact relates to the Commission's reliance upon Dr. Goldberg's opinion as to the claimant's ability to perform sedentary work or stand as evidence that it ignored Dr. Sheth's alleged opinion.

¶ 74 The claimant also argues that Illinois Rule of Evidence 803(4) (eff. Apr. 26, 2012) renders his proffered testimony as to Dr. Sheth's opinion admissible. However, even assuming that the Commission erred in sustaining the City's objection, we find that the error does not

affect the Commission's ultimate decision to credit Dr. Goldberg's opinion as to the extent of the claimant's disability.

¶ 75 As noted earlier, the decision states that the arbitrator would have reached the same conclusion, namely that the claimant does not have any left-sided nerve compression or spondylolisthesis, had she allowed the claimant to testify that Dr. Seth told him that he was totally disabled from work. As the Commission noted, the record fails to reflect Dr. Sheth's qualifications to render the opinion or the basis upon which the alleged opinion rested. Evidence which was before the Commission established that, before the claimant began complaining of neck pain on April 20, 2011, Dr. Yapor authorized him to return to full-duty work as of November 29, 2010, Dr. Patel authorized the claimant to return to full-duty work as of December 1, 2010, and Dr. Sheth authorized the claimant to return to sedentary work with restrictions on March 18, 2011. Even Dr. Stamelos authorized the claimant to return to light-duty work with restrictions as late as May 18, 2011. Further, as the Commission pointed out, MercyWorks' records reflect awareness as of June 9, 2011, that the claimant had non-work related cervical problems and might require neck surgery. It was not until September 28, 2011, that Dr. Stamelos's records first contain a reference to the claimant being "100% disabled," and it was six days later that that the claimant underwent a microdiscectomy and instrumental fusion at C5-C6 and C6-C7 which was performed by Dr. Espinosa; a condition which Dr. Stamelos testified was not work related.

¶ 76 The weight to be accorded to a medical opinion is a matter reserved for the Commission (*O'Dette*, 79 Ill. 2d at 253), and it is evident from its decision that the Commission would have accorded little weight to Dr. Sheth's opinion in the event that it would have allowed the claimant to testify to that opinion. We find, therefore, that the Commission's refusal to allow the claimant

to testify to Dr. Sheth's opinion that he is totally and permanently disabled, even if an abuse of discretion, was harmless and provides no basis for us to conclude that the Commission's reliance upon Dr. Goldberg's opinions as to the extent of the claimant's disability or his ability to perform sedentary work is against the manifest weight of the evidence.

¶ 77 The claimant also argues that the Commission erred in terminating his TTD benefits on January 8, 2013, based upon Dr. Goldberg's opinion. However, again the claimant fails to cite any authority in support of his contention, and as a result, has forfeited the argument. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *Compass Group*, 2014 IL App (2d) 121283WC, ¶ 33.

¶ 78 The claimant next argues that the Commission erred in finding that the nature and extent of his disability is 25% of a man as a whole as opposed to finding that he is permanently and totally disabled. He contends that he established his entitlement to PTD benefits based both upon the medical evidence and on an "odd-lot" theory. We disagree.

¶ 79 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette*, 79 Ill. 2d at 253. The nature and extent of a claimant's disability is a question of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Oscar Mayer*, 79 Ill. 2d at 256. For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009). Whether this court might reach the same conclusions is not the test of whether the Commission's determinations are against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's decision. *Benson*, 91 Ill. 2d at 450.

¶ 80 Relying upon the opinions of Dr. Goldberg, the Commission determined that the claimant was not permanently and totally disabled and instead awarded him PPD benefits for 25% loss of a man as a whole. Based upon the record before us, we are unable to find that its determination in this regard is against the manifest weight of the evidence without regard to whether the analysis is based upon medical evidence or an "odd-lot" theory.

¶ 81 An injured employee is totally and permanently disabled when he " 'is unable to make some contribution to the work force sufficient to justify the payment of wages.' [Citations]." *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286 (1983). In this case, Dr. Stamelos was of the opinion that the claimant was "100% disabled [from] work." The claimant's offer of proof was that, had he been permitted, he would have testified that Dr. Sheth told him that he was totally disabled. In contrast, Dr. Goldberg opined that the claimant is not suffering from any left-sided nerve compression or spondylolisthesis and that he is capable of sedentary work. Resolution of the conflict in medical opinions was a matter for the Commission to resolve, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *O'Dette*, 79 Ill. 2d at 253.

¶ 82 As to the extent of the claimant's spine injury, the radiologist's report of the claimant's MRI scan of June 16, 2010, supports Dr. Goldberg's opinion that the claimant did not suffer from left-sided nerve compression. Further, the credibility of Dr. Stamelos's opinion that the claimant is 100% disabled is called into question by the doctor's own notes of the claimant's August 19, 2014, visit in which he wrote: "I think the [the claimant] is using me to be his doctor of records [*sic*] so that he can go through these actions of proving his disability and stopping his return to work or not being able to return to work[;]" and his notes of a December 9, 2014, visit

in which he wrote that the claimant "needs some doctor to write the status and agree with his, I believe, exaggerated work disability status."

¶ 83 Based upon Dr. Goldberg's opinion that the claimant is capable of sedentary employment, an opinion which the Commission found persuasive, and the Commission's criticism of Dr. Stamelos's contrary opinion, we cannot conclude that the denial of the claimant's request for PTD benefits is against the manifest weight of the evidence from a medical evidence standpoint.

¶ 84 However, an injured employee need not be reduced to total physical incapacity in order to qualify for PTD benefits. *Interlake, Inc. v. Industrial Comm'n*, 86 Ill. 2d 168, 176 (1981); *Inland Robbins Construction Co. v. Industrial Comm'n*, 78 Ill. 2d 271, 275 (1980). Rather, an injured employee is totally disabled when he is incapable of performing services except those for which there is no reasonably stable market. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). However, an injured employee is not entitled to total and permanent disability benefits if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 362 (1978). If, as in this case, a claimant is not obviously unemployable from a medical standpoint, he has the burden of proving his entitlement to PTD benefits on an "odd-lot" theory by establishing the unavailability of employment for a person in his circumstance. *A.M.T.C. of Illinois*, 77 Ill. 2d at 490; *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 204 (2009).

¶ 85 Although Dr. Goldberg found that the claimant is capable of sedentary employment, Boyd opined that the claimant is not capable of competitive employment. Boyd based his opinion in this regard upon the opinions of Dr. Stamelos, the claimant's medical records, the

results of the tests which he administered to the claimant, and the claimant's lack of transferable skills. The City's vocational expert, Bose, discounted the results of the tests administered by Boyd, finding that the tests lacked external validity measures. She also was of the opinion that the results of the tests were inconsistent with what one would expect from an individual like the claimant who completed his GED, had a past history of semi-skilled work, and possessed the bilateral dexterity necessary for playing drums. Bose was of the opinion that the claimant was employable.

¶ 86 Assuming for the sake of analysis that the opinions of Dr. Stamelos and Boyd were sufficient to satisfy the claimant's burden of establishing the unavailability of employment for a person in his circumstance, the burden then shifted to the City to show that there is some work regularly and continuously available to the claimant. We believe that the City met its burden in that regard.

¶ 87 Peterson testified that he met with the claimant on March 1, 2013, and advised him that the City had work available to him at the police motor maintenance garage which was sedentary in nature and within the restrictions recommended by Dr. Goldberg. According to Peterson, the claimant never completed and returned the paperwork necessary for him to return to work. The Commission found that the claimant's work accident of June 9, 2010, did not ultimately decrease his reduced work capacity or render him permanently and totally disabled. We cannot say, based upon the record before us, that the Commission's denial of PTD benefits on an "odd-lot" theory is against the manifest weight of the evidence.

¶ 88 For his final argument on appeal, the claimant asserts that the Commission erred in failing to award him penalties pursuant to sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2010)) and attorney fees pursuant to section 16 of the Act (820 ILCS 305/16

(West 2010)). Again, however, the claimant failed to cite any authority supporting the propositions, and the issues are, therefore, forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *Compass Group*, 2014 IL App (2d) 121283WC, ¶ 33.

¶ 89 Based upon the foregoing analysis, we affirm the judgment of the circuit court which confirmed the Commission's decision.

¶ 90 Affirmed.